

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**COMMENTS OF PAY TEL COMMUNICATIONS, INC. IN RESPONSE TO
FURTHER NOTICE OF PROPOSED RULEMAKING**

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SUMMARY

Pay Tel Communications, Inc. (“Pay Tel”) respectfully submits these comments in response to the Further Notice of Proposed Rulemaking (“FNPRM”), released September 26, 2013, simultaneously with the Commission’s Report and Order (“*Order*”) in this docket, which *Order* aims to provide meaningful relief to millions of Americans by reforming the Inmate Calling Services (“ICS”) industry. Pay Tel, as a longstanding proponent of meaningful ICS reform, welcomes this opportunity to comment.

The FNPRM tees up several critical issues, left unresolved in the *Order*, that must be addressed if comprehensive reform—reform that protects and benefits inmates and their families without compromising safety and security in confinement facilities or communities at large, while allowing confinement facilities to recover their costs of administering ICS and ICS providers to earn a fair, non-predatory return on their investment—is to be realized.

In summary, Pay Tel responds to the issues identified in the FNPRM as follows:

- The Commission has the statutory authority to regulate intrastate ICS rates, and it is required under the law to exercise its jurisdiction, at a minimum, to preempt below-cost, state-imposed rate caps that serve as an obstacle to “fair compensation.”
- The Commission should expand the scope of those ICS-related costs that are recoverable, whether by providers or confinement facilities. The ultimate regulatory framework must take into account and permit recovery of the administrative, security-based and other costs incurred by confinement facilities as a result of providing ICS.
- The Commission should alter the one-size-fits-all regulatory framework adopted in the *Order* and replace it with a scheme which reflects demonstrated cost differences between jails and prisons. That is, the Commission should adopt two different rate caps: one cap that applies to provision of ICS in prisons and another applying to provision of ICS in jails, in order to account for the real, well-documented cost differences associated with provision of ICS in the different types of facilities.

- In applying any cost-based rate cap based on average costs, the Commission should ensure that there is appropriate “headroom” above the average costs to account for cost differentials among jail facilities. Adoption of caps based on average costs is not an appropriate rate making methodology for jails, where costs are variable between jails. Ensuring that only average costs are recovered may well ensure that high-cost facilities are unserved.
- The Commission should either revise or abandon the *Order’s* safe harbor requirements as applied to jails. As currently set, such safe harbors are so far below average costs as to be completely unworkable.
- In setting rate caps, the Commission should correct the call-type grouping established in the *Order* by grouping prepaid and collect calls together, rather than grouping prepaid and debit calls together, as the record establishes that prepaid calling is more costly than debit calling and is generally equal to the cost of collect calling.
- Pay Tel generally supports the *Order’s* position with regard to ancillary charges and would urge the Commission to adopt a scheme in which ancillary charges are generally prohibited, subject to a narrow list of clearly-defined exemptions that allow ICS providers to recover their costs of providing certain services.
- The Commission must address rate arbitrage problems and the security concerns associated therewith through elimination of arbitrage incentives and by leaving call-blocking decisions to confinement facilities.

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INTRODUCTION

Pay Tel Communications, Inc. (“Pay Tel”), by its attorneys, respectfully submits these comments in response to the Further Notice of Proposed Rulemaking (“FNPRM”), released September 26, 2013, in the above-captioned proceeding. The FNPRM was released simultaneously along with the Commission’s Report and Order (“*Order*”) in this docket,¹ which *Order* aims “to provide relief to the millions of Americans who have borne the financial burden of unjust and unreasonable interstate inmate phone rates.”² The Commission’s action (or inaction) in this FNPRM will determine whether the *Order*’s promised relief becomes reality. In the FNPRM, the Commission invites comment on several critical issues that the *Order* leaves unresolved.

Pay Tel is supportive of reform of the ICS industry.³ Pay Tel recognizes the Commission’s well-intentioned efforts to bring about that reform. But good intentions are not sufficient by themselves, and, as the Commission itself acknowledges, its work is “not done”.⁴ Indeed, leaving the *Order* “as-is” without further Commission action and, in so doing, imposing its one-size-fits-all regulatory scheme upon the ICS industry would lead to numerous unintended consequences, including the reduction and even elimination of ICS in certain confinement

¹ Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 13-113 (rel. Sept. 26, 2013) (“*Order*”).

² *Order* ¶ 1.

³ See, e.g., Pay Tel Comments at 14–16, WC Docket No. 12-375 (Mar. 25, 2013) (advocating for reform regarding several ICS providers’ practice of charging ancillary fees in order to increase profits); Transcript of Reforming ICS Rates Workshop at 264–78, WC Docket No. 12-375 (filed July 16, 2013) (testimony of Pay Tel’s President Vincent Townsend supporting Commission reform of ICS and laying out several concrete elements required therefor and stating that “first and foremost consumers are entitled to a fair and reasonable rate”); Pay Tel Ex Parte Presentation, “Reform of ICS Requires Reform of Both Interstate and Intrastate ICS Elements” at 1, WC Docket No. 12-375 (Aug. 1, 2013) (“Pay Tel Aug. 1 Ex Parte Presentation”) (explaining that Pay Tel “has consistently advocated in this proceeding [for] meaningful and lasting reform”).

⁴ *Order* ¶ 8.

facilities,⁵ widespread rate arbitrage and the increased security risks tethered thereto, and a situation in which Pay Tel and other similarly-situated ICS providers will be unable to recover their costs of providing ICS in jails and will be forced to either operate at a loss, discontinue service to certain high-cost facilities, or go out of business.

Fortunately, the Commission “tees up” for comment in the FNPRM several critical issues that, if correctly addressed, can prevent these dire consequences and yield comprehensive and meaningful reform—reform that protects and benefits inmates and their families without compromising safety and security in confinement facilities or communities at large, while allowing confinement facilities to recover their costs of administering ICS and ICS providers to earn a fair, non-predatory return on their investment.⁶

I. The Commission Has Jurisdiction Over Intrastate ICS Rates to Ensure Fair Compensation for All Calls

The FNPRM seeks comment on whether ICS reform should be extended to intrastate rates and, if so, the legal basis for such action. As part of its consistent advocacy for reform of the ICS industry, Pay Tel has previously explained that, at least for jails, any action to regulate interstate rates impacts a provider’s overall profitability due to rigid state rate constraints. In this regard, meaningful reform can only occur through coordinated Commission action with respect

⁵ A central defect in the *Order* is its failure to distinguish between jails and prisons. In this regard, Pay Tel observes that the Commission uses the term “correctional facilities” in its ICS Order to refer generically to all facilities—despite the fact that this term is typically not used in the jail context due to the temporal nature of the typical confinement in the jail setting.

⁶ See, e.g., Transcript of Reforming ICS Rates Workshop at 265–66 (testimony of Pay Tel President Vince Townsend: “[T]here really needs to be a comprehensive approach in order for this to reach the desired result” of true ICS reform); Pay Tel Notice of Ex Parte Presentation at 1, WC Docket No. 12-375 (May 31, 2013) (“Pay Tel May 31 Notice of Ex Parte”); Pay Tel Reply Comments at 1–3, WC Docket No. 12-375 (Apr. 22, 2013); Pay Tel Comments at 3–6.

to both interstate and intrastate ICS rates.⁷ In so doing, Pay Tel has repeated its view that aligns with the Commission’s tentative conclusion that: “Section 276 affords the Commission broad authority to regulate intrastate ICS rates and practices that deny fair compensation, and to preempt inconsistent state requirements.”⁸

Not only *can* the Commission regulate intrastate ICS rates, insofar as necessary to ensure that ICS providers are fairly compensated, it must do so in order to fulfill its statutory mandate and comply with federal law. Continued Commission failure to preempt below-cost, state-imposed rate caps—notwithstanding its authority to do so—would result in a scheme in which Pay Tel and other ICS providers exclusively serving jails fail to recover their aggregate costs, in violation of Section 276’s “fair compensation” requirement.

A. The Plain Language of Section 276 Clearly Establishes the Commission’s Authority Over Intrastate Rates and Services

The language and structure of Section 276 of the 1996 Act confer on the Commission clear authority to regulate intrastate inmate calling services—including local rates—and mandate the exercise of that jurisdiction to ensure that all ICS providers are fairly compensated for every intrastate call.⁹ Indeed, multiple provisions of Section 276 confer jurisdiction on the Commission to regulate intrastate rates and services.

⁷ See, e.g., Pay Tel Comments at 3–9; Pay Tel Reply Comments at 13–14; see generally Pay Tel Aug. 1 Ex Parte Presentation.

⁸ Order ¶ 135. Pay Tel believes that the Commission errs in suggesting in other parts of the Order that Section 276 was intended, in part, to ensure that rates are “fair” from a consumer point of view or that Section 276 may serve as a basis for the assertion of jurisdiction over non-rate aspects of intrastate ICS. Nonetheless, Pay Tel is in accord with the Commission’s construction of Section 276 requiring preemption of below-cost intrastate rate caps.

⁹ As a threshold issue, by definition the “fair compensation” requirements of Section 276 plainly apply equally to ICS providers as to payphone service providers. See 47 U.S.C. § 276(d) (defining “payphone service” to include “the provision of inmate telephone service in correctional institutions”).

First, and most importantly, Section 276(b)(1)(A) unequivocally states that the Commission must “take all actions necessary to prescribe regulations that establish a per call compensation plan to ensure that all [ICS] providers are fairly compensated for each and every completed intrastate and interstate call”¹⁰

Likewise, Section 276(b)(1)(B), which implements the subsidy prohibition of Section 276(a), expressly applies to intrastate services by directing the Commission to “prescribe regulations that . . . discontinue the *intrastate and interstate* carrier access charge payphone service elements and payments in effect on February 8, 1996, and *all intrastate and interstate* payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A).”¹¹ The clear intrastate application of subsection (b)(1)(B) reinforces what is plain from the face of the 1996 Act: Congress intended the Commission to exercise authority over both intrastate and interstate payphone calling in order to carry out the statutory mandate to eliminate subsidies and discrimination and to ensure fair compensation to providers.¹²

¹⁰ 47 U.S.C. § 276(b)(1)(A) (emphasis added).

¹¹ *Id.* § 276(b)(1)(B) (emphases added).

¹² Other subsections are to similar effect, although they do not expressly use the term “intrastate” to describe their scope as subsections (b)(1)(A) and (B) do. Sections 276(b)(1)(D) and 276(b)(1)(E) authorize the Commission to promulgate regulations governing PSPs’ negotiations with carriers for intraLATA and interLATA calls. Because the vast majority of intraLATA calls (and many interLATA calls) are intrastate, subsections (b)(1)(D) and (b)(1)(E) necessarily contemplate regulation of intrastate payphone calling. Similarly, Section 276(b)(1)(C) requires the Commission to “prescribe a set of nonstructural safeguards for [BOC] payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a)” Subsection (a), in turn, prohibits BOCs from subsidizing their payphone service “directly or indirectly from [their] telephone exchange service operations or [their] exchange access operations” and from “prefer[ring] or discriminat[ing] in favor of [their] payphone service.” 47 U.S.C. § 276(a). Although the regulatory mandate embodied in subsection (b)(1)(C) does not use the term “intrastate,” it is plain that the Commission’s regulatory authority includes the authority to address both intrastate and interstate subsidies and discrimination. A contrary reading of the statute would render meaningless the clear directive to the Commission that it “discontinue . . . all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues.” *Id.* § 276(b)(1)(B).

And, even if such plain language failed to answer the question regarding the Commission's regulatory authority regarding intrastate ICS (which it does not), subsection (c) expressly sets forth the Commission's plenary jurisdiction: "To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."¹³ That subsection indisputably requires preemption of state requirements that are inconsistent with any regulations promulgated by the Commission under the authority conferred by Section 276, or in order to ensure fulfillment of the Commission's mandate that ICS providers receive fair compensation for all calls. This would include existing state rate caps (or other rules), which must yield to Commission regulations promulgated pursuant to Section 276(b)(1)(A).

Viewed in this context, the plain language of Section 276 undeniably grants the Commission full statutory authority to regulate inmate calling services—specifically, intrastate rates. Indeed, it would defy logic for Congress, on one hand, to command the Commission to promulgate rules and "take all actions necessary . . . to ensure that all [inmate phone] service providers are fairly compensated for each and every completed intrastate and interstate call," but, on the other hand, to leave it powerless to promulgate rules that address and ameliorate the effects of local rate caps and other elements of an inmate phone service provider's compensation. To construe Congress's express mandate to take "all actions necessary" and to preempt any state requirements that are inconsistent with the Commission's regulations as anything other than a broad grant of jurisdictional authority over this area disregards—even ignores—the plain meaning of the statute.

¹³ 47 U.S.C. § 276(c) (emphasis added).

B. The Commission Has Declared That Its Jurisdiction Extends to Intrastate Rates and Services—and Defined “Fairly Compensated”—and It Reinforces Those Positions in the Order

In keeping with the language and structure of Section 276, the Commission has consistently taken the position that Section 276 confers upon it broad authority to regulate both intrastate and interstate payphone service.¹⁴ As the Commission explains in the *Order*, “section 2(b) has no effect where the Communications Act, by its terms, unambiguously applies to intrastate services.”¹⁵ Thus, Congress’s enactment of Section 276 subsequent to the enactment of Section 2(b) of the Communications Act means that the authority Section 276 confers overrides the general limitation on intrastate jurisdiction contained in Section 2(b).¹⁶

From the FNPRM and prior orders, it is clear that the Commission interprets Section 276 to provide a mandate to ensure fair compensation for both inter- and intrastate calls. In the Commission’s own words, “Congress gave [the FCC] the requisite authority in Section 276 and directed us to adopt a comprehensive plan for payphones,” including “a particular compensation plan”—even one that “contradicts existing state regulations.”¹⁷ The Commission has expressed

¹⁴ See, e.g., Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC 96-439, 11 FCC Rcd 21233, ¶ 162 (1996) (“*Payphone Reconsideration Order*”) (rejecting argument that Commission lacked authority to impose rate requirements on intrastate payphone line rates: “We disagree . . . regarding our authority to require federal tariffing of payphone services . . .”).

¹⁵ *Order* ¶ 136 (citing cases).

¹⁶ 47 U.S.C. § 152(b); see *Payphone Reconsideration Order* ¶ 57 (“In enacting Section 276 after Section 2(b), and squarely addressing the issue of interstate and intrastate jurisdiction, we find that Congress intended for Section 276 to take precedence over any contrary implications based on Section 2(b).”); see also First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 93 (1996) (identifying other instances where “Congress indisputably gave the Commission intrastate jurisdiction without amending Section 2(b),” such as in Sections 251(e)(1), 253, 276(b), and 276(c), and concluding that “the lack of an explicit exception in section 2(b) should not be read to require an interpretation that the Commission’s jurisdiction under sections 251 and 252 is limited to interstate services” because “a contrary holding would nullify several explicit grants of authority to the FCC . . . and would render parts of the statute meaningless”).

¹⁷ *Payphone Reconsideration Order* at ¶ 57.

no uncertainty about the reach of its regulatory jurisdiction or its authority to regulate intrastate payphone rates in furtherance of the clear directive of Section 276.¹⁸

Critically, where the Commission has previously declined to either preempt state rate caps on local collect calls, or permit ICS providers to collect an additional per-call surcharge above state rate caps, it has done so because it believed such providers were receiving “fair compensation” when their cost recovery was considered at a holding company level, or, in other words, when viewed in the aggregate. The Commission’s decision not to preempt below-cost state rate caps, therefore, did not arise from any purported grounds that it lacked jurisdiction to do so or otherwise regulate intrastate ICS:

[T]he critical factor is that the costs must ultimately be recovered, but we will not mandate a particular method of cost recovery. Unless an ICS provider can show that (i) revenue from its interstate or intrastate calls fails to recover, for *each* of these services, both its direct costs and some contribution to common costs, or (ii) the *overall* profitability of its payphone operations is deficient because the provider fails to

¹⁸ In keeping with this view of the intrastate reach of Section 276, the Commission has stated repeatedly that its cost-based rates and new services test requirements apply to ILECs’ intrastate as well as interstate rates. *See, e.g., Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, DA 97-678 (Apr. 4, 1997) (cost-based new services test requirement applies to ILECs’ intrastate as well as interstate rates); *Payphone Reconsideration Order* ¶ 163 & n.492 (explaining that “states must apply these [cost-based tariff] requirements and the *Computer III* [new services test] guidelines for tariffing such intrastate services”).

Some commenters have argued in this proceeding that the fact the Commission has rejected certain requests to preempt state rate caps or to impose federal surcharges in the past suggests that the Commission cannot, or should not, exercise its jurisdiction in this area. *See, e.g., Comments of Global Tel*Link* at 31–37, WC Docket No. 12-375 (Mar. 25, 2013). This argument misconstrues the authorities cited for support. The Commission’s decision not to intervene in certain circumstances is in no way equivalent to a determination that it does not have the jurisdictional authority to regulate intrastate payphone rates and services. In fact, the decision not to intervene expressly contemplates that the Commission believed it could intervene but declined to do so—not that it lacked authority to regulate. *See, e.g., Order on Remand and Notice of Proposed Rulemaking, In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, 3254–59, ¶ 24 (2002) (“2002 Order”) (explaining that the Commission denied, “at this time” to preempt all state ceilings because it found the providers seeking such preemption were already fairly compensated, clearly indicating that the Commission could have preempted state rates if necessary to ensure fair compensation).

recover its total costs from its aggregate revenues (including both revenues from interstate and intrastate calls), then we would see no reason to conclude that the provider has not been “fairly compensated.”¹⁹

That the Commission has declined, thus far, to exercise its authority to adopt regulatory mechanisms reaching intrastate ICS rates is in no way an indication that the Commission lacks that authority.

C. Judicial Interpretations of Section 276 Reaffirm the Reach of the Commission’s Jurisdiction

As the Commission correctly explains,²⁰ the D.C. Circuit Court of Appeals has expressly confirmed the intrastate application of Section 276(b)(1)(A). In *Illinois Public Telecomms. Ass’n v. FCC*,²¹ the appellate court considered a challenge to a Commission order deregulating intrastate local coin calling from payphones. Several petitioners urged that “the Commission lacks authority to regulate, or . . . to deregulate and prevent the States from regulating . . . rates for local coin calls.”²² The D.C. Circuit squarely rejected that argument, concluding that the statutory language of Section 276 could not be more clear and that such language “unambiguously grants the Commission authority to regulate the rates for” intrastate payphone calls.²³ Under *IPTA*, there is no argument—either based in the text of the statute or derived from

¹⁹ 2002 Order ¶ 23.

²⁰ Order ¶ 137.

²¹ 117 F.3d 555 (D.C. Cir. 1997) (per curiam), *cert. denied sub nom. Virginia State Corp. Comm’n v. FCC*, 523 U.S. 1046 (1998) (“*IPTA*”).

²² *Id.* at 561.

²³ *Id.* at 562; *see also id.* at 563 (“the Commission has been given an express mandate to preempt State regulation of local coin calls”) (emphasis added).

judicial interpretation of the statutory language—that the fair compensation provision applies to all ICS calls, both interstate *and* intrastate.²⁴

D. The Commission Must Preempt Below-Cost Intrastate Rates Because Failure to Do So Will Lead to a Violation of Section 276

As discussed, the Commission has broadly construed Section 276’s mandate requiring that ICS providers be “fairly compensated for each and every completed intrastate and interstate call,”²⁵ adopting in 2002 a “company-level” approach to Section 276, where the “fair compensation” requirement will be satisfied so long as ICS providers are able to cumulatively recover their costs of providing both interstate and intrastate call revenues in the aggregate.²⁶ The Commission reinforced that position just last month: “In the context of ICS, . . . the Commission has previously interpreted [the ‘each and every’ call] statutory requirement to apply on a whole company basis, not on the basis of an individual call or service location.”²⁷

At a minimum, then, even if an ICS provider does not actually recover its per-call costs on each and every completed call, the Commission has consistently held that Section 276 will be violated if a provider cannot, in the aggregate, recover all of the costs of providing interstate and

²⁴ See also, e.g., *New England Pub. Commc’ns Council v. FCC*, 334 F.3d 69, 71, 75, 78–79 (D.C. Cir. 2003) (holding that “section 276 unambiguously and straightforwardly authorizes the Commission to regulate the BOC’s intrastate payphone line rates” and explaining that “it would make little sense for Congress to command the Commission to promulgate rules opening the payphone market to competition while leaving it powerless to address intrastate subsidies and discrimination, which are, after all, no less an obstacle to fair competition than interstate subsidies and discrimination”).

²⁵ See 47 U.S.C. § 276(b)(1)(A) (emphasis added); Notice of Proposed Rulemaking, *In the Matter of Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶ 49, WC Docket No. 12-375 (rel. Dec. 28, 2012) (“NPRM”).

²⁶ 2002 Order ¶¶ 23–24.

²⁷ Order Denying Stay Petitions and Petition to Hold in Abeyance, *In the Matter of Rates for Interstate Inmate Calling Services* ¶ 33, WC Docket No. 12-375 (Nov. 21, 2013) (“Denial of GTL and Securus Requests”) (citing 2002 Order ¶ 23); see also *id.* ¶ 17 n.73.

intrastate ICS.²⁸ The Commission “interpret[s] the language in Section 276 that ICS providers be ‘fairly compensated’ for each and every completed call to require that an ICS provider be fairly compensated on the basis of either the whole of its ICS business or by groupings that reflect reasonably related cost characteristics, and not on the basis of a single facility it serves.”²⁹

Obviously, consistent with the underlying statutory admonition, the Commission cannot ignore intrastate rate caps and other legal constraints—especially in an environment where interstate rates are capped at average costs.

The Commission contends in the *Order* that the rate caps it has established “are set at sufficiently conservative levels to account for all costs ICS providers will incur in providing ICS”³⁰ This contention is erroneous as applied to Pay Tel and, presumably, other providers of ICS in jails.³¹ The *Order* fails to properly consider the impact that state-imposed, below-cost rate caps will have when working in tandem with the *Order*’s interstate rate caps. The *Order* imposes the very scenario of which the Commission was warned in this proceeding: “[w]ithout

²⁸ Pay Tel does not concede that this is the appropriate interpretation of Section 276’s per-call “fair compensation” requirement. For purposes of the instant analysis, however, whether the requirement applies to each call type or to aggregate costs makes no difference since the *Order* fails either test. Both the Petitioners and then-Chairwoman Clyburn have explained this rule in laymen’s terms. According to the Petitioners, “the rate for inmate telephone service is not ‘fair’ if it is so low as to cause the service provider to fail” Wright Petitioners Comments at 14, WC Docket No. 12-375 (Mar. 25, 2013).

And then-Chairwoman Clyburn added, at the Inmate Calling Services Workshop in July of this year, that balanced ICS reform required an approach that did not “drive prices down so low that providers leave.” Remarks of Acting Chairwoman Mignon Clyburn, Reforming ICS Rates Workshop (July 10, 2013), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0710/DOC-322109A1.pdf.

²⁹ *Order* ¶ 123. Again, the Bureau has recently confirmed this interpretation in its *Order Denying Stay Petitions and Petition to Hold in Abeyance* issued November 21, 2013 in this docket.

³⁰ *Id.* ¶ 74.

³¹ As noted, the Commission relied heavily on Pay Tel’s cost study in the *Order*, as Pay Tel was the only provider to submit a comprehensive examination of ICS costs using cost allocation and development mechanisms previously approved by the Commission in other proceedings. As such, Pay Tel’s cost study is the only competent evidence before the Commission of the cost of providing ICS in jails and, until shown otherwise through future cost submissions, Pay Tel’s study serves as a proxy generally for the cost of providing ICS in jails.

careful calibration, a federal cap on interstate inmate rates, while reasonable on a stand-alone basis, could in fact kill the business by making it financially unprofitable overall”³²

The *Order*, in its current form, does just that to Pay Tel. Its regulatory regime will make Pay Tel financially unsustainable overall. Such result is unlawful. Because intrastate regulation can avert this outcome, it is mandatory. Pay Tel’s cost study was a “whole company” study that did not differentiate between intrastate and interstate costs, as the Commission properly understood in assuming that “[Pay Tel’s] cost data is representative of both types of calls.”³³ As a consequence, it is not enough for Pay Tel to recover, for example, \$0.21 per minute for all interstate debit and prepaid calls and \$0.25 per minute for all interstate collect calls; it must also

³² Telmate Comments at 10; Pay Tel Reply Comments at 6 n.13 (quoting same). Moreover, Pay Tel has explained the existence and consequences of both below-cost rate caps imposed by state public service commissions and contractual requirements with confinement facilities—that Pay Tel has to subsidize those intrastate calls with interstate calls—repeatedly since at least 2007. *See, e.g.*, Pay Tel Comments at 7, CC Docket No. 96-128 (May 2, 2007); Ex Parte Written Response of Pay Tel at 2, 8 n.20, CC Docket No. 96-128 (June 16, 2008) (arguing for preemption of below cost intrastate rates); Pay Tel Ex Parte, CC Docket No. 96-128 (Sept. 9, 2008) (attaching 50-state rate analysis; pointing out the necessity of preempting below cost intrastate rates and identifying below-cost rate caps in Tennessee, North Carolina, Florida, South Carolina and Georgia based on the Wood Study demonstrating of ICS costs); Pay Tel Comments at 7, CC Docket No. 96-128 (May 2, 2009) (“Because most states impose price caps on a local call and because many of those capped rates are below the costs incurred to handle the call, ICS providers lose money in many states on every local call.”); *id.* at n. 40 (“average rate charged by Pay Tel for all local collect calls (81.2% of total calls) . . . is 33% below the rate proposed by [Petitioners].”); Pay Tel Ex Parte at 2, CC Docket No. 96-128 (July 15, 2009) (referring to 50-state rate chart submitted with Sept. 9, 2008 ex parte demonstrating that Petitioners’ rate proposal would result in long distance rates that would be lower than the then-current collect call rate in 32 states) (attaching updated 50-state rate chart showing proposed rates would result in interstate rates lower than local rates in 30 states); Pay Tel Petition for Partial Stay of *Rates for Interstate Inmate Calling Services Order*, WC Docket No. 12-375 (Nov. 26, 2013) (“*Pay Tel Stay Petition*”); Pay Tel Ex Parte, WC Docket No. 12-375 (Dec. 9, 2013) (attaching new study showing intrastate shortfall created by the *Order* interim rate structure and attaching regulatory orders establishing below-cost intrastate rate caps).

³³ *Order* ¶ 76 n.281 (“Also, Pay Tel does not report different costs for interstate and intrastate ICS calls, presumably reflecting the fact that it manages its ICS calls through common, centralized call management facilities. We therefore find it is reasonable to assume that its cost data is representative of both types of calls.”); *see also, e.g.*, Pay Tel Cost Study, Workpapers Section B at 2, WC Docket No. 12-375 (July 23, 2013) (“Costs associated with all call types have been summed to produce Non Service-Specific Costs.”); Pay Tel Notice of Ex Parte Presentation at 1, WC Docket No. 12-375 (July 26, 2013) (“Pay Tel July 26 Ex Parte Notice”) (explaining that during a meeting with FCC staff: “Mr. Wood explained that this cost represents the minimum amount that Pay Tel must recover per minute for all call types (i.e., local and long distance) in order to recover its costs of providing ICS.”).

recover at least these same rates for all intrastate calls as well.³⁴ Pay Tel could not charge, for example, \$0.21 per minute for all interstate debit calls, while still being subject to below-cost intrastate rates, and recover its costs.

The *Order*'s rate caps fail to take into account the fact that, even if Pay Tel's aggregate costs could be recovered by charging \$0.21 for all debit calls (interstate and intrastate), existing local rate caps—which the *Order* did not preempt—prohibit Pay Tel from doing just that. Pay Tel cannot charge above the below-cost intrastate rates without violating state regulatory requirements and/or its facility-imposed contractual obligations. Pay Tel has previously provided the Commission with evidence of ICS rates in all fifty states,³⁵ and it has specifically explained that, of the thirteen states in which Pay Tel currently provides ICS, several have state-imposed intrastate rate caps that fall below the *Order*'s interstate rate caps (most notably, North Carolina and Georgia), and in the other states, Pay Tel and other ICS providers are subject to rate caps that are imposed by the confinement facilities based on ILEC collect call rates.³⁶

Pay Tel has analyzed its projected revenues as compared to its average costs (using the cost study it filed with the Commission, on which the *Order*'s interstate debit calling rate cap is based). Pay Tel has provided the Commission with a facility-by-facility breakdown showing

³⁴ As Pay Tel explained in its Petition for Partial Stay of the *Order*, the *Order* erred in adopting a \$0.21 rate cap applicable to prepaid calls; therefore, even if Pay Tel could charge \$0.21 for all intrastate prepaid calls it still would not be recovering its average costs (including security costs) as demonstrated in its cost study. *Pay Tel Stay Petition* at 16–19.

³⁵ See, e.g., Pay Tel Notice of Ex Parte Presentation, WC Docket No. 12-375 (July 26, 2013) (addressing telephone conversation with FCC staff in which Pay discussed 50-state survey and specific below-cost intrastate caps); Pay Tel Ex Parte Report “Rates for a 15 Minute Local Collect Call With Any State-Imposed Rate Ceilings”, WC Docket No. 12-375 (July 3, 2013) (showing examples of below-cost intrastate rate caps) (also attached to Pay Tel's December 9, 2013 ex parte filings).

³⁶ Pay Tel Ex Parte Report “Intrastate Rate Caps for Local Calls” at 1, WC Docket No. 12-375 (Dec. 9, 2013).

whether it realizes an intrastate loss or surplus with respect to each jail in which it operates.³⁷

As Pay Tel set forth in its *Petition for Partial Stay of the Order*, this detailed analysis determined that:³⁸

- Of the 160 clients³⁹ to which Pay Tel provides ICS, 117 of these locations have at least one category of intrastate calls in which Pay Tel's average revenue per minute is below cost.
- For these 117 locations, the total amount by which intrastate capped rates are below cost is \$2,864,081.
- Even if one factors in those locations at which Pay Tel is able to charge above-cost intrastate rates in order to subsidize the below-cost locations (which rates are likely unsustainable in an environment of rabid arbitrage encouraged by the *Order*), the net intrastate deficit that remains is \$1,666,412.

In other words, Pay Tel has currently managed to recover its costs by filling that \$1.66 million "below-cost intrastate hole" through above-cost interstate rates and, in some cases, fees.⁴⁰ The *Order* effectively eliminates Pay Tel's ability to subsidize the below-cost intrastate rates. It requires that all ancillary service charges be cost-based,⁴¹ and it flash-cuts the amount Pay Tel is permitted to charge for interstate calls, while leaving in place and completely untouched the existing below-cost intrastate rates. The *Order* creates for Pay Tel an intrastate

³⁷ See generally Pay Tel Ex Parte Report "Wood Intrastate Shortfall Analysis", WC Docket No. 12-375 (Dec. 9, 2013) ("Pay Tel Wood Shortfall Analysis") (setting forth, facility by facility, the annual shortfall Pay Tel incurs as a result of provision of ICS where calls are governed by below-cost intrastate rate caps).

³⁸ See *Pay Tel Stay Petition* at 15; see *id.*, Wood Declaration (attached to Stay Petition); see generally Pay Tel Wood Shortfall Analysis.

³⁹ Pay Tel provides service to 160 jail clients, which operate 180 separate facilities, for which Pay Tel had 2012 cost data and which were included in its cost study. All facilities included in Pay Tel's cost study were considered in the analysis referenced herein, but commonly-owned facilities have been grouped. The only facilities not included in this analysis were new facilities in California, Maryland and New Mexico which just came online in the fourth quarter of 2013 and for which Pay Tel had inadequate data to conduct an analysis.

⁴⁰ Under the rules the Commission adopts in the *Order*, any cost-recovery Pay Tel has obtained from fees to fill this "intrastate hole" will be eliminated.

⁴¹ *Order* ¶ 91 (holding that ancillary service charges must be cost-based and must be reasonably and directly related to provision of ICS in order to be compensable).

revenue hole between \$1.66 million and \$2.86 million and leaves Pay Tel with no means by which to fill it.

Simply stated, by capping Pay Tel's interstate rates at its average costs without preempting below-cost intrastate rate caps, the *Order* creates a situation where Pay Tel is unable to recover its total company costs. Accordingly, Pay Tel will not be fairly compensated for Section 276 purposes if the *Order*'s rate caps and cost-based rates requirement remain.

Given the showing herein by Pay Tel that the *Order* creates a regulatory environment that precludes recovery of total company-level costs, the *Order* violates Section 276. The Commission can remedy this unlawful outcome by acting pursuant to its statutory authority and preempting below-cost intrastate rates.

It must be recognized, however, that merely preempting below-cost intrastate rate caps will not ameliorate the total impact of below-cost intrastate rate constraints, as some of these constraints result from facility-imposed constraints.⁴² Indeed some of the below cost restrictions were adopted into contractual requirements at a prior time when rate caps (e.g., Florida, South Carolina, and Tennessee) were in place, but are no longer, but nonetheless Pay Tel remains subject to the requirement. In this regard, the Commission must recognize that jail providers are currently subject to a multitude of local contracts that were entered into based on then-existing assumptions with regards to the regulatory environment. This includes the fact that, prior to the adoption of the *Order*, the FCC had pursued a policy of subsidizing below cost intrastate rates with above-cost interstate rates. To flash cut to a new regulatory environment, without recognizing that pre-existing contractual obligations exist, would be an irrational approach to

⁴² The 50-state rate chart submitted by Pay Tel in this proceeding reveals that the proposed FCC collect rate cap of \$0.25 per minute for a 15-minute call is below the local rate for a 15-minute call in 34 states. 27 states are below the FCC cap for prepaid collect/debit based on the \$0.21 per minute FCC interim cap. See Pay Tel Ex Parte, WC Docket No. 12-375 (May 31, 2013).

ratemaking and would cause a violation of Section 276. To address the intrastate shortfalls caused by these constraints, the Commission should either preempt such requirements or permit providers to deviate from the established rate caps where these restrictions exist.

II. Any Permanent Rate Structure Established by the Commission Must Allow Confinement Facilities to Be Made Whole

The record unequivocally demonstrates that jail administrators incur costs in providing ICS in their facilities.⁴³ By and large, these costs are currently reimbursed to confinement facilities by providers through the payment of site commissions. The payment of such site commissions, where facilities mandate them as a contractual term or prerequisite to selecting a

⁴³ See, e.g., Letter from Commander Kenneth Bradshaw, First Vice Chairman, Arizona Detention Association, to FCC at 1–2, WC Docket No. 12-375 (Dec. 11, 2013) (“There are very real costs associated with the administration of ICS systems, including: monitoring phone calls, analyzing recordings, providing escorts for phone repair technicians, answering questions about the system from inmates and their families, etc. . . .”); Letter from William T. Schatzman, Sheriff, Forsyth County, N.C., to Marlene H. Dortch, Secretary, FCC at 3, WC Docket No. 12-375 (Dec. 9, 2013) (“It bears repeating that the current rule [in the *Order*] makes no provision for local detention facilities to recover inherent costs associated with providing inmate calling services. Our detention facility must be allowed to recover our costs for this service or there may soon come a time where we are no longer able to provide any inmate calling service here.”); Letter from BJ Barnes, Sheriff, Guilford County, to Marlene H. Dortch, Secretary, FCC at 2–3, WC Docket No. 12-375 (Dec. 9, 2013) (explaining the multiple safeguards that are put in place to facilitate the safe provision of ICS and that such safeguards “entail additional expense that must be factored in to FCC rate caps as a cost associated with jail telephone services”); Letter from R.N. Elks, Sheriff, Pitt County, N.C., to Marlene H. Dortch, Secretary, FCC at 1–2, WC Docket No. 12-375 (Nov. 21, 2013) (explaining that ICS phones “would be removed without operating costs being reimbursed for the purpose of them using the system itself”); Pay Tel Ex Parte Presentation, “Cost Recovery for Facility ICS Administration,” at 1–3, WC Docket No. 12-375 (May 31, 2013) (explaining costs facilities incur in administering ICS); Transcript of Reforming ICS Rates Workshop at 261–62 (testimony of Timothy Woods of the National Sheriffs’ Association: “There are jail staffing costs for providing and monitoring, sometimes real-time monitoring, inmate calling services, and these calling systems can be highly sophisticated—blocking inmate calls to certain numbers, detecting calls to the same number by multiple inmates, authenticating voice recognition before an inmate can make a call In short, there are unique and substantial costs to learning about and securely operating a telephone system in a correctional facility.”); National Sheriffs’ Ass’n Letter, WC Docket 12-375 (July 31, 2013) (“There are very real costs associated with the administration of ICS systems, including: monitoring phone calls, analyzing recordings, providing escorts for phone repair technicians, answering questions about the system from inmates and their families, etc.”); National Sheriffs’ Association Comments at 2, WC Docket No. 12-375 (Mar. 25, 2013) (explaining that sheriffs operating in jails incur costs related to comprehensive monitoring and reporting systems and capabilities that are required in order to effectively oversee secure inmate use of ICS).

particular ICS provider, is not optional for ICS providers seeking to do business with those facilities; in such instances, site commissions are certainly not an “apportionment of profit”⁴⁴ to the providers disbursing them. Site commissions are, in these situations, an element of costs to Pay Tel and other ICS providers and should therefore be among those considered compensable and recoverable.

If the Commission refuses to take the position of allowing site commissions, the Commission should require cost recovery of those costs related to facilities’ administrative and security-based ICS expenses. The Commission, in the *Order*, acknowledges that facilities incur costs in offering ICS to inmates and has opened the door to establishing a mechanism for recovering them.⁴⁵ Pay Tel supports the proposition the Commission advances here and urges it to adopt rules permitting facilities to recover, at a minimum, their costs connected to administering ICS and monitoring calls to secure jails and protect the public. Such a cost recovery mechanism must allow confinement facilities to be made whole for offering ICS in their facilities. Facilities, under no obligation to provide ICS, are unlikely to continue to do so if

⁴⁴ *Order* ¶ 54.

⁴⁵ *Id.* ¶ 54 n.203 (explaining that payments from ICS providers “in certain circumstances [] reimburse correctional facilities for their costs of providing ICS”). *See also Order Denying GTL and Securus Stay Request* at ¶¶ 39, 50 (“[I]n the Order, the Commission made clear that actual costs reasonably and directly related to the provision of ICS, such as security costs, incurred by the correctional facilities and reimbursed by ICS providers could be recoverable.”; “[T]he Commission specifically allowed for the inclusion of costs related to the provision of ICS that are incurred by correctional facilities and reimbursed by ICS providers.”). This position is in fact consistent with the precedent the Commission cites for support in refusing to allow providers to recover the costs associated with site commissions. The *USF/ICC Transformation Order* that the Commission refers to explains that certain payments to an LEC should not be included as costs “because such payments have nothing to do with the provision of interstate switched access service.” *Order* ¶ 55 n.210 (quoting Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, WC Docket No. 10-90 et al., 26 FCC Rcd 17663, 17883–85, ¶¶ 684–86 (2011)) (emphasis added). Here, the Commission expressly points out that some portions of site commission payments do in fact have to do with provision of ICS; if the standard is that recovery is not allowed where payments have nothing to do with a certain service, then those elements of the payments directly and reasonably related to providing a given service must be recoverable costs.

they have to absorb the costs of administering ICS and monitoring calls to protect inmates, staff, and the public from criminal activity. In the absence of full cost recovery, jails will suffer financial losses that they will not be able to recoup and will face the decision as to whether to curtail ICS services if costs cannot be recovered.

III. The Commission Should Adopt Tiered Rates That Appropriately Differentiate Between the Costs of Providing ICS in Jails and Prisons

The Commission seeks comment regarding further ICS rate reform. Pay Tel has argued consistently that a one-size-fits all rate cap system, in which all confinement facilities are treated the same, is unworkable. Pay Tel instead urges adoption of a tiered rate structure that recognizes the differences between jails and prisons and the costs of providing ICS therein. The Commission may also wish to explore a uniform/unified approach in which interstate and intrastate calls are subject to the same rate caps, so that providers like Pay Tel can in fact recover their costs (as mandated by Section 276), and the incentive for rate arbitrage can be eliminated. Further, the Commission should correct the way it categorized calls for purposes of rate caps in the *Order*; prepaid accounts for families and inmate debit calls should not be subject to the same caps because the costs of the former are higher than the latter.

A. A Differentiated, or “Tiered” Rate Structure Between Prisons and Jails Is Required

There is abundant record evidence⁴⁶ demonstrating there are very real cost differences associated with providing ICS in jails and prisons—and that those differences make it significantly more costly to provide ICS in a jail than a prison.⁴⁷ These differences are borne out

⁴⁶ See, e.g., Dissenting Statement of Commissioner Ajit Pai at 112 n.45 (citing record evidence, including Pay Tel’s submissions) (“Pai Dissent”).

⁴⁷ Pay Tel’s submissions alone constitute substantial record evidence of the differences between providing ICS in prisons and jails, and the higher costs associated with operations in the latter. See, e.g.,

by the cost information submitted in this proceeding to date. As set forth below, these differences flow from the fundamentally different purposes served by the facilities and include matters such as: the heavy, consistent, and faster turnover of the inmate population in jails, leading to increased account set-up costs and requiring more phones per inmate in jails (and higher costs associated with the investment therein and maintenance thereof); a greater reliance on prepaid accounts and collect calling in jails, each of which is more costly to provide than debit calling; the necessity of integrating ICS systems with other services, like jail management, inmate banking and commissary systems, in order to facilitate the movement of money to pay for ICS calls—coupled with the fact that such integration is customized for each facility; the requirement that ICS providers operating in jails provide a significant amount of zero-revenue, or free, calls to inmates;⁴⁸ and fewer overall calling minutes in jails relative to prisons over which to spread costs due to prescribed limits on the length of calls in jails and other similar reasons.⁴⁹

Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Aug. 2, 2013) (“Pay Tel Aug. 2 Ex Parte”); Pay Tel Aug. 1 Ex Parte Presentation at 3–5; Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Aug 1., 2013); Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (July 31, 2013) (“Pay Tel July 31 Ex Parte”); Pay Tel Ex Parte Presentation, “Inmate Calling Service (ICS) Market Distinctions: Prisons vs. Jails”, WC Docket No. 12-375 (July 3, 2013) (“Pay Tel Prisons vs. Jails Report”); Pay Tel May 31 Notice of Ex Parte; Pay Tel Reply Comments at 2, 4–12; Pay Tel Comments at 9–11.

⁴⁸ *See, e.g.*, Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, at 2 WC Docket No. 12-375 (July 3, 2013) (explaining the “dramatic increase in zero-revenue calls such as free first calls to connect with family, free calls to public defenders” and more, and noting that these calls “can constitute over one-half of the total calls in the growing-number of jails” where jails require systems’ integration); Pay Tel Ex Parte Presentation, “Changes in ICS Costs in Jails: 2008 to Present”, at 2–3, WC Docket No. 12-375 (July 3, 2013) (“Pay Tel Report Changes in ICS Costs in Jails”) (“Demands from confinement facilities to better serve the needs of inmates have resulted in the use of the inmate phone for more functions than simply placing phone calls. Inmates now use the phone for first free calls to connect with family, free calls to public defenders, calls to perform balance inquiries on their trust accounts, calls to transfer funds to their debit phone account, calls to place commissary orders, calls to initiate . . . grievances, and more. In Jails where Pay Tel is required to provide free calls, commissary system calls, and visitation recording the average is 53.9% of total phone calls”); Pay Tel Reply Comments at 9.

⁴⁹ *See* Pay Tel Comments at 8–12. Pay Tel repeatedly summarized those differences and the higher costs of serving jails. *See, e.g.*, Pay Tel Aug. 1 Ex Parte Presentation at 3–4 (setting forth

All ICS providers uniformly agreed that these fundamentally different cost structures exist.⁵⁰ Even the Petitioners, while differing in their proposed remedy, also acknowledged these differences and agreed with Pay Tel’s suggestion for a “tiered” rate structure.⁵¹

The Commission, too, acknowledged this evidence.⁵² Nonetheless, it then adopted in the *Order* one-size-fits-all safe harbors and rate caps that treat all confinement facilities alike. This outcome simply does not comport with the reality faced by ICS providers nor with the record

numerous unique aspects of jails that make provision of ICS therein more costly than provision of ICS in prisons, including “(i) the heavy turnover of the inmate population which results in a greater demand for high-cost individual account set-up and greater density of phones per inmates (with resulting higher capital investment, repair cost and bandwidth demand); (ii) required integration of phone and commissary systems in jails as opposed to prisons; (iii) greater incidence of non-revenue calls in jails as compared to prisons; (iv) heavier reliance on individual account set-up as opposed to lower-cost debit calling in prisons; and (v) fewer calling minutes over which to spread costs as opposed to prisons”); Pay Tel Prisons vs. Jails Report at 1–9; Letter from Glenn B. Manishin, Counsel for Telmate, LLC, to Marlene H. Dortch, Secretary, FCC at 1, WC Docket No. 12-375 (filed July 26, 2013) (“[T]here are substantial differences in terms of scale, capacity, broadband costs and inmate ‘churn’ between larger state department of corrections (‘DOC’) systems and the thousands of smaller county and municipal jails served by ICS providers like Telmate.”).

⁵⁰ See, e.g., Network Communications International Corp. Comments at 2–7, WC Docket No. 12-375 (Mar. 25, 2013) (ICS provider that serves nearly 300 jails nationwide discussing the free services it provides; stating that the market data used by the Wright Petitioners to determine proposed benchmark rates “completely disregards the diversity of specific service costs relating to city holding facilities, county jails and privately owned facilities”; and explaining in detail why “it costs more to provide inmate telephone services to short-term stay inmates who generally stay in jail for as little as 1 hour, but require more management during their stay in jail than long-term DOC or federal inmates”); Letter from John E. Benedict, VP—Federal Regulatory Affairs & Regulatory Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC at 2–3, WC Docket No. 12-375 (filed Aug. 2, 2013) (submitting cost data demonstrating that CenturyLink’s cost-per-minute of providing ICS is 18% higher in jails than in prisons); see generally Comments of Securus Technologies, Inc., Expert Report of Stephen E. Siwek, WC Docket 12-375 (Mar. 25, 2013) (showing that the average costs of serving jail facilities are higher than serving prison facilities).

⁵¹ See Ex Parte Presentation of Petitioners Martha Wright, et al., Talking Points at 3, CC Docket No. 96-128 (Jan. 12, 2010) (“Petitioners agree with Pay Tel Communications that governing legal standards could be met by a tiered rate structure”); Ex Parte Presentation of Petitioners Martha Wright, et al., at 6, CC Docket No. 96-128 (Nov. 5, 2009) (“[I]f the concern is that carriers serving such facilities could not recover their costs under benchmark rates based on average costs, a tiered approach, as suggested by Pay Tel, should meet all legitimate concerns”).

⁵² See *Order* ¶ 77 (“Pay Tel serves jails exclusively, which are generally smaller and which providers claim are more costly to serve than prisons.”); *id.* ¶ 80 (characterizing smaller facilities as “potentially higher-cost” relative to larger facilities); *id.* ¶ 59 n.222 (acknowledging that groups have argued since at least 2007 that “there were variations among facilities in the costs of providing ICS and [that the Commission should] reflect those in setting rate maximums”).

that has been established in this proceeding. While there are economies of scale at work in any market, the distinctions here are driven not by volume, but rather by the unique characteristics of prisons and jails.⁵³ The drivers of those differentiated costs are detailed below.

1. Inmate Turnover or Churn in Jails

Each jail and prison facility has a fixed capacity or number of beds. The rate at which the inmate population changes is the inmate turnover, and it varies greatly between prisons and jails. Prisons generally house only inmates that have been tried, convicted and sentenced. Inmates in prisons remain therein for many months or years. By contrast, the majority of inmates in a jail have been arrested, but not yet tried or convicted. The typical inmate stay in a jail may be just a matter of hours or days; historically 66% of all inmates booked are released within 72 hours.⁵⁴

The higher inmate turnover in jails impacts costs of providing ICS in myriad ways. 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 then released prior to making 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. The constant churn of inmates arriving and departing at a jail means that the ICS provider is perpetually faced with presenting and explaining its calling program options to new inmates and new called parties.

The inmate turnover, naturally, leads to increased costs relating to the set-up of new accounts. In Pay Tel’s experience, the 67% of inmates who do place revenue-generating calls,

⁵³ See Pay Tel Ex Parte, WC Docket No. 12-375 (Dec. 9, 2013) (“Economic Characteristics of Prisons vs. Jails”). See also generally Pay Tel Prisons vs. Jails Report.

⁵⁴ See, e.g., Pay Tel Prisons vs. Jails Report at 1–2.

on average, place such calls to five unique numbers. Pay Tel's research shows that a small 212-bed jail can result in as many as 23,170 new customer telephone numbers dialed per year.⁵⁵

Over 93% of these numbers, 21,548 (wireless, VoIP or CLEC) require the called party to set up an account to receive phone calls. That is more than eight times the number of accounts that must be set up compared to a similar-sized prison facility. Each new account requires the initial validation, First Call Free expense, live customer service for account setup, and live customer service for account inquiries. All of these labor-intensive processes add to the cost of serving each of these customers even though the majority of the accounts will only receive a few phone calls and will go inactive in less than 72 hours, when the inmate is released.

Turnover also impacts the demand for customer service. Newly-booked inmates are encouraged to contact family to bond-out of the facility. Arrests happen at all hours, requiring 24-hour customer service.

Conversely, prisoners arrive at a facility after a trial, conviction and sentencing. There is no immediate urgency to place phone calls, and, often, inmates are not even permitted to make calls immediately upon arriving at a new facility, instead only making calls after numbers are reviewed, vetted and approved. While customer service is important and must be made available, there is no need for round-the-clock service. In addition, families receive calls from prisons, generally, for a period of months or even years. They become familiar with the service and require less personal assistance over time, further reducing the cost to support calling from a prison.

Providers serving jails also face increased costs related to refund processing and management of inactive accounts. When the majority of new accounts go inactive (again,

⁵⁵ See Pay Tel Prisons vs. Jails Report, Exhibit A.

usually just 72 hours after they are created), many customers contact the ICS vendor for a refund of their unused account balance. Properly refunding these funds in a timely manner is yet another labor-intensive, costly process that disproportionately affects providers of ICS in jails. After six months of no activity on an account, Pay Tel officially classifies such account as inactive and refunds the customer's money through a prepaid phone card that can be used by the customer to place long distance calls or apply the balance to another account, or the customer can return the card to Pay Tel for a full refund for no charge. All remaining account balances must be maintained by Pay Tel in conformance with individual state unclaimed property laws and turned over to the state revenue departments at the appropriate time. All of these procedures require significant IT development, are also very labor-intensive and increase dramatically the cost of providing ICS to Jails.

2. Costs of Integrating ICS Systems with Jail Systems

A particular cost relevant to the jail setting as opposed to the prison setting is the cost of integrating the ICS system to numerous internal jail systems, a practice required as a prerequisite for debit calling as well as to facilitate the movement of money between inmate accounts and the ICS provider to pay for ICS calling.⁵⁶

The rapid turnover and transitional nature of the inmate population in jails requires real time system integration.⁵⁷ So, too, does providing the option of debit calling, for which the

⁵⁶ The *Order* implies that “costs to integrate inmate calling with other services, such as commissary ordering, internal and external messaging, and personnel costs to manage inmate commissary accounts” might not be recoverable. *Order* ¶ 53. Pay Tel does not disagree that costs unrelated to the provision of ICS should be excluded; however, costs associated with integrating ICS with jail systems are in fact directly related to provision of ICS, as explained herein. As this is an area of ICS that is not well-understood or particularly well-developed in the record, an explanation of how this system integration actually works is appropriate.

⁵⁷ See, e.g., Pay Tel Prisons vs. Jails Report at 3, 9.

Wright Petitioners have long advocated; debit calling is not possible in jails unless ICS providers integrate the jail management system with either an inmate banking or commissary system. Among the systems typically integrated with the ICS phone system are the jail management system, commissary system, and inmate banking system.⁵⁸

In a typical jail setting, an inmate has a trust account into which money is deposited that can be used to purchase products from the commissary, pay jail-imposed fees, and to place debit phone calls. This account is managed by one of two entities, either an inmate banking company, or a commissary vendor. In order for an inmate to be able to pick up an ICS phone, check his trust account balance, and transfer funds from that balance (a debit transfer) into a debit account from which he can make ICS calls, three systems must be integrated: the jail management system, the inmate banking company or commissary system (whichever controls the trust account funds), and the ICS phone system. Without such integration, the inmate cannot place debit calls—again, an option for which the Wright Petitioners have long advocated.

It is critical that these systems are integrated in and operable in real time. Confinement facilities have an interest in processing inmates quickly so that persons do not spend more time than necessary in them. One of the best tools an inmate has to bond out of jail quickly is to place phone calls to persons via debit calling (so the called party does not incur the charge) in order to try and arrange bail money and the like. It is important that an inmate be afforded the opportunity to start placing those calls as soon as possible; he needs to have fast access to his funds in order to make the calls, which is accomplished through real-time integration of these systems.

⁵⁸ *Id.*

The costs ICS providers incur in creating and facilitating that integration are directly related to their provision of ICS. Pay Tel urges that the Commission establish that costs associated with systems integration, which is essential in providing high-level service in jails today, are in fact recoverable.

3. Any Rate Cap for Prepaid Calls Must Be Differentiated From the Rate Cap Applicable to Debit Calls

The Commission in the *Order* elected to treat debit and prepaid calls as similar services for the purposes of rate caps and safe harbors on the grounds that “[t]he record establishes that prepaid calling is generally less expensive than collect calling but can be about equal in rates to debit calling.”⁵⁹ Pay Tel respectfully submits that the record in fact establishes the opposite—that, if anything, prepaid calling is more costly than debit calling and is generally equal to the cost of collect calling.

In supporting its claim that the “record” evidence cuts in favor of grouping debit and prepaid together, the Commission cited just one source: *rate*,⁶⁰ not cost, data submitted by HRDC showing that prepaid rates are “lower than *or equal to collect rates* in” 38 states.⁶¹ The Commission thus elected to group prepaid calling with debit calling for rate purposes, and to cap prepaid rates a full \$0.04 below collect rates,⁶² based on *rate* data for prisons, where even that data failed to show conclusively that customers were charged less for prepaid than collect calls

⁵⁹ *Order* ¶ 24.

⁶⁰ That rates may be lower for prepaid does not necessarily reflect the underlying cost of the service, given that rates have not heretofore been set strictly on the basis of cost. There may be any number of reasons the prepaid rates cited by HRDC are lower than collect (contrary to Pay Tel’s cost study, which shows its prepaid and collect costs are the same), including the possibility that providers charged less for prepaid in order to encourage use of prepaid, which does not entail the risks of non-collection incident to collect calling.

⁶¹ *Id.* ¶ 24 n.84 (emphasis added).

⁶² *See* § 64.6030.

nationwide.⁶³ Further, the Commission mischaracterized HRDC’s comments, which explain that “prepaid calls are generally less expensive than collect calls *but more expensive than* or equal to debit calls.”⁶⁴ This difference, multiplied across millions of minutes of ICS calls, is not trivial, especially in an environment where rates are tied to costs.

The record, however, is replete with convincing, contrary evidence submitted by Pay Tel demonstrating that (1) its *costs* of providing prepaid service are far more comparable to its costs of providing collect service than its costs of providing debit service, and (2) its costs for providing prepaid calling—inclusive of additional fees for continuous voice biometric identification service—are above the interim \$0.21 rate cap.⁶⁵

Pay Tel consistently referred to its costs for providing prepaid and collect calls together, separate and apart from its less-costly debit calls: “Simply, Pay Tel would implore the Commission to consider rate-related issues with respect to prepaid collect and debit ICS calls separately. As Pay Tel has explained throughout this proceeding, the former carry considerably greater costs for ICS providers than the latter.”⁶⁶

In fact, the very cost data that the Commission used in developing its \$0.21 rate applicable to debit and prepaid calls came from Pay Tel—and yet the Commission disregarded the very categories Pay Tel used in submitting such data. That is, Pay Tel explained that its cost,

⁶³ The HRDC data relied on by the *Order* shows that only 17 states have rates that are the same for prepaid and debit, while 13 states have prepaid rates that are above debit rates. *See* HRDC Ex Parte Letter, Rev. Exh. B. Moreover, the seven states’ prison data relied upon by the Commission in establishing the safe harbor rates shows an average rate of \$0.1186/minute for debit and \$0.1268/minute for prepaid, which is a 6.4% difference in rates. *See Order* ¶ 63.

⁶⁴ HRDC Comments at 8 (emphasis added) (giving examples of states where *rates* for prepaid calls are higher than rates for debit calls).

⁶⁵ *See, e.g.*, Pay Tel Aug. 2 Ex Parte; Pay Tel Aug. 1 Ex Parte Presentation at 4 n.15; Pay Tel July 26 Ex Parte Notice; Further Comments of Pay Tel Communications, Inc. at 3–4, WC Docket No. 12-375 (July 17, 2013); Pay Tel Reply Comments at 9–10; Pay Tel Comments at 11 n.26.

⁶⁶ Pay Tel Aug. 2 Ex Parte (seeking different rate caps for prepaid collect and debit calls).

excluding commissions, of providing “collect/prepaid collect calls” was \$0.21 per minute and that its cost, excluding commissions, of providing “debit calls” was \$0.19 per minute.⁶⁷ In the *Order*, the Commission mysteriously and without explanation dropped the “prepaid collect” when describing Pay Tel’s cost data.⁶⁸ In reality, as explained, Pay Tel reported average actual and projected costs for “debit” and “collect/prepaid collect” calls, respectively, at those levels. The Commission embraced Pay Tel’s data, on the one hand, and failed, on the other, to consider Pay Tel’s repeated declarations that its prepaid costs are in line with its collect costs. The record evidence makes clear that grouping prepaid calling with debit calling was a mistake. The Commission should fix it and separate these two types of calls for rate cap and safe harbor purposes, and should properly group prepaid and collect calls together.

IV. The Commission Should Ensure That There Is Appropriate “Headroom” In Any Cost-Based Rate Caps Applicable to Service in Jails

A cost-based requirement that takes an “average cost” approach creates obvious difficulties for ICS providers serving the jail market where the costs associated with serving particular facilities can vary greatly. In this regard, the Commission’s attempt to impose price caps for this particular market is unique and novel, since a rate which recovers average costs may be too low in above-average cost facilities. Unlike other markets regulated by the Commission, costs across different types of jail facilities are anything but uniform; thus, creating a cost-based rate cap calculated by looking at the average costs across facilities, all of which have different

⁶⁷ See, e.g., Pay Tel Aug. 1 Ex Parte Presentation; Pay Tel Ex Parte Presentation, Inmate Calling Services Cost Presentation at 1–2, WC Docket No. 12-375 (July 23, 2013) (categorizing costs as those associated with “collect/prepaid collect” or “debit”).

⁶⁸ *Order* ¶ 75 (including no mention of prepaid calling: “In its recent cost study, Pay Tel reports average actual and projected costs for debit and collect ICS calls of \$0.208 per minute and \$0.225 per minute, respectively, inclusive of additional fees for continuous voice biometric identification service . . .”).

costs individually, creates significant problems. Most notably, such a rate cap creates, in this market where costs are not uniform, situations in which ICS providers will be cross-subsidizing losses incurred at facilities where costs exceed the rate caps with gains achieved at facilities where costs are below the rate caps. The cost-based requirement, as applied to Pay Tel and other providers of ICS in jails, slices too thin and will leave many providers facing the decision whether to lose money in serving a particular facility or abandon service altogether:

[T]he *Order* contains no credible explanation for why any provider would continue to serve any county jail where it is unable to recoup all of its costs. After all, providers are under no legal obligation to provide inmate calling services to any particular correctional facility. Should they make the rational business decision to withdraw from facilities where they would have to operate at a loss, inmates in those facilities ultimately will suffer. . . .

Given that the record shows that the cost of serving jails, and especially small jails, can be significantly higher than 21 cents a minute, there are sure to be many jails, juvenile correctional institutions, and secure mental health facilities, with costs above the cap. Given that the *Order* requires ICS providers to charge below-cost rates at such facilities until the Commission says otherwise, either providers will stop serving smaller jails or the waiver requests will come in swiftly.⁶⁹

Pay Tel would urge the Commission, therefore, to ensure that any rate caps applicable to the jail environment have sufficient “headroom” above average costs to allow for service to higher cost facilities. That is, such rate caps should take into account and then be set slightly above demonstrated costs so that providers are not forced to either cross-subsidize facilities or stop serving below-cost prisons or jails.

It is critical that there be separate rate caps for ICS in prisons and jails to account for the cost differences between the two.⁷⁰ The current rate cap for jails, as Pay Tel’s data illustrate, is deficiently low. Setting the rate cap so closely in line with average costs (as is the case for Pay

⁶⁹ Pai Dissent at 119–20, 126.

⁷⁰ NCIC, for example, proposes a nationwide, presumptively safe rate cap of \$0.25 per minute. See Network Communications International Corp., *Petition for Reconsideration* at 2, WC Docket No. 12-375 (Dec. 13, 2013).

Tel) eliminates any margin or “give” that might otherwise exist. If a provider elects to cross-subsidize facilities (rather than abandoning above-cost facilities), and then loses a contract with one of its below-cost facilities, its delicate subsidization balance will be upset, and it will face losses. The Commission should hold ICS providers serving all facilities to reasonable rate caps that accomplish the three goals which must result from meaningful reform: just and reasonable rates for ICS consumers, full cost-recovery for facilities, and modest, fair compensation for providers.

Fundamental market dynamics should ease concerns that all providers will simply charge up-to-the-rate caps, even where their individual costs fall significantly below such caps. The competition for ICS contracts will induce providers to compete on retail pricing. The Commission can revisit the rate caps from time to time in order to adjust them upwards or downwards based on changing costs and/or unanticipated market failings.

V. The Order’s Safe Harbor Rates are Unworkable as Applied To Jails and Must be Revised or Abandoned

The safe harbor rates of \$0.12 (debit/prepaid) and \$0.14 (collect) that are applied to jails are calculated based upon rate—not cost—data submitted by HRDC based on statewide contracts for seven state departments of correction (*prisons*) that have excluded site commission payments from their rates.⁷¹ Such application to jails is nonsensical in light of the abundant record evidence demonstrating the higher costs incurred in providing ICS in such facilities.

This error of using prison rates to generate a safe harbor applicable to jails becomes clear when such prison rates are juxtaposed against the cost data upon which the Commission relied in

⁷¹ *Order* ¶¶ 61–62. See *Pai Dissent* at 121 (“[The safe harbor] data is based on the prison rates of seven states that have eliminated site commissions. No data for jails (service to which, again, requires higher per-minute costs) was used to calculate the safe harbor, even though that benchmark applies to jails. It is therefore not surprising that the safe harbor is below the average per-minute costs of serving jails.”).

adopting debit and prepaid calling caps. The Commission adopted Pay Tel’s demonstrated average cost for providing debit calls in setting a \$0.21 per minute rate cap for debit calls, concluding that “Pay Tel’s public cost submission provides a sound basis to derive the conservative high-end estimate that we use to set the debit and prepaid interim rate cap.”⁷² It was the only cost data that the Commission deemed competent for purposes of setting its rate caps.⁷³

Thus, at least as applied to Pay Tel (and, presumably, to others that provide ICS in jails since Pay Tel’s cost data represents the benchmark data relied on by the Commission), the demonstrated average costs of providing ICS in jails are well above the safe harbor rate. The Commission accepted, at a minimum, that it costs at least one provider of ICS in jails \$0.21 per-minute to do so. Indeed, none of Pay Tel’s existing rates is within the safe harbor.⁷⁴ It is therefore irrational to have set a safe harbor rate, applicable to jails, beneath the average cost demonstrated for the service. It would have been one thing if the Commission had established a rate cap above demonstrated average costs—but it did not do so. As a result, since providers of ICS in jails are legally prohibited from pricing above their average costs, it would be irrational for these providers to price below their average costs, since they would have no legal mechanism for recovering the foregone revenue.

The irrationality of establishing a safe harbor for jails so far below average costs is exacerbated by the punitive repercussions of pricing outside the safe harbor. Even though Pay Tel cannot possibly charge rates remotely approaching the safe harbors in one facility, much less all its facilities, the *Order* nonetheless encourages and facilitates the filing of complaints

⁷² *Order* ¶ 76.

⁷³ *See, e.g., id.* ¶¶ 75–76, nn.277–78, 283 (declining to use cost study data submitted by Securus and CenturyLink).

⁷⁴ *See Pay Tel Stay Petition*, Declaration of Vincent Townsend.

asserting unjust and unreasonable rates against Pay Tel and other providers of ICS in jails—and puts the burden on the provider to defend itself in such proceedings at the risk of being forced to make refunds to customers if its rates are found to be non-compliant.⁷⁵ To put Pay Tel and other jail providers in this position for assessing rates based on average cost is nonsensical and defeats the purpose of the safe harbor in the first place. But that’s what the *Order* does.⁷⁶

To have, on the one hand, adopted Pay Tel’s cost study because of its indicia of reliability and then, on the other, capped Pay Tel’s rates at its average costs makes the *Order*’s “safe harbor” a nullity for providers of ICS in jails. As applied to jails, the “safe harbor” lacks any rational connection to the purpose of the mechanism in the first place and to the facts found regarding service in jails. The Commission must either create a meaningful, workable safe harbor for ICS rates in jails or abandon it altogether as applied to jails.

VI. The Commission Should Prohibit Ancillary Charges, Subject to Limited Exemptions

The Commission correctly understands that “ICS providers impose charges on inmates and ICS call recipients that do not recover the costs of providing phone service but rather recover costs associated with functions ancillary to provisioning ICS”⁷⁷ Pay Tel could not agree

⁷⁵ *Order* ¶¶ 120–21 (explaining that only those ICS providers whose rates are at or below the safe harbor at all facilities will be afforded the benefit of a rebuttable presumption that its rates are just, reasonable, and fair and that ICS providers “will bear the burdens of production and persuasion in all complaints challenging whether its ICS rates and/or ancillary charges are just, reasonable and fair”).

⁷⁶ It is obvious that the safe harbor rates were established with prisons in mind—not jails—under the assumption that the average cost of providing service in prisons is substantially lower than the average cost of providing service in jails. This is borne out by the fact that the safe harbor rates were set based on consideration of rates in prisons, not jails. This is yet another example of how the *Order* simply does not work in the jail environment.

⁷⁷ *Order* ¶ 167; *see, e.g.*, Further Comments of Pay Tel at 2 (citing record sources); *see generally* Prison Policy Initiative, “Please Deposit All of Your Money: Kickbacks, Rates and Fees in the Jail Phone Industry”, WC Docket No. 12-375 (May 9, 2013).

more, and has consistently advocated in this proceeding that the Commission regulate such ancillary charges and fees as an aspect of comprehensive ICS reform.⁷⁸

Consistent with its prior arguments, Pay Tel urges the Commission to adopt a scheme in which ancillary charges are generally prohibited, subject to a narrow list of clearly-defined exemptions that allow ICS providers to recover their costs of providing certain services directly related to the provision of ICS. Specifically, Pay Tel advocates that the Commission draw a distinction between fees associated with the processing of payments and all other ancillary service charges, permitting cost recovery for the former but not the latter. To the extent the Commission exempts certain ancillary charges from a general ban thereon, each excepted charge should be assessed a defined cap; any such exempted charges should not serve as a covert profit-generator. The Alabama Public Service Commission recently took this very approach:

The funds most ICS customers can afford to devote to inmate calls are finite. Therefore, any proportion absorbed by unnecessary or excessive ICS provider fees decreases the amount devoted for inmate calls and reduces commissionable revenue. The interests of ICS customers and confinement facilities are best served by eliminating unnecessary or excessive provider fees and thereby maximizing customer funds available for inmate calls. . . . [A]uthorized fees for ICS service are intended only to recover actual costs incurred by the ICS provider. They are not a profit center for the service provider nor are they to be a source of commissionable revenue for the inmate facility. Any evidence to the contrary constitutes tacit admission that the approved fees are above provider cost.⁷⁹

⁷⁸ See, e.g., Further Comments of Pay Tel at 2–6; Pay Tel Comments at 14–16; Pay Tel Reply Comments at 3 n.6; Pay Tel May 31 Notice of Ex Parte at 1.

⁷⁹ Errata and Substitute Order Proposing Revised Inmate Phone Service Rules and Establishing a Comment Period, *In re Generic Proceeding Considering the Promulgation of Telephone Rules Governing Inmate Phone Service* at 11, 15, Docket No. 15957 (Ala. Pub. Serv. Comm’n Oct. 7, 2013) (“*Alabama IPS Order*”).

Pay Tel has explained the costs associated with payment processing.⁸⁰ Most ICS providers offer customers several payment options, all of which have differing processing costs. Because of that, it is fairer to allow the costs providers incur through payment processing to be recovered through tailored fees (that reflect the costs associated with a certain method of payment) rather than rates, so that consumers who select cost-effective payment options are not subsidizing those whose selections are costlier. To the extent ICS providers are permitted to charge these payment processing fees, again, such fees must be cost-based and subject to caps. Pay Tel would continue to push for the proposed caps on such payment processing fees for which it has previously advocated in this proceeding,⁸¹ which are generally in line with those endorsed in the aforementioned *Alabama IPS Order*. The *Alabama IPS Order* recommends the following, maximum allowable fees related to payment processing: \$3.00 for website payment via credit or debit card; \$3.00 for IVR phone payment via credit or debit card; \$5.95 for live agent phone payment via credit or debit card; and \$3.00 for kiosk payment via cash, credit or debit card.⁸² It also prohibits ICS providers from receiving any portion of fees paid by customers to third-party financial services (e.g., Western Union and MoneyGram) for submission of payments for ICS and/or for transferring funds into inmate accounts:⁸³

Staff emphasizes that ICS providers are prohibited from receiving any portion of fees paid by their customers to third-party financial services for submission of payments for ICS and/or for transferring funds into inmate accounts. Any

⁸⁰ Pay Tel Further Comments at 3–5 (such costs include credit card payment processing, charge-backs, personnel time (for live-operator account set-up or manual handling of mail payments), compliance with PCI regulations, fraud prevention and management, customer refunds, and more).

⁸¹ See Pay Tel Further Comments at 6 (proposing, for example, fee caps of \$3.00 for web payments and automated IVR phone payments, \$5.95 for live agent payments, and, for third-party payments, a cap set at the lowest payment option available from a third party vendor with no fee revenue or share of commission paid to the ICS provider).

⁸² *Alabama IPS Order* at 16.

⁸³ *Id.*

evidence that ICS providers are benefitting financially from fees charged their prospective or existing customers by third-party money transfer services and/or that ICS providers are paying confinement facilities commissions therefrom, constitutes tacit admission that the fees are excessive and shall subject the provider to Commission regulatory action including, but not limited to, customer refunds with interest. All ICS providers shall submit, for informational purposes to the Commission, the transaction fee charged their customers by Western Union and MoneyGram for ICS payments and will update this information as the fees change. Staff will compare fees submitted by all ICS providers and require justification from ICS providers for any observed anomalies.⁸⁴

In addition to permitting certain, limited ancillary fees at capped rates, the Commission should—as it does in the *Order*—allow for cost recovery of third-party technology and security costs, such as voice identification biometrics, through providers’ rates.⁸⁵ Similarly, the Commission should also permit the recovery of fees charged by commissary companies associated with system integration and fund transfers. Again, here the recent proposals from the Alabama Public Service Commission serve as a template where the inmate benefitting from the service pays the fee as opposed to increasing the call rate:

ICS providers are typically required to invest in software interfaces with inmate trust/canteen accounts for purposes of transferring inmate funds into ICS debit accounts. Additionally, inmate trust/canteen providers typically assess ICS providers a percentage of the inmate funds transferred as a fee for the service. Usually the transfers are very small amounts (\$3 to \$5). The staff recommends a maximum convenience fee of five-percent (5%) of the funds transferred into the inmate’s ICS account for purposes of recovering the ICS provider’s costs.⁸⁶

Finally, Pay Tel would continue to advocate for the prohibition of any other fees or surcharges, per-call or otherwise, that are not cost-justified/substantiated.⁸⁷ ICS providers would, however, have the option of submitting to the FCC for approval cost data related to any

⁸⁴ *Id.* at 16–17.

⁸⁵ *See, e.g., Order* ¶ 75.

⁸⁶ *See Alabama IPS Order* at 17 (Alabama Public Service Commission staff recommending a maximum convenience fee of 5% of funds transferred into an inmate’s ICS account for purposes of recovering an ICS provider’s costs).

⁸⁷ *See Pay Tel Further Comments* at 5–6.

third-party technology (when requested or required by a facility) as part of the provider's annual report. The Commission should define a timeline for approval of such requests.

VII. The Commission Must Address Arbitrage and the Security Problems Associated Therewith Through Elimination of Arbitrage Incentives and by Leaving Call-Blocking Decisions to Confinement Facilities

The FNPRM is peppered with calls for comments regarding the very real problem of rate arbitrage. Pay Tel is concerned, however, that the Commission may not fully understand the potential for the rate arbitrage that will result if existing rate disparities established in the *Order* are allowed to continue. For example, the Commission asks whether the *Order's* cost-based rates would “create a market-based solution for driving intrastate rates to cost-based levels absent further regulatory actions”.⁸⁸ The rate arbitrage problem will exist so long as rate disparity remains.

It is true that rate arbitrage concerns ICS providers for economic reasons because consumers can obtain telephone numbers that do not reflect their true geographic location in order to avail themselves of the lowest rates possible. But the bigger, more important arbitrage problem deals with the deception that can be perpetrated through such arbitrage and the security and safety implications that spring from it. Pay Tel has explained both how such rate arbitrage operates and the security and safety risks/problems that confinement facilities must combat as a result.⁸⁹ Simply, rate arbitrage in the confinement facility setting is about more than consumers

⁸⁸ *Order* ¶134.

⁸⁹ *See, e.g.*, Pay Tel Comments at 6–9; Pay Tel Reply Comments at 7, 9, 11–12; Pay Tel Aug. 1 Ex Parte Presentation at 5 n.17; Pay Tel July 26 Ex Parte Notice at 2–3; Pay Tel “Inmate Calling Arbitrage” Report, WC Docket No. 12-375 (July 3, 2013) (“Pay Tel Arbitrage Report”); Pay Tel May 31 Notice of Ex Parte at 1–2; July 3 Ex Parte Notice at 3;

receiving artificially low prices; it is dangerous.⁹⁰ Pay Tel would urge the Commission to consider the negative consequences of arbitrage as it considers whether to impose uniform interstate and intrastate rates and how to handle various issues related to call blocking.

A. Rate Arbitrage Creates Genuine Security and Safety Concerns—and Is Increasingly Prevalent in the ICS Industry

Rate arbitrage raises critical safety and fraud concerns and is a well-recognized security risk for jails, where existing calling security protocols require accurate identification information for all parties to a call.⁹¹ Confinement facility officers must exercise control and surveillance over calls inmates place, and they need the identity and location of the called parties in order to effectively accomplish this. Inmate calls are monitored and restricted for important safety reasons: to protect both the public at large and identifiable, potentially at-risk persons like victims' families, judges, and jurors, and also to help detect, deter, and prevent ongoing criminal activity conducted from within confinement facilities. Such monitoring and restrictions are necessary—and standard—aspects of operating jails and prisons. All confinement facilities with which Pay Tel contracts, for example, require the installation of ICS equipment that is capable of monitoring and controlling inmate calling for the very reasons set forth above. Non-geographically-based telephone numbers, which ICS consumers obtain in order to take advantage of differing rates (thereby engaging in rate arbitrage), make it extremely difficult for corrections officials to verify that vital identification and location information, heightening security risks.⁹²

⁹⁰ See, e.g., Comments of Pay Tel Communications, Inc. in Support of Application for Review (DA 13-1990) at 5, WC Docket No. 09-144 (Nov. 12, 2013) (“Pay Tel Call Blocking Comments”)

⁹¹ See, e.g., Pay Tel July 3 Ex Parte Notice at 3.

⁹² See *NPRM* ¶ 41; Ex Parte Presentation of Alliance for Telecommunications Industry Solutions, CC Docket No. 96-128 (Aug. 24, 2007) (explaining that engaging in rate arbitrage, while “rational

Worse, rate arbitrage appears, if anything, to be on the rise. As Pay Tel has explained both in this proceeding and in the parallel ICS proceeding in Docket No. 09-144, “alternative ICS providers” not only offer, but even market and promote, the availability of geographically-based telephone numbers that are not tied to a consumer’s physical location.⁹³ Such alternative providers openly and purposefully seek to provide consumers with lower inmate calling services bills by tricking ICS providers into believing that calls are being routed to local called parties when, in fact, the called party is located outside the inmate’s correctional facility’s local calling area.⁹⁴

Pay Tel has explained its experience in, with shocking ease, establishing accounts with various alternative ICS providers using a falsified name, “Abraham Lincoln,” with a fictional address of Pennsylvania Avenue in Washington, D.C.⁹⁵ Mr. Townsend, Pay Tel’s president, was able to secure numbers local to the Blue Ridge Regional Jail in Lynchburg, Virginia. Two of the alternative providers, on their own initiative, supplied Mr. Townsend with a falsified home address in Lynchburg, Virginia to give to the ICS provider when it prompted Mr. Townsend for an address. One of the alternative providers even gave detailed instructions on how to respond to questions from the ICS provider (Securus) about the identity of the account holder and provided a falsified Verizon billing statement corresponding to the new local number and the address of a home for sale in Lynchburg.

economic behavior[.] . . . [has] negative consequences for safety and security in confinement facilities”); Pay Tel Comments at 8–9.

⁹³ Pay Tel Call Blocking Comments at 2–5; Pay Tel July 26 Ex Parte Notice at 2–3; Pay Tel Ex Parte Presentation “Security Risks With Alternative ICS Providers—The Reality With Rate Arbitrage Today”, WC Docket No. 12-375 (July 26, 2013) (“Pay Tel Security Risks With Alternative ICS Providers Report”).

⁹⁴ See Pay Tel Call Blocking Comments at 2–5; Pay Tel July 26 Ex Parte Notice at 2–3; see generally Pay Tel Security Risks With Alternative ICS Providers Report.

⁹⁵ See, e.g., Pay Tel Call Blocking Comments at 2–5; Pay Tel July 26 Ex Parte Notice at 2–3; see generally Pay Tel Security Risks With Alternative ICS Providers Report.

The complicity of these companies in establishing false billing addresses and account information highlights the very real security problems associated with rate arbitrage.

B. Security-Driven Call Blocking Is Necessary for Both Interstate and Intrastate Calls

In the *Order*, the Commission concludes that call blocking should not be permitted except under specified circumstances.⁹⁶ Here, Pay Tel believes that the Commission, in its zeal to help drive long distance prices down, has unintentionally created a situation which will compromise facility safety and security. Because state and local authorities have the authority to adopt and implement policies designed to manage the inner-workings of their confinement facilities, particularly the safety and security of those institutions, the *Order's* rule regarding billing-related call blocking is in error and should not be extended to intrastate ICS calls. Non-geographically based telephone number call blocking should be permitted.⁹⁷

The Commission has long-recognized that the special circumstances of ICS mean that that inmates are not entitled to the same telecommunications environment as the public and that the general prohibition on call blocking is neither applicable nor warranted in the ICS setting.⁹⁸ Both the Commission's *TOCSIA Order* and its *Bill Party Preference Order* are premised on the Commission's acknowledgment that provision of telephone service in the correctional setting is

⁹⁶ *Order* ¶ 113 (finding that billing-related call blocking of interstate ICS calls is only permissible if an ICS provider offers a "prepaid collect" calling option).

⁹⁷ See Comments of Pay Tel Communications, Inc. In Support of Application for Review (DA 13-1990), WC Docket No. 09-144 (Nov. 12, 2013).

⁹⁸ See, e.g., Report and Order, *Policies and Rules Concerning Operator Service Providers*, CC Docket No. 90-313, 6 FCC Rcd 2744 (1991) ("TOCSIA Order"); Second Report and Order and Order on Reconsideration, *Billed Party Preference for IntraLATA 0+ Calls*, CC Docket No. 92-77, 13 FCC Rcd 6122 (1998) ("Billed Party Preference Order"); see also Pay Tel Call Blocking Comments at 6-7.

unique and that “neither TOCSIA nor [FCC] rules require telephones for use only by prison inmates to be unblocked.”⁹⁹

Judicial precedent is to similar effect. Courts have repeatedly held that the administration of confinement facilities is a matter assigned to states and localities as part of their sovereign power to enforce criminal law.¹⁰⁰ One federal district court, in dismissing antitrust claims brought by persons who had received collect calls placed from Michigan’s confinement facilities, explained that “the state has the power to adopt policies it believes are best suited for managing its prisons and assuring the safety and security of those institutions”¹⁰¹—and found that the Michigan DOC’s requirement that inmates be limited to collect-only telephone service fell within a governmental exception in that state’s antitrust laws.¹⁰²

Limited call blocking is necessary for safety and security reasons. As such, the decision whether to block calls in confinement facilities directly implicates those aspects of managing prisons and jails that are properly left to the decisions of sheriffs and wardens nationwide.

VIII. Additional Regulation is Not Necessary to Address the Deaf and Hard of Hearing Community

The Commission seeks comment on four issues related to ICS for the deaf and hard of hearing community. Generally speaking, Pay Tel contends that pre-*Order* regulation of ICS with respect to this community is adequate and that further reform is unnecessary at this point in time.

⁹⁹ See *Billed Party Preference Order* at ¶56 (citing OSP Reform Notice).

¹⁰⁰ See, e.g., *In re Wilkinson*, 137 F.3d 911, 914 (6th Cir. 1998) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973) (stating that “it is difficult to imagine an activity in which a state has a stronger interest, or one that is more intricately bound up with state laws, regulations, or procedures, than the administration of its prisons”)).

¹⁰¹ *Miranda v. Michigan*, 141 F. Supp. 2d 747, 756 (E.D. Mich. 2001) (quoting *In re Wilkinson*, 137 F.3d 911, 914 (6th Cir. 1998)).

¹⁰² *Id.*

A. Regulation Provided Pursuant to the Americans With Disabilities Act Is Sufficient

Pay Tel's experience with regard to the provision of access to TRS, TTY technology and related services for hearing impaired inmates is amply addressed in current ADA regulations and through state and national corrections organizations. This is evidenced by the fact that virtually every Request for Proposals issued by confinement facilities for ICS contains specific requirements for the provision of TTY units and/or access to TRS. Typically, such RFPs expressly mention/require that bidding parties will comply with ADA regulations and/or a particular facility's adopted standards.

Pay Tel has actively worked with Video Relay services to promote the installation of this valuable service. However, the costs to provide these services are a good example of why the historical cost based rate setting proposed by the FCC will not work—although the FCC is clearly concerned about the needs of the hearing impaired, the FCC has yet to establish a way for ICS providers to cover the cost of this non-revenue producing service.

B. Discounted Rates for TTY Calls Are Unnecessary, But Permitting a Longer Call Duration is Reasonable

In Pay Tel's experience, TTY units are provided at no cost to confinement facilities, and calls completed through these units are provided at no cost to the inmate or the called party. Other providers may charge for TTY calls, but the pricing for such calls is the same as any other inmate phone call. TTY results in higher costs to ICS providers due to specialized equipment it requires; as these are costlier services to provide, special discounts are not appropriate. TTY and TRS users will benefit, like all ICS consumers, from the broad reforms adopted in the *Order*; the savings they achieve therefrom are sufficient—more is not needed.

Pay Tel, however, would not oppose providing a longer call duration for TTY/Video Relay calls/visits because of the time involved in call/visit set up and extra time taken with TRS operators.

C. TRS Access is Routinely Provided at the Direction of Confinement Facilities

As a routine matter of providing ICS, specialized access to TRS is provided. While direct dialing of 711 and toll free numbers is often blocked for security reasons, most, if not all, ICS platforms enable controlled access to TRS numbers. For example, TRS may be accessed through a speed dial code or other dialing shortcut. This enables the ICS system to maintain necessary security restrictions to eliminate live operator access while enabling controlled access to TRS.

D. Reporting is Not Needed

ADA compliance reporting requirements are sufficient to ensure that ICS providers are operating in concert with present regulations. Additional reporting requirements would simply add unnecessary cost and administrative burden to ICS providers, upon whom the *Order* already imposes exponentially greater reporting obligations. Consumers have numerous options for filing complaints with the U.S. Department of Justice, and the instructions are readily available and easy to understand. There is no need for duplication of effort by requiring separate reporting through the FCC.

E. Other Technologies

Pay Tel concurs with the Commission's tentative conclusion not to mandate the use of additional TRS technology. There are companies in the marketplace that offer deployment of innovative video solutions for confinement facilities. Often ICS providers are called upon to

provide the necessary bandwidth for these services and to provide specialized enclosures to make such equipment suitable in a secure setting; providers are also responsible for installing and maintaining the equipment. The Commission can encourage use of these technologies by authorizing related expenses as an acceptable, recoverable cost of service. It is possible that one way to cover this additional expense would be for ICS providers to be able to receive compensation from the TRS fund for document expenses to install and maintain Video Relay service. This would encourage deployment of this needed service.

IX. Competition Amongst ICS Providers Within ICS Facilities Would Create Unacceptable Security Risks

Recognizing the “special security requirements applicable to inmate calls”, the Commission has previously rejected after consideration the proposition that multiple providers should be able to offer ICS in a given facility.¹⁰³ Safety and security concerns continue to outweigh any public policy aims that might theoretically be advanced by internal competition amongst providers within specific facilities. While technological advances have allowed for centralization of calling management systems and led to other improvements in the provision of ICS, technology has also increased the methods by which inmates can utilize

¹⁰³ *Billed Party Preference Order*, 13 FCC Rcd 6122, 6156, ¶ 57 (“We are persuaded by comments of the United States Attorney General, other federal officials, and nearly all who have commented on this issue that implementation of BPP for outgoing calls by prison inmates should not be adopted. With regard to such calls, it has generally been the practice of prison authorities at both the federal and state levels, including state political subdivisions, to grant an outbound calling monopoly to a single IXC serving the particular prison. This approach appears to recognize the special security requirements applicable to inmate calls. Moreover, requiring BPP for inmate calls in the absence of BPP for 0+ calls might place the cost of implementation on the recipient of such calls, thus exacerbating the problem of high-cost calls. Finally, as the Florida Commission noted, prisons may allow inmates to place calls to pre-approved 800 numbers of their families and legal counsel, or, as the Florida Commission has done, allow them to use pre-paid debit cards. Such options would exert downward pressure on high interstate rates for 0+ calls from inmate phones, diminish the ability of a prison and its PIC to set supracompetitive rates, and thus lessen or obviate the need for further federal regulations concerning 0+ rates in this submarket.”).

telecommunications systems to attempt to thwart security measures that confinement facilities employ. As corrections officials have routinely stressed throughout this proceeding, safety and security must be paramount when it comes to ICS; concerns related thereto trump any “free market” arguments that would naturally carry the day outside the walls of a prison or a jail.¹⁰⁴

The reforms adopted in the *Order* adequately impose upon the ICS industry necessary reforms to ensure providers will offer just and reasonable rates. Allowing intra-facility competition would not depress rates; it would, however, increase security risks and costs. The security-related, investigatory and monitoring features that confinement facilities require ICS providers to provide are paramount. Such technology is provided to facilities at no additional cost; it is, in effect, part of the consideration exchanged between provider and facilities. Moreover, the presence of multiple providers in a facility would make it virtually impossible for providers to accurately project call revenue and recover their investments.

Having multiple providers serve a facility would increase exponentially the complexity of investigations and virtually eliminate the ability to analyze call patterns and activity with the efficiency that is available today. The multiple-provider choice model also creates the option for inmates to use multiple providers with the specific intention of making it more difficult to track their calling and compare the contents of their calls for investigative purposes.

¹⁰⁴ See, e.g., Louisiana Dept. of Corrections Comments at 1–3, WC Docket No. 12-375 (Mar. 25, 2013); Transcript of Reforming ICS Rates Workshop at 261–62; National Sheriffs’ Ass’n Letter, WC Docket 12-375 (July 31, 2013).

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Respectfully submitted,

PAY TEL COMMUNICATIONS, INC.

A handwritten signature in blue ink, appearing to read "Marcus W. Trathen", with a horizontal line extending to the right from the end of the signature.

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