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

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

SECOND REPORT AND ORDER AND THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

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I. INTRODUCTION

1. Twelve years have passed since Martha Wright of Washington, D.C. petitioned this Commission for relief from exorbitant phone rates charged by inmate calling service (ICS) providers, so that she might afford telephone contact with her incarcerated grandson.[1] For families, friends, clergy, and attorneys to the over 2 million Americans behind bars and 2.7 million children who have at least one parent behind bars,[2] maintaining phone contact has been made extremely difficult due to prohibitively high charges on those calls. Family members report paying egregious amounts, adding up to hundreds of dollars each month, just to stay connected to incarcerated spouses, parents and children.[3] For over a decade, they have pleaded with this agency for help fighting these excessive and unaffordable phone charges.[4]

2. In the Report and Order, we grant relief, answer the call of those millions of citizens seeking ICS reform, and adopt comprehensive reform of interstate[5] and intrastate ICS calls[6] to ensure just, reasonable and fair ICS rates as mandated by the Act.[7] We follow these reforms with a Further Notice that recognizes there is more work yet to be done. While the Commission prefers to rely on competition and market forces to discipline prices, there is little dispute that the ICS market is a prime example of market failure.[8] Market forces often lead to more competition, lower prices, and better services. Unfortunately, the ICS market, by contrast, is characterized by increasing rates, with no competitive pressures to reduce rates.[9] With respect to the consumers who pay the bills, ICS providers operate as

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[1] *See generally Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 (filed Nov. 3, 2003) (First Wright Petition); *see also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007) (Alternative Wright Petition).

[2] *See* U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2013* at 1 (2013), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5109 (last visited July 14, 2015).

[3] *See* Letter from Steven Renderos, Senior Campaign Manager, Media Action Grassroots Network, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed July 7, 2015) (Media Action July 7, 2015 *Ex Parte* Letter).

[4] *See* Letter from Kim Keenan, President and CEO, MMTC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (filed Apr. 9, 2015) ("In the meeting David Honig, shared a personal experience last year as pro bono chief counsel to the Florida NAACP where he had to return a call from an inmate. The call, including set-up and other fees, cost of $56 for four minutes – a $14.00 per minute rate that surpasses the hourly minimum wage in most states and is 31 times the per-minute cost of a call to Antarctica. To MMTC, this is a 'tax on pain' for families in already dire circumstances and counterproductive to reducing recidivism and enhancing recovery for the incarcerated."); *see also* Reply of Our Place DC, WC Docket No. 96-128, at 4-5 (filed Apr. 20, 2004) ("If the prisoner is so financially deprived that they cannot place money into their debit calling account, what makes it seem that the family is in any better position to do the same?").

[5] Interstate communication "means communication or transmission (A) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia . . . ." 47 U.S.C. § 153(22).

[6] Consistent with our authority under the Communications Act, this Order applies to all states and U.S. territories, including Puerto Rico, Guam and the U.S. Virgin Islands. *See* 47 U.S.C. § 153(22).

[7] 47 U.S.C. §§ 201, 276.

[8] *See Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd 14107, 14129-30, para. 41 (2013) (*2013 Order* or *2013 FNPRM*).

[9] *Id*. at 14118-19, para. 21 ("It is important to note that the users of ICS – the inmates and the family and friends whom they call – are not party to these contracts. Rather, the correctional institution agrees to an amount that it is

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unchecked monopolists. The record indicates that, absent regulatory intervention, ICS rates and associated ancillary fees likely will continue to rise.[10] After the adoption of interim interstate rate caps in 2013, there was hope that states would take a more active role in reforming intrastate ICS rates and ancillary fees. While this has occurred in a handful of states, such as Alabama, Minnesota, New Jersey, and Ohio, the unfortunate reality is that many states have not tackled reform and intrastate ICS rates have continued to increase since the *2013 Order*.[11]

3. Given this market failure, the Commission has a duty to act to fulfill our statutory mandate of ensuring that ICS rates are just, reasonable, and fair.[12] Ensuring that rates comply with the statute also has several positive public interest benefits. Studies have shown that family contact during incarceration reduces recidivism[13] and allows inmates to be more present parents for the 2.7 million children who suffer when an incarcerated parent cannot afford to keep in touch.[14] One commenter tells us

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willing to allow the ICS provider to charge.") (emphasis in original)*; pets. for stay granted in part sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014) (*Securus Techs. Partial Stay Order*); *pets. for review pending sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Nov. 14, 2013) (and consolidated cases); *pet. to hold in abeyance granted sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Dec. 16, 2014). *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd at 13179-80, para. 20 (2014) (*Second FNPRM*) ("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.") (internal citations omitted).

[10] *See, e.g.*, Comments of Prison Policy Initiative; Reforms to Ancillary Charges, WC Docket No. 12-375 at 4 (filed Jan. 12, 2015) (PPI Second FNPRM Comments) ("The companies have already proven adept at charging higher [ancillary] fees where their ability to reap revenue through rates has been diminished through commissions. If the FCC fails to fully control fees, the overall cost of prison phone service will remain excessively high.").

[11] *See* Transcript of Reforming ICS Rates Workshop at 169, WC Docket 12-375 (filed July 30, 2014) (2014 ICS Workshop Transcript) (Lee G. Petro, Counsel to Petitioners) ("We've seen now with the reduction in the interstate rates an increase in the intrastate rates and an increase in the ancillary fees."); *see also Second FNPRM*, 29 FCC Rcd at 13172-73, paras. 3-5.

[12] 47 U.S.C. § 201(b) (stating "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter); 47 U.S.C. § 276(b)(1)(A) "[T]he Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that – (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.").

[13] The Center on the Admin. of Criminal Law 2012 NPRM Comments at 10 (citing Nancy G. La Vigne, Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships, 21 J. OF CONTEMP. CRIM. JUSTICE 314, 316 (2005)); *accord* Letter from Roy "Lynn" McCallum, Jail Commander, Elmore County Sheriff's Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed April 22, 2013) ("We recognize the value of retaining family contact during incarceration. The reduction in recidivism is well documented."); *see also* AMY L. SOLOMON, JENNY OSBORNE, LAURA WINTERFIELD ET AL., Putting Public Safety First: 13 Parole Supervision Strategies to Enhance Reentry Outcomes at 29-31 (Washington, D.C.: The Urban Institute 2008), http://www.urban.org/UploadedPDF/411791_public_safety_first.pdf (last visited Sept. 14, 2014).

[14] *See* BRUCE WESTERN AND BECKY PETTIT, THE ECONOMIC MOBILITY PROJECT, Collateral Costs: Incarceration's Effect on Economic Mobility at 18-19 (THE PEW CHARITABLE TRUSTS 2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1pdf.pdf ("Research that controls for other variables suggests that paternal incarceration, in itself, is associated with more aggressive behavior among boys and an increased likelihood of being expelled or suspended from school. This is especially troubling given the powerful impact education has on one's upward economic mobility in adulthood. Among those who start at the bottom of the income ladder, 45 percent remain there in adulthood if they do not have a college degree, while
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that "[m]y family paid outrageous amounts, between $300 and $400 a month for the 10 months while I was incarcerated in the state of MD. Their savings were drained just so they could correspond with their only daughter who was pregnant with their first grandchild at the time."[15] One mother writes: "I pay 40 dollars a week for calls. I can't afford them but it puts a smile on my kid's face;"[16] another writes that her family has, at times, gone without food in order to pay these phone charges, "so we don't grow apart and so my kids feel like they still have a father."[17] These 2.7 million children are already coping with the anxiety of having an incarcerated parent, and often suffer additional economic and personal hardships that hinder their performance in school.[18] By charging inmates exorbitant phone rates, ICS providers prevent incarcerated parents from maintaining a presence in their children's lives through regular phone contact. The testimony of a father in St. Cloud, Minnesota underscores the need for our efforts: "I want to be able to raise my child even if it's over the phone for the time being. I would love to be in her life as much as possible, but it's hard to do so when the phone [price] is steadily climbing higher and higher. I know I'm paying my debt to society for my crime, but I need to stay in contact with family."[19]

4. Furthermore, inmates given access to regular phone contact with family are less likely to return to jail or prison. A 2014 report by the Department of Justice found that a staggering 75 percent of individuals released from prison were rearrested within five years.[20] Of the inmates who do find success and reintegrate after release, many credit phone contact and family support during their incarceration. As one former inmate writes, "The phone was my life line to that family and they got me through it intact. I thank God that my family was able to afford the phone calls. What happens to the families that can't? We all end up paying for it."[21] Incarceration costs taxpayers an average of $31,000 per inmate per year.[22] If telephone contact is made more affordable, we will help ensure that former inmates are not sent home as strangers, which reduces both their chances of returning to prison or jail and the attendant burden on society of housing, feeding, and caring for additional inmates.

5. Another commenter stresses how regular phone contact makes prisons and jails safer spaces for inmates and officers alike:

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only 16 percent remain if they obtain a degree. And, children who start in the bottom of the income ladder quadruple their chances of making it all the way to the top if they have a college degree.") (internal citations omitted) (last visited Sept. 30, 2015); *see also* Letter from Barbara Graves-Poller, Supervising Attorney, MFY Legal Services, to FCC, Office of Regulations, WC Docket No. 12-375, at 2-3 (filed July 7, 2014) (noting that under New York Domestic Relations Law § 111(2), a parent who fails to visit or communicate with a child for six months is deemed to have forfeited parental rights; thus inmates who cannot afford high ICS rates "risk losing their parental rights if they or their children's caregivers cannot afford to pay for telephone communications.").

[15] Letter from Steven Renderos and Nick Szuberla, Campaign for Prison Phone Justice, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 96-128, at 22 (filed Nov. 15, 2012) (Media Action July 7, 2015 *Ex Parte* Letter).

[16] Media Action July 7, 2015 *Ex Parte* Letter, Attach. at 4 (testimony of Jackie LeBlanc).

[17] *Id*., Attach. at 10 (testimony of Lacretiah Luckett).

[18] *See 2013 Order*, 28 FCC Rcd at 14134, para. 131 (finding that lack of regular contact between incarcerated parents and their children is linked to truancy, homelessness, depression, aggression, and poor classroom performance).

[19] Media Action July 7, 2015 *Ex Parte* Letter, Attach. at 17 (testimony of DeAndre Neal-Hihh).

[20] See U.S. Department of Justice, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* at 1 (2014), *available at* http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf (last visited July 14, 2015).

[21] Media Action July 7, 2015 *Ex Parte* Letter, Attach. at 6 (testimony of George Black).

[22] MDRC, *Building Knowledge About Successful Prisoner Reentry Strategies* at 1 (2013), http://www.mdrc.org/sites/default/files/Reentry_020113.pdf (last visited July 14, 2015) (Prisoner Reentry Strategies).

> I get to see my loved one once in every six months or so, and he doesn't get any visitors apart from me, so calling daily helps him retain his sanity. I think the connection he's given to his family is really important; there are so many times that he's called really angry at other inmates, saying that he just wanted to talk so that he can cool down and not start a fight. If calls are made more affordable, especially for indigent families, it may reduce prison violence as well as make the prisons a safer place for [corrections officers] to work in.[23]

6. The record indicates that our interim interstate rate caps increased call volumes, without compromising correctional facility security requirements.[24] Similarly, we expect our actions in this Order to reduce rates and increase call volume, while ensuring that ICS providers receive fair compensation and a reasonable return. Some commenters have argued that lowering ICS rates will compromise security in correctional facilities and fail to cover the cost of providing calling services.[25] Some have even argued the financial strain from rate regulation could lead to correctional facilities banning inmate calls altogether.[26] However, we find these assertions unpersuasive and unsupported by the record and our experience from the 2013 reforms.

7. While the actions taken to date have been positive in key respects (e.g., lower interstate rates and increased interstate call volume), more remains to be done. The Commission adopted interim interstate rate caps, but over 80 percent of calls to and from correctional facilities are intrastate, and were not subject to the reforms of the *2013 Order*.[27] Throughout this proceeding, the Commission has repeatedly called on states to reform inmate calling within their jurisdictions, but rates remain egregiously high in over half the states. The Commission has the legal authority to reform the rate structure for all ICS calls, and herein we determine it is appropriate and necessary to do so.[28]

8. In addition, we commit to continue evaluating the impact of these reforms and to conduct a review in two years to evaluate the changes in the market and determine whether further refinements are appropriate.

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[23] Media Action July 7, 2015 *Ex Parte* Letter, Attach. at 5 (testimony of Amsani Yusli).

[24] *See infra* para. 13.

[25] *See* Comments of Ohio Department of Rehabilitation and Correction, WC Docket No. 12-375, at 12 (filed Jan. 12, 2015) (ODRC Second FNPRM Comments) (stating that rate reductions would undermine the availability of security procedures needed to maintain the safety of inmate communications).

[26] *See id*. at 13 (stating "Any further reduction in ICS rates or the extension of the Commission's new rate regime to intrastate ICS rates, as suggested by the Order and FNPRM, would undercut the ODRC's ability to fund and deliver these critical and valuable programs and services to its inmate population"); Reply of CenturyLink, WC Docket No. 12-375, at 22 (filed Jan. 27, 2015) (CenturyLink Second FNPRM Reply) (stating that if a prospective interexchange carrier will not accept certain proposed terms, an ICS provider will not be able to uphold its contractual obligations to public entities).

[27] *See* Comments of Pay Tel, WC Docket No. 12-375, at 7 (filed Dec. 20, 2013) (asserting that in 2012, 84% of its calls in jail facilities were local calls); Comments of Telmate, WC Docket No. 12-375, at 3 (filed Mar. 20, 2013) (stating that "interstate traffic is a small percentage of ICS calling"); Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 6 (filed Apr. 20, 2007) (stating that in 2007, 81% of its calls in jail facilities were local calls).

[28] The record illustrates the exorbitant rates that many ICS providers charge per minute for intrastate calls. Per-minute rates vary, but commenters report paying as high as $1 per minute, and rates were exacerbated by ancillary service charges that greatly raised average per-minute cost of a call. *See* Media Action July 7, 2015 *Ex Parte* Letter, Attach. at 7 (testimony of Susanne Mason); *id.*, Attach. at 16 (testimony of Bianca Clarke).

II. EXECUTIVE SUMMARY

9. In the Order, we adopt comprehensive reform of all aspects of ICS to correct a market failure, foster market efficiencies, encourage ongoing state reforms, and ensure that ICS rates and charges comply with the Communications Act. As a threshold matter, we make clear that the reforms adopted herein apply to ICS offered in all correctional facilities, regardless of the technology used to deliver the service. Specifically, we take the following steps, which together form a comprehensive package of long-overdue reform to inmate calling services:

- Adopt tiered debit and prepaid rate caps that apply to all interstate and intrastate ICS, as well as a tiered rate cap for collect calling (which, after two years, will phase down to the rate caps adopted for prepaid and debit calls);
- Address payments to correctional institutions by excluding site commission costs from our rate caps (we otherwise discourage, but do not prohibit, ICS providers from sharing their profits and paying site commissions to facilities);
- Limit and cap ancillary service charges and address the potential for loopholes and gaming, including third-party services, thus addressing a disturbing trend in which ancillary service charges increased exponentially and unfairly, to the detriment of inmates and their families and in contravention of the statute;
- Prohibit ICS prepaid calling account funding minimums and establish an ICS prepaid calling account funding maximum limit;
- Establish a periodic review of ICS reforms, recognizing that further refinements may be appropriate as the marketplace evolves – thus complementing the Further Notice we initiate today (described in more detail below);
- Make clear that the rate caps and reforms we adopt today operate as a ceiling in states that have not enacted reforms with equal or lower caps on rates and ancillary fees and that we will preempt state laws that are inconsistent with the federal framework;
- Take measures to address ongoing concerns with access to ICS by inmates and their families with communications disabilities, including requiring that the per-minute rates charged for TTY-to-TTY calls be no more than 25 percent of the rates the providers charge for traditional inmate calling services and that no provider shall levy or collect any charge or fee for TRS-to-voice or voice-to-TTY calls;
- Adopt a transition period for rate caps and ancillary service charge reforms of 90 days after publication in the Federal Register for ICS provided in prisons and six months after publication in the Federal Register for ICS provided in jails to enable providers time to adjust contracts if necessary, given that the reforms adopted herein constitute regulatory changes and thus may trigger change-in-law provisions in existing ICS contracts;
- Take measures to prevent possible gaming during the transition to the new rules adopted herein;
- Require annual reporting and certification by ICS providers, to allow the Commission to ensure compliance and enable monitoring of developments, and require the providers to be transparent with regard to disclosure of their rates and policies;
- Confirm that section 276 of the Act is technology neutral and thus any service – regardless of name – that meets the definitional criteria for “inmate calling services” is subject to our rules, including the reforms adopted today; and
- Make clear that ICS providers may seek waivers if they are unable to receive fair compensation or request that the Commission preempt inconsistent state laws, and

encourage the Wireline Competition Bureau to resolve such waivers within 90 days of submission of complete information.

We adopt the following rate caps.

Table One

Size and Type of Facility	Debit/Prepaid Rate Cap per MOU[29]	Collect Rate Cap per MOU as of effective date	Collect Rate Cap per MOU as of July 1, 2017	Collect Rate Cap per MOU as of July 1, 2018
0-349 Jail ADP[30]	$0.22	$0.49	$0.36	$0.22
350-999 Jail ADP	$0.16	$0.49	$0.33	$0.16
1,000+ Jail ADP	$0.14	$0.49	$0.32	$0.14
All Prisons	$0.11	$0.14	$0.13	$0.11

We prohibit any ancillary service charges except for the following.

Table Two

Permitted Ancillary Service Charges and Taxes	Monetary Cap Per Use / Instruction
Applicable taxes and regulatory fees	Provider shall pass these charges through to consumers directly with no markup
Automated payment fees[31]	$3.00
Fees for single-call and related services, e.g., direct bill to mobile phone without setting up an account	Provider shall directly pass through third-party financial transaction fees with no markup, plus adopted, per-minute rate
Live agent fee, i.e., phone payment or account set up with optional use of a live operator	$5.95
Paper bill/statement fees (no charge permitted for electronic bills/statements)	$2.00
Prepaid account funding minimums and maximums	Prohibit prepaid account funding minimums and prohibit prepaid account funding maximums under $50
Third-party financial transaction fees, e.g., MoneyGram, Western Union, credit card processing fees and transfers from third party commissary accounts	Provider shall pass this charge through to end user directly, with no markup

10. These reforms supersede the reforms adopted in the *2013 Order* and therefore will replace the interim interstate rate caps and cost-based framework previously adopted. Accordingly, the extensive reforms we adopt in this Order constitute material changes of law and may also trigger contractual force majeure clauses. To comply with the new rules we adopt herein, we therefore expect

[29] "MOU" stands for "minutes of use."

[30] Average Daily Population (ADP). *See infra* paras. 38-47.

[31] Automated payments include payments by interactive voice response (IVR), web, or kiosk.

that ICS providers may need to renegotiate many of their contracts with correctional facilities but note that ICS rates in numerous states are already below our adopted caps.

11. While the steps we take today are significant, our work is not complete. With that in mind, in today's Further Notice, we seek additional comment on rates for international calls, promoting competition in the ICS industry, the benefits of a recurring Mandatory Data Collection, as well as a requirement that ICS providers file their ICS contracts with the Commission, video visitation, and other newer technologies to increase ICS options, and seek additional comment on the operations and economic impacts of providing those services as experienced by end users, correctional facilities, and ICS providers.

III. BACKGROUND

12. In 2003, Martha Wright and her fellow petitioners, current or former prison inmates and their relatives and legal counsel (Wright Petitioners or Petitioners), filed a petition seeking a rulemaking to address high long-distance ICS rates.[32] The petition sought to prohibit exclusive ICS contracts and collect-call-only restrictions in correctional facilities.[33] In 2007, the Petitioners filed an alternative rulemaking petition, asking the Commission to address high ICS rates by requiring a debit-calling option in correctional facilities, prohibiting per-call charges, and establishing rate caps for interstate, interexchange ICS.[34] The Commission sought and received comment on both petitions (Wright Petitions).[35]

13. In December 2012, in response to the Wright Petitions, the Commission adopted a Notice of Proposed Rulemaking seeking comment on, among other things, the proposals in the Wright Petitions.[36] The *2012 NPRM* proposed ways to "balance the goal of ensuring reasonable ICS rates for end users with the security concerns and expense inherent to ICS within the statutory guidelines of sections 201(b) and 276 of the Act."[37]

14. On August 9, 2013, the Commission adopted the *Inmate Calling Report and Order and FNPRM* (*2013 Order*), finding that market forces were not operating to ensure that interstate ICS rates were just, reasonable, and fair.[38] The Commission concluded that, in light of the absence of competitive pressures working to keep rates just and reasonable in the ICS market, the default of cost-based regulation should apply.[39] As such, the Commission focused on reforming interstate site commission payments, rates, and ancillary service charges.[40] The Commission also determined that site commission payments

[32] *See generally* First Wright Petition.

[33] *Id*.

[34] *See generally* Alternative Wright Petition.

[35] *See Petition For Rulemaking Filed Regarding Issues Related to Inmate Calling Services Pleading Cycle Established*, CC Docket No. 96-128, Public Notice, DA 03-4027, 2003 WL 23095474 (Wireline Comp. Bur. 2003); *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, CC Docket No. 96-128, Public Notice, 22 FCC Rcd 4229 (Wireline Comp. Bur. 2007).

[36] *See generally Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012) (*2012 NPRM*). The *2012 NPRM* incorporated relevant comments, reply comments and ex parte filings from the prior ICS docket, CC Docket No. 96-128, into WC Docket No. 12-375. *See 2012 NPRM*, 27 FCC Rcd at 16636, para. 15.

[37] *Id*. at 16636, para. 16.

[38] *See 2013 Order*, 28 FCC Rcd at 14131-32, para. 46 (noting that "fair" compensation requires that the rates be fair to both ICS providers and ICS end users).

[39] *Id*. at 14132, para. 46.

[40] *See id*., para. 47.

"were not part of the cost of providing ICS and therefore not compensable in interstate ICS rates."[41] Analyzing data submitted into the record and public data, the Commission adopted interim per-minute interstate ICS safe harbor caps of $0.12 for debit and prepaid calls and $0.14 for collect calls and hard rate caps of $0.21 for debit and prepaid calls and $0.25 for collect calls.[42] The Commission gave guidance to ICS providers regarding the process for obtaining waivers of the interim rate caps.[43] The Commission also required that ancillary service charges be cost-based.[44] At the time, the Commission declined to address intrastate ICS, noting instead that it had "structured [its reforms] in a manner to encourage . . . states to undertake reform and sought comment on intrastate reforms as part of the FNPRM."[45] Finally, the record indicates that as a result of our interim interstate rate caps, interstate call volumes have increased as much as 70 percent,[46] while interstate debit and prepaid rates have decreased, on average, 32 percent and interstate collect rates have decreased, on average, 44 percent.

15. To enable the Commission to enact ICS reform, the *2013 Order* adopted a Mandatory Data Collection[47] requiring ICS providers to file information regarding the costs of providing ICS, and an Annual Reporting and Certification Requirement for ICS rates.[48] The Commission noted that the Mandatory Data Collection would help it "develop a permanent rate structure, which could include more targeted tiered rates in the future."[49] Through the data collected pursuant to the Mandatory Data Collection, the Commission obtained significant cost and operational data, including ancillary service charge cost data, from a variety of ICS providers representing well over 85 percent of the ICS market.[50]

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[41] *See id*. at 14135, para. 54.

[42] *See id*. at 14138-53, paras. 59-81. Rates within the safe harbor levels of $0.12/minute and $0.14/minute would benefit from a presumption of reasonableness and would be insulated from refund liability, while rates above the interim interstate rate caps of $0.21/minute and $0.25/minute would not be permitted without a waiver. Rates between the safe harbor and hard rate caps were potentially subject to scrutiny to determine whether they were "cost-based" and "reasonable."

[43] Prior to the effective date of the *2013 Order*, the Wireline Competition Bureau (Bureau) found good cause to grant a temporary waiver of the interim interstate rate caps to one ICS provider. *See generally Rates for Interstate Inmate Calling Services*; *Pay Tel Communications, Inc.'s Petition for Waiver of Interim Interstate ICS Rates*, Order, WC Docket No. 12-375, 29 FCC Rcd 1302 (Wireline Comp. Bur. 2014) (*Pay Tel Waiver Order*). The Bureau found that, based on a combination of existing below-average-cost state ICS rates and the Commission's interim rate caps, "extraordinary circumstances" existed, and that the public interest was served by granting Pay Tel a limited waiver to be allowed to charge $0.46 per minute for new and existing interstate long distance ICS contracts for a period of nine months. *Id*. at 1308-09, 1412-13, paras. 11, 20-21. Pay Tel requested an extension of its waiver. *See* Pay Tel Communications, Inc.'s Petition for Extension of Waiver, WC Docket No. 12-375 (filed Oct. 31, 2014). We address that request later in this item. *See infra* Section IV.N.

[44] *See 2013 Order*, 28 FCC Rcd at 14157-58, para. 91.

[45] *Id*. at 14173, para. 130.

[46] Letter from Phil Marchesiello, Counsel to Praeses, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Oct. 3, 2014).

[47] *See 2013 Order*, 28 FCC Rcd at 14172-73, paras. 124-26. The data filed in response to the Mandatory Data Collection is confidential and was filed pursuant to the Protective Order in this proceeding. See *Rates for Interstate Inmate Calling Services*, Protective Order, WC Docket No. 12-375, 28 FCC Rcd 16954 (Wireline Comp. Bur. 2013) (*Protective Order*). Confidential information has been redacted from the public version of this Order.

[48] *See 2013 Order*, 28 FCC Rcd at 14169-70, paras. 116-17.

[49] *See id*. at 14112, para. 7.

[50] The Commission received cost data from fourteen ICS providers: ATN, CenturyLink, Combined Public Communications, Correct Solutions, Custom Teleconnect, Encartele, GTL, Lattice, ICSolutions, NCIC, Pay Tel Communications, Protocall, Securus, and Telmate. In the *Second FNPRM*, described below, the Commission

(continued….)

16. Prior to the effective date of the *Order*, the United States Court of Appeals for the District of Columbia Circuit stayed three rules adopted by the Commission pending resolution of the appeal, including the rule requiring rates to be based on costs, the rule adopting interim safe harbor rates, and the rule requiring ICS providers to file annual reports and certifications.[51] The court allowed other aspects of the *2013 Order* to take effect, including the interim interstate rate caps and Mandatory Data Collection.[52] Due to the partial stay, the requirement that ancillary service charges be based on costs did not go into effect. As a result, there have been no reforms to ancillary service charges and fees and they have continued to increase since the *2013 Order*. The litigation has been held in abeyance pending resolution of this Order.[53]

17. Since adoption of the *2013 Order*, the Commission has continued to monitor the effects of its reforms on the ICS industry and pursue additional reform, including holding a workshop entitled "Further Reform of Inmate Calling Services" on July 9, 2014. The workshop evaluated options for additional ICS reforms, discussed the effects of the *Order*, the role ancillary service charges play in the ICS market, the provision of ICS at different types of facilities, and communications technologies beyond traditional payphone calling being deployed in correctional facilities.[54]

18. *Second Further Notice of Proposed Rulemaking*. In October 2014, the Commission adopted a *Second FNPRM* and sought comment on several proposals in the record urging comprehensive ICS reform. The proposals the Commission sought comment on suggested a variety of ways to deal with issues identified in the record, including rate caps, site commission payments, and ancillary fees that were offered by various entities with differing perspectives in addressing ICS reform. For example, three ICS providers, GTL, Securus, and Telmate, jointly filed a proposal to comprehensively reform all aspects of ICS.[55] Several other individual ICS providers, including CenturyLink[56] and Pay Tel,[57] submitted their own proposals for reform. The Wright Petitioners, along with several public interest groups, also urged the Commission to consider its proposals for comprehensive reform.[58] Finally, the Commission sought comment on costs incurred by correctional facilities in the provision of ICS and the data received in response to the Mandatory Data Collection.

(Continued from previous page)
sought comment on this data, including some reporting and cost allocation inconsistencies among the providers. *See* Letter from Brian D. Oliver, Chief Executive Officer, GTL, Richard A. Smith, Chief Executive Officer, Securus, and Kevin O'Neil, President, Telmate, to Chairman Tom Wheeler, Chairman, FCC, WC Docket No. 12-375, at 5 (filed Sept. 15, 2014) (Joint Provider Proposal or Proposal).

[51] *See* 47 C.F.R. §§ 64.6010 (Cost-Based Rates for Inmate Calling Services), 64.6020 (Interim Safe Harbor); and 64.6060 (Annual Reporting and Certification Requirement).

[52] *Second FNPRM*, 29 FCC Rcd at 13177, para. 12.

[53] *See Securus Techs v. FCC*, No. 13-1280.

[54] *See FCC Announces Workshop on Further Reform of Inmate Calling Services*, Public Notice, WC Docket No. 12-375, 29 FCC Rcd 5367 (Wireline Comp. Bur. 2014).

[55] Joint Provider Proposal at 1-2 (These providers claim to be "the primary providers of inmate calling services . . . in the United States and representing 85% of the industry revenue in 2013.").

[56] Letter from Thomas M. Dethlefs, Associate General Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Aug. 14, 2014) (CenturyLink Aug. 14, 2014 *Ex Parte* Letter).

[57] *See* Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed Oct. 3, 2014) (attaching Pay Tel Proposal and ICS Regulatory Reform Proposal Comparison) (Pay Tel Proposal).

[58] *See, e.g.*, Reply of Wright Petitioners, WC Docket No. 12-375 at 1 (filed Apr. 2, 2013) (Wright Petitioners 2012 NPRM Reply) (advocating for adopting a $0.07 per minute rate cap for all interstate debit, prepaid, and collect calls, with no per-minute rate, and no other ancillary fees or taxes allowed).

19. *State Reforms.* Several states have undertaken ICS reform since the *2013 Order* that reflect and are meant to address circumstances specific to their jurisdiction.[59] The Alabama Public Service Commission (Alabama PSC), for example, adopted comprehensive ICS reforms that include tiered intrastate rate caps as well as a restricted number of ancillary service charges at caps it established.[60] The Minnesota Department of Corrections initiated a pilot program in a limited number of correctional facilities in which a flat rate of $0.07 per minute is charged for all local and long-distance debit calls, bringing the cost of a 15-minute call to $1.05, plus applicable tax.[61] New Jersey recently entered into a new ICS contract lowering rates for all interstate and intrastate calls from state prison facilities to $0.04348 a minute effective August 25, 2015.[62] The Ohio Department of Rehabilitation and Correction reduced rates to $0.05 per minute for all ICS calls as of April 1, 2015.[63] In announcing its change, the Ohio Department of Rehabilitation and Correction noted that "[t]elephone calls are one of the primary means of inmates maintaining connections with family and loved ones during incarceration; maintaining these connections positively influences behavior in prison and the likelihood an offender will succeed upon release from prison."[64] Inmates in the West Virginia Division of Corrections now pay $0.032/minute for all domestic ICS.[65] We are pleased that some states have taken positive steps to reduce intrastate rates but remain concerned that many intrastate rates remain high and some have even increased following the *2013 Order*.[66] The actions we take today embrace previous reforms and encourage additional states to follow and enact more-tailored relief in their states. The framework we adopt today acts as a ceiling to enable reforms, such as those undertaken by New Jersey, Ohio, and West Virginia.

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[59] Letter from Karina Wilkinson and Alix Nguefack, NJ Advocates for Immigrant Detainees, and Rebecca Hufstader and Alina Das, NY Univ. School of Law Immigrant Rights Clinic, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 4 (filed June 30, 2015) (NJAID/NYU IRC June 30, 2015 *Ex Parte* Letter) ("NJAID and IRC applaud the reforms, in New Jersey and around the country, that have resulted from the Commission's 2013 Order. However, these reforms have been implemented unevenly and inadequately, leading to high rates overall and particularly for county jails. Therefore, we encourage the FCC to exercise its authority under Sections 201 and 276 of the Communications Act to eliminate all ICS commissions, cap rates, and eliminate mandatory ancillary fees.").

[60] Letter from Glenn S. Richards, Counsel to NCIC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Exh. B at 49-50, 70-88 (filed July 9, 2014) (attaching Further Order of Alabama Public Service Commission Adopting Revised Inmate Phone Service Rules, Docket 15957 (rel. July 7, 2014) (Alabama PSC July 7, 2014 Further Order)).

[61] *See* Central Office Memorandum Letter from John R. King, Assistant Commissioner-Facilities Division, to All Offenders (dated April 15, 2014), https://www.prisonphonejustice.org/MN/mn-doc-rate-change-for-2014/ (last visited Sept. 19, 2014) (announcing pilot program).

[62] Letter from Alina Das, Attorney, et al., New Jersey Institute for Social Justice, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed May 15, 2015) (NJAID/NYU IRC May 15, 2015 *Ex Parte* Letter). Inmate calling in NJ county jails are not automatically included in this new contract. See *id*. at 1 and Attach. 2 ("While New Jersey has taken important steps to lower phone rates and eliminate commissions in state facilities, counties like Bergen County continue to charge the high rates and seek commissions at the expense of vulnerable families."). Rather, those that opt into the New Jersey Department of Correction's state contract must also conform to this reduced rate. *See generally id*.

[63] Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 n. 19 (filed May 18, 2015).

[64] Ohio Department of Rehabilitation and Correction Offender Phone Services (Mar. 31, 2015), http://www.drc.ohio.gov/web/phone_services.htm#inmate_Phone_.

[65] *See* CenturyLink Public Communications Portal, *available at* http://www.centurylink.com/corrections/west-virginia/rates html.

[66] *See Second FNPRM*, 29 FCC Rcd at 13173-74, para. 5.

IV. REPORT AND ORDER

A. Rate Caps that Comply with the Statute

20. In this section we adopt tiered rate caps for intrastate and interstate ICS that will allow providers to continue to offer safe and secure ICS while complying with the requirements of the Communications Act. These rate caps will apply to jails, prisons and immigration detention facilities, secure mental health facilities and juvenile detention facilities.

21. A review of the record, including over 100 comments and replies, costs reported in response to the Mandatory Data Collection, and various *ex parte* filings, indicates that, notwithstanding our interim caps on interstate rates, more work still must be done to bring ICS rates in conformance with the mandates of the Communications Act.[67] The record demonstrates that many interstate rates are not "just and reasonable rates as required by Sections 201 and 202" and that many interstate and intrastate rates result in compensation that exceeds the fair compensation permitted by section 276.[68] The Commission's finding in the *2013 Order* that the marketplace alone has not ensured that ICS rates are just, reasonable, and fair remains true today.[69] Nor has the risk of complaints filed under section 208, or enforcement actions pursuant to section 201(b) or section 276, been sufficient to keep ICS rates at levels that are just and reasonable and fairly compensatory.[70] We therefore act, pursuant to our statutory authority, to ensure that ICS rates comply with the Communications Act, while balancing the unique security needs related to providing telecommunications service in correctional institutions and ensuring that ICS providers receive fair compensation and a reasonable return on investment.[71]

22. Specifically, we adopt a rate cap of $0.22/MOU for debit and prepaid calls from jails with an ADP of 0-349; a $0.16/MOU cap for debit and prepaid calls from jails with an ADP of 350-999; and a $0.14/MOU cap for debit and prepaid calls from jails with an ADP of 1,000 or more. Debit and prepaid calls from prisons will be capped at a rate of $0.11/MOU. Collect calls from jail facilities will be capped at $0.49/MOU and collect calls from prison facilities will be capped at $0.14/MOU until July 1, 2017, and then transition down on an annual basis to the applicable debit/prepaid rate cap as described herein.

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[67] Comments of HRDC, WC Docket No. 12-375, at Exh. C (filed Jan. 12, 2015) (HRDC Second FNPRM Comments) (detailing 2013-2014 intrastate rates and showing that some are above the Commission's interim interstate caps adopted in 2013); *see id*. at 9 ("After the Commission issued its Order capping interstate ICS phone rates, that should have served as a bellwether for state public utility commissions to take similar action to protect consumers from high intrastate ICS rates and fees. With the exception of Alabama, it appears that none have chosen to do so. This highlights the need for the Commission to take action to protect consumers nationally, as the past decades of exploitative ICS practices and profiteering indicate that absent action by the Commission, nothing will be done at the state level in the vast majority of states."); Comments of Minnesota Department of Commerce (MNDOC), WC Docket 12-375, at 5 (filed Dec. 13, 2013) (Minnesota DOC 2013 Order Comments) ("Clearly . . . with respect to rates, further intrastate reform is needed in a non-competitive market such as this, in which neither the inmates themselves nor the recipients of inmate telephone communications have an opportunity to choose their own service provider to avoid or minimize charges, even when full disclosure is provided and rates are clearly presented. . . . To the extent that states like Minnesota do not have the ability to constrain the level of intrastate ICS rates through regulation, establishment of a structure that addresses both intrastate and interstate rate levels holistically may need to be handled by the FCC.").

[68] *2013 Order*, 28 FCC Rcd at 14131, para. 45.

[69] *Id*.

[70] *See* 47 U.S.C. §§ 201(b), 208, 276.

[71] *See 2013 Order*, 28 FCC Rcd at 13179, para. 19.

Table Three

Size and Type of Facility	Debit/Prepaid Rate Cap per MOU	Collect Rate Cap per MOU as of effective date	Collect Rate Cap per MOU as of July 1, 2017	Collect Rate Cap per MOU as of July 1, 2018
0-349 Jail ADP	$0.22	$0.49	$0.36	$0.22
350-999 Jail ADP	$0.16	$0.49	$0.33	$0.16
1,000+ Jail ADP	$0.14	$0.49	$0.32	$0.14
All Prisons	$0.11	$0.14	$0.13	$0.11

23. In the subsections that follow, we describe our methodology for adopting these rate caps. Specifically, we: (1) discuss the decision to adopt a tiered structure that distinguishes between jails and prisons, and, within jails, based upon ADP, (2) describe the reasoning for adopting the specified tiers, (3) describe the methodology and analysis supporting the specific rate caps adopted, using a carefully considered combination of analysis of the Mandatory Data Collection (including evidence suggesting that some providers submitted inflated cost data), successful reform in certain states, experience with the interim rate caps, and other data in the voluminous record of this proceeding, (4) explain the need for a temporary, separate rate for collect calls, which will phase out over a two-year period to equalize the rate for these calls with those of debit/prepaid calls, (5) reject per-call/per-connection charges and flat-rate calling as inherently unjust, unreasonable, and unfair in contravention of the statute, and (6) explain our legal authority to adopt these reforms.

1. Tiered Structure Distinguishing Between Jails and Prisons.

24. Before determining the specific amount of any rate *caps*, a key question before us is the appropriate rate *structure* for ICS – i.e., whether there should be a single unitary rate for inmate calling services regardless of the facility type or size. We find in this Order that the record supports distinguishing between the type of facility (jails vs. prisons) as well as, for jails, tiering based on the size of the facility.

a. Justification for Separate Tiers.

25. In both the *2013 FNPRM*[72] and *Second FNPRM*,[73] the Commission sought comment on rate tiering. In the *Second FNPRM*, the Commission also sought comment on the appropriate definition of "prison" and "jail," and on the potential suitability of rate tiering based on differences between jails and prisons as well as population size.[74] As discussed below, there was substantial record support for such an approach.

[72] *Id*. at 14182-84, paras. 156-59.

[73] *See Second FNPRM*, 29 FCC Rcd at 13198, paras 67-70

[74] *Id*. at 13197, para. 67, 71 (seeking comment on how to define "jail" and "prison" for purposes of ICS reform). Specifically, the Commission sought comment on the definition of jail as "a correctional facility operated by a political subdivision of a state or its agent" and on the definition of a prison as "as state-run or federally-run correctional facility." *Id*. In the Order, the Commission stated that "[t]hroughout this Report and Order and Second Further Notice we use 'correctional facility' and 'correctional institution' interchangeably" and noted that "the requirements adopted in this Order apply to federal, state, and local correctional facilities." *2013 Order*, 28 FCC Rcd at 14116, n.50.

26. *Background*. Some commenters support differentiating rates between different facility types or sizes.[75] For example, Petitioners assert that the "cost of providing service in these large facilities is substantially less than the cost of providing service in small jails, and that ICS providers can serve these larger facilities with less administrative costs."[76] Other commenters assert that "characteristics unique to different types of facilities" should lead to rate tiering.[77] Some commenters contend that it costs more to provide ICS in smaller jails than it does in larger jails.[78] These parties argue that a one-size-fits-all rate cap will not work, ignores the record and likely will lead to a violation of sections 201 and 276 of the Act.[79] We note that the Alabama PSC recently adopted rate tiers tied to facility type, with separate rates for jails and prisons.[80]

27. The Los Angeles Sheriff's Department advocates that the Commission "resist the temptation to set uniform rates" because the differences in security requirements, inmates, age, infrastructure and maintenance needs of facilities must be accounted for in the Commission's decision-making process."[81] The California State Sheriff's Association echoes these concerns, explaining that in California, the smallest jail can hold a maximum of 14 inmates, while the largest jail can hold a maximum of over 14,000 inmates, and contends that accounting for these differences "is much more important and realistic than attempting to craft a single 'solution' for uniformity's sake."[82] NCIC also supports tiering in order to "balance the needs of inmates, their families, correction facilities and ICS providers."[83]

28. Moreover, some commenters assert that, without tiering, providers serving small- to medium-sized jails "would likely be forced out of the market, particularly if the larger companies cross-subsidize between low-cost (Prison) and high-cost (Jail) facilities" because it is more costly to providers to serve smaller facilities (as confirmed by our analysis of the Mandatory Data Collection).[84] Additionally, there is evidence that some large ICS providers refuse to bid on contracts to serve only

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[75] *See, e.g.*, Comments of Network Communications International Corp. (NCIC), WC Docket No. 12-375, at 19-20 (filed Jan. 12, 2015) (NCIC Second FNPRM Comments) (suggesting that the Commission should adopt tiered rate caps to address differences between facilities).

[76] Comments of Wright Petitioners, WC Docket No. 12-375, at 14 (filed Jan. 13, 2015) (Wright Petitioners Second FNPRM Comments).

[77] Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket 12-375, at 11 (filed Jan. 7, 2015) (Pay Tel Jan. 7, 2015 *Ex Parte* Letter); *see also* Letter from William L. Pope, Pres., NCIC to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 6 (filed Apr. 16, 2015) (NCIC Apr. 16, 2015 *Ex Parte* Letter) ("the record of the proceedings for both the Commission and the APSC [Alabama PSC] shows the cost for providing ICS in jails is higher than in prisons.").

[78] *See* Comments of Pay Tel, WC Docket No. 12-375 at 11-25; 32-37 (filed Jan. 12, 2015) (Pay Tel Second FNPRM Comments).

[79] *See id*. at 2; *see also* Comments of Don Wood, WC Docket No. 12-375 at 21 (filed Jan. 12, 2015) (Don Wood Second FNPRM Comments) (arguing that facility size impacts the cost of providing ICS, in that providers' costs increase as facility size decreases).

[80] *See* Alabama PSC July 7, 2014 Further Order, Exh. B at 49-50, 70-88.

[81] Comments of County of Los Angeles Sheriff's Department, WC Docket No. 12-375, at 2 (filed Jan. 12, 2015) (LA Sheriff's Department Second FNPRM Comments).

[82] Letter from Adam E. Christianson, President, California State Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 5 (filed Dec. 19, 2015) (CSSA Second FNPRM Comments); *see also* Letter from Steve Case, Executive Director, Florida Sheriff's Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2-3 (filed Jan. 9, 2015).

[83] NCIC Second FNPRM Comments at 2.

[84] Pay Tel Second FNPRM Comments at 2; *see generally* Mandatory Data Collection.

smaller institutions – suggesting again that the cost structure of serving smaller institutions is higher than that of larger institutions.[85]

29. Other commenters, however, disagree with a tiered rate approach and counter that the Commission should continue to impose unitary rate caps, similar to the current, interim rate caps.[86] These commenters contend that unitary rates are less complex to understand and to administer, and that no real difference exists between the cost of serving jails and prisons.[87] For instance, GTL and CenturyLink contend that "there is no clean proxy for cost that could be relied upon to create tiers."[88] Additionally, some commenters argue that adopting tiers based on a prison/jail distinction would be arbitrary, especially as many large providers serve both prisons and jails.[89] Securus claims that "to adopt vastly

[85] *See* Pay Tel Second FNPRM Comments at 38, n.94 ("In addition, current market activity that Pay Tel has analyzed indicates that GTL and Securus are moving away from serving small- and medium-sized jails—movement that is not surprising given the blended rate caps proposed in the Joint Provider Proposal, which would allow for razor-thin (if any) profit margins in small- and medium-sized jails and windfalls in prisons in mega-jails."); *see also* Comments of Oregon State Sheriffs' Association, filed by Sheriff John Bishop, WC Docket No. 12-375, at 5 (filed Jan. 5, 2015) (OSSA Second FNPRM Comments) ("Small jails in Oregon have been put on notice by ICS providers that if intrastate calls are capped in the same manner as interstate calls, providing ICS services in these facilities will likely no longer be profitable. If that happens, the provider will either withdraw from providing service or will only offer service if the facility is willing to subsidize the costs associated with ICS").

[86] We note that Securus, a signatory of the Joint Provider Proposal which proposes one rate for debit and prepaid calling and one rate for collect calling, filed an administrative Petition for Stay of the *2013 Order* in part because of what it characterized as the Commission's one-size-fits-all approach to ICS rates. In support of its petition, Securus pointed out "[t]hat data, there can be no dispute, showed that costs to provide service to smaller facilities, which have lower call volume, were higher for Securus and other providers of ICS services at smaller facilities. The record also demonstrates the fundamentally different calling patterns and cost structure at jails, which typically house individuals for short periods of time, as opposed to state prisons. The Commission ignored the record evidence and adopted a 'one-size-fits-all' approach that is arbitrary and capricious." *Rates for Interstate Inmate Calling Services*. WC Docket No. 12-375; Securus Technologies, Inc. Petition for Stay of Report and Order Pending Appeal, WC Docket No. 12-375, filed Oct. 22, 2013 at 16-17 (Securus Petition for Stay). GTL also complained about what it characterized as the Commission's "one-size-fits-all" approach to rate caps in its administrative Petition for Stay; it did not include this argument as a reasons for seeking stay but indicated it would do so in its forthcoming judicial petition for review. *See Rates for Interstate Inmate Calling Services*; Petition of GTL for Stay Pending Judicial Review, WC Docket No. 12-375 at n.23 (filed Oct. 30, 2013).

[87] *See, e.g.*, Comments of GTL, WC Docket 12-375, at 12 (filed Jan. 13, 2015) (GTL Second FNPRM Comments); Comments of Securus, WC Docket No. 12-375, at 20 (filed Jan. 12, 2015) (Securus Second FNPRM Comments).

[88] GTL Second FNPRM Comments at 11, citing Letter from Thomas M. Dethlefs, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (filed Oct. 10, 2014) (CenturyLink Oct. 10, 2014 *Ex Parte* Letter); HRDC Second FNPRM Comments at 7 (asserting that it "does not support any type of tiered-rate structure; rather, we submit that a single unified rate structure is imperative to ensure ICS charges are transparent for prisoners and their families and to simplify oversight and enforcement, as was noted in the Joint Provider Reform Proposal."). *But see infra* n. 91 (filings from Securus and GTL criticizing the Commission's interim unitary rate caps).

[89] *See, e.g.*, Securus Second FNPRM Comments at 20 (asserting that, in the context of rate tiering, the jail versus prison construct "has no reasonable basis."); Comments of Inmate Calling Solutions, LLC., Docket No. 12-375, at 2, 21-22 (filed Jan. 12, 2015) (ICSolutions Second FNPRM Comments) (arguing that it "strongly recommends against establishing separate caps based upon facility type, population size etc." because "just and reasonable caps are just and reasonable to all consumers, irrespective of where their loved one resides'); GTL Second FNPRM Comments at 12 (contending that unitary rates are best and that no real difference exists between costs for jails and prisons, and asserting that for its own contracts, it services approximately 1600 correctional facilities of all types and sizes, ranging from municipal and county jails housing fewer than 20 inmates to state and federal systems housing tens of thousands of inmates). GTL further asserts that its varied customers include publicly and privately managed institutions, minimum-security and maximum-security facilities, correctional mental health facilities, remote work

(continued….)

different calling rates based on that empty [jails vs. prisons] distinction would constitute dissimilar treatment of customers that plainly are similarly situated," which it asserts is "unjustifiable."[90]

30. *Discussion*. Based on the record and market evidence, we find that tiering based on jail versus prison is appropriate, and therefore reject proposals that we should adopt a unitary rate similar to the unitary rate caps adopted in the *2013 Order*.[91]

31. In the *2013 Order*, the Commission found it appropriate to adopt interim unitary rates for a number of reasons.[92] First, the Commission observed the challenges to setting interim rates, including the fact that although the Commission relied on the best data available to it at the time, that data represented a very small subset of data, and included cost data from locations with varying cost and call volume characteristics.[93] Second, the Commission noted that it considered setting different rate caps based on the size or type of correctional facility, but stated that "the record contains conflicting assertions as to what those distinctions should be."[94] Instead, the Commission adopted interim interstate rate caps "for correctional facilities generally," "based on the highest cost data available in the record, which [it] anticipated will ensure fair compensation for providers servicing jails and prisons alike."[95] Finally, the Commission noted that unitary rates were the focus of the original petition for rulemaking and the focus of the majority of comments at that time.[96] Upon release of that item, the Commission adopted the Mandatory Data Collection to "enable [it] to take further action to reform rates, including developing a permanent cap or safe harbor for interstate rates, as well as to inform our evaluation of other rate reform options in the Further Notice."[97] The responses to the Mandatory Data Collection have greatly expanded the cost data available to us for analysis.

32. We conclude that adopting tiered interstate and intrastate rates accounts for the differences in costs to ICS providers serving smaller, higher-cost facilities, such as the vast majority of jails.[98] A similar concern applies to the potential for over-compensating ICS providers serving larger,

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camps, correctional facilities in urban and rural locations, facilities that hold prisons for a short time and those that house prisoners for extended periods. *Id.*

[90] Securus Second FNPRM Comments at 23; *see also* Comments of A New Way of Life Reentry Project, WC Docket No. 12-375, at 3 (filed Dec. 29, 2014) (ANWOL Second FNPRM Comments) (asserting that tiers should not be based on facility type because too many people who are awaiting trial and have not been convicted are held for long sentences in county jails, and they should not have to suffer higher rates because of the facility in which they were involuntarily placed).

[91] *See, e.g.*, GTL Second FNPRM Comments at 7-12; Joint Provider Proposal at 2; CenturyLink Aug. 14, 2014 *Ex Parte* Letter at 1; ICSolutions Second FNPRM Comments at 21 (citing *2013 Order*, 28 FCC Rcd at 14147-53, paras. 73-81).

[92] *See 2013 Order*, 28 FCC Rcd at 14152, paras. 78-81.

[93] *Id*. at 14150, para. 78.

[94] *Id*. at 14153, para. 81.

[95] *Id*.

[96] *Id*. at 14145-46, para. 69, 14153, para. 81; *see* Petitioners 2012 NPRM Comments at 3, Exh. C, Bazelon Decl. at 5; Comments of Telmate, WC Docket No. 12-375, at 3 (filed Mar. 25, 2013) (Telmate 2012 NPRM Comments); Comments of Pay Tel, WC Docket No. 12-375, at 9 (filed Mar. 25, 2013) (Pay Tel 2012 NPRM Comments); Comments of GTL, WC Docket No. 12-375, at 35 (filed Mar. 25, 2013) (GTL 2012 NPRM Comments); Comments of Securus, WC Docket No. 12-375, at 19 (filed Mar. 25, 2013) (Securus 2012 NPRM Comments); Reply Comments of Pay Tel, WC Docket No. 12-375, at 6-7 (filed Apr. 22, 2013) (Pay Tel 2012 NPRM Reply).

[97] *2013 Order*, 28 FCC Rcd at 14153, para. 124.

[98] *See* Reply Comment of Don Wood, WC Docket No. 12-375 at 11 (filed Jan. 27, 2015) (Wood Second FNPRM Reply); *see also* Pay Tel Second FNPRM Comments at 37-38; *see also* NCIC Second FNPRM Comments at 2, 20.

lower cost facilities, such as very large jails and prisons. We agree with those commenters who assert that the $0.20 and $0.24 rate caps proposed in the Joint Provider Proposal could result in excessive profits for the largest providers to the detriment of end users who would have to pay inflated rates far above the providers' costs.[99] For example, in the public portion of its cost data filing Securus noted that its overall cost per minute across all of its ICS contracts is $0.1776.[100] GTL similarly provided its overall cost per minute across all ICS contracts, which it estimated at $0.1341.[101] These averaged, self-reported, costs are well below the $0.20 and $0.24 rate caps proposed by these same providers in the Joint Provider Proposal.[102]

33. The record, and our analysis of costs reported in response to the Mandatory Data Collection, support rate tiering because, holding other factors constant, the costs to serve prisons are lower than to serve jails.[103] This is not surprising. Prisons typically have more stable, long-term inmate populations. For example, there is less than one percent inmate churn in prisons per week compared to an average of 58 percent inmate churn in jails.[104] The record suggests that higher churn rates increase costs to process and grant a new inmate access to calling services, and also when an inmate exits a facility. The record also indicates that prison inmates make fewer but longer calls[105] and providers appear to incur fewer bad debt costs when serving prisons.[106]

34. We also find that economies of scale, such as the recovering of fixed ICS costs over a larger number of inmates, support the tiering approach we adopt today.[107] In the *2013 Order*, the

[99] Pay Tel Jan. 7, 2015 *Ex Parte* Letter at 2. *But see* GTL Second FNPRM Comments, Attach. at 6 ("there is no evidence that large ICS providers would 'reap windfall profits' under a single set of rate caps as Pay Tel suggests.").

[100] *See* Securus Mandatory Data Collection Report at 3.

[101] *See* Letter from Chérie R. Kiser, Counsel to GTL to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at Exh. "FCC Mandatory Data Collection Description & Justification for Global Tel*Link" (filed Aug. 22, 2014). (GTL Mandatory Data Collection Report).

[102] Joint Provider Proposal at 2.

[103] *See* Mandatory Data Collection. We note that our analysis, as described in more detail below, relied on the providers' allocations of shared costs as reported in their Mandatory Data Collection Report. *See infra* Section IV.A.3.

[104] *See* Pay Tel Second FNPRM Comments at 11; *see also* Todd D. Minton and Zhen Zeng, U.S. Department of Justice, Bureau of Justice Statistics, Jail Inmates at Midyear 2014 – Statistical Tables, at Tbl. 7, http://www.bjs.gov/content/pub/pdf/jim14.pdf (last visited Oct. 20, 2015) (BJS Jail Inmates at Midyear 2014). Providers incur processing charges when a new inmate is granted access to calling services, and also when an inmate exits a facility, thus higher churn rates raise costs.

[105] *See, e.g.*, Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed July 3, 2013). To the extent that providers incur call set up costs, for example, monitoring a call may require identification of the caller, shorter calls will have a higher average cost than longer calls.

[106] *See id*. at 2 ("As with any other business, the cost of establishing service or "selling" to a new customer is greater than the cost of continuing to serve or maintain an existing customer. An analysis of Pay Tel's Jail traffic shows that 33% of inmates are booked, place only free calls from the intake area, and are released before they make a single revenue-producing phone call. Not only are the instances of non-revenue calls increased as the population churns, but the costs associated with opening new calling accounts increase as well.").

[107] *See infra* para. 56. For administrative simplicity, we decide to apply tiering only to jails to distinguish among different categories of jails (but not different categories of prisons) for several reasons. First, prisons are almost uniformly relatively large, so any institution-level setup costs for most prisons is broadly spread over minutes of use, while there is considerably more variation in jail size, and many jails are small, so a failure to tier in the case of jails is likely to have a much greater economic impact than in the case of prisons. Also, the data filed in response to the Mandatory Data Collection do not indicate there are differences in the costs of service prison facilities and, no party advocated for tiered rates applicable to prisons. As discussed below, the cost of servicing a jail of a given ADP is

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Commission noted that unit or average costs of providing ICS were decreasing as scale increased because of, for example, centralized application of security measures and "the ability to centrally provision across multiple facilities."[108] More generally, providers of ICS typically incur a range of costs that do not scale with volume, sometimes known as fixed costs. For example, the cost of a calling center is largely shared over a provider's entire operations, so the unit costs of the calling center fall quickly as call volumes increase.[109] Similarly, the cost of connecting a facility to the ICS provider's network increases at a much lower rate when minutes of use increase. Indeed, in general, the incremental cost of a minute of use is almost zero.[110] The Kansas Department of Corrections echoes these findings, stating in its support for rate tiering that "[t]he cost to provide an ICS is largely driven by the size of a facility and length of stay. Larger facilities benefit from the economies of scale that allows agencies and ICS providers to spread the cost among a larger population."[111] Pay Tel also reports that there are material fixed costs in providing ICS which can be distributed across larger facilities, like prisons, more readily than smaller facilities such as jails.[112] Indeed, many ICS providers currently offer service to multiple facilities under one contract, reflecting the benefits of centralizing fixed costs across a larger base of customers.[113] Lastly, ongoing

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likely greater than the cost of servicing a prison of similar size, so failing to account for size differences in jails is likely to have a greater economic impact than failing to do so for prisons. *See infra* para. 56. We do not find that an ICS provider or correctional facility will be able to change an institutions' categorization from prison to jail in order to take advantage of the tiered rates adopted herein.

[108] *2013 Order*, 28 FCC Rcd at 14122, para. 29. Commenters have discussed the effect the reforms established in the *2013 Order* had on call volumes. *See, e.g.,* Comments of Praeses, WC Docket No. 12-375, at 4 (filed Jan. 12, 2015) (Praeses Second FNPRM Comments) (discussing that its clients saw a 70 percent call volume increase when comparing the time periods of April through October 2013 and April through October 2014). Greater volumes may also raise costs, but any such cost increase will be swamped by the revenue increase from those volumes because of the general economies of scale in the supply of ICS. For example, the incremental cost of adding a call minute is considerably smaller than the per-minute prices we adopt here. Thus, if our adopted rates force a provider to lower its prices and thus increases demand, then for every *extra* minute that our lower prices generate, the provider gains a profit (because our price exceeds the very small (and possibly negligible) cost of those incremental minutes). (Note this is not a claim that our adopted prices will increase providers' overall profits, but only that they will earn positive profits on the *increased* volumes they see due to lower prices. They will, of course, see lower profits on each existing minute sold, since these minutes will now be sold at lower rates. However, we expect that total revenues will still be sufficient to cover total costs.). *See infra* para. 63.

[109] *See 2013 Order*, 28 FCC Rcd at 14122-23, paras. 29-30.

[110] *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17911-912, para. 752 (2011) (*USF/ICC Transformation Order*), *pets. for review denied sub nom., In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

[111] Comments of Kansas Dept. of Corrections, WC Docket No. 12-375, at 2 (filed Dec. 24, 2014) (Kansas DOC Second FNPRM Comments); *see also* GTL Aug. 10, 2015 *Ex Parte* Letter at 8 ("[T]he economies of scale observed in the ICS industry appear to be driven mainly by prison population, call volume, and the specific service needs of the correctional facility.").

[112] *See* Reply Comments of Pay Tel Communications, Inc., WC Docket No. 12-375, at 5 (filed Apr. 22, 2013) (explaining that because local jails have a "much smaller base over which to spread the cost" of services, "costs that may be easily recovered in a 20,000-bed state DOC system are not so easily recovered in a 200-bed local jail."); *see also* Letter from Glenn B. Manishin, Counsel to Telmate, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 12, fn. 20 ("There are plainly fixed costs in the provision of inmate services that do not vary with usage.").

[113] *See, e.g.,* Inmate Calling Service Agreement Between GTL and Mississippi Dept. of Information Technology Services as Contract Agent for the Mississippi Dept. of Corrections, https://www.prisonphonejustice.org/media/phonejustice/Current_Mississippi_Inmate_Phone_Contract.pdf (last visited Sept. 28, 2015); Contract Between the Florida Dept. of Corrections and Securus Technologies, Inc. through its Wholly Owned Subsidiary, T-Netix Telecommunications Services, Inc.,

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industry consolidation supports our finding that there are economies of scale in the provision of ICS, i.e., the incentive to become more efficient through scale is an incentive for providers to enter into mergers.[114]

35. Recent state reforms also support tiering. Indeed, the Alabama PSC recently adopted rate tiers tied to facility type with separate rates adopted for jails and prisons.[115] In December 2014, the Alabama PSC adopted a rate structure that "provides lower rates [for prisons] in recognition that the per-minute costs for service in prisons is lower than it is for jails."[116] In order "to ensure ample opportunity to correct any funding shortfalls resulting from potential reductions in site commissions," the adopted rate caps included a two-year phase-down period from $0.30/minute to $0.25/minute for collect and debit/prepaid calling from jails and $0.25/minute to $0.21/minute for debit/prepaid calling from prisons, while the prison collect rate stays at the initial $0.25/minute rate cap.[117]

36. We disagree with assertions that a tiered rate structure would be difficult for the Commission to administer, for ICS providers to implement, and for correctional officials to oversee.[118] Those commenters who make such assertions already charge different rates across different ICS contracts[119] and provide no real evidence or support for why rate tiers would be any more difficult or challenging than their current approaches.[120]

37. For all of these reasons, we conclude that adopting rate tiers based on facility type as well as size, or ADP, allows us to recognize the differences in the costs of serving facilities of different types

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https://www.prisonphonejustice.org/media/phonejustice/FL_phone_contract_between_FL_DOC_and_tnetix_2007.pdf (last visited Sept. 28, 2015); Contract Between the Texas Dept. of Corrections and Embarq Payphone Services, Inc., https://www.prisonphonejustice.org/media/phonejustice/TX_prison_phone_contract_and_award_with_embarq_2008.PDF (last visited Sept. 28, 2015).

[114] *2013 Order*, 28 FCC Rcd at 14122, para. 29.

[115] *See generally* Alabama Further Order Adopting Revised Inmate Phone Service Rules, Docket 15957 (Dec. 9, 2014) (Alabama PSC Dec. 9, 2014 Further Order) (stating that "[n]o service charge or additional fees above the rate indicated in this Schedule C shall be billed to any party.").

[116] *See id*. at 3.03.

[117] *Id*.

[118] GTL Second FNPRM Comments at 11.

[119] *See* Comments of Wright Petitioners, WC Docket No. 12-375, at 20 (filed Mar. 26, 2013) (Wright Petitioners 2013 Order Comments) (explaining that the cost of the same 15-minute collect call in two different states that were served by the same ICS provider varied by up to $10.00. Wright Petitioners also explained that for debit and prepaid calls the difference in cost for the same 15-minute call made in two different states that were served by the same ICS provider was nearly $5.00). *See, e.g.*, Current Call Rates, Arizona Department of Corrections, Attach. #6, Solicitation No. ADOC 14-00003887/14-066-214, "Interim Phone Rates as of Feb. 28, 2014," https://www.prisonphonejustice.org/media/phonejustice/AZ%20Rate%20Sheet%202014.pdf (last visited Sept. 16, 2015) (listing varying rates for Arizona DOC facilities for collect, prepaid, and debit calls for local, intraLATA, interLATA, interstate, and international calling); Exhibit 1, Attach., Offender Telephone Rates,https://www.prisonphonejustice.org/media/phonejustice/LA_Rates_from_Securus_Proposal_2012.pdf (last visited Sept. 16, 2015) (listing varying rates for Louisiana DOC facilities for day, evening, and night calls, as well as varying rates based on collect and debit calls); and Attach. B, p.2: Inmate Calling Solutions, Workstations Required, Calling Rates, https://www.prisonphonejustice.org/media/phonejustice/WY_Phone_Rates_2012.pdf (last visited Sept. 16, 2015) (listing varying rates for Wyoming DOC facilities for collect, pre-paid collect, and debit calls for local, intracell, intralata/intrastate, interlata/intrastate, and international calling).

[120] *See* Wood Second FNPRM Reply at 6 (GTL's claim that a tiered rate structure would be difficult to implement is "unsupported and directly at odds" with the data it filed in its response to the MDC).

as well as providing multiple checks to prevent gaming or manipulation as discussed below.[121] Tiering will limit "the impact of the higher rates to those facilities most in need, while ensuring that the vast majority of ICS calls are charged at a rate commensurate with the cost of providing the ICS service."[122]

b. Determination of Facility Type and Average Daily Population

38. *Defining Jails and Prisons.* Given that our rates will differ for prisons and jails, it is necessary to define these key terms with specificity. The Commission sought comment on defining the terms "prison" and "jail" in the *Second FNPRM*.[123] Subsequent to the *Second FNPRM*, several commenters provided suggested definitions.[124] We have considered these submissions and adopt the following definitions.[125]

39. Specifically, for purposes of this proceeding a jail is defined as the facility of a local, state, or federal law enforcement agency that is used primarily to hold individuals who are: (1) awaiting adjudication of criminal charges, (2) post-conviction and committed to confinement for sentences of one year or less, or (3) post-conviction and are awaiting transfer to another facility. The term also includes city, county or regional facilities that have contracted with a private company to manage day-to-day operations; privately-owned and operated facilities primarily engaged in housing city, county or regional inmates; and facilities used to detain individuals pursuant to a contract with U.S. Immigration and Customs Enforcement (ICE) and facilities operated by ICE.[126] For purposes of this proceeding a prison is defined as a facility operated by a territorial, state, or federal agency that is used primarily to confine individuals convicted of felonies and sentenced to terms in excess of one year. The term also includes public and private facilities that provide housing to other agencies such as the State Departments of Correction and the Federal Bureau of Prisons; and facilities that would otherwise fall under the definition of a jail but in which the majority of inmates are post-conviction or are committed to confinement for sentences of longer than one year.[127]

40. *Facility or Institution.*[128] The record indicates concern that some ICS providers may try to take advantage of the rate tiering structure we adopt in this Order by increasing the number of "facilities" in which they are allowed to charge the higher rate caps adopted for smaller jails above.[129] For

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[121] *See infra* Section IV.A.1.b.

[122] Wright Petitioners Second FNPRM Comments at 14-15.

[123] *See Second FNPRM*, 29 FCC Rcd at 13198-99, para. 71. We received minimal comment in response to the request for jail and prison definitions.

[124] *See* Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 1-3 (filed July 15, 2015) (Pay Tel July 15, 2015 *Ex Parte* Letter); Letter from Chérie R. Kiser, Counsel, GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 13-15 (filed Sept. 23, 2015) (GTL Sept. 23, 2015 *Ex Parte* Letter); Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, WC Docket No. 12-375, Attach. at 1-8 (filed July 27, 2015).

[125] According to the U.S. Department of Justice's Bureau of Justice Statistics (BJS), in 2013 there were approximately 2,220,300 total incarcerated adults with approximately 1,574,700 inmates held in state or federal prisons, and approximately 731,200 inmates held in local jails. *See* Lauren E. Glaze and Danielle Kaeble, *Correctional Populations in the United States*, 2013, Bureau of Justice Statistics at Tbl. 1 (Dec. 2014), http://www.bjs.gov/content/pub/pdf/cpus13.pdf. A 2014 BJS report details that approximately half of the jail population is held in facilities of 999 inmates or fewer. *See* BJS Jail Inmates at Midyear 2014 at Tbl. 7.

[126] *See infra* Appendix A.

[127] *See infra* Appendix A.

[128] *See 2013 Order*, 28 FCC Rcd at 14116, n.50 (making clear that "[t]hroughout this Order and Further Notice we use 'correctional facility' and 'correctional institution' interchangeably").

[129] *See* 2014 ICS Workshop Transcript at 211 (Comments of Richard A. Smith, CEO, Securus) ("We would go to a

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example, ICS providers may do this, commenters explain, by seeking to divide a detention facility into sub-units, such as wards or wings.[130] The Commission sought comment on these possibilities in the *Second FNPRM*.[131] Comments received in response confirmed that concerns that providers might try to game our rules were justified.[132] Such gaming would be contrary to this Order, and would serve to frustrate the underlying purposes of sections 201 and 276 of the Communications Act. It would allow providers to appear as though they are serving smaller jails than they actually are, even though they achieve economies of scale by combining multiple small facilities under a single contract, because they are able to centralize services, like call monitoring and recording, thereby reducing their overall costs.[133] In order to establish and maintain just, reasonable, and fair ICS compensation, we must consider these issues and take steps to ensure that our adopted tiered rate caps cannot be undone by gaming.

41. As such, we find that a jail, as defined above, and a prison, as defined above, cannot be divided into multiple wings, units, or wards by, for example, for the purpose of taking advantage of our tiered rate caps. If interested parties believe such gaming is occurring they may bring the issue to the Commission's attention, at which time the Commission will review the totality of the circumstances (e.g., treatment of the facility under state law, relevant contracts, physical attachment or proximity of units, etc.) to determine whether unlawful gaming has occurred.

42. *Average Daily Population for Jails*. As an initial matter, for purposes of the reforms adopted in this Order, the initial average daily population will be the sum of all inmates in a facility each day in the 12-month period prior to the effective date of this Order divided by the number of days in the year. This definition is consistent with that used by the Department of Justice's Bureau of Jail Statistics.[134] We note that correctional institutions often publicly report their ADP.[135] This publicly-reported population data should be used, where available, to determine the appropriate ADP for a facility. Going forward, when the relevant ADP is not publicly reported, beginning with January 31, 2017, the ADP will be calculated on a calendar year basis as the sum of all inmates in a facility each day between January 1 and December 31 of the previous year, divided by the number of days in the year. The applicable ADP will then be determined as of January 31 of each year pursuant to the ADP from the

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big facility like Florida. If you did, for example, an ADP or a minute of use kind of a tiering, we'd go to the big facilities and say instead of one contract, we're going to have 34, one per facility because they're different, they have different characteristics, they're in different parts of the state so we migrate up to a higher rate. Within the facilities, I'd start to look at booking areas versus detention areas versus the women's area and the men's area."); *see also* GTL Second FNPRM Comments at 13 (asserting that adopting a unitary rate could avoid problems with potential loopholes).

[130] *Id*.

[131] *See Second FNPRM*, 29 FCC Rcd at 13197-98, para. 70.

[132] *See* GTL Second FNPRM Comments at 11 ("Use of tiered rates will not help achieve the Commission's goal of realizing lower ICS rates and promoting competition. Instead, it will complicate implementation and require substantial Commission oversight due to the prospect of 'gaming' in the marketplace.") (internal citations omitted).

[133] *See, e.g., 2013 Order*, 28 FCC Rcd at 14122, para. 29.

[134] *See* BJS Jail Inmates at Midyear 2014 at n. B.

[135] *See, e.g.*, Illinois Department of Corrections Inspection Report of Champaign County Jails, http://www1.co.champaign.il.us/SHERIFF/JailInspectionReports/2014_IDOC_Inspection_Report.pdf (last visited Aug. 5, 2015) (noting a population of 145 inmates on the jail's inspection date and a maximum capacity of 182 inmates); *see also* Cook County Sheriff Department, http://www.cookcountysheriff.com/doc/doc_main html (approximating the Cook County Department of Corrections ADP at 9,000 inmates)(last visited Aug. 5, 2015); *see also* Texas Commission on Jail Standards, County Population Reports, http://www.tcjs.state.tx.us/index.php?linkID=326 (providing the population of each Texas county jail on a monthly basis as well as a compilation of previous, monthly reports) (last visited Oct. 16, 2015).

previous year and will remain in effect throughout that year.[136] Consistent with this approach, if a correctional facility adds a new building or wing to a facility, the inmate population of the new wing will not be accounted for immediately. Rather, the inmate population of a new building or wing will first be considered in the calculations for ADP to be applied in the following year. For example, if a new wing is established anytime between January 1, 2017 and December 31, 2017, its inmate population during this time frame will be included in the ADP to be applied on January 31, 2018. We find this to be the most administratively efficient and feasible option, rather than potentially having numerous rate changes during a calendar year. New buildings or wings may not be filled immediately, and it may take some time before population levels in a newly-established wing increase enough to push the facility as a whole into a new tier. We find these detailed definitions are necessary to ensure that end users are charged just, reasonable, and fair rates and that ICS providers receive fair compensation for the costs they incur in providing ICS to smaller and larger facilities.

43. *Categorization of Certain High-Cost Facilities.* In the *Second FNPRM* the Commission sought comment on suggestions that it either exclude from any adopted rate caps what are reported to be high-cost facilities, such as juvenile detention facilities or secure mental health facilities, or provide a blanket waiver for such facilities.[137] While the Commission did not request that providers separately calculate and report their costs for providing service to secure mental health facilities or juvenile detention facilities outside of jails or prisons in response to the Mandatory Data Collection, we agree with commenters that these facilities may be more costly to serve due to the smaller number of inmates.[138] This is also consistent with our analysis above.[139] We therefore conclude that the costs of providing ICS to juvenile detention facilities and secure mental health facilities are more akin to providing service to jail facilities. To the extent that juvenile detention facilities and secure mental health facilities operate outside of jail or prison institutions, they will be subject to the jail rate caps adopted herein.

2. Tiers for Jails

44. After placing issues relating to the Mandatory Data Collection out for public comment, the Bureau reviewed written comments, met with interested parties, and adopted a template for submission of required data in the Mandatory Data Collection.[140] In it, the Bureau directed ICS providers to document applicable costs and fees by "contract size."[141] Potential contract size categories for jails include 0-99, 100-349, 349-999, and 1000 ADP and greater, and potential categories for prisons include 1-4999, 5000-19,999, and 20,000 ADP and greater.[142]

45. The Commission sought comment on proposed rate tiering in the *Second FNPRM*.[143] Pay Tel asserts that it supports three rate tiers, one for "small-to-medium sized jails (less than 350 ADP) based on 'demonstrated operational and functional differences between prisons and jails – and the cost

[136] *See infra* Appendix A.

[137] *See Second FNPRM*, 29 FCC Rcd at 13198-99, para. 71.

[138] CenturyLink Aug. 14, 2014 *Ex Parte* Letter at 2.

[139] *See infra* Section IV.C.1.b.

[140] *See Commission Announces Inmate Calling Service Due Date*, WC 12-375, Public Notice, DA 14-829 (June 17, 2014).

[141] *See* MDC Instruction Form at 2, 4.

[142] *See* MDC Submission Template. These contract size numbers were developed by the Bureau after discussion with ICS providers.

[143] *Second FNPRM*, 29 FCC Rcd at 13197-99, paras. 67-72.

differences associated with [the] provision of ICS therein.'"[144] Petitioners support a two-tiered structure and suggest rate caps for facilities with 0-349 ADP and facilities with 350 and over ADP in order to take into account the "alleged higher costs incurred by small jails.[145] The Joint Provider Proposal does not favor any rate tiers.[146] Securus asserts that if the Commission adopts a tiered rate structure, "the tiers should be defined in a way that account[s] not only for ADP but also differences in the investment required to serve a site. . . . And, as Securus previously has stated, ADP must be very closely defined such that carriers cannot game the system in the way that they report those figures."[147]

46. In this Order we adopt rate tiers based on the following ADP for jails: 0-349, 350-999, and 1,000 and greater. We adopt these rate tiers for jails because we find that they most closely resemble the breakdown between small-to-medium jails, large jails, and very large, or mega-jails. We have decided not to include a 0-99 ADP breakdown in the rate tiers in part because, according to the Bureau of Justice Statistics, jails with an ADP under 99 make up less than 10 percent of the inmate population.[148] We also believe that adopting fewer tiers than those requested in response to the Mandatory Data Collection responds to comments in the record expressing concern over potential confusion and burden of multiple rates.[149] By adopting these tiers for jails, we conclude that our rate caps will most closely conform to the costs as filed in the record.[150] As a group, jails are more varied than prisons and, as we have discussed herein, there are economies of scale to be gained as facility size increases. Finally, as discussed below, the data received in response to the Mandatory Data Collection support these tiers.

47. Below we explain how we have determined that our prescribed rates will allow efficient providers to recover their costs. We rely principally upon: (1) analysis of data received in response to the Mandatory Data Collection, which shows that firms operating efficiently would earn substantial profits under our prescribed rates, (2) evidence suggesting that providers' reported costs in response to the mandatory data collection are overstated, and (3) other evidence in the record, including ICS providers' provision of service in jurisdictions with rates lower than those we prescribe here.

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[144] Pay Tel Second FNPRM Comments at I (Pay Tel also asserts that "ideally, the truest reform would include three rate tiers—one for prisons, one for large jails, and one for small- and medium-sized jails (less than 350 ADP)).

[145] Petitioners Sept. 8, 2015 *Ex Parte* Letter at 4; *see also* Petitioners Second FNPRM Comments at Attach., Decl. of Bazelon at 4 n.6 (asserting that "the true difference in costs to providing ICS is for these significantly smaller facilities," that is, in jails with ADP of 0-99). Although CenturyLink opposes the adoption of rate tiers generally, it does support excluding some types of facilities from any adopted rate caps, including jails with fewer than 100 inmates, "due to low cost volumes." CenturyLink Aug. 14, 2015 *Ex Parte* Letter at 3.

[146] *See* Joint Provider Proposal at 2-3; *but cf.* Letter from Andrew Lipman, Attorney, Morgan, Lewis & Bockius, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed July 21, 2015) (Lipman July 21, 2015 *Ex Parte* Letter) (Mr. Lipman contends that site commission payments should be based on an ADP of 0-300, 300-999, and 1,000 plus, but does not give reasons for such a breakdown).

[147] Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 10 (filed July 27, 2015) (Securus July 27, 2015 *Ex Parte* Letter); *see also* Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, WC Docket No. 12-375, at 1-2 (July 6, 2015) (asserting that if "[ADP] is the metric used to differentiate by jail size, the Commission should be very clear that the ADP for an entire correctional system, rather than just one facility or one building within the system, is the proper accounting method."

[148] BJS 2014 Census of Jails at Table 4. The BJS Census collected data based on the following facility sizes: 0-49; 50-99; 100-249; 250-499; 500-999; and 1,000 or more. Our data collection did not follow exactly those breakouts. We find that a 0-349 tier is the closest proxy and therefore adopt that as our smallest tier by ADP. *See id*.

[149] GTL Second FNPRM Comments at 10.

[150] *See infra* Section IV.A.3.b.

3. Determination of Specific Rate Caps

48. Having determined the basic structure of rate caps, we describe the methodology for the specific rate caps within that structure. Specifically, we find that the following rate caps will ensure that ICS rates are just, reasonable, and fair for inmates, their families and loved ones, as well as the ICS providers, and will incorporate the costs associated with the necessary security protocols: $0.22/MOU for debit and prepaid calls from jails with an ADP of 0-349; $0.16/MOU for debit and prepaid calls from jails with an ADP of 350-999; and $0.14/MOU for debit and prepaid calls from jails with an ADP of 1,000 or more. Debit and prepaid calls from prisons will be capped at a rate of $0.11/MOU. Collect calls from jails will be capped at $0.49/MOU and collect calls from prisons will be capped at $0.14/MOU until July 1, 2017, and then transition down to the appropriate debit/prepaid rate cap.

a. Marketplace Evidence of Rates in Certain States

49. Evidence of rates at the state level generally provides further support that the rate caps we adopt today allow sufficient room for providers to earn a fair profit. As noted above, Ohio eliminated site commissions and reduced ICS rates by 75 percent to $0.05 for Ohio Department of Rehabilitation and Correction (ODRC) facilities.[151] West Virginia's Division of Corrections recently reviewed bids without regard to site commissions offered by the bidders (i.e., the DOC did not take site commissions into account in deciding the winning bidder).[152] New Jersey recently awarded an ICS contract for state prisons that eliminated site commission payments and reduced rates below $0.05 per minute, yet the winning bidder, GTL, reported to the Commission average 2012 through 2013 ICS costs of **[[BEGIN CONFIDENTIAL]]**[redacted]**[[END CONFIDENTIAL]]**.[153] The Pennsylvania Department of Corrections (DOC) contracted with Securus at a $0.059 per-minute rate for all ICS and the elimination of

[151] *See* Letter from Bernadette Rabuy, Policy and Communications Assoc., Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 1 (filed June 12, 2015) (PPI June 21, 2015 *Ex Parte* Letter) (attaching article dated Feb. 7, 2015 from the Bucyrus Telegraph Forum on Ohio inmate call cost reform); *see* Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed June 29, 2015) (GTL June 29, 2015 *Ex Parte* Letter); *see also* GTL April 3, 2015 *Ex Parte* Letter at 6, n.52 (citing State Telecom, Communications Daily, April 1, 2015, at 14); *see also* Amanda Seitz, *Phone Calls from Prison Getting Cheaper*, Dayton Daily News (Mar. 31, 2015), http://www.daytondailynews.com/news/news/phone-calls-from-prison-getting-cheaper/nkjh3/ (last visited Sept. 29, 2015).

[152] *See* GTL June 29, 2015 *Ex Parte* Letter at 6 (citing *Request for Proposal COR61453 – Inmate Telephone System*, *available a*t http://www.state.WV.us/admin/purchase/rfq/fy2014/COR61453.pdf (last visited Sept. 29, 2015)); *see also* Letter from Chérie Kiser, Counsel to GTL, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375, at n. 53 (filed April 3, 2015) (GTL Apr. 3, 2015 *Ex Parte* Letter) (noting that in West Virginia, "the Division of Corrections recently reviewed bids for ICS without regard to the site commission payment offered, which resulted in competition between ICS providers solely on the basis of technology and end user rates").

[153] *See* GTL Apr. 3, 2015 *Ex Parte* Letter at n. 15 (asserting that "GTL's current rates for the New Jersey Department of Corrections ($0.13 per minute for all calls) are below the currently effective rate caps in New Jersey ($5.25 per-call surcharge and $1.15 per minute)"; *see also id*. at 6, n.51 (citing Amendments to Contract #61616 between GTL and the Purchase Bureau, Division of Corrections and Juvenile Justice Commission); *but see* NJAID/NYU IRC June 30, 2015 *Ex Parte* Letter at 1-3 (discussing the new state contract awarded to GTL on April 27, 2015, effect by August 2015, under which "there are no commissions or fees and calls have a basic per minute rate of 3.584 cents per minute, plus the additional "optional security features" that facilities can choose from at varying rates. Even with the security features, New Jersey facilities and counties tied to the state contract will have among the lowest ICS rates in the country." However, county facilities may opt out of this contract, and Bergen County, New Jersey, recently released an RFP which seeks to increase its commission from 60 to 65%. *Id*. at 2-3); NJAID/NYU IRC May 15, 2015 *Ex Parte* Letter at 1-2 (explaining that the New Jersey contract stipulates that "'[n]o service charge or additional fees above the rate indicated . . . shall be billed to any party,'" including "per call surcharges . . . account setup fees, bill statement fees, monthly account maintenance charges, or refund fees."). *See* GTL Mandatory Data Collection Report at 1 (providing the company's average per-minute cost).

all ancillary fees, while offering a 35 percent site commission, even though Securus reported to the Commission that its average cost of providing ICS over 2012 and 2013 was **[[BEGIN CONFIDENTIAL]]**[redacted]**[[END CONFIDENTIAL]]**.[154] Similarly, in New Hampshire, the state DOC lowered intrastate rates to less than $0.06 per minute with a 20 percent site commission.[155] That providers bid for these contracts, and supply ICS at rates consistent with these constraints, strongly suggests that efficient providers can provide ICS at rates closer to $0.05 per minute – less than half of our lowest rate cap of $0.11 per minute. This is not surprising, as a per-minute rate of approximately $0.05 per minute approximates the lowest average per-minute costs reported to us.[156] We observe that it is unlikely that any provider would supply any state if the rates allowed in those states did not at least cover the incremental costs of supplying each of those states, which further suggests that reported costs may be inflated. We also note that no provider clearly argued that such rate levels are the result of cross-subsidization, and there is no data in the record to support such a conclusion. While one provider made statements unsupported by data that might be so interpreted, those statements are too vague to evaluate.[157]

b. Analysis of Data Received in Response to the Mandatory Data Collection

50. *Rate Methodology*. In the *2013 Order*, the Commission adopted the Mandatory Data Collection to enable it "to take further action to reform rates, including developing a permanent cap or safe harbor for interstate rates, as well as to inform our evaluation of other rate reform options in the Further Notice."[158] In 2014, the Wireline Competition Bureau (Bureau) developed a template and related instructions for ICS providers to use in responding to the Mandatory Data Collection. The Commission also provided notice of the data collection, its due date, and information on contacting Bureau staff available to answer specific questions on how to comply with the filing requirement and the template and instructions. The instructions, template, and other related material were posted on the Commission's

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[154] *See* HRDC Second FNPRM Comments at 5-8 ("Pennsylvania recently entered into a new ICS contract with a blended per-minute rate for all intrastate and interstate calls of $.059/minute."); Letter from Alix Nguefack and Karina Wilkinson, New Jersey Advocates for Immigrant Detainees, and Rebecca Hufstader and Alina Das, New York University Law School Immigrant Rights Clinic, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed Jan. 26, 2015) (NJAID Jan. 26, 2015 *Ex Parte* Letter) ("The contract specifies that Securus will offer a flat rate of $0.059 per minute and will pay the state a 35% commission. . . . Moreover, the Pennsylvania's Request for Proposal requires that the provider not charge any ancillary fees"); Securus Mandatory Data Collection Report at 3 (providing the company's average per-minute cost). In short, Securus signed a contract that only allows it to keep $0.03835 (= 65% of $0.059) per minute supplied, **[[BEGIN CONFIDENTIAL]]**[redacted]**[[END CONFIDENTIAL]]** the average per minute cost Securus reports.

[155] *See* HRDC Second FNPRM Comments at 6 (explaining that New Hampshire "lowered their intrastate ICS rates following the Commission's September 26, 2013 Order" and has effective intrastate rates of $.043 per minute for collect calls and $.0586 per minute for prepaid and debit calls); Comment of Human Rights Defense Center, WC Docket No. 12-375, at 4-5, Exhibit C (filed Mar. 25, 2013) (HRDC 2012 NPRM Comment) (stating that New Hampshire imposes 20 percent site commissions).

[156] *See infra* paras. 58-64.

[157] *See* Letter from Chérie R. Kiser, Counsel to GTL to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1-2 (filed Aug. 21, 2015) ("The meeting covered the following issues: How the unique security and communication service needs of each correctional facility require individual case basis contracts, which can lead to different market-based pricing (e.g., $0.05, $0.12, or $0.20 per minute) among the same or similar "type" of facility. The specific security and inmate communication service needs of each facility are different and cannot be defined by regulators based on facility type, which is why a *backstop* rate cap is critical to the inmate calling services market . . . .").

[158] *2013 Order*, 28 FCC Rcd at 14172, para. 124.

website,[159] and the data collection due date was announced by Public Notice[160] which was also published in the Federal Register.[161] Responsive data were received in August 2014.[162]

51. The Commission directed the Bureau to create the template in a manner intended to allow a provider to include all costs incurred in the provision of ICS. Without limiting or restricting costs or cost categories, the Bureau directed providers to report their ICS-related costs for telecommunications, equipment, and security,[163] as well as any costs not captured in these categories (i.e., "other costs").[164] The Commission directed providers to submit the data for fiscal years 2012, 2013, and 2014, which provided the two most recent years of actual data and one year of partial actual and partial forecasted data.[165] Providers were required to report intrastate, interstate and international ICS cost data in the aggregate for debit, prepaid, and collect calling services. For each service, providers were required to identify which costs were direct[166] or common,[167] and to allocate costs by facility type and size. Providers also submitted call volume data (MOU and number of calls) for each category. The Commission received data filings from 14 of the 25 anticipated ICS provider respondents.[168] We estimate that the 14 responding providers together represent over 90 percent of the market.[169]

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[159] *See* ICS Mandatory Data Collection Form and Instructions, *available at* https://www.fcc.gov/encyclopedia/ics-mandatory-data-collection.

[160] *See Commission Announces Inmate Calling Services Data Due Date*, WC Docket No. 12-375, 29 FCC Rcd 7326 (Wireline Comp. Bur. rel. 2014) (announcing data due date as well as website to retrieve instructions and template).

[161] *See Rates for Interstate Inmate Calling Services*, 79 Fed. Reg. 35956 (June 25, 2014) (announcing data due date).

[162] The Commission partially granted requests for extension which extended the data due date from July 17, 2014 to August 18, 2014. *See generally Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order, 29 FCC Rcd 8316 (Wireline Comp. Bur. rel. 2014); *see also Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order, 29 FCC Rcd 9705 (Wireline Comp. Bur. rel. 2014) (Order denying requests for additional data filing deadline extensions).

[163] *See, e.g.*, GTL Mandatory Data Collection Response at 7 (including ICS-related security costs); Securus Mandatory Data Collection Response at 6-7 (including costs for security necessary for basic ICS).

[164] The instructions asked providers to report "(1) telecommunications costs and interconnection fees; (2) equipment investment costs; (3) security costs for monitoring and call blocking; (4) costs of providing inmate calling services that are ancillary to the provision of ICS, including any costs that are passed through to consumers as ancillary charges; and (5) other relevant cost data." Mandatory Data Collection Instructions at 1, *available at* https://www.fcc.gov/encyclopedia/ics-mandatory-data-collection.

[165] *See 2013 Order*, 28 FCC Rcd at 14172, para. 124 (2013); *see also* ICS Mandatory Data Collection Instructions, at 1 *available at* https://www fcc.gov/encyclopedia/ics-mandatory-data-collection.

[166] *See, e.g.*, *2013 Order*, 28 FCC Rcd at 14134-44, para. 53 and n.196 (2013) (providing examples of costs that are closely related to the provision of ICS such as equipment, originating, switching and transport, and security features inherent in the ICS providers' network).

[167] *See, e.g.*, *id*. at 14153, para. 82 (suggesting that common costs may be costs "shared with the provider's non-inmate calling services").

[168] *See* Information Collection Being Submitted for Review and Approval to the Office of Management and Budget (OMB), 79 Fed. Reg. 21757 (Apr. 17, 2014) (seeking comment on the Commission's Paperwork Reduction Act analysis submission to the OMB estimating 25 respondents to the Commission's Mandatory Data Collection).

[169] Three of the responding providers reported that in 2012 they represented 85% of the ICS market. *See supra* note 57. *But cf.* Letter from Chérie R. Kiser, Counsel to GTL, Stephanie A. Joyce, Counsel to Securus Technologies, Daniel A. Broderick, Counsel to Telmate, to Chairman Tom Wheeler et al., WC Docket No. 12-375, at 1 (filed Oct. 15, 2015) ("The undersigned parties [GTL, Securus and Telmate] are the primary providers of inmate calling services ("ICS") in the United States, representing more than 90% of industry revenue in 2014.") (Joint Provider Oct. 15, 2015 *Ex Parte* Letter).

52. The debit and prepaid rate caps we adopt are based on 2012 and 2013 data submitted by the 14 responding providers. The caps rely on the 2012 and 2013 data because it represents actual, rather than projected, data, and allows averaging across the two years to account for cost variations that may occur between the years. Costs per minute were calculated using a weighted average per minute cost (which is the same as dividing aggregate costs (i.e., the entirety of all costs reported by the providers for any category) by aggregate minutes of use in that category).[170] This prevents small outliers from having a disproportionate impact on our analysis.

53. Based on the record and our analysis described below, we believe the applicable rate caps will ensure just, reasonable and fair compensation for ICS. We have relied on the cost data and allocations as submitted by ICS providers in calculating these rate caps. We note that the providers cost data reflect their determinations about how to allocate certain common costs, such as call centers and back-office operations. It is generally understood that an economically rational provider will serve a facility if it can recover its incremental cost of doing so, which the record and our analysis indicate will be the case. We take the data at face value, even though the analysis shows that there is significant evidence—both from our own analysis and commenters' critiques—suggesting that the reported costs are overstated. We also find support in the record evidence of increased demand and additional scale efficiencies, which are not included in our quantitative analysis. Our analysis and the record evidence support our conclusion that efficient providers would be able to operate profitably under our rate caps.

54. *Discussion and Analysis*. Based on the record and our own analysis described below,[171] we find that our prescribed rate caps as outlined above[172] are more than sufficient to allow providers to recover efficiently-incurred ICS costs (excluding reported commissions).[173]

55. The record supports our conclusion. Coleman Bazelon, economics consultant for the Wright Petitioners, analyzed our rate caps and concluded that they "will largely cover the individual ICS providers' costs in providing service."[174]

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[170] Contrary to the suggestion in one of the dissenting statements, our decision to base the rate caps on total costs divided by total minutes shows that providers, in the aggregate, will be able to set rates at levels that allow them to recover average costs at each and every tier. *See* Dissenting Statement of Commissioner Pai at 6 (including the 2012-2013 costs of international and collect calls in its analysis but omitting the higher rate caps for collect calls in the first two years of our reform, and assuming that call volumes, including collect calls, and cost efficiencies will remain unchanged going forward from levels reported in 2012 and 2013). Moreover, as explained below, our approach is conservative in its analysis of both costs and call volumes. *See, e.g., infra* paras. 58-70. The record evidence indicates that average reported costs are exaggerated and in any case exceed efficient costs and that costs for collect calls should decline as inmates continue to move from collect to debit and prepaid calls, while overall call volumes are anticipated to increase as a result of our rate caps, leading to increased revenue. We also expect providers to achieve increased efficiencies in their provision of ICS, further driving down costs.

[171] For the purposes of this analysis, we assumed that the reported data are accurate and require no discounting or omission. This analysis thus likely reflects a worst-case scenario, and, as discussed below, even in the worst-case scenario, our rates are fair and reasonable.

[172] *See supra* para. 22.

[173] Efficiently-incurred costs are the lowest possible costs (sometimes called economic costs) necessary to produce a given level of output. An efficient firm, including an efficient provider, necessarily supplies output at the least cost of production.

[174] *See* Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed Oct. 15, 2015) (Wright Petitioners Oct. 15, 2015 *Ex Parte* Letter) (describing Dr. Bazelon's analysis and conclusions, and further noting that "only **[[BEGIN CONFIDENTIAL]]**[redacted]**[[END CONFIDENTIAL]]**firms, with about **[[BEGIN CONFIDENTIAL]]**[redacted]**[[END CONFIDENTIAL]]** of total industry costs, would not recover their costs under the proposed rates and may require waivers"); *see also id.* at Exh. A (FCC Rate Cap Impact Summary) (analysis of FCC rate caps performed by Wright Petitioners' economic

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The Bazelon economic analysis does not take into account the evidence that lower rates will spur demand, such that the vast majority of the industry costs will be covered by the rates adopted today.

56. ICSolutions, an ICS provider, states that it "can comply with the proposed rules" and notes that this "strongly suggests that any entity failures in the industry are likely a result of inefficient operations."[175] NCIC also supports our rate caps.[176] Praeses "believes that Providers will generally be

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consultant, Coleman Bazelon). We note that Dr. Bazelon's analysis covers 11 of the 14 reporting providers; these are the same providers covered in Dr. Bazelon's January 2015 analysis. It omits ATN, Encartele, and Protocall, because those providers did not respond to requests to provide the unredacted, confidential versions of their data to Dr. Bazelon. *See* Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at Exh. A (filed Oct. 16, 2015). The Commission's analysis, as noted, included all of the reporting providers. We find Dr. Bazelon's analysis of the 11 providers persuasive, but note that the Commission based its own analysis on both 2012 and 2013 data to minimize any distortion from outlier costs that a provider might have incurred during the time period. *But see* Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Oct. 19, 2015) (noting that Dr. Bazelon's analysis "is not in conflict with EI's analysis" for GTL but asserting that under EI's analysis of the rate caps, providers would provide 40 % of their debit/prepaid minutes at below-cost rates). GTL's objection has no limiting principle beyond that this Commission should set rates which would allow profits at the highest reported cost of any provider, whether excessive or not. For the reasons described below, we find that our rate caps permit just, reasonable, and fair compensation.

[175] Letter from Tim McAteer, President, ICSolutions, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at Attach. 1 at 3 (filed Oct. 15, 2015) (ICSolutions Oct. 15, 2015 *Ex Parte* Letter).

able to provide services pursuant to these rate caps at a profit."[177] Praeses also reports that interstate call volume and resulting revenue have increased since our 2013 interim reform, with facilities operated by its clients seeing approximately 76 percent interstate call volume increases and overall interstate revenue growth of approximately twelve percent.[178] This is unsurprising, as reduced prices typically lead to higher volume. ICSolutions reports seeing call volumes increase "by as much as 150%, and revenues increase by about 30%" when it implements lower call rates.[179] In addition, our rate caps are generally higher than rates that have been adopted in several states that have undertaken reform and there is no evidence in the record that such rates have made provision of ICS unprofitable. Also, nothing in the record suggests that states that have adopted such reforms are different from those states that have not adopted reform with respect to either costs or revenues.[180]

57. Our own analysis likewise shows that the rate caps will permit just, reasonable, and fair recovery for the provision of ICS. Our approach is conservative in its analysis of both costs and call volumes (and hence revenues). It includes all the reported data, assumes they do not overstate costs, and takes no account of likely increases in call volumes that our rates would induce,[181] thereby understating expected revenues. This analysis thus likely reflects a worst-case scenario, and, as discussed below, even in the worst-case scenario, our rates are fair and reasonable.

58. *Costs.* Our analysis of costs supports our conclusion that efficient providers will be assured just, reasonable, and fair compensation under our rate caps. In particular, based on the unaudited costs for 2012 and 2013 reported by the 14 respondents to the Commission's Mandatory Data Collection, the lowest rate cap we prescribe ($0.11) is greater than the average per minute cost of each of the more efficient reporting providers. Two of these providers are quite small, and operate in relatively small jails only. As a result, as discussed below, the expected efficient cost of these small providers on a per minute basis is likely higher than the efficient costs larger reporting providers face, which implies that larger providers should also be able to operate at a profit at our prescribed prices.[182]

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[176] Letter from William Pope, President, NCIC Inmate Phone Service, to Michael O'Reilly and Ajit Pai, Commissioners, Secretary, FCC, WC Docket No. 12-375 at 1 (filed Oct. 13, 2015); *see also* Letter from William L. Pope, President, NCIC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-3 (filed Oct. 14, 2015) (NCIC Oct. 14, 2015 *Ex Parte* Letter) (disputing claims by other ICS providers that the Commission's rate caps are too low and stating clearly that they extend "our full support for … the decisions as expressed in the Fact Sheet.").

[177] Letter from Phil Marchesiello, Counsel to Praeses LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Oct. 13, 2015) (Praeses Oct. 13, 2015 *Ex Parte* Letter) ("Praeses expects that this same trend will affect intrastate ICS call volume and revenue once the Commission's proposed new intrastate rate caps take effect, thereby substantially mitigating the loss of intrastate revenue that will occur as a result of the lower intrastate ICS rates.").

[178] *Id*.

[179] ICSolutions Oct. 15 *Ex Parte* Letter Attach. 1 at 8.

[180] *See supra* Section IV.A.3.a.

[181] Although increased call volumes would increase costs, the incremental cost of the additional minutes will be small relative to the gain in revenues (for example, the marginal cost of an additional minute of use is approximately zero, while the marginal revenue of a call minute is price, so under our rate caps it would be $0.11 or more per minute). *See infra* para. 61.

[182] We recognize that some providers may supply a range of services that go beyond ICS, and the prices that they charge may be used to cross-subsidize these services. However, we do not consider it appropriate for non-ICS services, such as location monitoring, to be paid for by inmates and their families and friends through ICS rates. Further, as discussed here, the margins that our adopted rate caps allow are substantial, being on the order of 100% or more, and so will in any case provide scope for such cross-subsidization. *See infra* para. 63.

59. Further, we find that providers reporting high costs could recover those costs and receive just, reasonable, and fair compensation under our rate caps through increased efficiencies. Our analysis suggests that providers generally may have been over inclusive in reporting their costs and that the supply of ICS is not fully competitive, implying that the adopted rate caps are conservative.[183] We also note that no providers have submitted evidence that their higher costs may be attributable to higher-quality or more technologically-advanced ICS.

60. Other evidence reinforces our view that respondents' reported costs may in some cases exceed economic costs, and lead us to conclude that our prescribed rate caps will allow efficient firms to recover their economic costs, including a reasonable return. For example, the average per-paid minute cost of each of the seven largest firms substantially exceeds the average per-paid minute average cost of each of three smaller providers. This data point suggests these larger firms are either economically inefficient or that they overstated their costs of ICS provision. On one hand, if there were economies of scale or constant returns to scale in production of calls or call minutes of use,[184] then larger firms would have lower or the same average costs as the smaller firms, implying that these larger firms' reported costs are above efficient levels. On the other hand, if there were diseconomies of scale (that is, the average per-minute cost rises with MOU volumes), then these firms are inefficiently large (they would be more effective broken up into smaller firms), and we should not subsidize that anomaly.

61. More generally, we find above[185] that average costs should fall with the provider's size. However, the reported data (implausibly) show only a very weak negative relationship between average costs and the number of calls or MOU.[186] Similarly, the data (again implausibly) do not support *a priori* assumptions about underlying costs. For example, regression analysis indicates that the firms' costs were highly correlated with different measures of MOU, type of call, and facilities serviced.[187] However, in most specifications the coefficients associated with the MOU and call variables were implausible: they were typically well above the expected marginal cost of an additional MOU. Further, in some

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[183] *See infra* Section IV.A.3.c.

[184] Economies of scale occur if the unit or average cost of supplying a unit of output, such as an MOU, declines with the volume of output. An example would be if producing 100 MOU costs $100, implying an MOU average cost of $1, but if producing 1,000 MOU cost $200, implying a much lower MOU average cost of $0.20. Economies of scale often obtain when there are large, sometimes called fixed, costs of supply. Such costs do not directly vary with the unit of output used (for example, MOU) when considering whether there are economies of scale. Inmate calling services may exhibit economies of scale in part because providers may face large set up costs due to the establishment of a calling center, and installation of equipment in, and obtaining access lines to, a supplied jail or prison. Constant returns to scale mean unit costs remain constant as output rises (so if producing 100 MOU costs $100, producing 1,000 MOU would cost $1,000), while diseconomies of scale mean that unit costs rise with output (so if producing 100 MOU costs $100, then producing 1,000 MOU must cost more than $1,000).

[185] *See supra* para. 56.

[186] Simple regressions of average per-paid minute cost, average per-all minute cost, and average per-call cost against respectively paid minutes, all minutes, and calls have almost no explanatory power, but show both statistically and economically insignificant negative correlations. The lack of relationship is directly visible in the data. [[**BEGIN CONFIDENTIAL]]** [redacted] **[END CONFIDENTIAL]]** (Our analysis here focuses on economies of scale which are defined by considering how costs change as a single measure of output (such as minutes or calls) rise. In reality, costs are caused by a range of factors (including for ICS, as discussed above, institution size and type). We separately considered the impacts of several likely cost drivers on costs as discussed in the rest of this paragraph. *See* Appendix D).

[187] The regression analyses are provided in Appendix C. *See infra* Appendix C. This analysis suggests that the reported data does not reflect the actual economic costs of supply.

specifications, the differences between the marginal costs of different types of calls were implausibly large and statistically significant.[188] Both of these facts (the lack of scale economies in call production and minutes of use and oddities about reported marginal costs) suggest that the data do not reflect the actual economic costs of supply and lead us to doubt the extent to which reported costs accurately reflect efficient costs.[189] Additionally, reinforcing our view that reported costs are inefficiently high, there is evidence that some of the providers' costs include services that are not directly related to the provision of ICS.[190] In short, all these observations make it all the more likely that our prescribed rate caps would allow an efficient provider to earn economic profits.

62. There is also evidence that competition to supply ICS may not always be robust, which in turn suggests providers are able to earn more than economic costs, and if faced with lower revenues, may remain profitable. The most important evidence in this last respect is that the providers' unaudited cost data show that roughly similarly situated providers have substantially different costs. This not only suggests that the higher cost providers are unlikely to be economically efficient, but also that if they were to operate more efficiently, they would have no difficulties in recovering their economic costs. For example, a lack of robust competition would explain why the reported cost data does not seem reflective of underlying costs (a result that is inconsistent with effective competition). Analysis of that data also finds a tight relationship between costs and output levels, both when commissions are included and excluded. This suggests a high degree of homogeneity in the industry between reported costs (with and without commissions) and output. One might expect such results if all bids for ICS were either competitive or non-competitive, but, as noted, other aspects of the cost data are inconsistent with competition, and other evidence suggests competition, if it exists, is not found everywhere.[191]

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[188] The marginal resource cost of a minute is likely close to zero. *See supra* para. 34. A high marginal cost of a call minute could arise if ICS providers purchase minutes or otherwise resell calls from an (independent) third party. If instead such prices arise from transactions between affiliated entities, such fees would merely be transfers among the affiliated parties, and not reflect economic costs.

[189] *See infra* Appendix D.

[190] *See, e.g.*, GTL Second FNPRM Comments at 42-44.

[191] *See* Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Apr. 3, 2015) (noting a "recent 150 - 200 inmate jail RFP where two of the three large providers did not submit a bid and the County Purchasing Manager confirmed that one of the companies sent a no-bid letter stating they are no longer willing to bid facilities their size".); s*ee* Pay Tel Second FNPRM Comments at 38, n.94 ("In addition, current market activity that Pay Tel has analyzed indicates that GTL and Securus are moving away from serving small- and medium-sized jails—movement that is not surprising given the blended rate caps proposed in the Joint Provider Proposal, which would allow for razor-thin (if any) profit margins in small- and medium-sized jails and windfalls in prisons in mega-jails."); *see also* OSSA Second FNPRM Comments at 5 ("Small jails in Oregon have been put on notice by ICS providers that if intrastate calls are capped in the same manner as interstate calls, providing ICS services in these facilities will likely no longer be profitable. If that happens, the provider will either withdraw from providing service or will only offer service if the facility is willing to subsidize the costs associated with ICS"). *Cf.* Letter from Stephani Joyce, Counsel to Securus, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375, filed Aug. 21, 2015 at 1-2 ("Securus is not 'abandoning' any correctional facilities. Should the Commission nonetheless have any apprehension that small facilities will not be served under the new rules, Securus voluntarily commits to serving **any** facility of **any** size if the rate caps offered in the ICS Industry Proposal [Joint Provider Proposal] - $0.20 per minute for debit calls and $0.24 per minute for collect calls – are adopted.") (emphasis in original). The behavior reported here is evidence of a lack of competition for certain contracts, and not evidence that certain contracts are unprofitable (and also reinforces our view the unit costs of serving such facilities are higher than of other facilities). Evidence presented herein (that small providers that only serve smaller jails are able to do so profitably under our proposed rates and that providers continue to bid for and enter contracts to provide ICS at rates lower than the rate caps we adopt demonstrates that it is possible to make a profit while serving such institutions at rates lower than the caps we adopt in this Order. *See infra* para. 91; *see also supra* para. 49. Thus, the evidence presented here suggests that some providers, in contrast to the behavior of a firm operating under

(continued….)

63. Two of the six smallest responding providers when ranked by paid MOU would earn substantial imputed profits at our prescribed rates.[192] For example, over 2012 and 2013, **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]** had an average per paid minute cost of $0.05 (and a similar average per all minute cost) when rounded to the nearest $0.05,[193] earning imputed profits of well over 200 percent.[194] Similarly, in 2012 and 2013, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** had an average per-paid minute cost of $0.10 when rounded to the nearest $0.05, earning imputed profits in excess of 100 percent.[195]

64. In contrast, our conservative approach imputed reductions in providers' ability to recover costs under our initial rate caps to seven of the reporting providers, but we find that all of these providers would be highly profitable if their cost structures resembled those of the two small efficient firms we identified. Four of these are among the six smallest responding providers.[196] Each reported average per-paid minute costs over 2012 and 2013 of $0.25 or higher. That is, in all cases their average per-paid minute costs were more than two and a half times, and in some cases several multiples of, the highest paid MOU average cost of the two small providers with imputed profits.[197] Consequently, if these four

(Continued from previous page)
competitive constraints, focus on locations where they can make larger profits, giving short shrift to locations which, because costs there are higher than elsewhere, yield profits that are not as large.

[192] Two of the six smallest responding providers did not provide estimates of unpaid minutes, being **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]**. **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]** all MOU size ranking would likely be similar to their paid MOU size ranking because there is quite a gap between their paid MOU and the nearest other providers' MOU.

[193] We have averaged by such a large number ($0.05) in order to maintain the confidentiality of the reported data.

[194] **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]** responding provider, and reported a paid MOU average cost**[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]**, and an average per-all minute cost of **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]**. Moreover, in 2012, this provider served only relatively small jails. It had **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]** contracts with an ADP of less than 100, and **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]** contracts with an ADP of between 100 and 349. **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]** did not report how many facilities it served in 2013, but their MOU reports indicate it only served jails, all with contract ADPs of less than [[**BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]**. Thus, on the grounds of size and facility type, if anything, this provider should have been at cost disadvantage to most providers. *See supra* para. 33.

[195] **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]** responding provider by paid and all MOU, and it reported an average per-paid minute cost of **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]**. In 2012 and 2013, it supplied jails only, and respectively had **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]** contracts, all with an ADP of less than 1,000, most with an ADP of less than 350, and with a minority with an ADP of less than 100.

[196] In order of their imputed reductions in cost recovery, from smallest to largest, with respectively average per-paid minute cost and imputed expected reduction in cost recovery listed in parentheses [[**BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]**. These four providers are generally larger by reported MOU than the two small providers with imputed profits just discussed.

[197] A similar statement can be made about average per-all minute costs. Only four of the six smallest responding providers provided their unpaid MOU. Three were providers with imputed losses, **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]**, and of these **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]** had the lowest reported average per-all minute cost, being $0.11. This was still more than twice the $0.05 average per-all minute cost of **[[BEGIN CONFIDENTIAL]**[redacted] **[[END CONFIDENTIAL]]**, the provider with imputed profits that also reported its unpaid MOU. Interpolating on the basis of paid MOU suggests that the missing data for the two providers that failed to provide unpaid MOU would not change this analysis.

providers' average costs were halved, so that they still exceeded those of the two small providers with imputed profits, then all four would operate at a profit given our conservative revenue assumptions.[198] The remaining three providers with imputed reductions in cost recovery are considerably larger than the two small providers with imputed profits discussed above,[199] and more than one supplies services in prisons as well as jails. Yet, each has an average per-paid minute cost that is at least three times as high as that of **[[BEGIN CONFIDENTIAL]]**[redacted] **[[END CONFIDENTIAL]]** (which we found to have large imputed profits).[200] Again, if these providers' costs were considerably closer to, but still well above those of **[[BEGIN CONFIDENTIAL]]**[redacted] **[[END CONFIDENTIAL]]**, then they would be able to earn profits while charging rates consistent with our prescribed rate caps. In the two subsequent years, providers' ability to recover costs would change, but in all cases if these providers were as efficient as the two efficient providers discussed above, they would earn an economic profit in all of the years discussed.

65. *Revenue*. Turning to revenue, our analysis likewise demonstrates that our rate caps permit fair, reasonable, and just compensation. Once again, we take the provider's data as filed despite the evidence that they are overstated. Moreover, even assuming the same call volumes as experienced in 2012 and 2013, no other revenue sources, and no improved efficiency in service provision, we can impute in the initial year that all providers, if operating efficiently, would be profitable under our prescribed rate caps.[201] With more realistic assumptions (greater call volumes, revenues from ancillary services, and productivity improvements), it is likely that any provider facing imputed revenue reductions in the range of 10 percent would remain profitable even if its reported costs were not overstated (and we find to the contrary). For example, for the reasons described below and based on record filings, capping rates is likely to increase minutes of use, thus raising revenues, and this would likely make up for such imputed reduction in revenue. The few remaining providers potentially could face larger imputed reductions in revenue (assuming their reported costs were efficient).[202] However, these providers have reported costs significantly higher than the industry average, even more strongly suggesting that they are likely to be inefficient providers. In any event, to the extent such providers can demonstrate that they are unable to receive fair compensation under our rate caps, they would be eligible to seek a waiver as described below.

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[198] **[[BEGIN CONFIDENTIAL]]**[redacted] **[[END CONFIDENTIAL]]** calculated revenues were more than half its reported average costs, so if its costs were halved it would be profitable. The other three small providers with imputed reductions in cost recovery would be even more profitable.

[199] The three remaining providers with imputed reductions in cost recovery are **[[BEGIN CONFIDENTIAL]]**[redacted] **[[END CONFIDENTIAL]]**.

[200] Specifically, **[[BEGIN CONFIDENTIAL]]**[redacted] **[[END CONFIDENTIAL]].**

[201] In the second year, still assuming no increase in minutes of use or improved efficiency, when collect rate caps have moved halfway to existing debit/prepaid rate caps, three providers would face imputed revenue reductions of five percent or less, three of between five and twenty percent, and two others in excess of 25 percent. Specifically, **[[BEGIN CONFIDENTIAL]]**[redacted] **[[END CONFIDENTIAL]]**. And in the third year, when collect rate caps have moved to match debit/prepaid rate caps, four providers would face imputed revenue reductions of ten percent or less, three of between five and twenty percent, and three others of 30 percent or more. Specifically, **[[BEGIN CONFIDENTIAL]]**[redacted] **[[END CONFIDENTIAL]]**. As noted, in all cases, these carriers would earn profits if their actual costs were more in line with those of the lower cost providers found in our dataset.

[202] Specifically, **[[BEGIN CONFIDENTIAL]]**[redacted] **[[END CONFIDENTIAL]]**.

66. In short, our revenue estimates are likely understatements, for the reasons described below. We also find that many of the providers' reported costs are likely to be higher than efficiently-incurred costs, and this is specifically the case for the carriers just discussed. Consequently, we have a high degree of confidence that our prescribed caps would allow efficient providers of ICS to operate profitably.

67. Our revenue imputation likely underestimates the actual revenues providers would obtain for four reasons. First, our analysis does not take into account the demand stimulation from lower rates. But there is substantial record evidence showing that, to the extent that our caps lower existing rates, they will increase minutes of use and raise provider revenues.[203]

68. Second, we impute rates that in some cases will be lower than the rates the providers may actually charge. The resulting revenue underestimate could be material for six of the providers for which we impute losses at our prescribed rate caps, meaning that as a practical matter they could make up for any shortfall. All these providers have jail contracts with ADPs of at least 350, and some of these providers have a large number of such contracts.[204] To estimate each provider's revenues under the rate caps we adopt today, we calculate the revenues the provider would have earned given the MOU the provider reported for 2012 and 2013 for debit and prepaid calls in the three different jail size categories, 0-349, 350-999, and 1,000+, for prisons, and for collect calls (so, for example, if a carrier had 1,000 debit MOU in the 0-349 category, we assume the provider would earn $220 (= 1,000*$0.22)).[205] This approach can understate revenues because providers reported contracts according to *the sum of the ADP of the facilities covered under the contract*, but in some cases providers will charge different rates in different facilities supplied under the same contract. In that case, when the contract has an ADP of 350 or more, but the provider serves under the contract jails with an ADP that is lower than the contract ADP, our estimate will understate the revenues they would have earned if our prescribed rates were applied. For example, a contract with an ADP of between 350 and 999 that currently sets different rates for different facilities might cover three jails, each with an ADP of 150. In that case, while we would impute a rate of $0.16 to the prepaid and debit MOU reported under that contract, in reality the provider could be entitled to the $0.22 rate cap on all those MOU.[206] Similarly, all jails reported under contracts with an ADP of

[203] *See* Praeses Oct. 13, 2015 *Ex Parte* Letter at 2 (reporting that facilities operated by its clients have seen a 76 percent increase in interstate call volume increases and overall interstate revenue growth of approximately twelve percent since the *2013 Order* took effect); ICSolutions Oct. 15 *Ex Parte* Letter Attach. 1 at 8 (noting that "[w]here we implement lower calling rates, we often see call volumes increase by as much as 150%, and revenues increase by about 30%" and providing examples of such effects in facilities they serve).

[204] The following table shows the number of jail contracts with ADPs in excess of 350 for these six providers. Each provider has at least two such contracts, and most have more than 25.**[[BEGIN CONFIDENTIAL]]**

[redacted]

[[END CONFIDENTIAL]]

[205] Providers reported MOU by contracts which covered jails with summed ADPs of 0-99, 100-349, 350-999, and 1000+, and prisons with a summed ADP of 1-4,999, 5000-19,999, and 20,000+.

[206] If a provider reported 10,000 prepaid MOU from contracts which individually covered institutions with summed ADPs of less than 350, and 100,000 prepaid MOU from contracts which individually covered institutions with summed ADPs of between 350 and 999, with no other charged minutes recorded, then we assigned revenues to the provider respectively of $2,200 (10,000 paid minutes x $0.22/minute) and $16,000 (100,000 paid minutes x $0.16/minute). This calculation would in general understate the revenues the provider would receive for those minutes because, for example, any contract covering institutions with combined ADPs of between 350 and 999,

(continued….)

1,000 or more were imputed the debit and prepaid rate of $0.14, but some of these jails could have ADPs of less than 1,000, and in some cases of less than 350. If the contract specified separate rates by facility, then the provider could be entitled to either the $0.16 or the $0.22 rate in those smaller jails.

69. Third, our analysis also does not take into account the caps that we impose on ancillary service charges, which likely will lead to an increase in minutes of use.[207] Finally, our analysis does not take into account the fact that international calls are not subject to our rate caps and therefore, such calls will produce more revenue than reflected.

70. A few providers, including GTL, Securus and Telmate, contend that our rate caps are too low and will not allow them to recover their costs.[208] Others assert that our rate caps may be too low with respect to particular facilities.[209] Some representatives of jail facilities express concern that the provision of ICS in their facilities may be in jeopardy.[210] Based on our analysis and the record, we find these assertions unpersuasive. Several providers dispute their claims, noting that GTL, Securus, and Telmate failed to break out their costs by facility type, and proposed rate caps well above their reported average costs over both prisons and jails. As a result, "any claim that the Commission's draft rates are demonstrably below carriers' reported costs is wholly unsubstantiated and without merit."[211] Our analysis indicates that the rate caps we adopt will permit just, reasonable, and fair compensation.[212] Moreover, we expect that the reforms adopted will lead to increased minutes of use, incentivize increased efficiency, and permit providers to generate increased revenues. Thus, we do not believe that there is a reason for service to facilities to be in jeopardy but, as noted below, there is a process for considering any unique circumstances that may justify a waiver to ensure fair compensation.

c. Evidence that the Mandatory Data Collection Likely Overstates Providers' Costs

71. In addition to the analysis detailed above, evidence in the record suggesting that a number of ICS providers overstated their costs in response to the Mandatory Data Collection provides us

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could include institutions with ADPs that do not exceed 350. For example, this would be the case for a contract that covered four institutions each with an ADP of 100. The ADP of the contract, being 400, would exceed 349, but in fact every paid MOU under the contract could receive the capped rate of $0.22, and not the assumed $0.16. A similar overstatement occurs when a contract is considered that covers jails with summed ADPs 1,000 or more, but include some institutions with an ADP of less than 1,000, and all the more so, if it includes institutions with an ADP of less than 350.

[207] *Id.*; *see also, e.g.*, NCIC Oct. 14, 2015 *Ex Parte* Letter at 4-5 (describing harmful economic effect of uncapped ancillary service charges).

[208] *See, e.g.*, GTL Oct. 13, 2015 *Ex Parte* Letter at 1-2 (FCC rate caps "would reduce all ICS rates to levels that are not supported by the record cost data and will not ensure fair compensation for ICS."); Letter from Stephanie Joyce, Counsel for Securus Technologies to Marlene H. Dortch, Secretary, FCC, WC docket No. 12-375 at 1 (filed Oct. 8, 2015) (Securus Oct. 8, 2015 *Ex Parte* Letter); Joint Provider Oct. 15, 2015 *Ex Parte* Letter at 5.

[209] *See, e.g.*, Letter from Thomas M. Dethlefs, Associate Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (CenturyLink Oct. 15, 2015 *Ex Parte* Letter) ("The proposed rate caps are grossly unreasonable as they will render many correctional facilities uneconomic to serve.").

[210] *See* Letter from Mary J. Sisak, Attorney for the National Sheriff's Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No 12-375 at 1 (NSA Oct. 14, 2015 *Ex Parte* Letter) (expressing NSA's "concern that a number of Inmate Calling Service (ICS) Providers are stating that the Commission's proposed ICS rates are not sufficient to continue to provide ICS to all jails").

[211] NCIC Oct. 14, 2015 *Ex Parte* Letter at 3; *see also* ICSolutions Oct. 15, 2015 *Ex Parte* Letter Attach. 1 at 1.

[212] *See infra* Sections. IV.A.5; IV.B.2.

with further comfort that the rate caps adopted today are appropriate and ensure fair compensation to the providers.

72. For instance, providers were directed to file a Description and Justification (D&J) with their Mandatory Data Collection response to document and explain their cost submissions. Three providers did not submit a D&J to the Commission. The D&Js received varied widely in detail and thoroughness. Five providers (CenturyLink, GTL, Pay Tel, Securus, and Telmate) claimed a cost of capital of 11.25 percent in developing their cost data submission.[213] The cost of capital has to be estimated and their estimate of 11.25 percent might be significantly higher than the prevailing cost of capital for companies that provide telecommunication services. In any event, none of these companies submitted evidence as to their costs of debt or equity capital or capital structure, the three components of the cost of capital, and so have not justified any cost of capital estimate. In addition, several providers (Securus, Telmate, and CenturyLink) included in their costs financing items as well as interest expense, which is included in the cost of capital.[214] This suggests that these providers, and possibly others, have over-estimated their capital costs, potentially double-counting their cost of debt. The five providers that specifically reported using 11.25 percent account for a large portion of the market, and thus a commensurate weight is reflected in the weighted average caps that we calculate.[215] Consequently, in the unlikely event that a provider omitted its cost of capital, the omission is unlikely to have a significant impact on the weighted average caps. We also note that the Bureau has recommended to the Commission that a zone of reasonableness for the Weighted Average Cost of Capital (WACC) is between 7.39 and 8.72 percent.[216]

73. We also find that the manner in which the data was collected and the clearly-stated purpose of the data collection, which occurred in the context of a Commission effort to set caps on ICS rates, gave providers every incentive to represent their ICS costs fully, and possibly, in some instances, even to overstate these costs. For example, one provider noted in its D&J that it even included in its ICS-related costs amounts for dues, subscriptions, entertainment and meals.[217] We question the

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[213] While other providers did not specify a cost of capital, given the length of this proceeding and the fact that the Commission clearly signaled its focus on setting appropriate ICS rates, as well as the fact that these respondents are sophisticated parties, we think that it is reasonable to assume that all responding providers included a cost of capital whether they specified it or not. This approach is consistent with that taken by the Commission in the *2013 Order*. *See 2013 Order*, 28 FCC Rcd at 14136, n.203 ("Furthermore, we do not remove costs or adjust inputs from the data used to establish the interim rate caps. For example, both cost studies used to establish the interim rate caps use an 11.25% rate of return to determine the cost of capital. We do not opine on whether this input is appropriate in this context. Instead, we accepted the figures in the cost study, as asserted without considering whether they represent accurate levels of costs that are reasonably and directly related to the provision of interstate ICS and, therefore, are appropriately recoverable [through] interstate ICS rates. Consequently, it is likely that these cost figures are overstated, but we accept that possibility as part of our decision to set conservative interim rate caps levels.").

[214] *See* Letter from Lee G. Petro, Counsel to Martha Wright, et al. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at Attach. (filed Aug. 14, 2015) (Wright Petitioners Aug. 14, 2015 *Ex Parte* Letter) (attaching analysis by economists Coleman Bazelon and Kristin Stinerson).

[215] *See supra* note 169.

[216] *See Prescribing the Authorized Rate of Return; Analysis of Methods for Establishing Just and Reasonable Rates for Local Exchange Carriers*, Wireline Competition Bureau Staff Report, DA 13-1111 at i (Wireline Comp. Bur. rel. May 16, 2013) (describing the significant changes in the industry since the 11.25 percentage was approved and recommending that the Commission lower the allowed rate of return in keeping with a newly-calculated WACC and increased carrier efficiency); *see also Connect America Fund et al*., WC Docket No. 10-90, Report and Order, 29 FCC Rcd 3964, 4011-12, paras. 106-07 (Wireline Comp. Bur. (2014)) (adopting a 8.5 percent cost of money input for the cost model used to determine the offer of Connect America Fund support to price cap carriers).

[217] **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**.

appropriateness of including such costs as ICS-related costs but as noted below we accept these reported costs without discounting or manipulating them. We have observed that at least one reporting provider did not actually calculate the percentage of traffic for each service (debit, prepaid or collect) represented but rather used the same percentage for each and merely offered a "guess" in reporting its 2014 data projections.[218] This information forces us to call into question the accuracy of this provider's data and how rigorous this provider was in preparing its Mandatory Data Collection response.[219] That the adopted rate caps include such costs, as well as the costs of international calls that are not subject to our rate caps,[220] causes us to conclude that the adopted caps are generous.[221] An analysis of the adopted rate caps shows that some providers will recover more than their stated costs, while others will recover less (because the caps are based on weighted industry averages but, as explained above, we believe all providers can more than recover the efficient costs of ICS supply).[222]

74. Moreover, comments in the record have also highlighted how the data likely overstate costs. For example, the Petitioners' economist, Coleman Bazelon, and Pay Tel's economic consultant Don Wood identified problems they observed with the data.[223] Dr. Bazelon also reported that, based on

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[218] *See* Protocall Mandatory Data Collection Description and Justification at 3 ("We estimate that our business will grow 49.24% in 2014. No evidence. Its [sic] just a guess.").

[219] *See* Letter from David Lindgren, Protocall Mandatory Data Collection Description and Justification, WC Docket No. 12-375, at 1 (filed Aug. 19, 2014) (Protocall Mandatory Data Collection Filing) ("Commissions, Revenue-producing MOU and Calls: We do not track calls by the call types asked for. So the split by call type requested is driven by the results of a random survey of prepaid account calls. . . .")

[220] The Mandatory Data Collection required providers to report their costs for international calls. These costs were not broken out separately from other ICS-related costs, however. As a result, the cost data that the Commission – and commenters – relied on to calculate appropriate rate caps included the costs providers incur for international calls, even though our rate caps do not apply to international calls. Thus, providers will be able to recover their costs for international calls under our rate caps for domestic calls, despite the fact that international calls are not subject to our rate caps. (International rates for ICS are, however, subject to the "just and reasonable" requirement of section 201(b). *See* 47 U.S.C. § 201(b).

[221] Due to a high rate of technological progress, the nominal costs in the supply of telecommunications services generally fall, or at least do not rise over time. *Response to Prof. Hogendorn Peer Review of Connect America Cost Model v.2* 3-4, *available at* https://apps fcc.gov/edocs_public/attachmatch/DOC-322385A1.pdf. As a result, in setting our adopted rate we do not consider it necessary to include an inflation adjustment, particularly since inflation rates are currently very low. *See, e.g.*, Bureau of Labor Statistics, U.S. Department of Labor, Consumer Price Index-All Urban Consumers, http://data.bls.gov/timeseries/CUUR0000SA0?output_view=pct_12mths (reporting annual change in CPI-U). However, we point out again that our adopted rates are generous relative to our estimates of efficient costs, so even if telecommunications costs were to rise in nominal terms, it is unlikely they would rise so much as to render supply unprofitable. *See* Wright Petitioners Oct. 15, 2015 *Ex Parte* Letter at 1, Attach. 1 [[**BEGIN CONFIDENTIAL**]] [redacted] [[**END CONFIDENTIAL**]].

[222] We need not set our rate caps at the level of the highest cost providers, but can use the rate cap to encourage more efficient provision of ICS. *See supra* Section IV.A.3.b. *Cf. e.g.*, Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at Attach. (filed Aug. 20, 2015) (arguing that the Commission should establish its rate caps above Securus' average per-minute cost of $0.1776).

[223] *See* Wright Petitioners Second FNPRM Comments at Exhibit A, 6 (Issues identified with the data submissions include: "Inconsistent and inaccurate allocation of costs between ICS and other services; Inconsistent categorization

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an analysis that included information not included in the provider's Mandatory Data Collection submissions, the reported costs of Securus and GTL "include many incorrectly calculated additions such as inappropriately recoverable financing costs."[224] Dr. Bazelon reports that, [[**BEGIN CONFIDENTIAL**]]

[redacted] [[**END CONFIDENTIAL**]].

75. After recalculating the providers' costs, Dr. Bazelon then concludes that their reported costs should be discounted by approximately [[**BEGIN CONFIDENTIAL**]] [redacted] [[**END CONFIDENTIAL**]]. While we do not discount the costs as recommended by Dr. Bazelon and, instead, take a more conservative approach of using the data at face value, this analysis underscores that the data submitted likely overstates costs and, as a result, the rate caps we adopt today are conservative.

d. Alternative Proposals in the Record

76. Numerous commenters have submitted rate reform proposals in the record. The Petitioners, along with several public interest groups, initially urged the Commission to adopt a $0.07 per minute rate cap for all interstate debit, prepaid, and collect calls, with no per-call charge, and no ancillary fees or taxes allowed.[226] GTL, Securus, and Telmate, who describe themselves as "the primary providers of inmate calling services . . . in the United States and represent[] 85% of the industry revenue in 2013,"[227] jointly filed a proposal to comprehensively reform all aspects of ICS.[228] The Joint Provider

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of costs into equipment, telecom, security, and other ancillary fees with limited or no justification or description; Incorrect calculation of financing charges; Inconsistent categorization of costs as direct or common; Inconsistent and inappropriate allocation of common costs with limited or no justification or description; Incorrect calculations for return on capital; and Incomplete description and justifications.").

[224] Wright Petitioners Second FNPRM Comments at Exhibit A, 7.

[225] Wright Petitioners Second FNPRM Comments at Exhibit A, 7.

[226] Comments of Wright Petitioners., WC Docket No. 12-375, at 3 (filed Mar. 25, 2013) (Wright Petitioners 2012 NPRM Comments).

[227] *See* Joint Provider Proposal at 1.

Proposal urges the adoption of rate caps of $0.20 per minute for debit and prepaid interstate and intrastate ICS, and $0.24 per minute for all interstate and intrastate collect ICS, effective 90 days after adoption of a final order.[229] The Joint Provider Proposal does not indicate that it is based on cost data received in response to the Mandatory Data Collection. In addition, the Joint Provider Proposal was signed by only three of the 14 ICS providers that responded to the Mandatory Data Collection. Pay Tel submitted what it calls an "Ethical Proposal," in which it proposes rate caps of $0.08 per minute for all prisons regardless of population, $0.26 per minute for jails with 1-349 ADP, and $0.22 per minute for jails with 350 plus ADP.[230] The Commission sought comment on these proposals in the *Second FNPRM*.[231]

77. In response to the *Second FNPRM*, Petitioners submitted another reform proposal. The Petitioners propose a rate of $0.08/minute for prepaid and debit calls and $0.10/minute for collect calls from all prisons and jails with over 350 beds.[232] Petitioners propose a rate of $0.18/minute for prepaid and debit calls and $0.20/minute for collect for facilities with fewer than 350 beds.[233] Petitioners suggest that the Commission adopt these tiered rates to account for higher churn rates, increased non-revenue calls, and higher bad debt issues experienced in smaller facilities.[234] In its comments to the *Second FNPRM*, PPI supports a cap of $0.05 to $0.07 per minute.[235]

78. Several commenters submitted economic justifications for their rate proposals, each of which relied on a slightly different subset of the data in the Mandatory Data Collection. For the reasons described below, the Commission declines to adopt any of these proposals.

79. After comments were received in response to the *Second FNPRM*, Pay Tel filed an additional proposal based on its economic consultant's analysis of the data filed in response to the Mandatory Data Collection.[236] The company proposes tiered per-minute rate caps, for all call types, plus institution cost recovery amounts to be added to those caps. The rates (rate cap plus additional facility cost recovery) would range from $0.10/min for prisons to $0.29/min for jails of 0-349 inmates.[237] Specifically, Pay Tel's economic consultant, Don Wood, excluded from his analysis, and subsequent proposed rate caps,[238] the data from ATN, Encartele, and Protocall because he did not receive data from

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[228] *See* Joint Provider Proposal at 1-2. *But cf.* Joint Provider Oct. 15, 2015 *Ex Parte* Letter ("The undersigned parties [GTL, Securus and Telmate] are the primary providers of inmate calling services ("ICS") in the United States, representing more than 90% of industry revenue in 2014.").

[229] *See* Joint Provider Proposal at 1-2.

[230] *See* Pay Tel Proposal at 1.

[231] *See Second FNPRM*, 29 FCC Rcd at 13195-99, paras. 61-72.

[232] *See* Petitioners Second FNPRM Comments at 14.

[233] *See* Petitioners Second FNPRM Comments at 14.

[234] *See* Petitioners Second FNPRM Comments at 14.

[235] *See* PPI Second FNPRM Reply at 4-5. We note that PPI provided no cost study or analysis of the data in the record aside from asserting that "the evidence in the record shows that actual costs to ICS providers" to supply prison phone services are under $.04/minute, inclusive of profit margin. *See id.*

[236] *See* Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 and Attach. "Proposed ICS Rules" at 4-6 (filed July 13, 2015) (Pay Tel July 13, 2015 *Ex Parte* Letter).

[237] *Id.*

[238] *See* Letter from Darrell Baker, Dir. Utility Services Div., Alabama PSC to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 1, 2015) (Baker and Wood July 1, 2015 *Ex Parte* Letter) ("Based upon their [Baker and Don Wood] independent reviews of cost support data filed by providers in response to the Commission's

(continued….)

those providers, and from Combined Public Communications, Custom Teleconnect and Correct Solutions, because he deemed them "unreliable for the purpose at hand."[239] Mr. Wood then observed that the remaining eight reporting ICS providers' data included no description of how their cost studies were performed, and stated that "a number of the studies are decidedly imperfect, and more complete documentation would certainly be desirable."[240] Regardless, Mr. Wood suggested that "key results of these studies should be relied upon by the Commission when making any decisions regarding the level and structure of ICS costs."[241] We conclude that our approach is more appropriate because it includes data from all providers, rather than excluding six of the fourteen reporting providers' data. This approach is less reliable than our rate caps because of its selective nature.[242] While we agree that the data are not perfect, we do not believe it is appropriate to ignore the filed data and we find Mr. Wood's rationale for excluding certain providers' data unpersuasive without additional justification. As such, the rate caps adopted herein are derived from all data filed in the record.

80. In comments to the *Second FNPRM*, the Wright Petitioners' economist, Coleman Bazelon, identified problems he observed with the data received in response to the Mandatory Data Collection. For example, Dr. Bazelon identified inconsistencies in how providers categorized and allocated costs.[243] Dr. Bazelon then discussed the rate caps that the Wright Petitioners' proposed in their comments. These rate caps were based on Securus' and GTL's average cost data, which Dr. Bazelon then discounted because of concerns regarding Securus' cost-reporting methodology. As noted above, Dr. Bazelon found errors in Securus' and GTL's submissions, which led them to likely overstate their reported costs.[244] After adjusting for these errors, the Wright Petitioners suggest that an appropriate rate cap for service to prison facilities should be $0.08/minute for debit/prepaid calling and $0.10/minute for collect calling.[245]

81. We appreciate Dr. Bazelon's analysis highlighting that the data are likely to be overstated, but we do not believe it is appropriate for our purposes. Dr. Bazelon's analysis[246] suggests

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Further Notice of Proposed Rulemaking, released September 26, 2013, Baker and Wood recommend adoption of a composite rate for prisons and higher composite rates for jails.").

[239] Wood Second FNPRM Comments at 15.

[240] Wood Second FNPRM Comments at 16.

[241] Wood Second FNPRM Comments at 16.

[242] With regard to Pay Tel's more-recent rate proposal, we note that Pay Tel does not serve prisons. This causes us to agree that it is challenging for the Commission to give much weight to Pay Tel's prison rate and prison cost-recovery proposals.

[243] *See* Wright Petitioners Second FNPRM Comments at Exhibit A, 6. We note that Dr. Bazelon analyzed 11 of the 14 reporting providers, because three did not respond to requests for unredacted versions of their data. *See* Wright Petitioners Oct. 16, 2015 *Ex Parte* Letter Exh. 1.

[244] *See supra* para. 74.

[245] *See* Wright Petitioners Second FNPRM Comments at 14.

[246] Securus is the only reporting provider that was once publicly-traded and that has recently been acquired, thus providing public sales and valuation information. *See Applications Granted for the Transfer of Control of the Operating Subsidiaries of Securus Technologies Holdings, Inc. to Securus Investment Holdings, LLC*, WC Docket No. 13-79, Public Notice, DA 13-961 (Wireline Comp. Bur. rel. Apr. 29, 2014). GTL has also recently changed ownership but it has never been a public company that has been subject to public Securities and Exchange Commission filing requirements. *See* FCC Mandatory Data Collection Description & Justification for GTL; Economists Incorporated, WC Docket No. 12-375 at n.11 (filed Aug. 22, 2014).

that one provider may have overstated its costs by some significant amount.[247] We find Dr. Bazelon's analysis of the submitted data troubling and believe that his conclusions, if true, might support discounting cost data from certain providers.[248] While we are concerned that the analysis from Dr. Bazelon suggests that costs were overstated, we do not believe it is appropriate to adopt a rate cap based on discounting a single provider's costs when we have data from 13 other providers. In addition, we determine above that we should not manipulate the data but more conservatively accept the providers' costs as filed to avoid potentially arbitrary means of working with the data.

82. Alabama Public Service Commission Utility Services Division Director Darrell Baker likewise reviewed the data. His proposal includes four tiers each for prisons and jails, based on inmate population, with both rate caps and additional facility cost-recovery amounts, yielding rates ranging from $0.12/min (prisons with more than 19,999 inmates) to $0.25/min (jails of less than 100 inmates).[249] In support of his proposal for prison rates, Mr. Baker relied on cost data from only seven of the reporting 14 providers.[250] He excluded from his rate cap and cost-recovery calculations the seven smallest reporting providers, on the basis "that the . . . [remaining] providers serve the overwhelming majority of jails and prisons and that . . . an analysis of their data should provide accurate and reliable results that are applicable across the entire industry."[251] In support of his proposal for jail rates, Mr. Baker relied on data from only six of the reporting providers, excluding one of the seven remaining providers' data because that "[o]ne provider's cost per MOU deviates substantially from the cost per MOU of other providers."[252] We find Mr. Baker's approach problematic because it eliminated the higher cost data in the record. Put another way, the seven smallest providers submitted what were among the highest reported costs of providing ICS and the other excluded provider by process of elimination must be a larger provider that is responsible for a more-significant portion of ICS minutes of use. Additionally, Mr. Baker appears to have given no consideration to potential justifications, if any, for that provider's higher costs. We are unable, on the record before us, to exclude providers' reported data in calculating the appropriate rate caps.

83. The comments in the record largely agree that the data are problematic but disagree on the reasons why and the overall effect on the reported data. Each analysis described above is based on a

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[247] The record reflects an ongoing debate regarding the correct approach to this aspect of Securus' data collection. *See* Wright Petitioners Aug. 14, 2015 *Ex Parte* Letter at Attach. (suggesting that in response to the Mandatory Data Collection "providers often included costs that do not meet the definition of 'reasonably and directly related to the provision of ICS.'"); *see also* Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2-4 (filed Aug. 21, 2015) (letter rebutting "attempts again to criticize the cost data that Securus submitted in July 2014, pursuant to the Mandatory Data Collection") (internal citations omitted); Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at Attach. (filed Aug. 28, 2015) (reviewing and responding to the points raised by Securus in its August 21, 2015 letter).

[248] We note, however, that our filing instructions did not specify in detail how providers should account for the data that Dr. Bazelon discussed, although we required providers to identify and explain all costs in the accompanying Description and Justification. The lack of specific instruction regarding the method of cost reporting should not have been interpreted as license to manipulate or over-report cost data, and the reference to the penalty for willful false statements should have made that evident. *See* Mandatory Data Collection Instructions at 1-4 available at https://www.fcc.gov/encyclopedia/ics-mandatory-data-collection.

[249] *See generally* Letter from Darrell Baker, Dir., Utility Services Div., Alabama PSC to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed July 12, 2015) (Baker July 12, 2015 *Ex Parte* Letter).

[250] *See* Baker July 12, 2015 *Ex Parte* Letter at 1-2.

[251] Baker July 12, 2015 *Ex Parte* Letter at 2.

[252] Baker July 12, 2015 *Ex Parte* Letter at 2-3 ("I attribute the deviation to the provider's allocation of common costs which appears disproportionate to the common cost allocation reported by other providers, particularly for debit and collect calls.").

different data set and criticizes the data for slightly different reasons. We take seriously the concerns that the commenters have raised about inconsistencies in the data, and for at least some of the reasons described above, conclude that the reported data likely overstates the providers' actual costs.[253] But, as explained herein, we are unable to agree with and do not adopt any of the commenters' choices about which data to exclude or discount.

e. Rate Caps for Collect Calls

84. In this section, we conclude that it is appropriate to put in place a temporary, distinct rate structure for collect calls, with a two-year phase down after which rate caps for collect calls will be the same as those of debit and prepaid calls.

85. In the *2013 Order*, the Commission established a rate cap for interstate debit and prepaid calling and a separate rate cap for interstate collect calling.[254] The interim interstate collect calling rate cap was $0.25.[255] In setting this separate rate cap, the Commission recognized that, based on the data available at the time, collect calling can be more expensive for ICS providers to offer than debit and prepaid calling.[256] The Commission encouraged facilities to move away from collect calling, noting that the use of prepaid calling helps called parties to better manage their budgets for ICS, thus making end-user costs for maintaining contact more predictable.[257] The Commission also noted that debit and prepaid calling address the problem of call blocking associated with collect calling by enabling service providers to obtain payment for calls up front, thus eliminating the risk of nonpayment.[258]

86. In the *Second FNPRM*, the Commission sought comment on retaining the differentials between debit/prepaid and collect calling.[259] The Commission noted that data received from the Mandatory Data Collection suggest that collect calling costs are higher than costs for prepaid and debit calls, and that collect calling accounted for less than nine percent of revenue producing minutes in the data collection in 2013.[260] Commenters suggest that collect calling is more costly to provide because of bad debt, billing costs, uncollectible debts and issues related to collection of non-payment.[261] For example, some commenters still assert that the Commission should adopt a higher rate cap for collect calling, largely because of the higher costs associated with collect call service.[262] The Commission, along with several commenters, has noted that use of collect calling in correctional facilities has dropped significantly in recent years.[263] Data received in response to the Mandatory Data Collection confirm this

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[253] *See supra* paras. 73-82.

[254] *See 2013 Order*, 28 FCC Rcd at 14147, para. 73.

[255] *Id.* at 14147, para. 78.

[256] *Id.* at 14120, para. 24.

[257] *Id.* at 14166-68, paras. 110-12.

[258] *Id.* at 14166-68, paras. 110-12.

[259] *See Second FNPRM*, 29 FCC Rcd at 13199, para. 73.

[260] *See, e.g., Second FNPRM*, 29 FCC Rcd at 13199, para 73 n. 208.

[261] *See, e.g., Second FNPRM*, 29 FCC Rcd at 13199, para 73 n. 205.

[262] *See e.g.*, Petitioners Second FNPRM Comments at 14, Joint Provider Proposal at 2; Letter from, Thomas M. Dethlefs, Counsel to CenturyLink, to Marlene Dortch, WC Docket No. 12-375 at 1 (filed Aug. 20, 2015) (CenturyLink Aug. 20, 2015 *Ex Parte* Letter) (asserting that the Commission "should adopt a simple, uniform rate cap for both interstate and intrastate calls, with a slightly higher cap for collect calls").

[263] *See 2013 Order*, 28 FCC Rcd at 14123, para. 30 ("In addition, ICS providers and correctional facilities increasingly offer prepaid and debit calling as an alternative to collect calling") and n.104; Petitioners 2013 Order Comments at 18 (asserting that "the operator-assisted collect call function has been eliminated, and these services

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decline.[264] Between 2012 and 2014, collect-calling minutes of use decreased over 50 percent, from 15 to 7 percent of minutes of use. CenturyLink recently told the Commission that "that traditional collect calling represents a small and *declining* percentage of inmate calls."[265]

87. Based on our analysis of the record, including data submitted in response to the Mandatory Data Collection, we predict that collect calling usage will continue to decrease in the future. We do not want to include high collect calling costs in debit and prepaid rate tiers because that would compel the majority of ICS end users that do not use collect calling to subsidize such calls. In light of that concern, and because we continue to encourage correctional institutions to move away from collect calling, as the Commission did in the *2013 Order*,[266] we adopt a separate rate cap tier for collect calling. This separate tier is consistent with the Commission's prior actions in adopting a separate collect calling rate tier based on data indicating that collect calls were more expensive than other types of ICS calls.[267] Since the adoption of our interim rate caps, only one provider has been granted a waiver based on an assertion of unreasonable or unsustainable rate caps, further supporting the reasonableness of the rate of the interim collect calling rate caps.[268]

88. We adopt a collect calling rate cap based on the cost data received in response to the Mandatory Data Collection, as well as a two-year step-down transitional period, as follows. First, we adopt a collect calling rate of $0.49/per minute for all jails and $0.14 for all prisons until July 1, 2017. Beginning July 1, 2017, we adopt a rate of $0.36/ per minute for jails of 0-349 ADP, $0.33/ per minute for jails of 349-999 ADP, and $0.32/ per minute for jails of 1,000 or greater ADP, and $0.14/ per minute for all prisons. This rate is halfway between the initial rate and the rates that are adopted in this Order for debit and prepaid calling. Finally, effective July 1, 2018 and beyond, we adopt a collect calling rate of $0.22/ per minute for jails of 0-349 ADP, $0.16/ per minute for jails with 359-999 ADP, and $0.14/ per minute for jails of 1,000 or greater ADP, and $0.11/ per minute for all prisons, in order to arrive at rates that are identical to those adopted in this Order for jails and prisons and the respective tiers therein.

89. We conclude that these separate tiers for collect calling rates will phase out after a two-year transition period. This two-year framework is justified by the data filed in response to the Mandatory Data Collection, showing that collect calling volume is decreasing and will most likely be at a

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are now automated and provided by the ICS provider without the intervention of a live operator."); GTL 2013 Order Comments at 22 (asserting that in 2013, approximately 80 percent of all ICS traffic came from debit and prepaid options).

[264] As part of the Mandatory Data Collection, the Commission collected three years of providers' minutes of use and the number of debit/prepaid and collect calls, including two years of actual use and a projection for the third year based on partial-year data.

[265] CenturyLink Aug. 14, 2015 *Ex Parte* Letter at 1 ("Two years ago, traditional collect calling represented approximately **[[BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL]]** of inmate calls at the correctional facilities CenturyLink serves where traditional collect calling is offered, whereas today it represents only about **[[BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL]]** of inmate calls.") (emphasis added).

[266] *See 2013 Order*, 28 FCC Rcd at 14166, para. 110.

[267] *See 2013 Order*, 28 FCC Rcd at 14149-52, paras. 77-81 (asserting that the Commission set interim collect calling rate cap of $0.25 on a "conservative" basis based on submitted costs for collect calls of $0.246 per minute and interim debit and prepaid caps on submitted costs of $0.124 per minute for all calls); *see also id.* at 14150, para. 78 (noting that Pay Tel and Securus reported costs of $0.225 per minute for collect calls and $0.124 per minute for all calls).

[268] *See supra* note 43. Additionally, if an ICS provider believes that its costs for collect calling are higher than the collect calling rate caps adopted herein, it may seek a waiver, as discussed below, of the collect calling caps. *See infra* Section IV.F.

nominal level in two years.[269] By adopting a two-year glide path, the rates ICS providers are permitted to charge phase down over time, with certainty and sufficient time to adapt to a changed landscape that includes reduced use of collect calling overall. We find that this transitional approach will be administratively efficient for both providers and the Commission, as it involves a straightforward two-year step-down process and reflects our expectation that providers will gain efficiencies in their contracts and collect calling, and that they will thus more easily adjust to the lower rate caps adopted for debit and prepaid calling.

90. Moreover, the record supports a uniform rate for collect calls. Indeed, several commenters no longer support a separate rate cap for collect calling, indicating that collect calling costs may not, in fact, differ significantly from debit or prepaid calling costs, or that collect calling accounts for a relatively small portion of calls.[270] The record indicates that this is because correctional institutions favor debit or prepaid calling over collect calling.[271] For example, when the Commission adopted the *2013 Order*, evidence in the record indicated that collect calling was the only ICS option offered in four states[272] and now the record indicates that collect calling is the only ICS option in one state.[273] As the Commission has stated previously, we encourage providers and facilities to move away from collect calling for the many efficiencies and cost savings that other types of calling offer.[274] Finally, we find that a two-year transition will allow the Bureau to monitor collect calling and address any potential traffic arbitrage issue that might occur if providers shift calling patterns to take advantage of the higher collect calling rate caps.

91. We acknowledge that the collect calling rate caps will be higher in year one than several of the collect calling caps proposed in the record.[275] We expect that these caps will serve as backstops, not a target for providers, as efficiencies are gained by providers, and contracts are changed, or new contracts are entered into between parties.[276] As discussed above, we expect that the trend towards declining collect calling volume will continue, and the adopted rate caps may be further modified in response to further data received as part of the MDC adopted herein.[277]

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[269] *See supra* para. 86.

[270] *See* Pay Tel July 15, 2015 *Ex Parte* Letter at Attach. ICS Reform Pay Tel *Ex Parte* Presentation, at 5; *see also* Baker July 1, 2015 *Ex Parte* Letter at 2 ("Because billed collect calls constitute a relatively minor and decreasing proportion of inmate calls, Baker and Wood . . . recommend consideration of a composite rate applicable to all inmate call types."); Comments of Alabama PSC, WC Docket No. 12-375 at 11 (filed Jan. 16, 2015) (Alabama PSC Second FNPRM Comments) ("Because inmate sent collect calls represent such a small percentage of total inmate calls, we see the merits of combining collect call rates and prepaid rate[s] in to a single per-minute rate for prisons and a single per-minute rate for jails and would support such a proposal.").

[271] GTL Second FNPRM Comments at 10 ("While correctional facilities are becoming more open to prepaid/debit calling, collect calling still represents about five percent (5%) of GTL's inmate calls.").

[272] *See* HRDC *NPRM* Comments at Exh. B (comprehensive list of state ICS rates indicating that inmates in AR, GA, MS, and OH only have access to collect ICS and showing no data for the state of HI).

[273] *See* HRDC Second FNPRM Comments at Exh. C (comprehensive list of state ICS rates indicating that inmates in HI have access to only collect ICS.).

[274] *2013 Order*, 28 FCC Rcd at 14166-68, paras. 110-12.

[275] *See, e.g.*, CenturyLink Aug. 20, 2015 *Ex Parte* Letter at 1; Joint Provider Proposal at 1-2.

[276] *See, e.g.*, GTL Second FNPRM Reply at 20 ("it is unlikely that the Commission's goal of achieving market-based ICS rates will occur without simultaneous Commission action to establish backstop rate caps for all ICS rates, to transition site commissions to admin-support payments, and to define industry-wide ancillary charges and fee caps"; *see also* NCIC Second FNPRM Comments at 7; Alabama PSC Second FNPRM Comments at 2.

[277] *See supra* para. 87.

92. We delegate to the Bureau the authority to seek comment on the possibility of adjusting the adopted collect calling rate cap if necessary to address any gaming issues that may arise prior to completion of the phase-down. As part of the annual reporting and certification requirement adopted herein, the Bureau will be monitoring collect call volume in order to review trends and to ensure that gaming does not occur.[278] As discussed below, the Commission also plans to collect rate data, including data about collect calling rates that will further inform this review.[279]

f. Cost-Benefit Analysis

93. In adopting these rate caps, we have carefully considered each proposal or suggestion from the extensive comments in the record and weighed its potential benefit against any potential burden it may impose, bearing in mind our statutory mandate that ICS rates must be just, reasonable, and fair, maximizing the public benefit from any proposal we adopt. We find, on balance, that the benefits of our rate caps outweigh any potential burden that may be imposed. For example, regular family contact not only benefits the public broadly by reducing crime, lessening the need for additional correctional facilities and cutting overall costs to society,[280] but also likely has a positive effect on the welfare of inmates' children.[281] Ensuring just and reasonable ICS rates will foster regular contact between inmates and families, reduce the economic burden on ICS end users, support more cost-effective communication between inmates and their counsel, and produce cost savings for the justice system.[282]

94. Additionally, as the Commission discussed in the *2012 NPRM*, studies show that regular contact with family reduces inmate recidivism.[283] Children who continue to stay in touch with their parent in prison exhibit fewer disruptive and anxious behaviors.[284] Yet, according to one study, only 38 percent of inmates reported "at least" monthly phone calls with their children.[285] Real telephone contact between inmates and their loved ones at high rates places a heavy burden on inmates' families because families typically bear the burden of paying for the calls.[286] The Government Accountability Office (GAO) has twice recognized the conclusions of Federal Bureau of Prisons officials that contact with family "aids an inmate's success when returning to the community" and thus lowers recidivism.[287]

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[278] *See infra* Section IV.J.

[279] *See infra* Section IV.D.

[280] *See* Petitioners 2013 Comments Exh. C, Bazelon Decl. at para. 48; Petitioners 2013 Reply, Exh. A, Bazelon Decl. at para. 10.

[281] *See* Transcript of Reforming ICS Workshop at 11, WC Docket 12-375 at 11 (filed July 15, 2013) (2013 ICS Workshop Transcript) (Mignon Clyburn, Acting Chairman, FCC) ("Regardless of why that inmate is in jail, the exorbitant inmate calling regime deeply and chronically affects the most vulnerable among us. If you were to ask their teachers, it is affecting their [children's] academic performance. If you ask the school counselors, it affects their behavior and attitudes. And if you were to speak with the guardians, families and friends, it impacts their ability to adequately and affordably care for these children.").

[282] As noted above, one expert estimate that incarceration costs taxpayers an average of $31,000 per inmate per year. *See supra* para. 4 (citing MDRC, Building Knowledge About Successful Prisoner Reentry Strategies at 1 (2013), *available at* http://www.mdrc.org/sites/default/files/Reentry_020113.pdf (last visited July 14, 2015)).

[283] *See 2012 NPRM*, 27 FCC Rcd at 16631, n.15.

[284] *See generally* THE PEW CHARITABLE TRUSTS 2010.

[285] CARI MICHAELS ET AL, UNIV. OF MINN. EXTENSION: CHILDREN, YOUTH & FAMILY CONSORTIUM, CHILDREN WITH INCARCERATED PARENTS – CONSIDERING CHILDREN'S OUTCOMES IN THE CONTEXT OF COMPLEX FAMILY EXPERIENCES AT 4 (2013), *available at* http://www.extension.umn.edu/family/cyfc/our-programs/ereview/docs/June2013ereview.pdf.

[286] *2012 NPRM*, 27 FCC Rcd at 16631, paras. 3-4.

[287] *2012 NPRM*, 27 FCC Rcd at 16631, para. 4.

Moreover, the GAO has found that "crowded visiting rooms make it more difficult for inmates to visit with their families" and that "[t]he infrastructure of the facility may not support the increase in visitors as a result of the growth in the prison population."[288]

95. As discussed above, there is little dispute that the ICS market is experiencing market failure.[289] Numerous commenters have expressed as much.[290] Various parties encourage the Commission to reform rates within inmate calling, and some offer specific reform proposals.[291] Reforms are necessary to ensure that the benefits discussed above, which are in the public interest, will be realized.

96. The Order recognizes, however, that imposing rate caps may impose burdens on some providers. We have taken steps to minimize burdens on providers. As discussed below, we allow a 90-day transition period for the rate caps adopted in this Order to take effect for prisons and six months for the applicable rate caps to take effect in jails.[292] We find that this length of time adequately balances the pressing need for reform while affording ICS providers and facilities sufficient time to prepare for the new rates.[293] Further, our rate caps are designed to ensure that efficient providers will recover all legitimate costs of providing ICS, including a reasonable return,[294] and, to the extent a provider can demonstrate special circumstances, it may seek relief from our rules in the form of a waiver.[295] Specifically, the Commission will consider requests from a provider arguing that particular facts, when considered in the context of the totality of the relevant circumstances, deprive the provider of fair compensation or have a substantial and deleterious effect on competition in the ICS market.

97. Additionally, the rate caps adopted in the Order include fewer tiers than the number of tiers used in the data requested in our Mandatory Data Collection.[296] The Commission collected data, for example, on the costs of serving jail facilities with 0-99 ADP, a grouping comprising less than 10 percent of the inmate population,[297] but we did not adopt that as a rate tier, thereby mitigating any administrative

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[288] *See 2012 NPRM*, 27 FCC Rcd at 16631, para. 4, n.19, citing UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF PRISONS; GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE at 21 (2012 GAO Report) *available at* http://www.gao.gov/assets/650/648123.pdf (last visited Oct. 21, 2015); *see also* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF PRISONS; IMPROVED EVALUATIONS AND INCREASED COORDINATION COULD IMPROVE CELL PHONE DETECTION, at 18 (2011 GAO Report) *available at* http://www.gao.gov/assets/330/322805.pdf (last visited Oct. 21, 2015).

[289] *See 2013 Order*, 27 FCC Rcd at 14129-30, para. 41; *see also supra* para. 2.

[290] *See, e.g.*, Pay Tel Second FNPRM Comments at 57; Wood Second FNPRM Comments at 6-8; Joint Provider Proposal at 1-2.

[291] *See supra* para. 18.

[292] *See infra* Section IV.I.

[293] *See id*.

[294] GTL and other providers argue that our rate caps conflict with the Commission's statutory mandate to promote the deployment of broadband and advanced services. *See, e.g.*, Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 6-9 (filed Oct. 10, 2015) (GTL Oct. 10, 2015 *Ex Parte* Letter). Specifically, GTL argues that "backstop rate caps" are "the best way to encourage innovation" and attempts to distinguish our rate caps from "backstop rate caps." *Id.* at 8 (arguing that the ICS rate caps are "set at cost (or below cost)." Such arguments are unfounded and unpersuasive based on the record before us, which identifies no ICS-related barrier to the reasonable and timely deployment of advanced telecommunications services.

[295] *See infra* Section IV.E.

[296] *See* MDC at https://apps fcc.gov/edocs_public/attachmatch/DOC-327664A1.pdf (last visited Oct. 16, 2015).

[297] *See* BJS 2014 Census of Jails at Tbl. 4. The BJS Census collected data based on the following facility sizes: 0-49; 50-99; 100-249; 250-499; 500-999; and 1,000 or more. Our data collection requested data by jail sizes of 0-99, 100-349, 350-999, and 1000-plus. We believe that a 0-349 tier is the closest proxy to the small-to-medium-size jail

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burden on providers of adding a separate rate tier for this comparatively small grouping. The rate caps we adopt today respond to commenter concerns regarding potential confusion and burden caused by multiple rates.[298] We also adopt a single rate cap for prisons, which should minimize the burden on providers that serve prisons.[299] Finally, we disagree with those commenters who assert that adopting a tiered rate structure would be unduly burdensome and difficult for the Commission to administer and for ICS providers and correctional officers to implement.[300] We find these allegations unsupported and commenters provide no persuasive evidence that our rate tiers would be more difficult for them to administer than the current approaches.

4. Rejection of Certain Types of Charges

a. No Per-Call or Per-Connection Charges

98. *Background*. Per-call or per-connection charges are one-time fees often charged to ICS users at call initiation.[301] In the *2013 Order*, the Commission noted problems with per-call charges, "potentially rendering such charges unjust, unreasonable and unfair."[302] Problems included calls dropped "without regard to whether there is a potential security or technical issue, and a per-call charge . . . imposed on the initial call and each successive call."[303] The Commission expressed "serious concerns about such charges" and sought comment about the risks of such charges, but did not ban them.[304]

99. In the *Second FNPRM*, the Commission sought additional comment about such charges. First, the Commission asked if it should consider per-call or per-connection charges to be part of the ICS rate and "therefore subject to the section 276 mandate to ensure fair compensation."[305] Second, the Commission asked, in the alternative, if it should consider per-call or per-connection fees more analogous to the ancillary fees discussed in section 276(d).[306] The Commission asked if there are "instances in which the correctional facility or some other third party assesses a per-call or per-connection fee," and, if so, the Commission sought comment on its authority to ban such charges.[307] Finally, the Commission sought comment on whether the elimination of per-call charges would allow for just and reasonable interstate and intrastate ICS rates and fair compensation for ICS providers, on "transitions" away from such charges, and on its legal authority to act on per-call or per-connection charges.[308]

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population reflected in the BJS inmate distribution data at facilities with populations of 0-249 and therefore adopt that as our smallest tier by ADP. *See id*.

[298] *See, e.g.*, GTL Second FNPRM Comments at 11; Securus Second FNPRM Comments at 20.

[299] *See, e.g.*, GTL Second FNPRM Comments at 11.

[300] GTL Second FNPRM Comments at 11.

[301] In the *Second FNPRM*, the Commission noted that "these terms are used interchangeably throughout this Second Further Notice." *Second FNPRM*, 29 FCC Rcd at 13227, n.209.

[302] For example, the Commission explained that several state departments of correction allow $3.95 per-call and $0.89 per-minute charges for collect interstate ICS calls. *2013 Order*, 28 FCC Rcd at 14155, para. 86.

[303] *2013 Order*, 28 FCC Rcd at 14155, para. 86.

[304] *Id*. at 14185, para. 162.

[305] *Second FNPRM*, 29 FCC Rcd at 13200, para. 75.

[306] *Id*.

[307] *Id*.

[308] *Id*.

100. We received limited comment in the record, but all supported the elimination of per-call or per-connection fees.[309] For example, HRDC supports the "elimination of per-call charges" for existing contracts.[310] Legal Services for Prisoners with Children asserts that "per-call" or connection fees are "unreasonably high" and that the Commission "should ban these charges" or, "at the very least," should introduce a "dropped call" provision that "prohibits ICS providers from charging multiple times for a call that has been reinitiated within a few minutes."[311] Pay Tel notes that if the Commission adopts "any rate cap regime—including Pay Tel's Proposal—that does not allow providers to charge end users an upfront surcharge or per-call surcharge, it will successfully eliminate the problem of premature disconnection of calls."[312]

101. *Discussion*. We disallow the use of per-call or per-connection charges pursuant to our legal authority to ensure just, reasonable, and fair ICS rates. No evidence in the record supports a conclusion that these charges are a necessary part of cost recovery for ICS calls. Indeed, no commenters indicated that these fees are tied to a cost that providers incur in initiating a call. Providers did not break out per-call or per-connection costs when they filed their per-minute costs in response to the Mandatory Data Collection, indicating that any costs incurred on a per-call basis were included in their per-minute cost calculations. Allowing providers to recover such charges on top of the per-minute rates we adopt in this Order would therefore risk allowing double recovery. Additionally, these fees appear to be less prevalent than they once were. Recent provider-drafted reform proposals in the record do not include per-call or per-connection charges,[313] and many recently-adopted ICS contracts likewise do not include these fees.[314] All of these factors indicate to us a trend away from the inclusion of such fees. Finally, we agree with the Commission's earlier finding in the *2013 Order* that allowing such fees may encourage providers to charge end users for dropped calls, which could lead to the "assessment of multiple per-call charges for what was, in effect, a single conversation," which has no place in a framework for just, reasonable, and fair compensation.[315] We find that disallowing such fees is in the public interest because it will decrease the cost to end users for shorter ICS calls and allow more contact between inmates and their loved ones.

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[309] No commenter defended or explained the economic rationale behind either per-call or per-connection fees.

[310] HRDC Second FNPRM Comments at 12. HRDC also asserts that "per-call charges and ancillary fees can also be eliminated within a 90-day period" and notes that "we know the rates can be adjusted in 90 days, because that was done with the interstate rate caps." *Id*.

[311] Comments of Legal Services for Prisoners with Children, WC Docket No. 12-375, at 3 (filed Dec. 8, 2014) (LSPC Second FNPRM Comments).

[312] Reply of Pay Tel, WC Docket No. 12-375, at 54 (filed Jan. 27, 2015) (Pay Tel Second FNPRM Reply) (further asserting that "an end user . . .will not be overcharged if and when his call is disconnected early and he is forced to try this call again. This is a significant benefit to such a rate structure.").

[313] *See, e.g.*, Joint Provider Proposal at 2; Pay Tel Proposal at 3; CenturyLink Aug. 14, 2014 *Ex Parte* Letter at 1-3; Petitioners' Second FNPRM Comments at 4-6.

[314] *See, e.g.*, GTL/New Jersey ICS contract at New Jersey, Amendments to Contract #61616 between GTL and the Purchase Bureau, Division of Corrections and Juvenile Justice Commission, https://wwwnet1.state.nj.us/treasury/dpp/ebid/Buyer/GetDocument.aspx?DocId=21689&DocName=14-x-22648RFP.pdf&DocLoc=13 (last visited Oct. 15, 2015). *But see* ICSolutions Oct. 15, 2015 *Ex Parte* Letter Attach. at Appendix E (attaching the Report of the Board of Supervisors of San Bernardino County and Record of Action, a new ICS contract between San Bernardino County and Securus Technologies, Inc., effective July 1, 2015, that allows for a $1.00 per-call fee on top of the per-minute rate).

[315] *2013 Order*, 28 FCC Rcd at 141545-55, para. 85; *see also* Pay Tel Second FNPM Reply at 54; HRDC Second FNPRM Comments at 12.

b. No Flat-Rate Calling.

102. *Background.* In the *2013 Order* the Commission noted that commenters raised issues regarding per-call charges that may be unjust, unreasonable, and unfair; callers are often charged more during a single conversation when calls are dropped, which the record reveals can be a frequent occurrence, thus resulting in multiple calls for a single conversation, each subject to a separate flat-rate charge.[316] The Commission stated that "a rate will be considered consistent with our rate cap for a 15-minute conversation if it does not exceed $3.75 for a 15-minute call using collect calling, or $3.15 for a 15-minute call using debit, prepaid, or prepaid collect calling."[317] Rule 64.6030 mirrors this language and was intended to illustrate that the rate for a five-minute collect call must be capped at $1.25 and the rate for a five-minute debit or prepaid ICS call must be capped at $1.05, while a 30-minute collect call could cost consumers no more than $7.50 and a 30-minute debit or prepaid ICS call no more than $6.30.[318]

103. *Discussion.* Subsequent to the *2013 Order*, Securus sought additional guidance on this issue, asking whether providers were allowed to impose a flat rate based on the interim rate caps for a 15-minute call regardless of actual call duration.[319] That is, it wished to know if it could charge a flat fee of $3.75 for a collect call of any duration up to 15 minutes. The Commission sought comment on Securus' question, as well as on whether it should revise the existing rules to prohibit flat-rate charges or to develop new rules prohibiting flat-rated charges.[320]

104. The record reflects minimal support for this practice. The Alabama PSC opposes Securus' proposed clarification, stating that "flat-rate pricing allows providers to maximize call revenues and to dictate phone usage to the end users."[321] It further asserts that flat-rate calling increases complaints related to dropped calls and penalizes inmates that want to make shorter calls.[322] Several commenters suggest that ICS providers will benefit from a ban on flat-rate calls because it will lower their costs related to consumer complaints and bill adjustments.[323] HRDC notes that the proposed flat rates "only fall within the rate caps when a full 15-minute call is actually completed" and argues that "this practice does not reflect the spirit" of the Commission's *2013 Order*.[324] Pay Tel asserts that "numerous ICS providers

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[316] *2013 Order*, 28 FCC Rcd at 141545-55 para. 85 (noting that each caller was charged at $3.75); *id.* ("[T]he record indicates concerns that these per-call charges are often extremely high and therefore unjust, unreasonable, and unfair" if shorter calls are evaluated at the effective per-minute rate."); *see also* "Please Deposit All of Your Money" (asserting that dropped calls are a pervasive problem and the providers do not offer any real solution).

[317] *2013 Order*, 28 FCC Rcd at 14156, n.330.

[318] *Second FNPRM*, 29 FCC Rcd at 13200, para. 76.

[319] Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Feb. 10, 2014) (Securus Feb. 10, 2014 *Ex Parte* Letter); *see also Second FNPRM*, 28 FCC Rcd, at 14155-56, para. 88; Securus July 30, 2014 *Ex Parte* Letter at 1-2.

[320] *Second FNPRM*, 29 FCC Rcd at 13201, paras. 77-78. The Commission specifically requested comment on what impact allowing this level of flexibility would have on the effective per-minute rates end users pay and whether a 15-minute call duration would allow for just and reasonable ICS rates and fair compensation. *See id.* at 76.

[321] *See* Alabama PSC Second FNPRM Comments at 11.

[322] *Id.*

[323] *See* Comments of Michael S. Hamden, WC Docket No. 12-375, at 14 (filed Jan. 12, 2015) (Hamden S*econd FNPRM* Comments); *see generally* NCIC Apr. 16, 2015 *Ex Parte* Letter.

[324] HRDC Second FNPRM Comments at 6; Reply of Human Rights Defense Center, WC Docket No. 12-375, at 9-10 (filed Jan. 27, 2015) (HRDC Second FNPRM Reply) (asserting that prisoners and their families are paying for 15 minute calls regardless of call duration, which is contrary to the intent of the Commission's Order); *see also* Letter from Paul Wright, Exec. Dir., HRDC, to Tom Wheeler, Chairman, FCC, WC Docket No. 12-375, at 3 (filed Sept. 8,

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have taken advantage of this language and vague guidance since release of the ICS Order and are charging end users a flat rate of $3.15 or $3.75 per call, even if the call is disconnected prior to expiration of fifteen minutes," which it asserts is "an abuse of the intent of the Commission's rules."[325]

105. We prohibit the imposition of flat-rate calling. There is minimal record support for such charges, which penalize those who make shorter calls (the record indicates that ICS calls last typically less than 15 minutes).[326] If an end user is charged for a 15-minute call but the duration of that call is less than 15 minutes, the price for that call is disproportionately high.[327] We also agree with those commenters who assert that allowing providers to charge a flat rate based on a 15-minute call does not comport with our requirement to make ICS rates just, reasonable, and fair. As such, we ban flat-rate calling rate plans.

5. Legal Authority for Intrastate and Interstate Rate Caps

106. *Background*. In the *2013 FNPRM*, the Commission tentatively concluded that section 276 affords it broad authority to reform intrastate ICS rates and practices that deny fair compensation, as well as to preempt inconsistent state requirements.[328] The Commission sought comment on these tentative conclusions.[329] Multiple commenters supported the Commission's tentative conclusion that it has jurisdiction over intrastate as well as interstate ICS rates.[330] These commenters argue that section 276 provides the Commission with clear jurisdiction, and that it must regulate intrastate rates to ensure comprehensive ICS reform.[331] After examining the record, we affirm the tentative conclusion that intrastate ICS rates are well within the Commission's jurisdiction for the reasons described below.

107. Our authority to ensure the reasonableness of rates and practices for interstate ICS is not in dispute. Under section 201(b) of the Communications Act, the FCC is empowered to "prescribe such rules and regulations as may be necessary" to ensure that "[a]ll charges [and] practices . . . for and in connection with [interstate] communication service" by wire or radio are "just and reasonable."[332] Section 276[333] directs the Commission to "establish a per call compensation plan to ensure that all

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2015) ("[The use of flat rates], which has become more common since the FCC capped interstate ICS rates, can result in extremely high effective rates when calls are required to be cut short by either party.").

[325] Pay Tel Second FNPRM Reply at 53-54.

[326] The Mandatory Data Collection required providers to submit call lengths. An analysis of that data shows that the average length of reported calls was less than 13 minutes. *See Second FNPRM*, 29 FCC Rcd at 13201, para. 78. NCIC reports that in a trial of lower rates and fees it conducted in Alabama, inmates started making more calls at shorter duration. *See* NCIC Apr. 16, 2015 *Ex Parte* Letter at 10 (showing typical call duration between eight and 10 minutes).

[327] *2013 Order*, 28 FCC Rcd at 14154-55, para. 85.

[328] *See 2013 Order*, 28 FCC Rcd at 14175-76, para. 135.

[329] *See id*.

[330] Comments of Lattice Incorporated, WC Docket No. 12-375, at 4 (filed Jan. 12, 2015) (Lattice Second FNPRM Comments); Pay Tel Second FNPRM Comments at 3.

[331] Lattice Second FNPRM Comments at 4; Pay Tel Second FNPRM Comments at 3. Commenters also claim that it is necessary for the Commission to exercise its intrastate authority, particularly because "Public Utility Commissions in many states are unable to regulate intrastate rates due to deregulation of telecom services." Comments of 51 Former State Attorneys General (NSAG), WC Docket No. 12-375, at 2 (filed Jan. 9, 2015) (NSAG Second FNPRM Comments).

[332] 47 U.S.C. § 201(b).

[333] 47 U.S.C. § 276.

payphone service providers"—which the statute defines to include providers of ICS[334]—"are fairly compensated for each and every completed intrastate and interstate call."[335] We find that these statutory sections provide the Commission with the authority to regulate interstate ICS rates and practices, including the use of per-call or per-connection fees as well as flat-rate calling.

108. *Legal Authority to Reform Intrastate Rates*. The Commission's authority over intrastate telecommunications is, except as otherwise provided by Congress, generally limited by section 2(b) of the Act, which states that "nothing in this Act shall . . . give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio."[336] As the Supreme Court has held, however, section 2(b) has no effect where the Communications Act, by its terms, unambiguously applies to intrastate services.[337] We conclude that such is the case here.[338]

109. Under section 276 of the Communications Act, the Commission is charged with implementing Congress's directive "that all payphone service providers [be] fairly compensated for each and every completed intrastate and interstate call."[339] Section 276 contains several express references both to ICS and intrastate calling, making it clear that the Commission has the authority to regulate intrastate ICS calling. For example, section 276 requires the Commission to broadly craft regulations to "promote the widespread development of payphone services for the benefit of the general public" including, notably, "the provision of *inmate telephone service in correctional institutions*, and any ancillary services."[340] In addition to this general grant of jurisdiction, section 276 includes a mandate to "establish a per call compensation plan to ensure that *all* payphone service providers are fairly compensated for each and every completed *intrastate* and interstate call using their payphone."[341] Section

[334] 47 U.S.C. § 276(d) ("As used in this section, the term 'payphone service' means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.").

[335] 47 U.S.C. § 276(b)(1)(A). The Commission has previously found that the term "fairly compensated" permits a range of compensation rates that could be considered fair, but that the interests of both the payphone service providers and the parties paying the compensation must be taken into account. *See Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd 3248, 3254-58, paras. 14-24 (2002) (*2002 Order*); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 at 2570, para. 55 (1999) (*Payphone Third Report and Order*); *see also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21302-03, para. 82 (2002) (holding that "fair" compensation under section 276 "implies fairness to both sides").

[336] 47 U.S.C. § 152(b).

[337] *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999) (ruling that section 2(b) does not preclude the Commission from regulating intrastate telecommunications under the provisions of section 251); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986) (section 2(b)'s jurisdictional fence may be breached when Congress used "unambiguous or straightforward" language to give the Commission jurisdiction over intrastate communications); *see also Illinois Public Telecommunications. Ass'n v. FCC*, 117 F.3d 555, 561-62 (D.C. Cir. 1997) (*Illinois Public Telecommunications Association*) (applying "unambiguous or straightforward" standard to find that section 276 unambiguously grants the Commission authority to regulate the rates for local coin payphone calls).

[338] *See* Joint Provider Oct. 15, 2015, *Ex Parte* Letter at 3-4 ("Further, in *AT&T v. Iowa Utils. Bd.*, the Supreme Court held that the local competition provisions of the 1996 Act grant the FCC the authority to regulate intrastate matters." (citing *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999)).

[339] 47 U.S.C. § 276(b)(1)(A).

[340] 47 U.S.C. §§ 276(b)(1), (d) (emphasis added).

[341] 47 U.S.C. § 276(b)(1)(A) (emphases added).

276 also expressly directs the Commission to "discontinue the *intrastate* and interstate carrier access charge payphone service elements…and all *intrastate* and interstate payphone subsidies."[342] In addition, section 276 explicitly grants the Commission authority to preempt state requirements to the extent they are inconsistent with FCC regulations.[343]

110. Furthermore, significant judicial precedent supports the Commission's authority to regulate intrastate ICS. In *Illinois Public Telecommunications Association*, the U.S. Court of Appeals for the D.C. Circuit found that the Act's requirement that "all payphone service providers are fairly compensated" provides the FCC with "authority to set local coin call rates"—which included intrastate service rates.[344] Additionally, in *New England Public Comm'ns Council, Inc. v. FCC*, the same court found that "section 276 unambiguously and straightforwardly authorizes the Commission to regulate…intrastate payphone line rates."[345] Therefore, we conclude that both section 276 and the associated case law give the Commission the authority to regulate ICS provider compensation for intrastate calls, including the rates ICS providers charge end users, per-call or per-connection charges, and flat-rate charges.[346]

111. We find arguments that the Commission lacks the authority to regulate intrastate ICS unpersuasive.[347] For example, we disagree with commenters who argue that section 276 is limited to prohibiting discrimination by Bell operating companies (BOCs).[348] While section 276(a) includes

[342] 47 U.S.C. § 276(b)(1)(B) (emphases added).

[343] 47 U.S.C. § 276(c).

[344] *Illinois Public Telecommunications Association*, 117 F.3d at 562.

[345] *New England Public Comm'ns Council, Inc. v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) (*New England Public Comm's Council*); *see also Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) ("§ 276 substantially expands the Commission's jurisdiction and gives it broad authority to regulate both intrastate and interstate payphone calls.") (*citing Illinois Public Telecommunications Association*, 117 F.3d at 561-62), *aff'd sub nom. Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc*., 550 U.S. 45 (2007).

[346] We note that this situation is analogous to the market surrounding competitive LEC terminating access charges, in which the Commission recognized that regulation was required because "the party that actually chooses the terminating access provider does not also pay the provider's access charges and therefore has no incentive to select a provider with low rates." *See Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9934, para. 28 (2001) As in that circumstance, here we have a situation in which the person choosing the ICS provider, i.e. the facility, is not the person required to pay the charges and thus, has little incentive to choose the provider with the lowest rates. Accordingly, Commission regulation is necessary to ensure that rates, term and conditions comply with the statute.

[347] *See* Comments of EagleTel, Inc. WC Docket No. 12-375, at 1(filed Nov. 12, 2014) ("[T]he FCC has no jurisdictional authority to regulate in-state ITS calling."); ICSolutions Second FNPRM Comments at 4-5; Praeses Second FNPRM Comments at 6, 17-18.

[348] Comments of National Association of Regulatory Utility Commissioners, WC Docket No. 12-375, at 8 (filed Jan. 9, 2015) (NARUC Second FNPRM Comments); *see also* Letter from Phillip R. Marchesiello, Counsel to Praeses LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (filed Sept. 9, 2015) (Praeses Sept. 9, 2015 *Ex Parte* Letter) ("Section 276 only can be interpreted to provide the Commission with authority to regulate ICS if a single provision, Section 276(b)(1)(A), is read out of context and in a manner that is fundamentally inconsistent with the statute's legislative history. Of course, if the statute does not provide the Commission with authority to regulate ICS, then it cannot provide the Commission with authority to regulate, much less ban, site commissions. The purpose of this statute, which is clear both on its face and in its legislative history, was to protect independent payphone service providers ("PSPs")—i.e., the owners of physical payphones—from discrimination by Bell Operating Companies ("BOC") and against revenue losses caused by the PSPs' customers' use of free dial around services. The "fair compensation" mandate in Section 276(b)(1)(A) only can be properly read in that context, and such protections are no longer applicable to Providers, which do not face BOC discrimination or a loss

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provisions specifically prohibiting discrimination by BOCs, we do not believe Congress intended for that subsection to limit the scope of the remaining provisions of section 276. For example, section 276(b)(1) expressly mandates that the Commission adopt regulations addressing five specific subjects related to payphone services; only two of those subjects—clauses (C) and (D)—relate to preventing BOC discrimination.[349]

112. In addition, although section 276(a) refers to Bell operating companies, and applies only to the BOCs, section 276(b) refers more broadly to "payphone service providers."[350] If Congress had intended for the regulations prescribed under section 276(b) to be limited to the narrow purpose of effectuating the nondiscrimination goals set forth in section 276(a), it easily could have made that clear.[351] Instead, Congress made clear that it was conferring a broader mandate in section 276(b), stating that: "[i]n order to promote competition among payphone service providers and to promote the widespread deployment of payphone services . . . , the Commission shall take all actions necessary . . . to prescribe regulations that . . . [*inter alia*] ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s] . . . ."[352]

113. We also disagree with commenters who argue that the Commission has never determined that section 276 extends to intrastate rates[353] or that section 276 applies only to "local calls made from a payphone and paid with coins."[354] Section 276 does not specify that compensation is only for calls paid by coin but rather "each and every" call.[355] Indeed, the very Commission order under review in *Illinois Public Telecommunications* held that the Commission had the authority to regulate intrastate payphone rates and preempt state regulation of intrastate rates.[356] Therefore, the Commission's position regarding its authority over intrastate rates under section 276 has remained consistent.[357]

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of revenue to dial around calls. The mere reference to "inmate telephone service in correctional institutions" in the definitions section of the statute does not somehow change the fundamental scope of the statute to cause Section 276(b)(1)(A) to newly provide the Commission with plenary authority over ICS".).

[349] *See* 47 U.S.C. §§ 276(b)(1)(C), (D).

[350] *Compare* 47 U.S.C. § 276(a) *with* 47 U.S.C. § 276(b); *see also* 47 U.S.C. § 276(b)(1)(A) (requiring the Commission to establish a per call compensation plan that ensures fair compensation for "all payphone service providers."). Moreover, neither section 276(c), addressing preemption, nor section 276(d), defining "payphone service," are limited to, or even refer explicitly to, Bell operating companies. *See* 47 U.S.C. §§ 276(c)-(d).

[351] Section 271, for example, is explicitly limited to regulating Bell operating companies. *See* 47 U.S.C. § 271. By contrast, section 251, like section 276, contains some provisions that apply to all carriers and some provisions that apply only to incumbent local exchange carriers. *Compare* 47 U.S.C. § 251(a) (describing duties of all telecommunications carriers) *with* 47 U.S.C. § 251(c) (describing obligations that apply only to incumbent local exchange carriers).

[352] 47 U.S.C. § 276(b)(1)(A).

[353] Comments of Arizona Corporation Commission (ACC), WC Docket No. 12-375, at 6 (filed Jan. 12, 2015) (ACC Second FNPRM Comments); Comments of CenturyLink, WC Docket No. 12-375, at 5 (filed Dec. 20, 2013) (CenturyLink 2013 Order Comments).

[354] NARUC Second FNPRM Comments at 12.

[355] *See* Reply of Andrew D. Lipman, WC Docket No. 12-275, at 3 (filed Jan. 26, 2015) (Lipman Second FNPRM Reply) ("'Each and every' means every call of every type, regardless of whether the destination is local or toll, and regardless of whether the charges are paid by coins or by credit card or in some other manner.").

[356] *Illinois Public Telecommunications Association*, 117 F.3d at 561-62.

[357] We reject claims that *Illinois Public Telecommunications Association* only applied to local calls paid for by coins, and could not be extended to intrastate toll calls because "[payphone service providers] have no right to impose long-distance rates." Comments of the National Association of Regulatory Utility Commissioners, WC

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114. *Rate Caps are Just, Reasonable and Fair*. As noted above, we have accepted the data submitted by providers in response to the Mandatory Data Collection as reported even though there is evidence that they are overstated.[358] As a result, we believe our rate caps are conservative and include sufficiently generous margins to allow providers to earn a profit. More generally, it is well-established that rates can be lawful if they fall within a zone of reasonableness, and hence a particular state's cap might be lower than our caps and still fall within that zone.[359] The rate caps we adopt today are intended both to ensure that ICS rates are "just and reasonable" and do not take unfair advantage of inmates, their families, or providers consistent with the "fair compensation" mandate of section 276.[360]

115. The Commission has broad discretion in establishing just and reasonable rates, as long as it articulates a rational basis for its decisions and as long as the result is not confiscatory.[361] As the Supreme Court has explained in construing the similar "just and reasonable rates" provision of the Natural Gas Act, "the Commission is not required by the Constitution or the Natural Gas Act to adopt as just and reasonable any particular rate level; rather, courts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness.'"[362] Section 276(b) charges us with ensuring that "all payphone service providers [be] fairly compensated."[363] This provision must be read in conjunction with our obligation under section 201(b) to ensure that charges and practices be just and reasonable.[364] Neither section 276(b) nor 201(b) require us to allow for recovery of costs that are not just, reasonable and fair.

116. We recognize that some ICS providers may see their profits decrease because the adopted caps are below the costs they reported to us under the Mandatory Data Collection (assuming that MOU stay constant).[365] The Commission has broad authority to set rate caps to apply to a particular service and

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Docket No. 12-375, at 11 (filed Dec. 20, 2013) (NARUC 2013 Order Comments); *see also* Lipman Second FNPRM Comments at 3-4 ("Payphone service providers (PSPs) can and do set rates for long-distance calls, in the form of sender-paid coin rates for such calls (whether interstate or intrastate). Thus, there is no bright-line boundary between local rates charged by PSPs and toll rates charged by IXCs.").

[358] *See supra* Section IV.A.3.b.

[359] *See 1996 Order on Recon*, 11 FCC Rcd at 20569, para. 51.

[360] *See* 47 U.S.C. §§ 201(b); 276; *see also 2013 Order*, 28 FCC Rcd at 14115, para. 14 ("The Commission has previously found the term 'fairly compensated' permits a range of compensation rates that could be considered fair, but that the interests of both the payphone service providers and the parties paying the compensation must be taken into account."); *see also supra* note 335.

[361] *See* Letter from Andrew D. Lipman, Morgan, Lewis & Bockius, LLP, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 6, 2015) (Lipman *Ex Parte* July 6, 2015 Letter) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (*Permian Basin*); *see also Verizon Communications Inc. v. FCC*, 535 US 467, 501-02 (2002) (citing *Permian Basin* as guidance for interpretation of Telecommunications Act of 1996).

[362] *See* Lipman July 6, 2015 *Ex Parte* Letter at 2 (citing *FPC v. Natural Gas Pipeline Co*., 315 U.S. 575, 585) ("No other rule would be consonant with the broad responsibilities given to the Commission by Congress; it must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Permian Basin*, 390 U.S. at 767; *see also National Ass'n of Reg. Util. Com'rs v. FCC*, 737 F.2d 1095, 1141 (D.C. Cir. 1984) (*NARUC*) (citing *Permian Basin* in upholding Commission's adoption of $25 special access surcharge).

[363] 47 U.S.C. § 276(d).

[364] 47 U.S.C. § 201(b).

[365] *See supra* Section IV.A.3.b (some inefficient operators may operate at a loss but there is reason to doubt that providers with actually incur net losses); *see also supra* para. 14 (discussing increase in minutes of use after the *2013 Order*).

does not have to set provider-specific rates that embody a rate of return for each individual provider.[366] Indeed, as at least one provider has explained in this proceeding, courts have recognized that the use of industry-wide average cost data to set rates is not arbitrary, and therefore agencies may use composite industry data or other averaging methods to set rates.[367] We therefore find that the rates we adopt today are reasonable for the reasons provided above and will allow economically efficient – possibly all – providers to recover their costs that are reasonably and directly attributable to ICS. The costs reported by the providers that are above our rate caps represent significant outliers, suggesting that their reporting methods may have varied from those of other providers or that they may be less efficient than their peers. Indeed, encouraging efficiency will lead to lower rates, which will both benefit end users as well as increase calling demand, thus furthering the dual goals of section 276 "to promote competition among payphone service providers" and encourage the "widespread deployment of payphone services to the benefit of the public."[368]

B. Payments to Correctional Institutions

117. The record indicates[369] that, in many cases, ICS bids are predicated on the winning providers' willingness to share part of its ICS revenues with the correctional facility.[370] These payments, commonly referred to as "site commissions," may take the form of monetary payments, in-kind payments, exchanges, or allowances.[371] In this Order, we define the term "site commission" broadly, to encompass any form of monetary payment, in-kind payment requirement, gift, exchange of services or goods, fee, technology allowance, product or the like.[372]

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[366] *See generally Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) (*Rates for Dominant Carriers*) (subsequent history omitted) (in which the Commission found that the public interest benefits of creating appropriate economic incentives for carriers to reduce their costs by becoming more efficient justified the departure from strict rate-of-return regulation).

[367] *See* GTL Sept. 2, 2015 *Ex Parte* Letter at 9 (citing, *inter alia, FPC v. Texaco Inc.*, 417 U.S. 380, 387 (1974) (noting that agency ratemaking does not "require that the cost of each company be ascertained and its rates fixed with respect to its own costs"); *Permian Basin*, 390 U.S.).

[368] 47 U.S.C. § 276(b); *see also Rates for Dominant Carriers*, 5 FCC Rcd at 6787, para. 22 ("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."); *Telecommunications Relay Services and Speech-To-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, 22 FCC Rcd 20140, 20167 (2007) (*2007 TRS Order*) (adopting tiered rate caps designed to promote competition); *In the Matter of Price Cap Performance Review for Local Exch. Carriers*, 10 FCC Rcd 8961 (1995) (*1995 Price Cap Order*) (explaining that the Commission's price cap plan for local exchange carriers was "designed to mirror the efficiency incentives found in competitive markets.").

[369] *See* Petitioners *FNPRM* Comments at 16 ("it would appear that, in the context of evaluating RFP responses, the determining factor for the contracting party is not whether the ICS providers can meet the technical requirements and security measures required by the correctional institutions. Instead, the selection of the winning bidder is based on the extra "add-ons" that an ICS provider will provide, such as free calls, pilot programs, or additional commissions paid to the correctional institution.").

[370] *See, e.g.*, Comments of Prison Policy Initiative, WC Docket No. 12-375, Attach. at 2 (filed May 9, 2013) (PPI 2012 NPRM Comments) (explaining that "in all but a few locations . . . [ICS providers] are contractually obligated to pay a large portion of the revenue collected back to the correctional facility . . .'").

[371] *2013 Order*, 28 FCC Rcd at 14135, para. 54. As the Commission has acknowledged, these payments, and the terminology used to describe them, vary from facility-to-facility. *2013 Order*, 28 FCC Rcd at 14135, para. 54, n.199; *see also, e.g.*, PPI May 9, 2013 Comments (attaching *Boston Globe* and *NYT* articles referring to "concession fees" that ICS providers pay facilities in exchange for exclusive contracts.").

[372] *See, e.g.*, Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC at 8 (filed April 3, 2015) (GTL April 3, 2015 *Ex Parte* Letter) (emphasis added); *see also* Joint Provider Proposal at 4 (proposing that

(continued….)

118. After carefully considering the evidence in the record, we affirm our previous finding that site commissions do not constitute a legitimate cost to the providers of providing ICS.[373] Accordingly, we do not include site commission payments in the cost data we use in setting the rate caps established in this Order. We conclude that we do not need to prohibit site commissions in order to ensure that interstate rates for ICS are fair, just, and reasonable and that intrastate rates are fair.[374] We reiterate, however, that site commissions have been a significant driver of rates[375] and that ICS rates have dropped dramatically in states that have eliminated site commissions.[376] We therefore encourage other states and correctional facilities to curtail or prohibit such payments as part of an effort to further ensure that inmates and their families have access to ICS at affordable rates.[377]

119. We recognize that some states have adopted reasonable rates that include a margin sufficient to allow providers to pay site commissions,[378] thus demonstrating that it is possible to have rates that are consistent with our rate caps but still allow for the payment of site commissions. The decision to establish fair and reasonable rate caps for ICS and leave providers to decide whether to pay site commissions – and if so, how much to pay[379] – is supported by a broad cross-section of commenters,

(Continued from previous page)
the Commission prohibit "any payment, service or product offered to, or solicited by any agency (or its agent) that is not directly related to, or integrated with, the provision of communications services in a correctional facility"). Securus urges the Commission to limit the definition of "site commissions" to monetary payments to correctional facilities or certain other enumerated entities. *See* Securus Second FNPRM Comments at 12-13; *see also* Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc. to Marlene H. Dortch, Secretary, FCC, Attach. at 2 (filed Feb. 9, 2015) (Securus Feb. 9, 2015 *Ex Parte* Letter). We agree with GTL, however, that "site commissions" should be construed more broadly. *See* GTL April 3, 2015 *Ex Parte* Letter at 8 (proposing to expand the definition suggested by Securus); *see also* Pay Tel *Second FNPRM* Reply at ii (suggesting that "site commissions" be defined expansively to include in-kind payments).

[373] *2013 Order*, 28 FCC Rcd at 14135, para. 54 (stating that "site commission payments are not part of the cost of providing ICS and therefore [are] not compensable in interstate ICS rates."); *see also 2002 Order*, 17 FCC Rcd at 3254-5, 3262, paras. 15 and 38.

[374] *See* 47 U.S.C. §§ 201(b) (requiring that interstate services be provided at just and reasonable rates) and 276(b)(1)(A) (requiring the Commission to establish a per call compensation plan that ensures ICS providers are "fairly compensated").

[375] *See, e.g.*, *Second FNPRM*, 29 FCC Rcd at 13180, para. 21. According to HRDC, for example, "[u]ntil the late 1980s when Evercom invented the kickback model of giving money to corrections officials in exchange for monopoly contracts, telephone services for prisoners and their families were cheap, high quality and affordable." HRDC July 29 Letter at 10; *see also* Wright Petitioners 2012 NPRM Comments at 9; Lipman July 6, 2015 *Ex Parte* Letter at 5.

[376] *See, e.g.*, *Second FNPRM*, 29 FCC Rcd 13170 at 13183-84, para. 27 (2014).

[377] *See, e.g.*, Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 5 (filed Sept. 25, 2015) (GTL Sept. 25, 2015 *Ex Parte* Letter) (explaining 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.").

[378] For example, the record indicates that rates for intrastate calls in New Hampshire are below $.06 per minute, even including a 20% site commission. *See* HRDC Second FNPRM Comments at 6 (explaining that New Hampshire has effective intrastate rates of $.043 per minute for collect calls and $.0586 per minute for prepaid and debit calls); *see also* Letter from Alex Friedmann, Assoc. Dir., HRDC to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at Exh. C (filed June 8, 2013) (stating that in 2012 New Hampshire imposes 20% site commissions).

[379] We recognize that, in the short term, some providers may be contractually obligated to pay site commissions, at least until their existing contracts expire, or are renegotiated. As explained below, we expect that the reforms adopted in this Order will trigger change-of-law provisions that will allow providers to negotiate modifications, including, possibly, changes to any site commission requirements. *See infra* para. 132.

including consumer advocates, such as the Wright Petitioners; ICS providers, such as CenturyLink, NCIC and ICSolutions; representatives of correctional facilities, such as Praeses; and state regulators, such as the Alabama PSC. This broad support from practically every type of interested party underscores the reasonableness of our approach. We will continue to monitor the market and will take appropriate action if we find that, notwithstanding our rate caps, site commissions are somehow driving ICS rates to levels that are unjust, unreasonable, or unfair.

1. Background

120. In the *2002 Order*, the Commission concluded that, consistent with prior precedent, site commissions ICS providers paid to inmate facilities were not a cost of providing payphone service, "but represent an apportionment of profits between the facility owners and the providers of [ICS]."[380] In the *2012 NPRM*, the Commission sought comment on its longstanding conclusion that site commissions are not a cost of providing ICS,[381] and additional comment and data on site commissions and their impact on ICS rates.[382]

121. In the subsequent *2013 Order*, the Commission affirmed the previous determination that site commissions "are not costs that are reasonably and directly related to the provision of ICS"[383] and determined that site commissions were "a significant factor contributing to high [ICS] rates."[384] The Commission concluded that, "under the Act, [site] commission payments are not costs that can be recovered through interstate ICS rates."[385] The Commission noted, however, the possibility that correctional facilities may incur costs in making ICS available to inmates and sought comment on whether there were any such costs that should be compensable through ICS rates.[386]

122. In the *Second FNPRM*, the Commission sought additional comment on potential reforms to site commissions[387] and its legal authority to "restrict the payment of site commissions in the ICS context pursuant to sections 276 and 201(b) of the Act."[388] As the Commission explained, site commissions "distort[] the ICS marketplace" by creating incentives for the facilities to select providers that pay the highest site commissions, even if those providers do not offer the best service or lowest

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[380] *See 2002 Order*, 17 FCC Rcd at 3255, para. 38; *cf. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order, 14 FCC Rcd 2545, 2515-16 (1999) (finding that location rents should not be treated as costs).

[381] *2012 ICS NPRM*, 27 FCC Rcd at 16642-43, para. 37.

[382] *2012 ICS NPRM*, 27 FCC Rcd at 16643, para. 38.

[383] *2013 Order*, 28 FCC Rcd at 14135, para. 54.

[384] *2013 Order*, 28 FCC Rcd at 14125, para. 34; *see also 2002 Order*, 17 FCC Rcd 3248, para. 10 (explaining that site commissions are generally the largest factor affecting ICS rates).

[385] *2013 Order*, 28 FCC Rcd at 14137, para. 56. In the *FNPRM*, the Commission also tentatively concluded "that site commissions should not be recoverable through intrastate rates." *2013 Order*, 28 FCC Rcd at 14175, para. 133.

[386] *2013 Order*, 28 FCC Rcd at 14135-36 n.203; 14175, para. 133.

[387] *Second FNPRM*, 29 FCC Rcd at 13180, para. 21. A few months before the *Second FNPRM* was released, the Wireline Competition Bureau issued a brief Public Notice further addressing site commissions. *See Wireline Competition Bureau Addresses the Payment of Site Commission for Interstate Inmate Calling Services*, WC Docket No. 12-375, Public Notice, 29 FCC Rcd 10043 (Wireline Comp. Bur. rel. 2014) (reiterating the Commission's 2013 findings regarding site commissions and explaining that the Commission would examine any payments of site commissions by ICS providers as part of any complaint proceeding challenging the lawfulness of an ICS provider's interstate rates.).

[388] *See Second FNPRM*, 29 FCC Rcd at 13184, para. 29.

rates.[389] The Commission cited responses to the Mandatory Data Collection showing that ICS providers paid over $460 million in site commissions in 2013 alone.[390] Press reports have cited even higher figures.[391] These payments represent a significant portion of total ICS revenues. Indeed, as the Commission has noted, site commissions can amount to as much as 96 percent of gross ICS revenues.[392] The Commission, therefore, sought comment on whether it should prohibit all site commission payments for interstate and intrastate ICS.[393] The Commission also sought comment on whether correctional institutions incur any costs in the provision of ICS, and requested data demonstrating that any costs that facilities bear are "directly related to the provision of ICS."[394] To the extent that correctional facilities were found to incur costs "reasonably and directly related to making ICS available," the Commission sought comment on whether recovery of those costs should be "built into any per-minute ICS rate caps."[395]

2. Discussion

123. Although we do not prohibit providers from paying site commissions, we do not consider the cost of any such payments in setting our rate caps.[396] Evidence submitted in response to the *Second FNPRM*[397] reinforces the Commission's conclusion that the site commissions ICS providers pay to some correctional facilities are not reasonably related to the provision of ICS and should not be considered in determining fair compensation for ICS calls.[398] HRDC, for example, describes site commissions as "legal bribes to induce correctional agencies to provide ICS providers with lucrative monopoly contracts."[399]

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[389] *Second FNPRM*, 29 FCC Rcd at 13180-81, para. 22.

[390] *Second FNPRM*, 29 FCC Rcd at 13181, para. 23.

[391] *See, e.g.*, Kery Murakami, *Inmate Calling Rate Cap to Be Considered in FNPRM*, Communications Daily, Sept. 25, 2014 (citing "$540 million paid in commissions nationally. . . ."); *see also* HRDC Jan. 13, 2015 Comments at 5 ("Securus issued a press release on October 31, 2014, touting the $1.3 billion the company had paid in ICS site commissions over the last 10 years.")

[392] *Second FNPRM*, 29 FCC Rcd at 13182-83, para. 26; *see also* HRDC Second FNPRM Comments at 7 (referring to Arizona DOC's March 2014 RFP, included in Exhibit G, where "CenturyLink, the winning bidder, was able to offer a commission rate of 93.9%); Comments of The Silent Sentence Coalition, WC Docket No. 12-375, Attach. at 1 (filed June 23, 2015); Letter from Marcus W. Trathen, Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 5-6 (July 8, 2015) (Pay Tel July 8, 2015 *Ex Parte* Letter) (explaining that in February 2014, the Georgia DOC received bids with 82%-85.1% commission rates, but additional requirements "reveal sky-high effective commission rates" of well over 90%).

[393] *Second FNPRM*, 29 FCC Rcd at 13183-84, para. 27.

[394] *Second FNPRM*, 29 FCC Rcd at 13180, para. 28.

[395] *Second FNPRM*, 29 FCC Rcd at 13188, para. 39; *see also id.* at 13189-90, para. 43.

[396] This decision is consistent with the Commission's previous finding that "only costs that are reasonably and directly related to the provision of ICS . . . are recoverable through ICS rates." *2013 Order*, 28 FCC Rcd at 14133, para. 53; *id.* at para. 54 (excluding site commission payments from the costs used to establish interim rate caps for interstate ICS); *see also 2002 Order*, 17 FCC Rcd 3248, at 3254, para. 15. Regardless of whether site commission payments constitute an "apportionment of profits" or a cost to the provider, they cannot be recovered through ICS rates unless they are "reasonably and directly related to the provision of ICS." *See 2013 Order*, 28 FCC Rcd at 14136-47, para. 55.

[397] *See Second FNPRM*, 29 FCC Rcd at 13180-91, paras. 21-47 (seeking comment on whether to prohibit site commissions).

[398] *See 2013 Order*, 28 FCC Rcd at 14136-37, para. 55.

[399] HRDC Second FNPRM Comments at 6; *see also* PPI *2012 NPRM* Comments Attach. at 2 (describing site commissions as "kickbacks"); Comments of the Wright Petitioners at 7 (filed Jan. 12, 2015) (discussing the "ICS kickback regime"); PPI June 21, 2015 *Ex Parte* Letter (attaching Bucyrus Telegraph Forum discussing "prison

(continued….)

Other parties use less colorful language, but still indicate that site commissions often "have nothing to do with the provision" of ICS.[400] We agree with commenters opposed to recovery of site commissions in ICS rates[401] and find that site commission payments should not be included in our rate cap calculations.

124. We therefore agree with inmate advocates, such as the Wright Petitioners[402] and the Civil Rights Coalition, a group of 20 national civil rights and social justice organizations;[403] providers, such as CenturyLink[404] and NCIC;[405] United States Senators;[406] and state regulators, such as the Alabama PSC[407] that, at this time, we should focus on our core ratemaking authority in reforming ICS and not prohibit or specifically regulate site commission payments. While we continue to view such payments as an apportionment of profit, and therefore irrelevant to the costs we consider in setting rate caps for ICS,[408] we do not prohibit ICS providers from paying site commissions.[409]

125. The record supports excluding site commission payments from the costs used to calculate the rate caps for ICS. Indeed, even many of the commenters that oppose a prohibition on site commissions urge the Commission to consider only costs related to the provision of ICS in calculating the

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phone commission kickbacks."); Letter from Paul Wright, Exec. Dir., HRDC to The Honorable Tom Wheeler, Chairman, FCC, WC Docket No. 12-375 (filed Oct. 4, 2015).

[400] Letter from Andrew D. Lipman, Morgan, Lewis, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 9 (filed April 8, 2015) (Lipman Apr. 8, 2015 *Ex Parte* Letter); *see also id.* at 10-13 (describing a wide variety of programs that are supported by site commissions but are unrelated to ICS); PPI Second FNPRM Reply at 7-9 (filed Jan. 27, 2015); CSSA Second FNPRM Comments at 2 (filed Dec. 19, 2014) (explaining that California law requires site commission proceeds to be deposited into an inmate welfare fund that supports educational, vocational, recreational, and rehabilitative programs); Securus Second FNPRM Reply at 12-13 (noting that it is "well documented in the record . . . that correctional facilities rely on site commission payments to fund prison initiatives and administer inmate welfare programs").

[401] For example, Verizon, a former provider of ICS, argues that "providers should not be permitted to recover the costs of commissions in their rates." Comments of Verizon, WC Docket No. 12-375, at 1-2 (filed Jan. 12, 2015).

[402] *See* Wright Petitioners Second FNPRM Comments at 11.

[403] *See* Letter from Asian Americans Advancing Justice, et al, to Chairman Wheeler, FCC, WC Docket No. 12-375 (filed Oct. 14, 2015) (asserting that the coalition supports the Commission's plans to proceed with cap rates for all ICS calls, including local, long-distance . . . and the imposition of limits on excessive fees on calls.).

[404] *See* Comments of CenturyLink, WC Docket 12-375, at 1 (filed May 20, 2015) (CenturyLink May 20, 2015 Comments) (supporting ICS reform that is "based on reasonable rate caps" and "sharp limits on ancillary fees").

[405] *See* NCIC Oct. 14, 2015 *Ex Parte* Letter at 3-7 (asserting that the Commission's recommendation for facility site commissions in the fact sheet is reasonable); Reply Comments of NCIC, WC Docket No. 12-375, at 4 (filed Jan. 27, 2015) (NCIC Second FNPRM Reply) (stating that "the FCC should cap the rates, ancillary fees, and single-payment products at the rates they deem reasonable to inmates and then let market-forces manage the cost-recovery paid to the jails and prisons.").

[406] *See* Letter from Cory A. Booker, United States Senator, *et al.*, to Chairman Wheeler, FCC, WC Docket No. 12-375, at 1 (filed Oct. 15, 2015) ("[I]t is of utmost importance that the FCC move forward with its proposal to curb intrastate calling rates for inmates. We applaud the FCC's discouragement of commissions paid by phone providers to institutions and continued oversight of this matter.").

[407] Alabama PSC Second FNPRM Comments at 2.

[408] *See 2013 Order*, 28 FCC Rcd at 14137, para. 56.

[409] Of course, providers' rates must comply with our rate caps, regardless of whether the provider pays site commissions.

rate caps.[410] If site commissions were factored into the costs we used to set the rate caps, the caps would be significantly higher.[411] Passing the non-ICS-related costs that comprise site commission payments including contributions to general revenue funds,[412] onto inmates and their families as part of the costs used to set rate caps would result in rates that exceed the fair compensation required by section 276[413] and that are not just and reasonable, as required by section 201.[414]

126. We note that several commenters argue that the programs currently supported by site commissions should be paid for out of tax funds collected from the population at large, or from other sources.[415] HRDC, for example, argues that "all taxpayers should fund the cost of operating correctional facilities, including the cost of providing ICS," just as homeowners pay taxes to fund schools, regardless of whether they have school-age children.[416] We need not reach such arguments to support our decision. Rather, we conclude that, because the programs in question are unrelated to the provision or use of ICS, the burden of paying for them may not, under the Communications Act, be imposed on end users of

[410] NSA, for example, asks only that we adopt an "additive amount to the ICS rate" that reflects the costs facilities incur "in connection" with ICS. Letter from Mary J. Sisak, Counsel, National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 9 (filed June 12, 2015) (NSA June 12, 2015 *Ex Parte* Letter); *see also, e.g.*, NCIC Second FNPRM Comments at 3-4.

[411] In addition, we find it likely that if we included the site commission payments in our rate cap calculation, we could not ensure that rates were consistent with the statute. Moreover, if providers could increase the rate cap and pass the cost of site commission payments – no matter how high those payments were – through to customers as part of the ICS rates, they would have no incentive to negotiate with facilities to lower or eliminate such costs. *Cf. 2002 Order*, 17 FCC Rcd 3248, para. 19 ("Any increase in an inmate calling services' revenue to permit a larger contribution to common costs . . . will only encourage higher location commissions."). Rather, the providers would be more likely to pay whatever site commissions facilities demanded in order to win an ICS contract, knowing they could pass the costs on to their (literally) captive customers. *See Second FNPRM*, 29 FCC Rcd at 13180-81, para. 22; *see also* Lipman July 6, 2015 *Ex Parte* Letter at 5 (explaining that "in the absence of any regulatory constraint, site commissions were not related in any way to cost, nor were they restrained by any market forces. ICS providers had an incentive to offer increased site commissions . . . and consumers had no influence [on site commission payments] even though this expense was being passed through to them in rates for calls."); *2002 Order*, 17 FCC Rcd 3428, para. 28.

[412] *See, e.g.*, Comments of Prisoners Legal Services of Massachusetts (PLS), WC Docket No. 12-375, at 7 (filed Mar. 25, 2013) (PLS NPRM Comments) (noting that commissions paid to county facilities in Massachusetts are placed in a fund available for use by the Sheriff, while commissions paid to the Department of Correction are transferred to the General Fund of the Commonwealth).

[413] 47 U.S.C. § 276(1)(A).

[414] 47 U.S.C. § 201(b).

[415] *See, e.g.*, HRDC Second FNPRM Comments at 2-3 ("If prison and jail officials believe certain programs are worthwhile and deserving of funding, then they should go to their respective legislative bodies and request funding for those programs, with the cost borne by all taxpayers through the legislative budget process – not just by prisoners and their family members through contractual fiat by corrections officials and ICS providers."); Comments of Prisoners Legal Services, WC Docket No. 12-375, at 3 (filed Jan. 12, 2015) (PLS Second FNPRM Comments) ("while treatment and educational programs in prison are underfunded and sorely needed, to pay for these programs through consumer telephone rates is unjust to consumers and harmful to society"); *but see, e.g.*, VA Ass'n of Regional Jails Aug. 5, 2015 *Ex Parte* Letter at 2 ("[I]f a rural county with finite resources is financially forced to choose between computers for 4th grade students in the elementary school or computers for inmates in the jail[,] then those choices are easily predictable.").

[416] Letter from Paul Wright, Executive Director, HRDC to Chairman Wheeler, FCC, WC Docket No. 12-375 at 7 (filed July 29, 2015) (arguing that "[p]risoners and their families already pay more than their fair share [for ICS] through inflated phone rates").

ICS.[417] As the Commission has explained, how facilities use the site commission payments they receive from ICS providers is irrelevant to our analysis:[418] "[t]he Act does not provide a mechanism for funding social welfare programs or other costs unrelated to the provision of ICS, no matter how successful or worthy."[419] Consistent with the record in this proceeding, as well as the Commission's decision in the *2013 Order*, we therefore exclude site commission payments from our rate cap calculations.[420]

127. In the *Second FNPRM*, the Commission sought comment on whether it could or should prohibit site commissions.[421] A variety of commenters support such a prohibition, primarily based on their belief that a rule against site commissions is needed to ensure that ICS rates are fair, just, and reasonable.[422] Other commenters, primarily sheriffs and others associated with correctional facilities, favor the continued use of site commissions. As noted above, many of these parties, however, appear to be concerned mostly with ensuring that facilities can recover costs they incur in allowing access to ICS.[423] As a threshold matter, as noted herein the record is not clear as to whether the correctional facilities in fact bear a cost in the provision of ICS that is unique to the provision of phone service in addition to the costs of operating a correctional facility. The record suggests that site commissions are used mainly to

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[417] *See 2013 Order*, 28 FCC Rcd at 14137-38, para. 57; *see also, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 17876-77, para. 666 (explaining that how revenues are used is "not relevant in determining whether . . . rates are just and reasonable in accordance with section 201(b)."); HRDC Second FNPRM Comments at 3 ("the FCC's duty is to ensure 'fair, reasonable and just' phone rates for all consumers. What the commissions are or are not used for is immaterial to that analysis."); Comment of Public Interest Groups, WC Docket No. 12-375, at 11 (filed Apr. 22, 2013) (stating that providers "cannot lawfully charge unjust rates even if the profits from those rates are put towards productive use."); Lipman Apr. 8, 2015 *Ex Parte* Letter at 9-10.

[418] *See 2013 Order*, 28 FCC Rcd at 14137-38, para. 57 (noting that although site commission payment may be used for "worthy goals," the Commission is "bound by our statutory mandate to ensure that end user rates are 'just and reasonable,' and "fair'").

[419] *2013 Order*, 28 FCC Rcd at 14137-38, para. 57. We also note that although site commissions are "the main cause of the dysfunction of the ICS marketplace," evidence suggests that they have only a minimal impact on prison facilities' budgets. *Second FNPRM*, 29 FCC Rcd at 13182, para. 24; *id.* para. 23 (citing evidence that site commission payments represent less than 0.5 percent of facilities' total budgets and noting that although site commission payments appear to be "of limited relative importance to the combined budgets of correctional facilities [they have] potentially life-altering impacts on prisoners and their families"); *see also* Letter from Paul Wright, HRDC to Chairman Wheeler at 3-5 (filed July 29, 2015) (HRDC July 29, 2015 *Ex Parte* Letter).

[420] *2013 Order*, 28 FCC Rcd at 14137, para. 56.

[421] *Second FNPRM*, 29 FCC Rcd at 13180-13191, paras. 21-46.

[422] *See, e.g.*, HRDC Second FNPRM Reply at 1 ("the time has come . . . to ban ICS site commissions . . . to ensure just, reasonable and fair rates for consumers"); Comments of American Bar Association, WC Docket No. 12-375, at 11 (filed Jan. 26, 2015) (prohibiting site commissions "would not only cause a sharp drop in rates prisoners are forced to pay, but would further stop correctional authorities from charging prisoners fees for non-commissary services"); Comments of U.S. Conference of Catholic Bishops, WC Docket 12-375, at 1 (filed Jan. 12, 2015) ("The Commission should move forward with its proposal to eliminate site commission payments"); Prison Policy Initiative Second Further Notice Reply at 2 ("site commissions distort what little competition exists in the ICS market"); Letter from Brian Dolinar, Illinois Campaign, to Chairman Wheeler, FCC, WC Docket 12-375, at 1 (filed Aug. 24, 2015) (urging the Commission to eliminate site commissions).

[423] The NSA, for example, asks only that we adopt an "additive amount to the ICS rate" that reflects the costs facilities incur "in connection" with ICS. NSA June 12, 2015 *Ex Parte* Letter at 9; *see also, e.g.*, NCIC Second FNPRM Comments at 3-4. According to the Wright Petitioners, "the five largest ICS providers, making up more than 95% of the ICS industry, have expressed their support for the elimination or substantial reduction of the current kickback regime. Apparently, these ICS providers would have the FCC adopt rules limiting the sharing of ICS revenue to only those occasions where there are documented administrative and security costs associated with the provisioning of ICS by the correctional authorities." Wright Petitioners Second FNPRM Comments at 8.

fund a wide and disparate range of activities, including general governmental or correctional activities unrelated to the costs of providing ICS by either the provider or facility.[424] Even assuming facilities do incur costs tied to the provision of ICS, we have addressed such a concern by not prohibiting providers from sharing their profits with correctional facilities to recover such costs, if appropriate. Some of these commenters also argue that site commissions should be preserved because they provide an important incentive for facilities to make ICS available to their inmates.[425] Another group of commenters question the Commission's legal authority to prohibit site commissions[426] and argue that prohibiting site commissions would not produce any material benefit.[427] A number of commenters, representing a wide range of interests, urge the Commission to follow the lead of the Alabama PSC[428] and restrict site

[424] *See* Letter from Gregory J. Ahern, Sheriff-Coroner, Alameda Co., CA to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed Jan. 16, 2015) ("Through our Inmate Services Unit, inmates are provided re-entry services, substance abuse programs, and educational/vocational classes to help them lead healthy and productive lives once released from incarceration. The mission of Inmate Services is to reduce the impact of crime on our communities by helping inmates acquire the skills, attitudes, and values needed to find and hold jobs and become socially responsible. With the provided tools, former inmates have the opportunity to make positive contributions to their families and the communities in which they live. The revenue received from the inmate phone system is the primary source of funding for these programs."); *see also 2013 Order*, 28 FCC Rcd at 14137-38, para. 57.

[425] Comments of National Sheriffs' Association, WC Docket No. 12-375, at 7 (filed Jan. 12, 2015) (NSA Second FNPRM Comments) ("eliminating payments to jails will reduce the ability and incentive of Sheriffs to allow ICS in jails."); Comments of Georgia Dept. of Corrections, WC Docket No. 12-375, at 14 (filed Jan. 12, 2015) (Georgia DOC Second FNPRM Comments) ("the elimination of site commissions may cause some correctional agencies to reduce their investment in ICS"); *see also, e.g.*, Letter from George T. Maier, Sheriff, Stark County, Ohio, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Apr. 14, 2015) (one of over 90 form letters from sheriffs arguing that correctional facilities must recover their costs in order to continue to allow the wide availability of ICS); Letter from Marcus Trathen, Counsel, Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Oct. 8, 2015) (Pay Tel Oct. 8, 2015 *Ex Parte* Letter) (payments to facilities would "incent[] facilities to enter into contracts with lower calling rates in order to stimulate increased phone usage").

[426] *See, e.g.*, ICSolutions Second FNPRM Comments at 4 ("ICSolutions does not believe the Commission has the jurisdiction to regulate or otherwise restrict site commissions"); *see also* Letter from Thomas M. Dethlefs, Associate General Counsel - Regulatory, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (CenturyLink May 14, 2015 *Ex Parte* Letter) ("the Commission does not have legal authority over … site commissions"); Praeses Sept. 9, 2015 *Ex Parte* Letter at 3.

[427] *See, e.g.*, OSSA Second FNPRM Comments at 1; CenturyLink Second FNPRM Reply at 23 ("proposals to ban site commissions altogether are likely to merely shift commission payments from monetary payments to various difficult to monitor in-kind payments."); ICSolutions Second FNPRM Comments at 14 ("restricting or eliminating commissions will produce unintended consequences of increasing costs by encouraging 'gold-plated' service and in-kind payments to facilities"); Wood Second FNPRM Comments at 13; Alabama PSC Second FNPRM Comments at 5 ("we disagree that eliminating site commissions alone will enable the market to perform properly."); Reply of Pay Tel Communications, WC Docket No. 12-375, at 33 (filed Apr. 22, 2013) ("Pay Tel disagrees that elimination of commissions, on its own, will lead to reduced rates."); *see also* Reply of Wright Petitioners, WC Docket No. 12-375, at 10 (filed Jan. 27, 2015) (Wright Petitioners Second FNPRM Reply) ("[i]t is likely that any attempt by the FCC to regulate kickbacks will merely lead to new and innovative strategies by ICS providers and correctional authorities to divvy up ICS revenue."); Praeses Second FNPRM Comments at 25, n. 54 (arguing that a prohibition against site commissions would be "unworkable").

[428] *See* Alabama PSC Dec. 9, 2014 Further Order, Attach. at 12-15, paras. 4.04, 4.06 (stating that although the Alabama Order does not ban site commissions the Alabama PSC hopes that site commission payments will be reduced as a result of the Order). *But see* GTL Apr. 3, 2015 *Ex Parte* Letter at 7 ("GTL has appealed the [Alabama] PSC's [ICS] decision … arguing that the newly adopted rate caps are confiscatory in light of the PSC's failure to address the payment of site commissions"). The Alabama Supreme Court granted requests to stay the PSC order's application to Securus and GTL; although this decision did not apply to other ICS providers, CenturyLink's concerns that this would create an unlevel playing field led the Alabama PSC to issue a temporary stay of the Order's implementation date until July 1, 2015. *See* Letter from Darrell A. Baker, Director, Utility Services

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commissions only indirectly, by imposing caps on ICS providers' rates, thereby limiting the amount of profit available to pay site commissions.[429] The Wright Petitioners, among others, suggest that we adopt a similar approach here, arguing that the Commission should "simply establish an ICS rate that complies with Sections 201, 205, and 276 of the Act, and let ICS providers and correctional authorities allocate the revenue in any manner they wish."[430] ICS provider NCIC "agrees that jails and prisons should be allowed [to seek] site commission payments after the FCC caps the rates, ancillary fees and convenience payment options, which will reduce commission payments to reasonable levels to provide cost-recovery."[431] GTL disagrees, however, arguing that under the Alabama model, "providers must generate revenue to pay the unconstrained site commissions . . . which puts upward pressure on end-user prices."[432] In fact, GTL and others contend that a regulatory regime that permitted providers to make site commission payments, but did not take those payments into account in setting the rates would result in an unconstitutional "taking" in violation of the Fifth Amendment,[433] and is "arbitrary and capricious."[434]

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Division, Alabama PSC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 6, Exhibit 2 at 4 (filed Feb. 10, 2015). When the Order was implemented on July 1, 2015, GTL issued a press release stating that it would voluntarily "alter its rates and fees for inmate calling in the state of Alabama to comply with those set by the Alabama Public Service Commission (PSC) even though it is exempt from implementing the changes by virtue of a pending lawsuit." *See* Press Release, FCC, GTL, GTL Announces New Rates and Fees for Alabama (July 1, 2015), http://www.gtl.net/gtl-announces-new-rates-and-fees-for-alabama/ (last visited Oct. 15, 2015).

[429] *See, e.g.*, NCIC Second FNPRM Comments at 3 ("By capping the rates, the FCC has already eliminated the potential for the rates to continue to rise whether commissions are paid or not. Furthermore, if the FCC caps ancillary fees and single payment (Premium / Convenience products) as is being done in Alabama, actual commissions paid to jails will drop significantly, as well as profit made by the ICS providers."); Comments of Consolidated Telecom, Inc., WC Docket No. 12-375, at 7 (filed Dec. 19, 2014) (CTEL Second FNPRM Comments) ("Completely eliminating site commissions would seem an unnecessary device to lower rates, because rates will be capped in any event."); Letter from Thomas Dethlefs, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 4 (CenturyLink July 20, 2015 *Ex Parte* Letter) ("the Commission should set ICS rate caps with sufficient headroom to allow for a reasonable site commission payment").

[430] Wright Petitioners Second FNPRM Comments at 11; *see also* Comments of Sheriff John Bishop, WC Docket No. 12-375, at 2 (filed Jan. 5, 2015) ("We would propose that instead of prohibiting site commissions, the Commission cap the rates which ICS providers may charge for calls, and let market forces dictate how much of the profit ICS providers are willing to share with correctional facilities."); *see* Letter from Darrell A. Baker, Director of Utility Services Division, Alabama PSC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3-4 (filed Jan. 16, 2015) (explaining that "the APSC believes a holistic approach is necessary and that by simultaneously setting just and reasonable rates and fees in all sources of provider revenue, site commissions will return to a reasonable level that more closely approximates facility costs without the need to proceed down the slippery slope of interference in contractual matters"); *but see* GTL Apr. 3, 2015 *Ex Parte* Letter at 4-5 ("Contrary to the views of the Alabama Public Service Commission ('PSC'), it is not enough to simply establish backstop rate caps and accept a defined set of ancillary fee caps.").

[431] Letter from William L. Pope, President, NCIC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed May 18, 2015) (NCIC May 18, 2015 *Ex Parte* Letter); *see also* CenturyLink July 20, 2015 *Ex Parte* Letter at 4.

[432] GTL Second FNPRM Comments at 16, n. 74; *see also* Pay Tel July 8, 2015 *Ex Parte* Letter at 5, 8-9 (claiming that facilities and their representatives continued to demand site commissions on interstate rates long after the Commission excluded the costs of site commission payments from interstate ICS rates).

[433] *See* GTL Apr. 3, 2015 *Ex Parte* Letter, at 7; Letter from Andrew D. Lipman, Attorney, Morgan, Lewis & Bockius LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No 12-375, at 7 (filed June 1, 2015) (Lipman June 1, 2015 *Ex Parte* Letter) (claiming that "imposing rate caps on ICS providers that do not permit ICS providers to recover the costs of site commissions while at the same time doing nothing to end the practice of site commissions would necessarily result in rates that are confiscatory in violation of the Fifth Amendment to the Constitution"); *see also* Securus Petition For Stay (arguing that a failure to adequately account

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128. Based on the evidence in the record, we conclude that we do not need to prohibit site commissions at this time to achieve the statutory directives of ensuring that ICS rates are just, reasonable, and fair.[435] The fact that we do not prohibit site commission payments does not mean, however, that we have failed to address site commissions.[436] To the contrary, we have addressed the harmful effects of outsized site commissions by establishing comprehensive rate caps and caps on ancillary service charges that may limit providers' ability to pass site commissions through to ICS consumers. We have also made the considered decision to establish caps on rates and ancillary service charges and allow market forces to dictate adjustments in site commission payments. As noted below, this approach is consistent with the Commission's general preference to rely on market forces, rather than regulatory intervention, wherever reasonably possible.[437] Our expectation that ICS providers and correctional facilities will find an approach that meets their needs and complies with our rate caps is neither arbitrary nor capricious. In fact, evidence in the record demonstrates that ICS rates can be set at levels that are well within our rate caps while allowing for fair compensation and still leaving room for site commission payments.[438] For example, in Pennsylvania, the per-minute rate of $0.059 includes a 35 percent site commission.[439] Similarly, in New Hampshire, the state DOC lowered intrastate rates to less than $0.06 per minute with a 20 percent site commission.[440] Thus, it is possible to have reasonable rates and fair compensation without expressly prohibiting site commissions.

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for site commissions led the FCC to "set rate caps that are confiscatory in violation of the Takings Clause of the Fifth Amendment"); Letter from Darrell A. Baker, Director, Utility Services Division, Alabama Public Service Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Feb. 10, 2015), Attach. 1 at 3, Securus' Application for Supersedeas and Order Thereon, Case No. 1140266 (Ala. filed Dec. 16, 2014) (arguing that the Alabama Public Service Commission's failure to cap site commissions or allow adjustments to inmate calling rates to accommodate payment of unrestricted commissions "creates a capricious, unpredictable, and possibly confiscatory result in violation of the Fifth and Fourteenth Amendments of the United States Constitution.").

[434] Letter from Andrew D. Lipman, Attorney, Morgan, Lewis & Bockius LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No 12-375, at 6 (filed Oct. 7, 2015) (Lipman Oct. 7, 2015 *Ex Parte* Letter).

[435] *See, e.g.*, Comments of Combined Public Communications, Inc., WC Docket No. 12-375, at 3 (filed Dec. 23, 2014) (CPC Second FNPRM Comments) (arguing that it is possible to achieve reasonable rates without prohibiting site commissions and noting that "over the last ten years CPC has been providing service with flat per minute usage rates sometimes as low at $0.10."); Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Oct. 16, 2015) (Public Knowledge Oct. 16, 2015 *Ex Parte* Letter) (agreeing that "imposing a cap on rates, combined with continued close monitoring of the industry, will provide enormous and much needed relief for the families of those incarcerated."); ACC Second FNPRM Comments at 10.

[436] *See* Lipman Oct. 7, 2015 *Ex Parte* Letter at 6-8.

[437] Although our approach in this Order is similar to the one the Commission took in the *2013 Order*, one important difference is that our current reforms are not limited simply to interstate rates for ICS. Instead, we have addressed a broad range of issues, including both interstate and intrastate ICS rates and ancillary charges. These comprehensive reforms leave less room for entities to seek to "game" the rules by, for example, attempting to recover site commission payments through intrastate rates that were not subject to our interim rate caps.

[438] *See* Securus Second FNPRM Reply at 14 (listing several states that have not eliminated site commissions, but maintain ICS rates between $0.12 and $0.25 per minute).

[439] *See* HRDC Second FNPRM Comment at 5-8 (also noting that New Hampshire has effective intrastate rates below $.06 per minute despite imposing a 20% site commission).

[440] *See* HRDC Second FNPRM Comment at 6 (explaining that New Hampshire "lowered their intrastate ICS rates following the Commission's September 26, 2013 Order" and has effective intrastate rates of $.043 per minute for collect calls and $.0586 per minute for prepaid and debit calls); Comment of Alex Friedmann, Human Rights

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129. We emphasize that the actions we take here are based on our ratemaking authority[441] and are intended to ensure fair, just, and reasonable ICS rates. The caps and restrictions we impose on providers' rates should eliminate or substantially reduce the ability of site commissions to inflate rates above providers' costs or reasonable profit to otherwise distort ICS rates.[442] As explained elsewhere in this Order,[443] we have seen some positive steps toward the lowering and/or elimination of site commissions and we believe that this trend, coupled with the actions we take today, constitutes a reasonable means of addressing ICS issues one step at a time, given the fact that some portion of some site commissions are said to represent the recovery of reasonable institutional costs.[444] We reiterate that we will, however, continue to monitor the ICS market and will not hesitate to take additional action to prohibit site commissions, if necessary.[445]

130. Our decision not to prohibit site commission payments should not be viewed as an endorsement of such practices.[446] Rather, our decision simply reflects our focus on achieving our statutory objectives with only limited regulatory intervention. We understand the positions of those parties calling for the regulation of site commission practices,[447] or even those calling for a complete ban of them.[448] We also acknowledge that some commenters have questioned our legal authority to prohibit site commissions.[449] Other parties argue that we have clear authority to regulate site commission

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Defense Center, WC Docket 12-375, at 4-5, Exhibit C (filed Mar. 25, 2013) (HRDC 2013 Order Comments) (stating that New Hampshire imposes 20% site commissions).

[441] *Cf.* Lipman July 6, 2015 *Ex Parte* Letter at 2 ("[i]t is well-established that the Commission has broad discretion in establishing just and reasonable rates . . . .").

[442] *Cf.* HRDC July 29, 2015 *Ex Parte* Letter at 7 (explaining that before the advent of site commissions in the late 1980s, "nearly all prisons and jails in the United States . . . provided phone services to prisoners at a fraction of the costs being charged now").

[443] *See supra* para. 49.

[444] *See infra* Section IV.B.2.a.

[445] *See infra* Section IV.B.2.b.

[446] To the contrary, the evidence in the record suggests that the unconstrained use of site commissions distorts the market for ICS and is harmful to both providers and users of ICS. *Second FNPRM*, 29 FCC Rcd at 13180-81, para. 22; Adeshina Emmanuel and Olivia Exstrum, Illinois and Cook County Reconsider Profits From Inmate Calls at 4, filed as attachment to Illinois Campaign *Ex Parte* Letter (quoting Peter Wagner of Prison Policy Initiative's statement that the current site commission structure "gives an incentive to the sheriff to award a contract to the vendor that gives the best deal to the sheriff, and not the one that gives the best deal to the consumer."); *cf.* Letter from Peter Wagner, Executive Director, Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (Aug. 12, 2015) (agreeing that "the current market dysfunction in the prison and jail communications industry is largely the product of the [site] commission system").

[447] *See, e.g.*, Comments of Lattice, Inc., WC Docket No. 12-375, at 6 (filed Jan. 12, 2015) ("Failure to regulate site commissions would impede the purposes of Section 276 of the Communications Act."); Joint Provider Proposal at 4 (filed Sep. 15, 2014) ("ICS providers should be barred from paying and correctional facilities . . . should be prohibited from soliciting or accepting any other compensation or payment other than the FCC-prescribed admin-support payment").

[448] *See, e.g.*, HRDC Second FNPRM Comments at 5 ("the elimination of commission payments is the only way correctional facilities will begin to enter into ICS contracts that provide just and reasonable phone rates for prisoners and their families.").

[449] *See, e.g.*, NCIC Second FNPRM Comments at 9 (filed Jan. 12, 2014); Comments of Praeses LLC, WC Docket No. 12-375, at 23-25 (filed Jan. 12, 2015) (Praeses Second FNPRM Comments); Comments of Inmate Calling Solutions, LLC, WC Docket No. 12-375, at 4-7 (filed Jan. 12, 2015).

payments.[450] Ultimately, however, we do not need to determine whether we have authority to ban site commission payments, given our decision to take a less heavy-handed approach, similar to that adopted by the Alabama PSC.[451] This approach is consistent with the Commission's general preference to rely on market forces, rather than regulatory fiat, whenever possible.[452]

131. We expect that the approach adopted in this Order will result in lower site commissions,[453] and strongly encourage additional jurisdictions to eliminate site commissions altogether to help ensure that inmates and their families have access to ICS at affordable rates. We applaud recent efforts by New Jersey and Ohio to eliminate site commissions.[454] The per-minute intrastate ICS rates in these states have dropped considerably (from $0.15 to under $0.05 in New Jersey and $0.39 to $0.05 in Ohio).[455] Pay Tel estimates that in eight states that have eliminated site commissions the rates average less than $0.07/minute.[456] The actions taken by these states demonstrate that site commissions can be

[450] *See, e.g.*, Letter from Andrew D. Lipman, Attorney, Morgan Lewis & Bockius LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 10 (filed June 1, 2015) (arguing that the "FCC has broad authority to prohibit the use of site commissions"); Reply of Lattice, Inc., WC Docket No. 12-375, at iii, 14 (filed Jan. 27, 2015) (Lattice Second FNPRM Reply) ("The Commission's jurisdiction is not limited to inmate calling rates but extends to site commissions because they impact the cost of inmate calling and the availability of ICS. . . . Even if the Commission lacks jurisdiction over the correctional facilities themselves, Commission precedent supports regulation of the commissions paid by ICS providers and the contracts they enter into."); Public Knowledge Oct. 16, 2015 *Ex Parte* Letter at 1 (noting that "Public Knowledge believes the Commission has authority to ban [site] commissions.").

[451] *See, e.g.*, Letter from Lee Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed May 19, 2015) (explaining that the FCC has the authority to eliminate site commissions, but should not do so; instead the FCC should allow providers to "allocate excess revenue to cover any ICS costs incurred by the correctional facilities."); CPC Second FNPRM Comments at 3 ("Reasonable rates can be achieved even with the inclusion of site commission as legitimate expenses. For example, over the last ten years CPC has been providing service with flat per minute usage rates sometimes as low at $0.10."); NCIC Second FNPRM Reply at 2-3; CTEL Second FNPRM Comments at 6-7 ("The FCC has received comments from a number of prison associations expressing concerns about the elimination of site commissions. . . . These comments urged the FCC to consider mirroring the overall regulation recently implemented in Alabama."); *see also supra* note 430 (quoting Alabama PSC Second FNPRM Comments).

[452] *See, e.g.*, *2013 Order*, 28 FCC Rcd at 14128, para. 39 ("The Commission traditionally prefers to rely on market forces, rather than regulation, to constrain prices and ensure that rates are just and reasonable.").

[453] *See* Praeses Oct. 13, 2015 *Ex Parte* Letter at 3 (arguing that "the Commission can effectively drive down the actual cost of ICS to inmates and their friends and family members by establishing ICS rate caps and tight restrictions on ancillary fees" without "directly" regulating site commission payments); HRDC Jan. 13, 2015 Comments at 4 ("As a practical matter, if the Commission imposes caps on ICS rates that are low enough . . . ICS providers will not be able to provide more than token amounts to the correctional agencies."); *see also* Letter from Darrell A. Baker, Director, Utility Services Division, Alabama Public Service Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 11 (filed Feb. 10, 2015) (Alabama PSC Feb. 10, 2015 *Ex Parte* Letter) (noting that "the APSC believes . . . that by simultaneously setting just and reasonable rates and fees in all sources of provider revenue, site commissions will return to a reasonable level that more closely approximates facility costs without the need to proceed down the slippery slope of interference in contractual matters outside our regulatory jurisdiction.").

[454] *See* NJAID/NYU IRC May 15, 2015 *Ex Parte* Letter at 2-3 (noting that the new RFP for inmate calling services in New Jersey state correctional institutions "explicitly excludes commissions"); *see also* Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (May 18, 2015) (GTL May 18, 2015 *Ex Parte* Letter).

[455] *See supra* para. 49; *see also* GTL May 18, 2015 *Ex Parte* Letter at 3 ("In New Jersey and Ohio, the elimination of site commission payments has resulted in lower ICS rates.").

[456] *See* Pay Tel Second FNPRM Comments at 31; *see also Second FNPRM*, 29 FCC Rcd at 13180, para. 21.

eliminated without sacrificing facilities' ability to implement robust security protocols. Additional states continue to take similar steps to curb or prevent the use of site commissions in their state prison systems[457] and we urge other states to take similar actions. We also reiterate that rates can be significantly below our rate caps and still offer ICS providers sufficient profit to allow them to pay reasonable site commissions.[458]

132. Further, we note that, despite what some entities appear to suggest, this Order does not maintain the *status quo* in the ICS market.[459] To the contrary, we conclude that our actions in this Order constitute changes in law and/or instances of force majeure that are likely to alter or trigger the renegotiation of many ICS contracts.[460] We also think it reasonable to anticipate that ICS providers are on notice of these changes in law and, going forward, will not enter into contracts promising exorbitant site

[457] GTL Apr. 3, 2014 *Ex Parte* Letter at 6 (noting that West Virginia reviewed recent bids without regard to site commission payment percentages); HRDC May 21, 2014 *Ex Parte* Letter at 1. Other states that have acted to limit or eliminate site commissions include Alabama, California (prisons only), Michigan (prisons only), Nebraska (prisons only), New Mexico (limited impact on jails), New York (prisons only), Rhode Island (prisons only), and South Carolina (prisons only). *See* Pay Tel Jan. 7, 2015 *Ex Parte* Letter at 2-4.

[458] *See* HRDC Second FNPRM Comments at 5-8. Some parties argue that it would be confiscatory for the Commission to exclude site commission payments from the costs used to set ICS rates without also prohibiting providers from paying such site commissions. *See, e.g.*, Letter from Andrew D. Lipman, Attorney, Morgan, Lewis & Bockius LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No 12-375, at 7 (filed June 1, 2015) (Lipman June 1, 2015 *Ex Parte* Letter). As explained below, these parties appear to underestimate the difficulty of showing that a regulatory rate is confiscatory. In addition, the new rate caps we adopt in this Order constitute a change that should permit providers to renegotiate many, if not all, of their existing contracts that require them to charge rates above our caps. *See infra* Section IV.E.3. Moreover, our waiver process remains available to any providers that find that the rate caps do not result in fair compensation for their services, whether due to demands for site commission payments or other factors.

[459] *See* Letter from Andrew D. Lipman, Morgan, Lewis & Bockius to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Oct. 5, 2015) ("[C]orrectional facilities perceive the FCC's proposed rules as a victory allowing them to continue demanding excessive site commissions from ICS providers. The AJA alert's headline emphasizes that site commissions are 'allowed,' suggesting that its members have no intention of changing their practices that drive up the rates for ICS to unreasonably high levels.");*but see, contra*, Letter from Phil Marchesiello, Counsel to Praeses LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 6 (filed Oct. 13, 2015) (noting, *inter alia* that "[p]roviders are economically sophisticated and, as such, in most cases have negotiated terms in their ICS contracts that take into account that the FCC will modify permissible ICS rates.") Praeses further explains that these provisions are likely to lead to negotiations that will result in amendments that would "prevent any loss to a Provider that otherwise may have occurred as a result of the" FCC's new ICS rules and policies. *Id*.

[460] In this item, we amend the Federal Code of Federal Regulations by adopting final, substantive rules that are binding upon ICS providers. These new rules – including our new rate caps – clearly have the force of law and, accordingly, should trigger contractual change-of-law provisions, absent some unusual circumstance not presented to us in the record. *See, e.g., MolyCorp., Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) ("To determine whether a regulatory action constitutes promulgation of a regulation, we look to three factors: (1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency. *See Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418 (D.C. Cir. 1998). The first two criteria serve to illuminate the third, for the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law."). At least one party is concerned that the correctional facilities will not agree to renegotiate contracts in light of our reforms. Letter from Andrew Lipman, Attorney, Morgan, Lewis & Bockius, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3-4 (filed Oct. 9, 2015). This concern appears to be unfounded, however. For example, Praeses, which negotiates contracts on behalf of many correctional facilities, indicates that the reforms adopted in this Order will trigger modifications of ICS contracts. *See* Praeses Oct. 13, 2015 *Ex Parte* Letter at 3-4.

commission payments that they will not be able to recover through their ICS rates under our rate caps.[461] Indeed, we anticipate that the reforms adopted in this Order will help recalibrate ICS market competition by motivating correctional facilities to evaluate bids based on factors other than the highest site commission.[462] However, as noted above, we will monitor the market and will take appropriate action if our prediction proves inaccurate.

a. Facility Costs Related to Providing ICS

133. *Background.* In the Mandatory Data Collection, the Commission required ICS providers to submit their costs related to the provision of ICS, including their telecommunications, equipment and security costs.[463] For example, in the Mandatory Data Collection Instructions, the Bureau directed ICS providers to include "security costs incurred by the ICS provider in the provision of inmate calling services, such as, but not limited to, voice biometrics technology and call recording and monitoring."[464] In their responses, ICS providers indicated that the data they filed included costs associated with security features relating to the provision of ICS.[465]

134. In the *Second FNPRM*, the Commission noted that the record to-date was mixed regarding how much, if anything, facilities spend on ICS.[466] It sought comment on the "actual costs" that facilities may incur in the provision of ICS and the appropriate vehicle for enabling facilities to recover such costs.[467] The Commission also sought comment on whether any such costs should be recoverable through the per-minute rates ICS providers charge inmates and their families.[468] In response, some law enforcement representatives assert that correctional facilities incur costs related to "call monitoring, responding to ICS system alerts, responding to law enforcement requests for records/recordings, call recording analysis, enrolling inmates for voice biometrics, and other duties," including "administrative

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[461] Fact Sheet, FCC, Ensuring Just, Reasonable, and Fair Rates for Inmate Calling Services (Sept. 30, 2015), https://www.fcc.gov/document/fact-sheet-ensuring-just-reasonable-fair-rates-inmate-calling. To be clear, we do not here concede that providers that have already entered into such contracts are entitled to any regulatory relief. *See, e.g., infra* para. 143 (observing that providers have been on notice for years that the Commission might adopt rate caps, or even eliminate site commissions, and therefore any claims that our actions today upset "investment-backed expectations of ICS providers" are likely to fail, particularly claims from providers that recently entered into new contracts with high site commissions in an effort to circumvent possible Commission regulations); *see also infra* note 918. Thus, we are not persuaded by arguments urging us to grandfather existing contracts. *See, e.g.*, Letter from Andrew Lipman, Attorney, Morgan, Lewis & Bockius, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed Oct. 9, 2015); *but cf.* Joint Provider Oct. 15, 2015 *Ex Parte* Letter at 5-9 (arguing that the Commission has the authority to regulate existing contracts).

[462] HRDC Second FNPRM Comments at 4 (explaining that "if the Commission imposes caps on ICS rates that are low enough . . . [t]his will also have the effect of leveling the playing field, because ICS contracts will no longer be bid based on the highest commission, as has been the historical practice."); Alabama PSC Feb. 10, 2015 *Ex Parte* Letter at 11 (explaining that in states where rates have significantly decreased, providers are now chosen based on low prices to the end user.); GTL Sept. 25, 2015 *Ex Parte* Letter, Attach. at 5.

[463] *See 2013 Order*, 28 FCC Rcd at 14172-72, paras. 124-26.

[464] *See* Mandatory Data Collection Instructions at 4, *available at* https://www.fcc.gov/encyclopedia/ics-mandatory-data-collection.

[465] *See, e.g.*, GTL Mandatory Data Collection Response at 7 (including ICS-related security costs); Securus Mandatory Data Collection Response at 6-7 (including costs for the security necessary for basic ICS).

[466] *Second FNPRM*, 29 FCC Rcd at 13189, paras. 41-43.

[467] *Second FNPRM*, 29 FCC Rcd at 13139, para. 41.

[468] *Second FNPRM*, 29 FCC Rcd at 13189-90, paras. 43-44.

duties" that arguably are related to ICS.[469] Some ICS providers, however, contend that many of the activities the facilities claim as ICS-related costs are, in fact, handled by the ICS provider.[470] For example, Securus states that it performs most ICS-related tasks for facilities, including handling U.S. Marshal inquiries, cell phone detection and interception, listening to calls, and providing call recordings to courts.[471] Similarly, GTL explains that the "established industry protocol" is for ICS providers to handle security duties for the correctional facilities they serve, either as part of a turnkey ICS product or as a condition of the contract award, regardless of the size of the facility.[472]

135. Although some commenters argue that allowing ICS creates costs for facilities,[473] others question whether correctional facilities incur any costs that should be passed on to consumers as part of the per-minute rates for ICS.[474] One issue is whether the costs parties seek to attribute to ICS are, in fact, costs that facilities would incur regardless of whether they allowed ICS. Andrew Lipman, for example, argues that many correctional facilities seek payment for "activities that have nothing to do with the provision of a telecommunications service."[475] These parties argue that the costs facilities seek to pass on

[469] NSA June 12, 2015 *Ex Parte* Letter at 2 (filed June 12, 2015) (NSA June 12, 2015 *Ex Parte* Letter).

[470] *See, e.g.*, GTL Second FNPRM Reply at 15 (explaining that GTL routinely administers PIN, debit, and voice biometric systems for its customers, maintains databases of allowed and blocked numbers, generates reports and statistical analyses, and responds to law enforcement requests in the correctional facilities it serves); Securus Second FNPRM Reply at 2 (confirming that Securus performs tasks such as maintaining phones and monitoring maintenance of phones and administering the inmate phone platform).

[471] Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Dec. 8, 2014) (Securus Dec. 8, 2014 *Ex Parte* Letter); *but see* Letter from David S. Gould, Cayuga County Sheriff, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed Dec. 18, 2014) (arguing that corrections staff perform all of the tasks enumerated by Securus).

[472] GTL Second FNPRM Reply at 15; *but see* Comments of Oregon State Sheriffs' Association, WC Docket No. 12-375, at 2-3 (filed Apt. 22, 2013) (OSSA Apr. 22, 2013 Comments) (describing various costs facilities incur in making ICS available); NSA Second FNPRM Comments at 2-3 (listing tasks that may be performed by facility officers).

[473] *See, e.g.*, Pay Tel Second FNPRM Comments at 60 ("There can be no dispute at this time that sheriffs and jail administrators do incur real costs for the provision of ICS."); CenturyLink Second Reply at 19 ("[c]orrectional facilities incur legitimate costs in making ICS available"); GTL Sept. 19, 2014 *Ex Parte* Letter, Attach. 2 at 3 ("Correctional facility-level staffing costs associated with ICS are … generally non-trivial."); Georgia DOC Second FNPRM Comments at 17 ("Like all correctional agencies, GDC incurs substantial costs in connection with its ICS functions"); Letter from Mary J. Sisak, Counsel to National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Feb. 18, 2015) (discussing the "costs incurred by Sheriffs to allow inmate calling services"). Over 90 sheriffs filed form letters in support of NSA's comments and reply comments in the proceeding and noted that "[i]f our locality continues to incur further cuts to our budget then it will be difficult to keep pace with operational costs." *See, e.g.*, Letter from Dana Lawhorne, Sheriff, City of Alexandria, VA to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Apr. 14, 2015). The form letter also notes that "[i]n addition to security and administrative functions that must be maintained, there are programs for inmates that we are required by law to maintain. If the cost of allowing ICS must compete with all other budget needs, some programs may not be funded. However, if the cost of allowing ICS has its own source of funding, it is less likely to be impacted by the budget process." *See id.*

[474] *See, e.g.*, Letter from Andrew D. Lipman, Attorney, Morgan, Lewis & Bockius, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 4 (filed Mar. 13, 2013) ("the record contains scant evidence of any costs incurred by correctional facilities that actually are related to and caused by the provision of ICS within their facilities"); Hamden Second FNPRM Comments at 11 ("it is not clear that any substantial costs arise from the provision of ICS in a correctional setting"); Prisoners Legal Services Comments at 5-6 ("ICS providers should be expected to provide necessary technology and administration for their own services as part of normal overhead costs"); Prison Policy Initiative Second FNPRM Reply at 4.

[475] *See, e.g.*, Lipman Apr. 8, 2015 *Ex Parte* Letter at 9.

to ICS providers and users are more properly classified as law enforcement costs related to operating a correctional facility that should be borne by the government and not ICS users.[476]

136. Even commenters asserting that facilities incur costs that are properly attributable to the provision of ICS do not agree on the extent of those costs.[477] A group of the largest ICS providers, for example, notes that while they support the recovery of "legitimate costs incurred by correctional facilities that are directly related to the provision of inmate calling services," they cannot agree on how those costs should be calculated.[478] The NSA suggests that the Commission approve a "compensation amount for the security and administrative duties performed in jails in connection with ICS that is an additive amount to the ICS rate."[479] Relying, in large part, on the results of a survey it took of its members, as well as analyses submitted by other parties, NSA suggests that this additive amount should range from $0.01 to $0.11 per minute, depending on the size of the facility being served.[480]

137. Several commenters offer critiques of NSA's survey data, however. GTL's economic consultant, for example, concludes that NSA's latest proposal would offer facilities "significantly larger" annual compensation than would be justified by estimates derived from the analyses conducted by itself and other parties, particularly for small facilities such as jails with an ADP below 350.[481] Even Pay Tel, which generally supported the NSA's survey as a "robust and significant dataset,"[482] agrees that NSA failed to remove outliers from its calculations and that NSA included costs that are "typically associated with on-going investigations that would not be considered for Cost Recovery purposes."[483] Andrew Lipman notes that the NSA survey was based on only three months of data from only approximately five percent of NSA's members and that NSA had not provided any indication of whether the survey respondents were representative of NSA's broader membership.[484] Mr. Lipman also points out that the NSA did not provide the raw data, a copy of the survey, any information on the methodology used by

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[476] *See, e.g.*, PPI Second FNPRM Reply at 7-9; Lipman Apr. 8, 2015 *Ex Parte* Letter at 9-10.

[477] *Compare, e.g.*, Comments of Imperial County Sheriff's Office, WC Docket No. 12-375, at 2 (filed Jan. 12, 2015) (Imperial County Sheriff's Office Second FNPRM Comments) (estimating ICS-related costs of $.34/minute) *with* Comments of Tennessee Dept. of Corrections, WC Docket No. 12-375, at 1 (filed Jan. 12, 2015) (Tennessee DOC Second FNPRM Comments) (estimating ICS-related costs of $.03/minute); *see also* Comments of Cook County, WC Docket No. 12-375, at 5 (filed Jan. 12, 2015) (Cook County Second FNPRM Comments) (urging the Commission to allow each correctional facility to determine its own justifiable costs).

[478] Joint Provider Proposal at 3 (filed Sept. 15, 2015) (raising the possibility that "correctional facilities *may* incur administrative and security costs to provide inmates with access to ICS.") (emphasis added).

[479] NSA June 12, 2015 *Ex Parte* Letter at 3.

[480] NSA June 12, 2015 *Ex Parte* Letter at 9. NSA had previously relied on its survey results to claim that facilities incur costs of anywhere from $0.003 per minute to $1.74 per minute to make ICS available. *See* NSA Second FNPRM Comments, at Attach. NSA offered no new data to support its June 12 proposal. *See* NSA June 12, 2015 *Ex Parte* Letter at 2.

[481] GTL June 29, 2015 *Ex Parte* Letter Attach. at 2. The rates NSA proposed for small jails (ADP below 350) was more than five times higher than the cost estimate from GTL's economic consultant. *Id.*

[482] Letter from Timothy G. Nelson, Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 4 (filed May 8, 2015) (Pay Tel May 8, 2015 *Ex Parte* Letter).

[483] Pay Tel May 8, 2015 *Ex Parte* Letter at 6 (excluding staff minutes that exceeded 50% of ICS conversation minutes).

[484] *See* Lipman Apr. 8, 2015 *Ex Parte* Letter at 11. As Mr. Lipman explains, "there is good reason to suspect" that the respondents are not representative of the rest of NSA's membership, as "those sheriffs with relatively low costs would have had less motivation to respond to the survey than those with relatively high costs." Lipman July 6, 2015 *Ex Parte* Letter at 7 (also noting that "most sheriffs did not identify costs for specific tasks, so that NSA was unable to provide this level of detail in its results.").

members to allocate time, or detailed descriptions of the tasks encompassed by various categories of costs, such as "administrative," "security" or "other."[485] Relying on other evidence in the record, Mr. Lipman suggests that it would be unreasonable for providers to agree to pay more than $0.01-$0.03 per minute to reimburse facilities for any costs they may incur in agreeing to make ICS available to inmates.[486] Darrell Baker of the Alabama PSC recommends a cost recovery rate of $0.04 per minute for jails of all sizes and $0.01 to $0.02 per minute for prisons,[487] while an earlier analysis from GTL yields median cost recovery rates of $0.005 per minute for prisons and $0.016 per minute for jails.[488]

138. *Discussion.* The record contains a wide range of conflicting views regarding whether correctional facilities incur any costs that are directly and reasonably related to making ICS available and that must be recovered through ICS rates.[489] As at least one commenter points out, ICS continues to be offered in states that have prohibited payments from ICS providers to facilities.[490] This evidence undermines claims that facilities incur unique costs that are attributable to ICS and that must be recovered from ICS rates.[491] These claims are further undermined by the fact that "[n]one of the correctional facilities and associations submitted sufficient detail in this proceeding to support the amount of their alleged costs, or to demonstrate that these costs meet the used and useful standard."[492]

139. Some commenters argue that the costs claimed by facilities are "basic law enforcement activities [such as surveillance and investigation of calls] and not costs for providing a telecommunications service."[493] The record is not clear that the costs facilities claim to incur due to ICS

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[485] *See* Lipman July 6, 2015 *Ex Parte* Letter at 7.

[486] Letter from Andrew D. Lipman, Morgan Lewis to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 6 (filed May 1, 2015) (Lipman May 1, 2015 *Ex Parte* Letter) ("considering the record evidence, including the studies submitted by GTL and other parties, . . . the Commission should find that agreements to pay site commissions in excess of the following levels is an unreasonable practice by ICS providers:" $0.03/minute amount for facilities with 1-299 ADP, $0.02/minute for facilities with 300-999 and, $0.01/minute for facilities with 1,000+ ADP).

[487] *See* Letter from Darrell Baker, Director, Utility Services Division, Alabama PSC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 4-5 (filed July 13, 2015).

[488] Letter from Chérie R. Kiser, Counsel to GTL to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 11-12 (filed Sept. 19, 2014).

[489] *See, e.g.*, Joint Provider Proposal at 3 (supporting the recovery of "legitimate costs incurred by correction facilities that are *directly related to the provision of inmate calling services*.") (emphasis added); Lipman Feb. 20, 2015 *Ex Parte* Letter at 4 (noting that section 276 does not require correctional facilities to be compensated for ICS-related costs).

[490] *See, e.g.*, HRDC Second FNPRM Comment at 3 ("Consider the example of New York, which banned ICS commissions in 2007:" Not only did New York continue to offer ICS to inmates, but "even without the $20 million in annual commission payments, New York's prison system did not stop providing educational and recreational programs that benefit prisoners.").

[491] At a minimum, the evidence from states, such as New York, that have eliminated site commissions indicates that any costs that facilities may incur in connection with ICS are low enough not to deter the facilities from continuing to allow ICS even if they do not receive any compensation for doing so.

[492] Lipman Apr. 8, 2015 *Ex Parte* Letter at 9.

[493] Lipman Apr. 8, 2015 *Ex Parte* Letter at 9-10 (arguing that some costs facilities may incur in connection with ICS, such as monitoring calls and supervising inmate movements, are "not an ICS cost . . . but should be funded by general revenues."); *see also* PPI Second FNPRM Reply at 7-9. Pay Tel argues that the ICS-related functions performed by jail personnel should be treated as direct costs of ICS. *See* Pay Tel May 8, 2015 *Ex Parte* Letter at 1. We agree with Mr. Lipman, however, that Pay Tel's analysis is overly simplistic. *See* Lipman *Ex Parte* Letter July 6, 2015 at 7 (analogizing Pay Tel's argument to an argument that "if a jail provides chess boards for its inmates to

(continued….)

would actually be eliminated if the facilities ceased to allow inmates to have access to ICS.[494] Moreover, providers indicate that costs that facilities claim to incur in allowing ICS are, in fact, borne directly by the providers.[495] Those costs are already built into our rate cap calculations and should not be recovered through an "additive" to the ICS rates.[496] Accordingly, while we strongly encourage the elimination of site commission payments, we do not dictate what an ICS provider can do with its profits and conclude that the most reasonable and fair approach is to leave it to ICS providers and facilities to negotiate the amount of any payments from the providers to the facilities, provided that those payments do not drive the provider's rates above the applicable rate cap. We note, however, that evidence submitted in the record – and discussed above – indicates that if facilities incurred any legitimate costs in connection with ICS, those costs would likely amount to no more than one or two cents per billable minute. Our rate caps are sufficiently generous to cover any such costs.[497]

140. As noted above, some parties contend that correctional facilities will remove or limit access to telephones if the Commission acts to limit site commission payments.[498] We find it highly unlikely, however, that facilities would eliminate or limit access to ICS as a result of this Order. [499] Given that we do not ban site commissions, facilities have no basis for taking such extreme measures. Notably, the record contains no indication that ICS deployment has decreased in states that have eliminated site commissions.[500] This is unsurprising, given what we anticipate would be an intensely negative backlash

(Continued from previous page)
use in a recreation facility, the cost of playing chess included the salaries of the officers who attend to the recreation room.").

[494] For example, although a facility may allocate a portion of a guard's salary to ICS based on an argument that some of that guard's time is occupied by duties such as escorting inmates to and from telephones, we think it is unlikely that eliminating ICS would result directly in the facility reducing its workforce. Thus, it is unclear whether any or all of the guard's salary should be considered a cost directly and reasonably related to ICS.

[495] *See, e.g.*, Securus Dec. 8, 2014 *Ex Parte* Letter at Attach. A (providing a list of 25 tasks related to ICS, 20 of which it says it handles for its correctional facility customers and five of which the correctional facilities handle themselves); *see also* Reply of GTL, WC Docket No. 12-375, at 15 (filed Jan. 27, 2015) ("GTL . . . estimates that, for the vast majority of the duties identified by NSA, it is established industry protocol for the ICS provider to handle those tasks for its correctional facility customers."). As noted above, facilities dispute this claim and argue that they perform the functions themselves. *See supra* para. 143; *see also* Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No 12-375 (filed July 22, 2015) (explaining that it covers certain functions in larger facilities, but that those functions are performed by the facilities' employees in smaller jails.).

[496] *2013 Order*, 28 FCC Rcd at 14173, paras. 124-25 (the Commission's mandatory data collection instructions asked "all ICS providers to file data regarding their costs to provide ICS" in order to "ensure that rates, charges and ancillary charges are cost-based.").

[497] To the extent that a facility decides to "insource" some aspects of ICS, it will be able to recover any legitimate telecommunications-related costs it incurs through a site commission negotiated with the provider.

[498] *See, e.g.*, NSA Second FNPRM Comments at 7; *see also, e.g.*, Letter from George Maier, Stark County, Sheriff to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Apr. 14, 2015).

[499] Similarly, we find little merit in NSA's concerns that sheriffs will not be able to find providers willing to offer ICS in their jails. NSA Oct. 14, 2015 *Ex Parte* Letter at 2. For the reasons explained in the discussion above, we are confident that if jails cannot find providers willing to pay site commissions to serve their facilities, they will lower or eliminate their site commissions as needed to ensure their inmates have continued access to ICS.

[500] To the contrary, the record shows that the elimination of site commission payments results in more meaningful competition between ICS providers as facilities select winning bidders "solely on the basis of technology and end user rates." *See, e.g.*, GTL Apr. 3, 2015 *Ex Parte* Letter at 6 (describing the beneficial effects states such as Ohio and New Jersey realized by eliminating site commission payments).

to such an action.[501] In addition, the record indicates that ICS provides valuable, non-monetary benefits to correctional facilities, such as correctional management[502] and incentives to inmates who exhibit good behavior.[503]

b. Ensuring Fair Compensation

141. Some parties argue that it would be confiscatory for the Commission to exclude the costs of site commission payments from our rate cap calculations without also explicitly prohibiting ICS providers from paying such commissions.[504] According to these parties, ICS providers will not be able to afford the site commission payments demanded of them by correctional facilities if the providers' revenues are limited by the rate caps established here.[505] These claims rest largely on the fact that existing ICS contracts may obligate providers to pay site commissions to the facilities they are serving.[506] As explained further below, we conclude that these concerns are largely unfounded.[507]

142. For the same reasons set forth in the *2013 Order*, we reject arguments that the reforms we adopt herein effectuate unconstitutional takings.[508] The offering of ICS is voluntary on the part of ICS providers, who are in the best position to decide whether to bid to offer service subject to the contours of the request for proposal (RFP). There is no obligation on the part of the ICS provider to submit bids or to do so at rates that would be insufficient to meet the costs of serving the facility or result in unfair compensation.[509] We also reiterate that our rate caps are based on the reported costs that the providers themselves submitted into the record without any adjustment by the Commission. Thus, the rate caps provide ample room for an economically efficient provider of ICS to earn a reasonable profit on its

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[501] *See, e.g.*, Letter from James A. Gondles, Jr., Executive Director, American Correctional Association to Marlene H. Dortch, Secretary, FCC (filed June 24, 2015) ("sheriffs and jail administrators would never pull ICS out of the jails completely . . . it [is] an integral part of correctional business and a necessary service for inmates.").

[502] *See id.* at 2 ("Recognizing that there is no constitutional right for adult/juvenile offenders to have access to telephones, nonetheless consistent with the requirements of sound correctional management, adult/juvenile offenders should have access to a range of reasonably priced telecommunications services."); *see also* Comments of Prisoners Legal Services, WC Docket No. 12-375, at 2 (filed Mar. 25, 2013) ("As the FCC, Government Accountability Office and Bureau of Prisons have already recognized, [inmates] keeping in as close contact [with family] as possible is paramount to ensuring stability and success both inside and outside of the prison walls.").

[503] *See* Comments of the Ctr. on the Admin. of Criminal Law, WC Docket No. 12-375, at 8 (filed Mar. 25, 2013) (stating that "the end result of frequent inmate-family contact is that an inmate secures an early release through 'good behavior.'"); HRDC July 29, 2015 *Ex Parte* Letter at 9.

[504] *See, e.g.*, Lipman June 1, 2015 *Ex Parte* Letter at 7 (claiming that "imposing rate caps on ICS providers that do not permit ICS providers to recover the costs of site commissions while at the same time doing nothing to end the practice of site commissions would necessarily result in rates that are confiscatory in violation of the Fifth Amendment to the Constitution.").

[505] Lipman June 1, 2015 *Ex Parte* Letter at 13 ("ICS providers will not be able to remain in business if they must comply with the FCC's rate caps, while using the revenues from those regulated rates to pay site commissions to the correctional facility.").

[506] *See* Lipman June 1, 2015 *Ex Parte* Letter at 17; Comments of Securus Technologies, Inc., WC Docket No. 12-375, at 2 (filed Jan. 12, 2015); Securus Petition For Stay.

[507] *See infra* Section IV.D.

[508] *See 2013 Order*, 28 FCC Rcd at 14163-65, paras. 103-07.

[509] *See* Praeses Sept. 9, 2015 *Ex Parte* Letter at 6 (Praeses acknowledges that if the Commission refrains from banning or regulating site commissions then facilities will use their RFP processes to drive down provider compensation for provisioning ICS to a level near the actual cost to the providers plus a profit margin that results from a competitive process.).

services.[510] The fact that our rate caps do not include an explicit allowance for site commission payments does not render them confiscatory. As explained above, the record does not support a conclusion that site commission payments are costs that are "reasonably related to the provision of ICS."[511] The fact that providers choose to pay site commissions is not enough to render them compensable through the ICS rate, particularly in light of section 276's requirement that ICS compensation must be "fair." Excluding site commission payments from the rate cap calculation is no different than excluding any other cost that is not reasonably related to the provision of the service. For example, if a provider decided to purchase a fleet of private jets to ferry its executives from place to place, we would not prohibit such an expenditure, but – because the purchase of private jets is not "reasonably related" to the provision of ICS – we would not include such an expense in the costs used to determine a fair compensation rate for ICS.

143. In addition, we re-emphasize that a party carries a heavy burden if it seeks to demonstrate that a regulation creates an unconstitutional "taking." For instance, to succeed on a "takings" claim, a party must demonstrate that the losses caused by the regulation in question are so significant that the "net effect" is confiscatory.[512] When confronted with a "takings" claim, courts will examine the net effect of the regulation on the company's enterprise as a whole, rather than on a specific product or service.[513] Thus, it is not enough for a provider to show that it is losing money on a particular service or in serving a particular customer. Instead, a provider seeking to show that our rate caps are confiscatory will have to demonstrate that any cognizable harm caused by our regulations is so severe that it meets the high bar for a takings with respect to the company as a whole, e.g., by "destroying the value of [the provider's] property for all the purposes for which it was acquired."[514] Moreover, providers have been on notice for years that the Commission might adopt rate caps, or even eliminate site commissions.[515] Thus, any claims that our actions today upset "investment-backed expectations of ICS providers"[516] are likely to fail, particularly claims from providers that recently entered into new contracts with high site commissions in

[510] *See supra* Section IV.A.3.c.; *but see* GTL Oct. 10, 2015 *Ex Parte* Letter at 3-4 (contending that "a significant portion of the ICS would face costs in excess of the proposed caps," assuming that the caps are based on industry average costs).

[511] *See supra* para. 122.

[512] *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310-16 (1989); *see also Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 437 (5th Cir. 1999).

[513] *See Baltimore & O. R. Co. v. United States*, 345 U.S. 146, 147-150 (1953); *see also 20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 293 (1994) ("'so long as rates as a whole afford [the regulated firm] just compensation for [its] over-all services to the public,' they are not confiscatory. That a particular rate may not cover the cost of a particular good or service does not work confiscation in and of itself. In other words, confiscation is judged with an eye toward the regulated firm as an enterprise." (citing *B. & O.*, 345 U.S. at 150)).

[514] *2013 Order*, 28 FCC Rcd at 14165, para. 107 (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. at 307); *see also Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254 at 1263 (D.C. Cir. 1993) (to support a takings claim, a party must make a particularized showing that the rate order in question "threatens the financial integrity of the [party] or otherwise impedes [its] ability to attract capital"); *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 at 1181 (D.C. Cir. 1987); *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101 at 1109 (D.C. Cir. 2011) (in order to constitute a taking, government action must "amount to a deprivation of all or most of the economic use" of property") *cert. denied*, 131 U.S. 3003 (2011).

[515] *See 2013 Order*, 28 FCC Rcd at 14164, para. 106; *see also, e.g.*, *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385, 5391, para. 13 (2008) (noting that parties' concerns about the enforcement of new regulations were undermined by the fact that carriers had been on notice of possible Commission action for years).

[516] *2013 Order*, 28 FCC Rcd at 14164, para. 106.

an effort to circumvent possible Commission regulations.[517] We find it unlikely that our rates will result in a "taking," but the waiver process described below should offer providers an adequate avenue for relief if they find our ICS regulations unworkable.

C. Ancillary Service Charges and Taxes

1. Background

144. The record contains evidence that ancillary service charges have increased since the *2013 Order*,[518] which highlights the fact that, absent reform, ICS providers have the ability and incentive to continue to increase such charges unchecked by competitive forces. Indeed, the continuing growth in the number and dollar amount of ancillary service charges represents another example of market failure necessitating Commission action. These charges are unchecked by market forces because inmates and their families must either incur them when making a call or forego contact with their loved ones.[519]

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[517] *See, e.g.*, Letter from Paul Wright, Executive Director, HRDC to Tom Wheeler, Chairman, FCC, WC Docket No. 12-375, at 1, 3 (filed Aug. 8, 2015) (describing "signing bonuses in excess of $1 million plus hundreds of free computer tablets" Securus and GTL offered to "entice jails" to enter into exclusive ICS contracts as part of an effort to "work around any new regulations expected to be issued by the Commission"); Pay Tel July 8, 2015 *Ex Parte* Letter at 4-7 (describing various demands contained in RFPs that Praeses has issued to ICS providers on behalf of facilities, including "upfront payments and other 'creative' arrangements"); *see also* contract between Securus and San Bernardino County, California requiring a $4 million upfront minimum annual guarantee (MAG) payment, subsequent MAG payments equal to the greater of $3.5 million or 81 percent of "commissionable revenues," and $300 thousand per year in "technology fund" payments at 15-16 (*available at* http://cob-sire.sbcounty.gov/sirepub/agdocs.aspx?doctype=summary&itemid=239559.

[518] *See* Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene. H. Dortch, Secretary, FCC, WC Docket No. 12-375 at Attach. 2 (filed July 10, 2014) (Pay Tel July 10, 2014 *Ex Parte* Letter); *see also*, *e.g.*, Comments of Praeses, LLC, WC Docket No. 12-375, at 43 (Praeses Second FNPRM Reply) ("Over the last few years, ICS providers have been deriving a greater percentage of their overall ICS revenue from multiple and sometimes exorbitant ancillary fees rather than ICS rates."); *see also* Letter from Paul Wright, Executive Director, HRDC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Aug. 8, 2015) (HRDC Aug. 8, 2015 *Ex Parte* Letter) ("As the Commission is aware, ancillary fees related to inmate calling services (ICS) increased after the Order implementing interstate ICS rate regulation became effective in February 2014.") (citing 2014 ICS Workshop Transcript at 169 (Lee G. Petro, Counsel to Petitioners)). We note that, due to the partial stay, the requirement that ancillary service charges be based on costs did not go into effect and there have been no reforms to ancillary service charges and fees. *See* 47 C.F.R. § 64.6010 (Cost-Based Rates for Inmate Calling Services).

[519] ICS providers typically assess a wide range of separate charges for services ancillary to the provision of ICS, such as fees to open, fund, maintain, close, or refund an ICS account. *See, e.g.*, *2013 Order*, 28 FCC Rcd at 14156-57, para. 90, n.335 (citing examples of charges). Ancillary service charges reported in response to the Mandatory Data Collection included an account close-out fee, account transfer fee, automated information services, automated operator recharge fee, bill processing charge for direct billed calls, bill processing fee, bill statement fee, biometric service charge, carrier cost recovery fee, collect call bill statement fee, collect call regulatory fee, collect interstate USF cost recovery fee, continuous voice verification, credit card charge-back fee, credit card processing fee, federal regulatory recovery fee, federal USF, federal USF administration fee for LEC billed calls, federal USF administration fee for non-LEC billed calls, funding fee, funding fee from cashier's check deposit, funding fee from credit/debit cards, funding fee from money order deposit, funding fee from Western Union deposit, live operator recharge fee, live prepaid account set-up fee, load fee, location validation, minimum payment fee, monthly bill statement fee, payment fee - IVR/web, payment fee - live operator, per call administrative fee for calls from county facilities, prepaid accounts, prepaid deposit fees, processing fee, refund fee, regulatory assessment fee, sales tax, state cost recovery fee, state regulatory cost recovery fee for LEC-billed calls, state regulatory cost recovery fee for non-LEC billed calls, state USF, state USF administration fee for LEC billed calls, technology, USF administrative fee, USF federal, USF federal (LEC billed), validation recovery fee, victim information and notification everyday (VINE), voice biometrics, web interface account set-up and recharge fee, and wireless administration fee.

Ancillary service charges inflate the effective price consumers pay for ICS. According to some estimates, ancillary service charges may represent as much as 38 percent of total consumer ICS payments.[520] The sheer number of ancillary service charges, their varying nomenclature, and the variability of the amounts charged make for a confusing system.

145. The record overwhelmingly supports the need to reform ancillary service charges.[521] While we would prefer to allow the market to discipline rates, the evidence since the Commission's *2013 Order* confirms that ancillary service charges have not only increased, but new charges have appeared. We find our statutory directive requires us to adopt reforms to limit ancillary service charges. As described below, we adopt caps for certain ancillary fees, and we prohibit all other charges that are ancillary to ICS.

146. Our Mandatory Data Collection confirmed that various ICS providers charge a plethora of ancillary service charges, and that different providers may describe the same charge by different names. Commenters suggest that ancillary service charges inflate the cost of ICS to end users without justification.[522] For example, some providers charge account set-up, maintenance, closure, and refund fees.[523] Praeses contends that "[p]roviders should not be permitted to charge any ancillary fees to recover… intrinsic ICS costs, such as validation fees or fees related to Facility-required security."[524] This distinction between what is an intrinsic part of providing ICS, and what is not, has helped us to select the ancillary service charges we find appropriate and to ban all other ancillary service charges.

147. In responding to the unique challenges posed by escalating ancillary fees, this Order establishes a limited list of ancillary fees that the Commission will permit ICS providers to charge. The amount of each of these fees is capped, and ICS providers are restricted from charging any ancillary fees not specifically allowed in our Order. For fees for single-call and related services and third-party financial transaction fees, we allow providers to pass through only the charges they incur without any additional markup. We limit automated payment fees to $3.00, live agent fees to $5.95, and paper statement fees to $2.00. Apart from these specific fees, no additional ancillary service charges are allowed. Taxes are discussed separately and must be passed through with no markup. We also take

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[520] *See* LSPC Second FNPRM Comments at 4 (citing Letter from Peter Wagner, Exec. Dir., Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, (filed May 9, 2013)); *see also* Pay Tel July 10, 2014 *Ex Parte* Letter at Attach. (explaining that "[i]f a family has budgeted $100 for calls during a month, and they make a $25 payment each week using the vendor's website," after accounting for payment processing fees, account fees, and completing one single call service call per month, the funds actually available for calls out of the $100 is only $40).

[521] *See infra* paras. 148-160.

[522] *See, e.g.*, Wright Petitioners *Second FNPRM* Reply at 12-15; Pay Tel Second FNPRM Reply at 39-41; HRDC Sept. 8, 2015 *Ex Parte* Letter at 2.

[523] *See generally* Please Deposit All of Your Money Study (suggesting that ICS providers are "Profiting on prepayment," "Profiting on calls that are never made," and "Making money on holding customer's money.").

[524] Praeses Second FNPRM Comments at 44-45 (further contending "[o]nly certain services that are offered by Providers to inmates or their friends and families as a convenience, and that therefore are not reasonably required to be incurred for an inmate to place a call should be permitted to be subject to ancillary fees, and all such ancillary fees should be required to be cost-based."); *see also* PLS Second FNPRM Comments at 9 ("Most expenses covered by fees are incident [sic] to the general costs of conducting business in the ICS industry and should be included in the per-minute rates."). In addition, Praeses argues that ancillary service charges should only be allowed for "certain services that are offered by Providers to inmates or their friends and families as a convenience, and that therefore are not reasonably required to be incurred for an inmate to place a call." Praeses Second FNPRM Comments at 44-45. Further, "Praeses agrees with the Commission's proposal to prohibit ancillary fees related to 'account establishment by check or bank account debit; account maintenance; payment by case, check or money order; monthly electronic account statements; account closure; and refund of remaining balances.'" *Id*. at 45.

action to avoid potential loopholes in these rules, such as artificial limits on minimum and maximum account balances that could require inmates to reload accounts frequently and unnecessarily increase costs borne by consumers. This approach involved analyzing the data submitted by carriers, as well as comments in the record, to determine which fees ICS providers should legitimately be able to charge end users.

2. Discussion

148. *Review of Ancillary Service Charges in the Record*. In response to the Mandatory Data Collection, the Commission received some data regarding ancillary service charges, but providers did not follow consistent approaches in assessing and labeling such fees, and allocated and reported these costs in inconsistent ways.[525] Accordingly, in the *Second FNPRM* the Commission sought comment on these data inconsistencies and on the ancillary service charge data generally.[526] The Commission also sought comment on prohibiting separate ancillary service charges for functions that are typically part of normal utility overhead and should be included in the rate for any basic ICS offering,[527] and asked if certain types of ancillary service charges, such as refund charges, should be disallowed altogether.[528]

149. In response to the *Second FNPRM*, commenters disagreed over the exact nature of the reforms that should be implemented, but the majority agreed that many or all ancillary service charges should be eliminated.[529] ICS provider CTEL claims that ancillary service charges, not site commissions, drive high ICS calling rates.[530] ICS users also supported reforming ancillary service charges with examples of the impact of such charges on their ability to make calls.[531] Even when consumers are made aware of the fees, they can still seem unjustified or unclear.[532] The record indicates that ICS providers can

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[525] *Second FNPRM*, 29 FCC Rcd at 13204, para. 84.

[526] *See Second FNPRM*, 29 FCC Rcd at 13204, para. 84. The Commission sought comment on whether to cap charges for certain ancillary services, such as payment processing for credit and debit card payments that enhance convenience for ICS consumers. *Id*. at 13205, para. 87.

[527] *Second FNPRM*, 29 FCC Rcd at 13206, para. 89.

[528] *See, e.g.*, *Second FNPRM*, 29 FCC Rcd at 13206, para. 89.

[529] *See, e.g.*, Prison Policy Initiative: Ancillary Fees at 2 (explaining that a consensus has developed acknowledging the fact that unregulated fees are a fundamental problem, and quoting three ICS providers: "CenturyLink: '[T]he Commission should prohibit all or all but a very narrow class of ancillary fees. Ancillary fees are the chief source of consumer abuse and allow circumvention of rate caps;' Pay Tel: 'you ought to get rid of them except the fees where the consumer makes a choice;' NCIC: '[a]lthough telecom companies don't normally welcome a regulation, we see the need for the FCC and state regulators to set a standard rate and fee structure'"); *see also* Praeses Second FNPRM Comments at 42 ("With the exception of a limited number of the largest Providers, there is broad consensus on the record that the Commission must further regulate ancillary fees as a crucial part of any new ICS regulation adopted by the Commission.").

[530] CTEL Second FNPRM Comments at 3; NCIC Second FNPRM Comments at 3-4 (explaining that "[m]ost ICS providers assess far more reasonable and fewer ancillary fees on their customers than the dominant providers in this industry, [and] there are no traditional market forces to push prices lower and no guarantee that eliminating site commissions will result in lower end user prices").

[531] For example, Cathrine Nussbaum expressed her frustration and confusion, explaining "for every $25 you put on the account, they take $5; then because I use a cell phone for calls, there is a surcharge for cell calls…we only live 25 miles away…why are the calls so expensive and why a surcharge for cells?" Media Action July 7, 2015 *Ex Parte* Letter, Attach. at 2 (testimony of Cathrine Nussbaum).

[532] Carolyn Esparza, for example, states that ICS providers "do tell you about the fee in the voice recording, before you add money to your phone account. But there should be NO SERVICE CHARGE. They make excessive amounts of money off the calls themselves." Media Action July 7, 2015 *Ex Parte* Letter, Attach. at 3 (testimony of

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receive fair compensation and provide secure services with a simplified ancillary service charge structure.[533]

150. *Prohibiting Ancillary Service Charges.* The Commission sought comment on prohibiting ancillary service charges altogether.[534] Certain parties argued that the best approach to ancillary service charges was to ban them outright.[535] The Wright Petitioners, for example, contend that no cost data in the record justifies the existence of ancillary fees, and that ancillary fees differ significantly among providers for no reason except that ICS providers will charge as much as they can.[536] If the Commission does not eliminate ancillary service charges, then the Wright Petitioners contend that any rules addressing ancillary service charges must specifically identify the fees that may be charged and prohibit all others.[537] PLS argues the Commission should prohibit ancillary service charges because many of these fees bear no relation to ICS costs.[538]

151. *Reducing Categories of Ancillary Service Charges.* The Commission also sought comment on limiting the number of allowable ancillary service charges.[539] Many commenters support this approach as enabling ICS providers to still earn a profit, while providing their services at just and reasonable rates.[540] CenturyLink explains that "the overall cost of ICS to inmate families will not be

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Carolyn Esparza (emphasis in original). Margaret Reynolds even explains that she was nervous to "give my credit card and not know how much it would cost. They would not tell me." *Id*. at 4 (testimony of Margaret Reynolds).

[533] *See, e.g.*, Comments of Idaho DOC, WC Docket No. 12-375, at 2 (filed Nov. 20, 2014) ("The IDOC believes that a soundly managed and financially stable ICS provider with a reasonable per-minute fee structure can be profitable and provide the robust ICS platform while utilizing a simple ancillary fee structure."); NCIC Apr. 16, 2015 *Ex Parte* Letter at 15 ("based on our series of 'real world' tests, we feel that when the FCC drops the rates to a postalized per-minute pricing, decreases the ancillary fees . . . jails can continue to receive a fair cost-recovery/commission program to compensate the management of up to three times as many calls while still allowing the inmate phone providers to experience fair profits.").

[534] *See Second FNPRM*, 29 FCC Rcd at 13207, para. 91.

[535] *See, e.g.*, Comments of Illinois Campaign, WC Docket No. 12-375, at 3 (filed Jan. 9, 2015) (Illinois Campaign Second FNPRM Comments) (arguing that the FCC should "[u]se its authority to eliminate all ancillary fees, including per-call connection fees as well as charges to open, close or deposit money in debit accounts"); Comments of NLG, WC Docket No. 12-375, at 4 (filed Jan. 12, 2015) (NLG Second FNPRM Comments) ("[A] model that eliminates ancillary fees entirely and accepts all ancillary services as a basic operational cost will diminish that rift [between the incarcerated and their family] and promote strong family and community ties for all prisoners despite a prisoner's family's socioeconomic status"); Comments of NJ ISJ, WC Docket No. 12-375, at 4 (filed Jan. 12, 2015) (NJ ISJ Second FNPRM Comments) (advocating for elimination of ancillary fees for intrastate ICS calls).

[536] Wright Petitioners Second FNPRM Comments at 16.

[537] Wright Petitioners Second FNPRM Comments at 18.

[538] PLS Second FNPRM Comments at 9-10.

[539] *See Second FNPRM*, 29 FCC Rcd at 13205-06, paras. 87-89.

[540] *See, e.g.*, NCIC Apr. 16, 2015 *Ex Parte* Letter at 15; *see also* Comments of Leadership Conference, WC Docket No. 12-375, at 1 (filed Jan. 12, 2015) (Leadership Conference Second FNPRM Comments) ("Unnecessary fees, such as per-call fees also drive up rates"); Comments of Pay Tel, WC Docket No. 12-375, at 31 (filed Dec. 2013) (Pay Tel First FNPRM Comments) ("Pay Tel recommends that ancillary charges be 'generally prohibited, subject to a narrow list of clearly-defined exemptions,' particularly 'fees associated with the processing of payments.'"). Lattice even argues that ancillary service charges may not be necessary because, to the extent that site commissions are kept at reasonable levels, ICS providers will have no need to recoup revenue shared with facilities through ancillary service charges. Lattice Second FNPRM Comments at 8; *see also* Comments of Arizona DOC, WC Docket No. 12-375, at 2 (filed Dec. 13, 2014) ("[Arizona DOC] eliminated 'ancillary fees,' while at the same time it
(continued….)

reduced without restrictions on ancillary fees"[541] and recommends that the Commission "eliminate all but a narrow class of ancillary fees and impose reasonable rate caps on those that it allows."[542] One commenter explains that ancillary fees have "no actual relation to actual costs borne by ICS providers and have become a mechanism by which providers sustain or increase their overall revenues."[543] Indeed, even ICS providers have recognized the need for reform and have submitted various proposals to that end.[544]

152. Parties differ about which ancillary service charges should be capped. For example, a number of commenters believe that the Commission should eliminate all fees for services that a consumer is required to pay in order to access basic ICS, including, but not limited to, account set-up, maintenance, funding, refund, and closure fees.[545] In addition, Praeses suggests that "[a]ll costs that Providers necessarily and unavoidably incur as part of completing an inmate call should be recovered through ICS rates. As a result, Providers should not be permitted to charge any ancillary fees to recover such intrinsic ICS costs, such as validation fees or fees related to Facility-required security."[546]

153. Of additional concern is the ability of ICS providers to evade any limitation on a particular ancillary service charge simply by changing its name.[547] ICSolutions notes that if an RFP for ICS prohibits a specific fee, some bidding ICS providers simply rename it or create a new fee to take its place.[548] Other commenters contend that if ICS providers want to impose additional ancillary service charges, then they should ask for a waiver from the Commission or a rule modification.[549]

154. This concerns us because it suggests that ICS providers are using ancillary service charges as a loophole to increase revenues and undermine the impact of the interstate rate caps adopted in the *2013 Order*. Illustrating the impact this trend has on consumers, Pay Tel explains that if a family has $100 to spend on inmate calling for the month, ancillary fees can consume up to $60, leaving only $40 for the actual phone calls. Ancillary fees often increase the average cost of a 15-minute call to as much as $8.33, more than double the price of a 15-minute call at the Commission's interim rate caps adopted in

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kept per minute rates low and retained an allowance for commissions on intrastate calls to fund inmate education, as well as other programs benefitting inmates.").

[541] Letter from Thomas M. Dethlefs, Associate Counsel to CenturyLink to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Apr. 28, 2015) (CenturyLink Apr. 28, 2015 *Ex Parte* Letter).

[542] CenturyLink Apr. 28, 2015 *Ex Parte* Letter at 1.

[543] Comments of Williamson County Sheriff's Office, WC Docket No. 12-375, at 2 (filed Jan. 2, 2015); *see also* PLS Second FNPRM Comments at 9-10.

[544] *See, infra* paras. 155-160.

[545] *See* ANWOL Second FNPRM Comments at Section C; HRDC Second FNPRM Comments at 1, 9; Illinois Campaign Second FNPRM Comments at 3; LSPC Second FNPRM Comments at 4; Hamden Second FNPRM Comments at 15; Comments of 51 Former State Attorneys General, WC Docket No. 12-375, at 2 (filed Jan. 9, 2015) ("[T]he telecoms should not be allowed to charge refund fees to return consumer funds"); Alabama PSC Second FNPRM Comments at 15; Praeses Second FNPRM Comments at 45; Comments of Tyner, WC Docket No. 12-375, at 2 (filed Jan. 12, 2015) (explaining that "[d]uring a community forum, families expressed concerns about account setup/closure fees, connection fees, and fees associated with adding funds to an account").

[546] Praeses Second FNPRM Comments at 44.

[547] *See* Praeses Second FNPRM Comments at 46.

[548] ICSolutions Second FNPRM Comments at 9.

[549] Wright Petitioners Second FNPRM Comments at 18; LSPC Second FNPRM Comments at 4 (explaining that the Commission should "[i]nstitute a review process before any ICS provider levies a new ancillary charge or changes an existing charge"); *see also* ANWOL Second FNPRM Comments Section C; PLS Second FNPRM Comments at 10 ("Any fees that the Commission considers legitimate should be strictly regulated, cost-based and capped.").

the *2013 Order*.[550] Some commenters also raise concerns that some ICS providers may impose unfair rates by instituting minimum or maximum amounts that may be deposited for prepaid calling accounts.[551]

155. *Proposals in the Record.* The Commission has focused on market failure with regard to unchecked and escalating ancillary service charges in this proceeding, including releasing a public notice prior to the *2013 Order* seeking additional information about this topic. Since 2012, the Commission has received several proposals detailing comprehensive ICS reform approaches, and had the benefit of observing real world models regulating ancillary service charges.

156. *Alabama PSC Reforms*. In the *Second FNPRM*, the Commission noted that the Alabama PSC had implemented an approach to ancillary service charges that both limited the kinds of allowable ancillary service charges and capped the fees for those charges.[552] Specifically, the Alabama PSC authorized, but capped, separate ancillary service charges for particular services, including a $3.00 maximum fee for debit/credit card payment, $5.95 maximum fee for payment via live agent, $3.00 maximum cap for bill processing for collect calls billed by a call recipient's local telecommunications service provider, $5.95 maximum cap on third-party payment services, five percent cap on inmate canteen/trust fund transfers, and a $2.00 maximum cap on paper billing statements.[553] The Commission sought comment on this approach.[554]

157. In the *Second FNPRM*, the Commission specifically asked whether the Alabama PSC's rate caps for credit card payments ($3.00 maximum) and live operator assisted payments ($5.95) would be appropriate for the Commission to adopt.[555] Many commenters seeking to reform ancillary service charges focused not only on reducing the kinds of ancillary service charges that may be imposed, but also on imposing caps on the fees that may be charged for the approved ancillary service charges.[556] Some commenters expressed concern that unreasonable costs would continue to be passed through to end users if regulations only specified the ancillary service charges that may be levied, without also imposing caps on those charges.[557]

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[550] *See 2013 Order*, 28 FCC Rcd at 14147-48, paras. 73-74.

[551] *See infra* paras. 175-178.

[552] *Second FNPRM*, 29 FCC Rcd at 13206, para. 90. The Alabama PSC approach defined basic utility overhead services as including account set-up, account maintenance, account funding, payment by check or money order, monthly electronic billing statements, and refunds, declining to authorize separate fees for these services; *see also Second FNPRM*, 29 FCC Rcd at 13209-10, Tbl. Two (breaking down the ancillary service charge proposals from the Alabama PSC July 7, 2014 Further Order, Joint Provider Proposal, and Pay Tel Proposal).

[553] *Second FNPRM*, 29 FCC Rcd at 13206, para. 90.

[554] *Second FNPRM* 29 FCC Rcd at 13206, para. 90. The Commission also sought comment on the approach taken by the New Mexico Public Regulation Commission, which adopted a similar but more proscriptive approach, barring all fees except payment processing fees for credit card or check by phone payments, and a refund fee. *See id.*

[555] *Second FNPRM*, 29 FCC Rcd at 13208, para. 94.

[556] *See, e.g.*, LSPC Second FNPRM Comments at 4 (explaining that the Commission should "[p]lace a cap on all ancillary charges that the FCC determines to be justified.").

[557] *See, e.g.*, Praeses Second FNPRM Comments at 45-46 ("To the extent that the Commission permits Providers to impose certain ancillary fees, the Commission should require all such fees to be cost-based and subject to a fixed cap to prevent Providers from agreeing to, and passing through to inmates, unreasonable costs charged to Providers by third parties in connection with certain third-party services, such as third-party money wiring services."); CPC Second FNPRM Comments at 3 (stating that the Commission should subject ancillary service charges to rate caps and monitor them).

158. *Joint Provider Proposal*. In the *Second FNPRM*, the Commission also sought comment on the Joint Provider Proposal's suggestions for ancillary service charge reform.[558] This proposal would voluntarily eliminate a number of types of fees, including per-call fees, account set-up fees, billing statement fees, account close-out and refund fees, wireless administration fees, voice biometrics and other technology fees, and regulatory assessment fees, and cap charges for non-eliminated fees.[559] The Joint Provider Proposal supported a $7.95 cap for three years on debit/credit card payment or deposit fees, a cap for three years at existing fees (as high as $14.99) for calls billed to a credit card and as high as $9.99 for calls billed to a mobile phone, and a cap on money transfer fees at the existing level (as high as $11.95), plus a $2.50 administrative fee cap.[560] Joint Provider Proposal supporters claim that their proposal will "dramatically alter the economic landscape of the ICS industry, making it possible for providers to forego many fees and cap others at current levels."[561]

159. Some commenters criticize the Joint Provider Proposal as retaining the most lucrative ancillary service charges, and undermining reform efforts by allowing the large providers to maintain their dominant positions.[562] CTEL asserts that smaller ICS providers lack the market power to impose high ancillary service charges.[563] The Alabama PSC also states that it "cannot emphasize strongly enough that the outliers in terms of excessive ancillary fees are the providers that submitted the Proposal to the Commission."[564]

160. *Pay Tel Proposal*. On October 3, 2014, Pay Tel submitted an *ex parte* describing a proposal for comprehensive reform, including rate reform, a proposed approach for site commission payments, reporting requirements, and a proposal for ancillary service charge reform.[565] The Commission sought comment on this proposal in the *Second FNPRM*.[566] The Wright Petitioners agree with Pay Tel that there should be specific guidelines for the disclosure of rate and ancillary fee information."[567] The Alabama PSC, Wright Petitioners, CenturyLink, and NCIC agree with Pay Tel's suggested ancillary service charge rate caps in a number of respects.[568] Securus, however, argues that Pay Tel mischaracterizes the Joint Provider Proposal, and that, to justify its own proposal, Pay Tel grossly

[558] *Second FNPRM*, 29 FCC Rcd at 13207, para. 92.

[559] *Second FNPRM*, 29 FCC Rcd at 13207, para. 92.

[560] *See* Joint Provider Proposal at 4-7.

[561] Joint Provider Proposal at 4; *see also* Comments Oklahoma DOC Second, WC Docket No. No. 12-375, at 2 (filed Jan. 8, 2015) (supporting the Joint Provider Proposal in its "elimination and limitation of a number of ancillary fees"); Lattice Second FNPRM Comments at 8 (agreeing with the concept of banning the fees that the Joint Provider Proposal suggests, and explaining that charges related to account transactions, validation and security, third-party money transfers, and convenience or premium payment options are important); GTL Second FNPRM Comments at 19-25.

[562] CTEL Second FNPRM Comments at 3. The Alabama PSC expressed concern that the Joint Provider Proposal proposed ancillary fees that would result in substantial net revenue increases for providers. *See generally* Letter from Darrell Baker, Dir. Utility Services Division, Alabama PSC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Sept. 30, 2014).

[563] *Id*.

[564] Alabama PSC Second FNPRM Comments at 13.

[565] *See generally* Pay Tel Proposal.

[566] *See, e.g.*, *Second FNPRM*, 29 FCC Rcd at 13208-210, paras. 96-97 and Tbl. 2.

[567] Wright Petitioners Second FNPRM Comments at 18.

[568] *See infra* Section IV.C.3.

overestimates the amount of ancillary service charges that consumers will have to pay under the Joint Provider Proposal.[569]

3. Establishing Limited List of Permitted Ancillary Service Charges

161. After careful consideration of the record, including analysis of the Mandatory Data Collection, we conclude that reform is necessary to address ever-increasing fees that are unchecked by competitive forces and unrelated to costs. ICS providers, which typically have exclusive contracts to serve a facility, have the incentive and ability to continue to extract unjust and unreasonable ancillary service charges.[570] As a result, we conclude it is necessary to reform the ancillary service charge structure imposed on consumers by ICS providers, as shown in Table Four below. All other ancillary service charges not specifically included in Table Four are prohibited.[571] We conclude that the allowable charges will facilitate communications between inmates and their loved ones and will allow ICS providers to recover the costs incurred for providing the ancillary service associated with the relevant fee. We find no other examples in the record of ancillary services that are actually provided today and that have a cost that warrants recovery.[572]

162. Our approach is supported by the record and will reduce the cost of service for millions of consumers.[573] Even so, as with all reforms adopted in this Order, we will reevaluate these charges in two years to determine if adjustments are appropriate. We expect that these caps will serve as backstops as efficiencies are gained by providers, and contracts are changed, or new contracts are entered into between parties. For example, the record indicates that the recently-adopted New Jersey state correctional institutions' ICS contract specifically prohibits "discretionary fees," which include bill statement fees, monthly recurring wireless account maintenance charges, account setup fees, funding fees, refund fees, and a single bill fee.[574] Finally, we believe it is reasonable to expect that the ancillary service charge caps may encourage providers to more efficiently provide ancillary services, potentially stimulating competition among ICS providers to the added benefit of consumers and in keeping with section 276's statutory mandate.[575] The reforms are intended to facilitate the proper functioning of the ICS market.

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[569] Letter from Stephanie Joyce, Counsel to Securus Technologies, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 4-6 (filed Oct. 7. 2014).

[570] *See Second FNPRM*, 29 FCC Rcd at 13203, para. 82 ("Given that ancillary charges are typically shielded from site commission assessments in correctional institutions' contracts with providers, ICS providers appear to have an incentive to assess additional ancillary charges as an alternative source of revenue to compensate for lowered ICS rates or for increasingly high site commission payments.").

[571] Thus, providers would be prohibited from imposing charges for biometrics technology, for example. *See* Pay Tel Oct. 8, 2015 *Ex Parte* Letter at 3 (seeking clarification "as to whether a separate 'biometrics fee' would be permissible as an additive to the rate caps.").

[572] *See, e.g.*, Please Deposit All of Your Money Study at 9 (PPI discusses the "premise impose fee" and the "public telephone surcharge" that some ICS providers charge their customers and then suggests that "[t]he prison phone industry's embrace of prepaid calling means that the phone companies enjoy the convenience of not having to worry that their low-income customers may not be able to pay their bills. While paying interest or a giving a discount might be an appropriate way to thank consumers for paying in advance, the industry instead charges additional fees on top of the high telephone rates simply for keeping the prepaid account open.").

[573] *See, e.g.*, NCIC Second FNPRM Comments at 3 ("In the case of the ICS providers with the highest fees and single pay products, their profits will drop by as much as 70%.").

[574] *See* NJAID/NYU IRC May 15, 2015 *Ex Parte* Letter at 2 and note 3 (providing NJ Dept. of Treasury, Division of Purchase and Property staff responses to ICS contract bidders' questions about what fees may be included in contract bids.).

[575] *See* 47 U.S.C. § 276(b)(1).

163. Each of the entries in Table Four focuses on the particular functions related to each type of charge listed below.[576]

Table Four

Permitted Ancillary Service Charges and Taxes	Monetary Cap Per Use / Instruction
Applicable taxes and regulatory fees	Provider shall pass these charges through to consumers directly with no markup
Automated payment fees[577]	$3.00
Fees for single-call and related services, e.g., direct bill to mobile phone without setting up an account	Provider shall directly pass through third-party financial transaction fees with no markup, plus adopted, per-minute rate
Live agent fee, i.e., phone payment or account set up with optional use of a live operator	$5.95
Paper bill/statement fees (no charge permitted for electronic bills/statements)	$2.00
Prepaid account funding minimums and maximums	Prohibit prepaid account funding minimums and prohibit prepaid account funding maximums under $50
Third-party financial transaction fees, e.g., MoneyGram, Western Union, credit card processing fees and transfers from third-party commissary accounts	Provider shall pass this charge through to end user directly, with no markup

164. *Data Analysis*. Based on our analysis of the ancillary service charge cost data submitted in response to the Mandatory Data Collection and the record, we conclude that the caps we adopt for ancillary service charges will allow ICS providers to recover their reported costs attributable to providing these services and earn fair compensation. Ten of the fourteen ICS providers that submitted data in response to the Mandatory Data Collection included cost and revenue data for ancillary service charges.[578] One provider did not report any direct costs related to ancillary service charges and one provider reported only one ancillary service charge. The reported *rates* for ancillary service charges range from $0.08 to $10.97 per use for automated payments, from $2.49 to $5.95 per use for transactions handled by a live agent, and from $1.50 to $5.00 for paper billing fees. In comparison, ICS providers report that they incur *costs* for ancillary service charges ranging from $0.10 to $6.58 when they offer automated payments, $2.49 to $5.26 when they offer transactions handled by a live agent, and $0.08 to $2.88 when they offer paper billing.[579] These numbers serve to illustrate the enormous difference between the charges imposed

[576] Thus, even if a provider renames one of its fees to match the terminology in this table, that will not be sufficient to make it an allowable ancillary service charge. Also, each individual ancillary service charge that an ICS provider levies must serve one of the permitted functions in order to qualify as a permissible ancillary service charge, regardless of the precise terminology used. In the event of dispute, the Commission will evaluate the fee charged to a consumer on the basis of the totality of the circumstances, judged from a reasonable consumer's point of view, to determine whether the fee serves one of the permitted functions.

[577] Automated payments include payments by interactive voice response (IVR), web, or kiosk.

[578] In a separate 2014 filing Pay Tel reported that its cost of providing web and IVR-based payment processing to its customers is $3.14 and its cost of providing live agent payment processing to its customers is $6.55. *See* Pay Tel Communication Inc.'s Petition for Waiver of Interim Interstate ICS Rate Caps, WC Docket No. 12-375 (filed Jan. 8, 2014) at Attach. "Cost Study," Worksheet H1, p.1.

[579] *See generally* provider responses to the Mandatory Data Collection.

on ICS end users and the much lower costs to ICS providers of offering those services. The ancillary service charge caps we have selected fall within a reasonable range[580] of the reported costs for the services, and are supported by the record for each fee cap as explained below.

165. We also note that some jurisdictions have banned ancillary service charges and that providers have complied with such regulations.[581] This suggests that ancillary service costs can be recovered with reasonable ICS rates. Accordingly, our ancillary service charge caps should more than adequately compensate for the costs incurred. Moreover, we conclude that the annual reporting, certification and data collection requirements adopted herein regarding ancillary fee information will ensure compliance with the requirements. We will use this information to ensure that ICS providers are complying with the reforms adopted herein.

166. *Ancillary Services Charge Cap Methodology*. The reforms we adopt herein represent a middle ground between the various proposals in the record. First, we determined which categories of ancillary service charges should be allowed. Next, we evaluated the information obtained through our Mandatory Data Collection as discussed above, and comments in the record addressing the specific proposals in and in response to the *Second FNPRM*. We conclude that prohibiting ICS providers from recovering their costs reasonably and directly related to making available an ancillary service would not allow ICS providers to receive fair compensation for those services. We also conclude that certain proposed high ancillary service charges, such as those in the Joint Provider Proposal, would result in excessively compensatory fees and would violate our requirement to make ICS rates just, reasonable and fair to end users. Therefore, we adopt caps on fees for ancillary service charges that will allow ICS providers to recover the costs incurred for providing the ancillary service associated with the relevant fee while ensuring just, reasonable, and fair rates to end users. Below we explain the analysis that went into determining the appropriate cap for each category of permitted ancillary service charge.

167. *Automated Payment Fee.* We permit up to a $3.00 automated payment fee for credit card, debit card, and bill processing fees, including payments made by interactive voice response (IVR), web, or kiosk.[582] This approach is supported by the record and more than ensures that ICS providers can recoup the costs of offering these services.[583] The Commission specifically sought comment on automated payment fees in the *Second FNPRM*. For example, the Commission asked whether a $3.00 cap for debit and credit card payment fees via the web, an IVR, or a kiosk was an appropriate charge.[584] We find support for our approach from numerous commenters, including the Alabama PSC,[585] which concluded, as we do, that a $3.00 cap for credit card processing and bill processing is appropriate.[586] This $3.00 cap is also supported by Pay Tel, which charges this amount for automated payments.[587] In addition, multiple parties support this approach in the record, including the Wright Petitioners,[588]

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[580] *See supra* para. 108.

[581] *See, e.g.*, Comments of Cook County, IL, WC Docket No. 12-375 (filed Jan. 12, 2015).

[582] *See infra* Appendix A.

[583] Providers Mandatory Data Collection reported costs for automated payments ranging from $0.10-$6.58. *See supra* para. 164.

[584] *See Second FNPRM*, 29 FCC Rcd at 13208, para. 94.

[585] Alabama PSC Second FNPRM Comments at 16 (For example, the ancillary fee caps "are, in fact, the same fees that Pay Tel applied to its end users before the APSC adopted them and are generally in line with what other providers in Alabama charge with the exception of Securus, GTL, and Telmate.").

[586] Alabama PSC Second FNPRM Comments at 19.

[587] Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at Attach. (filed Jan. 28, 2014) (Pay Tel Jan. 28, 2014 *Ex Parte* Letter).

[588] Wright Petitioners Second FNPRM Reply at 10.

CenturyLink,[589] and NCIC[590] – all of which agree this amount is an appropriate cap for automated payments.[591] Securus, one of the largest ICS providers in the market, asserted that allowing end users to pay with credit cards costs the company more than $3.00.[592] The credit-card processing costs that Securus cites indicate to us that it is an outlier, especially since, as just discussed, companies that are much smaller than Securus acknowledge that they can process credit card payments at a $3.00 rate. We find that a $3.00 cap on automated payments is supported by the reported *costs* of providing the service as opposed to other *rates* for the service.[593]

168. *Live Agent Payment Fee or Account Set Up.* We allow ICS providers to recover up to $5.95 when consumers choose to make use of an optional live operator to complete ICS transactions.[594] We have recognized that interaction with a live operator to complete ICS transactions may add to the costs of providing ICS. Thus, we allow an ancillary service charge to compensate providers for offering this optional service.[595] As with the other ancillary service charges we have determined are appropriate, in the *Second FNPRM*, the Commission also specifically asked commenters about the $5.95 maximum fee for live operator assisted payments.[596] For the live agent phone payment of $5.95 that we adopt, we note that multiple ICS providers including, CenturyLink,[597] NCIC,[598] and Pay Tel,[599] as well as the Wright Petitioners,[600] and the Alabama PSC,[601] all agree that this is the correct rate. This $5.95 fee may only be charged once per interaction with a live operator, regardless of the number of tasks completed in the call, and live operator calls may not be terminated in order to attempt to charge this fee an additional time. We

[589] CenturyLink Second FNPRM Reply at 28.

[590] Letter from William L. Pope, President, NCIC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed May 18, 2015) (NCIC May 18, 2015 *Ex Parte* Letter).

[591] This cap level is also supported by a provider of payment processing services. *See* Letter from Stephen Price, General Partner, CEO, E-Complish, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed June 10, 2015).

[592] *See* Securus Second FNPRM Comments at Decl. of Dennis Rose; *see also* Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 12-13 (filed Oct. 8, 2015).

[593] The Joint Provider Proposal for example, says that its $7.95 cap on transaction or deposit fees "is consistent with the current market rate for funding ICS accounts." *See* Joint Provider Proposal at 5 (emphasis added); *see also supra*. para. 164.

[594] *See infra* Appendix A.

[595] *See, e.g.*, Hamden Second FNPRM Comments at 15 (recognizing that additional compensation for transactions involving a live operator may be justified); NCIC Second FNPRM Comments at 21-22 ("The Alabama Public Service commission was generous to allow up to $5.95 on funding via a live operator. By allowing ICS providers to recoup their cost in offering live assistance, family members will have more convenient access to a live representatives instead of forcing families to use IVR or to visit a website."); *see also supra* para. 164.

[596] *See Second FNPRM*, 29 FCC Rcd at 13208, para. 94.

[597] Letter from Thomas M. Dethlefs, Associate General Counsel - Regulatory, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed May 14, 2015) (CenturyLink May 14, 2015 *Ex Parte* Letter).

[598] NCIC May 18, 2015 *Ex Parte* Letter at 1.

[599] Pay Tel Jan. 28, 2014 *Ex Parte* Letter at Attach.

[600] Wright Petitioners Second FNPRM Reply at 10.

[601] Reply Comments of Alabama PSC, WC Docket No. 12-375 at 8-9 (filed Jan. 30, 2015) (Alabama PSC Second FNPRM Reply).

will monitor any complaints we receive with regard to the live agent fee that suggest that providers are attempting to circumvent the limitations this rule sets forth.

169. *Paper Bill/Statement Fee.* We permit a cap of $2.00 for optional paper billing statements.[602] In the *Second FNPRM*, the Commission noted that the Alabama PSC had capped the charge for a paper bill or statement, and asked commenters to explain whether this, and other approaches taken by the Alabama PSC, were reasonable and would lead to just and reasonable rates and fair ICS compensation.[603] Multiple commenters agreed. Specifically, the $2.00 paper bill charge[604] we adopt is supported by the Wright Petitioners,[605] Pay Tel,[606] and the Alabama PSC,[607] while CenturyLink argues that the rate should be marginally higher at $2.50 per bill.[608]

170. *Third-Party Financial Transaction Fee.* In the *Second FNPRM*, the Commission asked how it should ensure that money transfer service fees paid by ICS consumers are just and reasonable and fair.[609] The record establishes that inmates' families frequently do not have bank accounts,[610] and therefore rely on third-party money transfer services such as Western Union or MoneyGram to fund calls with inmates.[611] Third-party financial transaction fees as discussed herein consist of two elements. The first element is the transfer of funds from a consumer via the third-party service, i.e., Western Union or MoneyGram,[612] to an inmate's ICS account.[613] The second element is the ICS provider's additional charge imposed on end users for processing the funds transferred via the third party provider for the purpose of paying for ICS calls.[614] We find that this first aspect of third-party financial transaction, e.g., the money transfers or credit card payments, does not constitute "ancillary services" within the meaning of section 276. The record suggests that ICS providers have limited control over the fees established by third parties, such as Western Union or credit card companies, for payment processing functions.[615]

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[602] *See infra* Appendix A.

[603] *See Second FNPRM*, 29 FCC Rcd at 13206, para. 90.

[604] We believe the paper bill charge is typically used in the context of collect calling which, as discussed, above, we find is decreasing in use. *See supra* Section IV.A.3.e.

[605] Wright Petitioners Second FNPRM Reply at 10.

[606] Pay Tel Aug 18, 2014 *Ex Parte* Attach. "Data Collection" at 5.

[607] Alabama PSC Second FNPRM Reply at 9.

[608] CenturyLink May 14, 2015 *Ex Parte* Letter at 2 (addressing this fee specifically in terms of collect billing fees).

[609] *See Second FNPRM*, 29 FCC Rcd at 13212-13, paras. 103-04.

[610] CTEL Second FNPRM Comments, App. B at 8.

[611] NCIC Second FNPRM Comments at 25.

[612] We use these two services as an example but do not foreclose the possibility that there are other third-party financial transaction services. Credit card payment processing also falls under our discussion here.

[613] One payment-processing service provider indicates that its company usually charges $3.00 to $5.00 per transaction, and the use of a live operator would increase the charge to $5.00 to $7.00 per transaction. *See* Letter from Stephen Price, General Partner/CEO, E-Complish, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed June 10, 2015).

[614] *See, e.g.*, Lancaster County DOC Mar. 3, 2015 *Ex Parte* at 7 (explaining that the Joint Provider Proposal "seeks Commission approval of a $2.50 additive to the fees charged by third-party transfer services such as Western Union and Money Gram").

[615] *See* Lipman Second FNPRM Comments at 10 ("When the ICS provider is billing a customer for some other service, such as a money transfer, the Commission's jurisdiction is not applicable."); Securus Second FNPRM Comments at 25; GTL Second FNPRM Comments at 30; Alabama PSC Second FNPRM Comments at 23; GTL

(continued….)

171. However, the record indicates that ICS providers are imposing significant additional charges, as high as $11.95, for end users to make account payments via third parties, such as Western Union or Money Gram, and sharing the resulting profit with those third-party financial institutions.[616] We find that the ICS providers' additional fee or mark-up to the third-parties' service charges function as a billing-and-collection related charge, on top of the third-party charge, that the Commission has authority to address. Providers have offered no cost-based justification for imposing an additional fee on end users on top of the third-party money-transfer service or financial institution fee,[617] nor have they explained what (if any) functions they must necessarily perform to "process" a transfer already transferred from the third-party provider. Therefore, as discussed in more detail below, we require that ICS providers pass through to their end users, with no additional markup,[618] the money transfer or third-party financial transaction fees they are charged by such third parties.

172. Our adopted approach ensures that, in transactions like these, ICS providers do not receive excessive compensation, while also protecting consumers from unreasonable additional fees that result in unjust and unreasonable ICS rates.[619] We find support for our third-party financial transaction fee approach from parties such as CenturyLink[620] and NCIC,[621] and the Alabama PSC additionally urges the Commission to require ICS providers to "eliminate the provider ancillary charge premium they assess

(Continued from previous page)
Second FNPRM Comments at 22; CTEL Second FNPRM Comments, App. B at 8.

[616] *See, e.g.*, Prison Policy Initiative Jan. 13, 2014 *Ex Parte* Letter at 3 ("The exact extent to which a portion of the third-party fee is actually cost-based may still be up for debate, but the FCC can be confident that a portion of the fees charged by third parties such as Western Union for payments to certain providers is in fact being collected by ICS companies."); *see also* PPI NPRM Comments at Exh. 14 (providing screen captures of the Western Union bill pay web interface that shows an $11.95 end-user fee to make a payment on a Securus account and a $1.50 end-user fee to pay a power company bill by the same method).

[617] *See, e.g.*, *Please Deposit All of Your Money* at 8; Alabama PSC Second FNPRM Comments at 23 ("[T]he record for our proceeding shows that Western Union and MoneyGram are currently sharing revenue with ICS providers when the transfer fee exceeds $5.95."); Lancaster County DOC Mar. 3, 2015 *Ex Parte* at 7-8 ("What justification is there for a provider additive to the payment transfer fee other than a dubious claim [that] it is to cover administrative costs for taking the customer's money?"); HRDC Second FNPRM Comments at 10 ("The [Joint Provider Reform Proposal] suggests a maximum of $2.50 for administrative fees with no explanation as to how that amount was calculated and whether it is just or reasonable. The ICS providers should be required to justify the proposed fee by disclosing the actual costs incurred to process a money transfer payment.").

[618] The record indicates that no additional markup is warranted on top of the fees charged by the third-party payment providers. *See, e.g.*, CenturyLink Oct. 10, 2014 *Ex Parte* Letter at 2 ("The September 15 Proposal would retain charges for 'premium' payment options that are grossly excessive and unfair to consumers, [and] would allow an unnecessary $2.50 per-transaction markup for third-party funding methods (e.g., Western Union and MoneyGram."). *But see* GTL Sept. 23, 2015 *Ex Parte* Letter at 7 (claiming that "[t]he money transfer fee is reasonable because ICS providers incur costs associated with funding ICS accounts, whether the funds are being transferred to the ICS provider via credit card or via a third-party money transfer service").

[619] Alabama PSC Second FNPRM Comments at 23 ("The APSC is opposed to the $2.50 transfer fee additive included in the [Joint Provider Reform] Proposal and questions why any such additive should be given any consideration when Western Union or MoneyGram are performing the money transfer, not the ICS provider. Any administrative costs incurred with processing the customer's payment is part of routine business overhead."); HRDC Second FNPRM Comments at 11 ("[A] $2.50 fee added to the amount charged by third-party money transmitters (up to $11.95, according to Western Union's website) [as in the Joint Provider Proposal] may result in excessive fees charged to prisoners' families simply to add money to their account.").

[620] CenturyLink May 14, 2015 *Ex Parte* Letter at 2 ("The Commission should prohibit markups of third-party funding fees, such as those charged by Western Union.").

[621] NCIC May 18, 2015 *Ex Parte* Letter at 1.

on top of the $5.95 payment transfer fee available to their customers from Western Union and MoneyGram."[622]

173. *Prohibited Fees*. As explained above, our approach to fees charged for ancillary services specifically enumerates the charges permitted and bans all other ancillary service charges. We find no other examples in the record of ancillary services that are actually provided today and that have a cost that warrants recovery. While we place limits on the types of ancillary service charges we allow, we note that it is important to have payment options that permit the consumer simply to pay for service without incurring any additional charges. Many commenters, including ICS providers,[623] agree that these basic or standard methods, such as making payments by check or money order, must remain available without charge.[624] Securus, for example, has assured the Commission that "[p]ayment by check or money order always will be available and free of charge."[625] In accordance with our decision to allow only the specific ancillary service charges we enumerate in this Order, we clarify that no charges are permissible for payment by check or money order.

174. At this time, we do not find it necessary to eliminate all ancillary service charges to be consistent with our statutory objectives and policy goals for ICS reform. We are mindful of and concerned about the potential for continued abuse of ancillary service charges, and we will monitor the implementation of these caps and determine if additional reforms are necessary in the future.[626] By limiting the scope of ancillary service charges, we also resolve other problems presented in the record.[627] We prohibit all other ancillary service charges not enumerated because the record did not demonstrate that any other ancillary services are reasonably and directly related to the provision of ICS, nor are they necessary to ensure that ICS providers receive fair compensation for providing service. Permitting any other ancillary service charges would promote unfair, unjust, and unreasonable rates to end users, and would thus be contrary to our statutory mandate. Further, we find that removing a substantial number of unjustifiable charges not only benefits consumers, but also reduces compliance costs for ICS providers by allowing them easily to identify whether a particular charge is permitted by our rules. Additionally, since we have determined that the only justifiable ancillary service charges are the ones we specifically enumerated, there are no countervailing costs that would outweigh our selected approach.

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[622] Alabama PSC Second FNPRM Reply at 4-5.

[623] For example, one of GTL's voluntary commitments explains that "[e]ach ICS provider shall offer the ability for consumers and inmates to pay for an inmate-initiated call without incurring a payment processing fee, such as a transaction or deposit fee, a money transfer fee, or a 'convenience' payment processing fee. Such 'no-charge' options include a mailed payment by check or money order." Letter from Chérie R. Kiser, Counsel, GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 1-2 (filed July 2, 2015) (GTL July 2, 2015 *Ex Parte* Letter).

[624] Ample support for this proposition exists in the record. For example, Michael S. Hamden explains that "as long as consumers may pre-pay accounts via check or money order without paying a premium, it may be reasonable to permit ICS providers to charge a modest fee to cover the cost of debit and credit card transactions, with some permissible increment for transactions involving a live operator." Hamden Second FNPRM Comments at 15. Similarly, GTL notes that the Joint Provider Proposal explains that end users always have "the ability to proceed with the transaction without incurring any fee (such as payment by check or money order)." GTL Second FNPRM Comments at 20.

[625] Securus Second FNPRM Reply at 19; *see also* GTL Apr. 3, 2015 *Ex Parte* Letter at 16 ("Consumers should have the ability to utilize convenience payment options if they so choose, especially when they are advised of the amount of the charge and the availability of free payment options in advance as outlined in the Joint Provider Proposal.").

[626] *See infra* Sections IV.D, IV.K.

[627] *See, e.g.*, NSAG Second FNPRM Comments at 2 ("In some cases, telecoms are actually taking prepaid monies from prisoner accounts if for whatever reason the account is 'inactive.' Any action taken by the FCC should therefore include elimination of this practice.").

175. *Purchase Minimums and Maximums.* In the *Second FNPRM*, the Commission asked commenters whether anything should be done about policies, such as funding minimums and maximums that may restrict consumers' access to ICS.[628] In response, some parties raise concerns that some ICS providers are engaging in unjust and unreasonable practices and imposing unfair rates by instituting minimum or maximum amounts that may be deposited for prepaid calling accounts. CenturyLink, for example, contends that "[p]roviders might impose high purchase minimums and complex refund policies to obtain captured funds. Providers might also adopt low purchase maximums to force customers to have to repeatedly re-purchase services and generate transaction fees."[629] Similarly, ICSolutions urges the Commission to regulate minimum and maximum funding requirements, arguing that high minimum funding requirements "can preclude consumers from receiving calls from their loved ones," while low maximums can force consumers to "fund their account more frequently, so that [the provider] can charge more ancillary fee payments."[630] Furthermore, NCIC points out that "payments for prepaid service by money order or check [are] available free of charge to ICS end users but this payment method is frequently impractical because of the excessive latency involved in establishing service (up to ten days for some providers)."[631] Thus, inmates are essentially forced into entering into more costly prepaid options, many of which require minimum payments and/or impose maximum limits on deposits.[632]

176. We agree that high purchase minimum requirements can lead to unfair compensation by forcing consumers to deposit relatively large sums of money even if they only want to make one short call or by driving consumers to more expensive calling options. Thus, high purchase minimums can effectively allow providers to charge exorbitant amounts for single calls.[633] Such a result would be antithetical to the Commission's goals and to the requirements of sections 201 and 276.

177. An artificial limit on maximum account deposits could also lead to gaming and loopholes. CenturyLink points out that low maximums on deposits can allow providers to increase transaction fees.[634] A provider may refuse to permit a consumer from depositing more than a certain amount of money into an inmate calling account in a single transaction, thereby compelling the consumer to engage in additional transactions and, as a result, incur multiple ancillary service charges. Thus, providers could circumvent our reforms by placing artificially low limits on deposits and requiring consumers to incur ancillary charges every time they add additional money to an account.

178. In order to prevent ICS providers from obtaining unfair compensation by inflating costs for end users relating to maximum and minimum deposits, we prohibit ICS providers from instituting prepaid account minimums, and require that any provider that limits deposits to set the maximum purchase amount at no less than $50 per transaction.[635] Data from the Mandatory Data Collection show that the average call length reported by respondents was approximately 13 minutes.[636] Under our new rate

[628] *See Second FNPRM*, 29 FCC Rcd at 13216, para. 111.

[629] CenturyLink Oct. 15, 2015 *Ex Parte* Letter at 2-3.

[630] ICSolutions Oct. 15, 2015 *Ex Parte* Letter at 3.

[631] NCIC Oct. 14, 2015 *Ex Parte* Letter at 4.

[632] *Id.* at 4 (noting that for newly-booked inmates, a "long wait to establish contact with loved ones and/or attorneys is unacceptable. . .").

[633] In addition, NCIC explains that "many inmate families are economically disadvantaged and can afford only small prepayments that exhaust quickly." NCIC Oct. 14, 2015 *Ex Parte* Letter at 4.

[634] CenturyLink Oct. 15, 2015 *Ex Parte* Letter at 2-3.

[635] *See, e.g.*, CenturyLink Oct. 15, 2015 *Ex Parte* Letter at 3 ("To close these loopholes, the Commission should prohibit purchase minimums and should require that purchase maximums be no lower than $50."); ICSolutions Oct. 15, 2015 *Ex Parte* Letter.

[636] *See Second FNPRM*, 29 FCC Rcd at 13201, para. 78.

structure, that means the average cost of a call from a prison would be about $1.43.[637] Accordingly, a $50 maximum per transaction would mean that consumers will be able to make a relatively large number of calls with a single deposit (on average about 35 calls).[638] We find that allowing a lower limit would create an unacceptable risk that providers would be able to compel consumers to incur multiple ancillary service charges, as explained above. We note, however, that the record also reflects concerns that setting the floor for maximum allowable deposits too low could create risks for ICS providers, including the potential for fraud.[639] Allowing providers to institute maximum deposit amounts, but requiring that those maximums be no lower than $50, strikes a reasonable balance between the competing concerns expressed in the record. We also note that various providers have instituted maximum deposit policies that conform to our requirement of no less than a $50 maximum per transaction, and in some circumstances have even instituted higher maximum deposit limits.[640] As noted below, we will continue to monitor the ICS marketplace and to investigate any attempts, such as these, to circumvent our rate caps or our rules governing ancillary charges. Due to the history of the large number and ever-changing and growing nature of ancillary service charges, as described in the record, we will be diligent in identifying any providers that violate the new rules covering ancillary service charges, third-party financial transaction fees, and minimum and maximum account funding. Accordingly, we delegate to the Bureau the authority to clarify the rule as necessary, after public notice and an opportunity to comment, where appropriate, to ensure that the reforms adopted in this Order relating to ancillary service charges and third-party financial transaction fees are properly reflected. This includes seeking comment on prohibiting additional ancillary fees if there is evidence of abuse of the permitted charges.

4. Cost-Benefit Analysis

179. After careful consideration, we find that our approach to adopt simple ancillary service charge caps provides significant and important benefits to ICS end users, outweighing any potential burdens to providers. As discussed above, we conclude that reform is necessary to address ever-increasing and multiplying fees that are unchecked by competitive forces and unrelated to costs.[641] We find that the allowable ancillary service charges will facilitate communications between inmates and their families, while enabling ICS providers to recover the costs incurred for providing the associated ancillary services.

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[637] An average 13 minute call multiplied by the rate for prisons ($0.11) yields an average cost of about $1.43 per call from a prison. *See supra* Tbl. Three.

[638] $50.00 divided by an average cost per call of $1.43 yields approximately 35 calls per $50.00 deposit. Even a customer paying the highest jail rate of $.22/minute would be able to make approximately 17 calls per $50.00 deposit. There is also evidence that a $50.00 limit would allow the average consumer to go two months, or longer, between transactions. *See* Alabama PSC Second FNPRM Comments, Attach. at 18 (stating that the "average household spends $24 per month on inmate communications.").

[639] *See, e.g.*, Alabama PSC Second FNPRM Comments, Attach. at 18 (explaining that in the Alabama PSC July 7, 2014 Further Order, CenturyLink expressed concerns that setting the maximum deposit below $50.00 "could endanger CenturyLink's merchant agreements which currently have a $50 transaction maximum" and could harm consumers who were the victims of credit card theft).

[640] *See, e.g.* Please Deposit All of Your Money Study at 7 ("TurnKey will accept up to $400 in a one-month period, but only allows individual deposits of up to $150, each with an $8 deposit fee. Similarly, AmTel will accept up to $250 per week, but charges $6.95-$10.00 to make a maximum individual payment of up to $100, and ICSolutions will accept $275 per month, but charges $6.95 to make a payment of up to $50."); CenturyLink Oct. 15, 2015 *Ex Parte* Letter at 3 ("[P]urchase maximums [should] be no lower than $50"). We note that our rules require no less than a $50 maximum per transaction, but there is no upward limit on the per transaction deposit amounts. ICS Providers are free to allow maximum deposits over our $50 requirement.

[641] *See supra* para. 161.

180. It is clear that market failure exists with regard to ancillary service charges.[642] Numerous parties cite specific instances of such market failure or abuse among ancillary service charge categories.[643] Additionally, commenters request the Commission take action to curb these abuses by adopting reforms.[644]

181. By creating simple rate caps and limiting the scope of ancillary service charges, we resolve these problems and reform ancillary charges. We prohibit all ancillary service charges not specifically allowed, not only for the foregoing reasons, but also because the record did not demonstrate that any other ancillary services are reasonably and directly related to the provision of ICS or necessary to ensure that ICS providers receive fair compensation for providing service.[645] Further, we find that removing a substantial number of unjustifiable charges not only benefits consumers, but also reduces compliance costs for ICS providers by allowing them easily to identify whether a particular charge is permitted by our rules, thus reducing the burden on them. As noted below, however, to minimize any potential burdens associated with ancillary service charges, we will reevaluate these charges to determine if adjustments are appropriate.[646]

5. Fees for Single-Call and Related Services

182. *Background*. The record indicates that single-call and related services[647] are a growing part of the ICS market.[648] These options, such as single-call services, are billing arrangements whereby an ICS provider's collect calls are billed through third-party billing entities on a call-by-call basis to parties whose carriers do not bill collect calls.[649] A single-call service thus may be used for calls placed from the inmate facility to mobile phones or a telecom service where the called party does not have an

[642] *See supra* Section IV.C.1.

[643] *See, e.g.*, NSAG Second FNPRM Comments at 2 ("In some cases, telecoms are actually taking prepaid monies from prisoner accounts if for whatever reason the account is 'inactive.' Any action taken by the FCC should therefore include elimination of this practice.").

[644] *See, e.g.*, Hamden Second FNPRM Comments at 15 (explaining that "as long as consumers may pre-pay accounts via check or money order without paying a premium, it may be reasonable to permit ICS providers to charge a modest fee to cover the cost of debit and credit card transactions, with some permissible increment for transactions involving a live operator"); CenturyLink May 14, 2015 *Ex Parte* Letter at 2 (stating that "the Commission should prohibit markups of third party funding fees, such as those charged by Western Union."); Alabama PSC Second FNPRM Comments at 23 (opposing "the $2.50 transfer fee additive included in the [Joint Provider Reform] Proposal and question[ing] why any such additive should be given any consideration when Western Union or MoneyGram are performing the money transfer, not the ICS provider."); HRDC Second FNPRM Comments at 11 (contending that a "$2.50 fee added to the amount charged by third-party money transmitters (up to $11.95, according to Western Union's website) [as in the Joint Provider Proposal] may result in excessive fees charged to prisoners' families simply to add money to their account."); Wright Petitioners Second FNPRM Comments at 16 ("[T]hese fees go straight to the ICS providers' bottom line and exist solely to extract unnecessary funds from ICS customers.").

[645] *See supra* Section IV.C.

[646] *See infra* Section IV.D.

[647] Providers sometimes refer to these services with the broad term "convenience calling," presumably because some of the services permit a called party to receive a call for a fee without opening an account with the provider. To avoid confusion, we will refer to them with respect to the actual service involved.

[648] *See, e.g.*, Prison Policy Initiative: Second FNPRM Single Call Programs Comments at 8 ("[W]e wish to point out that single call programs warrant the Commission's careful review because they may account for as much as 40% of the revenue, they are clearly growing, and the providers are claiming these programs are not subject to FCC or state regulation.") (internal citations omitted).

[649] *See infra* Appendix A.

account, does not want to establish an account, or does not know the party can establish an account with the ICS provider.[650] Although some efficiencies may derive from single-call and related services, the record is replete with evidence that some of these services are being used in a manner to inflate charges, and may be offered at unjust, unreasonable, or unfair rates, and/or at rates above our interim rate caps or rate caps adopted in this Order.[651] The record also highlights substantial end-user confusion regarding single-call services.[652]

183. A significant problem with single-call and related services is that they end up being among the most expensive ways to make a phone call.[653] In the *Second FNPRM*, the Commission sought comment on the prevalence of single-call services and whether rates for such services are just and reasonable.[654]

184. There is a diversity of views in the record on single-call and related services. CPC believes that single-call services should be treated as ancillary services subject to rate caps and that consumers must be notified of the option to set up a prepaid account instead.[655] Several commenters believe that all of these single-call and related services should be eliminated because they are simply an "end run" around the Commission's rate caps.[656] The Wright Petitioners note that any proposed rate caps

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[650] *See, e.g.*, Alabama PSC Second FNPRM Comments at 16 ("Securus, GTL, and Telmate offer single payment services wherein inmate collect call are billed to a wireless recipient's carrier bill via a SMS (premium text message) or to the wireless recipient's credit card if their cell phone is not SMS capable.").

[651] *See, e.g.*, CPC Second FNPRM Comments at 3 ("[E]xpenses are recouped with high priced 'single call' services with rates upwards of $1.00 per minute charged to end users."); ICSolutions Second FNPRM Comments at 11 ("At very best, if the call lasts the maximum duration (10 or 15 minutes), the cost of these calls can be as much as 376% higher than the current interstate cap rates.").

[652] Commenter Robin Fussell, for example, reported picking up the phone and beginning to talk with a panicked loved one who was in jail in Alabama. After about one minute, a message interrupted their conversation: "Your account will be charged $2.39 for the first minute plus zero cents per minute up to the max call time of 15 minutes. In addition to the quoted bill of the call, applicable taxes and fees will apply." A few days after the call, Ms. Fussell noticed a credit card charge not for $2.39, but for $11.33, apparently because of "applicable taxes and fees." The unexpected bill amount came from an ICS provider's single call service. *See* Letter from Robin Fussell, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1-2 (filed June 15, 2015); *see also* Prison Policy Initiative: Single Call Programs at 5 (quoting Alex Friedman, Associate Director, HRDC, describing receiving a single call service call from a client: "She called me, and when I picked up the phone the automated system told me I was receiving a free call from somebody in jail. And she said, 'I'm locked up. I'm in such-and-such-a jail. I'm scared. I need help. Can you please…,' and then she was cut off, and an automated system kicked in and informed me that if I wanted to continue that free call, I could conveniently pay $14.95 on my credit card or open a prepaid account." 2013 ICS Workshop Transcript at 24.

[653] Prison Policy Initiative: Second FNPRM Single Call Programs Comments at 5; *id*. at 3 ("Single call programs are a new product where fees constitute almost the entirety of the charge to the customer.").

[654] *Second FNPRM*, 29 FCC Rcd at 13210-11, paras. 98-99.

[655] CPC Second FNPRM Comments at 3; Thurber Mar. 16, 2015 *Ex Parte* Letter at 7 ("Interestingly, none of the other inmate calling providers [apart from the ones submitting the Joint Provider Proposal] offer these services to their customers. Instead, they direct wireless recipients of sent-collect inmate calls to their service center for purposes of setting up a prepaid account. Using a debit/credit card, the account can be established while the inmate remains on hold.").

[656] *See* HRDC Second FNPRM Comments at 12 ("The Commission asks if these services are 'effectively an end run around the Commission's rate caps,' and the answer is yes."); *see also* Wright Petitioners Second FNPRM Reply at 10 ("Other charges, such as single-call or text-to-connect fees, must comply with the per-minute ICS rate adopted by the FCC, and must not serve as a backdoor avenue for ICS providers to further gouge their customers, and must avoid paying kickbacks to the correctional authorities."); Pay Tel Second FNPRM Reply at 39 ("Consistent with the approach to these calls adopted by Alabama, Pay Tel has proposed a reasonable $3.00 automated phone payment fee

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should also apply to single-call services, along with a $3.00 funding fee.[657] PPI also argues that, in the alternative, charges for single call services should be restricted to a reasonable deposit fee, plus a reasonable capped call fee.[658] As the Alabama PSC notes, "[t]he regulator's duty is to set fair and reasonable rates for ICS calls."[659]

185. ICSolutions notes that the single-call or related service charge is often $9.99 or $14.99, regardless of whether the call lasts one minute or 10 or 15 minutes, and that these rates are 300 percent or 376 percent higher than the effective interstate rate caps.[660] It contends that such calls pose a danger to consumers, and that providers manipulate consumers into selecting these calling options even though less costly call options may exist.[661] Other providers share ICSolutions' concern that single-call or related services are used to "inflate ancillary fees" at the expense of end users.[662] CenturyLink, ICSolutions, and NCIC, among others, expressed concern about the use of third parties, including unregulated subsidiaries, to provide single-call or related services at high fees, and about revenue-sharing arrangements that enable ICS providers to recoup all or a portion of the ancillary service charge as profit outside our rate caps.[663] Additionally, the Alabama PSC analyzed these single-call services in a jail, and found that "[a]lthough single payment calls account for 14% of the calls and 17% of the minutes at the facility, they are responsible for 42% of all the revenue generated."[664] Conversely, GTL urges the Commission not to regulate these services, arguing the Commission does not have jurisdiction to do so.[665] Securus similarly argues that single-call and related services should not be considered ancillary services because they are optional and are not intended to be a substitute for traditional ICS calls.[666] Securus asserts that if the

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per single call, plus otherwise applicable per-minute rates, for these programs."). Some commenters expressed concerned that "such calls create an opportunity for providers to circumvent the rate caps and that these calls are a source of revenue used to support excessive site commissions on other inmate calls." *See, e.g.*, Thurber Mar. 16, 2015 *Ex Parte* Letter at 9; Pay Tel Second FNPRM Reply at ii ("Certain ICS providers' exorbitant charges for purportedly 'convenient,' 'premium,' 'optional' single-call programs are an end-run around the Commission's rate caps and must be stopped in order to ensure just and reasonable rates for ICS end users."). NCIC notes that by using a third party to validate the destination number for billing, to send the text message, and to collect on their convenience payment options, ICS providers often bypass regulations, taxes and state and federal fees. NCIC Second FNPRM Comments at 26-27. NCIC states that it offers its single-call service for $0.25/minute with no "premium" or "convenience" fee. *Id*. at 26. PPI argues that "single payment services may be purposefully diverted to third-party processors where exorbitant unregulated rates are charged by the provider and the revenues associated therewith are purposefully concealed not only from regulators but from the facility served by the provider." Prison Policy Initiative: Single Call Programs at 5 (quoting Alabama PSC Dec. 9, 2014 Further Order at § 6.35); PPD Second FNPRM Comments at 4.

[657] Wright Petitioners Second FNPRM Comments at 15.

[658] PPI Second FNPRM Single Call Program Comments at 9.

[659] Alabama PSC Second FNPRM Comments at 20.

[660] ICSolutions Second FNPRM Comments at 11. ICSolutions contends that these high costs are not driven by site commissions, so regulation of site commissions will provide no relief for consumers that use single call or related services. *Id*. at 11, 14.

[661] ICSolutions Oct. 15, 2015 *Ex Parte* Letter at 3 & Attach. A.

[662] *See, e.g.*, CenturyLink Oct. 15, 2015 *Ex Parte* Letter at 3.

[663] *Id*.; *see also* NCIC Oct. 14, 2015 *Ex Parte* Letter at 5; NCIC Oct. 9, 2015 *Ex Parte* Letter at 2 (describing harm from ancillary service charges assessed by third-party non-tariffed "pirate" providers).

[664] Alabama PSC Second FNPRM Comments at 17.

[665] GTL Second FNPRM Comments at 26.

Commission regulates the rates for single-call and related services, ICS providers will be forced to stop offering them, and inmates and their friends and families will have fewer calling options by which to stay in touch.[667]

186. *Discussion.* We agree with commenters that suggest single-call and related services are another form of ancillary service charges.[668] The additional costs stemming from single-call and related services are ancillary to the provision of ICS because they are additional fees charged to consumers, based on the consumer's discretion and desire to make use of such a service because, for example they want to speak to the incarcerated person as quickly as possible in order to arrange their release. We therefore believe that reform is necessary and that it is appropriate to address unreasonable charges. As a result, for single call and related services, we permit ICS providers to charge the amount of the third-party financial transaction (with no markup) added to a per-minute rate no higher than the applicable rate cap.[669] These reforms are necessary to ensure that when end users decide to take advantage of single-call and related services, the rates for such calls comply with the statute.

187. Unlike the ancillary service charge caps adopted above, we do not find that single-call and related services are reasonably and directly related to the provision of ICS, but are ancillary to ICS. We believe that charges for single-call and related services inflate the effective price end users pay for ICS and result in excessive compensation to providers. Accordingly, for single-call and related services, the Commission will allow ICS providers to charge end users for each single call in a manner consistent with our approach to third-party financial transaction fees – i.e., ICS providers may charge the amount of the third-party financial transaction (with no markup) added to a per-minute rate no higher than the applicable rate cap.[670] This approach is consistent with our overall approach to reforming both ICS per-minute rates and ancillary service charges. It will ensure just and reasonable rates for end users that are based on actual costs incurred by ICS providers.[671]

188. The record supports our reforms to fees charged for single-call and related services.[672] We have authority to reform ancillary service charges and we therefore disagree with ICS providers that

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[666] Securus Second FNPRM Comments at 27-28; *see also* Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Oct. 14, 2015) (Securus Oct. 14, 2015 *Ex Parte* Letter); Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Oct. 2, 2015).

[667] Securus Second FNPRM Comments at 28-29.

[668] *See, e.g.*, CPC Second FNPRM Comments at 3.

[669] *See infra* paras. 193-196.

[670] *See infra* paras. 193-196.

[671] *See* Letter from Thomas M. Dethlefs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No 12-375, at 2 (filed May 14, 2015) (CenturyLink May 14, 2015 *Ex Parte* Letter) ("Premium or convenience payment options should either be prohibited or allowed only when parties billed would incur rates and fees that match all other billing options."); Alabama PSC Second FNPRM Reply at 3 ("Unless ICS providers offering single payment services are able to successfully cost justify why the ancillary charge component of single payment calls should be higher, the maximum ancillary charge authorized by the Commission (bill processing fee or credit card processing fee) should apply to single payment calls as well.").

[672] *See, e.g.*, Wright Petitioners Second FNPRM Reply at 10 ("Other charges, such as single-call or text-to-connect fees, must comply with the per-minute ICS rate adopted by the FCC, and must not serve as a backdoor avenue for ICS providers to further gouge their customers, and must avoid paying kickbacks to the correctional authorities."); Pay Tel Second FNPRM Reply at 39 ("Consistent with the approach to these calls adopted by Alabama, Pay Tel has proposed a reasonable $3.00 automated phone payment fee per single call, plus otherwise applicable per-minute rates, for these programs."); CenturyLink May 14, 2015 *Ex Parte* Letter at 2 ("Premium or convenience payment options should either be prohibited or allowed only when parties billed would incur rates and fees that match all

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argue we lack authority.[673] Moreover, our approach in no way interferes with contracts between ICS providers and third-party payment processors or mobile phone companies because our rule simply prevents ICS providers from adding additional fees to the cost of these calls. It does not dictate what fees an ICS provider itself may choose to pay or not pay these third parties for services rendered.

189. We have also heard from commenters that a major problem with single-call and related services is that customers are often unaware that other payment options are available, such as setting up an account.[674] To help alleviate the problem of customers continually paying set up fees for single-call and related service calls, we encourage providers to make clear to consumers that they have other payment options available to them.[675] This is consistent with our discussion and analysis regarding consumer disclosure requirements below.[676] We will continue to monitor the use of such calling arrangements and seek specific information about them in the Further Notice of Proposed Rulemaking adopted today.[677]

6. Taxes and Regulatory Fees

190. The record in this proceeding indicates that ICS providers charge ICS end users "fees under the guise of taxes."[678] In an effort to ensure just, reasonable and fair ICS rates, in the *Second FNPRM*, the Commission asked "whether the cost of regulatory compliance should be considered a normal cost of doing business and as such should be recovered through basic ICS rates, not additional ancillary fees."[679] In response, Lattice asserts that "ICS providers also must be permitted to continue to

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other billing options."); NCIC Second FNPRM Comments at 28 (stating, with regard to the Alabama PSC approach for single call services, that "[t]he Alabama PSC was more than generous to offer this product at a flat rate, especially for Single Call Services billed to a major credit card / debit card. One would think the per-minute rate is more than sufficient when billed on a card"); HRDC Second FNPRM Comments at 12 ("It is imperative that the Commission completely eliminate allowable fees for single call/single payment services.").

[673] *See, e.g.*, Joint Provider Proposal at 4 ("the parties respectfully submit that the regulation of ancillary fees for transactions other than the provision of ICS is beyond the scope of the Commission's jurisdiction"); *see also* Securus Second FNPRM Comments at 25; Lattice Second FNPRM Comments at 8.

[674] *See, e.g.*, ICSolutions Second FNPRM Comments at 11 ("We believe consumers select these premium options not because they want the convenience, but rather, they are unaware of the other lower cost payment options."); CenturyLink Second FNPRM Reply at 26 ("Moreover, called parties generally are not advised about available lower cost options at the time of an inmate call, effectively coercing them into a very high cost option."); PLS Second FNPRM Comments at 10 (stating that charges for single payment services should only be allowed if consumers are explicitly informed of their other options for receiving calls and establishing accounts).

[675] *See, e.g.*, Joint Provider Proposal at 5-6; CenturyLink Second FNPRM Reply at 27-78; GTL Apr. 3, 2015 *Ex Parte* Letter at 13-14; GTL July 2, 2015 *Ex Parte* Letter at 2.

[676] *See infra* Section IV.L.

[677] *See infra* Section V.F.

[678] *See Please Deposit All of Your Money* at 10-11. *Please Deposit All of Your Money* demonstrates that the taxes charges by some ICS providers vary based on the payment method and not based on the amount of money being spent or loaded onto an account. *See id*.

[679] *See Second FNPRM*, 29 FCC Rcd at 13214, para. 106. The Commission has previously found that "it is unreasonable and misleading for carriers to include administrative and other costs as part of 'regulatory fees or universal service charges' or similar line item labels that imply government mandated charges." *Truth-in-Billing and Billing Format*, CG Docket No. 98-170 et al., Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, at 6461-62, para. 28 (2005) (*Truth-in-Billing Second Report and Order*).

collect pass-through charges such as state and local taxes, universal service and numbering charges, and other federal, state and local fees."[680]

191. ICS providers are permitted to recover mandatory applicable pass-through taxes and regulatory fees, but without any additional mark-up or fees.[681] The Commission has defined a government mandated charge as follows: "amounts that a carrier is required to collect directly from customers, and remit to federal, state or local governments."[682] Non-mandated charges are defined to be "government authorized but discretionary fees, which a carrier must remit pursuant to regulatory action but over which the carrier has discretion whether and how to pass on the charge to the consumer."[683] Commission precedent prohibits providers from placing a line item on a carrier's bill that implies a charge is mandated by the government when it is in fact, discretionary.[684]

192. We agree that the ability to collect applicable pass-through taxes and regulatory fees without adding a markup is important and consistent with precedent.[685] However, we reiterate that it is misleading "for carriers to state or imply that a charge is required by the government when it is the carriers' business decision as to whether and how much of such costs they choose to recover directly from consumers through a separate line item charge."[686] As such, we do not permit fees or charges beyond mandatory taxes and fees, and authorized fees that the carrier has the discretion to pass through to consumers without any mark up.[687] This will help ensure, consistent with the goals of the reforms adopted in this Order, that ICS end user's rates are just, reasonable and fair because they are paying the cost of the service they have chosen and any applicable taxes or fees, and nothing more. This approach has support in the record, including from the Joint Provider Proposal[688] and Pay Tel.[689]

7. Legal Authority

193. We reaffirm the Commission's finding in the *2013 Order* that it has jurisdiction over interstate ICS ancillary service charges and further find that we have authority to reform *intrastate* ancillary service charges.[690] The Commission sought comment in the *Second FNPRM* as to whether it is

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[680] Lattice Second FNPRM Comments at 9.

[681] *See infra* Appendix A.

[682] *See Truth-in-Billing Second Report and Order*, 20 FCC Rcd at 6469, para. 40.

[683] *See id*.

[684] *See id*. at 6460-61, paras. 25-27.

[685] 47 C.F.R. § 54.712.

[686] *Truth in Billing Second Report and Order*, 20 FCC Rcd at 6461, para. 27.

[687] The Joint Provider Reform Proposal agrees with our methodology. That proposal states that "[u]nder the parties' proposal, ICS providers would still be permitted to charge applicable federal, state, and local taxes as well as fees associated with federal, state and local governmental action, including federal and state universal service fund fees, numbering fees, federal and state regulatory fees, and any other federal, state, or local fee permitted to be imposed on end user customers. ICS providers would impose such taxes and fees consistent with existing federal and state requirements regarding calculation and disclosure of such taxes and fees." Joint Provider Proposal at 4-5, n.13.

[688] Joint Provider Proposal at 4, n. 13.

[689] Pay Tel Comments to June 26, 2013 PN at 5.

[690] *2013 Order*, 28 FCC Rcd at 14157-58, para 91 (the Commission asserting that it has "sufficient information and authority to reach several conclusions regarding ancillary charges," including that ancillary charges "must be cost-based, and to be compensable costs must be reasonably and directly related to provision of ICS." The Commission also asserted jurisdiction pursuant Section 201(b) of the Act, which requires that 'all charges, practices, classifications, and regulations for and in connection with' communications services be just and reasonable, and

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also authorized to regulate intrastate ancillary service charges.[691] In response, several commenters took the position that section 276 of the Act authorizes the Commission to regulate intrastate ancillary service charges.[692] We agree.

194. We find that the Commission has the legal authority to adopt necessary reforms to interstate, intrastate, and international ancillary service charges. In the *2013 Order*, the Commission addressed interstate charges and found that billing and collection services provided by a common carrier for its own customers are subject to section 201, and are therefore, subject to Commission regulation.[693] The Commission explained that it has jurisdiction "to regulate the manner in which a carrier bills and collects for its own interstate offerings, because such billing is an integral part of that carrier's communication service."[694] We reaffirm that finding here. Thus, providers are on notice that efforts to circumvent our rate caps through artificially high ancillary fees will not be tolerated.[695]

195. Although "ancillary services" are not defined by statute, and there is some disagreement in the record on this point,[696] the dictionary meaning of the term "ancillary"—"providing *necessary*

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Section 276 of the Act, which defines 'payphone services' to encompass 'the provision of inmate telephone service in correctional institutions and any ancillary services,' and requires that providers be 'fairly compensated.').

[691] *Second FNPRM*, 29 FCC Rcd at 13204, para. 85.

[692] HRDC Second FNPRM Comments at 10; Pay Tel Second FNPRM Comments at 4, 55; Wright Petitioners Second FNPRM Comments at 16-17; Illinois Campaign Second FNPRM Comments at 3; Lipman Second FNPRM Comments at 6. *Contra* GTL Second FNPRM Comments at 27. Even though GTL argues that the Commission does not have authority to regulate ancillary service charges it has, on several occasions, offered to eliminate or limit ancillary fees that it charges. *See* Joint Provider Proposal at 4; GTL Apr. 3, 2015 *Ex Parte* Letter at 13-14; GTL July 2, 2015 *Ex Parte* Letter at 2.

[693] *2013 Order*, 28 FCC Rcd at 14168, para. 114; *see also Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, CG Docket Nos. 11-116 et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 4436, 4480, paras. 123-25 (2012) (*2012 Cramming Order*) (carrier practice of placing third-party charges on bills makes cramming possible and is subject to section 201(b); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Second Recommended Decision, 13 FCC Rcd 24744, 24771-72, para. 70 & n.87 (1998) (Federal-State Joint Board Second Recommended Decision) ("We believe that a carrier's billing and collection practices for communications services are subject to regulation as common carrier services under Title II of the Act."); *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1512 (D.C. Cir. 1990) (explaining that "[b]illing and collecting for a carrier's own offering is part and parcel of providing that service in the first place, and since the service itself fell within the FCC's jurisdiction, the billing and collecting process did as well"). Section 201 provides the Commission authority over interstate and foreign communication. *See* 47 U.S.C. § 201(a).

[694] *2013 Order*, 28 FCC Rcd at 14168, para. 114, n.415 (citing *Truth-in-Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7506-07, para. 25 (1999). The Commission relied on this finding more recently in regulating carrier "cramming" practices, finding that the 1986 Detariffing Order "did not prevent it from requiring that carrier billing practices 'for and in connection with' telecommunications services must be just and reasonable" under section 201(b). *See 2012 Cramming Order*, 27 FCC Rcd at 4480, para. 123.

[695] *See 2013 Order*, 28 FCC Rcd at 14168, para. 114, n.415.

[696] *See* Lipman Second FNPRM Comments at 7 ("The Commission must seek to determine the meaning of the term 'ancillary' services' in the context in which it was used by Congress in Section 276. The structure of the 'payphone services' definition as well as the overall statutory scheme both require that the term 'ancillary' be interpreted in a limited sense."). Despite the lack of a statutory definition, one commenter correctly notes that the Commission has in the past categorized services such as caller ID, voice mail, call forwarding, call blocking, call screening, as "ancillary services." *See* GTL Second FNPRM Comments at 28; *see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 19 FCC Rcd 5608, para. 42 (2004) (categorizing "caller ID, voice mail, call forwarding, long distance, push-to-talk" as "ancillary services").

support to the primary activities or operation of an organization, institution, industry, or system"[697]—is instructive.[698] Additionally, section 276(b)(1)(A) specifies that any compensation plan set forth by the Commission must ensure that providers "are fairly compensated for each and every *completed intrastate and interstate call*. . . ."[699]

196. In the discussion above, we find that we have jurisdiction over *intrastate* ICS charges, pursuant to section 276 of the Act.[700] We also note that section 276(d) defines "payphone service" as "the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any *ancillary services*."[701] Thus, we believe it is clear that Congress provided the Commission with authority over ICS-related "ancillary services."[702] Based upon the plain language of these statutory provisions and the common definition of the term "ancillary," we find that the term "ancillary services," as used in section 276(d), is reasonably interpreted to mean services that *provide necessary support for the completion of international, interstate and intrastate calls* provided via ICS.[703] We find that section 276 authorizes the Commission to regulate charges for intrastate ancillary services, such as billing and collection services, to the extent those charges involve the completion of a call, or other communications services.[704] Such charges are quite literally the "necessary support"[705] essential for the completion of inmate phone calls. Indeed, often the only purpose for establishing ICS accounts is to fund communication with inmates; therefore, these charges are reasonably understood to be ancillary to the completion of phone calls.[706] As such, we conclude that billing-and-collection-related

[697] *See* Oxford Dictionaries, www.oxforddictionaries.com/us (last visited Oct. 21, 2015) (emphasis added)

[698] Furthermore, several sections of the Act provide sufficient context to provide meaning to the term and chart the parameters of the Commission's jurisdiction. For example, section 1 gives a strong indication as to what the "primary activity" is, stating that the purpose of the Act is: "to make available . . . a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151 (emphasis added). Similarly, section 2(a) states that the Act's provisions apply to "communication by wire or radio . . . ." 47 U.S.C. § 152(a) (emphasis added).

[699] 47 U.S.C. § 276(b)(1)(A) (emphasis added); *see also* Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, Docket No, 12-375 at 7 (Sept. 24, 2015) (Pay Tel Sept. 24, 2015 *Ex Parte* Letter) ("[T]he plain language of Section 276, specifically its 'fair compensation' requirement applicable to both interstate and intrastate ICS, empowers the Commission with the authority to regulate ancillary charges.").

[700] *See supra* Section IV.A.5.

[701] 47 U.S.C. § 276(d); *see also* Public Knowledge Oct. 16, 2015 *Ex Parte* Letter at 1.

[702] 47 U.S.C. § 276(d) (emphasis added); *see also* Lipman Second FNPRM Comments at 6 ("Thus, some class of 'ancillary services' is subject to the Commission's authority under Section 276, but the scope of that class is not defined by statute.").

[703] *See, e.g.*, Pay Tel Sept. 24, 2015 *Ex Parte* Letter ("The 'ancillary charges' at issue here qualify as 'ancillary services' and are therefore manifestly within the Commission's jurisdiction under Section 276.").

[704] *See* Pay Tel Second FNPRM Comments at 55 ("Pay Tel agrees with the Commission's conclusions that it has authority, pursuant to Section 201 and 276, to regulate ancillary fees – including both interstate and intrastate charges. Section 201, by its plain language, provides the Commission authority over 'all charges' and 'practices,' 47 U.S.C. § 201(b), and Section 276, on its face, provides the Commission authority over intrastate ICS, 47 U.S.C. § 276(b)(1)(A).").

[705] *See* Oxford Dictionaries, www.oxforddictionaries.com/us (last visited Oct. 21, 2015) (referring to the definition of "ancillary").

[706] *See* Wright Petitioners Second FNPRM Comments at 17.

ancillary services such as account set up and transaction fees fall within the Commission's jurisdictional authority and will be regulated in the manner described above.[707]

D. Periodic Review of Reforms

197. While the *2013 Order* and today's reforms are a significant step forward, we are committing to continuing to review the ICS market, including both costs and rates, to ensure that regulation remains necessary and that the reforms we adopt herein strike the right balance.[708] The reforms adopted in this Order may facilitate changes in the ICS market that potentially could make it function properly and enable the Commission to reduce regulations. At the same time, changes in the market, for example, may necessitate additional modifications to the reform we adopt today. We will incorporate lessons learned from the prior data collection to improve quality and eliminate anomolies. While the policies adopted in this Order have been carefully designed based on the record before us, we remain dedicated to evaluating how changing circumstances impact the nature and scope of reform. The Commission has the authority to take steps to effectively monitor compliance with this Order going forward.[709]

198. To enable the Commission to take further ICS reform action, identify and track trends in the ICS market, as well as monitor compliance with the reforms adopted herein, we adopt a second, one-time Mandatory Data Collection to occur two years from publication of Office of Management and Budget (OMB) approval of the information collection. We believe it is appropriate to be able to conduct a review of the ICS market including ICS costs, rates and ancillary service charges to ensure that any regulations continue to be necessary to fulfill our statutory objectives and to ensure that any such reforms and rate caps reflect current market dynamics and costs.

199. In the *Second FNPRM*, the Commission sought comment on the benefits of establishing a review process.[710] The Commission also sought comment on the Wright Petitioners' suggestion that the Commission commit to review the interim rates adopted in the *2013 Order*.[711] In its comments, HRDC states generally that periodic reviews by the Commission to evaluate the ways in which ICS reforms

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[707] Wright Petitioners Second FNPRM Comments at 16 ("In particular, Section 201(b) grants the FCC authority to determine that a "charge, practice, classification, or regulation" is unjust or unreasonable. Moreover, Section 276 grants the FCC the authority to regulate intrastate ICS rates, which includes "inmate telephone service in correctional institutions, and any ancillary services." Finally, Section 205 directs the FCC to "determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation or practice is or will be just, fair, and reasonable.").

[708] The Commission has provided itself the tools necessary to review rate caps in several other instances. *See, e.g.*, *1995 Price Cap Order*, 10 FCC Rcd 8961, 8966 para. 5 (explaining that the Commission had undertaken a "comprehensive review" of the performance of its price cap plan for LECs"); *2007 TRS Order*, 22 FCC Rcd at 20160, para. 46 and n.141 (2007) (adopting a rate cap for IP Relay, but requiring providers to continue filing data that would "be helpful in reviewing the compensation rates resulting from price caps and whether they reasonably correlate" with the provider's cost data).

[709] 47 U.S.C. § 403 ("The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any provisions of this Act."); *see also* 47 U.S.C. §§ 201, 215, 218, 220, 276.

[710] *Second FNPRM*, 29 FCC Rcd at 13230, paras. 152-54.

[711] Petitioners 2013 Order Comments at 2, 10 (the Commission should "take into account the information provided by the ICS providers in connection with the annual data collection required under the new FCC rules, and reduce rates when necessary.").

impact phone rates, ancillary service charges and competition in the industry are "essential to ensure that the reforms create and maintain the proper incentives to drive ICS rates to competitive levels."[712]

200. We find that, on balance, Petitioners' proposal for a periodic review of ICS data is not necessary at this time, nor is it the best tool for monitoring compliance with the Order.[713] Therefore, we establish a less onerous requirement, which we anticipate will provide significant benefit at minimal cost. In lieu of the Petitioners' proposal, we adopt an approach similar to the one used by the Commission in a prior payphone order establishing the per-call rate for payphones, in which the Commission determined that it would "have to periodically review the cost-based compensation rate in order to ensure that it continues to 'fairly compensate' PSPs and promote payphone competition and widespread deployment of payphones."[714] The Commission explained that, "[e]specially when market conditions have changed significantly, it is incumbent upon us to reexamine whether the conditions resulting in the recent Commission-prescribed rate still apply."[715] As with that situation, we conclude that the Commission should have the tools necessary to review the reforms that we adopt in this Order, in light of changing market conditions, to ensure that the rates continue to be just, reasonable, and fair. As explained above, ancillary service charges also significantly impact the effective rates ICS providers charge, and should therefore be part of this review.[716]

201. To allow for consistent data reporting and to prevent duplicative filings, we direct the Bureau to develop a template for submitting the data and provide ICS providers with further instructions to implement the data collection. We direct the Bureau to complete a review of ICS costs and rates within one year from the date data is submitted, and we delegate to the Bureau authority to require an ICS provider to submit such data as the Bureau deems necessary to perform its review. Information in response to the forthcoming data collection may be filed under the *Protective Order* in this proceeding[717] and will be treated as confidential.[718]

202. Several commenters have expressed concern for the lack of transparency regarding ICS rates and fees.[719] We share the concern that ICS contracts are not sufficiently transparent and we find adequate evidence, such as numerous public records lawsuits,[720] to support HRDC's assertion that

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[712] HRDC Second FNPRM Comments at 14;

[713] *See* Petitioners 2013 Order Comments at 2, 10.

[714] *See Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, WC Docket No. 03-225, Report and Order, 19 FCC Rcd 15636, 15643, para. 19 (2004) (internal citations omitted) (*Payphone Dial-Around Order*).

[715] *Payphone Dial-Around Order*, 19 FCC Rcd at 15643, para. 19.

[716] *See generally* Section IV.C.

[717] *See generally Protective Order*.

[718] *See* 47 C.F.R. § 0.459.

[719] *See* Letter from Paul Wright, Exec. Dir., HRDC, to the Honorable Tom, Wheeler, Chairman, FCC, WC Docket No. 12-375, at 1 (filed July 30, 2015) (HRDC July, 30 2015 *Ex Parte* Letter) (expressing concern for "the lack of transparency by Inmate Calling Service (ICS) providers" and submitting that there is a "critical need for the Commission to address this issue as part of comprehensive ICS reform."); Letter from Darrell Baker, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 5 (filed July 21, 2015) (Baker July 21, 2015 *Ex Parte* Letter)("Baker stated that lack of transparency in the ICS industry is problematic."); PPI Second FNPRM Comments at 3 ("The [joint] proposal shows that fees need to be more transparent."); Joint Provider Proposal at 2 (supporting greater transparency of ICS fees for consumers).

[720] *See, e.g.*, HRDC July 30, 2015 *Ex Parte* Letter (attaching Prison Legal News' Freedom of Information Act (FOIA) lawsuit filed against the Illinois DOC to obtain access to the ICS rates in the state).

members of the public must "unnecessarily expend time and money to obtain records" of ICS contracts.[721] We also recognize evidence suggesting that the information regarding ICS contracts and rates that is publically available may not be reliable.[722] Therefore, we encourage ICS providers and facilities to make their contracts publicly available.

E. Harmonization with State ICS Rules and Requirements

203. Below, we provide guidance to ICS providers, correctional facilities and state regulatory bodies on the effect of the comprehensive reforms adopted herein on ICS requirements in the states and the Commission's authority to regulate these services pursuant to section 276 of the Communications Act.

1. Background

204. In the *2013 Order*, the Commission sought comment on its tentative conclusion that section 276 "affords the Commission broad discretion to regulate intrastate ICS rates and practices . . . and to preempt inconsistent state requirements."[723] Commenters' responses were mixed.[724] The Commission then followed up by seeking more focused comments on issues related to preemption and harmonization of state ICS requirements.[725] Several commenters support preemption of state laws and requirements that are inconsistent with the federal regime,[726] while a small number of commenters oppose such preemption and question our authority to preempt state requirements related to intrastate ICS.[727] As discussed below, we now adopt the tentative conclusion the Commission first expressed in the *2013 Order*, and hold that we have the authority to preempt state requirements that are inconsistent with the rules we adopt in this Order. More specifically, we conclude that a state requirement that ICS be provided at a particular rate that exceeds the caps we have adopted would trigger change-in-law provisions or require renegotiation. If for some reason that does not occur for any particular contract, parties can file a petition with the Commission seeking the appropriate relief.[728] State rates below our rate caps or ancillary fee caps will not be preempted.[729]

205. The rate caps and reforms adopted herein should operate as a ceiling in areas where states have not enacted reforms. This is consistent with Commission precedent in which it has determined that rates at or below a newly-enacted rate cap were not to be changed.[730] We strongly encourage all states to

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[721] HRDC July 30, 2015 Comments at 1.

[722] *See* Letter from Paul Wright, Exec. Dir., HRDC, to the Honorable Tom Wheeler, Chairman, FCC, WC Docket No. 12-375, at 2 (filed Aug. 6, 2015) (apologizing for inaccurate data submitted in a previous comment and stating that "members of the public cannot rely on information provided by government officials with respect to ICS rates. As illustrated in this case, we relied not only on the ICS rates posted on the Montgomery County Jail's website, but also on information received directly from the sheriff's office after inquiring as to the accuracy of those rates." It was not until HRDC reviewed the ICS contract and rate sheet that it realized the reported rates were incorrect.).

[723] *2013 Order*, 28 FCC Rcd at 14175, para. 135.

[724] *See Second FNPRM*, 29 FCC Rcd at 13217, para. 116 (describing commenters' responses regarding section 276).

[725] *See Second FNPRM*, 29 FCC Rcd at 13217-20, paras. 116-122.

[726] *See, e.g.*, Lipman Second FNPRM Comments at 2-6; Lattice Second FNPRM Comments at 3.

[727] *See generally* ACC Second FNPRM Comments; NARUC Second FNPRM Comments.

[728] *See infra* Section IV.F.

[729] ICS providers are free to file a waiver if circumstances warrant. *See* 47 U.S.C. § 276(b)(1)(A) (requiring the Commission to ensure that payphone providers are "fairly compensated"); *see also infra* Section IV.F.

[730] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17934-36, para. 801; *see also* Letter from Andrew D. Lipman, Morgan, Lewis & Bockius, LLP to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed July 23, 2015) (providing several examples of situations in which the FCC adopted maximum payments, or other requirements, but allowed states to impose rate that were lower – or regulations that were stricter – than the

(continued….)

evaluate additional measures to reduce and eliminate site commissions and ensure that rates for inmate calling services are as low as possible while still ensuring that robust security protocols are in place. Our actions today serve to ensure that a much-needed default framework is in place in areas where states have not acted to curb ICS rates.

206. In the *Second FNPRM*, the Commission sought comment on a number of issues related to the preemption of state regulation of ICS, as well as the potential to harmonize state requirements that are inconsistent with the Commission's comprehensive framework for regulation of both interstate and intrastate ICS.[731] Among other questions, the Commission sought comment on its belief that it has "broad discretion to find that a particular state requirement, or category of state requirements, is either consistent or inconsistent with Commission ICS regulations under section 276(c)" and to preempt those regulations that are inconsistent.[732]

207. Several commenters support preemption, urging the Commission to establish a uniform framework for both interstate and intrastate ICS. ICS provider Lattice, for example, argues that "[s]ound public policy as well as the Communications Act and FCC precedent all support FCC reform across all ICS."[733] Lattice contends not only that "[s]ection 276 grants the Commission express authority to preempt state requirements to the extent they are inconsistent with FCC regulations,"[734] but that "preemption of state regulation is required to fulfill the requirements of Section 276."[735] Pay Tel also argues that the Commission has authority over intrastate ICS, and must "preempt inconsistent state regulations."[736] Additional commenters echo these assertions, arguing that the Commission has jurisdiction over both interstate and intrastate rates and must preempt inconsistent state requirements.[737] Indeed, the Wright Petitioners state that "there is no debate that the FCC has the authority to preempt those state regulations that conflict with regulations adopted in this proceeding."[738]

208. Other commenters contend that the Commission lacks the authority to preempt state ICS requirements.[739] According to the Arizona Corporation Commission (ACC), for example, "[s]ection 276 must be read in *pari materia* with 47 U.S.C. Section 152's reservation of authority over intrastate matters."[740] The ACC further asserts that "the primary purpose of Section 276 was to prevent unfair competition by incumbent local exchange carriers against the payphone providers [and t]he other express

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Commission's requirements).

[731] *See Second FNPRM*, 29 FCC Rcd at 13217-19, paras. 116-19.

[732] *Second FNPRM*, 29 FCC Rcd at 13218-19, para. 118.

[733] Lattice Second FNPRM Comments at 3; *see also id*. at 4 (urging the Commission to "adopt a comprehensive regulatory framework and preempt any state that fails to come into compliance.").

[734] Lattice Second FNPRM Comments at 3; *see also* Hamden Second FNPRM Comments at 4 (arguing that "[t]he statutory language [of section 276] is clear and expansive").

[735] Lattice Second FNPRM Comments at 4.

[736] Pay Tel Second FNPRM Comments at 3.

[737] Lipman Second FNPRM Comments at 2-6; Wright Petitioners Second FNPRM Comments at 3 (arguing that "the FCC must adopt a uniform rate for interstate and intrastate ICS . . . and take steps to preempt those states that refuse to reform ICS.").

[738] Wright Petitioners Second FNPRM Comments at 20 (supporting preemption of "any state law or regulation that authorizes rates and fees beyond what is adopted in this proceeding.").

[739] *See* ACC Second FNPRM Comments at 4 (arguing that neither section 276 nor section 201 authorize the Commission to preempt state regulation of ICS); *see also* NARUC Second FNPRM Comments at 8-9.

[740] ACC Second FNPRM Comments at 5; *see also* NARUC Second FNPRM Comments at 8.

purpose of this Section was to ensure that payphone providers were fairly compensated for all calls placed using their payphones."[741] In addition, the ACC claims that state regulation of intrastate ICS is part of the states' "historic police powers" and therefore should not be preempted unless preemption "was the clear and manifest purpose of Congress."[742]

2. Discussion

209. NARUC and the ACC argue that our authority under section 276 is limited to interstate services,[743] and that our regulations must be narrowly targeted to address concerns about anticompetitive conduct by incumbent local exchange carriers.[744] We disagree. These arguments are contradicted by the plain language of section 276. As explained above, the statute provides the Commission with the authority to regulate both interstate and intrastate ICS.[745] Similarly, although section 276 addresses potential discrimination by Bell operating companies, it also contains provisions related to other subjects, including compensation for "payphone service providers," a group that, by definition, encompasses providers "of inmate telephone service in correctional institutions, and any ancillary services."[746] Furthermore, we believe that section 276's broad mandate stands in stark opposition to ACC's and NARUC's attempts to narrowly confine the Commission's ICS-related preemption authority.

210. Pay Tel urges the Commission to preempt state-imposed intrastate rates that are below the adopted caps, arguing that any rates that deviate from the Commission's caps are "by definition, 'inconsistent'" and must be preempted.[747] We disagree. The primary purpose of the rate caps we adopt today is to ensure that ICS rates are "just and reasonable" and do not take unfair advantage of inmates or their families.[748] State requirements that result in rates below our caps advance that purpose and there is no credible record evidence demonstrating or indicating that any requirements that result in rates below our conservative caps are so low as to clearly deny providers fair compensation. Evidence in the record shows that ICS can be provided at rates at or below $0.05 a minute. We applaud the efforts some states have made to lower ICS rates and hope other states follow their lead. Our goal is affordable rates that

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[741] ACC Second FNPRM Comments at 6 (arguing that "[a]t the center of the FCC's payphone compensation proceedings has been the compensation of payphone providers for coinless calls" and asserting that the Commission has "never construed its authority under Section 276 to extend to intrastate toll services.") (emphasis omitted).

[742] ACC Second FNPRM Comments at 8; *see also* NARUC Second FNPRM Comments at 8.

[743] NARUC Second FNPRM Comments at 7-9; ACC Second FNPRM Comments at 4-7; Letter of James Bradford Ramsay, General Counsel, NARUC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Oct. 16, 2015).

[744] *See* NARUC Second FNPRM Comments at 8 (claiming that "[t]he rules under § 276 are to assure that Bell Operating Companies do not 'discriminate in favor of its payphone services' or 'subsidize payphone services directly or indirectly.'") (sic); ACC Second FNPRM Comments at 6 ("the primary purpose of Section 276 was to prevent unfair competition by the incumbent local exchange carriers against the payphone providers."); Letter from James Bradford Ramsay, General Counsel, NARUC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2-4 (filed Oct. 15, 2015) (NARUC Oct. 15, 2105 *Ex Parte* letter).

[745] *See supra* Section IV.A.5; 47 U.S.C. § 276(b)(1); *see also* Lipman Second FNPRM Comments at 3-5.

[746] *See* 47 U.S.C. § 276(b)(1)(A) (requiring the Commission to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated"); 47 U.S.C. § 276(d) (defining the term "payphone service"); *see also supra* Section IV.A.5; *see also* Lipman Second FNPRM Comments at 5-6.

[747] *See* Pay Tel Second FNPRM Comments at 52; *see also id*. at 1-2 (decrying the "patchwork" of interstate and intrastate ICS regulations).

[748] *See* 47 U.S.C. § 201(b); 47 U.S.C. § 276(b)(1)(A); *see also 2013 Order*, 28 FCC Rcd at 14131-32, para. 46 and n. 189 (explaining that "fair compensation" requires fairness to both the end users and the providers).

provide fair compensation, and the federal framework we adopt today is meant to serve as a backstop to ensure rates are consistent with the statute in absence of state action.[749]

211. We are mindful, however, of the fact that we also have a statutory obligation to ensure that payphone service providers, including ICS providers, are "fairly compensated."[750] If any state adopts intrastate requirements that result in providers being unable to receive fair compensation, providers may either seek appropriate relief in that state or from the Commission. We will review the relevant state requirements if they are brought to our attention in a petition and will decide at that time what, if any, remedial actions are warranted. If any party believes that a particular form of relief is called for, that party should clearly state the requested relief in a petition and set forth the legal authority for granting such relief. As noted above, section 276 explicitly grants the Commission authority to preempt state requirements to the extent they are inconsistent with FCC regulations.[751] Accordingly, if a provider is able to demonstrate that a particular state law or requirement is inconsistent with the rules we adopt in this Order, we will, consistent with section 276, preempt the inconsistent requirement. We strongly encourage providers to seek relief from the relevant state entity before approaching the Commission, however.[752] We also note that there is no presumption that state-mandated rates deny fair compensation simply because they are lower than our rate caps.[753] To the contrary, as noted above, we encourage states to enact additional reforms to inmate calling service and to drive intrastate rates as low as possible, consistent with the need to ensure fair compensation, retain service quality, and maintain adequate security.

212. Consistent with the regulatory approach adopted herein, providers may be able to comply with such statutory requirements without charging rates that exceed our rate caps. Given the absence of clear evidence indicating whether there are any state laws or other requirements that, in practice, would require providers to charge rates that exceed our caps, we need not decide whether any laws currently exist that are "inconsistent" with our regulatory framework.[754] To the extent there are state requirements, including possible contractual requirements, that make our rate caps onerous for a particular provider, the affected provider may file for preemption of the state requirement or seek a temporary waiver of the rate caps for the duration of any existing contract.[755] We note that any waiver request should include a

[749] Our rate caps constitute a ceiling, not a floor, and we agree with those commenters that assert that competition will drive rates below the rate caps we establish. *See, e.g.*, Securus Second FNPRM Comments at 17 (arguing that competition will drive rates down).

[750] 47 U.S.C. § 276(b)(1)(A).

[751] *See supra* para. 101; 47 U.S.C. § 276(c).

[752] Our review of petitions for waiver or preemption will be informed by the fact that ICS providers are under no obligation to serve any particular facility and are free to negotiate contracts that offer them reasonable compensation. Providers should not offer low rates in order to win a bid and then ask the Commission for relief on the grounds that the negotiated rates are too low. To the extent that providers have already entered into contracts that make it difficult to provide service at rates below our rate caps, we expect most, if not all, issues can be addressed through a combination of transition period we adopt in this order and the change-of-law provisions that are included in most contracts.

[753] As noted above, our rate caps are conservative and already include profit as reported by providers plus a buffer sufficient to cover any reasonable costs that might not have been captured in the Mandatory Data Collection. A state that prohibits any such payments may adopt a lower rate cap without denying providers the ability to recover their reasonable costs. More generally, it is well established that rates can be lawful if they fall within a zone of reasonableness. *See, e.g.*, *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). A particular state's cap might fall within that zone even if it is lower than our rate caps.

[754] *See* 47 U.S.C. § 276(c).

[755] As noted above, we strongly encourage providers to seek relief from the relevant state regulatory or legislative body before seeking preemption. *See supra* para. 211.

discussion of the provider's efforts to renegotiate the subject contracts and the outcome of such efforts. We delegate to the Bureau the authority to rule on such petitions and to seek additional information as needed. We also direct the Bureau to endeavor to complete review of any such petitions within 90 days of the provider submitting all information necessary to justify a waiver.

3. Existing Contracts

213. As the Commission has previously noted,[756] ICS contracts "typically include change of law provisions."[757] We expect that the new rate caps and other requirements adopted in this Order constitute regulatory changes sufficient to trigger contractual change-in-law provisions that will allow ICS providers to void, modify or renegotiate aspects of their existing contracts to the extent necessary to comply with the new rate caps and/or to relieve the providers from site commission payments that would prove to be unduly onerous once this Order takes effect.[758] The record regarding implementation of the 2013 interim rate caps indicates that such changes were implemented quickly. Indeed, the Commission has previously highlighted the fact that the record "indicates that ICS contracts are amended on a regular basis."[759] For instance, the record indicates that Securus provided nine days' notice to facilities prior to implementing the rate caps adopted in the *2013 Order*.[760] The record also indicates that GTL had a four-day transition period after executing a new contract to serve the state of Ohio.[761]

214. Parties have further argued that invoking contractual change of law provisions and engaging in renegotiations with correctional facilities would materially affect ICS providers' ability to conduct their daily business.[762] Yet the Commission saw little such impact regarding implementation of the 2013 interim rate caps. Those rate caps affected all interstate calls throughout the country, much like today's reforms will affect calls nationwide. Our experience with the Commission's previous reforms leads us to conclude that, for ICS providers that choose to invoke existing change of law provisions – and

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[756] *See Pay Tel Waiver Order*, 29 FCC Rcd at 13312, para. 19 (explaining that ICS providers "generally can renegotiate contract terms with the facilities they serve, particularly where such contracts contain change of law provisions."); *see also 2013 Order*, 28 FCC Rcd at 14162-63, paras. 102-03, n.367; *Order Denying Stay Petitions and Petition To Hold in Abeyance*, Order, WC Docket No. 12-375, 28 FCC Rcd 15927 at 15947, para. 40 (Wireline Comp. Bur. 2013).

[757] Comments of GTL, WC Docket No. 12-375, at 29 (filed Mar. 25, 2013) (GTL NPRM Comments); HRDC Jan. 13, 2014 *Ex Parte* Letter at 7 ("ICS contracts typically include provisions that accommodate renegotiations or amendments upon agreement of the parties."); *Order Denying Stay Petitions and Petition To Hold in Abeyance*, 28 FCC Rcd 15927 at 15947, para. 40 n.171 (Wireline Competition Bureau 2013) ("The record shows that state contracts for ICS as well as county contracts for ICS include language 'wherein the respective parties also agreed to conform their agreements in the future to take into account possible changes in the regulatory landscape.'") (quoting Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Aug. 2, 2013)).

[758] *Pay Tel Waiver Order*, 29 FCC Rcd at 13312, para 19; GTL NPRM Comments at 29.

[759] *Order Denying Stay Petitions*, 28 FCC Rcd at 15947, para. 41; *see also* Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 3 (filed Aug. 2, 2014) ("In light of . . . evidence . . . provided in the record, it is clear that the parties to ICS contracts routinely reserve the right to amend or renegotiate contracts should there be changes in state or federal regulations.").

[760] *See* Wright Petitioners Consolidated Comments, WC Docket No. 12-375 at Exhibit B (filed Mar. 11, 2014).

[761] *See* GTL June 29, 2015 *Ex Parte* Letter at 2 (discussing a four day transition to lower rates in Ohio after the contract was executed).

[762] GTL NPRM Comments at 29-30 (claiming that "the company's business plans and its day-to-day operations are predicated on the assumptions that were considered and agreed to when those contracts were executed. If 30% to 40% of those contracts were to be altered to take account of new ICS rules, the change could have a material impact on GTL's ability to do business.").

subsequently to engage in renegotiations with the facilities they serve – any inconvenience imposed on them in doing so will not materially affect the providers' ability to conduct their day-to-day business.[763] Finally, the negotiations for any new or renewed contracts can and should be informed by the decisions in this Order, including our adoption of new rate caps for ICS.

215. ICS providers that have entered into contracts without change-of-law provisions did so with full knowledge that the Commission's ICS proceeding has been pending since 2012.[764] Even so, we encourage facilities to work with those ICS providers during the transition period described below[765] which we believe provides ample time to renegotiate contracts, if necessary, to be consistent with this Order.[766] If any provider believes it is being denied fair compensation during the transition or implementation of the reforms adopted in this Order – due, for example, to the interaction of our rate caps with the terms of the provider's existing service contracts – it may file a petition seeking a limited waiver of our new rate caps or seek preemption of the requirement to pay a site commission, to the extent that it believes that such a requirement is a state requirement and is inconsistent with the Commission's regulations.[767] Finally, negotiations for any new or renewed contracts can and should comply with the decisions in this Order, including our limitation on site commission payments and our adoption of new rate caps.

216. We note that the contractual provisions to which a state subjects itself, or its subdivision, may reasonably be subsumed within the "state requirements" addressed by section 276(c). Therefore, if a state or a political subdivision thereof uses a contractual agreement as a vehicle to impose certain requirements regarding rates or other aspects of ICS, we would consider, on a case-by-case, fact-specific basis, preempting those requirements to the extent they are "inconsistent with the Commission's regulations" as set forth in this Order.[768] Without deciding whether preemption is factually or legally warranted in any particular case, we note that a contrary interpretation could leave states and localities free to undermine the Commission's implementation of section 276 by doing so via a contract, rather than

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[763] *Order Denying Stay Petitions*, 28 FCC Rcd at 15938, para. 23 n.88 (holding that "to the extent there are any indirect effects on particular contracts, change of law provisions and/or routine amendment processes should be sufficient to address those effects without impairing the contracts.") (citing *2013 Order*, 28 FCC Rcd at 14162, para. 101).

[764] As ICSolutions aptly points out, if any ICS providers entered into a contract that does not include change-of-law provisions that would be triggered by our new rules, those providers "either knew or should have known that they would have to bear the regulatory risk of changes to the rates . . . when considering whether to enter into the agreement, especially if those agreements were entered into after the FCC first began this rulemaking proceeding on December 24, 2012." ICSolutions Oct. 15 *Ex Parte* at 2; *cf. 2008 Competitive Networks Order*, 23 FCC Rcd at 5391, para. 13 (noting that the "validity of exclusivity provisions in contracts for the provision [of] telecommunications services to residential MTEs has been subject to question for some time . . . Thus, carriers have been on notice for . . . years that the Commission might prohibit . . . [the] enforcement of such provisions"). Similarly, ICS providers have been on notice for years that we might prohibit site commission payments. In fact, as noted above, the record indicates that some providers may have purposely entered into contracts requiring upfront site commission payments as a means of circumventing rules they anticipated we might adopt limiting or prohibiting site commission payments. *See, e.g.*, Letter from Paul Wright , Executive Director, HRDC, to Tom Wheeler, Chairman, FCC, WC Docket No. 12-375, at 1, 3 (describing ICS contracts parties have entered into as part of an effort to "work around any new regulations expected to be issued by the Commission") (filed Aug. 8, 2015).

[765] *See infra* Section IV.I.

[766] *See* ICSolutions Oct. 15, 2015 *Ex Parte* Letter at 2 (noting that while "ICS providers' option to renegotiate the contract is triggered by the regulatory change, there are no limitations in the renegotiations, thereby allowing the ICS provider to renegotiate other terms that may have been indirectly affected by the regulatory change.").

[767] *See* 47 U.S.C. § 276(c).

[768] 47 U.S.C. § 276(c).

a state law or regulation, which result appears to be counter to Congress's objectives in enacting section 276(c).[769] As the Commission has noted in this very proceeding, "agreements cannot supersede the Commission's authority to ensure that the rates paid by individuals who are not parties to those agreements are fair, just and reasonable."[770] To the extent ICS providers require waiver relief, they may take advantage of the procedures described below.

F. Waivers of Rules Adopted in this Order

217. In the *2013 Order*, the Commission held that an ICS provider that "believes that it has cost-based rates for ICS that exceed our interim rate caps" may file a petition for waiver for good cause.[771] The *2013 Order* also confirmed that the Commission's standard waiver process applies to ICS providers.[772] The Commission delegated to the Bureau the authority to approve or deny waiver requests.[773] The Commission articulated the following factors that the Bureau could consider in reviewing a waiver request: costs directly related to the provision of interstate ICS and ancillary services; demand levels and trends; a reasonable allocation of common costs; and general and administrative cost data.[774] The Commission also noted that, because the adopted interim interstate rate caps were set at conservative levels, it expected that petitions for waiver "would account for extraordinary circumstances."[775] Additionally, the Commission held that, for "substantive and administrative reasons," waiver petitions would be evaluated at the holding company level.[776] The Bureau processed three requests for waiver of the interim interstate rate caps following this guidance and granted a temporary waiver to one provider.[777]

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[769] This also accords with the language and our interpretation of state preemption under section 253 of the Act, where contracts likewise can impose "requirements" subject to preemption. *See* 47 U.S.C. § 253(a) (restricting certain "State or local statute[s] or regulation[s], or other State or local legal requirement[s]"); *Petition of the State Of Minnesota For A Declaratory Ruling Regarding the Effect of Section 253 On An Agreement To Install Fiber Optic Wholesale Transport Capacity In State Freeway Rights-of-Way*, CC Docket No. 98-1, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21706-07, para. 17 (1999) (concluding that the state contract at issue creates a "legal requirement" for purposes of section 253(a)). Additional support for our reading of "state requirements" appears in the grandfathering clause of section 276(b)(3). Congress included section 276(b)(3) to exempt payphone contracts in existence as of February, 8, 1996 (the enactment date of the 1996 Act) from the new requirements of section 276. Therefore, in addition to section 276(c)'s explicit authorization to preempt inconsistent state requirements, section 276(b)(3) indicates that inconsistent contracts executed after the date of enactment are subject to preemption. 47 U.S.C. § 276(b)(3).

[770] *See 2013 Order*, 28 FCC Rcd at 14162, para. 101.

[771] *2013 Order*, 28 FCC Rcd at 14153, para. 82. *See* 47 C.F.R. § 1.3; *see also* GTL Second FNPRM Reply at 10 (stating that "ICS providers have always had the ability to seek a waiver of the backstop rate caps to the extent the ICS provider can demonstrate that the backstop rate caps do not allow the ICS provider to economically serve a particular correctional facility.").

[772] *2013 Order*, 28 FCC Rcd at 14153-54, paras. 82-84.

[773] *2013 Order*, 28 FCC Rcd at 14154, para. 84.

[774] *2013 Order*, 28 FCC Rcd at 14153, para. 82.

[775] *2013 Order*, 28 FCC Rcd at 14153, para. 83.

[776] *2013 Order*, 28 FCC Rcd at 14153, para. 83 (noting that the centralization of functionalities by providers that serve multiple facilities may significantly reduce costs and explaining that evaluating petitions at a holding company level will allow the Commission to address waiver petitions more expeditiously.).

[777] *See Pay Tel Waiver Order*, 29 FCC Rcd 1308-09, 1412-13, paras. 11, 20-21 (finding that "extraordinary circumstances" justified granting Pay Tel a limited waiver to exceed the interim rates caps for a period of nine months.); *see also Securus Technologies Petition to Expand Pay Tel Waiver, Petition for Leave to Add Fee for Voice*

(continued….)

218. In the *Second FNPRM*, the Commission sought comment on the waiver process detailed in the *2013 Order*.[778] Several commenters object to the use of this waiver process to address concerns about the sufficiency of the rate caps.[779] Some ICS providers ask that we review waiver petitions on a facility-by-facility basis in order to review locations where the costs of service exceed the rate caps.[780] One commenter requests an expedited waiver process to allow the adoption of products or services involving costs paid to a third party, such as those involving a software agreement or new security feature.[781] Commenters also suggest that the Bureau issue a blanket waiver excluding juvenile detention centers, secure mental health facilities, and jails with small populations, from our rate caps.[782]

219. We have relied on the Mandatory Data Collection in establishing the rate caps adopted above. For the reasons previously given, we believe our rate caps are more than sufficient to allow carriers to receive fair compensation.[783] We agree with the Petitioners that a tiered rate cap approach, as adopted herein, will reduce the need for waivers.[784] We recognize, however, that we cannot foreclose the possibility that in certain limited instances, our rate caps may not be sufficient for certain providers. For those instances, we reaffirm the waiver standard for ICS providers adopted in the *2013 Order* and delegate to the Bureau the authority to rule on such waivers. Accordingly, an ICS provider that believes the rate caps for interstate and intrastate ICS do not allow for fair compensation may seek a waiver pursuant to the guidance articulated in the *2013 Order*.[785] ICS provider waiver petitions may be accorded confidential treatment to the extent consistent with rule 0.459.[786] We direct the Bureau to endeavor act to on such waivers within 90 days of the provider submitting all information necessary to justify a waiver. As the Commission previously stated, waiver petitions should be filed at the holding-company level.[787] We believe that this approach best captures the way the majority of the ICS market functions; specifically

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Biometrics Technology, WC Docket No. 12-375, Order, 29 FCC Rcd 5973 (2014) (*Securus Petition to Expand Pay Tel Waiver Order*).

[778] *See Second FNPRM*, 29 FCC Rcd at 13201-02, para. 79.

[779] *See, e.g.*, Securus Second FNPRM Comments at iii and 41-42 (asserting that "the current standard for obtaining a waiver is far too onerous" and suggesting that the Commission permit carriers to seek waivers on a site-by-site basis, particularly if the Commission adopts the unified, nationwide rate caps that the Industry Proposal sets forth); Pay Tel Second FNPRM Reply 29 n.106 (stating that "reliance on a waiver process to try and remedy a below-cost rate cap is not an effective or efficient way of handling such issues").

[780] *See, e.g.*, GTL Second FNPRM Comments at 8 (stating that "as explained in the Joint Provider Proposal Form, waivers of rate caps should be permissible only [by] a facility-by-facility basis"); Securus Second FNPRM Comments at iii and 41-42.

[781] *See* GTL Second FNPRM Reply at 10-12 (proposing a streamlined waiver process, similar to section 214 applications for transfers of control that would apply only to waivers associated with the introduction of additional products and services for which the provider incurs a third-party cost); *see also* Reply Comments of Pay Tel, WC Docket No. 12-375, at 23 (filed Jan. 13, 2014) (urging the Commission to establish a mechanism by which a provider could seek approval for new charges needed to recover the costs of providing new technologies).

[782] *See, e.g.*, Letter from Thomas M. Dethlefs, Attorney, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Aug. 14, 2015); OSSA Second FNPRM Comments at 6 ("asserting that "the Commission should adopt a blanket waiver for all small facilities.").

[783] *See supra* Section IV.A.3.

[784] *See* Petitioners Second FNPRM Comments at 15 (explaining that a tiered rate cap would "likely eliminate or substantially limit the number of companies that will need to seek waivers of the rules").

[785] *See 2013 Order*, 28 FCC Rcd at 14153, para. 82.

[786] *See* 47 C.F.R. § 0.459.

[787] *2013 Order*, 28 FCC Rcd at 14153, para. 83.

that ICS providers serve multiple facilities utilizing centralized infrastructure, thus spreading related costs across their correctional facility customer base whenever possible. Furthermore, as described in the *2013 Order*, providers will be expected to provide data showing why they are unable to meet their costs under the applicable rate caps.[788] We reiterate that "unless and until a waiver is granted, an ICS provider may not charge rates above the [applicable] rate cap and must comply with all aspects of this Order . . . ."[789] However, consistent with Commission precedent, exigent circumstances may warrant that the Bureau provide interim relief during the pendency of its review of a waiver request.[790]

220. We also conclude that there is insufficient evidence available at this time to support a blanket waiver to providers incurring third-party technology costs or serving high-cost facilities. The Bureau will consider waiver petitions, including those from providers claiming to serve high-cost facilities, and evaluate the details specific to such petitions on a case-by-case basis.

G. Disability Access to ICS

1. Background

221. In the *2012 NPRM*, the Commission noted that "there is evidence in the record to indicate that inmates with hearing disabilities may not have access to ICS at reasonable rates using TTYs [text telephones]."[791] Specifically, the Commission cited evidence that "deaf and hard of hearing inmates who use TTYs have to pay more than their hearing counterparts" because "the average length of a telephone conversation using a TTY is approximately four times longer than a voice telephone conversation."[792] In light of this record, the Commission sought comment about the ICS access available to deaf and hard of hearing inmates and about the rates such inmates paid for ICS.[793]

222. In the *2013 Order*, the Commission clarified that ICS providers may not collect additional charges for calls made through any type of telecommunications relay service (TRS).[794] In the *Second FNPRM* that accompanied the *2013 Order*, the Commission also noted commenters' assertions that TTY calls take "at least three to four times longer than voice-to-voice conversations to deliver the same conversational content."[795] The Commission, therefore, tentatively concluded that per-minute ICS

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[788] *2013 Order*, 28 FCC Rcd at 14153, para. 82 ("An ICS provider that believes that it has cost-based rates for ICS that exceed our interim rate caps may file a petition for a waiver. Such a waiver petition would need to demonstrate good cause to waive the interim rate cap. As with all waiver requests, the petitioner bears the burden of proof to show that good cause exists to support the request.") (internal citations omitted).

[789] *2013 Order*, 28 FCC Rcd at 14154, para. 83.

[790] *See, e.g.*, *Connect America Fund*; *Universal Service Reform — Mobility Fund*; *Petitions for Waiver of Windy City Cellular, LLC, and Adak Eagle Enterprise, LLC*, WC Docket No. 10-90, WT Docket No. 10-208, Order, 27 FCC Rcd 15836 (Wireless Tel. Bur./Wireline Comp. Bur. 2012).

[791] *2012 NPRM*, 27 FCC Rcd at 16644, para. 42.

[792] *Id.*

[793] *Id.*

[794] *2013 Order*, 28 FCC Rcd at 14159-60, para. 95, citing 47 U.S.C. § 225 (explaining that such charges would be inconsistent with section 225 of the Act, which requires that TRS users "pay rates no greater than the rates paid for functionally equivalent voice communications services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination"). TRS means "telephone transmission services that provide the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio." 47 U.S.C. § 225(a)(3).

[795] *See 2013 Order*, 28 FCC Rcd at 14178-79, para. 143 (noting that these estimates did not include the time it takes the TTY caller to connect to the "operator").

rates for TTY calls should be 25 percent of the rate for standard ICS calls, and sought comment on this proposal.[796] In addition, the Commission sought comment on a number of other issues related to ICS for inmates who are deaf and hard of hearing, including: (1) whether and how to discount the per-minute rate for ICS calls placed using TTY; (2) whether action is required to ensure that ICS providers do not deny access to TRS by blocking calls to 711 and/or state established TRS access numbers; (3) the need for ICS providers to receive complaints on TRS and file reports on those complaints with the Commission; and (4) actions the Commission can take to promote the availability and use of video relay service (VRS) and other assistive technologies in prisons.[797]

223. The Commission asked additional questions about accessible ICS in the *Second FNPRM*.[798] Specifically, the Commission sought comment on the following: (1) the actual relative length of TTY-to-TTY and TTY-to-voice calls as compared to voice-to-voice calls; (2) the claim that no ICS provider charges for voice-to-TTY or TTY-to-voice calls because "the 'interexchange company holding the [state] TRS contract carries the call to the called party,'" and if true, whether the final reduced ICS rates for TTY calls should only apply to TTY-to-TTY calls; (3) whether AT&T and other entities that provide TRS are providing ICS for TRS calls placed by inmates; (4) how the Commission's relay service registration requirements can be met in a correctional facility setting where the equipment is handled by several users; and (5) the availability of and security concerns relating to devices used with newer technologies, such as videophones used for VRS and point-to-point video communications, devices used for IP CTS, and devices used for IP Relay.[799]

224. Since 2012, when the Commission first sought comment on access to ICS for inmates who are deaf or hard of hearing, the Commission has continued to receive filings expressing concern about these prisoners' lack of access to telephone services that are functionally equivalent to the services available to users of traditional voice services.[800] The Washington Lawyers' Committee (WLC), for

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[796] *See 2013 Order*, 28 FCC Rcd at 14179, para. 144.

[797] *2013 Order*, 28 FCC Rcd at 14159-60, paras. 95-96. VRS is a form of TRS "that allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users through video equipment. The video link allows the [communications assistant] to view and interpret the party's signed conversation and relay the conversation back and forth with a voice caller." 47 C.F.R. § 64.601(a)(40). Other forms of TRS include Internet Protocol Relay (IP Relay), Captioned Telephone Service (CTS), Internet Protocol Captioned Telephone Service (IP CTS), and Speech-to-Speech (STS). IP Relay is a form of TRS "that permits an individual with a hearing or a speech disability to communicate in text using an Internet Protocol-enabled device via the Internet, rather than using a [TTY] and the public switched telephone network." 47 C.F.R. § 64.601(a)(17). CTS is a form of TRS that permits an individual who can speak but who has difficulty hearing over the telephone to simultaneously listen to the other party and read captions of what the other party is saying. *See Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket 98-67, Declaratory Ruling, 18 FCC Rcd 16121 (2003). There are two forms of CTS. Users access the first form of CTS with a special telephone that has a text screen to display captions of what the other party is saying (a "captioned telephone"). With this form of CTS, the connection carrying the captions from the relay service provider is via the public switched telephone network (PSTN). *Id*. Users access the second form of CTS with a telephone and an Internet Protocol-enabled device (IP CTS). With IP CTS, the connection carrying the captions from the relay service provider is via the Internet. *See* 47 C.F.R. § 64.601(a)(16). STS is a form of TRS "that allows individuals with speech disabilities to communicate with voice telephone users through the use of specially trained [communications assistants] who understand the speech patterns of persons with speech disabilities and can repeat the words spoken by that person." 47 C.F.R. § 64.601(a)(30).

[798] *See Second FNPRM*, 29 FCC Rcd at 13223-27, paras. 133-44.

[799] *See Second FNPRM*, 29 FCC Rcd at 13223-26, paras. 136-42.

[800] *See, e.g.*, Comments of the National Association of the Deaf, et al., WC Docket No. 12-375 at 1-3 (filed Jan. 5, 2015) (NAD Second FNPRM Comments); HEARD Second FNPRM Comments at 1-5; WLC Second FNPRM Comments at 2-3.

example, claims that correctional facilities often fail to make TRS available to inmates.[801] Similarly, Helping Educate to Advance the Rights of the Deaf (HEARD) asserts that "deaf prisoners in several states have had no telecommunications access for several years, while deaf detainees often spend their entire time in jail with no telecommunication."[802] According to the Rosen Bien Galvan & Grunfeld (RBGG) law firm, its clients "routinely report that their access even to outdated and disfavored [TTYs], particularly in county jail facilities, is limited to nonexistent and that their ability to communicate with loved ones and attorneys is thereby impaired."[803] RBGG further asserts that, even when correctional facilities have TTYs, "they are often not actually available to our clients because they are broken, because staff does not know they exist, or because staff does not know how to use the machines."[804]

225. In response to the *Second FNPRM*, Securus and GTL contend that correctional facilities, not the ICS providers, "set correction facility policy as to the amount of access that hearing-impaired inmates (or any inmates) have to telecommunications services."[805] GTL also asserts that "disability access concerns are being addressed by the industry"[806] and that GTL's inmate calling services and the rates for those services are "fully compliant with the requirements of the Americans with Disabilities Act (ADA), the Communications Act of 1934, as amended, and current Commission requirements."[807]

2. Discussion

226. *Functionally Equivalent Access.* We now take measures to address the various concerns and ongoing reports regarding the lack of equal telephone access by inmates.[808] As an initial matter, we note that this proceeding has generally referred to individuals who are "deaf and hard of hearing," in discussing accessibility matters. Because inmates who are deaf-blind or have speech disabilities also use

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[801] WLC Second FNPRM Comments at 2. According to WLC, "accessible technology has not been a part of any of [the Federal Bureau of Prison's] past ICS negotiations. . . . To our knowledge, the BOP has not been able to locate a single ICS or VP provider whose products work with their ICS or any ICS it believes will work in its environment." *Id*. at 3. *Contra* GTL Second FNPRM Reply at 25-26 (asserting that "many, if not all, of the requests for proposal to which GTL responds contain provisions requiring the ICS provider to ensure inmates with disabilities have access to ICS. . . . TTY and similar devices are available in the vast majority of correctional facilities, and more recently, videophone technology has been made available") (internal citations omitted).

[802] HEARD Second FNPRM Comments at 1 n.2.

[803] RBGG Second FNPRM Comments at 3; WLC Second FNPRM Comments at 2 (asserting that TTY devices are often housed apart from other ICS equipment).

[804] RBGG Second FNPRM Comments at 3; *see also* DeafCan Second FNPRM Comments at 1-2 (asserting that two years ago, hearing disabled inmates at Graterford State Prison in Pennsylvania "went for more than a full year with no phone access at all" because "their one TTY apparently broke and, instead of having a back-up or plans or policies to get it repaired or replaced, it remained broken").

[805] Securus Second FNPRM Comments at 39, citing Hopfinger Decl. Dec. 2013 para 11; GTL Second FNPRM Reply at 25.

[806] GTL Second FNPRM Reply at 25.

[807] GTL Second FNPRM Reply at 25. Title II of the ADA prohibits discrimination against individuals with disabilities by state and local governments. *See* 42 U.S.C. §12131 et seq. The U.S. Department of Justice has made clear in its regulations implementing Title II of the ADA that this prohibition extends to activities of state and local correctional facilities. 28 C.F.R. § 35.152; *see also Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) (Title II of the ADA covers inmates in state prisons).

[808] HEARD Second FNPRM Comments at 4 ("Simply put, the deaf prison population cannot rely on written English as an effective means of communication. Since TTY devices require the user to type out their communication, they prove to be an inadequate and ineffective means for Deaf prisoners to communicate with their families. Moreover, this mode of communication is especially ineffective for deaf prisoners who need to communicate with advocates and attorneys who need to convey complex information with complicated or specialized vocabulary.").

TRS, they, too, have the same or similar policy concerns as inmates who are deaf or hard of hearing. Accordingly, we will now refer more generally to inmates with "communication disabilities" when discussing these accessibility issues. Additionally, we note that while our focus here is primarily on calls that are made *by* inmates with these disabilities, some of the policies we adopt requiring access to TRS will also benefit inmates who need to place calls *to* people with such disabilities.[809]

227. Section 225 of the Act requires every common carrier that provides voice services to offer access to TRS within their service areas.[810] Accordingly, all common carriers must make available, or ensure the availability, to their customers of those types of TRS that the Commission has required to be mandatory services provided to the public. At present, the Commission mandates two forms of TRS: TTY-based TRS and speech-to-speech (STS),[811] both of which are provided over the PSTN.[812] We remind ICS providers of their obligations to ensure the availability and provision of these forms of TRS.[813] Consistent with these obligations, ICS providers also may not block calls to 711, a short form dialing code that is used to access TRS provided by state-run TRS programs.[814]

228. We note that several parties have requested that the Commission require correctional facilities to provide more "modern" forms of TRS as well, along with the equipment needed to access those services. These parties assert that TTYs are largely outdated and that videophones and captioned telephones are the standard modes of communication for people with communication disabilities.[815] For example, RBGG urges the Commission's "active intervention" to encourage facilities to adopt modern

[809] The Commission's rules prohibit Communications Assistants (CAs), subject to some exceptions, from "disclosing the content of any relayed conversation" and "from keeping records of the content of any conversation beyond the duration of the call." *See* 47 C.F.R. § 64.604(a)(2). Yet, the Commission has recognized call recording and monitoring are often implemented as security measures associated with ICS. *See 2013 Order* 28 FCC Rcd at 14109, para. 2. We conclude that we do not need to waive rule 64.604 in order to accomplish the reforms enacted herein because any recording performed in the completion of ICS is performed by the ICS provider, not the relevant CA.

[810] 47 U.S.C. § 225(c); *see also* 47 U.S.C. § 225(b)(1) (requiring the Commission to "ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States").

[811] 47 C.F.R. § 64.601(a)(30) ("A telecommunications relay service that allows individuals with speech disabilities to communicate with voice telephone users through the use of specially trained CAs who understand the speech patterns of persons with speech disabilities and can repeat the words spoken by that person.").

[812] *See, generally, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Rcd 4657 (1991); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5149, para. 15 (2000).

[813] 47 U.S.C. § 225; 47 C.F.R. § 64; *see also, e.g.*, 47 C.F.R. §§ 64.64.604(c)(5)(iii)(A), (B) (requiring contributions to the Interstate TRS Fund).

[814] 47 C.F.R. § 64.603 (requiring common carriers to "provide access via the 711 dialing code to all relay services as a toll free call"); *see also 2013 Order*, 28 FCC Rcd at 14180, para. 148.

[815] *See* HEARD Second FNPRM Comments at 3 (urging the Commission to make "videophones and modern technology" more available, noting that TTY usage is declining and asserting that "75% of all accessible calls made in the United States are made via videophone"); Comments of Prison Law Office at 3, WC Docket No. 12-375 (filed Dec. 1, 2014) (PLO Second FNPRM Comments); HRDC Second FNPRM Comments at 13; NAD Second FNPRM Comments at 3.

communications technologies, such as videophones.[816] Similarly, the National Association of the Deaf (NAD) asserts that "correctional facilities should be required to install and provide access to the telecommunications equipment required by deaf and hard of hearing inmates – whether it's a TTY, videophone, captioned telephone, or even an amplified telephone or one that is amplified and has large buttons."[817]

229. The Communications Act requires TRS to be provided "in a manner that is *functionally equivalent* to the ability of a hearing individual" to use conventional voice telephone services.[818] We agree with commenters that limiting all inmates with communication disabilities to one form of TRS, particularly what many view as an outdated form of TRS that relies on TTY usage, may result in communication that is not functionally equivalent to the ability of a hearing individual to communicate by telephone.[819] However, as noted above, at this time, only two forms of TRS, TTY-based TRS and STS, are mandated services for all common carriers. While the Commission *authorizes* compensation from the Interstate TRS Fund for VRS, IP Relay, and both PSTN-based CTS and IP CTS,[820] it does not *mandate* that these types of services be provided by any common carrier at this time. Accordingly, while we are only able to require ICS providers to make TTY-based TRS and STS available to inmates with communication disabilities, or to inmates who communicate by telephone with users of these services at this time, we strongly encourage correctional facilities to work with ICS providers to offer these other forms of TRS.

230. Several inmates with communications disabilities that have commented in the record note that in some instances, using a Telecommunication Device for the Deaf (TDD)[821] is unsatisfactory because "[o]ur family members and friends who are deaf, are no longer using the obsolete TDD system."[822] We reaffirm our existing policy of strongly encouraging correctional facilities to provide

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[816] RBGG Second FNPRM Comments at 2-3; *see also* HEARD Second FNPRM Comments at 3 (arguing that "videophones should be a mandatory provision by ICS providers when requested by prisoners who use sign language or prisoners whose family members use sign language").

[817] NAD Second FNPRM Comments at 3. NAD asserts that correctional facilities have a legal obligation to provide accommodations, such as accessible telecommunications equipment, to individuals with disabilities. *Id*.

[818] 47 U.S.C. § 225(a)(3) (emphasis added).

[819] *See, e.g.*, HEARD Second FNPRM Comments at 3 (asserting that "many deaf individuals require sign language for effective communication, and can only communicate effectively through sign language"); RBGG Second FNPRM Comments at 2 ("Many of our clients also report that their limited proficiency in written English is a further obstacle to their effective use of [TTYs]."); NAD Second FNPRM Comments at 1-2 (stating that "deaf and hard of hearing inmates need access to the more functionally equivalent telecommunications equipment that are used by the majority of deaf and hard of hearing individuals outside of these facilities such as videophones, captioned telephones, and other Internet-based communications").

[820] In order to implement the statutory requirements that TRS users "pay rates no greater than the rates paid for functionally equivalent voice communication services" and that "costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service," the Commission established the Interstate TRS Fund, which enables TRS providers to recover the reasonable costs of providing interstate TRS. 47 U.S.C. §§ 225(d)(1)(D), (d)(3)(B); *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300 (1993).

[821] "The term 'TDD' means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system." 47 U.S.C. § 225(a)(2).

[822] *See* Letters from Daniel Blanco, Tyson Hopper, Juan Rivera, Allen Fisher, inmates at California Substance Abuse Treatment Facility (CSATF), to FCC, WC Docket No. 12-375 (filed Mar. 12, 2013). The same commenters also complain that TDD calls cost more than standard telephone calls from their correctional facility because TDD "is not under the prison telephone contract . . . . It costs much more for collect calls on TDD." *Id*.

inmates with communication disabilities with access to TTYs, as well as equipment used for advanced forms of TRS, such as videophones and captioned telephones.[823] In addition, we strongly encourage correctional facilities to comply with obligations that may exist under other federal laws, including Title II of the ADA, which require the provision of services to inmates with disabilities that are as effective as those provided to other inmates.[824] Access to more advanced forms of TRS, including VRS, IP Relay, CTS, and IP CTS, may be necessary to ensure equally effective telephone services for these inmates. We recognize that some facilities have already begun providing access to alternative forms of TRS,[825] often as the result of litigation brought under these other statutes.[826] We strongly encourage other facilities to continue this trend voluntarily, without the need for further litigation. The Commission will monitor the implementation and access to TRS in correctional institutions and may take additional action if inmates with communications disabilities continue to lack access to functionally equivalent service.

231. *Rates*. Several commenters have also expressed concern about the costs inmates with communication disabilities incur when they use TTYs. HEARD, for example, asserts that TTY calls are "at least four times slower than voice-to-voice conversations" and that "this time estimation does not account for varied literacy levels of users; 'garbled' transmissions that frequently occur in loud settings or with incompatible newer telephone technology; or the time required to connect to the operator, and subsequently to the party being called, among other things."[827] One commenter describes his experience as an inmate with communications disabilities:

> [a]fter you give the relay operator your name for the collect call the relay operator put[s] you back on hold once again to see if charges will be accepted by the party at the other end of your call. This process takes at least 5 to 8 minutes. This time is part of the 15-minute time limit that the Department of Corrections has on their timers for each call. Now keep in mind that a regular call costs a total of about $2 but the relay service had

[823] *See Second FNPRM*, 29 FCC Rcd at 13225-26, para. 141. In addition, although we do not mandate access to these more modern forms of TRS, we note that state and local governments and many businesses have legal obligations to ensure access to these services as part of their obligation to ensure that their facilities, programs, and services are accessible to individuals with disabilities under statutes such as Section 504 of the Rehabilitation Act of 1973 and the ADA. *See* 29 U.S.C. § 794(d); 42 U.S.C. §§ 12101-12213.

[824] *See* 42 U.S.C. § 12131 et seq.; 28 C.F.R. §§ 35.130, 35.152.

[825] WLC Second FNPRM Comments at 2 ("Until sued, DOCs virtually never bring [accessible communications] up with their ICS providers, and until explicitly asked, ICS providers will not consider the possible technological solutions. We are aware of no ICS provider at this time that includes accessible telecommunication equipment as part of the packages that they provide to DOCs.").

[826] Several facilities have agreed to provide inmates with access to VRS as part of settlements entered into in response to lawsuits brought by the Department of Justice and private litigants, pursuant to Title II of the ADA. *See, e.g., Jarboe v. Maryland Department of Public Safety and Correctional Services*, Case 1:12-cv-00572-ELH (D. Md., Settlement June 8, 2015); *Settlement Agreement between the United States of America and Erie County, New York regarding the Erie County Holding Center and the Erie County Correctional Facility under the Americans with Disabilities Act*, Department of Justice Complaint No. 204-53-125 (December 17, 2014) http://www.ada.gov/erie_county/erie_county_sa htm (last visited June 27, 2015) (DOJ Erie County Settlement).

[827] HEARD Second FNPRM Comments at 4-5; *see also Second FNPRM*, 29 FCC Rcd 13170 at 13224, para. 136, (citing *2013 Order*, 28 FCC Rcd at 14178, para. 143 (noting the assertions of numerous commenters that TTY-to-voice calls take "at least three to four times longer" than voice-to-voice calls to deliver the same conversational content, not including the time it takes to connect to the TRS operator)); DOJ Erie County Settlement ("Telephone calls placed using a TTY take longer than telephone calls placed using standard voice telephone equipment. Accordingly, the Sherriff will allow inmates using a TTY at least three times the length of time permitted for voice communication where the jail imposes time limitations on inmates using the telephone.").

> a $3.62 hook up fee, then so much per minute after that so you only get 5 to 7 min. and you have to call back and repeat this process.[828]

232. Given the differences between TTY and traditional voice service, several commenters argue that TTY users should be charged a discounted rate for ICS calls.[829] The Prison Law Office, for example, has argued that if the Commission does not take into account the relatively slow speeds of TTY-based conversations, it will be "in effect placing a surcharge on deaf prisoners."[830] The Commission itself tentatively concluded in the *2013 Order* that the per-minute ICS rate for TTY calls should be set at 25 percent of the safe harbor rate of $0.12/minute for debit/prepaid calls and $0.14/minute for collect calls.[831]

233. Neither ICS providers, nor any other commenters, dispute arguments that TTY calls are longer, and therefore more expensive to consumers than non-TTY calls. Instead, Securus merely contends that it receives no additional compensation for this type of call above its tariffed rate.[832] GTL, for its part, generally asserts that its ICS and associated rates are "fully compliant with the requirements of the Americans with Disabilities Act, the Communications Act of 1934, as amended, and current Commission requirements."[833]

234. We find that the record overwhelmingly supports the conclusion that TTY calls take significantly longer than voice conversations, due to factors that include the longer time it takes the TTY user to type – rather than speak – his or her part of the conversation;[834] the time delays that occur while the text is transmitted;[835] and the technical difficulties that appear to affect TTY calls disproportionately compared to voice calls.[836] TTY calls through TRS can take even longer than calls between two TTY users, because of the need for such calls to be set up before the communications assistant can connect the TTY user to the voice telephone user,[837] and the need for the communications assistant to transcribe the spoken part of the call and relay it to the TTY user.

235. Given that there does not appear to be any dispute in the record over whether TTY calls take longer to transact than voice calls involving similar content, the question remains whether inmates with communication disabilities (or their families) should be required to pay more for ICS calls than their hearing counterparts simply because they need to rely on TTYs to communicate with their friends and

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[828] Letter from Amalia Deloney, Policy Director, Center for Media Justice, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2-3 (filed Aug. 2, 2013).

[829] *2013 Order*, 28 FCC Rcd at 14178-79, paras. 143-44 (citing Consumer Groups 2013 Comments at 4 (urging the Commission to "proportionally discount all relay calls by seventy-five percent"); P&A 2013 Comments at 2 (asking the Commission to reduce rates charged for TTY calls to "at least one half or one quarter . . . of the charges for voice calls"); HEARD 2013 Comments at 9; RIT/NTID Student Researchers 2013 Comments at 6 (stating that an 85 percent reduction in TTY calls would achieve an appropriate price reduction).

[830] PLO Second FNPRM Comments at 2-3; *see also* NAD Second FNPRM Comments at 3; HEARD Second FNPRM Comments at 4.

[831] *2013 Order*, 28 FCC Rcd at 14179, para. 144.

[832] Securus Second FNPRM Comments at 38-39 and Hopfinger Decl. at 2-4.

[833] GTL Second FNPRM Reply at 25.

[834] *See* Michael Stein NPRM Comments, WC Docket No. 12-375, at 1 (filed Mar. 25, 2013) (Stein NPRM Comments); Comments of National Association of the Deaf, WC Docket No. 12-375, at 2-3 (filed Mar. 25, 2013) (NAD NPRM Comments).

[835] *See* Stein NPRM Comments at 6.

[836] *See* HEARD Second FNPRM Comments at 5.

[837] *See* Stein NPRM Comments at 6; *see also* NAD NPRM Comments at 2-3.

relatives. As explained below, we find that it would be unfairly discriminatory to require TTY users to pay more per call than users of traditional voice telephone equipment.

236. In the *2013 Order*, the Commission clarified that it would be inconsistent with section 225 of the Act for ICS providers to collect "additional charges" (i.e., charges in excess of those charged by the ICS provider for functionally equivalent voice communications service) for calls made through any type of telecommunications relay service.[838] The *2013 Order*, however, did not address the relevance of section 276 to ICS provider charges for TRS calls. Section 276, which requires the Commission to ensure that ICS providers "are fairly compensated for each and every completed intrastate and interstate call," also states that TRS calls "shall not be subject to such compensation."[839] Thus, we believe it is reasonable for the Commission to interpret 276(b)(1)(A) to mean that TRS calls are not subject to the per-call compensation framework adopted herein.[840] Specifically, section 276 exempts both emergency calls and TRS calls from the fair compensation mandate. The exemption of emergency calls means that providers may not charge for emergency calls.[841] We believe it is reasonable to interpret the pairing of TRS with emergency calls as an indication that Congress also intended TRS calls be provided for no charge. Therefore, we prohibit ICS providers from assessing charges for ICS calls between a TTY device and a traditional telephone.[842]

237. As for TTY-to-TTY calls, we find that, because such calls, by their nature, are of longer duration than voice calls, and because inmates with communication disabilities do not have the alternative of placing voice calls, it would be unfairly discriminatory to require TTY users to pay more per call than users of traditional voice telephone equipment. This finding is compelled not only by the evidence in the record, but also by the language of the relevant statutory provision. Section 276 requires the Commission to establish a "per call compensation plan" to ensure that payphone providers, including ICS providers, are fairly compensated for "each and every . . . call."[843] Such per-call compensation must be "fair" not only to the provider but also to the party paying for the call.[844] Because of the significantly longer time

[838] *2013 Order*, 28 FCC Rcd at 14159-60, para. 95.

[839] 47 U.S.C. § 276(b)(1)(A); *see also 2012 NPRM*, 27 FCC Rcd at 16644-45, para. 42 (noting that under section 276(b)(1)(A) of the Act, "telecommunications relay service calls for hearing disabled individuals" are specifically exempt from the Commission's per-call compensation plan ensuring that ICS providers are "fairly compensated").

[840] *See* 47 U.S.C. § 276(b)(1)(A).

[841] *Implementation of the Pay Telephone Reclassification Act and Compensation Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Operator Service and Pay Telephone Compensation*, CC Docket Nos. 96-128 and 91-35, Report and Order, 11 FCC Rcd 20541, 20545, para. 6 (1996) ("Although we embark in this Report and Order on a new deregulatory structure for the payphone industry, we take a number of steps to facilitate use of payphones by consumers. . . . Second, we require that each payphone provide access, free of charge to the caller, to emergency calling, telecommunications relay service calls for the hearing disabled, and dialtone generally.").

[842] To the extent that an ICS provider is assessed a per-call or per-minute charge by another carrier or service provider to complete a call made through a TRS center and such charge is no greater than the charges assessed for functionally equivalent voice communication services assessed for other inmates with respect to the duration of the call, the time of day, and the distance from point of origination to point of termination, such charge may be directly passed through to the inmate caller, without a markup. *See* 47 U.S.C. § 225(d)(1)(D) (no extra charges can be passed along to TRS consumers that are associated with a leg of the call that must go through TRS). We find that neither our decision regarding TTY-based TRS calls nor our decision regarding TTY-to-TTY calls "disturb or negatively impact" arrangements between states and providers of intrastate TRS. *See* NARUC Oct. 15, 2105 *Ex Parte* letter at 4. Our new rules affect only ICS providers and should have no impact on either TRS providers or the states with which they contract.

[843] 47 U.S.C. § 276(b)(1)(A).

[844] *2013 Order*, 28 FCC Rcd at 14131-32, para. 46.

that is necessarily consumed by TTY calls – as compared to the duration of voice telephone ICS calls – we conclude that, to ensure fair compensation on a per-call basis, ICS providers should offer TTY calls at lower per-minute rates than are charged for voice calls, even if such lower rates do not provide the level of *per-minute* compensation determined to be fair for voice telephone calls in the "per call compensation plan."[845] We reach this decision because of the per-call discrimination that would result were we to set the same rates for both types of calls.

238. Accordingly, for the reasons described above, we require that the rates charged by ICS providers for TTY-to-TTY calls be no more than 25 percent of the rates the providers charge for traditional inmate calling services.[846] We recognize that this discounted rate may not represent the same level of compensation that is provided for voice telephone calls carried over the same networks, but we have considered any additional costs that might be incurred by providers in setting the rate caps for ICS and concluded that there is enough room within the general rate caps to ensure the providers are still fairly compensated. Thus, ICS providers can expect to recover the cost of the TTY discount through the rates they charge other users, who account for the vast majority of ICS calls.[847]

239. In setting the mandatory discount for ICS calls involving TTYs, we are cognizant of Securus' claim that it cannot track TTY calls separately from other ICS calls and that any type of TRS-related billing requirement "would be extremely time-consuming and burdensome."[848] If Securus, or any other ICS provider, finds it too burdensome to track TTY calls and bill customers the discounted rate for those calls, it may opt to provide TTY-to-TTY calling for free.[849] We expect the cost of forgoing the discounted fees for the relatively small number of TTY users of ICS will be nominal and that providers will be able to recover those costs through the "cushion" we have built into our rate caps. We find that the benefit to inmates that use TTY and TRS technologies outweighs any nominal costs to ICS providers. Finally, we note that facilities and ICS providers can avoid costs related to TRS calls by allowing inmates to use IP-based forms of TRS, such as VRS, IP Relay and IP CTS. However, the record indicates that "only a handful of prisons are equipped with videophones (e.g., Vermont, Virginia, and Wisconsin) and no prison or jail is known to have installed captioned telephones, many using security as an excuse for discrimination."[850] These calls would not require the services of an ICS provider and would be provided free of charge to both the user and to the facility.

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[845] 47 U.S.C. § 276(b)(1)(A).

[846] *Second FNPRM*, 29 FCC Rcd at 13224, para. 136 (citing *2012 Order*, 28 FCC Rcd at 14178, para. 144).

[847] We note that the record provides generalized data, but indicates that these calls represent a very small portion of ICS. No commenter has asserted otherwise. We believe this reasonably bolsters our argument that ICS providers can expect to recover these costs through the rates for traditional ICS.

[848] Securus Second FNPRM Comments at Hopfinger Decl. at 5.

[849] *See, e.g.*, *Telecommunications Relay Services and the Americans with Disabilities Act of* 1990, CC Docket No. 90-571, Fifth Report and Order, 17 FCC Rcd 21233, 21253-54, para. 45 (Common Car. Bur. 2002) (requiring payphone operators to provide local TRS calls for free "because the states and carriers consider such costs when entering into their contracts and determining their general overhead expenses"); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Fourth Report and Order, 15 FCC Rcd 25216, 25225 n.49 ("This type of accommodation is not without precedent. Because it can take up to three times longer to complete TTY calls than voice calls, the Commission encouraged wireline interexchange carriers to offer discounts on long distance calls to [TRS] users several years ago. Several long distance companies currently provide such discounts to TTY and relay users.") (internal citations omitted); *see also* Comments of Jessica Rogalski, WC Docket No. 12-375, at 2 (filed Feb. 7, 2013) (claiming at least one facility in Pennsylvania ensures "that deaf prisoners have access to free TTY calls").

[850] Comments of Sheena Green, WC Docket No. 12-375, at 2 (filed Mar. 20, 2013).

240. *Disability-Access Related Reporting*. In discussing ICS disability access issues in the *2013 Order*, the Commission asked whether ICS providers should be required to collect and report: "(i) data on TRS usage via ICS, and (ii) complaints from individuals that access TRS via ICS."[851] The Commission also sought comment "on the benefits and burdens, including on small entities, of imposing these reporting requirements."[852]

241. In the *Second FNPRM*, the Commission again sought comment on possible recordkeeping and reporting requirements specific to accessible ICS.[853] Specifically, the Commission asked if "ICS providers [should] be required to report to the Commission the number of disability-related calls they provide, the number of problems they experience with such calls, or related complaints they receive?"[854] In response, the NAD asserts that the Commission should require "complaints, technical problems, how much telecommunications access is provided as compared to non-deaf or hard of hearing inmates, and whether there is access to modern telecommunications equipment."[855] HEARD asserts that "[t]he Commission can generate a genuine sense of accountability simply by requiring ICS providers to collect and report data on calls made using relay service, especially if prisoners and family members are paying for the service."[856] More specifically, HEARD suggests that, pursuant to the Commission's existing consumer complaint procedures, correctional facilities should be required to report how long they have been without relay service or access, and if a recent change in the ICS provider preceded the problem.[857]

242. Securus counters that "tracking of TTY is not possible" and that culling out calls would require Securus "to write a new computer application for its billing system" and "establish 'separate databases at each correctional facility to identify inmates that may use a TTY device or call friends or family that require the use of a TTY or similar device.'"[858] Securus further asserts that this difficulty is "compounded for any facility that does not use Prison Identification Numbers in association with its inmate telephone system."[859] Securus asserts generally that any type of TRS-related billing or call recordkeeping requirement "would be extremely time-consuming and burdensome."[860]

243. GTL separately asserts that the new technologies it is introducing, which are "better categorized as advanced communications services (ACS), enhanced services, or simply new

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[851] *2013 Order*, 28 FCC Rcd at 14180, para. 149 (internal citations omitted). These proposals were based on comments in the record. *Id*.

[852] *Id*.

[853] *See Second FNPRM*, 29 FCC Rcd at 13227, para. 144.

[854] *Id*.

[855] NAD Second FNPRM Comments at 2 (asserting that "this information will help the Commission and other government entities improve telecommunication access in prison. Of course, with any reporting, the Commission must consider the privacy of inmates and those they are communicating with and protect the confidentiality of their calls.").

[856] HEARD Second FNPRM Comments at 14.

[857] HEARD Second FNPRM Comments at 14; *see also* RBGG Comments at 3 (stating that "[w]e entirely endorse this reporting proposal. As the Commission is aware, it is presently very difficult to obtain accurate information regarding the availability of assistive technology in correctional facilities . . . . Requiring ICS providers to provide regular reporting on disability access issues would enable the Commission to accurately access the scope of these problems and to determine whether further rulemaking is necessary."

[858] Securus Second FNPRM Comments at 38, (citing Hopfinger Decl. Dec. 19, 2013 at para. 10).

[859] *Id*.

[860] Securus Second FNPRM Comments at Hopfinger Decl. at 5.

technologies" are already subject to certain disability access requirements, including recordkeeping and reporting requirements.[861] GTL is specifically referring to rule 14.31, which requires ACS providers discontinuing a product or service to create and keep records (for a two year period) relating to: (1) their efforts to consult with individuals with disabilities; (2) the accessibility features of their products and services; and (3) the compatibility of their products and services with peripheral devices or specialized customer premise equipment commonly used to help individuals with disabilities achieve access.[862] Additionally, ACS providers must file an annual compliance certificate with the Commission.[863] Finally, ACS providers facing formal or informal accessibility complaints must produce responsive records to the Commission upon request.[864]

244. After reviewing the record, we adopt the reporting requirements proposed by HEARD and supported by NAD. Specifically, we require all ICS providers to include in the Annual Reporting and Certification filing described below:[865] (1) the number of disability-related calls they provided; (2) the number of dropped disability-related calls they experienced; and (3) the number of complaints they received related to access to ICS by TTY and TRS users, e.g., dropped calls, poor call quality and the number of incidences of each.[866] We agree with HEARD that these reporting requirements will foster accountability on the part of ICS providers.[867] We believe these reporting requirements will encourage providers to actively address problems affecting users' ability to access TRS (including TTY) via ICS. Moreover, the reports will give the Commission the information needed to assess ICS providers' compliance with the requirements adopted herein, as well as those imposed by section 225, including the statutory requirement that individuals with communications disabilities must be able to engage in communication by wire or radio "in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability," as well as the requirement that TRS be provided "in the most efficient manner."[868]

245. Securus' main objection to the reporting requirements appears to be related solely to the difficulty of tracking TRS calls. But the record indicates that TRS calls make up only a small portion of ICS calls. Moreover, TTY-based TRS calls require specialized equipment and/or require calling a designated number such as 711.[869] Either scenario should facilitate tracking TTY-based TRS calls. For instance, it should not be difficult to track a relatively small number of calls made from specialized equipment located in a correctional facility. Moreover, any burdens associated with providing limited reporting on these calls are far outweighed by the benefits such reporting will offer in terms of greater

[861] GTL Second FNPRM Comments at 43-44 (internal citations omitted) (also asserting that "non-interconnected VoIP service providers also are required to register with the FCC (by filing certain portions of the FCC Form 499-A) and to contribute to the interstate [TRS] fund on the basis of their interstate end-user revenues").

[862] 47 C.F.R. § 14.31(a).

[863] 47 C.F.R. § 14.31(b).

[864] 47 C.F.R. § 14.31(c). While GTL's assessment of its recordkeeping and reporting obligations under rule 14.31 are correct, these requirements are largely unrelated to the more granular requirements the Commission sought comment on in this matter.

[865] *See infra* Section IV.K.

[866] *See Second FNPRM*, 29 FCC Rcd at 13227, para. 144.

[867] *See* HEARD Second FNPRM Comments at 14.

[868] 47 U.S.C. § 225(a)(3) and (b)(1). Hearing users of traditional voice communications services generally enjoy extremely reliable service, particularly when using wireline devices. A service that is unreliable (e.g., that experiences a significant number of dropped calls) would not be either "functionally equivalent" or "efficient," as required by the statue.

[869] *See https://www.fcc.gov/guides/711-telecommunications-relay-service.*

transparency and heightened accountability on the part of ICS providers. For example, our reporting requirements will facilitate monitoring of issues related to TRS calls, encourage greater engagement by the advocacy community, and provide the Commission the basis to take further action, if necessary, to improve inmates' access to TRS.[870]

246. We further address concerns regarding the burdensomeness of our reporting requirements by establishing a safe harbor that will allow ICS providers to avoid any reporting obligations if certain conditions are met. Specifically, if an ICS provider either (1) operates in a facility that allows the offering of additional forms of TRS beyond those we currently mandate or (2) has not received any complaints related to TRS calls, then it will not have to include any TRS-related reporting in the Annual Report detailed below, provided that it includes a certification from an officer of the company stating which prong(s) of the safe harbor it has met. If the facility an ICS provider serves either ceases allowing additional forms of TRS beyond those we mandate[871] or the ICS provider begins to receive TRS-related complaints, however, it must include all required TRS reporting information in its next Annual Report. We note that a report that includes the number of TRS calls provides important context for determining whether the number of complaints or dropped calls reported by a provider is problematic. We believe that allowing these safe harbors will provide equal or superior benefits over the reporting requirements because if taken advantage of they help mitigate ICS providers' concerns over the burdens associated with reporting (although we believe these burdens are minimal), and will help drive the adoption of more modern forms of TRS by correctional facilities, which helps further the deployment of ICS as well as helps maintain or increase contact between more incarcerated persons and the outside world.

247. *Cost-Benefit Analysis*. We find that the reporting and recordkeeping requirements related to disability-access ICS calling adopted in this Order are not overly burdensome. Parties have complained that the disability access communications within correctional facilities are not priced at rates that are just, reasonable, and fair, and that Commission intervention is necessary.[872]

248. As discussed above, we conclude that these recordkeeping requirements are necessary to foster accountability on the part of ICS providers, and will encourage providers to address problems limiting users' ability to access TRS (including TTY) via ICS.[873] Further, the reporting requirements will give us the information we need to assess ICS providers' compliance with the requirements adopted herein, as well as those imposed by section 225.

249. We find unpersuasive the objections raised to the reporting requirements.[874] Reporting the number of problems and complaints associated with TRS calls does not seem unduly burdensome.

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[870] *See* RBGG Second FNPRM Comments at 3 ("Requiring ICS providers to provide regular reporting on disability access issues would enable the Commission to accurately assess the scope of these problems and to determine whether further rulemaking is necessary."); *see also* HEARD Second FNPRM Comments at 14 ("Finally, there is a great deal of information about the use of TTYs and relay service that can only be answered by ICS providers and prisons. Should the Commission mandate the submission thereof, it could use these data to make more informed decisions related to accessibility and service quality compliance in the future.").

[871] We understand that ICS providers do not dictate the access-related services made available in correctional institutions but we hope that such a safe harbor will serve as an incentive for ICS providers to encourage their correctional institution clients to permit the offering of more-advanced TRS such as VRS, IP Relay or IP CTS.

[872] *See, e.g.*, HEARD Second FNPRM Comments at 14; RBGG Second FNPRM Comments at 3; NAD Second FNPRM Comments at 2.

[873] *See, e.g.*, HEARD Second FNPRM Comments at 14.

[874] *See, e.g.*, Securus Second FNPRM Comments at Hopfinger Decl. at 5.

TRS calls make up only a small portion of ICS calls.[875] Moreover, as noted above, TTY-based calls require specialized equipment and/or require calls to a designated number, such as 711; either scenario should allow for ease of tracking.[876] Moreover, any burdens associated with providing limited reporting on these calls are far outweighed by the benefits such reporting will offer in terms of greater transparency and heightened accountability on the part of ICS providers. We further mitigate any potential burden from our reporting requirements by establishing safe harbors that allow ICS providers to avoid any reporting obligations if certain conditions are met, as discussed more fully above.[877]

H. Section 276 is Technology Neutral

250. We confirm the findings in the *2013 Order* that section 276, by its terms, is technology neutral with respect to inmate calling services.[878] As such, our rules adopted herein apply to ICS regardless of the technology used to deliver the service. Therefore, if a particular service meets the relevant definition in our rules,[879] then it is a form of ICS that was subject to our interim rules and that is subject to the rules we adopt today. The nomenclature used to describe a service is not dispositive of whether the service is or is not ICS. Whether any particular service meets those definitions requires a fact-specific inquiry that we may adjudicate if necessary.[880]

I. Transition and Existing Contracts

251. In establishing the transition, we balance the critical goal of providing necessary relief to consumers from unreasonably high ICS rates while remaining mindful of the potential impact on ICS providers and facilities to ensure a smooth transition to implement the new reforms. In designing our transition for this Order, we build on the lessons learned from implementing the 2013 ICS reforms. The record does not indicate that providers experienced difficulties implementing the rate caps within 90 days after the *2013 Order*'s publication in the Federal Register.[881] For example, the record shows that one provider sent a one-page letter to its customers informing them of the rate changes to be implemented as a result of the Commission's *2013 Order*.[882] The letter provided nine days' notice before rates changed. While we find that a multi-year transition period for new rate caps is unnecessary, we recognize that the new rate caps and ancillary service charge framework adopted in this Order may require some adjustment time for ICS providers and facilities. Accordingly, the reforms adopted in this Order will become

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[875] *See, e.g.*, CenturyLink 2013 Order Comments at 12, n. 21 ("The Further Notice also seeks data regarding TDD/TTY calls' minutes of use compared to overall minutes of use; for CenturyLink this amount is less than one percent.").

[876] *See supra* para. 245.

[877] *See supra* para. 246.

[878] *See 2013 Order*, 28 FCC Rcd at 14115, para. 14 ("Section 276 makes no mention of the technology used to provide payphone service and makes no reference to 'common carrier' or 'telecommunications service' definitions. Thus, the use of VoIP or any other technology for any or all of an ICS providers' service does not affect our authority under section 276."); *see also* 47 C.F.R. § 64.6000 ("Provider of Inmate Calling Services, or Provider, means any communications service provider that provides Inmate Calling Services, regardless of the technology used.").

[879] 47 C.F.R. § 64.6000 ("Inmate calling services means the offering of interstate calling capabilities from an Inmate Telephone; Inmate Telephone means a telephone instrument or other device capable of initiating telephone calls set aside by authorities of a correctional institution for use by Inmates").

[880] We note that our definition of "inmate telephone" is broad and does not inherently rule out advanced services, and that the burden is on the provider in the first instance to determine whether it is providing ICS, and if it is not certain, to seek guidance from the Commission, for example in the form of a Declaratory Ruling.

[881] *See 2013 Order*, 28 FCC Rcd at 14194, para. 187.

[882] *See* Wright Petitioners Consolidated Comments, WC Docket No. 12-375 at Exhibit B (filed Mar. 11, 2014).

effective 90 days after publication in the Federal Register for prisons and six months after publication in the Federal Register for jails.

252. This transition period reflects a careful balancing of the important goal of expediting relief to end users while allowing the necessary time to prepare for any impact our new rules may have on ICS providers and correctional institutions. In adopting the transition, we note as a threshold matter that the issue of ICS reform has been pending for years and, with the substantial progress made in recent years through the *2013 Order* and *Second FNPRM*, ICS providers and facilities have been on notice that the Commission may reform ICS.[883] With that consideration in mind, we transition to our new rules 90 days after publication in the Federal Register for prisons and six months after publication in the Federal Register for jails. Below we also discuss the effect of our adopted reforms on existing ICS contracts.

1. Transition Proposals in the Record

253. In the *Second FNPRM*, the Commission sought comment on a variety of transition paths for the new rules[884] and encouraged commenters advocating for a transition to identify the appropriate transition framework and the justifications for doing so.[885] For example, the ICS providers that submitted the Joint Provider Proposal suggested that "[t]he new rate caps should become effective 90 days after adoption, along with any site commission reductions and ancillary fee changes outlined below."[886] They further asserted that "[t]his period for implementation should ensure ICS providers and correctional facilities have adequate time to implement the new rate caps and any corresponding reductions in site commissions, including any contract amendments or adjustments that may be necessary."[887] Pay Tel suggested a 90-day, after final order publication transition period for transaction fees, third-party money transfer service fees, and ancillary fees and an 18-month transition period for jail and prison rate caps.[888] In the *Second FNPRM* the Commission also specifically sought comment on the 90-day delayed effective date we implemented in the *2013 Order* as well as a two year transition.[889]

254. In response to the *Second FNPRM*, many interested parties submitted detailed comments explaining how the Commission should structure the transition to new rules for ICS rates.[890] Commenters advocated for a variety of transition period lengths and the responses varied depending on the type of fee being transitioned. Some commenters suggested that all of the new rate caps, ancillary service charges, and other charges should be transitioned together.[891] For example, GTL explained that "[i]t is unlikely

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[883] *See, e.g.*, HRDC Second FNPRM Comments at 13 ("[P]rison and jail officials have known since at least 2003 that the Commission may take action on ICS rates. Also, since the 2013 Order was issued, all correctional agencies were on notice that there may be changes to site commissions received from ICS providers, giving them ample time to prepare for extremely modest budget reductions.").

[884] *Second FNPRM*, 29 FCC Rcd at 13221-22, paras. 128-29.

[885] *Second FNPRM*, 29 FCC Rcd at 13222-23, paras. 130-32.

[886] *See* Joint Provider Proposal at 2.

[887] *Id*.

[888] *See generally* Pay Tel Proposal.

[889] *Second FNPRM*, 29 FCC Rcd at 13222-23, paras. 130-32.

[890] For example, we sought comment on a two-year transition period, having at least one state or state subdivision budget cycle to transition away from site commission payments, a 90-day transition for rates to be at or below the cap, while allowing two years for site commissions to be eliminated, as well as longer transition paths, including a three year transition. *Id*. at 13222-23, para. 131.

[891] *See, e.g.*, GTL Second FNPRM Comments at 3-4 ("[T]he Proposal recommends the new rate caps, admin-support payments, and ancillary fee changes should be effective 90 days from the effective date of the Order resulting from the Second ICS FNPRM. In the event the Commission determines a longer transition period is

(continued….)

that the Commission's goal of achieving market-based ICS rates will occur without simultaneous Commission action to establish backstop rate caps for all ICS rates, to transition site commissions to admin-support payments, and to define industry-wide ancillary service charges and fee caps."[892] We took such arguments into consideration in designing our transition.

255. At the other end of the spectrum, commenters advocating for a longer transition[893] contend that longer transitions are necessary to ensure that correctional authorities and ICS providers can plan for the new regulatory regime. As discussed above, facilities have received certain inducements, such as site commissions, from ICS providers for selecting them to be the sole provider of ICS in their facilities.[894] These commissions have been used for a variety of purposes, some of which are wholly unrelated to the provision of ICS to inmates and their families.[895] We acknowledge that our adopted rules and requirements may affect facility budgets, and we want to ensure that those facilities have time to account for disturbances to their budgets, which is why we are not adopting an immediate transition.[896]

256. Proponents of the shorter length transitions note that ICS providers and facilities have been on notice of upcoming changes and have successfully adjusted quickly to new rules in the past. For example, NJAID and NYU IRC explain that "[i]n New Jersey and around the country, states and localities were able to implement the 2013 Order within ninety days. Moreover, these governments have been on notice since the issuance of the First FNPRM in 2013."[897] Commenters advocating for shorter length transitions expressed confidence that 90 days was sufficient time to implement caps and would be the

(Continued from previous page)
required to address site commissions, a similar longer transition period must be applied to the implementation of new ICS rate caps and ICS providers' changes to ancillary fees.").

[892] GTL Second FNPRM Reply at 20; *see also* NCIC Second FNPRM Comments at 7 ("If the FCC chooses not to regulate commissions, then there is no need to have a two-year transition as mentioned in paragraph 28. Rates, fee and premium products could be reduced immediately to everyone's benefit – the inmates, their families and the jails."); Alabama PSC Second FNPRM Comments at 2 ("[T]he APSC believes a holistic approach is necessary and that by simultaneously setting just and reasonable rates and fees in all sources of provider revenue, site commissions will return to a reasonable level that more closely approximates facility costs").

[893] *See, e.g.*, Comments of King George County, VA, WC Docket No. 12-375 at 2 (filed Dec. 17, 2014) ("[A] grace period of 18 to 36 months is absolutely vital to prevent serious local economic dislocation.").

[894] *See supra* Section IV.B.

[895] *See id*.

[896] *See, e.g.*, Comments of the Florida Sheriffs Assoc., WC Docket No. 12-375 at 5 (filed Jan. 5, 2015) ("Any changes to site commission and rate caps may reduce revenue in Sheriffs' budgets otherwise necessary to maintain ICS functions. A two-year transition would allow Sheriffs to adjust their budgets to ensure that ICS can be properly maintained without any adverse consequences."); Comments of the Montana Dept. of Corrections, WC Docket No. 12-375 at 2 (filed Dec. 29. 2014) ("The MDOC appreciates a transition period as inmates will need to be prepared for the elimination of many inmate activities and re-entry assistance."); NSA Second FNPRM Reply at 4 ("A short implementation period will preclude the ability of Sheriffs operating jails to modify their budgets to account for the loss of revenues they will experience or consider other alternatives that will allow them to maintain the security and administrative functions necessary.").

[897] Comments of NJAID and NYU IRC, WC Docket No. 12-375 at 10 (filed Jan. 10, 2015) (NJAID/NYU IRC Second FNPRM Comments); Wright Petitioners Second FNPRM Comments at 21 ("The FCC proposed to permit a 90-day period after the effective date of new ICS rules to modify contracts between ICS providers and correctional authorities. The Petitioners support this proposal, especially since this would be the second round of changes to the agreement since 2013. Correctional authorities have been on notice since at least December 2012 that the FCC may take action in this proceeding, and ICS providers were successful in implementing the changes in the interstate ICS rates.").

timeliest option.[898] Indeed, some parties argued that no more than 60 days are necessary to complete the transition.[899] Conversely, others worry that abbreviated transitions, such as 90-day transitions, will not be feasible for facilities to implement.[900] However, other commenters point out that "[a]lmost every ICS contract has a provision for renegotiation due to changes in the regulatory environment, so no one year grace period should be required for implementation of rates and fees."[901] CenturyLink is concerned that a 90-day transition is not "realistic," and advocates for a substantially longer transition period.[902] NSA argues that a 90-day transition is not sufficient for jails, in particular.[903] NSA notes that the sheer number of contracts to be renegotiated would require additional time to complete, specifically noting that there are "over 2000 jails in the country and only a "handful of ICS providers."[904] Thus, NSA explains, each ICS provider would have to renegotiate "potentially hundreds of contracts with Sheriffs and jails in a 90-day period."[905] According to NSA, 90 days is not enough time to allow providers to negotiate all of these contracts and for those contracts to be approved by the relevant authorities.[906] These concerns are echoed by Praeses and others.[907] We agree that these parties raise valid concerns regarding the time needed to transition all of the country's jails to the new rate regime. Accordingly, we adopt a six-month transition period for jails, in order to give providers and jails enough time to negotiate (or renegotiate) contracts to the extent necessary to comply with all of the rules adopted herein. We do not believe an extended transition is necessary for prisons to obtain new or revised contracts, however. There are far fewer prisons/departments of correction than jails (typically one per state) and providers are likely to prioritize negotiations with prisons over negotiations with jails, particularly given that prisons tend to house much larger inmate populations and generate significantly more ICS revenues than jails. Moreover, according

[898] *See, e.g.*, NCIC Second FNPRM Comments at 29 ("Ideally, all rate, ancillary fee and Single Call caps should be implemented within 90 days following the effective date of the order to provide immediate relief to inmate families.").

[899] HRDC July 29, 2015 *Ex Parte* Letter at 10.

[900] *See, e.g.*, ICSolutions Second FNPRM Comments at 19 ("In our opinion, 90 days is grossly inadequate time for correctional facilities — that reasonably relied on the then-existing regulations when setting budgets — to adjust to federal regulations.").

[901] NCIC Second FNPRM Comments at 28.

[902] Letter from Thomas M. Dethlefs, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Oct. 15, 2015) (asking that the Commission "either grandfather existing contracts or provide for at least a full budget cycle as a transition period.").

[903] *See, e.g.* NSA Oct. 14, 2015 *Ex Parte* Letter at 2.

[904] *Id.*

[905] *Id.*

[906] *Id.* at 2 (explaining that "even if some portion of contracts can be renegotiated within 90 days, Sheriffs, in most cases, will then need to seek approval from county government[s]."). In addition, NSA notes that some sheriffs will want, or need, to seek a new ICS provider and 90 days is not enough time to identify a new provider and negotiate a new agreement. *Id.*

[907] Letter from Phil Marchesiello, Counsel to Praeses LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 3-4 (filed Oct. 13, 2015) (arguing that a 90-day transition period would be insufficient "due to the sheer magnitude and number of ICS contracts that may need to be modified . . . and other operational matters" and asserting that "it is not feasible to negotiate and execute all such contracts within this time period, especially in light of the sometimes complex state and municipal procurement regulations involved."); *see also* GTL Oct. 10, 2015 *Ex Parte* Letter at 10 (explaining that "the process of renegotiating hundreds of contracts with hundreds of customers over a 90-day period would be an impossible task. Renegotiating these complex contracts with state and local agencies . . . will take significantly longer than 90 days."); *cf.* Supplemental Comments of Florida Sheriffs Association, WC Docket No. 12-375 at 1-2 (filed Oct. 15, 2015).

to the record more than 10 prison systems already have rates at or below our rate caps. Therefore, we adopt a 90-day transition period for prisons.

2. Implementation of Reforms and Transition Periods

257. The record reflects commenters advocating for immediate transitions and also for transition periods ranging from 90 days to up to three or four years. We find the arguments for a shorter transition period to be the most persuasive. The immediate transition and long transition options are impractical. For example, proponents of an immediate transition generally explained that longer transition periods are not necessary and would only serve to delay relief from quickly reaching inmates and their families.[908] Despite such arguments, we think that the reforms adopted in this Order warrant providing some amount of time to ensure a smooth transition for end users, providers, and facilities.

258. As explained above, the record clearly shows that charges for ancillary services have increased since the *2013 Order*.[909] This highlights that ICS providers have the incentive and ability to increase ancillary service charges absent reform, which could have the effect of frustrating the Commission's and Congress's policy goals by undermining the rate caps we adopt.[910] While we have received substantial comment in the record about the challenges associated with transitioning for our site commission action and rate caps, the record lacks explanation as to why an immediate transition for ancillary service charges would be burdensome for ICS providers.[911] As such, we find that transitioning ancillary service charges 90 days after publication in the Federal Register for prisons and six months after publication in the Federal Register for jails is appropriate because it will provide significant relief to many ICS end users, while still giving providers ample time to adjust their systems and procedures.[912]

259. As explained above, our goal is to ensure a reasonable transition and minimize disruption, while providing relief to end users as quickly as possible. We have the benefit of understanding how the transition to implement the interim interstate rate caps occurred. Evidence in the record about actual transition periods calls into question protestations in the record about the excessive

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[908] NCIC, for example, argues that "[r]ates, fees and premium products could be reduced immediately to everyone's benefit – the inmates, their families and the jails." NCIC Second FNPRM Comments at 7; id. at 29 ("Ideally, all rate, ancillary fee and Single Call caps should be implemented within 90 days following the effective date of the order to provide immediate relief to inmate families."). Similarly, the Illinois Campaign argues that "[t]he changes put forward in our recommendations require immediate implementation. Given the relative small percentage of corrections income deriving from phone services, a quick transition to rate caps as well as the elimination of site commissions and ancillary fees would be manageable." Illinois Campaign Jan. 9, 2015 *Ex Parte* Letter at 12.

[909] *See supra* Section IV.C.

[910] *See, e.g.*, NCIC Second FNPRM Comments at 21 ("Ancillary fees came about as a way to bypass state rate caps, as a new means to increase revenue without actually increasing the per-minute rates. ICS providers have used these fees either to build profit or to offer higher 'perceived' commissions to win bids that are based on highest percentage offered."); HRDC Second FNPRM Comments at 9 ("The Commission should note that the existence of an increase in ICS ancillary fees is fairly recent, and is merely a means for ICS providers to boost their profits and make up for revenue lost in paying site commissions.").

[911] *See, e.g.*, Pay Tel Proposal at 2 (suggesting with no support, that "Transaction Fee regulations go into effect 90 days following the Order's publication date").

[912] *See, e.g.*, NCIC Second FNPRM Comments at 7 ("If the FCC chooses not to regulate commissions, then there is no need to have a two-year transition, as mentioned in paragraph 28. Rates, fees and premium products could be reduced immediately to everyone's benefit – the inmates, their families and the jails."); Illinois Campaign Second FNPRM Comments at 12-13 ("In terms of impact on the providers, the fact is that they have been riding a wave of profits from this industry for years. A transition to a normal profit rate is in fact long overdue.").

time it will take to renegotiate contracts, particularly for prisons.[913] We adopt here a 90-day transition from publication in the Federal Register for prisons and six months from publication in the Federal Register for jails for the adopted rate caps. We find that this length of time adequately balances the pressing need for reform, affords ICS providers enough time to prepare for the new rates, and is amply supported by the record.

260. Evidence in the record indicates that some ICS providers and their customers have been acting to modify contracts in an attempt to lock in attractive terms at the expense of the ratepayers, the end users, in anticipation of this Order.[914] We are concerned that such activity may also occur in between the adoption and effective dates of this Order. We will be vigilant in monitoring the industry during the transition period. If we observe or are made aware of evidence of price gouging or other harmful behavior through, but not limited to, increased rates, ancillary service charges, and/or site commissions, we will not hesitate to take appropriate remedial action up to and including enforcement action pursuant to our legal authority under sections 201 and 276 or referral to another appropriate agency.

J. Anti-Gaming Provisions

261. We are concerned that parties may seek to negotiate agreements aimed at circumventing the rules we adopt in this Order,[915] and we are particularly concerned that parties will have an incentive to do so before our new rules take effect. To minimize this type of "gaming," we prohibit ICS providers from entering into new contracts (including contract renewals) – or negotiating amendments to existing contracts – that would require or permit providers to charge rates in excess of our adopted rate caps, impose ancillary service charges that are prohibited by this Order, or charge ancillary service charges that exceed the caps adopted in this Order. These prohibitions will take effect immediately upon publication of the Order in the Federal Register.

262. We find that there is good cause to make this requirement effective upon publication.[916] There is evidence in the record that this type of gaming has already occurred in anticipation of the changes we enact in this Order. For example, a recent Securus contract requires the payment of a $4 million minimum annual guarantee (MAG), which advocates have called a "signing bonus,"[917] and

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[913] *See, e.g.*, Reply Comments of Emerald Correctional Management, WC Docket No. 12-375 at 11 (filed Jan. 27, 2015) ("Emerald agrees that '[i]t is simply not possible for the ICS industry to implement fundamental changes in its operational structure in a matter of several months.' This problem is heightened in the context of for-profit correctional facilities, because in this context there are two different contracts that must be renegotiated in tandem: the contract between a Correctional Agency and a private facility, as well as the contract between the facility and its ICS provider. Therefore, the Commission should introduce any further ICS regulation gradually and thoughtfully, and the Commission should grandfather existing ICS arrangements.").

[914] *See* ICSolutions Oct. 15, 2015 *Ex Parte* Letter Attach. at Appendix E (attaching the May 29, 2015 contract between Securus and San Bernardino County for inmate payphone services effective July 1, 2015) (Provision E.1.1 of the contract references FCC actions specifically contemplated by this proceeding: "Actions taken by the Federal or state government regarding inmate telephone services operating rules, pricing or other telecommunications-related matters such as, but not limited to, the *elimination of commission-based contracts, changes to allowable rates for calling*, may require this contract to be modified.") (emphasis added).

[915] *See* Letter from Andrew Lipman, Attorney, Morgan, Lewis & Bockius LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 8-9 (filed Sept. 21, 2015) (arguing that any transition period must address the possibility of gamesmanship in the period in between the Commission's adoption of new rules and their effective date); ICSolutions Oct. 16, 2015 *Ex Parte* Letter from Lee G. Petro, Counsel to Martha Wright to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Aug. 27, 2015); Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Sept. 25, 2015).

[916] Pursuant to section 553(d) of that Administrative Procedure Act, rules may become effective upon publication "for good cause found." 5 U.S.C. § 553(d).

[917] Letter from Paul Wright, Executive Director, HRDC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-

(continued….)

subsequent MAG payments equal to the greater of $3.5 million or 81 percent of commissionable revenues per year.[918] In determining whether good cause exists, an agency should "balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling."[919] In this case, the rule must take effect as soon as possible in order to minimize gaming of the sort already noted in the record, and the attendant harm to prisoners and their families in the form of unjust, unreasonable, and unfair rates and fees. In these circumstances, we find that the need for immediate implementation outweighs any concerns that parties may not be afforded sufficient time to prepare for the effective date of this prohibition, particularly given that parties have long been on notice that the Commission might impose new regulations governing ICS rates and ancillary fees.[920] We are not requiring providers to take any action; instead we are merely requiring that they refrain from taking certain steps that would effectively undermine our regulations governing rates and ancillary service charges. Accordingly, providers do not need time to prepare to meet this prohibition. Therefore, on balance, we find good cause to make this requirement effective upon publication in the Federal Register.

K. Annual Reporting and Certification Requirement

263. In the *2013 Order*, the Commission adopted an Annual Reporting and Certification Requirement that included the submission of interstate and intrastate ICS rate and demand data, as an additional means of ensuring that each and every ICS provider's rates and practices were just, reasonable, and fair, and remain in compliance with the *2013 Order*, as well as to facilitate any future enforcement that may be needed regarding the adopted rules.[921] Additionally, the Commission adopted a requirement that an officer or director from each ICS provider file an annual certification with the Commission as to the accuracy of the data filed and as to the provider's compliance with all portions of the adopted *Order*.[922] These requirements were later stayed by court order.[923]

264. *Recordkeeping and Reporting.* The Joint Provider Proposal suggests that ICS providers "should be required to provide certain information to the Commission annually for three (3) years to ensure the caps on per-minute rates and any admin-support payments are implemented as required."[924] Specifically, the Proposal suggests that such information should include four things: "a list of the ICS provider's current interstate and intrastate per-minute ICS rates, the ICS provider's current fee amounts, the locations where the ICS provider makes admin-support payments, and the amount of those admin-support payments."[925] The Commission sought comment on this proposal in the *Second FNPRM*.[926]

(Continued from previous page)
375, at 2 (filed Aug. 8, 2015) (arguing that signing bonuses are "another way to package kickbacks to prison and jail administrators in exchange for monopoly contracts.").

[918] *See* ICSolutions Oct. 15, 2015 *Ex Parte* Letter, Attach. at Appendix E.

[919] *Omnipoint Corp. v. FCC*, 78 F.3d 620 at 630 (D.C. Cir. 1996) (citation and internal quotation marks omitted).

[920] *See Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385, 5391, para. 13 (2008) (noting that parties' concerns about the enforcement of new regulations were undermined by the fact that carriers had been on notice of possible Commission action for years).

[921] *2013 Order*, 28 FCC Rcd at. 14169-70, paras. 116-17; *see also* 47 C.F.R. § 64.6060.

[922] *Id*.

[923] *See Securus Techs. Partial Stay Order*.

[924] Joint Provider Proposal at 7.

[925] *Id*.

[926] *Second FNPRM*, 29 FCC Rcd at 13230, paras. 152-54.

265. In its comments, CPC recommends that the Commission look to the "Alabama model," including the "specific reporting requirements that will serve to monitor compliance with those [adopted] restrictions."[927] In its 2014 Further Order Adopting Revised Inmate Phone Service Rules Order, the Alabama PSC adopted a number of recordkeeping and reporting requirements.[928] Items to be recorded and reported annually include, but are not limited, to, monthly number of local, intrastate, and interstate calls; monthly local, intrastate, and interstate minutes of use; monthly local, intrastate, and interstate call revenue, divided into collect, prepaid collect, prepaid debit, prepaid inmate calling card, and direct-billed service, divided by facility; ancillary call charges; unused prepaid collect, prepaid debit, and prepaid inmate phone card account balances; and total number of calls disconnected for suspected three-way call violations.[929] That order was temporarily stayed by court order which expired on July 1, 2015.[930]

266. We find that a recordkeeping and reporting requirement will best serve the Commission's stated goals of ensuring that each and every ICS provider's rates and practices are just, reasonable, and fair, and that they remain in compliance with this Order. We also believe that an annual recordkeeping and reporting requirement will help the Commission capture any trends or changes in calling patterns, will facilitate any future enforcement action, and allow other interested parties the ability to monitor ICS providers' compliance with the Order.[931] We also believe that such a requirement is necessary because the ICS industry is modernizing and will continue to change. Consistent with the Commission's approach in the *2013 Order*, if after an investigation it is determined that ICS providers rates and/or ancillary service charges are unjust, unreasonable or unfair under sections 201 and 276 of the Act, lower rates will be prescribed and ICS providers may be ordered to pay refunds.[932] Providers also may be found in violation of our rules and face additional forfeitures.[933]

267. We thus require all ICS providers to provide, on an annual basis, categorized by facility and size of facility, the following information: First, we require all ICS providers to file their current interstate, international and intrastate ICS rates. Second, we require all ICS providers to file their current ancillary service charge amounts and the instances of use of each. Third, where an ICS provider makes site commission payments, we require the ICS provider to file the monthly amount of such payment. Fourth, for ICS providers that provided video visitation services, either as a form of ICS or not, during the

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[927] CPC Second FNPRM Comments at 4.

[928] Alabama PSC Dec. 9, 2014 Further Order at App. G, 11-13.

[929] *Id.*

[930] On April 10, 2015, the Alabama Supreme Court ordered *sua sponte* that the Securus and GTL appeals of the Alabama PSC December 9, 2014 Further Order be held in abeyance. *Securus Technologies, Inc. v. Alabama Public Service Commission,* Supreme Court of Alabama, Case No. 1140266, Order (Apr. 10, 2015); *Global Tel*Link Corporation, DSI-ITI, LLC, Public Communications Services, Inc. and Value-Added Communications, Inc. v. Alabama Public Service Commission*, Supreme Court of Alabama, Case No. 114-0284, Order (Apr. 10, 2015). In response to this delay, the Alabama PSC issued a new implementation schedule for its December 9, 2014 Further Order. Under this revised schedule, the December 9, 2014 Further Order applies to all providers other than GTL and Securus as of July 1, 2015. *Generic Proceeding Considering the Promulgation of Telephone Rules Governing Inmate Phone Service*, Docket No. 15957, Further Order Denying Motion to Extend Implementation, Establishing a Revised Schedule of Submission Requirements, and Amending Appendix G to the Final Order (June 12, 2015) (Alabama PSC June 12, 2015 Further Order Denying Motion to Extend). If the Alabama Supreme Court upholds the Alabama PSC December 9, 2014 Further Order, Securus and GTL "must refund any overpayments paid by ICS customers during the pendency of the appeal." Alabama PSC June 12, 2015 Further Order Denying Motion to Extend at 3.

[931] *2013 Order*, 28 FCC Rcd at 14169-70, paras. 116-17.

[932] *2013 Order*, 28 FCC Rcd at 14172, para. 123.

[933] *See 2013 Order*, 28 FCC Rcd at 14171-72, paras. 121-23.

reporting period, we require that they file the minutes of use and per-minute rates and ancillary service charges for those services. Fifth, as discussed in greater detail in the Disability Access section above, we also require that ICS providers report: (1) the number of disability-related calls they provided; (2) the number of problems they experienced with such calls, e.g., dropped calls, poor call quality and the number of incidences of each; and (3) the number of complaints they received related to access to ICS by TTY and TRS users.[934]

268. In order to facilitate compliance with this requirement, we direct the Wireline Competition Bureau to develop a template for such annual reports and provide for confidential treatment of any particular information warranting it, consistent with our rules. We believe this will help ensure that the incoming information is provided in the most straight-forward and consistent manner. The use of such a template will also be beneficial to any interested parties that want to view the information thus encouraging increased public participation in this proceeding. Each annual report shall be submitted to the Commission by April 1st of each year, regarding the providers' interstate, international and intrastate ICS. The first annual report will be due after the Commission publishes Office of Management and Budget (OMB) approval pursuant to the Ordering Clauses below. If for example, OMB approval is granted in 2016 then the first annual report and certification (as discussed below) will be due on April 1, 2017 and cover the time period from January 1, 2016 to December 31, 2016.

269. *Cost-Benefit Analysis*. We find that a recordkeeping and reporting requirement serves the Commission's goal of ensuring that ICS rates and practices are just, reasonable, and fair, and that they remain in compliance with this Order. We find, on balance, that the benefits of such recordkeeping and reporting outweigh any potential burden that may be imposed.

270. We find that such recordkeeping and reporting requirements will help monitor ICS providers' compliance with the Order, capture any trends or changes in calling patterns, and will facilitate any future enforcement action.[935] Such a requirement is necessary because the ICS industry is modernizing and will continue to change.[936]

271. We find very few objections raised to the reporting requirements, and none to be persuasive.[937] Additionally, we also find no cost objections to these requirements. We have taken steps to minimize burdens on providers by adopting less burdensome recordkeeping requirements than some of those suggested by commenters.[938] Moreover, any burdens associated with providing limited reporting on these calls are far outweighed by the benefits such reporting will offer in terms of greater transparency and heightened accountability on the part of ICS providers. Additionally, these data will guide the Commission as it evaluates next steps in the Further Notice.[939]

272. *Annual Certification*. The participants in the Joint Provider Proposal suggest that all ICS providers should be required, in addition to their recordkeeping and reporting requirements, to submit an annual certification signed by the company Chief Executive Officer, Chief Financial Officer, and General Counsel, under penalty of perjury, certifying that the company is in compliance with the Commission's

[934] *See infra* Section IV.G.2.

[935] *2013 Order*, 28 FCC Rcd at 14169-70, paras. 116-17.

[936] *Id*.

[937] *See, e.g.*, Securus Second FNPRM Comments at Hopfinger Decl. at 5 (asserting that it would be "extremely time-consuming and burdensome" for Securus to comply with the Commission's proposed disability-access reporting requirements).

[938] *See, e.g.*, Alabama PSC Dec. 9, 2014 Further Notice at App. G, 11-13.

[939] *See infra* Section V.

ICS rate rules and adopted payment rules.[940] CenturyLink counters that "there is no need for more than a single officer to certify that the company has complied with Commission rules."[941]

273. We agree with CenturyLink that "there is no need for more than a single officer to certify that the company has complied with Commission rules."[942] We find that, on balance, requiring more than one officer of an ICS provider to certify to compliance would be unnecessarily burdensome on some providers and is in fact, contrary to the manner in which the Commission conducts other annual certifications.[943] Therefore we adopt CenturyLink's proposal and require one officer of each ICS provider to annually certify its companies' compliance with our adopted rules.[944] The annual certification should be submitted at the same time as the annual report.

L. Consumer Disclosure Requirements

274. *Background*. In the *2013 Order*, the Commission reminded providers of their current and ongoing obligations to "comply with existing Commission rules."[945] Specifically, the Commission reminded providers of their obligations pursuant to section 64.710 of our rules, which requires providers of inmate operator services to disclose to the consumer the total cost of the call prior to connecting it, including any surcharges or premise-imposed fees that may apply to the call as well as methods by which to make complaints concerning the charges or collection practices.[946] Additionally, ICS providers that are non-dominant interexchange carriers must make their current rates, terms, and conditions available to the public via their company websites.[947] Any violation of such responsibilities, or failure to comply with existing rules, may subject ICS providers to enforcement action, including, among other penalties, the imposition of monetary forfeitures.[948]

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[940] *See* Joint Provider Proposal at 7.

[941] CenturyLink April 28, 2015 *Ex Parte* Letter at 2.

[942] *Id*.

[943] *See, e.g.*, FCC Form 477, https:/www fcc.gov/forms.

[944] Further guidance will be provided on this requirement by the Bureau when it releases a template for submission of data.

[945] *2013 Order*, 28 FCC Rcd at 14170, para. 118. The Commission initially adopted rules establishing annual certification filing requirements regarding providers' interstate and intrastate ICS rates, reasoning that having such information "available in a common format . . .[would] simplify the Commission's task of reviewing these rates and . . . provide consumers and advocates the an additional resource for understanding them." *Id*. at 14169, para. 116; *see also* 47 C.F.R. § 64.6060 (Annual Reporting and Certification Requirement) was one of three rules that was stayed by the partial stay imposed by the D.C. Circuit Court of Appeals. *See Securus Techs. Partial Stay Order*.

[946] *See 2013 Order*, 28 FCC Rcd at 14170, para. 118, 47 C.F.R. § 64.710(a)(1).

[947] 47 C.F.R. § 42.10(b). In the *USTelecom Forbearance Order*, the Commission conditionally forbore from section 42.10(a) of its rules requiring that rates, terms and conditions be made publicly available at a physical location, as long as the information is available on a provider's publicly-accessible website or the provider makes reasonable accommodations to provide the information to consumers without Internet access. *See Petition of USTelecom for Forbearance Under 47 U.S.C. Section 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order and Report and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7672-74, paras. 98-100 (2013).

[948] *See* 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a). Where the Commission deems appropriate, such as in particularly egregious cases, a carrier may also face revocation of its section 214 authorization to operate as a carrier. *See* 47 U.S.C. § 214; *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, Report and Order, CC Docket No. 97-11, 14 FCC Rcd 11364, 11374, para. 16 (1999) (stating that a carrier's blanket section 214 authority can be revoked "when warranted in the relatively rare instances in which carriers may abuse their market power or their common carrier obligations").

275. In the *Second FNPRM*, the Commission sought comment on "how to ensure that rates and fees are more transparent to consumers" and specifically on the requirement that ICS providers notify their customers regarding the ICS options available to them and the cost of those options.[949] ICS providers that offer interstate toll service are already required to post their rates on their websites, and, to the extent they offer inmate operator services, their live agents are already required to make certain notifications to customers.[950] The Commission sought comment on whether providers' websites, automated IVRs, and live agents should be required to offer in a more prominent fashion no-cost or lower-cost options before offering other, higher-priced optional services.[951] The Commission also sought comment on two reform proposals that offered suggestions for requiring the publication of ancillary service charges.[952]

276. The Joint Provider Proposal, acknowledging existing requirements for providers to publish interstate rates, terms and conditions on their websites,[953] offered a detailed proposal regarding notification requirements for so-called "convenience or premium payment options," and suggested that all providers be required to "clearly and conspicuously identify the required information . . . so that it is actually noticed and understood by the customer."[954] Specifically, the Joint Provider Proposal suggests that an ICS provider "may provide this information to consumers (1) on its website, (2) in its web-posted rates, terms, and conditions, (3) orally when provided in a slow and deliberate manner and in a reasonably understandable volume, or (4) in other printed materials provided to a customer."[955] The providers that signed on to the Joint Provider Proposal suggest that "clear and conspicuous" means that "notice would be apparent to the reasonable customer,"[956] and that to determine the effectiveness of the disclosure, the Commission should "consider the prominence of the disclosure in comparison to other information, the proximity and placement of the information, the absence of distracting elements, and the clarity and understandability of the text of the disclosure."[957] Pay Tel suggests that on a website, postings must list call rates and fees, as well as refund instructions.[958] Pay Tel also suggests that the vendor website must provide a link to the FCC Enforcement Bureau website and the applicable state regulatory agency website.[959] Pay Tel also suggests making facility-specific printed material available at each facility.[960] The Commission explicitly sought comment on these proposals in the *Second FNPRM*.[961]

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[949] *Second FNPRM*, 29 FCC Rcd at 13214, para. 109.

[950] *See* 47 C.F.R. §§ 42.10, 64.710.

[951] *Second FNPRM*, 29 FCC Rcd at 13215, para. 109.

[952] *Second FNPRM*, 29 FCC Rcd at 13215, para. 110.

[953] Joint Provider Proposal at 5.

[954] Joint Provider Proposal at 6.

[955] Joint Provider Proposal at 6 n.16; *see also* PPI Second FNPRM Comments at 3 (suggesting that the Commission consider requiring the disclosure and publication requirements suggested in the Joint Provider Proposal).

[956] Joint Provider Proposal at 6 n.17; 47 C.F.R. § 64.2400 et seq. (Commission's truth-in-billing rules for common carriers) and *Joint FCC/FTC Policy Statement for the Advisement of Dial-Around and Other Long-Distance Service to Consumers*, 15 FCC Rcd 8654 (2000).

[957] Joint Provider Proposal at 6 n.18.

[958] Pay Tel Proposal at 4.

[959] Pay Tel Proposal at 4.

[960] Pay Tel Proposal at 4.

[961] *Second FNPRM*, 29 FCC Rcd at 13215-16, para. 110.

277. In comments to the *Second FNPRM*, CenturyLink notes that especially in jails and short-term facilities, payment decisions are "typically made in 'real-time,' as the call is received from the inmate" and that "there is no reasonable way for called parties to make informed decisions unless the ICS provider proactively informs them of options in clear, concise language prior to payment."[962] CenturyLink further asserts that "simple posting[s] on websites or reactive responses upon request are not sufficient" when faced with time-sensitive situations such as initial incarceration.[963] The record indicates that many consumers face the problem of uncertainty with respect to the cost of ICS.[964] Praeses argues that in addition to disclosing their ancillary service charges in a prominent location on their websites, providers should be required to disclose all applicable fees at the time that a consumer seeks a service that is subject to an ancillary service charge from a provider, but prior to the inmate or call recipient incurring the fee.[965] DC Prisoners' Project of the Washington Lawyers' Committee suggests that the Commission require all ICS providers to train their staff to disclose all rate and fee information to anyone who contacts the provider.[966] In addition to the suggestions in the Joint Provider Proposal, GTL asserts that the Commission "should enforce its existing requirements regarding oral disclosures and the posting of rates, terms, and conditions."[967] GTL notes that "ICS providers have 'ongoing responsibilities' to comply with these existing rules, and violations of those responsibilities or failure to comply with those existing rules could subject ICS providers to enforcement action."[968]

278. *Discussion*. We believe that transparency in rates, terms, and fees will facilitate compliance with the reforms and ensure that consumers are informed of their choices. We find persuasive arguments that ICS payment decisions are often made in "real time," especially in short-term detention facilities, and "there is no reasonable way for called parties to make informed decisions" unless rates and terms are clearly available for consumers prior to the commencement of the call.[969] For example, transparency about the rates charged for ICS will provide substantial consumer protection benefits by empowering consumers to make informed decisions about the ICS offerings they decide to use.[970] We also applaud voluntary commitments that enhance transparency for consumers.[971] Here, we

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[962] CenturyLink Second FNPRM Reply at n.101; *see also* Letter from Thomas M. Dethlefs, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No 12-375, at 2 (filed Sept. 28, 2015) ("Single pay options actually reduce inmate calling options and suppress the number of completed calls. This is because providers of 'single pay' calling often fail to properly advise called parties of lower cost options at the time the call is received…. Consumers often select these programs not because they view them as a convenient alternative, but rather because they are unaware of other, often lower cost, payment options.").

[963] CenturyLink Second FNPRM Reply at n.101. Similarly, ICSolutions argues that "there is nothing in the [Joint Provider Reform] proposal with regards to educating or otherwise explaining to consumers as to what these additional fees represent, leaving it very difficult for consumers to even understand or know what a" particular charge may entail. *See* ICSolutions Second FNPRM Comments at 18.

[964] For example, Elois P. Clayton states "[t]here are always fees (that we aren't informed will appear) on our next phone bill." Media Action July 7, 2015 *Ex Parte* Letter, Attach at 5.

[965] *See* Praeses Second FNPRM Comments at 46.

[966] WLC Second FNPRM Comments at 19.

[967] GTL Second FNPRM Comments at 34.

[968] GTL Second FNPRM Comments at 35 (quoting *2013 Order*, 28 FCC Rcd at 14170, para. 118).

[969] *See, e.g.*, CenturyLink Second FNPRM Reply at 26 n.101.

[970] *See, e.g.*, GTL Second FNPRM Comments at 35 ("Enforcement of [the Commission's existing] requirements would ensure consumers have the rate and fee information they need to make informed choices regarding inmate calling products and services.").

[971] *See* GTL July 2, 2015 *Ex Parte* Letter at 2.

supplement our existing rules to require ICS providers to clearly and accurately disclose their interstate, international and intrastate rates and ancillary service charges to consumers.[972] The new rule we adopt will provide key consumer benefits with minimal burden on ICS providers. Ensuring that end users know the costs of the services they seek to use will help consumers make informed decisions about what types of services they can afford and for what amount of time.

279. We do not mandate a specific format for how consumer disclosures must be made. Rather, we find that suggestions for disclosure such as those in the Joint Provider Proposal offer a reasonable framework as to how to make these disclosures.[973] However, we note that this would not necessarily be the only framework for compliance. We will formally evaluate the reasonableness of the Joint Provider Proposal and any other disclosure formats if and when complaints arise as to the adequacy of the disclosures.[974] We note that each failure to disclose all charges to consumers is counted as an individual violation, which should create a significant incentive for compliance. In addition, the Commission shall evaluate disclosures of all consumer charges for reasonableness, in part, on the basis of the following factors:

- Disclosure of information regarding all material charges, such as the applicable rate, any and all ancillary service charges - whether one time or recurring – including those to initiate service, and the name, definition and cost of each rate or fee;
- Use of plain language accessible to current and prospective end users;
- Description of single call and related services and disclosures making clear that consumers have less-costly options rather than single call and related services;
- Ability of end users to easily understand the disclosure;
- Timeliness of any updates/changes to the rates and fees, prior to any updates/changes;
- Availability of the disclosure in a prominent location on the ICS provider's website;
- Listing of the name, address, and toll-free number of the ICS provider; and
- Listing of the toll-free number for the FCC Consumer Help Center (888-225-5322).

280. Providers should already be informing customers about the total amount on a per-call basis that they will be charged so the disclosure requirements should not be onerous or a significant new burden. Indeed, the addition to our rules with respect to ancillary service charges should in fact simplify transparency, as it greatly reduces the number and variable rates of allowable ancillary service charges, and thus charges ICS providers must disclose to consumers.[975] This information is relevant to consumer decision making, and the providers must also keep this information in order to comply with the Annual Reporting and Certification Requirements adopted herein.[976]

281. The new disclosure rule discussed above falls well within the confines of the First Amendment. As explained, these disclosures serve important government purposes, ensuring that end

[972] *See infra* Appendix A.

[973] *See* Joint Provider Proposal at 6 n.16.

[974] We also note concerns that providers may be using consumer disclosures as an opportunity to funnel end users into more expensive service options, such as those that may require consumers to pay fees to third parties. *See, e.g.*, CenturyLink Oct. 15, 2015 *Ex Parte* Letter at 3 (noting that "[p]roviders can divert transactions to certain third party processors" that charge high fees that may be shared with the ICS provider); ICSolutions Oct. 15, 2015 *Ex Parte* Letter at 2; *but see* Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Oct. 2, 2015) (defending such third-party transactions as "innovative, valuable additions to ICS"). We find that our actions herein will help deter such practices.

[975] *See supra* Section IV.C.

[976] *See supra* Section IV.K; *see also infra* Section V.C.

users have accurate and accessible information about ICS providers' services. This information is central both to preventing consumer deception and to the overall deployment and operation of ICS.

282. The Supreme Court has made plain in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* that the government has broad discretion in requiring the disclosure of information to prevent consumer deception and ensure complete information in the marketplace.[977] Under *Zauderer*, mandatory factual disclosures will be sustained "as long as disclosure requirements are reasonably related to the State's interest in preventing deception to consumers."[978] As the Court observed, "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed."[979] The D.C. Circuit recently reaffirmed these principles in *American Meat Institute v. United States Department of Agriculture*, an en banc decision in which the Court joined the First and Second Circuit Courts of Appeals in recognizing that other government interests beyond preventing consumer deception may be invoked to sustain a disclosure mandate under *Zauderer*.[980]

283. The new disclosure rule and disclosure language suggested in this Order clearly pass muster under these precedents. Preventing consumer deception in the ICS market lies at the heart of the disclosure rule we adopt today. The Commission has found that ICS providers have the incentive and ability to engage in harmful practices, as discussed above.[981] Similarly, the suggested disclosure language is designed to prevent confusion to all consumers of the ICS providers' services, and serve to curb providers' incentives to engage in harmful practices by shedding light on the business practices of ICS providers. Accurate information about ICS provider offerings encourages consumer choice and the widespread deployment of ICS. In sum, the government interests supporting the disclosure rule (as well as the suggested disclosure language), in addition to the interest of preventing consumer deception, are substantial and justify our consumer disclosure suggestions.

284. In addition, the disclosure rule adopted in this Order meets the analysis the Supreme Court developed for commercial speech cases in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*.[982] *Central Hudson's* test first asks whether the expression is protected by the First Amendment, which requires that the speech concern lawful activity and not be misleading.[983] Next, the Court asks whether the asserted governmental interest is substantial.[984] If the first two prongs of the analysis are met, the Court then determines whether the regulation directly advances the governmental interest asserted and

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[977] *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (*Zauderer*); *see also Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, 30 FCC Rcd. 5601 at 5874, paras. 558-59 (2015) (finding that disclosure requirements adopted pursuant to the Commission's transparency requirements do not violate the First Amendment).

[978] *Zauderer*, 471 U.S. at 651.

[979] *Zauderer*, 471 U.S. at 651 n.14; *id*. at 651 (explaining that an advertiser's constitutionally protected interest in not providing any particular factual information is "minimal.").

[980] *American Meat Institute v. U.S. Dept. of Agriculture*, 760 F.3d 18, 22 (D.C. Cir. 2014) ("All told, Zauderer's characterization of the speaker's interest in opposing forced disclosure of [factual] information as 'minimal' seems inherently applicable beyond the problem of deception, as other circuits have found.") (citing *N.Y. State Rest. Ass'n v. N.Y. City Bd. Of Health*, 556 F.3d 114, 133 (2d. Cir. 2009); *Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (Torruella, J.); *id*. at 316 (Boudin, C.J. & Dyk, J.); *id*. at 297-98 (per curiam); *Nat'l Elec. Mafrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-15 (2d Cir. 2001)).

[981] *See supra* section IV.C.

[982] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (*Central Hudson*).

[983] *Id*. at 566.

[984] *Id*.

whether it is not more extensive than necessary to serve that interest.[985] Requiring ICS providers to disclose information about ICS rates meets this four-part test. First, ICS providers' rate information qualifies as an expression protected by the First Amendment, as it is speech concerning lawful activity that is not misleading. Second, as explained elsewhere in this Order, the Commission has a substantial interest in consumer protection and advancing the public interest, particularly where, as here, Congress has directed the Commission to ensure that ICS rates are just, reasonable and fair, pursuant to regulations that redound "to the benefit of the general public."[986] Third, as explained above, the regulation directly advances the public interest and consumer protection in requiring disclosure of this information, as transparency in rates and charges allows consumers to make more informed choices.[987] Finally, this new consumer disclosure requirement is not more extensive than is necessary to protect consumers. Since ICS providers have already been operating under similar requirements, this information is readily available to them and, as explained above, we do not prescribe a particular format for how consumer disclosures must be made, thereby affording providers leeway to comply with the revised rule in a flexible, individualized manner that minimizes burden.[988]

285. *Cost-Benefit Analysis*. We find that, on balance, requiring ICS providers to disclose information for their intrastate, interstate and international ICS rates, categorized by facility and size of facility, as well as ancillary service charges, is not overly burdensome. These requirements are necessary to ensuring that end users know the costs of the services they seek to use and helps consumers make informed decisions about what types of services they can afford and for what amount of time.

286. The Commission has found that ICS providers have the incentive and ability to engage in harmful practices, as discussed above.[989] Commenters have asked the Commission to mandate additional disclosure and transparency regarding ICS rates and fees.[990] Similarly, these disclosure requirements are designed to prevent confusion to all consumers of the ICS providers' services, and serve to curb providers' incentives by shedding light on the business practices of ICS providers. Numerous commenters support these reforms.[991]

287. These requirements provide key consumer benefits with minimal burden on ICS providers. Providers currently are required to post their rates publicly on their websites. Additionally, providers must keep this information to comply with the Mandatory Data Collection and Annual Reporting and Certification Requirements adopted herein.[992]

288. To minimize any potential burden on providers, the Commission does not prescribe a particular format for how consumer disclosures must be made, but suggests a framework for consideration and allows providers flexibility in adopting such disclosures, thus allowing providers with maximum flexibility and minimum burden.

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[985] *Id*.

[986] *See* 47 U.S.C. §§ 201(b), 276; *see also* 47 U.S.C. § 276(b)(1) (directing the Commission to "take all actions necessary" to prescribe certain regulations in order to promote competition among payphone service providers and the widespread deployment of payphone services "to the benefit of the general public.").

[987] *See supra* para. 278.

[988] *See supra* para. 279.

[989] *See supra* Section IV.C.

[990] *See, e.g.*, CenturyLink Second FNPRM Reply at n.101; PPI Second FNPRM Comments at 3; Pay Tel Proposal at 4.

[991] *See, e.g.*, Joint Provider Proposal at 6 n.16; *see also* PPI Second FNPRM Comments at 3; Pay Tel Proposal at 4.

[992] *See supra* Section IV.K.

M. Severability

289. All of the rules that are adopted in this Order are designed to ensure just, reasonable, and fair ICS rates. Each of the reforms we undertake in this Order serve a particular function toward this goal. Therefore, it is our intent that each of the rules and regulations adopted herein shall be severable. We believe that ICS end users will benefit from the rates caps adopted and will also benefit separately from the adopted ancillary service charge caps. If any of the rules or regulations, or portions thereof including, for example, any portion of our rate caps and ancillary service charge rules, are declared invalid or unenforceable for any reason, it is our intent that the remaining rules shall be in full force and effect.

N. Outstanding Petitions

290. After the Commission released the *2013 Order*, numerous entities petitioned the Commission for a stay of the new rules and requirements. The requests for stay[993] generally expressed concern about one or more of the following categories of issues: (1) that a "one-size-fits-all" approach for ICS rate reform will be ineffective, and ignores the fact that jails incur real costs and will face budget shortfalls under the Commission's adopted approach;[994] (2) the continued need for site commissions, or a concern about how to manage correctional budgets built on a reliance on those site commissions;[995] (3) a concern about the Commission seeking comment on asserting jurisdiction over intrastate ICS calls or classifying all ICS calls as interstate;[996] (4) a potentially harmful impact on the security at facilities and the safety of citizens stemming from the Commission's rules and requirements;[997] and (5) general requests that the Commission stay its Order with no legal analysis or justifications for the request.[998] We dismiss the first four categories on the basis that the present order adequately addresses and answers the arguments and concerns contained within them. We adopt tiered rate caps based on population size, address site commissions and security concerns, as well as assert jurisdiction over intrastate ICS, in this Order.[999] We dismiss the fifth category of stay requests on the basis that they do not present any legal reasoning or analysis to justify a stay of our rules and have been rendered moot by this Order.

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[993] Many of the requests for stay came to us as form letters and emails that lacked any substantive legal analysis, but requested a stay of the Order. For example, the entire body of many emails read as follows: "I request that the ICS Order that is scheduled to go into effect Feb 11, 2014 be "STAYED" as it applies to Sheriffs and jails. Thank you in advance!" *See, e.g.*, Email from Wendy Greene, Lieutenant, Caldwell County Sheriff's Office, to Tom Wheeler, Chairman, FCC (Dec. 10, 2013) (Caldwell County Email).

[994] *See, e.g.*, Email from Ricky L. Whitney, Sheriff, Allegany County, NY, to Tom Wheeler, Chairman, FCC (Dec. 10, 2013); Email from Cathy Coyne, Legislative Analyst, California State Sheriff's Association, to Tom Wheeler, Chairman, FCC (Dec. 9, 2013); Email from Kenneth McGovern, Sheriff, Douglas County, KS, to Tom Wheeler, Chairman, FCC (Dec. 9, 2013).

[995] *See, e.g.*, Email from J. Adam Shepherd, Sheriff, Gila County, AZ, to Tom Wheeler, Chairman, FCC (Dec. 10, 2013); Letter from Thomas J. Dougherty, Sheriff, Livingston County, NY, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed Jan. 6, 2014) (Livingston County Jan. 6, 2015 *Ex Parte* Letter).,

[996] *See, e.g.*, Letter from Timothy S. Whitcomb, Sheriff, Cattaraugus County, NY, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-3 (filed Jan. 10, 2014); Livingston County Jan. 6, 2014 *Ex Parte* Letter at 1-2.

[997] *See, e.g.*, Letter from William T. Schataman, Sheriff, Forsyth County, NC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2-3 (filed Dec. 9, 2014); Livingston County Jan. 16, 2014 *Ex Parte* Letter at 1-2.

[998] *See, e.g.*, Caldwell County Email; Email from Melvin Andrews, Sheriff, Elbert County, GA, to Tom Wheeler, Chairman, FCC, WC Docket No. 12-375 (Dec. 10, 2013).

[999] *See supra* Section IV.A; Section IV.B; and Section IV.A.5.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Promoting Competition

291. While we adopt regulations in this Order to correct failures in the ICS market, the Commission generally prefers to rely on competition over regulation.[1000] We seek additional comment on whether there are ways to promote competition within the ICS market to enable the Commission to sunset or eliminate our regulations adopted herein in the future. We also seek comment on the extent to which the reforms adopted today facilitate a properly functioning market.

292. In the *2012 NPRM*, the Commission noted that the First Wright Petition asked the Commission to "mandate the opening of the ICS market to competition."[1001] In the First Wright Petition, the Petitioners further requested that the Commission address high ICS rates by prohibiting exclusive ICS contracts and collect-call-only restrictions at privately administered prisons, and requiring such facilities to permit multiple long-distance carriers to interconnect with prison telephone systems.[1002] The Commission sought comment on these proposals but noted that ICS contracts "are typically exclusive."[1003] In the *2013 Order*, the Commission observed that while it had previously held that competition existed among ICS providers to provide service to correctional facilities,[1004] facilities opposed the allowance of multiple providers due to security concerns.[1005] The Commission sought comment on whether security issues were still a legitimate reason for limiting competition within correctional facilities, and whether any technological advances had changed the justification for such exclusive use.[1006] The Commission asked similar questions in the *Second FNPRM*, and requested comment regarding any costs that may be incurred by the introduction of multiple providers within a single facility, any additional barriers to competition within a facility, and how to allow greater competition without banning exclusive ICS contracts.[1007]

293. In response, commenters raised concern about requiring facilities to utilize multiple providers at the same location. Many commenters assert that security could be compromised if more than one ICS provider operated at a single facility. For instance, GTL notes that "investigators would have to conduct duplicative search procedures" which could compromise "law enforcement's ability to monitor and track inmate calling for victim protection, investigative resources, and other public safety purposes."[1008] Securus warns that officers would need to be trained in every system and that having to check multiple systems could lead to a delay in officers' ability to react.[1009] Commenters also note potential increased administrative burdens and complexities for correctional facilities in order to install and maintain separate telephone systems. Securus asserts such complexities could include the need to create complex bids to allow for multiple providers, negotiate and oversee multiple contracts, review and

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[1000] *See 2013 Order*, 28 FCC Rcd at 14128, para. 39.

[1001] *2012 NPRM*, 27 FCC Rcd at 16642, para. 36.

[1002] *See* First Wright Petition at 2.

[1003] *2012 NPRM*, 27 FCC Rcd at 16642, para. 36. The Commission further noted that "once an ICS provider wins a contract it becomes the sole provider." *Id*.

[1004] *2013 Order*, 28 FCC Rcd at 14190, para. 176.

[1005] *2013 Order*, 28 FCC Rcd at 14190, para. 177.

[1006] *2013 Order*, 28 FCC Rcd at 14190-91, para. 177.

[1007] *Second FNPRM*, 29 FCC Rcd at 13217, paras. 114-15.

[1008] GTL Second FNPRM Comments at 37 (quoting NSA FNPRM Comments at 5-6).

[1009] *See* Securus Second FNPRM Comments at 32 (quoting David Kunde Decl. paras. 6-7).

process vendor payments and address vendor disputes.[1010] Commenters assert that these increased burdens to correctional facilities would likely lead to higher inmate ICS costs.[1011] Some commenters say that requiring multiple providers per facility could lead small facilities to eliminate ICS altogether.[1012] GTL states that, "[i]f provision of ICS at facilities with multiple providers is not financially feasible for each provider, then facilities will not have multiple providers, regardless of what rules the Commission promulgates."[1013] Some commenters suggest that banning exclusive contracts would lead to lower capital investment resulting in lower and less predictable call quality.[1014] But HRDC suggests that "[o]nly when consumers are afforded the choice to select telecommunications providers that offer the best service at the lowest price will a competitive and free market prevail in the ICS industry."[1015]

294. We seek additional comment on this issue because the record also indicates there may be multiple providers in some facilities.[1016] How common is this practice? Does it indicate that not all facilities enter into exclusive ICS contracts? If the Commission finds it necessary to ban exclusive ICS contracts to encourage greater competition in providing ICS in correctional institutions, we seek comment on our legal authority to do so. Would such a ban serve the express purposes of section 276(b)(1), namely to promote competition and the widespread deployment of payphone services?[1017] How should existing, exclusive ICS contracts be treated if the Commission decided to ban exclusive contracts? Should they be abrogated, grandfathered, subject to a transition period or some other treatment? We seek information on the extent to which multiple providers currently serve different regions of the country.

[1010] *See* Securus Second FNPRM Comments at 29-34; Praeses Second FNPRM Comments at 18, n.40; Kansas DOC Second FNPRM Comments at 2.

[1011] Praeses Second FNPRM Comments at 18 n.40; *see also, e.g.*, GTL Second FNPRM Comments at 37 (arguing that banning exclusive contracts would increase ICS costs for providers and facilities), Securus Second FNPRM Comments at 29-31 (explaining that a multi-provider system would result in higher costs and poorer service); OSSA Second FNPRM Comments at 6.

[1012] *See, e.g.*, Kansas DOC Second FNPRM Comments at 2 (explaining that the Kansas DOC would likely eliminate ICS rather than allowing multiple ICS vendors); Oregon State Sheriff's Assoc. at 6 (declaring that if given the choice between allowing multiple ICS providers or not at all, "many facilities in Oregon would elect not to have any ICS"); NCIC Second FNPRM Comments at 16 (stating that it would be more cost effective for some small facilities to eliminate ICS altogether); *see also* GTL Second FNPRM Comments at 38 (stating that allowing multiple providers would decrease call volume and make it less attractive for providers to bid on certain contracts).

[1013] GTL Second FNPRM Comments at 38 (stating that allowing multiple providers would decrease call volume and increase uncertainty for reach provider).

[1014] *See, e.g.*, Securus Second FNPRM Reply at 31-32 (stating that multiple providers would lead to administrative chaos and lower capital investment resulting in lower call quality); GTL Second FNPRM Reply at 22; Pay Tel Second FNPRM Reply at 51 (stating that an exclusive contract with one provider assures consistent quality in service and security measures).

[1015] HRDC Second FNPRM Comments at 3; *see also* HRDC July 29, 2015 *Ex Parte* Letter at 8 ("One option the Commission has at its disposal, which HRDC would welcome and which would end much of this discussion, empower consumers and introduce true competition into the ICS market, is to require correctional facilities to give consumers who place and receive calls from prisons and jails a choice in the carrier and telecom service they use. So long as ICS providers view their 'customers' as the corrections agencies that control access to a captive, monetized population, and not the consumers who actually pay the bills, the discussion will continue to revolve around ways to gouge consumers and extract money from them – not on how to deliver the best, most cost-efficient ICS services to prisoners and their families.").

[1016] GTL Second FNPRM Comments at 38, n.165 ("[I]n some large facilities, multiple vendors already operate side by side, providing different aspects of inmate communications services. For example one company might provide voice service, another video visitation, and another may provide kiosks or other commissary services.").

[1017] *See* 47 U.S.C. § 276(b)(1).

Specifically, are there even multiple ICS providers available to serve each correctional institution? Are there correctional facilities that can only be served by one ICS provider?

295. Are there ways to mitigate concerns raised in the record that multiple providers could increase burdens and make it "more difficult . . . to maintain security"?[1018] How could allowing competition inside correctional institutions decrease end-user rates? Would facilities, as suggested in the record, eliminate ICS if the Commission banned exclusive contracts?[1019] If so, would it be necessary for the Commission to take action to prevent this practice? We seek comment on our legal authority to do so. Is it feasible for multiple providers to serve the same facility without having to build out their own separate infrastructure, for example by offering some form of secure, dial-around service?[1020] If so, could the Commission require ICS providers to offer such a service? Is it possible for multiple providers to co-exist at a single facility without compromising important security features and increasing infrastructure and personnel costs?[1021] Would technological advances address such concerns?[1022] Would requiring multiple providers in institutions, by prohibiting providers from bidding on exclusive contracts, lead to lower capital investment and ultimately affect call quality, as suggested by both GTL and Pay Tel?[1023] Finally, should the Commission, as suggested, first adopt rate and ancillary service charge reform and then determine if additional steps are necessary and perhaps revisit the idea of intra-facility competition then?[1024]

B. Video Calling and other Advanced Inmate Communications Services

296. Our core goals for inmates and their families, friends, clergy and lawyers remain the same regardless of the technologies used—ensuring competition and continued widespread deployment of ICS and the societal benefits that they bring.[1025] Since the Commission adopted the *2013 Order*, we have seen an increase in the use of video calling, including video visitation.[1026] Given the lack of competitive pressures and the market failure[1027] the Commission has identified in the ICS market, we are concerned

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[1018] GTL Second FNPRM Reply at 21-22 (quoting County of Butler Prison Board December 2013 FNPRM Comments at 2).

[1019] *See* ODRC Second FNPRM Comments at 5.

[1020] *See* Securus Second FNPRM Comments by David Knude Decl. at 2 (stating that "[t]he ICS provider is responsible for completing and paying for *infra*structure deployment . . . facility *infra*structure will be even more taxed Duplicative transport, trunks, and inside wiring will be needed.").

[1021] *See* Securus Second FNPRM Comments, Attach. at 2; *see, e.g.*, Pay Tel Second FNPRM Reply at 4.

[1022] *See 2013 Order*, 28 FCC Rcd at 14190-91, para. 177.

[1023] *See, e.g.*, GTL Second FNPRM Reply at 22 (stating that "requiring intra-facility competition would create operational and administrative chaos, resulting in lower capital investment by ICS providers and thus lower quality of service."); Pay Tel Second FNPRM Reply at 51 (quoting the Ohio Department of Rehabilitation and Correction "[a]n exclusive agreement with a single provider assures consistent quality both in service provided and in security measures.").

[1024] *See* Wright Petitioners Second FNPRM Comments at 19-20.

[1025] *Second FNPRM*, 29 FCC Rcd at 13227 para. 145.

[1026] *See* Prison Policy Initiative, Screening Out Family Time: The for-profit video visitation industry in prisons and jails at 4-6 (Jan. 2015) (PPI Study: Screening Out Family Time), http://www.prisonpolicy.org/visitation/report html; *see also* Illinois Campaign Second FNPRM Comments, WC Docket No. 12-375, at 2 (filed Jan. 9, 2015) ("Most of the counties we surveyed are implementing or moving toward the use of video visitation.").

[1027] *See 2013 Order*, 28 FCC Rcd at 14109, para. 3 ("While we generally prefer to promote competition to ensure that inmate phone rates are reasonable, it is clear that this market, as currently structured, is failing to protect the inmates and families who pay these charges.").

that rates for video calling and video visitation services that do not meet the definition of ICS could be used as a way[1028] to allow ICS providers to recover decreased rates as a result of the reforms adopted herein. We seek further comment on these newer technologies, to gain a better understanding of their use, the costs to providers and rates to consumers, and to identify any trend of moving away from more traditional ICS technologies.[1029] We seek comment on whether the incentives that allowed ICS rates to exceed just, reasonable, and fair levels might also occur for video calls and the action needed to address such issues.

297. *Background*. In the *Second FNPRM*, the Commission sought comment on "the impact of technological advancements on the ICS industry."[1030] The Commission also invited comment on its legal authority to regulate the rates for services provided over newer technologies.[1031] The Commission received insight from commenters, but additional information was necessary to gain a fuller understanding of video visitation and other advanced services. Accordingly, the Commission asked supplemental questions about these services in the *Second FNPRM*. For example, the Commission specifically sought "a greater factual understanding of the availability of these and other services," among other issues.[1032] The record received in response to the *Second FNPRM* provided us with further detail about the issues surrounding these services, but we again seek additional information on some questions addressed in both the *FNPRM* and *Second FNPRM*, as well as other areas that we have determined warrant further consideration. We specifically seek comment on video calls, including, but not limited to, video visitation, as the record indicates that such technology is growing in use in correctional institutions. We also ask questions about other advanced services described in the record.

298. *Discussion*. Video calling has become another way for inmates to make contact with the outside world in addition to in-person visits and ICS via telephones hanging on the wall.[1033] One commenter suggested that video visitation systems, "which allow both video and non-video calls at unregulated rates, email, text messaging, face-to-face visits, mail and hearing-impaired systems," actually compete with ICS providers.[1034] We seek comment on how pervasive video visitation services are in prisons and jails. How many facilities allow such services? Is there a difference in availability between prisons and jails? How many providers offer these services? Are there providers of video visitation that are not also providers of traditional ICS, or do the same companies offer both services?[1035] Do commenters believe certain forms of video visitation are in fact distinct from ICS? If so, what feature(s)

[1028] *See* PPI Second FNPRM Comments at 3 (stating that "[F]ailure to regulate prison and jail video communication charges will leave this industry with a ready method to instantly subvert the FCC's price caps on long-distance calls simply by replacing facilities' current telephones with video phones and labeling the verbal communications that take place as 'video calls'").

[1029] Yet we note, as discussed above, that when we use the term "traditional ICS," we are not ruling out the possibility that some forms of video visitation may be forms of non-traditional ICS that are subject to our rules. *See supra* para. 251.

[1030] *2013 Order*, 28 FCC Rcd at 14185-86, para. 164.

[1031] *See id*. at 14185-86, paras. 164-65.

[1032] *See Second FNPRM*, 29 FCC Rcd at 13228-29, paras. 148-151.

[1033] *See, e.g.*, HEARD Second FNPRM Comments at 3 ("[V]ideo visitation is now seen as a safe method of communication at jails and prisons nationwide."); Illinois Campaign Second FNPRM Comments at 11 ("Video visitations are a growing trend in Illinois, and the nation.").

[1034] NCIC Second FNPRM Comments at 28.

[1035] Commenters indicate that "ICS providers have generally been the monopolistic provider in most jails, but that is quickly changing with jails installing video visitation systems provided by a non-ICS provider whereby inmates can make both video and non-video calls to family members." NCIC Second FNPRM Comments at 15-16.

make them distinct? For instance, might intra-institution video visitation facilities that require the friend or family member to come to the institution in order to have a video visit fall inherently outside the definition of ICS as compared to video visitation between the inmate in the institution and a friend or family member in a remote location?[1036] Do certain forms of video visitation use devices other than "inmate telephones" as the term is defined in our rules?[1037] We also ask commenters to provide data on the minutes of use for video calls and whether and how these minutes of use have grown over the last few years. How common are video visitation only companies, as compared to traditional ICS providers?

299. We are particularly interested in the rates that providers of video calls charge for this service compared to traditional ICS. How are these rates established? For example, the Illinois Campaign states that one provider "typically charges a dollar a minute for a video visit."[1038] PPI suggests that the rate may fluctuate between as low as $0.33 per minute for certain providers up to $1.50 per minute for others.[1039] We seek detailed information about the rates video visitation providers charge for these services. What is a typical rate charged for video visitation? Does the rate differ between prisons and jails? How much, if at all, do the rates for video visitation fluctuate based on the type or size of the facility? If there is a difference between charges for facility type or size, what are the reasons for the differences? Are the rates for these services different from the rates for traditional ICS? If so, what is the justification for the difference? To the extent that video visitation providers are charging rates that exceed our interim caps, have those providers been able to explain why their services are not a form of ICS that is not subject to those caps? If there are strictly video visitation providers who do not provide other forms of ICS, do their rates differ from those set by traditional ICS providers? Does the end-user rate fluctuate by call volume or technology used?

300. What limits or protections would need to be implemented to provide relief from or prevent excessive rates for video visitation services, to the extent that they are not already being treated as forms of ICS? Are the ancillary service charges for video visitation comparable to those of traditional ICS?[1040] PPI explains that certain ICS providers that also provide video visitation charge different amounts for credit card transaction fees depending on the technology used by the inmate.[1041] Is this typical for ancillary fees and charges in general? Do video visitation providers bundle this service with traditional ICS or other services, and does that affect the rates users pay for video visitation?[1042] Do

[1036] GTL Second FNPRM Comments at 41-42 ("[V]ideo visitation [allows] federal, state, county, municipal, and private facilities to offer more secure on-premise or remote visitation. In addition, friends, family, and professional visitors will have a convenient, accessible way to stay connected with inmates. . . [u]tilizing the At-Home video visitation solution [GTL offers] allows visitors to conduct their regular visitation sessions through most PCs, laptops, and certain tablets without stepping onto facility property.").

[1037] *See* 47 C.F.R. § 64.6000.

[1038] Illinois Campaign Second FNPRM Comments at 2.

[1039] PPI Study: Screening Out Family Time at 14, fig. 5. In the sample of 5 video visitation providers included in the study, PPI details the following rate ranges: $0.50-$0.65/min; $0.20-$0.43/min; $0.50-$1.50/min; $0.35-$0.70/min; and $0.33-$0.66/min. *Id*. For those 5 providers, the "typical rate" was as follows, respectively: $0.50/min; $0.33/min; $1.00/min; $0.35/min; and for the final provider, the commissions paid to the facilities varied in the sample so much that a "typical rate" could not be determined. *Id.*

[1040] *See* PPI: Updates re: Second Further Notice of Proposed Rulemaking: Video Visitation, WC Docket No. 12-375, at Exh. 3 (filed July 6, 2015) (PPI July 6, 2015 Video Visitation Update) (providing a recent article from The Dallas Morning News describing that Securus proposed a $4.95 transaction fee for video visitation in Dallas County, TX and the County Judge suggested a decrease to $3.00 per transaction).

[1041] PPI Jan. 12, 2015 *Ex Parte* Letter at 3.

[1042] *See, e.g.*, PPI Study: Screening Out Family Time at 12 ("Video visitation is rarely a stand-alone service, and 84% of the video contracts we gathered were bundled with phones, commissary, or email. Sometimes it is obvious that bundling of contracts persuades counties to add video visitation.").

providers pay site commissions on video calls?[1043] If so, we ask commenters to file information on the magnitude of these payments.[1044]

301. News articles and commenters indicate that some ICS providers, as a condition for offering video calling, have eliminated in-person visitation entirely.[1045] We seek comment on how common conditions, such as eliminating in-person visits, are to offering video visitation services.[1046] What cost savings do institutions experience, if any, by moving away from in-person visits? What effects do conditions such as the elimination of in-person visitation have on inmates and their decisions to use video visitation or traditional ICS?[1047] Are inmates and their families given a choice? Do they have input into the decision to eliminate in-person visits? Does the practice of eliminating or reducing in-person visitation differ between jails and prisons? The record indicates that some video visitation contracts may also include a quota system, mandating a minimum number of usages of the technology per month.[1048] What are the consequences if such quotas are not met? How frequently are such conditions included in video visitation contracts? Are there other requirements like this that video visitation providers include in their contracts? One commenter, for example, hypothesized that "if commissions on phone services are restricted, providers could include with the phone services a video visitation system and, as an incentive to select them, offer to charge for on-site visits while offering a large commission on the consumer paid visitation services to compensate for commissions restricted on the inmate phone calling."[1049] Is this a practice that occurs, or is likely to occur in some facilities offering video visitation?

[1043] *See* PPI July 6, 2015 Video Visitation Update at Exh. 1, Solano County, California iWebVisit.com Video Visitation Contract at Exh. 4 (showing ascending revenue share percentages based on various levels of paid visits per month per inmate).

[1044] *See supra* Section IV.K.

[1045] *See, e.g.*, Matt Stroud and Joshua Brustein, Expensive 'Prison-Skype' is Squeezing Out In-Person Visitation, BLOOMBERG BUSINESS, (Apr. 17, 2015), http://www.bloomberg.com/news/articles/2015-04-27/expensive-prison-skype-is-squeezing-out-in-person-visitation ("Prisons use two types of video chat. In one, visitors sit at a bank of video terminals and chat with inmates at the same building, which is generally free. In the other, prisoners or their families pay to communicate remotely through Internet chat. Companies often offer both services as part of a single contract. But they push the latter option because it translates directly into revenue, according to advocates and officials at correctional facilities. And according to the PPI, video visitation is being used not to supplement in-person visitation, but to eliminate it completely."); HRDC Second FNPRM Comments at 14; Illinois Campaign Second FNPRM Comments at 2 (noting that for one video visitation provider in Illinois, "in six of the seven counties where it operates, the contract requires that face-to-face visits be eliminated").

[1046] *See* PPI July 6, 2015 Video Visitation Update at Exh. 3 (attaching a June 24, 2015 Washington Post article describing the Mayor's decision to reverse the elimination of in-person visits at the D.C. jail because it "reflected her desire to see better reintegration of the District's prisoner population when they return to the local community.").

[1047] For example, HRDC explains that "Human contact in the form of in-person visits has an even more significant effect than telephone calls, not only on recidivism but on prisoner behavior, and cannot be eliminated in the name of profit." HRDC Second FNPRM Comments at 14. PPI explains that "most jails choose to ban in-person visitation after installing a video visitation system." PPI Study: Screening Out Family Time at 20. However, we also note that GTL, for example, states that "decisions regarding inmate visitation and the parameters of in-person visitation are beyond the scope of the Commission's jurisdiction." GTL Second FNPRM Reply at 24.

[1048] *See* Illinois Campaign Second FNPRM Comments at 12 (explaining that one carrier has stated "explicitly the goal of having all those incarcerated in the jail signed up to do a minimum of one paid remote video visit per month within the first six months of installation," which leads to "the possibility of a 'quota' system where both staff and people inside the jail will be under pressure to ensure more use of the video visitation system, largely at the expense of already financially stressed families").

[1049] ICSolutions Second FNPRM Comments at 17.

302. We also seek comment on the benefits of video visitation as compared to traditional ICS. In facilities that offer both video visitation and traditional ICS, what percentage of inmates and their families utilize video visitation? For the inmates and families that do use video visitation, how frequent is their use? What is the comparative percentage between video visitation usage and traditional ICS usage? Are inmates and their families more apt to use video visitation in jails or prisons, or is there no notable difference based on the type or size of facility? We seek comment on the impact video calling has on inmate connectivity with friends and family. For example, is there evidence that video calling has reduced or increased the frequency of connectivity with friends and family because they may be charged by the minute, while friends and family do not have to pay for an in-person visit?

303. We seek general comment on the costs to providers of video visitation. Are there additional costs to ICS providers in developing, provisioning, or offering video visitation services? Are there costs to the correctional facilities for provisioning video visitation services? Do ancillary service charges and site commissions affect video visitation rates?[1050] If so, how?

304. We have made clear that our authority to regulate ICS is technology neutral.[1051] We also note that certain commenters have specifically agreed that we have authority to regulate video visitation.[1052] For example, PPI suggests that we should "regulate the video visitation industry so that the industry does not shift voice calls to video visits."[1053] To the extent that video visitation is not already a form of ICS that is subject to our ICS rules, is this a suggestion we should pursue? Are there any barriers to the Commission specifically regulating video visitation service that do not constitute inmate telephone service under section 276?

305. HRDC and PPI have suggested that the same perverse incentives that have harmed the traditional ICS market also harm the video visitation market.[1054] We seek additional comment on whether there is a similar market failure for video visitation and other advanced services as the market failure described above for traditional ICS.[1055] Keeping in mind the Commission's stated goals of increased communication at just, reasonable, and fair rates, what steps can be taken to prevent or alleviate problems in video visitation that have prompted our action with regard to traditional ICS? Would adopting rate caps be effective to ensure just, reasonable, and fair rates for video visitation that does not meet the

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[1050] The Illinois Campaign, for example, notes that there are "disparities in commission percentages for video across [Illinois]. Securus typically offers 20%, while in one county [Inmate Calling Solutions] offers 79%, the same as its phone agreement. Again, Champaign County has the lowest rates for video, with [ICSolutions] charging $10 for a 20 minute visit, without offering a commission. While it has advantages, video is significantly more expensive for customers and promises greater profits for providers." Illinois Campaign Second FNPRM Comments at 12. PPI explained that commissions for video visitation range from no commission up to 50% of the rate charged to the user, and also noted that even within an individual provider the commission paid ranges that much in some cases. PPI Study: Screening Out Family Time at 14, Fig., 5.

[1051] *See* Section IV.H; *see also 2013 Order*, 28 FCC Rcd at 14115, para. 14.

[1052] *See, e.g.*, Hamden Second FNPRM Comments at 6 ("The conclusion is ineluctable that the Commission has plenary authority to regulate (1) 'commissions' on interstate and intrastate ICS calls; (2) ancillary surcharges; and (3) new and emerging ICS technologies and services."); *Id*. at 3-6; HRDC Second FNPRM Comments at 14. ("We believe that the Commission has jurisdiction to regulate video visitation services but should do so in a separate proceeding based on a developed record.").

[1053] PPI Study: Screening Out Family Time at 28.

[1054] PPI cautions that there is "clear evidence that the video communications market is currently driven by the same perverse incentives that caused market failure in the correctional telephone industry." HRDC Second FNPRM Comments at 14 (quoting PPI Dec. 20, 2013 *Ex Parte* Letter at 1); *see also* PPI Jan. 12, 2015 *Ex Parte* Letter at 1.

[1055] *See supra* para. 298.

definition of ICS?[1056] To the extent the record indicates that a similar failure is occurring in the market for video calling as we witnessed for traditional ICS, we seek comment on adopting rate caps and reforms to ancillary service charges to ensure that video calls and video visitation do not create loopholes that providers may exploit and undermine the reforms adopted herein.

306. Some commenters are concerned that bundling regulated and unregulated products together harms the market for ICS.[1057] Would prohibiting IC providers' bundling of regulated and unregulated products together in contractual offerings alleviate some of the problems with current rates charged for advanced services?[1058] What other kinds of advanced services are available to inmates? Are they available commonly in most facilities, or only in certain ones? What is the demand for these services and what rates and fees are charged? What additional functionalities do they offer? Do they provide any greater benefits to inmates, their families, or others, than traditional services? What are ICS providers' rates for other services such as email, voicemail or text messaging? The record indicates that some ICS providers offer tablet computers and kiosks that allow inmates to access games, music, educational tools, law library tools and commissary ordering.[1059] What is the compensation mechanism for access to these offerings? What are ICS providers' rates for such services, including both service-specific rates and "all-you-can-eat" plans?

307. We also seek comment on the implications of offering video calls, including video visitation, for inmates who are deaf or hard of hearing. Increased deployment of video call systems has the potential to provide inmates who are able to communicate using American Sign Language (ASL) with the ability to access and use VRS, as well as providing direct communications with other ASL users who have video communications access. We note, however, that VRS and videophone users require a smooth, uninterrupted transmission of signal to communicate effectively in ASL. What range of bandwidths and broadband speeds are currently provided or planned for video call systems? What bandwidth and broadband speed are the minimum necessary for effective video communications between ASL users? In

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[1056] *See, e.g.*, PPI Study: Screening Out Family Time at 28 (advocating for rate caps for video visitation). The Illinois Campaign also suggests, for example, that "[t]he FCC should investigate video visitation costs and set a rate cap which ensures access to all people while providing a reasonable profit for the provider." Illinois Campaign Second FNPRM Comments at 12.

[1057] *See, e.g.*, PPI Study: Screening Out Family Time at 12 (explaining that one provider claims it "needs to bundle its contracts or else it will be unable to provide video visitation free of charge to the facility. In other words, in this county, [the provider] apparently subsidizes the costs of video visitation equipment by charging families high fees to deposit funds into [that provider's] commissary accounts") (emphasis in original); *id*. at 28 ("Requiring that facilities bid and contract for these services separately would end the current cross-subsidization. Alternatively, the FCC could strengthen safeguards when allowing the bundling of communications services in correctional facilities, to ensure that the facilities are better able to separately review advanced communications services as part of the Request for Proposals process. Either approach needs to enable all stakeholders to understand these services, their value, and the financial terms of the contracts.").

[1058] *See id.* at 28; *see also* PPI Second FNPRM Comments at paras. 145-151; Advanced Inmate Communications Services at 3 and n.2 ("Recommendation #2. As an interim measure, the FCC should, as part of its forthcoming order, explicitly prohibit the bundling of regulated services with any services that the contracting parties consider to be unregulated and require phone service providers to certify their compliance annually, listing the services they provide under each contract. Alternatively, the FCC could strengthen safeguards when allowing bundling of communications services in correctional facilities, to ensure that the facilities can better separately review advanced communications services as part of the Request for Proposals process. This would in turn make it that much easier for all stakeholders to understand these services, their value, and the financial terms of the contract."); HRDC Second FNPRM Reply at 6 ("[T]he Commission should take special notice of the pricing of these services and should expressly prohibit the bundling of regulated services with any services that the contracting parties consider to be unregulated, as recommended by PPI.").

[1059] *See, e.g.*, GTL Second FNPRM Comments at 42-44.

addition, what types of video technology are currently used in video call systems? To what extent are video call systems interoperable with the video communications systems used by VRS providers?[1060] Should such interoperability be required? If video call systems are used to provide accessible video communications services to deaf inmates, what steps need to be taken to ensure that any charges for such service are fair, just, and reasonable, given that for deaf inmates, such services are functionally equivalent to voice communication? Finally, we seek comment on how prevalent VRS is in correctional institutions.

C. Recurring Data Collection

308. As discussed above, we adopt a second, one-time Mandatory Data Collection to occur two years from the effective date of this Order. In this data collection, we will require all ICS providers to submit ICS cost, calling, company and contract information as well as facility, revenue, ancillary fee and advanced service information. We found the data received in response to the 2013 Mandatory Data Collection to be beneficial, and anticipate that the forthcoming additional data will also be helpful to ensure that ICS rates and practices remain just, reasonable, and fair, in keeping with our statutory mandate.

309. Throughout this proceeding, several commenters suggest that the Commission impose additional periodic reviews to "ensure that the reforms create and maintain the proper incentives to drive ICS rates to competitive levels."[1061] We have found in the Order that for the time being, only a one-time additional collection is warranted. We seek comment, however, on extending in the future the Mandatory Data Collection adopted in this Order into a recurring data submission. Should providers be required to file the cost data described above in the Mandatory Data Collection annually? Why or why not? Do commenters agree that an ongoing annual data collection would provide the Commission with more fulsome data with which to help "drive end user rates to competitive levels?"[1062] Since ICS contracts typically run at least three to five years, with one-year extension options, is there benefit in collecting more than several years' worth of cost data in order to obtain a more accurate picture about ICS costs?[1063] Some commenters have asserted that upfront investment costs in certain ICS facilities are very high.[1064] Would collecting ICS cost data over more than one or two years lead to a more accurate economic picture for such investments? Would an ongoing ICS cost data collection provide the Commission a clearer picture of the industry than a one-time data collection? Would the benefit of such data submissions to the Commission, and its continued monitoring and regulation of the ICS industry, outweigh any potential burden on ICS providers?

D. Contract Filing Requirement

310. In the *2013 Order* the Commission reminded providers of their obligations to comply with existing rules, including rules requiring that ICS providers that are non-dominant interexchange carriers make their current rates, terms, and conditions available to the public via their company websites.[1065] In 2014, the Commission sought comment on "how to ensure that rates and fees are more

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[1060] Such technology is used not only for access to relay service, but also for direct video communications between ASL users.

[1061] HRDC Second FNPRM Comments at 14; *see also* Wright Petitioners 2013 Order Comments at 2, 10.

[1062] *Second FNPRM*, 29 FCC Rcd at 13230, para. 152.

[1063] *See 2013 Order*, 28 FCC Rcd at 14161, para. 98.

[1064] *See, e.g.*, Letter from Melissa Newman, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Aug. 1, 2013) (asserting that in Texas, it has "spent tens of millions of dollars building calling infrastructure for the prison system").

[1065] *2013 Order*, 28 FCC Rcd at 14170, para. 118 and n.421, citing 47 C.F.R. § 42.10(b).

transparent to consumers" and specifically on the requirement that ICS providers notify their customers regarding the ICS options available to them and the cost of those options.[1066]

311. Several commenters have expressed concern over a lack of transparency regarding ICS rates and fees.[1067] HRDC asserts "almost a total lack of transparency on the part of both ICS providers and the government agencies from which they secure their monopoly contracts."[1068] HRDC further contends that "state agencies often create obstacles to inhibit the public records process that require [sic] consumers and other organizations to unnecessarily expend time and money to obtain records designated by law to be "public" records."[1069] HRDC suggests that the Commission require "all ICS providers to post their contracts with detention facilities on their websites where they are publicly available."[1070] Mr. Baker, of the Alabama PSC, asserts that "lack of transparency in the ICS industry is problematic"[1071] and recommends several solutions, including requiring providers to submit to the Commission and to state commissions "upon request or routinely if requested, a copy of the contract from each facility serviced as well as the provider's response to any facility invitation to bid or request for proposal."[1072]

312. Securus disagrees with these suggestions and asserts that what HRDC calls "public documents often contain information that is protected from disclosure under the very statutes, like the Freedom of Information Act, 5 U.S.C. § 552, that HRDC invokes" as a reason for mandating their disclosure.[1073] Securus asserts that such protected information includes "non-public financial data, proprietary information about patented and patentable technology, and the operation of crucial security features."[1074] Securus contends that requiring the production of ICS contracts "could contravene federal and state disclosure statutes."[1075] Securus further asserts that, even if it were able to enact the "appropriate, lawful redaction" needed to protect sensitive and confidential data, the production of such contracts would be "far too broad and too burdensome."[1076] Finally, Securus asserts that such contract production will be unnecessary if certain reform proposals are adopted, such the Joint Provider Proposal provision requiring all ICS providers to annually certify full compliance with all federal and Commission rules and regulations.[1077]

[1066] *Second FNPRM*, 29 FCC Rcd at 13214-15, paras. 109-110.

[1067] *See, e.g.*, HRDC July 30, 2015 *Ex Parte* Letter; Baker July 8, 2015 *Ex Parte* Letter at 5.

[1068] HRDC July 30, 2015 *Ex Parte* Letter at 1; *see also* HRDC Aug. 6, 2015 *Ex Parte* Letter at 1-2.

[1069] HRDC July 30, 2015 *Ex Parte* Letter at 1. HRDC specifies that "in a letter dated April 6, 2015, the Illinois DOC summarily rejected our request for public records including ICS contracts and documents related to commission kickbacks as being 'unduly burdensome.'" (citing Attachment 4 to HRDC July 14, 2015 *Ex Parte* Letter). HRDC further assets that "as a result, we have been required to retain counsel and initiate legal action in order to obtain the public documents we requested, which include the ICS contract currently in effect at the Illinois Department of Corrections as well as do documents that reflect the ICS rates, ancillary fees, and kickback data." *Id*., citing *Prison Legal News v. Illinois Dep't of Corrs.*, 2015-CH-11292, Cook County Chancery Court.

[1070] HRDC Aug. 8, 2015 *Ex Parte* Letter at 2. HRDC recommends that these disclosures be made within 30 days. *Id*.

[1071] Baker July 8, 2015 *Ex Parte* Letter at 5.

[1072] *Id*.

[1073] Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Aug. 7, 2015) (Securus Aug. 7, 2015 *Ex Parte* Letter).

[1074] *Id*. at 1.

[1075] *Id*. at 1-2.

[1076] *Id*. at 2-3.

[1077] *Id*.

313. Section 211 of the Act grants the Commission authority to require common carriers to "file with the Commission copies of contracts and agreements relating to communications traffic."[1078] Section 43.51 of the Commission's rules specifies that any dominant communications common carrier "must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto" that relate to "[t]he exchange of services" and "matters concerning rates."[1079] The Commission has also clarified that "only non-dominant carriers treated with forbearance are not required to file contracts," whereas non-dominant carriers who are not treated with forbearance are still subject to filing requirements because "material filed by [non-dominant] carriers subject to streamlined regulations may be useful in the performance of monitoring."[1080]

314. We share commenters' concern that ICS contracts are not sufficiently transparent.[1081] We also share the concern of commenters who assert that members of the public must "unnecessarily expend time and money to obtain records" of ICS contracts.[1082] We also recognize the evidence suggesting that the information regarding ICS contracts and rates that is publically available may not be as reliable as the actual contract.[1083]

315. Should the Commission require ICS providers to file all contracts, including updates, under its section 211(b) authority?[1084] Does the annual reporting requirement meet this transparency objective? Are there any reasons such a requirement would not apply to all ICS providers or result in the filing of all ICS contracts? We seek comment on the costs and benefits related to contract filing. Would such a requirement be overly burdensome to ICS providers? Do the benefits outweigh the costs? Would such requirement conflict with any other state or federal laws or requirements, such as the Freedom of Information Act?[1085] How should the contracts be filed with the Commission? To allow greater public accessibility to ICS contracts, we seek comment on requiring ICS providers to file their contracts with the Commission, in a newly assigned docket, via the Commission's Electronic Comment Filing System (ECFS) within 30 days of entering into a new contract.[1086] What would trigger the need to file an updated

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[1078] *Amendment of Sections 43.51 et al. of the Commission's Rules To Eliminate Certain Reporting Requirements*, CC Docket No. 85–346, Report and Order, 1 FCC Rcd 933, 934, para. 2 (1986) (*Reporting Requirement Report and Order*); 47 U.S.C. § 211.

[1079] 47 C.F.R. § 43.51(a)(1) states: Any communication common carrier described in paragraph (b) of this section must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto with respect to the following: (i) The exchange of services; and, (ii) The interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances, except as provided in paragraph (c) of this section.

[1080] *See Reporting Requirement Report and Order*, 1 FCC Rcd at 934, para. 11.

[1081] HRDC July 30, 2015 *Ex Parte* Letter at 2; Baker July 8, 2015 *Ex Parte* Letter at 5.

[1082] HRDC July 30, 2015 *Ex Parte* Letter at 1.

[1083] *See* Letter from Paul Wright, Exec. Dir., HRDC, to the Honorable Tom Wheeler, Chairman, FCC, WC Docket No. 12-375, at 2 (filed Aug. 6, 2015) (HRDC Aug. 6, 2015 *Ex Parte* Letter) (apologizing for inaccurate data submitted in a previous comment and stating that "members of the public cannot rely on information provided by government officials with respect to ICS rates. As illustrated in this case, we relied not only on the ICS rates posted on the Montgomery County Jail's website, but also on information received directly from the sheriff's office after inquiring as to the accuracy of those rates." It was not until HRDC reviewed the ICS contract and rate sheet that it realized the reported rates were incorrect.).

[1084] 47 C.F.R. § 43.51; 47 U.S.C. § 211.

[1085] *See* Securus Aug. 7, 2015 *Ex Parte* Letter at 1.

[1086] We believe ICS contracts are public documents and should therefore be made easily available to the public.

contract and how quickly after execution should new or updated contracts be filed? In what format should contracts be filed? What are the best ways to handle issues related to confidentiality? Would the *Protective Order* in effect in this docket adequately cover any confidentiality issues that might arise surrounding contracts that might be filed with us?[1087] We seek comment on these and any other potential issues that may arise related to the potential filing of ICS contracts with the Commission. For example, should the Commission adopt additional tools to help it prevent contract-related gaming such as that described above?[1088] What do commenters suggest as additional means to combat such gaming?

E. International Calling Rates

316. In the *2013 FNPRM*, the Commission sought comment on the prevalence of international ICS calling and on the need to reform international ICS rates.[1089] The Commission also sought comment on its legal authority to regulate international ICS and on what rates should apply to international ICS, should the Commission assert jurisdiction.[1090] In the *Second FNPRM*, the Commission sought "updated comment on international ICS and the need for Commission reform focused on such services."[1091]

317. In response, several commenters urge the Commission to regulate international ICS rates.[1092] The record demonstrates that many inmates either lack access to international ICS[1093] or that such services are only available at very high rates.[1094] Numerous international ICS calling rates far exceed the rates permitted for interstate ICS calls,[1095] with some international rates from county correctional institutions set as high as $17.85 to $45 for a 15-minute call.[1096] Friends and family members who live outside the United States and who wish to stay in contact with those who are incarcerated pay the price of such high rates.[1097] Commenters also suggest that immigrant detainees are particularly vulnerable to high phone rates, due to several factors, including their need to stay in touch with family abroad and the centrality of phone access to immigration proceedings.[1098] We seek comment on whether and how we

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[1087] *See* 47 C.F.R. § 0.459; *Protective Order*, 28 FCC Rcd 16954.

[1088] *See supra* Section IV.A.1.b.

[1089] *See 2013 Order*, 28 FCC Rcd at 14186-87, para. 166.

[1090] *2013 Order*, 28 FCC Rcd at 14186-87, para. 18.

[1091] *Second FNPRM*, 29 FCC Rcd at 13194, para. 60.

[1092] *See, e.g.*, NJAID/NYU IRC Second FNPRM Comments at 2; HRDC Second FNPRM Comments at 5.

[1093] NJAID/NYU IRC Second FNPRM Comments at 6-9.

[1094] *See, e.g.*, NJAID/NYU IRC June 30, 2015 *Ex Parte* Letter at 3 (asserting that "at almost $20 for a fifteen-minute call, international rates in some New Jersey facilities are exorbitant compared to the safe harbor and hard cap rates set by the FCC for interstate rates.").

[1095] *See, e.g.*, NJAID 2013 Order Comments at 3; *see also* NJAID/NYU IRC Second FNPRM Comments at 1-2 ("The Commission's 2013 Order capping interstate ICS rates led to significant progress both in New Jersey and around the country. Yet for intrastate and international calls, immigrant detainees and others housed in New Jersey's county jails still pay far above the interstate hard caps.").

[1096] *See* NJAID/NYU IRC Second FNPRM Comments at 6 (stating that rates of international ICS are "exorbitant"); HRDC Second FNPRM Comments at 5 ("[e]xorbitant international ICS rates are a significant problem that must be addressed by the Commission").

[1097] Many immigrant detainees, as well as prisoners who are U.S. citizens, rely on ICS to contact friends or relatives outside of the United States. *See, e.g.*, Comments of American Immigration Lawyers Assoc., WC Docket No. 12-375, at 2 (filed Mar. 25, 2013) (AILA 2013 Order Comments) (asserting that asylum and immigration applicants must gather substantial information from their home countries, much of which must be coordinated by telephone from a correctional facility).

[1098] NJAID/NYU IRC June 30, 2015 *Ex Parte* Letter at 3.

should act to improve inmates' and detainees' access to ICS for international calls, as well as what rates should apply to such calls. We seek comment on applying the adopted rate caps to all international calls.

318. *Legal Authority to Reform International Rates*. Longstanding precedent establishes the Commission's authority to ensure that payphone service providers – including providers of ICS – "are fairly compensated for international as well as interstate and intrastate calls."[1099] In addition, section 201 provides the Commission with the authority to ensure that carriers' rates and practices for interstate and "foreign" communications are just and reasonable, and grants the Commission authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[1100] Based on these provisions, we tentatively conclude that the Commission has authority to reform international ICS rates as necessary to ensure that they are fair, just, and reasonable.[1101] We seek comment on this tentative conclusion.

319. *Rates for International Calling*. Although several parties note that rates for international ICS calls are very high in some facilities, the record contains relatively little information about the specific costs, if any, ICS providers incur in providing international calling or what would constitute just, reasonable, and fair compensation for international ICS calls. The Mandatory Data Collection required providers to submit their costs related to the provision of ICS, including the provision of international calling.[1102] Responses to the Mandatory Data Collection, however, did not separate out costs for international calls from costs for the provision of interstate and intrastate calls. Thus, we lack information about the costs providers incur in providing international ICS.

320. We seek comment on extending our rate caps for interstate and intrastate calls to international calls. Would establishing international rates at levels consistent with our rate caps ensure that ICS users do not pay rates that are unfair or that are unjustly or unreasonably excessive? Would capping rates for international calls at the same levels as we have established for interstate and intrastate calls allow providers to receive fair compensation? If not, why not? Would allowing a higher rate for international calls lead to over-recovery by providers, as their costs for international calls are already factored into the rate caps we set to govern interstate and intrastate ICS rates?[1103] Would the benefit of breaking out international calls be sufficient to justify the added complexity of adding a separate regime for international calls in addition to the rate caps we adopt in the accompanying Order? What percentage of ICS providers' minutes of use do international calling minutes constitute? For example, would a relatively low volume of international calls weigh against establishing a separate rate regime for such calls, particularly given that the costs of international calls are already included in the costs we used to set the rate caps for interstate and intrastate ICS?

[1099] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-128 et al., Report and Order, 11 FCC Rcd 20541, 20569, para. 54 (1996) (concluding that the Commission has authority under sections 4(i) and 201(b) of the Act to ensure that payphone service providers are fairly compensated for international as well as interstate and intrastate calls and finding "no evidence of congressional intent to leave these calls uncompensated under Section 276.").

[1100] 47 U.S.C. § 201.

[1101] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 et al., Order on Reconsideration, 11 FCC Rcd 21233, 21260, para. 53 (1996) (reiterating that "we have the requisite authority under Sections 4(i) and 201(b) of the Communications Act of 1934, as amended, to ensure that PSPs are fairly compensated for international calls.").

[1102] Instructions for Inmate Calling Services Mandatory Data Collection at 1, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327664A1.pdf (last visited Oct. 16, 2015).

[1103] *See supra* para. 73.

321. There is evidence that many of the approximately 400,000 immigrants detained in this country each year are held in local jails and prisons that have contracted with Immigration Customs and Enforcement (ICE).[1104] ICS rates and policies were discussed at the Commission's 2014 ICS Workshop.[1105] The record indicates that ICE "detainees are charged . . . a uniform rate of 15 cents per minute for international calls to landlines and 35 cents per minute for international calls to mobile phones," with "no additional connection fees or ancillary charges."[1106] We seek comment on these rates. Should the Commission establish separate rate caps for international calls that terminate to landline devices and for those that terminate to mobile devices? If so, what rates should apply to each type of call? How challenging would it be for ICS providers to bill different rates for different types of international calls? Is it administratively feasible for ICS providers to distinguish between calls to landline phones versus calls to mobile devices? Should rates vary depending on which foreign country the inmate is calling? Should there be a separate rate cap for international calls made by ICE detainees? Why or why not?

322. The ICE ICS contract provides for free telephone calling services to select numbers through a "centralized pro bono platform which can be accessed at any detention facility."[1107] According to the record, since this ICE contract was awarded, "the number of calls per detainee and minutes per detainee has increased substantially."[1108] The record also indicates that detainees may make calls to 200 different countries for the same per-minute rates.[1109] We seek additional comment on the rates available under the ICE contract. Are these rates a reasonable approximation of what the Commission should adopt for international rate caps? Is ICE able to attain economies of scale that other facilities are not? Would it be more appropriate for the Commission to: (1) adopt the ICE rates for all international calls, (2) subject international ICS calls to the same rate caps we adopt for interstate and intrastate calls, or (3) adopt a different rate regime that is not based on either the ICE rates or the existing rate caps? Are any of these options supported by cost data or other data in the record? If not, is such data available? If the Commission adopts rate caps that are higher than those currently offered by ICE facilities, should those facilities be allowed to raise their rates? We seek comment on ICE's decision to apply different rates for international landline ($0.15/minute) and international mobile ($0.35/minute) calls. Are these rates a

[1104] Comments of New Jersey Advocated for Immigrant Detainees and NYU Law Immigrant Rights Clinic, WC Docket No. 12-375, at 1 (filed Dec. 13, 2013); *see also* BJS Jail Inmates at Midyear 2014, Bureau of Justice Statistics.

[1105] *See* 2014 Workshop Transcript, Statement of Mr. Kevin Landy, Assistant Director, Office of Detention Policy and Planning, U.S. Immigration and Customs Enforcement, Department of Homeland Security at 192-3 (discussing international inmate calling ICS at ICE, which "detains approximately 34,000 at any given time in more than 200 facilities across the country," in which more than 400,000 people each year are booked into ICE custody for some length of time, with an average length of stay of under a month. Mr. Landy asserted that "most of the detention facilities that ICE uses are county jails which have a mix ICE detainees and non-ICE prisoners. However, most of our largest facilities are operated by private contractors and hold exclusively ICE detainees." He further asserts that "paid telephone services are offered by our DTS provider at 16 ICE detention facilities including almost all dedicated facilities. These facilities range in population from 300 to 1800 and collectively house approximately 13,000 detainees on average which represents about 40 percent of our average population.").

[1106] 2014 Workshop Transcript at 192-93; *see also* Contract between ICE and Talton Communications, Contract No. HSCEDM-09-C-00009, dated 5/6/2009, *available at* http://www.ice.gov/doclib/foia/contracts/hscedm-09-c-00009taltoncommunications.pdf (last visited Oct. 5, 2015).

[1107] 2014 Workshop Transcript at 193-94. ("This pro bono platform enables detainees who dial in to place free calls to a number of entities including foreign consulates, immigration courts, and hotlines operated by ICE and by the DHS Office of Inspector General.").

[1108] 2014 Workshop Transcript at 193.

[1109] 2014 Workshop Transcript at 223-24.

reasonable approximation of providers' costs? Is this cost differential a similar one to that which other providers have experienced?

323. We also seek further comment on other issues related to international calling from correctional facilities. The record indicates that although it is feasible for inmates to make international calls, international ICS calling is not always available.[1110] Commenters assert that the lack of availability of international calling is particularly burdensome to immigrant inmates and their families.[1111] We note that many immigration detainees are housed in county jails, rather than in ICE detention facilities. In addition, some inmates in jails and prisons have family and loved ones in countries outside the United States. Do most facilities allow international calling? If not, why not? Are any additional restrictions applied to such calls, such as time-of-day restrictions or prior-permission requirements? Should the Commission require the availability of international calls? If so, what legal authority would we rely on to adopt such a requirement? If we were to adopt such a requirement, what rates should apply to international calls and how should the Commission set such rates? Would subjecting international calls to the same rate caps that apply to interstate and intrastate ICS calls lead to providers or facilities discontinuing or restricting international ICS calls?

F. Third-Party Financial Transaction Fees

324. In the *Second FNPRM*, the Commission sought comment on third-party financial transactions, and asked how it should ensure that money transfer service fees paid by ICS consumers are just and reasonable and fair.[1112] In the ICS context, third-party financial transaction fees consist of two elements: a fee from a third party, such as Western Union or Money Gram to transfer funds from a consumer to an inmate's ICS account,[1113] and an additional charge by an ICS provider for processing the funds transferred via the third party for the purpose of paying for ICS calls.[1114] After carefully reviewing the record, we determine, in the Order above, that the first aspect of third-party financial transaction, e.g., the money transfer or credit card payment, does not constitute an "ancillary service," within the meaning of section 276.[1115] However, we assert jurisdiction over any additional fee or markup that the ICS provider might impose on the end user, and require ICS providers to pass third-party transaction fees to end users with no additional markup.[1116]

325. Several commenters express concern about an additional issue related to these transactions: potential revenue-sharing arrangements between ICS providers and financial companies. ICSolutions, for example, states that, despite the Commission's cap on third-party financial transaction fees,[1117] providers and vendors have an incentive to enter into fee-sharing arrangements with financial

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[1110] *See, e.g.*, CIVIC 2013 Order Comments at 3; AILA 2013 Order Comments at 2; NJAID/NYU IRC Second FNPRM Comments at 6; HRDC Second FNPRM Comments at 5.

[1111] *See, e.g.*, AILA 2013 Order Comments at 2.

[1112] *See Second FNPRM*, 29 FCC Rcd at 13212-13, paras. 103-04.

[1113] One payment-processing service provider indicates that its company usually charges $3.00 to $5.00 per transaction, and notes that the use of a live operator would increase the charge to $5.00 to $7.00 per transaction. *See* Letter from Stephen Price, General Partner/CEO, E-Complish, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed June 10, 2015).

[1114] *See, e.g.*, Lancaster County DOC Mar. 3, 2015 *Ex Parte* at 7 (explaining that the Joint Provider Proposal "seeks Commission approval of a $2.50 additive to the fees charged by third-party transfer services such as Western Union and Money Gram."

[1115] *See supra* para. 171.

[1116] *See supra* para. 172.

[1117] ICSolutions Oct. 15, 2015 *Ex Parte* Letter at 1-2. ICSolutions discussed the Commission's proposed ancillary rate reforms detailed in the Commission's Fact Sheet released on September 30, 2015. *Id.* at 1.

services companies, "thereby complying with the pass-through cost component, but still unnecessarily increasing consumers' cost."[1118] ICSolutions urges the Commission to address this practice by imposing limits on the fees third-party financial companies can charge end users in an effort to prevent "secondary fee-sharing arrangements" between these companies and ICS providers that can "unnecessarily increase the cost of financial transactions to consumers."[1119] Similarly, CenturyLink asserts that ICS providers can "divert transactions to certain third party processors, claiming high fees charged by the third party."[1120] CenturyLink states that, by using a third-party payment processor, an ICS provider can inflate ancillary fees through a revenue-sharing agreement that adds a "direct or indirect markup" to ancillary services.[1121] CenturyLink argues that providers should be "permitted to use such services but not permitted to enter into arrangements that add a direct markup or indirect markup though a revenue sharing arrangement."[1122] Securus, however, defends these calling arrangements as "innovative, valuable" additions to ICS that benefit consumer by giving them more options.[1123]

326. We seek additional comment on the revenue-sharing issues discussed above. First, we seek comment on issues related to our jurisdiction over these transactions. Does the Commission have jurisdiction over third-party financial processor vendors, or over contracts between ICS providers and third-party vendors? Does our authority over ICS providers allow us to regulate providers' ability to enter into revenue-sharing arrangements with third-party vendors? Could these service charges constitute unjust and unreasonable practices, in violation of section 201(b), or a practice that would lead to unfair rates in violation of section 276, because, for example, the manner in which such charges are imposed artificially inflates the amounts that consumers pay to access ICS? How can we ensure that these revenue sharing arrangements are not used to circumvent our rules prohibiting markups on third-party fees? How common are the revenue-sharing arrangements described by CenturyLink and others? Do providers have any control over the fees established by third parties, such as Western Union or credit card companies, for payment processing functions?[1124] Are these revenue-sharing arrangements used to add direct or indirect markups to ancillary services? Should the Commission distinguish between revenue-sharing arrangements between providers and affiliated companies versus arrangements between providers and unaffiliated third parties? If so, what would be the legal basis for such a distinction? Does the Commission have greater authority over arrangements between ICS providers and their affiliates than it does over agreements between providers and unaffiliated entities? Assuming the Commission were to regulate arrangements between providers and affiliated companies that offer financial services, how would such regulations work? Specifically, how could the Commission prevent an affiliate from sharing revenues (or profits) with an ICS provider? Are there other factual or legal considerations the Commission should consider in determining whether and how to address arrangements between ICS providers and financial services companies?

[1118] ICSolutions Oct. 15, 2015 *Ex Parte* Letter at 2.

[1119] ICSolutions Oct. 15, 2015 *Ex Parte* Letter at 2.

[1120] CenturyLink Oct. 15, 2015 *Ex Parte* Letter at 3.

[1121] *Id*. at 3.

[1122] *Id*. at 3; *see also* Securus Second FNPRM Comments, App. A, at 53-54 (discussing "PayNow," an Automated Operator Service "where the called party pays for each call using a major credit card").

[1123] Securus Oct. 14, 2015 *Ex Parte* Letter at 2.

[1124] *See* Lipman Second FNPRM Comments at 10 ("When the ICS provider is billing a customer for some other service, such as a money transfer, the Commission's jurisdiction is not applicable."); Securus Second FNPRM Comments at 25; GTL Second FNPRM Comments at 30. Alabama PSC Second FNPRM Comments at 23; GTL Second FNPRM Comments at 22; CTEL Second FNPRM Comments, App. B at 8; *see also supra* Section IV.C.5.

G. Cost/Benefit Analysis of Proposals

327. Acknowledging the potential difficulty of quantifying costs and benefits, we seek to determine whether each of the proposals above will provide public benefits that outweigh their costs. We also seek to maximize the net benefits to the public from any proposals we adopt. For example, commenters have argued that inmate recidivism decreases with regular family contact.[1125] This not only benefits the public broadly by reducing crimes, lessening the need for additional correctional facilities and cutting overall costs to society,[1126] but also likely has a positive effect on the welfare of inmates' children.[1127] We seek specific comment on the costs and benefits of the proposals above and any additional proposals received in response to this Third Further Notice. We also seek any information or analysis that would help us to quantify these costs or benefits. We request that interested parties discuss whether, how, and by how much they would be impacted in terms of costs and benefits of the proposals included herein. Additionally, we ask that parties consider whether the above proposals have multiplier effects beyond their immediate impact that could affect their interest or, more broadly, the public interest. Further, we seek comment on any considerations regarding the manner in which the proposals could be implemented that would increase the number of people who benefit from them, or otherwise increase their net public benefit. We recognize that the costs and benefits may vary based on such factors as the correctional facility served and ICS provider. We have received minimal cost benefit analysis in this proceeding. Therefore, we request again that parties file specific analyses and facts to support any claims of significant costs or benefits associated with the proposals herein.[1128]

VI. PROCEDURAL MATTERS

A. Filing Instructions

328. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). Comments and reply comments on this *Third FNPRM* must be filed in WC Docket No. 12-375.

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m.

[1125] *See, e.g.*, PPI Study: Screening Out Family Time at 1-2; HRDC Second FNPRM Comments at 14; LSPC Second FNPRM Comments at 1.

[1126] *See* Petitioners 2013 Comments, Exh. C, Bazelon Decl. at para. 48; Petitioners 2013 Reply, Exh. A, Bazelon Decl. at para. 10.

[1127] *See supra* para. 94.

[1128] *See, e.g.*, *Second FNPRM*, 29 FCC Rcd at 13231, para. 159.

All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

B. Ex Parte Requirements

329. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[1129] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. Memoranda must contain a summary of the substance of the *ex parte* presentation ad not merely a list of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. If the oral presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

C. Paperwork Reduction Act Analysis

330. This Report and Order contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in the proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(4), we previously sought comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

331. This Further Notice contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) and other Federal agencies to comment on the information

[1129] 47 C.F.R. §§ 1.1200 *et seq*.

collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

D. Congressional Review Act

332. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A).

E. Final Regulatory Flexibility Analysis

333. As required by the Regulatory Flexibility Act of 1980, *see* 5 U.S.C. § 604, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules, as proposed, addressed in this order. The FRFA is set forth in Appendix E.

F. Initial Regulatory Flexibility Analysis

334. As required by the Regulatory Flexibility Act of 1980 (RFA),[1130] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this Notice, of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth as Appendix F. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided on or before the dates indicated on the first page of this document. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Further Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[1131]

VII. ORDERING CLAUSES

335. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 1, 2, 4(i)–(j), 201(b), 215, 218, 220, 276, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)–(j), 201(b), 215, 218, 220, 276, 303(r), and 403 this Second Report and Order and Third Further Notice of Proposed Rulemaking IS ADOPTED.

336. IT IS FURTHER ORDERED that Part 64 of the Commission's Rules, 47 C.F.R. Part 64, is AMENDED as set forth in Appendix A. These rules shall become effective 90 days after publication in the Federal Register, except for the rules and requirements governing the rates and fees charged in connection with inmates held in jails, as discussed herein, which shall become effective 6 months after publication in the Federal Register, and the rules and requirements involving Paperwork Reduction Act burdens, as discussed herein, which will take effect immediately upon publication of Office of Management and Budget approval.

337. IT IS FURTHER ORDERED, that the prohibition against entering into new contracts, – or negotiating amendments to existing contracts, as discussed in Section IV.J, herein, shall take effect immediately upon publication of the Order in the Federal Register.

338. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Second Report and Order and Third Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis

[1130] *See* 5 U.S.C. § 603.

[1131] *See* 5 U.S.C. § 603(a).

and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

339. IT IS FURTHER ORDERED, that pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 C.F.R. §§ 1.4(b)(1) and 1.103(a), that this Second Report and Order and Third Further Notice of Proposed Rulemaking SHALL BE EFFECTIVE 30 days after publication of a summary thereof in the Federal Register except as noted otherwise above.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

The Federal Communications Commission amends 47 C.F.R. part 64, subpart FF as follows:

Subpart FF – INMATE CALLING SERVICES

1. Section 64.6000 is revised to read as follows:

§ 64.6000 Definitions

As used in this subpart:

a. *Ancillary Service Charge* means any charge Consumers may be assess for the use of Inmate Calling services that are not included in the per-minute charges assessed for individual calls. Ancillary Service Charges that may be charged include the following. All other Ancillary Service Charges are prohibited.

   1. *Automated Payment Fees* means credit card payment, debit card payment, and bill processing fees, including fees for payments made by interactive voice response (IVR), web, or kiosk;

   2. *Fees for Single-Call and Related Services* means billing arrangements whereby an Inmate's collect calls are billed through a third party on a per-call basis, where the called party does not have an account with the Provider of Inmate Calling Services or does not want to establish an account;

   3. *Live Agent Fee* means a fee associated with the optional use of a live operator to complete Inmate Calling Services transactions;

   4. *Paper Bill/Statement Fees* means fees associated with providing customers of Inmate Calling Services an optional paper billing statement;

   5. *Third-Party Financial Transaction Fees* means the exact fees, with no markup, that Providers of Inmate Calling Services are charged by third parties to transfer money or process financial transactions to facilitate a Consumer's ability to make account payments via a third party.

b. *Authorized Fee* means a government authorized, but discretionary, fee which a Provider must remit to a federal, state, or local government, and which a Provider is permitted, but not required, to pass through to Consumers. An Authorized Fee may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation.

c. *Average Daily Population (ADP)* means the sum of all inmates in a facility for each day of the preceding calendar year, divided by the number of days in the year. ADP shall be calculated in accordance with sections 64.6010(e) and (f);

d. *Collect Calling* means an arrangement whereby the called party takes affirmative action clearly indicating that it will pay the charges associated with a call originating from an Inmate Telephone;

e. *Consumer* means the party paying a Provider of Inmate Calling Services;

f. *Correctional Facility or Correctional Institution* means a Jail or a Prison;

g. *Debit Calling* means a presubscription or comparable service which allows an Inmate, or someone acting on an Inmate's behalf, to fund an account set up though a Provider that can be used to pay for Inmate Calling Services calls originated by the Inmate;

h. *Flat Rate Calling* means a calling plan under which a Provider charges a single fee for an Inmate Calling Services call, regardless of the duration of the call;

i. *Inmate* means a person detained at a Jail or Prison, regardless of the duration of the detention;

j. *Inmate Calling Service* means a service that allows Inmates to make calls to individuals outside the Correctional Facility where the Inmate is being held, regardless of the technology used to deliver the service;

k. *Inmate Telephone* means a telephone instrument, or other device capable of initiating calls, set aside by authorities of a Correctional Facility for use by Inmates;

l. *International Calls* means calls that originate in the United States and terminate outside the United States;

m. *Jail* means a facility of a local, state, or federal law enforcement agency that is used primarily to hold individuals who are (1) awaiting adjudication of criminal charges; (2) post-conviction and committed to confinement for sentences of one year or less; or (3) post-conviction and awaiting transfer to another facility. The term also includes city, county or regional facilities that have contracted with a private company to manage day-to-day operations; privately-owned and operated facilities primarily engaged in housing city, county or regional inmates; and facilities used to detain individuals pursuant to a contract with U.S. Immigration and Customs Enforcement;

n. *Mandatory Tax or Mandatory Fee* means a fee that a Provider is required to collect directly from Consumers, and remit to federal, state, or local governments;

o. *Per-Call, or Per-Connection Charge* means a one-time fee charged to a Consumer at call initiation;

p. *Prepaid Calling* means a presubscription or comparable service in which a Consumer, other than an Inmate, funds an account set up through a Provider of Inmate Calling Services. Funds from the account can then be used to pay for Inmate Calling Services, including calls that originate with an Inmate;

q. *Prepaid Collect Calling* means a calling arrangement that allows an Inmate to initiate an Inmate Calling Services call without having a pre-established billing arrangement and also provides a means, within that call, for the called party to establish an arrangement to be billed directly by the Provider of Inmate Calling Services for future calls from the same Inmate;

r. *Prison* means a facility operated by a territorial, state, or federal agency that is used primarily to confine individuals convicted of felonies and sentenced to terms in excess of one year. The term also includes public and private facilities that provide outsource housing to other agencies such as the State Departments of Correction and the Federal Bureau of Prisons; and

facilities that would otherwise fall under the definition of a Jail but in which the majority of inmates are post-conviction or are committed to confinement for sentences of longer than one year;

s. *Provider of Inmate Calling Services, or Provider* means any communications service provider that provides Inmate Calling Services, regardless of the technology used;

t. *Site Commission* means any form of monetary payment, in-kind payment, gift, exchange of services or goods, fee, technology allowance, or product that a Provider of Inmate Calling Services or affiliate of an Provider of Inmate Calling Services may pay, give, donate, or otherwise provide to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide ICS, a governmental agency that oversees a correctional facility, the city, county, or state where a facility is located, or an agent of any such facility.

2. Section 64.6010 is replaced with a new Section 64.6010 to read as follows:

§ 64.6010 Inmate Calling Services Rate Caps

(a) No Provider shall charge, in the Jails it serves, a per-minute rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of:

(1) $0.22 in Jails with an ADP of 0-349;
(2) $0.16 in Jails with an ADP of 350-999; or
(3) $0.14 in Jails with an ADP of 1,000 or greater.

(b) No Provider shall charge, in any Prison it serves, a per-minute rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of:

(1) $0.11;

(c) No Provider shall charge, in the Jails it serves, a per-minute rate for Collect Calling in excess of:

Size and Type of Facility	Debit/Prepaid Rate Cap per MOU	Collect Rate Cap per MOU as of effective date	Collect Rate Cap per MOU as of July 1, 2017	Collect Rate Cap per MOU as of July 1, 2018
0-349 Jail ADP	$0.22	$0.49	$0.36	$0.22
350-999 Jail ADP	$0.16	$0.49	$0.33	$0.16
1,000+ Jail ADP	$0.14	$0.49	$0.32	$0.14

(d) No Provider shall charge, in the Prisons it serves, a per-minute rate for Collect Calling in excess of:

(1) $0.14 after the effective date of the Order;
(2) $0.13 after July 1, 2017; and
(3) $0.11 after July 1, 2018, and going forward.

(e) For purposes of these rules, the initial ADP shall be calculated, for all of the Correctional Facilities covered by an Inmate Calling Services contract, by summing the total number of inmates from January 1, 2015, through the effective date of the Order, divided by the number of days in that time period;

(f) In subsequent years, for all of the correctional facilities covered by an Inmate Calling Services contract, the ADP will be the sum of the total number of inmates from January 1st through December 31st divided by the number of days in the year and will become effective on January 31st of the following year.

3. Section 64.6020 is replaced with a new Section 64.6020 to read as follows:

§ 64.6020 Ancillary Service Charge

(a) No Provider shall charge an Ancillary Service Charge other than those permitted charges listed in Section 64.6000.
(b) No Provider shall charge a rate for a permitted Ancillary Service Charge in excess of:
  (1) For Automated Payment Fees—$3.00 per use;
  (2) For Single-Call and Related Services—the exact transaction fee charged by the third-party provider, with no markup, plus the adopted, per-minute rate;
  (3) For Live Agent Fee—$5.95 per use;
  (4) For Paper Bill/Statement Fee—$2.00 per use;
  (5) For Third-Party Financial Transaction Fees—the exact fees, with no markup that result from the transaction.

4. Section 64.6030 is revised to read as follows:

§ 64.6030 Inmate Calling Services Interim Rate Cap

No Provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. These interim rate caps shall sunset upon the effectiveness of the rates established in section 64.6010.

5. Section 64.6040 is revised to read as follows:

§ 64.6040 Rates for Calls Involving a TTY Device

(a) No Provider shall levy or collect any charge in excess of 25 percent of the applicable per-minute rate for TTY-to-TTY calls when such calls are associated with Inmate Calling Services.
(b) No Provider shall levy or collect any charge or fee for TRS-to-voice or voice-to-TTY calls.

6. Section 64.6060 is revised to read as follows:

§ 64.6060 Annual Reporting and Certification Requirement

(a) Providers must submit a report to the Commission, by April 1st of each year, regarding interstate, intrastate, and international Inmate Calling Services for the prior calendar year. The report shall be categorized both by facility type and size and shall contain:

(1) Current interstate, intrastate, and international rates for Inmate Calling Services;

(2) Current Ancillary Service Charge amounts and the instances of use of each;

(3) The Monthly amount of each Site Commission paid;

(4) Minutes of use, per-minute rates and ancillary service charges for video visitation services;

(5) The number of TTY-based Inmate Calling Services calls provided per facility during the reporting period;

(6) The number of dropped calls the reporting Provider experienced with TTY-based calls,; and

(7) The number of complaints that the reporting Provider received related to e.g., dropped calls, poor call quality and the number of incidences of each by TTY and TRS users.

(b) An officer or director of the reporting Provider must certify that the reported information and data are accurate and complete to the best of his or her knowledge, information, and belief.

7. Section 64.6070 is added to read as follows:

§ 64.6070 Taxes and Fees

(a) No Provider shall charge any taxes or fees to users of Inmate Calling Services, other than those permitted under section 64.6020, Mandatory Taxes, Mandatory Fees, or Authorized Fees.

8. Section 64.6080 is added to read as follows:

§ 64.6080 Per-Call, or Per-Connection Charges

No Provider shall impose a Per-Call or Per-Connection Charge on a Consumer.

9. Section 64.6090 is added to read as follows:

§ 64.6090 Flat-Rate Calling

No Provider shall offer Flat-Rate Calling for Inmate Calling Services.

10. Section 64.6100 is added to read as follows:

§ 64.6100 Minimum and Maximum Prepaid Calling Account Balances

(a) No Provider shall institute a minimum balance requirement for a Consumer to use Debit or Prepaid Calling.

(b) No Provider shall prohibit a consumer from depositing at least $50 per transaction to fund a Debit or Prepaid Calling account.

11. Section 64.6110 is added to read as follows:

§ 64.6110 Consumer Disclosure of Inmate Calling Services Rates

(a) Providers must clearly, accurately, and conspicuously disclose their interstate, intrastate, and international rates and Ancillary Service Charges to consumers on their websites or in another reasonable manner readily available to consumers.

APPENDIX B

List of Commenting Parties to the *Second FNPRM* in WC Docket No. 12-375[1]

Organization(s) Submitting Comments	Abbreviated Citation
ACLU of Idaho	ACLU Idaho
Adair County Sheriff's Office	Adair Cnty. Sheriff
Alabama PSC	Alabama PSC
Alabama Sheriffs Association	Ala. Sheriffs Assoc.
Alameda Co., CA Sheriff's Office	Alameda Cnty. Sheriff
Alliance of Baptists	Alliance of Baptists
American Bar Association	ABA
American Civil Liberties Union	ACLU
American Immigration Lawyers Association	AILA
American Jail Association	AJA
Andrew Lipman	Lipman
Arizona Community Colleges	AZ Community Colleges
Arizona Corporation Commission	ACC
Arizona Department of Corrections	ADC
Asian American Justice Center The Center for Media Justice Communications Workers of America Free Press The Leadership Conference on Civil and Human Rights National Association for the Advancement of Colored People National Council of La Raza National Hispanic Media Coalition National Organization for Women Foundation National Urban League New America Foundation's Open Technology Institute Public Knowledge United Church of Christ Office of Communications Inc.	The Phone Justice Commenters
Barnstable Co, MA Sheriff	Barnstable Cnty. Sheriff
Butler Co, PA Prison Board	Butler Cnty. Prison Board
California Department of Corrections and Rehabilitation	CDCR
California Immigrant Policy Center	CIPC
California State Association of Counties	CSAC
California State Sheriffs' Association	CSSA
Center on the Administration of Criminal Law	Center on the Admin. of Criminal Law
CenturyLink	CenturyLink
Chief Probation Officers of California	CPOC
Clackamas County Sheriff's Office	Clackamas Cnty. Sheriff

[1] We note that there were approximately 28 form letters from sheriffs filed in the docket, each providing an identical list of 25 ICS-related tasks that each sheriff's department handles and incurs costs to perform.

Clark County Sheriff's Office	Clark Cnty. Sheriff
Coconino County Children of Incarcerated Parents (CIP) Task Force	Coconino Cnty. CIP
Coconino County Sheriff's Office	Coconino Cnty. Sheriff
Columbia Legal Services	CLS
Combined Public Communications	CPC
Community Initiatives for Visiting Immigrants in Confinement	CIVIC
Community Justice Project	CJP
Campaign for Prison Phone Justice	Prison Phone Justice
Congressional Black Caucus	CBC
Congressman Tom Reed	Congressman Tom Reed
Congresswoman Bonnie Coleman	Congresswoman Bonnie Coleman
Consolidated Telecom	CTEL
Cook County, IL	Cook Cnty.
County of Santa Clara Department of Corrections	County of Santa Clara DOC
DeafCAN	DeafCAN
Delaware Co, PA	Delaware Co.
Deschutes County Sheriff's Office	Deschutes Cnty. Sheriff
DisAbility Rights Idaho	DisAbility Rights Idaho
Don Wood	Don Wood
Dr. Artika Tyner	Tyner
EagleTel	EagleTel
Elmore County Sheriff's Office	Elmore Cnty. Sheriff
Embracing Lambs Ministries	Embracing Lambs
Emerald Correctional Management	Emerald
Florida Sheriffs Association	FSA
Georgia DOC	GA DOC
Global Tel*Link Corporation	GTL
Hampden Co, MA Sheriff	Hampden Cnty. Sheriff
Helping Educate to Advance the Rights of the Deaf	HEARD
Hemphill Co, TX Judge	Hemphill Cnty. Judge
Human Rights Defense Center	HRDC
ICSolutions	ICSolutions
Idaho Department of Correction	Idaho DOC
Idaho Sheriffs' Association	ISA
Illinois Campaign for Prison Phone Justice	Illinois Campaign
Immigration Equality	Immigration Equal.
Imperial Co, CA Sheriff's Office	Imperial Cnty. Sheriff
Indiana Utility Regulatory Commission	Indiana Commission
Interfaith Coalition for Immigrant Rights	Interfaith Coalition
Iowa CURE	CURE
Jail Education Solutions	JES
Jefferson County Sheriff's Office	Jefferson Cnty. Sheriff
Johnson Co, IA Sheriff's Office	Johnson Cnty. Sheriff
King George County, VA	King George Cnty.
Kansas Department of Corrections	Kansas DOC
Kern Co, CA Sheriff's Office	Kern Cnty. Sheriff

Lake County Sheriff	Lake Cnty. Sheriff
Lancaster Co., NE Department of Corrections	Lancaster DOC
Lattice	Lattice
The Leadership Conference on Civil and Human Rights	The Leadership Conference
Legal Center for People with Disabilities and Older People Colorado Developmental Disabilities Council	Legal Center and CODDC
Legal Services for Prisoners with Children	LSPC
Los Angeles County, CA Sheriff's Department	LA Sheriff's Department
Louisiana Department of Public Safety & Corrections	LA DOC
Marion County Detention Center	Marion Cnty. Det. Ctr.
Marion Co, IN Sheriff	Marion Cnty. Sheriff
Martha Wright, *et. al*. The D.C. Prisoners' Legal Services Project, Inc. Citizens United for Rehabilitation of Errants Prison Policy Initiative The Campaign for Prison Phone Justice	Wright Petitioners
Michael S. Hamden	Hamden
Michigan Citizens for Prison Reform	MICPR
Minority Media and Telecommunications Council	MMTC
Mississippi Department of Corrections	MDOC
Missouri State Public Defender System	Mo. Pub. Defender Sys.
MMTC and Rainbow PUSH	MMTC
Montana Department of Corrections	Montana DOC
Moultrie County Sheriff's Office	Moultrie Cnty. Sheriff
National Association of Regulatory Utility Commissioners	NARUC
National Association of State Utility Consumer Advocates	NASUCA
National Association of the Deaf Telecommunications for the Deaf and Hard of Hearing, Inc. Deaf and Hard of Hearing Consumer Advocacy Network Association of Late-Deafened Adults, Inc. Hearing Loss Association of America California Coalition of Agencies Serving the Deaf and Hard of Hearing Cerebral Palsy and Deaf Organization	NAD
National Consumers League	NCL
National Disability Rights Network	NDRN
National Lawyers Guild	NLG
National Sheriffs' Association	NSA
National State Attorneys General Program	NSAG
Network Communications International Corp.	NCIC
Nevada Department of Corrections	NDOC
New Jersey Advocates for Immigrant Detainees	NJAID/NYU IRC

New York University School of Law Immigrant Rights Clinic	
New Jersey Institute for Social Justice	NJ ISJ
A New Way of Life Re-Entry Program	ANWOL
Ohio Department of Rehabilitation and Correction	ODRC
Oklahoma Department of Corrections	Oklahoma DOC
Open Access Connections	OAC
Orange Co, CA Sheriff's Department	Orange Cnty. Sheriff
Oregon Department of Corrections (*Ex Parte* Letter)	Oregon DOC (Ex Parte Letter)
Oregon State Sheriffs' Association	OSSA
Pennsylvania Public Utility Commission	PA PUC
Pay Tel Communications, Inc.	Pay Tel
Praeses LLC	Praeses
Prison Law Office	PLO
Prisoners Legal Services of Massachusetts	PLS
Prison Policy Initiative	PPI
Promise of Justice Initiative	PJI
Protection and Advocacy for People with Disabilities, Inc.	P&A
Public Service Commission of the District of Columbia	DC PSC
Rev. Craig Scott	Scott
Rhode Island Institute of Technology Deaf and Hard of Hearing Students	RIITDHHS
Riverside Co, CA Sheriff's Association	RCSA
Rochester Institute of Technology Student Researchers National Technical Institute for the Deaf	RIT/NTID Student Researchers
Rock County Sheriff	Rock Cnty. Sheriff
Rosen Bien Galvan & Grunfeld LLP	RBGG
Routt County Sheriff's Office	Routt Cnty. Sheriff
San Bernardino Co, CA Sheriff's Department	San Bernardino Cnty. Sheriff
San Diego County Sheriff's Department	San Diego Cnty. Sheriff
Santa Barbara Co, CA Sheriff	Santa Barbara Cnty. Sheriff
Securus Technologies, Inc.	Securus
Shasta Co, CA Sheriff's Office	Shasta Cnty. Sheriff
Sophia Lewis	Lewis
South Dakota Department of Corrections	SDDOC
Stephen A. Raher	Raher
Taylor Co, TX Judge	Taylor Cnty. Judge
TechFreedom	TechFreedom
Telmate, LLC	Telmate
Tennessee DOC	Tennessee DOC
Texas Civil Rights Project	TCRP
Texas Jail Project	Tex. Jail Project
US Conference of Catholic Bishops	USCCB
Thurston County Sheriff's Office	Thurston Cnty. Sheriff
Ventura Co, CA Sheriff's Office	VCSO
Vera Institute of Justice	Vera
Verizon and Verizon Wireless	Verizon
Virginia Association of Regional Jails	VARJ

Washington Lawyers' Committee	WLC
Williamson Co, TX Sheriff	Williamson Cnty. Sheriff

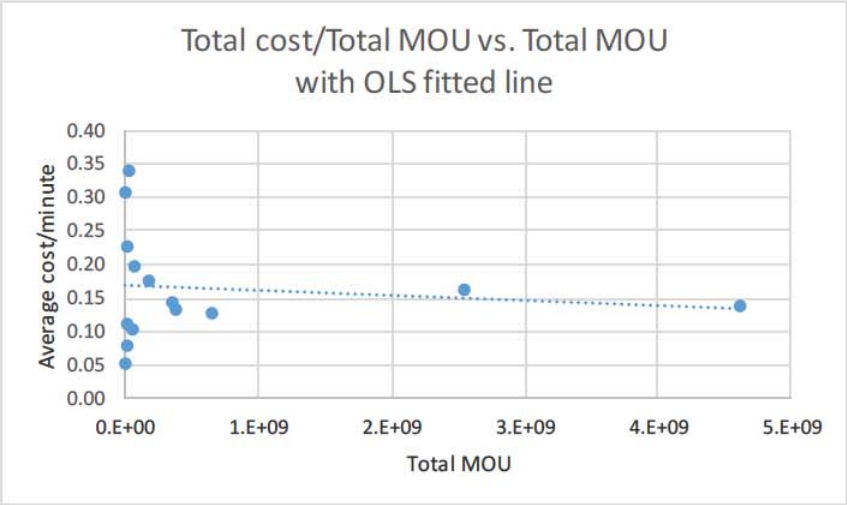
APPENDIX C

Staff Analysis Investigating Whether the ICS Cost Data Show Economies of Scale in the Production of Calls or Call Minutes of Use

This note describes staff analysis that found that there are economies of scale, but that economies of scale in the production of calls or call minutes of use were not reflected in the ICS provider cost data submitted by ICS providers. This analysis suggests that the reported ICS data do not reflect the actual economic costs of supply.

Average or unit costs are total costs divided by total units produced. For example, if a firm produced 100 minutes of use (MOU) for a total cost of $100, then the average cost of an MOU would be $1 (= $100/100). Economies of scale arise when average costs fall as production increases. For example, a production process would have economies of scale over the production range of 100 to 1,000 MOU if the average cost of 100 MOU was $1, and the average cost of producing 1,000 MOU fell to $0.90.[1]

We investigated the extent to which the ICS cost data show economies of scale in the production of calls, paid MOU and total MOU (that is, paid and unpaid MOU). Fourteen providers reported their costs and output levels, in each case for the two years of 2012 and 2013. The relationship between these providers' average cost (excluding site commissions) over those years and total MOU is plotted in the chart below, with a fitted line from a single variable ordinary least squares (OLS) regression also provided. Casual inspection suggests that if there is a relationship between average costs, it is weak, with other factors playing a much more important role.



To more formally investigate the extent of economies of scale in the production of calls or call minutes of use in this data we ran nine OLS regressions of average cost against (1) calls, (2) paid MOU, and (3) total MOU. In six regressions, we had 28 observations: two observations, one for 2012 and another for 2013, for each of the fourteen responding ICS providers. The first three of these regressions were single variable regressions: average cost was regressed against (1) calls, (2) paid MOU, and (3) total MOU. We added a year dummy-variable to the second three regressions (which might account for any

[1] *See, e.g.*, http://www.economist.com/node/12446567 (viewed July 17, 2015).

particular differences that occurred between one year and the next that affected all providers). The last three regressions had 14 observations (one for each responding ICS provider). It regressed average costs for 2012 and 2013 combined against the sum for 2012 and 2013 respectively of calls, paid MOU, and total MOU.

None of our 9 regressions provided any indication of the presence of economies of scale in the production of calls or call minutes of use. Of the 9 regressions, none resulted in an R^2 statistic, which is a loose measure of the regressions explanatory power,[2] that could be said to explain more than approximately four percent of the variation in average cost. While we found in all of our regressions a negative coefficient with respect to our measure of output (calls, paid MOU, total MOU), which would indicate the presence of economies of scale in the production of calls or minutes of use, in no case was this coefficient of an economically meaningful size, or statistically distinguishable from noise even at unconventionally low levels of statistical confidence.

The results of our 9 regressions are produced below.

```
. reg  costpercall calls

      Source |       SS       df       MS              Number of obs =      28
-------------+------------------------------           F(  1,    26) =    0.38
       Model |  3.33445778     1  3.33445778           Prob > F      =  0.5454
    Residual |  230.917898    26   8.8814576           R-squared     =  0.0142
-------------+------------------------------           Adj R-squared = -0.0237
       Total |  234.252355    27  8.67601316           Root MSE      =  2.9802

------------------------------------------------------------------------------
 costpercall |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |  -6.58e-09   1.07e-08    -0.61   0.545    -2.87e-08    1.55e-08
       _cons |   2.663811   .6312646     4.22   0.000     1.366228    3.961394
------------------------------------------------------------------------------
```

```
. reg  costpermin_paid paid_mou

      Source |       SS       df       MS              Number of obs =      28
-------------+------------------------------           F(  1,    26) =    1.19
       Model |  .010464333     1  .010464333           Prob > F      =  0.2856
    Residual |  .228862284    26  .008802396           R-squared     =  0.0437
-------------+------------------------------           Adj R-squared =  0.0069
       Total |  .239326617    27  .008863949           Root MSE      =  .09382

------------------------------------------------------------------------------
costpermin~d |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
    paid_mou |  -3.03e-11   2.77e-11    -1.09   0.286    -8.73e-11    2.68e-11
       _cons |   .1986427   .0198197    10.02   0.000     .1579028    .2393826
------------------------------------------------------------------------------
```

```
. reg  costpermin_all mou

      Source |       SS       df       MS              Number of obs =      28
-------------+------------------------------           F(  1,    26) =    0.41
       Model |  .003043581     1  .003043581           Prob > F      =  0.5298
    Residual |  .195143193    26  .007505507           R-squared     =  0.0154
-------------+------------------------------           Adj R-squared = -0.0225
       Total |  .198186775    27  .007340251           Root MSE      =  .08663

------------------------------------------------------------------------------
costpermin~l |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
         mou |  -1.61e-11   2.53e-11    -0.64   0.530    -6.82e-11    3.59e-11
       _cons |   .1715968   .0183695     9.34   0.000     .1338376    .2093559
------------------------------------------------------------------------------
```

[2] *See* Econometric Analysis by William H. Greene, 2nd Ed. Pp. 152-153.

```
. reg  costpercall calls  year

      Source |       SS       df       MS              Number of obs =      28
-------------+------------------------------           F(  2,    25) =    0.19
       Model |  3.50818895     2  1.75409447           Prob > F      =  0.8281
    Residual |  230.744166    25  9.22976666           R-squared     =  0.0150
-------------+------------------------------           Adj R-squared = -0.0638
       Total |  234.252355    27  8.67601316           Root MSE      =  3.0381

------------------------------------------------------------------------------
 costpercall |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |  -6.59e-09   1.10e-08    -0.60   0.553    -2.91e-08    1.60e-08
        year |   .1575404   1.148281     0.14   0.892    -2.207389     2.52247
       _cons |   -314.386   2310.916    -0.14   0.893    -5073.806    4445.034
------------------------------------------------------------------------------
```

```
. reg  costpermin_paid paid_mou year

      Source |       SS       df       MS              Number of obs =      28
-------------+------------------------------           F(  2,    25) =    0.57
       Model |   .0105143     2   .00525715           Prob > F      =  0.5703
    Residual |  .228812316    25  .009152493           R-squared     =  0.0439
-------------+------------------------------           Adj R-squared = -0.0326
       Total |  .239326617    27  .008863949           Root MSE      =  .09567

------------------------------------------------------------------------------
costpermin~d |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
    paid_mou |  -3.02e-11   2.83e-11    -1.07   0.296    -8.85e-11    2.81e-11
        year |  -.0026722   .0361653    -0.07   0.942    -.0771561    .0718117
       _cons |   5.576408   72.78256     0.08   0.940    -144.3221    155.4749
------------------------------------------------------------------------------
```

```
. reg  costpermin_all mou year

      Source |       SS       df       MS              Number of obs =      28
-------------+------------------------------           F(  2,    25) =    0.19
       Model |  .003043877     2  .001521938           Prob > F      =  0.8241
    Residual |  .195142898    25  .007805716           R-squared     =  0.0154
-------------+------------------------------           Adj R-squared = -0.0634
       Total |  .198186775    27  .007340251           Root MSE      =  .08835

------------------------------------------------------------------------------
costpermin~l |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
         mou |  -1.61e-11   2.58e-11    -0.62   0.538    -6.93e-11    3.71e-11
        year |  -.0002054   .0333988    -0.01   0.995    -.0689915    .0685807
       _cons |   .5849464   67.21494     0.01   0.993    -137.8468    139.0167
------------------------------------------------------------------------------
```

```
. reg  costpercall calls

      Source |       SS       df       MS              Number of obs =      14
-------------+------------------------------           F(  1,    12) =    0.16
       Model |  1.54340157     1  1.54340157           Prob > F      =  0.6918
    Residual |   112.32004    12  9.36000334           R-squared     =  0.0136
-------------+------------------------------           Adj R-squared = -0.0686
       Total |  113.863442    13  8.75872628           Root MSE      =  3.0594

------------------------------------------------------------------------------
 costpercall |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |  -3.17e-09   7.80e-09    -0.41   0.692    -2.02e-08    1.38e-08
       _cons |   2.631169   .9165659     2.87   0.014     .6341433    4.628194
------------------------------------------------------------------------------
```

```
. reg  costpermin_paid paid_mou

      Source |       SS       df       MS              Number of obs =      14
-------------+------------------------------           F(  1,    12) =    0.54
       Model |  .00452977     1  .00452977           Prob > F      =  0.4777
    Residual | .101186637    12  .00843222           R-squared     =  0.0428
-------------+------------------------------           Adj R-squared = -0.0369
       Total | .105716406    13 .008132031           Root MSE      =  .09183

------------------------------------------------------------------------------
costpermin~d |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
    paid_mou |  -1.41e-11   1.92e-11    -0.73   0.478    -5.60e-11    2.78e-11
       _cons |   .1952585   .0274379     7.12   0.000     .1354765    .2550405
------------------------------------------------------------------------------

. reg  costpermin_all mou

      Source |       SS       df       MS              Number of obs =      14
-------------+------------------------------           F(  1,    12) =    0.16
       Model | .001171966     1 .001171966           Prob > F      =  0.6921
    Residual |  .08544414    12 .007120345           R-squared     =  0.0135
-------------+------------------------------           Adj R-squared = -0.0687
       Total | .086616106    13 .006662777           Root MSE      =  .08438

------------------------------------------------------------------------------
costpermin~l |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
         mou |  -7.08e-12   1.74e-11    -0.41   0.692    -4.51e-11    3.09e-11
       _cons |   .1684279   .0253072     6.66   0.000     .1132882    .2235676
------------------------------------------------------------------------------
```

APPENDIX D

Regressing Potential Cost Drivers on Providers' Total Costs with and without Commissions

Introduction

We analyzed the data submitted to us by fourteen providers of inmate calling services (ICS) covering two years of historical data[1] to gain an understanding of the determinants of the costs in this business. These fourteen firms represent most of the important entities that provide ICS in the United States, although not every provider. The statistical analysis of the data is informative to the extent that the data we analyzed are representative for the industry, and to the extent the data allow controlling for other effects that may disguise cost relationships.

Our approach regresses total costs on various partitions of variables we believe to be the primary cost drivers in the ICS supply. We chose this approach because the limited data set available to us restricts our ability to formulate an analytical model of costs.[2] We found that the results of our regressions are fairly stable across our many specifications and that the goodness of fit of each regression is very high.

Such strong results could reasonably be used to draw inferences about the determinants of costs in the ICS industry in the absence of any structural changes not modeled. However, here we hesitate to rely too much on our results as they may in part reflect too few degrees of freedom in our analysis because of the relatively small data set.

The variables used in the regressions are given in the table immediately below.[3]

Variables Used in Regression

Variable	Definition
cost	Total annual (or biennial) cost of the provider (includes commissions paid).
cost_noncomm	Total annual (or biennial) cost (net of commissions paid).
serves_pri~n	Equal to 1 if the firm serves at least one prison, and zero otherwise.
jail_099	Number of jails served with an ADP of 99 or less.
jail_100349	Number of jails served with an ADP of between 100 and 349.
jail_350999	Number of jails served with an ADP of between 350 and 999.
facilit~1000	Number of facilities (jails and prisons) served with an ADP greater than 1000.

[1] We also collected one year of partial projected data and partial historical data, but our analysis, to avoid any biases in the providers reported projections, relied on the two years of historical data.

[2] For example, two years of data do not allow us to control for substantial ICS investments that are incurred at different points in time, and are used over many years (though such investments are not directly related to the marginal cost of calls or minutes). Without a structural model, out of sample predictions carry more risk, and it is difficult to test for causation.

[3] Average daily population (ADP) estimates were based on contracts, not institutions, and the numbers of facilities by type (jail or prison) were inferred.

calls	Yearly number of calls supplied by the firm.
mou_total	Yearly number of minutes supplied (paid and unpaid).
mou_unpaid	Yearly number of unpaid minutes of call supplied.
mou_tot_jail	Yearly number of minutes supplied (paid and unpaid) in jails.
mou_tot_pris	Yearly number of minutes supplied (paid and unpaid) in prisons.
mou_debit	Yearly number of debit minutes supplied.
mou_prepaid	Yearly number of prepaid minutes supplied.
mou_collect	Yearly number of collect minutes supplied.
yeardum	Binary variable, equal to 1 for 2013, zero otherwise.

Results

Presented below are results of a relatively large set of regressions (developed by running variations of likely cost drivers against providers' total costs, subject to the constraint of maintaining a minimal number of degrees of freedom).[4] Instead of discussing the results of each regression, we present below some of the implications that we believe can be generally inferred from the results.

1. The goodness of fit of regressions aimed at explaining costs with and without commissions is similar.
2. The type and the number of minutes of use and the number of calls are statistically significant in most of the specifications.
3. The coefficients associated with minutes of use across our various specifications are greater than the expected marginal cost of a minute of call.[5]

[4] When taking the approach of running a large number of regressions, it is inappropriate to use the regressions' statistical properties to identify a preferred regression (for example, by choosing the regression with the highest R-squared) and then to rely on that regression above others to explain the data. Doing this is called "fishing" and is inconsistent with the underlying statistical analysis. In particular, the more regressions one runs, the more likely a given regression will look particularly good according to some statistical criteria, but with more regressions it is also increasingly likely that the identified "best" regression is simply a statistical accident. Nonetheless, when it is difficult to identify the true (in this case, cost) model, a "try and see" approach can be used to provide general inferences from the data set. With that understanding, we took this approach and did not rely on any single regression to explain the data but rather looked at the group of regressions for general inferences.

[5] While the underlying resource costs of all types of MOU are likely to be the same and close to zero (see discussion in main text), it may be possible that some providers purchase some calling services wholesale. For those purchases, the wholesale price is (from the perspective of the provider) the marginal cost of those minutes. If such wholesaling is undertaken between divisions of the same firm or affiliated firms, then such costs do not reflect the true marginal cost faced by the parent entity and should not be reported as such. Moreover, the record does not suggest that the purchasing of wholesaling from independent third parties, if it occurs, is common. Similarly, it is possible that in supplying certain paid MOU the provider incurs finance fees based on a percent of revenues, which could also appear as per-minute cost of supply (for example, if the provider charges end users on a per-minute basis). In most cases, however, the regressions' MOU costs are substantially higher than what would be expected from usual finance fees, which makes it unlikely that finance fees could explain the very high per-minute marginal costs found in our regressions. For example, in Table 1 the cost of an MOU is over $0.12 implying an average per-minute rate charged to inmates of more than $2.40 given a 5% finance charge (5% of $2.40 equals $0.12), which is at the upper end for credit card fees. *See, e.g.*, Robin A. Prager *et al.*, *Interchange Fees and Payment Card Networks: Economics, Industry Developments, and Policy Issues* 12 (Federal Reserve Board, Finance and Economics

(continued….)

4. In some specifications, the differences between the estimated coefficients associated with different types of minutes of use are greater than expected.

5. The goodness of fit of all regressions is remarkably high. Given the preceding points, this suggests several, not mutually exclusive possibilities, including that: (1) total costs may not be driven by underlying resource costs, but rather by intracompany (transfer) pricing, and/or calling services that are purchased in the wholesale market on a per-minute basis or due to finance fees (in all cases, directly distorting final prices relative to costs, as well as creating a risk of further distortion through inefficient double marginalization); (2) the just listed wholesale charges may be different across different types of calls, again potentially contrary to underlying costs, and hence inefficient; and (3) there is a surprising degree of industry cohesion in estimating costs and/or setting of input prices.

Table 1 (2012 and 2013)

```
                                                      Number of obs =      28
                                                     R-squared     =  0.9995

                              (Std. Err. adjusted for 14 clusters in carrier)
------------------------------------------------------------------------------
             |               Robust
        cost |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
serves_pri~n |  -12805.23    6666308    -0.00   0.998    -1.44e+07    1.44e+07
    jail_099 |   19810.26   11221.19     1.77   0.101    -4431.653    44052.16
 jail_100349 |  -6457.246   150711.2    -0.04   0.966    -332048.9    319134.4
 jail_350999 |  -5053.754   40423.75    -0.13   0.902    -92383.95    82276.44
facilit~1000 |  -8305.125   89734.16    -0.09   0.928      -202164    185553.7
       calls |   1.420021   .7446188     1.91   0.079    -.1886304    3.028672
   mou_total |   .1259728   .0151328     8.32   0.000     .0932805    .1586652
     yeardum |   -1616141    1482186    -1.09   0.295     -4818210     1585928
       _cons |    1608211    1995117     0.81   0.435     -2701977     5918398
------------------------------------------------------------------------------
```

(Continued from previous page)
Discussion Series Working Paper No. 2009-23, June 2009), *available at* http://www.federalreserve.gov/pubs/feds/2009/200923/200923pap.pdf (indicating interchange fees on credit cards do not commonly exceed 2%). This is high even by the standards of inmate calling services.

Table 2 (2012 and 2013)

```
                                                   Number of obs =      28
                                                    R-squared     =  0.9993

------------------------------------------------------------------------------
             |               Robust
cost_noncomm |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
serves_pri~n |   -3353757    5474236    -0.61   0.551    -1.52e+07     8472611
    jail_099 |   7689.422   5137.307     1.50   0.158    -3409.055     18787.9
 jail_100349 |   21962.32   105493.8     0.21   0.838    -205943.2    249867.8
 jail_350999 |   23744.29   34126.62     0.70   0.499     -49981.8    97470.38
facilit~1000 |  -47869.06   67964.48    -0.70   0.494    -194697.4    98959.28
       calls |   .6361073   .6028355     1.06   0.311    -.6662397    1.938454
   mou_total |   .1121533   .0142027     7.90   0.000     .0814701    .1428364
     yeardum |   41838.63    1107667     0.04   0.970     -2351131     2434808
       _cons |  -998384.5    1256620    -0.79   0.441     -3713147     1716378
------------------------------------------------------------------------------
```

Table 3 (2012 and 2013)

```
                                                   Number of obs =      28
                                                    R-squared     =  0.9991

------------------------------------------------------------------------------
             |               Robust
        cost |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |   .8917604   .3719596     2.40   0.032     .0881905     1.69533
   mou_total |   .1659513   .0320191     5.18   0.000     .0967783    .2351242
     yeardum |    -767580    1357153    -0.57   0.581     -3699530     2164370
       _cons |    2279687    1226843     1.86   0.086    -370744.9     4930119
------------------------------------------------------------------------------
```

Table 4 (2012)

```
                                                   Number of obs =      14
                                                    R-squared     =  0.9997

------------------------------------------------------------------------------
             |               Robust
        cost |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |   1.196998   .0432811    27.66   0.000     1.103495    1.290501
   mou_total |   .1404063   .0040811    34.40   0.000     .1315898    .1492229
       _cons |    1561185   914186.5     1.71   0.111    -413794.5     3536165
------------------------------------------------------------------------------
```

Table 5 (2013)

```
                                                      Number of obs =      14
                                                       R-squared     =  0.9992

------------------------------------------------------------------------------
             |               Robust
        cost |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |  -1.756581   1.000776    -1.76   0.103    -3.918625     .405463
   mou_total |   .3693364   .0777123     4.75   0.000     .2014492    .5372235
       _cons |    3639938    1476837     2.46   0.028     449426.1     6830449
------------------------------------------------------------------------------
```

Table 6 (2012 and 2013)

```
                                                      Number of obs =      28
                                                       R-squared     =  0.9924

------------------------------------------------------------------------------
             |               Robust
cost_noncomm |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |  -.8540865   .9490734    -0.90   0.385    -2.904435    1.196262
   mou_total |   .2116107   .0820291     2.58   0.023     .0343976    .3888237
     yeardum |    1845944    1701970     1.08   0.298     -1830939     5522828
       _cons |   82512.68    1002496     0.08   0.936     -2083247     2248273
------------------------------------------------------------------------------
```

Table 7 (2012)

```
                                                      Number of obs =      14
                                                       R-squared     =  0.9987

------------------------------------------------------------------------------
             |               Robust
cost_noncomm |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |  -1.243446   .2411288    -5.16   0.000    -1.764374   -.7225193
   mou_total |   .2501968   .0211003    11.86   0.000     .2046124    .2957812
       _cons |  -37648.29   984834.6    -0.04   0.970     -2165254     2089958
------------------------------------------------------------------------------
```

Table 8 (2013)

```
                                                      Number of obs =      14
                                                       R-squared     =  0.9944

------------------------------------------------------------------------------
             |               Robust
cost_noncomm |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |  -5.045074   2.122649    -2.38   0.034    -9.630779   -.4593691
   mou_total |   .5293698   .1649299     3.21   0.007     .1730603    .8856792
       _cons |    3632162    2226817     1.63   0.127     -1178583     8442907
------------------------------------------------------------------------------
```

Table 9 (2012 and 2013)

```
                                                      Number of obs =      28
                                                       R-squared     =  0.9995

------------------------------------------------------------------------------
             |               Robust
        cost |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
serves_pri~n |   1541.192    6896428     0.00   1.000    -1.49e+07    1.49e+07
    jail_099 |   19966.35   12273.33     1.63   0.128    -6548.576    46481.27
 jail_100349 |  -7020.943   154890.3    -0.05   0.965    -341641.2    327599.3
 jail_350999 |  -5224.226   41950.17    -0.12   0.903    -95852.07    85403.62
facilit~1000 |  -7848.194   92831.57    -0.08   0.934    -208398.6    192702.2
       calls |   1.407564   .7975511     1.76   0.101      -.31544    3.130569
mou_tot_jail |   .1276696   .0283835     4.50   0.001     .0663507    .1889885
mou_tot_pris |   .1259657   .0156817     8.03   0.000     .0920874    .1598441
     yeardum |   -1618278    1521115    -1.06   0.307     -4904448     1667892
       _cons |    1596735    2105603     0.76   0.462     -2952144     6145614
------------------------------------------------------------------------------
```

Table 10 (2012 and 2013)

```
                                                      Number of obs =      28
                                                       R-squared     =  0.9994

------------------------------------------------------------------------------
             |               Robust
cost_noncomm |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
serves_pri~n |   -3661856    4750270    -0.77   0.455    -1.39e+07     6600478
    jail_099 |    3667.04    2535.26     1.45   0.172    -1810.056    9144.136
 jail_100349 |   38076.88   100637.7     0.38   0.711    -179337.6    255491.3
 jail_350999 |   27824.18   28949.61     0.96   0.354    -34717.65       90366
facilit~1000 |  -59157.62   66301.48    -0.89   0.388    -202393.3    84078.01
       calls |   .9609909   .6170194     1.56   0.143    -.3719984     2.29398
mou_tot_jail |   .0668956   .0173708     3.85   0.002     .0293682    .1044229
mou_tot_pris |   .1121612   .0101512    11.05   0.000     .0902308    .1340917
     yeardum |   50202.97    1141847     0.04   0.966     -2416608     2517014
       _cons |    -681211    1356842    -0.50   0.624     -3612491     2250069
------------------------------------------------------------------------------
```

Table 11 (2012 and 2013)

```
                                                   Number of obs =      28
                                                        R-squared     =  0.9995

------------------------------------------------------------------------------
             |               Robust
        cost |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
serves_pri~n |    2372224    7312256     0.32   0.751    -1.34e+07    1.82e+07
    jail_099 |   24737.66   10470.57     2.36   0.034     2117.358    47357.95
 jail_100349 |   1085.382   195472.7     0.01   0.996    -421207.7    423378.5
 jail_350999 |   -17394.2   45015.01    -0.39   0.705    -114643.2    79854.81
facilit~1000 |   -6038.66   74623.59    -0.08   0.937    -167253.1    155175.8
       calls |   1.610104    1.17059     1.38   0.192    -.9188011    4.139009
   mou_debit |   .1377522   .0478175     2.88   0.013     .0344487    .2410557
 mou_prepaid |   .0973393   .0420371     2.32   0.038     .0065237    .1881549
 mou_collect |   .0714781    .099243     0.72   0.484    -.1429234    .2858795
  mou_unpaid |   .1729149   .4821641     0.36   0.726    -.8687373    1.214567
     yeardum |   -1300389    1321316    -0.98   0.343     -4154918     1554140
       _cons |   905759.4    1513655     0.60   0.560     -2364293     4175812
------------------------------------------------------------------------------
```

Table 12 (2012 and 2013)

```
                                                   Number of obs =      28
                                                        R-squared     =  0.9994

------------------------------------------------------------------------------
             |               Robust
cost_noncomm |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
serves_pri~n |   -5940844    5361548    -1.11   0.288    -1.75e+07     5642076
    jail_099 |   4525.512   4744.738     0.95   0.358    -5724.872     14775.9
 jail_100349 |  -3113.544   129181.2    -0.02   0.981    -282192.5    275965.4
 jail_350999 |   36596.53   33378.45     1.10   0.293    -35513.23    108706.3
facilit~1000 |  -35384.04   58361.89    -0.61   0.555    -161467.2    90699.16
       calls |   .6351679   .7436227     0.85   0.408    -.9713313    2.241667
   mou_debit |   .0693736   .0289561     2.40   0.032     .0068178    .1319294
 mou_prepaid |   .1265592   .0233191     5.43   0.000     .0761813     .176937
 mou_collect |   .1173732   .0542328     2.16   0.050     .0002103    .2345361
  mou_unpaid |   .2148266   .2777769     0.77   0.453    -.3852739    .8149271
     yeardum |  -125780.9    1012148    -0.12   0.903     -2312394     2060832
       _cons |  -688140.3    1224692    -0.56   0.584     -3333927     1957646
------------------------------------------------------------------------------
```

Table 13 (2012 and 2013)

```
                                                  Number of obs =      28
                                                       R-squared     =  0.9994

------------------------------------------------------------------------------
             |               Robust
        cost |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |   1.588349   .3017861     5.26   0.000     .9363794    2.240318
   mou_debit |   .1324854    .052929     2.50   0.026     .0181392    .2468316
 mou_prepaid |   .0979836   .0269353     3.64   0.003     .0397933    .1561738
 mou_collect |   .0761933   .0524721     1.45   0.170    -.0371658    .1895524
  mou_unpaid |   .4002066   .1387334     2.88   0.013     .1004914    .6999218
     yeardum |   -1221744    1479284    -0.83   0.424     -4417542     1974054
       _cons |    1343056    1146658     1.17   0.263     -1134147     3820259
------------------------------------------------------------------------------
```

Table 14 (2012)

```
                                                   Number of obs =      14
                                                      R-squared     =  0.9998

------------------------------------------------------------------------------
             |               Robust
        cost |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |   1.164745   1.045063     1.11   0.285    -1.092975    3.422466
   mou_debit |    .167213    .101072     1.65   0.122    -.0511397    .3855658
 mou_prepaid |   .1272223   .1155715     1.10   0.291    -.1224548    .3768993
 mou_collect |   .1475403   .0183989     8.02   0.000      .107792    .1872887
  mou_unpaid |   .2213866    .198455     1.12   0.285    -.2073494    .6501226
       _cons |    1647239    1097460     1.50   0.157    -723679.9     4018158
------------------------------------------------------------------------------
```

Table 15 (2013)

```
                                                       Number of obs =      14
                                                      R-squared     =  0.9997

------------------------------------------------------------------------------
             |               Robust
        cost |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |   .5477358   .8062864     0.68   0.509     -1.19414    2.289612
   mou_debit |   .2027767   .0519342     3.90   0.002     .0905798    .3149737
 mou_prepaid |   .1864311   .0776506     2.40   0.032     .0186772    .3541849
 mou_collect |   .1396013   .0477832     2.92   0.012      .036372    .2428306
  mou_unpaid |    .514795   .1179706     4.36   0.001      .259935     .769655
       _cons |    1059772    1538977     0.69   0.503     -2264986     4384530
------------------------------------------------------------------------------
```

Table 16 (2012 and 2013)

```
                                                  Number of obs =      28
                                                       R-squared     =  0.9989

------------------------------------------------------------------------------
             |               Robust
cost_noncomm |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |   .8279614    .289663     2.86   0.013     .2021825     1.45374
   mou_debit |   .0875878   .0613493     1.43   0.177    -.0449493    .2201249
 mou_prepaid |   .0660014    .030862     2.14   0.052    -.0006718    .1326747
 mou_collect |   .0267671   .0514261     0.52   0.611    -.0843322    .1378663
  mou_unpaid |    .674209   .1765008     3.82   0.002     .2929021    1.055516
     yeardum |     179217    1087623     0.16   0.872     -2170450     2528884
       _cons |   -2135498    1001365    -2.13   0.053     -4298815    27818.36
------------------------------------------------------------------------------
```

Table 17 (2012)

```
                                                  Number of obs =      14
                                                       R-squared     =  0.9994

------------------------------------------------------------------------------
             |               Robust
cost_noncomm |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |   .0211266   1.874759     0.01   0.991    -4.029044    4.071297
   mou_debit |   .1724891   .2013499     0.86   0.407     -.262501    .6074792
 mou_prepaid |    .128536   .2035391     0.63   0.539    -.3111835    .5682555
 mou_collect |   .1009729   .0633263     1.59   0.135    -.0358352    .2377809
  mou_unpaid |   .5430063   .3180275     1.71   0.111    -.1440503    1.230063
       _cons |  -926453.3    1098231    -0.84   0.414     -3299037     1446131
------------------------------------------------------------------------------
```

Table 18 (2013)

```
                                                  Number of obs =      14
                                                       R-squared     =  0.9995

------------------------------------------------------------------------------
             |               Robust
cost_noncomm |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
       calls |  -1.696438   .5893978    -2.88   0.013    -2.969755   -.4231215
   mou_debit |   .2238389   .0451809     4.95   0.000     .1262314    .3214464
 mou_prepaid |   .3046195    .056322     5.41   0.000     .1829432    .4262959
 mou_collect |   .1396257   .0416818     3.35   0.005     .0495777    .2296738
  mou_unpaid |   .6064488   .1074681     5.64   0.000     .3742782    .8386195
       _cons |  -148005.2   758582.1    -0.20   0.848     -1786822     1490812
------------------------------------------------------------------------------
```

APPENDIX E

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Second Notice of Proposed Rulemaking (Second FNPRM) in WC Docket 12-375.[2] The Commission sought written public comment on the proposals in the Second FNPRM, including comment on the IRFA.[3] The Commission did not receive comments directed toward the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[4]

A. Need for, and Objectives of, the Report and Order

2. The Report and Order (Order) adopted rules to ensure that interstate, intrastate, and international inmate calling service (ICS) rates in correctional institutions are just, reasonable, and fair. In the initiating *Second FNPRM*, the Commission sought information on issues related to the ICS market, payments to correctional facilities, ICS interstate and intrastate rates, ancillary fees, additional ways to promote competition, harmonization of state regulations, existing contracts, transition periods, accessible ICS, advanced ICS, periodic review, enforcement, and a cost/benefit analysis of reform proposals.[5]

3. In this Order, the Commission adopts comprehensive reform of all aspects of ICS to correct a market failure, foster market efficiencies, encourage ongoing state reforms and ensure that ICS rates and charges comply with the Communications Act. The Order does this by addressing interstate and intrastate ICS rates, payments to correctional facilities, ancillary service charges, connection and per-call charges, flat-rate charges, harmonization with state regulations, disability access, transition periods, periodic review, mandatory data collection, waivers, and consumer protection measures such as annual certification and reporting requirements. The reforms adopted in this Order apply to ICS offered in all correctional facility types and regardless of technology used to deliver the services.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

4. The Commission did not receive comments specifically addressing the rules and policies proposed in the IRFA.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

5. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[7] In addition, the term "small business" has the same meaning as

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[1] *See* 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170 (2014) (*Second ICS FNPRM*).

[3] *See id*. at 13235, App., para. 2.

[4] *See* 5 U.S.C. § 604.

[5] *See generally Second FNPRM*, 29 FCC Rcd 13170.

[6] 5 U.S.C. § 604(a)(3).

[7] 5 U.S.C. § 601(6).

the term "small business concern" under the Small Business Act.[8] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[9]

6. **Small Businesses**. Nationwide, there are a total of approximately 27.9 million small businesses, according to the SBA.[10]

7. **Wired Telecommunications Carriers**. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[11] According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.[12] Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1,000 employees or more.[13] Thus, under this size standard, the majority of firms can be considered small.

8. **Local Exchange Carriers (LECs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[14] According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[15] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[16] Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the Commission's action.

9. **Incumbent Local Exchange Carriers (incumbent LECs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[17] According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[18] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees

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[8] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[9] 15 U.S.C. § 632.

[10] *See* SBA, Office of Advocacy, "Frequently Asked Questions," available at http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf (last visited June 26, 2013).

[11] 13 C.F.R. § 121.201, NAICS code 517110.

[12] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110" (issued Nov. 2010).

[13] *See id*.

[14] 13 C.F.R. § 121.201, NAICS code 517110.

[15] *See* Trends in Telephone Service, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (Trends in Telephone Service).

[16] *See id*.

[17] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[18] *See* Trends in Telephone Service at Table 5.3.

and 301 have more than 1,500 employees.[19] Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the Commission's action.

10. The Commission has included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[20] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[21] The Commission has therefore included small incumbent LECs in this RFA analysis, although it emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

11. **Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[22] According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[23] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.[24] In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[25] In addition, 72 carriers have reported that they are Other Local Service Providers.[26] Of the 72, 70 have 1,500 or fewer employees and two have more than 1,500 employees.[27] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the Commission's action.

12. **Interexchange Carriers (IXCs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[28] According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of

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[19] *See id*.

[20] 5 U.S.C. § 601(3).

[21] *See* Letter from Jere W. Glover, Chief Counsel to Advocacy, SBA, to William E. Kennard, Chairman, FCC (filed May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); *see also* 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[22] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[23] *See* Trends in Telephone Service at Table 5.3.

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] *See id.*

[28] *See* 13 C.F.R. § 121.201, NAICS code 517110.

interexchange services.[29] Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.[30] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the Commission's action.

13. **Local Resellers**. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[31] According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.[32] Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.[33] Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by the Commission's action.

14. **Toll Resellers**. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[34] According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.[35] Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.[36] Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by the Commission's action.

15. **Other Toll Carriers**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[37] According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[38] Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.[39] Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the Commission's action.

16. **Payphone Service Providers (PSPs)**. Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[40] According to Commission data,[41] 535 carriers have reported that they are engaged in the provision of payphone services. Of these, an

[29] *See* Trends in Telephone Service at Table 5.3.

[30] *See id.*

[31] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[32] *See* Trends in Telephone Service at Table 5.3.

[33] *See id.*

[34] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[35] *See* Trends in Telephone Service at Table 5.3.

[36] *See id.*

[37] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[38] *See* Trends in Telephone Service at Table 5.3.

[39] *See id.*

[40] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[41] *See* Trends in Telephone Service at Table 5.3.

estimated 531 have 1,500 or fewer employees and four have more than 1,500 employees.[42] Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the Commission's action.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

17. *Recordkeeping, Reporting, and Certification*. The Order requires that all ICS providers file annually data, categorized by facility and size of facility, on their current intrastate, interstate, and international ICS rates.[43] The Commission also requires ICS providers to file their current ancillary service charge amounts and the instances of use of each.[44] ICS providers that make site commission payments must file the monthly amount of any such payment. The Commission requires ICS providers that provided video visitation services, either as a form of ICS or not,[45] during the reporting period, to file the minutes of use and per-minute rates for those services. As discussed in greater detail in the Disability Access section above, the Commission also requires that ICS providers report: (1) the number of disability-related calls they provided; (2) the number of problems they experienced with such calls; and (3) the number of complaints they received related to access to ICS by TTY and TRS users e.g., dropped calls, poor call quality and the number of incidences of each. The adopted reporting requirements will facilitate enforcement and act as an additional means of ensuring that ICS providers' rates and practices are just, reasonable, fair and in compliance with the Order.

18. The Commission delegates to the Wireline Competition Bureau (Bureau) the authority to adopt a template for submitting the required data, information, and certifications.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

19. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[46]

20. The Commission needs access to data that are comprehensive, reliable, sufficiently disaggregated, and reported in a standardized manner. The Order recognizes, however, that reporting obligations impose burdens on the reporting providers. Consequently, the Commission limits its collection to information that is narrowly tailored to meet its needs.

21. *Monitoring and Certification*. The Commission requires ICS providers to submit annually their data on their intrastate, interstate and international ICS rates, categorized by facility and size of facility. The Commission requires ICS providers to file their charges to consumers that are ancillary to providing the telecommunications piece of ICS. Providers are currently required to post their rates publicly on their websites. Thus, this additional filing requirement should entail minimal additional compliance burden, even for the largest ICS providers.

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[42] *See id.*

[43] *See supra* Section IV.K.

[44] *See id.*

[45] *See id*.

[46] 5 U.S.C. § 603(c)(1)–(c)(4).

22. The information on providers' websites is not certified and is generally not available in a format that will provide the per-call details that the Commission requires to meet its statutory obligations. Thus, the Commission further requires each provider to annually certify its compliance with other portions of the Order. The Commission finds that without a uniform, comprehensive dataset with which to evaluate ICS providers' rates, the Commission's analyses will be incomplete. The Commission recognizes that any information collection imposes burdens, which may be most keenly felt by smaller providers, but concludes that the benefits of having comprehensive data substantially outweigh the burdens. Additionally, some of these potential burdens, such as the filing of rates currently required to be posted on an ICS provider's website, are minimally burdensome.

23. *Data Collection*. The Commission is cognizant of the burdens of data collections, and has therefore taken steps to minimize burdens, including directing the Bureau to adopt a template for filing the data that minimizes burdens on providers by maximizing uniformity and ease of filing, while still allowing the Commission to gather the necessary data. The Commission also finds that without a uniform, comprehensive dataset with which to evaluate ICS providers' costs, its analyses will be incomplete, and its ability to establish ICS rate caps will be severely impaired. The Commission thus concludes that requiring ICS providers to report this cost data appropriately balances any burdens of reporting with the Commission's need for the data required to carry out its statutory duties.

F. Report to Congress

The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[47] In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.[48]

[47] 5 U.S.C. § 801(a)(1)(A).

[48] *See id.* § 604(b).

APPENDIX F

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Federal Communications Commission (Commission) has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Third Further Notice of Proposed Rulemaking (Third Further Notice). Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Third Further Notice. The Commission will send a copy of the Third Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the Third Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Notice

2. In this Third Further Notice, the Commission seeks comment on additional measures it could take to ensure that interstate and intrastate inmate calling service (ICS) are provided consistent with the statute and public interest and the Commission's authority to implement these measures. The Commission believes that additional action on ICS will promote competition and in the marketplace and allow ICS providers to better serve inmates with the benefits of technological advancements in the ICS industry while still ensuring the critical security needs of correctional facilities of various sizes. Specifically, the Third Further Notice seeks comment on:

- Promoting competition in the ICS marketplace;
- Banning exclusive ICS contracts with correctional facilities;
- The treatment of exclusive contracts if provider competition is required for a correctional facility;
- Video calling within correctional facilities, including video visitation;
- Whether a provider data collection should be extended into the future; and
- Requiring ICS providers to file all ICS contracts, including updates, with the Commission.

B. Legal Basis

3. The legal basis for any action that may be taken pursuant to the Third Further Notice is contained in sections 1, 2, 4(i)-(j), 201(b), 211, 225, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b), 211, 225, and 276.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of

[1] *See* 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.[6] A "small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[7]

5. **Small Businesses**. Nationwide, there are a total of approximately 28.2 million small businesses, according to the SBA.[8]

6. **Wired Telecommunications Carriers**. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[9] According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.[10] Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1,000 employees or more.[11] Thus, under this size standard, the majority of firms can be considered small.

7. **Local Exchange Carriers (LECs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[12] According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[13] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[14] Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by our action.

8. **Incumbent Local Exchange Carriers (incumbent LECs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local

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[4] *See* 5 U.S.C. § 603(b)(3).

[5] *See* 5 U.S.C. § 601(6).

[6] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[7] *See* 15 U.S.C. § 632.

[8] *See* SBA, Office of Advocacy, "Frequently Asked Questions," http://www.sba.gov/sites/default/files/advocacy/FAQ_March_2014_0.pdf (last visited July 21, 2014).

[9] 13 C.F.R. § 121.201, NAICS code 517110.

[10] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110" (issued Nov. 2010).

[11] *See id.*

[12] 13 C.F.R. § 121.201, NAICS code 517110.

[13] *See* Trends in Telephone Service, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (Trends in Telephone Service).

[14] *See id.*

exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[15] According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[16] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[17] Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

9. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field" of operation.[18] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[19] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

10. **Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[20] According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[21] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.[22] In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[23] In addition, 72 carriers have reported that they are Other Local Service Providers.[24] Of the 72, 70 have 1,500 or fewer employees and two have more than 1,500 employees.[25] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by our action.

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[15] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[16] *See* Trends in Telephone Service at Table 5.3.

[17] *See id.*

[18] 5 U.S.C. § 601(4).

[19] *See* Letter from Jere W. Glover, Chief Counsel to Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); *see also* 5 U.S.C. § 601(4). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[20] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[21] *See* Trends in Telephone Service at Table 5.3.

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.*

11. **Interexchange Carriers (IXCs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[26] According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[27] Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.[28] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by our action.

12. **Local Resellers**. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[29] According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.[30] Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.[31] Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our action.

13. **Toll Resellers**. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[32] According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.[33] Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.[34] Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

14. **Other Toll Carriers**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[35] According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[36] Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.[37] Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by our action.

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[26] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[27] *See* Trends in Telephone Service at Table 5.3.

[28] *See id.*

[29] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[30] *See* Trends in Telephone Service at Table 5.3.

[31] *See id.*

[32] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[33] *See* Trends in Telephone Service at Table 5.3.

[34] *See id.*

[35] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[36] *See* Trends in Telephone Service at Table 5.3.

[37] *See id.*

15. **Payphone Service Providers (PSPs)**. Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[38] According to Commission data,[39] 535 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 531 have 1,500 or fewer employees and four have more than 1,500 employees.[40] Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

16. In this Third Further Notice, the Commission seeks public comment on options to reform the inmate calling service market. Possible new rules could affect all ICS providers, including small entities. In proposing these reforms, the Commission seeks comment on various options discussed and additional options for reforming the ICS market.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[41]

18. The Third Further Notice seeks comment from all interested parties. The Commission is aware that some of the proposals under consideration may impact small entities. Small entities are encouraged to bring to the Commission's attention any specific concerns they may have with the proposals outlined in the Third Further Notice.

19. The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the Third Further Notice, in reaching its final conclusions and taking action in this proceeding. Specifically, the Commission will conduct a cost/benefit analysis as part of this Third Further Notice and consider the public benefits of any such requirements it might adopt, to ensure that they outweigh their impacts on small businesses.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

20. None.

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[38] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[39] *See* Trends in Telephone Service at Table 5.3.

[40] *See id.*

[41] 5 U.S.C. § 603(c)(1)–(c)(4).

STATEMENT OF
CHAIRMAN TOM WHEELER

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

As an agency whose core mission is to promote the public interest, the Commission routinely takes actions that impact the lives of ordinary Americans. But few issues have a more direct and meaningful impact on the lives of millions of American than inmate calling reform. With today's action, we will provide material relief to nearly two million families with loved ones behind bars.

To be clear, this is not a niche issue impacting only the families of incarcerated Americans. As Dr. Martin Luther King famously wrote – fittingly in a Birmingham jail cell – "Injustice anywhere is a threat to justice everywhere."

To portray this issue as a battle for justice and fairness may sound hyperbolic to some. To those people, I say, "Look at the law." We have a statutory mandate to ensure that ICS rates are "just, reasonable, and fair." Fighting for justice and fairness is our job. Today, we are getting the job done.

Inmate calling reform is not only the right thing to do, it's also good policy.

Contact between inmates and their loved ones has been shown to reduce the rate of recidivism, but high inmate calling rates have made that contact unaffordable for many families, who often live in poverty. By adopting tiered rate caps that apply to all interstate and intrastate ICS calls, and limiting and capping runaway ancillary service charges, this item addresses unaffordable ICS rates head on. At the same time, the new caps fully cover the enhanced security requirements of inmate calling and facilitate access to inmate calling for persons with communications disabilities, while allowing providers a reasonable return. This ensures that the rates for phone calls between inmates and their families are *just, reasonable and fair* all around.

Today's actions also help to address a prime example of a market failure. Where, as here, market forces have not been able to discipline costs to consumers, we must shoulder the responsibility of promoting communications services that do not leave the most vulnerable of our population behind.

Perhaps the most important thing people need to understand about today's reforms is that this would not have happened without the leadership of Commissioner Clyburn. This issue was largely ignored by this agency for a decade. She began championing this issue when she arrived as Commissioner in 2009, and when she got the gavel in 2013, she was determined to seize the opportunity to fast track real reform. From the first Order and Further Notice adopted by the Commission under her interim leadership, to the Second Further Notice adopted a year ago, to this item now, Commissioner Clyburn has been the undisputed leader on these issues, as much a champion of a just cause as I have seen. This item is a testament to her strong leadership, the dedication of her staff, notably Rebekah Goodheart, the unflagging advocacy of the Wright Petitioners, as well as the truly tireless efforts of the ICS Team in the Wireline Competition Bureau and Office of General Counsel.

STATEMENT OF
COMMISSIONER MIGNON CLYBURN

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

South African President Nelson Mandela is known to have said, "that no one truly knows a nation until one has been inside its jails" and that "a nation should not be judged by how it treats its highest citizens, but its lowest ones."

Today, our proud nation holds the regrettable distinction of having the highest rate of incarceration in the world, and with recidivism rates within five years of every inmate released topping 75%, a broad coalition can be heard calling for comprehensive criminal justice reform. But what is often missing during these bi-partisan criminal justice reform discussions is how integral today's decision is to the success or failure of these efforts.

Incarceration is a family matter, an economic matter, a societal matter. The greatest impact of an inmate's sentence is often on the loved ones who are left behind.

These families are shouldering incredible burdens, making unbelievable economic and personal sacrifices that impact their health, education and quality of life. They face stigmas that are literally destroying communities. And for too long we remained idle as families, friends, clergy, attorneys and coalitions pleaded for relief.

But October 22, 2015, marks the day, 14 long years after the court dismissed their lawsuit and referred the petitioners to this agency, when we answer the calls and uphold our statutory obligation to ensure that everyone pays just, reasonable and fair rates for all telephone calls. I am extremely proud that the FCC is finally acting on behalf of the 2.7 million children who have been suffering unfairly and most often in silence. No more excuses, no more justification for inaction that put other agency priorities over fair rates at the expense of these children's well-being. The only thing that was ever asked of us was to be in compliance with our rules and regulations so that families can make a simple call, hear the voice and express the love for a parent over the phone, without sinking further into an economic morass.

One consistent refrain I hear when we speak about this issue is – why should we care? People are locked up for a reason. Let's throw away the key. I do not care what price they pay. They deserve everything they get.

The truth is that each of us is paying a heavy price for what is now a predatory, failed market regime. None of us would consider ever paying $500 a month for a voice-only service where calls are dropped for seemingly no reason, where fees and commissions could be as high at 60% per call and, if we are not careful, where a four-minute call could cost us a whopping $54. Truth be told, however, most of us in this room have the ability to pay those costs. But, for the majority of those faced with these bills, high payments are their reality and they are making incredible sacrifices unimaginable to most of us. This is untenable, egregious and unconscionable.

Two weeks ago, I met Jazlin Mendoza from New Mexico, whose grandparents have been forced to jeopardize her educational future by forgoing the purchase of a much-needed computer, printer and laptop in order to stay in touch with her father. Young Ms. Mendoza's family has spent $28,000 over the last 10 years so that she can spend a few minutes each month speaking to the father who was incarcerated when she was four years old. She spoke, voice trembling, about being resentful of a person she loves very much because that line item in the family budget kept her in digital darkness.

And then there are grandparents, such as the late Mrs. Martha Wright, lead petitioner in the phone justice movement, who are sacrificing their health and well-being by forgoing needed medications in order to stay in touch with their incarcerated grandchildren who are increasingly hundreds of miles away from home.

We met Bethany Fraser back in 2013, who, along with hundreds of thousands of others, are forced to relocate, downsize and make difficult sacrifices in order to keep their children connected to their fathers. In a nation as great as ours, there is no legitimate reason why anyone else should ever again be forced to make these levels of sacrifices, to stay connected, particularly those-- who make up the majority in these cases –who can least afford it. The system is inequitable, it has preyed on our most vulnerable for too long, families are being further torn apart, and the cycle of poverty is being perpetuated.

Studies consistently show that meaningful communication beyond prison walls helps to promote rehabilitation and reduce recidivism.

700,000 inmates are released every year and too many of them return to their communities as strangers, are less likely to successfully reassimilate and more likely to continue the cycle back to prison because studies estimate that only 38% of them are able to maintain "at least" regular monthly contact. In addition to increased crime, crowded correctional facilities, more expensive prisons being built, and the judicial time required to prosecute additional crimes by repeater offenders, it costs an average of $31,000 per year to house each inmate. We all are paying enormous costs.

Voting to endorse today's reforms will eliminate the most egregious case of market failure I have ever seen in my 17 years as a state and federal regulator. Adopting rate caps for all local and long distance calls from correctional facilities, eliminating and capping an endless array of fees, ensuring that every call made from a prison or jail has a rate that is just, reasonable and fair, and closing loopholes will make us truly compliant with those pillars so clearly laid out in the Communications Act. Calls from any state or federal prison in this nation will soon be capped at 11 cents a minute, and, except for three capped fees, all other secret or oblique fees are done.

Many may ask why not go further and adopt rates like New Jersey at just 4.5 cents a minute or West Virginia of just over 3 cents a minute? My answer is two-fold: the FCC is creating a federal ceiling with rate caps, based on the filings of the majority of the industry. And there is nothing stopping states that have yet to reform to follow the lead of New Jersey, New York, Ohio and others to further reduce fees, and I hope that with collective encouragement, this will happen soon.

And yes, it is true, I suffer from a degree of heartburn when it comes to the policies surrounding site commissions, but this too is an area where states must do their part and take a hard look at their site commission practices and how such payments impact prices, service and the reverberating impact on the community.

Change is never easy, but I am confident that today's decision is rooted in the record and provides a reasonable transition path for all impacted parties.

Today's vote will never make up for the inactions of the past, but it is my hope that the Order will finally bring relief to those who have waited for so long.

I want to thank the advocates, many of them are here today, for bringing this issue to my attention many years ago, particularly the original petitioners and their counsel, MAG-Net and their Campaign for Phone Justice, and, while there have been countless advocates, let me also thank the Human Rights Defense Center (HRDC), the Prison Policy Initiative, and the Leadership Conference on Human and Civil Rights who have been dedicated to this issue for over a decade. You have remained steadfast in your advocacy and are providing the impetus for us as we tackle the issues in the Further Notice, including the video visitation regime.

Mr. Chairman, as I yield, allow me to thank you for making this issue a priority and dedicating the resources to reach today's result. And Commissioner Jessica Rosenworcel, we would not be here without your support in 2013, and for that and more, I thank you.

Finally, I would be remiss if it didn't thank the dedicated team of the Wireline Competition Bureau including Matt DelNero, Madeleine Findley, Eric Ralph, Lynne Engledow, Pam Arluk, Gil Strobel, Rhonda Lien, David Zesiger, Don Sussman, Thom Parisi, Christine Sanquist, Doug Galbi, and

Bakari Middleton, as well as the assistance from the Office of General Counsel, the Consumer and Governmental Affairs Bureau, and of course my legal advisor Rebekah Goodheart, who worked long and hard so that soon, millions of families will finally be able to afford to stay in touch.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

The United States is home to the largest incarcerated population in the world. While we have less than five percent of the people on the planet, we are responsible for a quarter of its prisoners. We currently have 2.2 million people housed in our prisons and jails. There is no other country that comes close.

These staggering statistics are not the result of our nation being inherently more criminal. They are the byproduct of a series of intentional policy choices that have increased the population of our prisons and jails nearly eight-fold since 1970.

This growth of our prison system comes at a sky-high cost. Collectively we spend over a quarter of a trillion dollars a year on the criminal justice system. Yet the individual expense is in many ways greater—destroying potential, swelling despair, and diminishing possibilities for rehabilitation. But perhaps the cruelest cost is the hardship these policies pose on the families of the incarcerated—and the 2.7 million children in this country who are growing up with a parent in prison.

This challenge is well beyond the authority of this Commission, but it is finally getting the notice it deserves. There is now a bipartisan effort on Capitol Hill working to reexamine federal sentencing laws and mandatory minimums. And just this week more than 130 police chiefs, prosecutors, and sheriffs joined the fray and added their voice to the call to reduce our nation's incarceration rate.

But there is also something this Commission can do. We can address the outrageous rates that too many families of prison inmates pay for phone service. Inmates are often separated from their families by hundreds of miles, and families may lack the time and means to make regular visits. Phone calls are the only way to stay connected. But when the price of a single phone call can be as much as most of us spend for unlimited monthly plans, it is hard to stay in touch. This is not just a strain on the household budget. It harms the families and children of the incarcerated—and it harms all of us because regular contact with kin can reduce recidivism.

We have taken steps before to reduce the cost of these calls. We continue on this course today. We put in place firm caps to prevent unreasonable charges for inmate calls. In addition, we take action to limit so-called ancillary service charges and prohibit flat-rate calling. These practices may not only run afoul of the law, they can impose unfair costs on prisoners and their families.

The arc of history is long, but we are going to bend it toward justice. And when we finally do we will owe credit to my colleague Commissioner Clyburn, who has been unwavering in her effort to right this wrong. We will also need to credit Martha Wright, who passed away last year, but whose fight to stay in contact with her grandson brought this problem to our attention. There is no better way to honor her legacy than to finally fix the criminal cost for too many families to simply stay in touch—and this effort has my full support.

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

When we launched this rulemaking in 2012, I welcomed the opportunity to "consider new rules for interstate inmate calling services," so long as we took action "consistent with our legal authority."

[1] This item is the latest in a series of well-intentioned actions on that front by the Commission, and I commend the efforts of those working to reduce the rates for inmate calling services. But the last time the Commission adopted rules for inmate calling service, I thought the action legally flawed[2]—and the D.C. Circuit ultimately stayed most of those rules.[3] Unfortunately, I cannot support these regulations either because I believe that they are also unlawful. The *Order* fails to respect the bounds that the Communications Act places on our jurisdiction and fails to comply with the Administrative Procedure Act's requirement that our rules not be arbitrary and capricious in light of the evidence contained in the record.

I.

In my view, the Commission does not have the legal authority to regulate the intrastate rates charged by payphone service providers (including inmate telephone service providers).

Let's start with section 201 of Act, which commands that "charges [and] practices . . . shall be just and reasonable" and that any "charge [or] practice . . . that is unjust or unreasonable is declared to be unlawful."[4] That directive forms the basis for the Commission's plenary authority to review and regulate rates. But it comes with a caveat: It only applies to "interstate or foreign communication by wire or radio."[5] And so, if the Commission wants to declare unlawful certain interstate charges (say particular per-minute rates for interstate inmate telephone services or ancillary fees associated with interstate inmate telephone services[6]), there's little doubt that section 201 empowers the Commission to do so.

And there's likewise little doubt that section 201 expressly does *not* authorize the Commission to regulate intrastate rates in the same manner. Indeed, as the Supreme Court has held, Congress decided to "fence[] off from FCC reach or regulation intrastate matters."[7] In section 2, Congress made clear that the FCC cannot touch intrastate rates: "[N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges . . . for or in connection with intrastate communication service by wire or radio of any carrier."[8] In section 221, Congress made clear that local rates were off limits as well: "[N]othing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges . . . for or in connection with . . . telephone exchange service [i.e. local service] . . . even though a portion of such exchange service constitutes interstate or

[1] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16662 (2012) (*Interstate Inmate Calling Notice*) (Statement of Commissioner Ajit Pai).

[2] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14218 (2013) (Dissenting Statement of Commissioner Ajit Pai).

[3] *Securus Techs. v. FCC*, No. 13-1280, Order (D.C. Cir. Jan. 13, 2014).

[4] Communications Act § 201(b).

[5] Communications Act § 201(a).

[6] *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510, 1512 (D.C. Cir. 1990).

[7] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986).

[8] Communications Act § 2(b).

foreign communications."[9] And section 601 of the Telecommunications Act of 1996 instructed the FCC that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede . . . State . . . law unless expressly so provided in such Act or amendments."[10]

In the face of these clear, specific prohibitions, ambiguous delegations of authority—such as section 4(i)'s authorization for the FCC to "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions"[11]—cannot be the basis for intrastate ratemaking.

Nor can the Commission rely on section 276 of the Communications Act for intrastate ratemaking authority. Congress adopted that section for the narrow purpose of empowering independent payphone service providers to compete against the Bell operating companies.

Before the Telecommunications Act of 1996, the Bells monopolized local telephone service and leveraged that monopoly to dominate the market for payphone services. Congress adopted section 276 to end the "government regulation of prices, regulatory barriers to entry and exit, as well as . . . significant subsidies from other telecommunications services" that "significantly distorted" the payphone service market.[12] And Congress did so through a discrete and particularized set of commands to the FCC: The Commission had to establish a plan to ensure fair compensation for all payphone service providers,[13] to discontinue implicit and explicit subsidies for payphone service,[14] to prescribe nonstructural safeguards for Bells in the payphone market,[15] and to establish payphone service providers' right to select their presubscribed carriers.[16] The FCC prescribed regulations to fulfill those duties before the end of 1996.[17]

Unsurprisingly, the Commission has *only* invoked section 276 in the context of eliminating the subsidies and discriminatory conduct that once warped the payphone service market. In the *New England Preemption Order*, the Commission preempted Connecticut's bar on independent payphone service providers entering the market (implementing section 276(b)(1)(D)).[18] In the *Payphone Reconsideration Order*, the Commission reconsidered its methodology for ensuring that local exchange carriers no longer subsidized their own payphone services (implementing section 276(b)(1)(B)).[19] In the *Second Payphone Order*, the Commission addressed the default fair compensation that interexchange carriers would pay payphone providers for dial-around calls (implementing section 276(b)(1)(A)).[20] In the *Third Payphone*

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[9] Communications Act § 221(b).

[10] Telecommunications Act § 601(c)(1).

[11] Communications Act § 4(i).

[12] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 et al.*, CC Docket Nos. 96-128 et al., Report and Order, 11 FCC Rcd 20541, 20548, para. 13 (1996) (*Initial Payphone Order*).

[13] Communications Act § 276(b)(1)(A).

[14] Communications Act § 276(b)(1)(B).

[15] Communications Act § 276(b)(1)(C).

[16] Communications Act § 276(b)(1)(D)–(E).

[17] *Initial Payphone Order*, 11 FCC Rcd 20541.

[18] *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCB Pol. 96-11, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19726, para. 27 (1996).

[19] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd 21233, 21236, para. 3 (1996).

[20] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Second Report and Order, 13 FCC Rcd 1778, 1778, para. 1 (1997). Dial-

(continued….)

Order, the Commission reexamined its default fair compensation scheme for dial-around calls (implementing section 276(b)(1)(A)).[21] And in the *Wisconsin Payphone Order*, the Commission reviewed the discriminatory rates that Bells charged independent payphone operators for connecting to the network (implementing sections 276(a)(1)–(2) and 276(b)(1)(C)).[22]

Furthermore, the Commission rejected the idea that section 276 gives us ratemaking authority over inmate telephone service rates in the *Payphone Reconsideration Order*.[23] There, inmate telephone service providers had argued that the Commission should order carriers to pay "special" compensation for inmate telephone service. In rejecting that argument, the Commission first found that "virtually all calls originated by inmate payphones are 0+ calls"—meaning those calls were handled by an inmate telephone service provider's chosen carrier—and thus inmate telephone service providers "tend to receive their compensation pursuant to contract" with that carrier.[24] Next, the Commission stated that "whenever a [payphone service provider] is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied."[25] Or as the Commission put it elsewhere: "[T]he level of 0+ commissions paid pursuant to contract on operator service calls is *beyond the scope of both Section 276* and this proceeding."[26]

To be fair, section 276 does contain a preemption clause and makes clear that its "fair compensation" mandate extends to intrastate calls.[27] But that mandate is a one-way ratchet: We preempt state regulations only when intrastate payphone service rates are *too low* to ensure fair compensation—and thus *too low* to "promote competition among payphone service providers and promote the widespread deployment of payphone services."[28]

The *Initial Payphone Order*, for example, found that states had adopted "subsidized local coin rate[s]" "in the context of [local exchange carriers] providing local payphone service as part of their regulated service"[29] and held that such rates were *too low* to "ensure that all payphone service providers are fairly compensated."[30] As a reviewing court later found, "[b]ecause the only compensation that a [payphone service provider] receives for a local call . . . is in the form of coins deposited by the caller," section 276's directive could only have effect for local coin calls if the FCC preempted state regulation

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around calls are calls where a payphone caller neither pays the payphone service provider directly nor uses the presubscribed interexchange carrier that has a prearranged billing relationship with the payphone service provider.

[21] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999).

[22] *Wisconsin Public Service Commission Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2064, para. 42 (2002).

[23] *Payphone Reclassification Order*, 11 FCC Rcd 21233.

[24] *Id.* at 21269, para. 72.

[25] *Id.*

[26] *Id.* at 21260, para. 52 (emphasis added). As NARUC ably explains, section 276's "new framework separated payphone equipment from the telecommunications services provided, including, as the FCC has previously specified the operator services provided to payphones which are independently regulated under the Telephone Operator Consumer Services Improvement Act." NARUC Comments at 10. Notably, the federal statute on operator services expressly limits the Commission's reach to *interstate* services. Communications Act § 226(a)(7).

[27] Communications Act § 276(b)(1)(A), (c).

[28] Communications Act § 276(b)(1).

[29] *Initial Payphone Order*, 11 FCC Rcd at 20571, para. 58.

[30] Communications Act § 276(b)(1)(A).

for such calls.[31]

The *Payphone Reclassification Order*, in turn, acknowledged that "state-mandated intrastate toll rate ceilings" might be *too low* to ensure fair compensation.[32] As such, the Commission instructed inmate telephone service providers to "remind the states that Section 276's mandate that [inmate telephone service providers] be fairly compensated for all payphone calls is an obligation that is borne both by us and the states" and invited those companies to petition for preemption if rates were in fact *too low*.

Nonetheless, the *Order* claims that section 276 gives the Commission *carte blanche* to regulate the intrastate rates charged by inmate telephone service providers, asserting that section "requires the Commission to broadly craft regulations to 'promote the widespread development of payphone services for the benefit of the general public.'"[33] Not so.

For one, section 276 covers not just inmate telephone services but all payphones, and it manifestly does not purport to be another iteration of section 201 for payphones. It does not require payphone charges or practices to be just and reasonable.[34] Nor does it declare unjust and unreasonable charges or practices to be unlawful.[35] Nor does it empower the Commission to determine and prescribe what will be the just and reasonable charge for payphone services.[36] Nor does it anywhere suggest that we have general authority to regulate payphone services. Small wonder, then, that the Commission itself has held that it "does not regulate payphone rates."[37]

For another, the *Order* may be correct that section 276 uses the term intrastate "several" times,[38] but "[u]ntil this proceeding, the FCC has consistently interpreted this section in a much less preemptive fashion."[39] More specifically, the FCC has viewed its intrastate authority as strictly limited by the metes and bounds of section 276. So when the Commission determined that it could require the Bells' intrastate payphone line rates to be cost-based in the *Wisconsin Payphone Order*, it stressed that "we do not have a Congressional grant of jurisdiction over non-[Bell] [local exchange carrier] line rates" and that "we cannot say that . . . Congress has spoken with sufficient clarity to overcome the presumption of section 2(b)."[40] The D.C. Circuit upheld that reasoning, agreeing with the FCC that "when Congress referred to 'Bell operating companies' rather than 'local exchange carriers,' it acted deliberately" and thus "the Commission may not regulate [the] intrastate payphone line rates" of non-Bell local exchange carriers."[41]

To be sure, the *Order* points out that the court held "that section 276 unambiguously and straightforwardly authorizes the Commission to regulate the BOCs' intrastate payphone line rates."[42] But the *Order* misses a critical point. Those rates are *not* the rates a payphone service provider can charge a customer but instead the rates that Bell operating companies could charge payphone service providers for

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[31] *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997).

[32] *Payphone Reconsideration Order*, 11 FCC Rcd 21269, para. 72.

[33] *Order* at para. 109 (quoting in part section 276(b)'s preamble).

[34] *Cf.* Communications Act § 201(b).

[35] *Cf.* Communications Act § 201(b).

[36] *Cf.* Communications Act § 205(a).

[37] *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Fifth Report and Order, 17 FCC 21233, 21243, para. 24 (2002).

[38] *Order* at para. 109.

[39] NARUC Comments at 8.

[40] *Wisconsin Payphone Order*, 17 FCC Rcd at 2064, para. 42.

[41] *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69, 78 (D.C. Cir. 2003).

[42] *Id.* at 75.

local service. And as the FCC explained in the *Wisconsin Payphone Order* and the court reiterated, that authority stemmed from several Bell-specific provisions of the section, *not* section 276's fair-compensation mandate.

I would have thought these points uncontroversial just three years ago, when the Commission launched this proceeding. There, we sought comment on "our authority to address *interstate* interexchange ICS rates,"[43] recognized that "intrastate local or long distance calls . . . are regulated by the states,"[44] and sought comment on "how the Commission can encourage states to reevaluate their policies regarding intrastate ICS rates."[45] Indeed, the very caption of this docket—"Rates for Interstate Inmate Calling Services"—reflected what was then the unanimous view of the five Commissioners regarding our jurisdiction.

Our lack of jurisdiction does not, of course, mean that inmate calling service providers set intrastate rates without constraint. States have been quite active in lowering rates. Michigan law requires rates for inmate calls in prisons to be "the same as . . . for calls placed from outside of correctional facilities" except for charges "necessary to meet special equipment costs."[46] Rhode Island law requires rates in prisons to be "comparable" to rates outside.[47] In Alabama, the Public Service Commission has set capped rates for jails and prisons and capped ancillary service charges.[48] And the Ohio Department of Rehabilitation and Correction renegotiated lower state prison rates just this year.[49]

Other States have lowered rates more indirectly. New York law prohibits the state department of corrections from accepting commissions "in excess of its reasonable operating cost" and requires the department to focus on the "lowest possible cost to the telephone user."[50] New Mexico law requires prisons and jails to award contracts to vendors who offer "the lowest cost of service to inmates."[51] Nebraska's administrative code prohibits prisons from receiving site commissions "[i]n the interest of making inmate calling as affordable as possible."[52] Rhode Island law prohibits site commissions at state prisons.[53] South Carolina law prohibits site commissions at state prisons and requires rate reductions in proportion to this foregone state revenue.[54] So does California law.[55] And the Missouri, New Jersey, and West Virginia Departments of Corrections have evaluated bids without regard to site commissions.[56]

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[43] *Interstate Inmate Calling Notice*, 27 FCC Rcd at 16647, para. 49 (emphasis added).

[44] *Id.* at 16647, para. 50.

[45] *Id.*

[46] Mich. Act. No. 245, Public Acts of 2008 § 219.

[47] R.I. Gen. Law § 42-56-38.1.

[48] Final Order of Alabama Public Service Commission Adopting Revised Inmate Phone Service Rules, Docket 15957 (July 7, 2014).

[49] Ohio Department of Rehabilitation and Correction – Offender Phone Services, http://www.drc.ohio.gov/web/phone_services.htm.

[50] N.Y. Cor. Law § 623.

[51] N.M. Stat. § 33-14-1.

[52] Neb. Admin. Code § 205.03(XII).

[53] R.I. Gen. Law § 42-56-38.1.

[54] S.C. Code § 10-1-210.

[55] Calif. Sen. Bill 81 § 32 (2007 Reg. Sess.).

[56] Missouri Request for Best and Final Offer for Offender Telephone System No. B2Z11019, Exhibit A (2011) ("Prices shall not include commissions to be paid to the State of Missouri."); New Jersey Department of the Treasury, Division of Purchase and Property, Request for Proposal 14-x-22648, Addendum No. 3 ("The State is not

(continued….)

Whatever the method, it is clear that many States can and do regulate intrastate rates. Congress did not authorize us to reach beyond our jurisdictional bounds to displace them.

II.

Lack of statutory authority is not the *Order*'s only legal infirmity. The *Order* fails to comply with the Administrative Procedure Act because the record evidence does not support the Commission's chosen rate caps.

The *Order* establishes rates of 11 cents a minute for prisons, 14 cents for very large jails with 1,000 or more inmates, 16 cents for large jails with 350–999 inmates, and 22 cents for medium jails with 100–349 inmates as well as small jails with fewer than 100 inmates. These rates apply to all domestic calls, although collect calls will have higher, interim rates for two years.[57] At these rates, inmate calling service revenues should total $610,394,065 each year, with revenues $80,910,259 higher in the first year of the plan and $43,096,251 higher in the second due to the interim rates for collect calls.[58]

And what are the costs of service? Let's start from the top. In aggregate, inmate calling service costs $671,676,423 each year, or about $61,282,358 more than expected revenues once the rates become permanent.[59] And that's problem number one: You can't cap rates in aggregate so that revenues won't cover expenses unless you want the quantity produced (here, likely the number of facilities served) to be reduced. That doesn't appear to the Commission's policy, nor is it Congress's,[60] but it's the ineluctable result of these caps.[61]

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seeking to receive commissions or other form of rebate or payment through this contract."); West Virginia Request for Proposal – Inmate Telephone System No. COR61453, Attachment A (2013) ("The commission rate quoted by Vendor will not be included in the bid evaluation process.").

[57] *Order* at Table One.

[58] Like the *Order*, this analysis relies on the 2012 and 2013 historical data reported by inmate calling service providers unless otherwise noted. To calculate total annual revenues for a particular facility type, I multiplied the average annual minutes of use for each call type (prepaid/debit and collect) by the appropriate rate according to the *Order*'s Table One. So for small jails, I multiplied 85,567,713 prepaid/debit minutes of use by the 22 cent a minute rate ($18,824,896.86), multiplied 15,279,505 collect minutes of use by the 49 cent a minute rate in year one ($7,486,957.45), and then added the two together to get the total revenues inmate calling providers could expect to receive from serving small jails in year one ($26,311,854.31). I reiterated this process for all facility types and summed the results by year to arrive at the totals.

[59] To calculate total annual costs, I summed total costs for serving all facility types in 2012 and 2013 and then divided by two.

[60] Communications Act § 276(b) (charging the FCC with adopting regulations to "promote the widespread deployment of payphone services").

[61] Although the Order asserts that "average reported costs are exaggerated and in any case exceed efficient costs," *Order* at note 170, the record is not so clear on that point. Inmate calling service "is really a managed IT service" with costs varying by the demands (such as security needs) and policies of the particular institution, Letter from Thomas M. Dethlefs, Associate General Counsel – Regulatory, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (Oct. 15, 2015), which explains the fact that a single firm has both the highest and lowest costs per minute for serving prisons. *Compare id.* (Texas prisons cost the most); CenturyLink, Rates for West Virginia Division of Corrections, http://www.centurylink.com/corrections/west-virginia/rates.html (showing West Virginia prisons cost the least—several times less than Texas). So low per-minutes rates in certain states are not evidence that "reported costs may be inflated," *Order* at para. 49, but that in those particular states costs per minute are low. That two small providers have low costs doesn't make them "efficient," *Order* at paras. 63–64, but instead suggests they serve lower-cost facilities. It's not "implausibl[e]" that the data don't show average costs falling with the provider's size, *Order* at para. 61, or that "roughly similarly situated providers have substantially different costs," *Order* at para. 62; the data plausibly suggest such providers serve different institutions. I suppose one could take the stance of Coleman Bazelon—an economist the *Order* cites to support its conclusion, *see Order* at
(continued….)

This creates a serious problem for our nation's jails. Very large jails are the most expensive to serve, with annual costs of $267,549.88 per facility, followed by the large jails ($200,266.21), the medium jails ($91,140.03), and small jails ($24,918.08).[62] But calling volume scales quickly, so that the revenues needed to cover costs in very large jails are only 16.2 cents a minute, but 18.9 cents in large jails, 25.7 cents in medium jails, and 34.4 cents in small jails.[63] In other words, the *Order*'s rates fail to compensate inmate calling service providers for the average cost of serving *each and every tier of jails*.[64]

It's worst for the smallest facilities. The rate caps cover only 64% of the cost of serving small jails, which according to our own data account for more than one third of all jails in the country.[65] And while small jails may account for "less than 10 percent of the inmate population,"[66] that doesn't make inmates there any less deserving of access to inmate calling services. Nor is that a reason to use the same rate cap for small and medium jails given their widely divergent costs (rates need to be about 33% higher[67] at small jails to cover their costs).[68]

Does that mean every jail in the country will lose service? Of course not—some likely have below-cap costs and a few might benefit from cross-subsidies. But it does mean that some jails should expect to lose service once these caps come into full effect. It's no wonder that the National Sheriff's Association wrote the FCC that with these caps "there is the very real possibility that many Sheriffs will no longer have an [inmate calling service] provider that is willing to provide [such] service in their jail and that there will be no remedy for the Sheriff."[69]

Compounding the problem is that the *Order* fails to include sufficient head room in its chosen rate caps so that providers can compensate facilities for the cost of administering inmate calling services.[70] From enrolling inmates into a biometric voice system to real-time call monitoring,[71] the record

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para. 55—that "it is impossible" to set rates based on the data the FCC has collected, Letter from Lee G. Petro, Counsel for Martha Wright et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 16 (Sept. 17, 2014), but the *Order* nonetheless proceeds to set rates based on the data as it is, and so I structure my analysis accordingly.

[62] To calculate costs per facility, I summed total costs by facility type in 2012 and 2013, divided by two, and then divided by the total number of each type of facility in the data set.

[63] To calculate costs per minute by facility type, I summed total costs by facility type in 2012 and 2013, summed total revenue-producing minutes of use by facility type in 2012 and 2013, and divided the former by the latter.

[64] In contrast, the average prison costs $147,167.25 to serve, which translates into a per-minute rate of 10.5 cents to recover those costs.

[65] 22 cents a minute divided by 34.4 cents a minute equals 63.95%.

[66] *Order* at para. 46.

[67] 34.4 cents a minute divided by 25.7 cents a minute equals 133.85%.

[68] The *Order* suggests that lumping small jails in with medium jails should mitigate GTL's concern for "potential confusion" if the FCC were to adopt (as it did) tiered caps. *Id.* But I cannot fathom how adding one more tier to the FCC's given structure, *Order* at Table One, could create confusion significant enough to warrant ignoring the real cost differences between small and medium jails.

[69] Letter from Mary J. Sisak, Counsel to the National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (Oct. 14, 2015).

[70] Letter from Martin Ryan, President of the California State Sheriffs' Association and Sheriff of Amador County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (Oct. 14, 2015) ("Sheriffs must be able to recover the costs that are associated with providing ICS and it is unclear that the Commission's proposed rates will permit that in practice.").

[71] National Sheriffs' Association Comments at 2–3 (listing inmate-calling-specific activities performed by corrections officers).

makes clear that facilities incur actual costs that are directly and incrementally attributable to increased access to inmate calling services. The only dispute is the amount of those costs: whether it's 1.6 cents a minute (as one of the two largest providers suggests),[72] 5.28 cents (as one mid-sized provider explains),[73] or 5.9 cents for large and very large jails and 9.4 cents for small and medium jails (as a mid-sized provider explains).[74] (Notably, the FCC did not ask for these data as part of its mandatory collection, so these estimates are the best record evidence available.) Taking the most conservative estimate, jails' administrative and security expenses owing to inmate calling service total $38,120,863 each year.[75] And yet, the *Order* excludes the cost to jails for administering and monitoring inmate calling services in calculating rates entirely.[76] And because the caps already put inmate calling service providers underwater at most jails, county sheriffs are likely to bear the brunt of these costs.[77]

The record makes clear the consequences: Less access to inmate calling services in jails around the country. Sheriff Danny Click of Laramie, Wyoming and Sheriff Jon Stivers of Washington County, Colorado explain that they currently let inmates make calls twelve or even sixteen hours a day. But if they can't recover their costs, they'll have to cut back inmate access.[78] The sheriffs of Louisiana and Maryland agree, noting that "discretionary access to phones by inmates and detainees may be significantly limited or eliminated altogether" absent cost recovery.[79] The sheriffs of Washington State worry that the "rate structure, if implemented, would jeopardize the viability of the ICS market and leave many jails without the ability to provide calling services to their inmates."[80] Indiana has already heard from many sheriffs in the state that "they may be forced to discontinue or significantly limit discretionary

[72] Reply Comments of Global Tel*Link Corp., Attachment 2 at 10.

[73] Letter from Thomas M. Dethlefs, Associate General Counsel, Regulatory for CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 & Attachment B (Sept. 19, 2014).

[74] Letter from Timothy G. Nelson, Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 4 (filed May 8, 2015).

[75] 1.6 cents a minute (the lowest record estimate of costs to jails) multiplied 2,382,553,962 average minutes of use at jails equals $38,120,863.39.

[76] The *Order*'s primary reason for not including any facility costs appears to be that "ICS continues to be offered in states that have prohibited payments from ICS providers to facilities." *Order* at para. 138 (citing one commenter for the point). Notably, that commenter points to New York, but then explains that the legislature made up for the shortfall through "budget increases and the elimination of some inmate services." HRDC Comments at 3. Similarly, when Ohio renegotiated its contract to reduce its site commission and the accompanying rates, Governor John Kasich included offsetting funding in his budget proposal. Prison Policy Initiative Comments at Attachment. Such funding cannot be assured in other states, undermining the *Order*'s rationale.

[77] If the Commission chooses to treat inmate calling service providers and corrections officers as partners splitting a joint profit (as it does), then it must also treat them as partners for purposes of assessing the costs of service. And yet, the rate caps wholly exclude all payments to jails and prisons, even though some (perhaps significant) portion is attributable to the incremental cost of permitting access to inmate calling services at the facility.

[78] Letter from Danny Glick, Sheriff of Laramie, Wyoming, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (Oct. 8, 2015); Letter from Jon Stivers, Sheriff of Washington County, Colorado, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (Oct. 7, 2015).

[79] Letter from Craig E. Frosch, Counsel for Louisiana Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (Oct. 9, 2015); Letter from Karen J. Kruger, Executive Director and General Counsel, Maryland Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (Oct. 7, 2015) ("[R]estricting . . . payments to levels that do not at least cover costs will have the effect of reducing the ability to continue to allow ICS in this manner.").

[80] Letter from Casey Salisbury, President of Washington Association of Sheriffs and Police Chiefs and Sheriff of Mason County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (Oct. 14, 2015).

inmate calling services if they cannot recover their costs."[81] Sheriff K.C. Clark of Navajo County, Arizona, points out that "[i]f the cost of allowing ICS must compete with all other budget heeds, it may not be funded."[82] Or Sheriff Ezell Brown of Newton County, Georgia put it: We "will not be ripping the phones off the walls" but instead "forced to significantly limit access to inmate phones."[83]

One more likely consequence of below-cost caps is less competition: If inmate calling service providers cannot recover their costs, new competitors are less likely to enter the market and existing providers are more likely consolidate to stay in business. And that's precisely the opposite result from Congress's intent, which passed section 276 in part to "to promote competition among payphone service providers and promote the widespread deployment of payphone services."[84]

These are not the only flaws with the *Order*'s rate caps. These caps are apparently intended to be set based on averages, but doing so by definition means a significant number of facilities will face caps set at or below their cost of service. As the Los Angeles Sheriff's Department explains, differences in security requirements, inmates, age, infrastructure and maintenance needs of facilities must be accounted for in the Commission's decision-making process.[85] To put it another way: The security requirements of a maximum-security facility are likely different than those of a juvenile detention center, so it should not be surprising that the per-minute rates needed to recover costs at even similarly styled facilities may vary significantly. As CenturyLink recently explained, capital investments and security features like voice biometrics and "strict manual processes for pre-registering and verifying each called party" almost double the cost of offering inmate calling services in Texas prisons.[86] And using averages is doubly difficult here since the Commission isn't setting rates but setting caps—so all rates above the caps must come down to the average, but below-average rates remain where they are pursuant to existing contracts. That means the $61 million annual shortfall I discussed earlier *understates* the gravity of the situation for inmate calling service providers and the facilities they serve.

The *Order*'s transition period is also problematic. As the *Order* recognizes, most contracts for inmate calling services require site commission payments, which are real costs to the provider above and beyond the cost of service. And yet the below-cost rate caps will deny providers the money to make those payments. How the Commission intends inmate calling service providers to renegotiate contracts (and these payments) with the 1,491 prisons in the country in 90 days, let alone the 3,724 jails in six months is beyond comprehension.[87] Nor is there any precedent for such an abbreviated transition. When we found that rates were too high in the intercarrier compensation context, we gave carriers six to nine years to transition.[88] And when we found that rates paid by taxpayers for video relay services was too high, we

[81] Letter from Stephen P. Luce, Executive Director of the Indiana Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (Oct. 12, 2015).

[82] Letter from K.C. Clark, Sheriff of Navajo County, Arizona, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at (Oct. 7, 2015).

[83] Letter from Ezell Brown, Sheriff of Newton County, Georgia, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (May 7, 2015).

[84] Communications Act § 276.

[85] Comments of County of Los Angeles Sheriff's Department, WC Docket No. 12-375, at 2 (filed Jan. 12, 2015) (County of Los Angeles Sheriff's Department Second FNPRM Comments).

[86] Letter from Thomas M. Dethlefs, Associate General Counsel – Regulatory, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (Oct. 15, 2015).

[87] *Order* at para. 132 ("[W]e conclude that our actions in this Order constitute changes in law and/or instances of force majeure that are likely to alter or trigger the renegotiation of many ICS contracts.").

[88] *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17677, para. 35 (2011).

adopted a four-year transition that still leaves rates above cost.[89] Here, despite the substantial turmoil the *Order* appears to contemplate, it sticks with 90 days because the record doesn't show significant difficulties in implementing the higher, interstate-only rate cap two years ago (without explaining why that experience, which imposed a substantially higher cap on a substantially smaller fraction of calls, is relevant).

* * *

There is another pressing issue involving prisoners and phones that deserves the Commission's attention: inmates' use of contraband cellphones. On October 15, I visited a maximum-security prison in Jackson, Georgia to learn more about this problem. To put it mildly, I was disturbed by what I heard. Georgia Department of Corrections Commissioner Homer Bryson, Warden Bruce Chatman, and other corrections officers told me that contraband cellphones are flooding into Georgia prisons. They are flown into institutions via drones. They are thrown over prison fences stuffed into everything from footballs to dead cats. They are smuggled into facilities within everything from underwear to legal papers. Contraband cellphones have even made their way into the most secure part of the prison: death row. This year alone, Georgia corrections officers have seized over 8,305 illicit cellphones, and the pace of confiscations is on the rise.

Those are only the contraband devices that are caught. Those that aren't caught are used by inmates to perpetrate a wide range of criminal activities. For instance, prisoners use contraband cellphones to extort the family and friends of the incarcerated, putting inmates' safety and lives at risk. For example, the wife of one Georgia prisoner received a text demanding $1,000 from inmates in the same prison as her husband. And when she couldn't gather the money, she was texted an image of her husband with burns, broken fingers, and the word "RAT" carved into his forehead. In another case out of Georgia, a woman received images on her phone of her incarcerated boyfriend being strangled with a shank held to his head. She was told that unless she forked over $300, the beatings would continue. She could only afford to send about half that amount. Sadly, the assaults didn't stop, and after a severe beating, he died.

The problems aren't limited to any one state. In Maryland, an inmate being held in the Baltimore City Detention Center on murder charges used a contraband cellphone to order the murder of a witness to his crime. Shortly thereafter, a 15-year-old gang member shot the witness three times, killing him in the process. An inmate in South Carolina orchestrated a "hit" on a prison guard through his contraband cellphone. The guard was shot six times but miraculously survived. And across the border in North Carolina, a high-ranking member of the Bloods street gang serving a life sentence used a contraband cellphone to mastermind the kidnapping of the father of the Assistant District Attorney who had prosecuted him. During the abduction, the kidnappers and the inmate exchanged at least 123 calls and text messages as they discussed how to kill and bury the victim without a trace. Fortunately, the FBI was able to rescue the victim and save his life.

During my prison visit, I also learned that inmates frequently conduct phone scams. In one popular scheme, inmates pretend to be calling from the local sheriff's office and tell the person on the other end of the line that there is a warrant for his or her arrest for failing to show up for jury duty. They then indicate that unless the person receiving the phone call pays a hefty fine, he or she will go to jail. Those who are fooled into paying up are then told to purchase prepaid debit cards, such as Green Dot MoneyPaks, and relay those cards' serial numbers to the caller. Inmates are then able to transfer money from those cards to their own accounts. In one Georgia case, a 78-year-old man purchased $734 worth of cards at the behest of an inmate serving 30 years in jail for drug offenses. The money ended up on the prepaid Visa card of someone dating the inmate's brother. The inmate then called his brother, who moved some of the money onto more prepaid cards and spent the rest at barbecue restaurants and

[89] *Structure and Practices of the Video Relay Service Program et al.*, CG Docket Nos. 10-51, 03-123, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618, 8705, Table 2 (2013).

convenience stores. Unfortunately, stories like this are commonplace because prisoners across the country are using contraband cellphones to defraud vulnerable people on a daily basis.

When it comes to the use of contraband cellphones by prison inmates, the status quo is entirely unacceptable. One reason we imprison criminals is to incapacitate them; that is, to prevent them from committing additional crimes. But with contraband cellphones, prisons have become a base of operations for criminal enterprise. While behind bars, inmates are running drug operations. They are managing gang activities. They are ordering hits. They are running phone scams.

The time has come to end this crime wave.

The bad news is that it's just not possible for corrections officers to keep all cellphones out of prisons. Contraband has always made its way in, and it always will. But the good news is that the FCC has a positive role to play. In 2013, the Commission issued a Notice of Proposed Rulemaking that aimed to spur the development of technological solutions to combat the use of contraband wireless devices in correctional facilities. The factual record we've developed has long since been complete. And in the intervening two years, the problem has only become worse. The message I took from Georgia—one I suspect most people around the country would deliver—is that the Commission needs to take further action, and soon, to protect the public.

Solving this problem won't be easy. There are both technological and legal obstacles to overcome. But I'm convinced that we can make substantial progress if the FCC, wireless carriers, technology companies, and dedicated corrections officers like the ones I met in Georgia work together in good faith. In the weeks and months ahead, I intend to work closely with all stakeholders to see if we can find common ground. We owe it to all Americans—victims, witnesses, inmates, corrections officers, and the many others who have been harmed through the use of contraband cellphones—to get the job done.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

When the Commission initiated the Second Further Notice last October, I observed that absent a compelling and actionable record on competition, the Commission was likely to head down a highly regulatory path that I would not have imagined possible based on the statute alone. While we received some evidence of multiple providers operating in certain facilities, it was not enough to change the proposed course of action. Therefore, the Commission today adopts detailed and excessive regulations—covering intrastate, interstate, and collect call rates, as well as ancillary fees—that far exceed our narrow legal authority. I cannot support this approach.

Despite the intentions of supporters, it is highly probable that the end result of the changes in this item will lead to a worse situation for prisoners and convicts, to which I am only so sympathetic. Any cost savings from inmate payphone calls will likely be extracted in some other form. It is simply not the case that the item will not impact incarceration conditions or overall telephone service offerings within such facilities. This notwithstanding, my main objections result from the starting point where all regulatory reviews must begin, the Commission's authority to impose such a new regime.

First, I disagree that the Commission has authority under section 276 to impose a hyper-regulatory rate structure on prison payphone providers. For those people actually involved, we remember that the provision was clearly designed to protect payphone providers that had been unable to receive fair compensation for their service from long distance carriers, or IXCs. It was not meant to give the Commission authority to cap end-user rates.

The fact that providers voluntarily bid for and enter into contracts with correctional facilities establishes that they are fairly compensated and that section 276 is satisfied. The assertions in the record that some prison payphone providers may be overcompensated as a result of these contracts could raise some legitimate policy concerns, but that is outside the scope of section 276. Moreover, the allegations in the record that these rate caps could force certain providers to discontinue service to some facilities, if true, would undermine the provision's express goal of promoting payphone deployment.

Second, since Congress addressed inmate calling, however briefly, in section 276—and intentionally chose not to address end-user rates—I do not believe that the Commission can fall back on the general "just and reasonable" language of section 201. We've seen this maneuver in other Commission items, including Net Neutrality and various enforcement actions, and it needs to stop. If section 201 were as powerful as the Commission seems to believe, then why did Congress spend so much effort enacting the provisions of the 1996 Act? The Commission continues its mockery of the principles of legislative construction to achieve its end goals.

Third, I am appalled that the Commission would try to mash together bits and pieces of different provisions in an attempt to create a new unsubstantiated legal standard: just, reasonable, and fair rates. The Commission is governed by a statute, not an optional menu. We don't get to order a la carte and make substitutions at will.

Finally, I do not support the Commission's attempt to further expand its jurisdiction by claiming that section 276 is technology neutral and seeking comment on regulating video calls. Any authority we have under section 276 is limited to *payphone* service. The fact the provision includes the term "inmate telephone service" does not give the FCC authority over non-payphone calls in correctional institutions. Rather, "inmate telephone service" is a subset of payphone service that is provided in jails or prisons. A video call is not a telephone service much less a payphone service and any decisions to the contrary would set a harmful precedent, not supported by the statute. Skype, Facetime, Hangouts and other video calling apps should take note.

While there is no dispute that the prison payphone market as a whole does not seem to be functioning properly, we must respect the limits of our authority. The proper place to deal with any issues would be the Congress, where I suspect there may be receptivity to address specific problems. But it is not our role to create imaginary authority to serve a social agenda.

Today's item far exceeds the role that Congress assigned to the Commission. I must respectfully dissent.