

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

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

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

Marcus W. Trathen
Timothy G. Nelson
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Suite 1600
Wells Fargo Capitol Center
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304
mtrathen@brookspierce.com
tnelson@brookspierce.com

Counsel for Pay Tel

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SUMMARY

Pay Tel Communications, Inc. (“Pay Tel”) respectfully submits these reply 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.

The FNPRM teed up several critical issues left unresolved in the *Order* that must be addressed in order to realize comprehensive ICS 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.

In summary, Pay Tel herein responds to other comments submitted in response to the FNPRM as follows:

- The Commission is correct in its tentative conclusion that it has the statutory authority to regulate intrastate ICS rates insofar as it is necessary to ensure fair compensation to ICS providers. In fact, 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.” Numerous commenters’ arguments that the Commission lacks such intrastate authority ignore the plain meaning of Section 276 and Commission and judicial precedent interpreting the statute.
- There are real differences between providing ICS in jails and prisons making provision of ICS in jails more costly than in prisons. The Commission must recognize these differences and should establish different permanent ICS rates, one applicable to provision of ICS in jails and another applicable to provision of ICS in prisons. In establishing those permanent rates, the Commission should consider establishing a per-minute, postalized ICS rate mechanism which may help to alleviate some of the concerns raised by commenters with dropped calls.
- The Commission should consider the regulation of ancillary fees as a critical component of ICS reform. The Commission may wish to expressly limit the fees

that may be charged and establish rate caps for permissible fees. Further, the Commission should establish nationwide safe harbor caps on permissible ancillary fees consistent with the recent proposed Order issued by the Alabama Public Service Commission.

- The Commission must ensure that confinement facilities are able to recover the costs they incur in permitting ICS operations.

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REPLY COMMENTS

Pay Tel Communications, Inc. (“Pay Tel”), by its attorneys, respectfully submits these reply comments in response to the Further Notice of Proposed Rulemaking, WC Docket No. 12-375, released September 26, 2013 in the above-captioned proceeding simultaneously along with the Commission’s Report and Order (“*Order*”) in this docket.¹

I. The Commission Has Jurisdiction to Ensure that ICS Providers Are Fairly Compensated for Intrastate Calls

Various ICS providers argue that the Commission lacks the authority to regulate intrastate ICS. Ultimately, however, these arguments cannot overcome the plain language of Section 276 supporting the Commission’s authority, indeed obligation, to ensure that ICS providers are fairly compensated for intrastate calls.

A. The Plain Language of Section 276 is Irrefutable and, by its Express Terms, Requires the Commission to Ensure that ICS Providers Are Fairly Compensated for Intrastate Calls

Securus and Global Tel*Link (“GTL”), among others, argue that the Commission lacks authority to regulate intrastate ICS rates because Section 152(b) of the Act grants state regulators exclusive jurisdiction over intrastate calls.² Both argue that it is “well settled that the Commission cannot set rates for intrastate telecommunications service in the absence of a clear congressional mandate.”³ Pay Tel does not dispute that, generally, the Commission’s authority over intrastate rates is limited. But the plain language of

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 See Securus Comments at 2–3, WC Docket No. 12-375 (Dec. 20, 2013) (“Securus FNPRM Comments”); Global Tel*Link Comments at 8, WC Docket No. 12-375 (Dec. 20, 2013) (“GTL FNPRM Comments”); NARUC Comments at 8–10, WC Docket No. 12-375 (Dec. 20, 2013).

³ Securus FNPRM Comments at 3; GTL FNPRM Comments at 2.

Section 276 represents one of those situations in which Congress has unambiguously and straightforwardly granted the Commission authority over intrastate rates—a matter which should come as no surprise given the steady stream of post-1996 Telecommunications Act court decisions, including decisions of the U.S. Supreme Court, confirming that the 1996 Act overrode the traditional demarcation of jurisdictional authority established by Section 152(b). Section 276 requires the Commission to “take all actions necessary to prescribe regulations that establish a per call compensation plan *to ensure that all . . . providers are fairly compensated for each and every completed interstate and intrastate call.*”⁴ To argue that the Commission lacks the ability to regulate intrastate rates where it must do so in order to ensure fair compensation for “each and every completed interstate and intrastate call” is to render the statute’s plain language meaningless.

It is true that there is a direct conflict between the specific terms of Section 276, which grants the Commission authority over intrastate ICS rates, and the general terms of Section 152, denying the Commission jurisdiction over intrastate rates. Basic principles of statutory construction, however, and the Commission’s own precedent regarding this direct conflict, resolve the question in favor of Section 276.⁵ Consistent with this

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

⁵ Congress’s grant of Section 276’s intrastate regulatory jurisdiction *after* enacting Section 2(b) of the Act means that Section 276 overrides the general limitation on jurisdiction contained in Section 2(b) of the Communications Act, 47 U.S.C. § 152(b). *See* Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233, ¶ 57 (1996) (“*Payphone Reconsideration Order*”) (“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).*”) (emphasis added); *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

approach, the D.C. Circuit, in *Illinois Public Telecommunications Association*,⁶ considered and rejected the argument that Section 152(b) precludes the Commission from setting local rates pursuant to Section 276, because the language of Section 276(b) manifests the clear congressional intent necessary to preempt the States' power over local coin rates.⁷ Indeed, that the provisions of the 1996 Act fundamentally restructured the Commission's authority over intrastate matters has been recognized by the U.S. Supreme Court.⁸

The commenters also argue that the Commission should not interfere with states and that the law generally disfavors preemption. In this regard, the commenters point out that courts have sometimes held that the regulation of state and local corrections facilities is best left to local authorities.⁹ While it is true, generally speaking, that the grant of jurisdiction to the Commission does not mean that the Commission must exercise that jurisdiction, here there is ample justification for the Commission's assertion of authority. By its express terms, Section 276 is mandatory where Commission action is necessary to ensure fair compensation to ICS providers. And, as Pay Tel has previously demonstrated, the existence of below-cost intrastate rate caps necessitates the Commission's assumption of jurisdiction. In this regard, given the command of Section 276 to ensure aggregate fair compensation for all calls, the Commission's decision to reduce interstate calls to cost-based levels mandates that the Commission also preempt below average cost intrastate

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").

⁶ 117 F.3d 555 (D.C. Cir. 1997).

⁷ *Id.* at 561–62.

⁸ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 381 n.8 (1999).

⁹ See GTL FNPRM Comments at 9; Securus FNPRM Comments at 11–14.

rate caps. The Commission’s reduction of interstate rates to cost without taking the additional step required by Section 276 with respect to below-cost intrastate rates is a per se violation of Section 276.

B. The Commission’s Reliance on *Illinois Public Telecommunications Association* is Proper

Those commenters arguing against the Commission’s stated position that it has authority over intrastate ICS rates completely misread the case which controls here: *Illinois Public Telecommunications Association v. FCC* (“IPTA”). In that case, the D.C. Circuit Court of Appeals considered a challenge to a Commission order deregulating intrastate local coin calling from payphones. The Court considered whether payments collected by payphone service providers from customers for local coin service are included when interpreting the Commission’s mandate to ensure “fair compensation” under Section 276. Several petitioners urged—just as commenters do here—that “the Commission lacks authority to regulate, or . . . to deregulate and prevent the States from regulating . . . rates for local coin calls.”¹⁰ Both the Commission and the D.C. Circuit squarely rejected that argument.

The Court concluded that local coin calls are among the intrastate calls for which payphone operators must be “fairly compensated,” and it concluded that Congress gave the Commission “the authority to set local coin call rates in order to achieve that goal.”¹¹ The Court rejected an argument “that if the Congress had intended to give the Commission jurisdiction over local coin rates, instead of requiring only generally that PSPs be ‘fairly compensated,’ then it would have stated specifically that it was giving the

¹⁰ 117 F.3d at 561.

¹¹ *Id.* at 562.

Commission the authority to set the rates for such calls.”¹² The Court disagreed with such a narrow reading, concluding that the term “compensation” in Section 276 applied to payments made to payphone service providers by customers:

Because the only compensation that a PSP receives for a local coin call (aside from the subsidies from CCL charges that LEC payphone providers enjoy) is in the form of coins deposited into the phone by the caller, and there is no indication that Congress intended to exclude local coin rates from the term “compensation” in § 276, we hold that the statute unambiguously grants the Commission authority to regulate the rates for local coin calls.¹³

Securus argues *IPTA* does not extend to ICS calls because the case “did not regard intrastate long distance rates”¹⁴ and dealt only with local coin calls in the context of public payphones in a multi-carrier environment and merely protected payphone owners to be compensated for the use of their equipment.¹⁵ Such a reading is impermissibly narrow. In *IPTA*, the D.C. Circuit affirmed the Commission’s position that it had authority to regulate local coin rates pursuant to Section 276 in light of the Commission’s assessment that such action was necessary to ensure fair compensation for such calls. Where Commission regulation of intrastate rates is necessary to ensure fair compensation, such regulation is expressly authorized—indeed, mandated—by statute.

In *IPTA*, the “compensation” for the PSPs at issue came through local coin calls—the retail rate paid by users of payphones for local calls. Because the Commission is mandated to ensure fair compensation for each and every completed interstate and intrastate call, it was proper for the Commission to regulate the mechanism through

¹² *Id.*

¹³ *Id.*

¹⁴ Securus FNPRM Comments at 6.

¹⁵ *Id.*

which the PSPs were compensated: local coin calls—even where that meant regulation of rates and payments made by end users.

The situation here is absolutely no different. ICS providers are compensated for local collect calls based on state-imposed collect calling caps. *ITPA* expressly authorizes Commission regulation of intrastate rates paid by end users—the very kind of regulation the Commission correctly asserts it has here—where such regulation is necessary to ensure fair compensation for the provider. As in *IPTA*, “there is no indication that Congress intended to exclude” intrastate ICS rates “from the term ‘compensation’ in § 276”; the statute therefore “unambiguously grants the Commission authority to regulate the rates”¹⁶ for collect local ICS calls.

C. Read Carefully, None of the Commenters Appears to Quarrel with Pay Tel’s Basic Assertion that the Commission Has An Obligation to Ensure Fair Compensation for Intrastate Calls

While various providers object to an expansive reading of Section 276 as a basis of general jurisdiction over intrastate rates divorced from concerns about the ability of providers to receive fair compensation for intrastate calls, the providers appear to recognize the point made by Pay Tel in its comments—that the Commission has a duty under Section 276 to preempt below-cost intrastate rate caps. Indeed, these same providers have previously advanced exactly this interpretation of Section 276 to this Commission in urging the Commission to preempt below-cost intrastate rate caps.¹⁷

¹⁶ 117 F.3d at 562.

¹⁷ In fact, some of the very providers—or their predecessor entities—who currently argue the Commission does not have intrastate authority have previously urged the Commission to preempt below-cost local rates or impose a surcharge to make up for the intrastate shortfall. Indeed, these arguments were the basis for the Commission’s voluntary remand on the inmate issue on appeal from the 1996 Order. *See, e.g.,* Inmate Calling Services Providers Coalition, Petition for Further Reconsideration at 5–19, CC Docket No. 96-128, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of*

The providers' other arguments do not contradict this basic obligation of the Commission under Section 276.

CenturyLink points out that Section 276's "fair compensation" requirement is inapplicable where providers of ICS are compensated pursuant to contract with a carrier that terminates the calls in question.¹⁸ It is true, of course, that the Commission has favored a "market-based approach" to fair compensation, and that it has suggested that the existence of a negotiated contract for compensation is evidence of such a market-based mechanism (e.g., where a payphone provider enters into a contract with a long distance carrier for handing off long distance calls to it). However, the Commission has specifically noted that a Section 276 compensation claim could still arise where a state-

1996 (May 7, 2002) ("ICSPC Reconsideration Petition"). The ICPSC at that time was comprised of several companies, including Global Tel*Link and Evercom, predecessor to Securus. *See, e.g.*, Inmate Calling Service Providers Coalition, Notice of Ex Parte Presentation at 16, CC Docket No. 96-128, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* (May 10, 2000) (listing ICSPC members). In 2002, the ICPSC argued that the Commission's 2002 *Remand Order*, 17 FCC 3248, conflicted with the plain meaning of Section 276: "In the vast majority of confinement facilities, the only telephone service offered to inmates is collect calling service. Therefore, if collect calling service is not included in 'inmate telephone service,' then the term 'inmate telephone service' has no meaning in Section 276. The Commission may not adopt an interpretation of the Act that is contrary to the plain meaning of the Act. . . . By limiting fair compensation in the inmate context to payments received from other service providers (or imputed as internal transfer payments within the service provider itself), the Commission fails to follow its own interpretation of the Section 276 compensation provision—an interpretation that has been upheld by [the] U.S. Court of Appeals for the D.C. Circuit [in the *IPTA* case]. . . . The Commission must interpret its Section 276 obligations consistently. There is no rational basis for concluding that the 'fairly compensated' requirement applies to payments by customers for local coin calls, but not to payments by customers for local inmate collect calls. . . . Just as local coin calling is the primary telephone service that public payphone service providers offer to end users at public payphones, collect calling service is the primary—and in most cases the only—telephone service offered to inmates of correctional facilities. To exclude either service would defeat the whole purpose of Section 276 with respect to the affected segment of the industry, and would hinder the emergence of the service competition mandated by Section 276. In short, there is no material difference between local coin service and local inmate collect calling service for purposes of eligibility for compensation under Section 276." ICSPC Reconsideration Petition at 8–11.

¹⁸ CenturyLink Comments at 5, WC Docket No. 12-375 (Dec. 20, 2013) ("CenturyLink FNPRM Comments") (citing *Payphone Reconsideration Order* at ¶ 72).

regulated OSP-cap is too low to permit the ICS provider to recover its costs.¹⁹ And, of course, in the case of today’s provision of ICS, the OSP function and the inmate calling function are provided by the same entity—whose only source of revenue in the case of local collect calls is the collect call rate. Even if one was to treat the calling and equipment functions separately and “impute” the OSP costs to the inmate calling function, the reality remains that such imputation does not magically create another source of revenue for the ICS providers, and certainly CenturyLink has identified no other source of revenue. Rather, the ICS provider’s total available revenue for the collect local call is whatever rate it can charge for the call.

CenturyLink also asserts that Section 276 was never intended to regulate end-user rates and that the statute was not intended to grant general ratemaking authority to the Commission over intrastate rates.²⁰ Instead, CenturyLink states that the “common denominator prompting [] action by the Commission was that payphone service providers were not receiving sufficient compensation for the calls they completed.”²¹ Regardless whether Section 276 was intended as a source of general ratemaking authority, it is clear, and CenturyLink appears to concede as much, that Section 276 commands the Commission to take action with respect to intrastate rates where such action is necessary to ensure fair compensation for intrastate phone calls. Indeed, the Commission, contrary to CenturyLink’s assertion, has previously regulated end user rates by deregulating the

¹⁹ Order on Remand & Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, ¶ 35 (2002).

²⁰ CenturyLink FNPRM Comments at 5.

²¹ *Id.* at 4.

price of local payphone calls, and this action was specifically affirmed by the D.C. Circuit Court of Appeals in the *IPTA* case.

II. The Commission Needs More Data In Order to Set Permanent Rates and Should Establish Different Rates for Provision of ICS in Jails and Prisons

A. Pay Tel’s Cost Study Is Currently the Only Competent Evidence in the Record, and the Interim Interstate Rate Caps Based Thereon Are Flawed

The Commission sought comment on the methodology it should use to establish permanent cost-based rate caps to ensure just, reasonable rates and fair compensation to providers.²² Pay Tel agrees with the Wright Petitioners that there is currently insufficient cost data in the record to set permanent rates and that the Commission ought to wait until it has received the data it requests in the *Order* to do so.²³

The Commission adopted its interstate ICS rate caps for debit calls based on Pay Tel’s cost study, which constituted the only competent and current evidence in the record.²⁴ Pay Tel’s analysis of the impact of the *Order*’s rate caps—on its projected

²² *Order* ¶ 154.

²³ Comments of Martha Wright, et. al. at 9–10, WC Docket No. 12-375 (Dec. 20, 2013) (“Wright Petitioners’ FNPRM Comments”) (“[T]he Petitioners urge the FCC to adopt rules to review the interim rates no later than 180 day (sic) after the ICS providers have submitted their second round of data collected under Section 64.6060 of the Commission’s rules. Specifically, the FCC should adopt procedures to solicit comments within 30 days of the second round of data, and make any necessary changes to the interim rates within 180 days. In the event that the implementation of Section 64.6060 is delayed, then the interim ICS rates for Interstate and Intrastate calls must remain in place until the FCC deems that it has sufficient information to make any changes to the interim rates.”).

²⁴ *Order* ¶¶ 74–78. The *Order*’s cap for prepaid calls was adopted based on the rate for debit calls (the Commission erroneously, in Pay Tel’s view, found no cost distinctions between debit and prepaid calls, despite Pay Tel’s cost study demonstrating precisely such a difference and despite Pay Tel’s filings demonstrating such differences). *Order* ¶ 76. See Pay Tel Comments in Response to Further Notice of Proposed Rulemaking at 24, WC Docket No. 12-375 (Dec. 20, 2013) (“Pay Tel FNPRM Comments”); Pay Tel Petition for Stay of *Rates for Interstate Inmate Calling Services* Order 16, WC Docket No. 12-375 (Nov. 26, 2013) (“Pay Tel Stay Petition”). See also *Order* ¶ 76 n.282 (explaining that Pay Tel supplied “the kind of objective

revenues as compared to its average costs—proves that the *Order*'s current framework is flawed: as Pay Tel explained in its comments, Pay Tel will not be able to comply with the *Order*'s interstate rate caps and also recover its total-company costs of providing ICS.²⁵ Because the interim rate caps were set based upon the only current, competent cost data in the record and yet still fail to allow ICS providers operating in jails to recover their costs, the Commission must either gather more data before setting permanent rates as to jails, or provide the “headroom” in its current interim rate caps as applied to jails for which Pay Tel advocated in its comments.²⁶

B. The Commission Should Establish Separate Permanent Rate Caps for ICS in Jails and Prisons

Pay Tel has repeatedly explained the differences between provision of ICS in prisons and jails and the attendant cost differences related thereto—and has argued that different rate caps should be set for prisons and jails.²⁷ Numerous other commenters who have direct experience with provision of ICS in jails agree. Telmate, for example, explains that “[t]he rate caps and safe harbors must be raised, at least at smaller facilities,

cost data that the Commission sought in the 2012 ICS NPRM in order to facilitate [its] data-driven analysis of ICS costs”). The Commission based its interim interstate collect call rate cap on data provided by a coalition of providers more than five years ago. *Order* ¶¶ 78–80.

²⁵ Pay Tel FNPRM Comments at 9–15.

²⁶ *Id.* at 26–27.

²⁷ *See, e.g., id.* at 17; Pay Tel Stay Petition at 6–7; 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. 1 Ex Parte Presentation, “Reform of ICS Requires Reform of Both Interstate and Intrastate ICS Elements” at 3–5, 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 (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 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”); Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No.12-375 (May 31, 2013) (“Pay Tel May 31 Ex Parte”); Pay Tel Reply Comments at 2, 4–12, WC Docket No. 12-375 (Apr. 22, 2013); Pay Tel Comments at 9–11, WC Docket No. 12-375 (Mar. 25, 2013) (“Pay Tel Comments”).

so that ICS providers can continue to serve the inmates serving time there. . . . Telmate cannot profitably serve small facilities . . . under the rate cap.”²⁸ Such evidence, coupled with Pay Tel’s demonstrated cost analysis showing that it, as an ICS provider exclusively serving jails, cannot recover its costs under the *Order*’s framework, clearly demonstrates the need for different permanent rate caps applicable to prisons and jails.

In the face of this abundant, cost-based data, the Wright Petitioners argue that “[t]he record is wholly insufficient to support the adoption of a tiered structure that would permit higher rates in smaller facilities” and that “the adoption of a separate rate structure for local and county jails is not necessary.”²⁹ This is in stark contrast, of course, to the Petitioners’ prior support for a tiered-rate structure³⁰ and the acknowledgement of their own consultant that “the idea of setting rates in tiers, as suggested by Pay Tel, is an appropriate way to achieve what I suggested”³¹ In support of the argument that there should not be a distinct rate for jails, the Petitioners cite to data that they argue shows that some inmates in certain, isolated jails are starting to spend longer amounts of time therein (perhaps because of infrequent prison overcrowding), and thus, Pay Tel’s

²⁸ Telmate Comments at 3–4, WC Docket No. 12-375 (Dec. 20, 2013) (“Telmate FNPRM Comments”); *see also* Pai Dissent at 112 n.45 (citing record evidence of real cost differences between provision of ICS in prisons and jails).

²⁹ Wright Petitioners’ FNPRM Comments at 11.

³⁰ *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”).

³¹ Ex Parte Presentation of Martha Wright, et al., at 7, CC Docket No. 96-128 (Dec. 23, 2008) (Declaration of Douglas A. Dawson).

argument that “inmate churn” in jails fuels higher costs is wrong.³² The Petitioners’ arguments are speculative, distort the statistics on which they rely, and cannot serve to undercut the evidence Pay Tel has put in the record.

Petitioners’ arguments fail for several reasons. As just one example of such failure, they cite to seven states wherein Department of Justice statistics indicate that 20% or more of the prisoner population is housed in jails.³³ Petitioners’ selective use of the statistics ignores the fact that the very same data upon which the Petitioners rely show that the nationwide average percentage of state prisoners being housed in jails is just 6.1%, and that thirty-one states report that less than 2% of their state prison population is housed in local jails.³⁴

³² *Id.* at 11–12. As an initial matter, a chorus of jails joins Pay Tel in arguing that “inmate churn” represents a very real difference between providing ICS in prisons and jails. The American Jail Association explains: “A jail’s population evolves hourly, while a prison’s population is much more consistent over a longer period of time. This is a significant distinction” Letter from American Jail Association to Marlene H. Dortch, Secretary, FCC at 2, WC Docket No. 12-375 (Dec. 20, 2013) (“American Jail Association Letter”). Next, the Petitioners’ argument lacks context or detail and raises more questions than answers. For example, where prison inmates are being housed in jails, are the jails’ policies as to ICS being applied to them? Are they receiving the same free calls as other inmates? At what point does the addition of some prison inmates to the existing jail population have any impact in terms of an ICS providers’ costs?

Even if the Petitioners’ argument as to inmate churn had merit, which it does not, Pay Tel has routinely provided several reasons for the higher costs of providing ICS in jails, many of which have little or nothing to do with high inmate turnover. Among these are the costs associated with the myriad requirements jails impose upon their ICS providers, including the integration of numerous ICS-related systems and the provision free calls. *See, e.g.*, Pay Tel FNPRM Comments at 22–24; Pay Tel Prisons vs. Jails Report at 3.

³³ Letter from Lee Petro, Counsel for Wright Petitioners, to Marlene H. Dortch, Secretary, FCC at 2, WC Docket No. 12-375 (Dec. 20, 2013).

³⁴ *See id.* at Exhibit A. In addition, the Petitioners cite to date which they claim shows that many inmates spend less than a day in jails and that many others spend more than a week therein. *Id.* at 2. Assuming for the sake of argument that the data is accurate, the Petitioners’ reliance on it is misplaced. Even if an inmate does not set up an account, in many cases he is receives “free calls” and contacts the call center for assistance, resulting in expenses to ICS providers. Further, the economies of scale which reduce ICS costs only start to occur once an inmate has been housed in a facility for more than thirty days. The fact an inmate stays more than one week does not reduce costs.

Conversely, Pay Tel’s record evidence is extensive and justifies different rates for jails and prisons. Given that Pay Tel exclusively serves jails, its costs serve as a definitive benchmark of the cost of providing ICS in jails, costs which are significantly higher than those more anecdotal costs put in the records for prisons. In addition, Pay Tel has provided extensive comments explaining the structural and operational differences between jails and prisons (e.g., inmate churn, free calls, integration costs, individualized set-up costs, costs of handling individualized customer inquiries, etc.), none of which has been rebutted in the record. The Commission intended to set its interim rate caps at “sufficiently conservative levels to account for all costs ICS providers will incur in providing ICS,”³⁵ but as Pay Tel and Telmate point out, this statement is inapplicable to those providing ICS in jails, where the *Order*’s interim rates, far from being conservative, are in fact too low.³⁶ Indeed, the interim safe harbor rates are totally unworkable as to jails, because they are set so low as to be utterly unattainable; it would be utterly irrational for any provider to charge any rate in jails within the safe harbor range, a range which is lower than the average cost of providing ICS in jails.³⁷

The Petitioners cannot point to any cost data contradicting or even rebutting such evidence. Instead, they seem to take the position that they suspect that the costs of

The Petitioners’ reliance on a California report to justify their claims regarding inmate churn also has significant flaws. The Petitioners point out that the kinds of prisoners who are now held in jails in that state are “non-serious, non-violent, non-sex offenders”—precisely the kinds of prisoners with shorter sentences who spend less time in facilities than other prisoners. *Id.* at 2.

³⁵ *Order* ¶ 74.

³⁶ *See* Telmate FNPRM Comments at 2–5 (“Unfortunately, any rate regime that ignores the inherently higher costs associated with serving small facilities threatens to deprive inmates in those facilities of ICS (and its many corresponding benefits).”).

³⁷ *Id.* at 5 (the “Commission should . . . create true safe harbor rates for prisons and, separately for jails”).

providing ICS in large jails may be more like those for providing ICS in prisons, and, thus, there need not be separate rate caps for different facilities.

Such an argument ignores hard data analysis in favor of untested hypotheses. The Petitioners are asking the Commission to maintain the *Order's* one-size-fits-all-facilities rate cap notwithstanding the record evidence—and cost data—showing the vast differences between facilities. The Petitioners, on the one hand, urge the Commission to delay implementation of permanent rate caps because there is insufficient record evidence to set them and, on the other, completely ignore the cost-based data that actually is in the record, which data unequivocally shows that it costs more to provide ICS in jails than prisons. The Petitioners feel as though there is not yet enough data to establish permanent rates; at the same time, they are confident that as-yet-ungathered data will prove that the cost of providing ICS in jails and prisons is similar. That speculative approach is backwards.

If, in fact, additional cost data is submitted and proves correct the Wright Petitioners' hunch regarding costs of serving large jails and prisons, then the Commission can consider adjusting rate caps accordingly at that time. To this point, however, the record manifestly shows that there are cost differences between jails and prisons, and the Commission should establish different rate caps in accord therewith. The Petitioners don't get to "shoot first" and ask questions later on this issue: setting one rate applicable to all facilities, or keeping in place the interim rate as to all facilities, would, as Pay Tel has demonstrated, prevent total-company cost recovery for it and likely other providers of ICS in jails. That, in turn, would threaten the sustained provision of ICS in jails. The more prudent course of action would be to set different rates for prisons and jails, based

upon the evidence already in the record, and to amend such rates later if the results of additional data collection so merit.

C. In Adopting Permanent ICS Rates, the Commission May Wish to Consider Establishing a Per-Minute Rate Cap for Each Type of Calls (Debit, Prepaid and Collect)

The Commission permits but expresses concern over per-call charges:

In particular, we are concerned that a rate structure with a per-call charge can impact the cost of calls of short duration, potentially rendering such charges unjust, unreasonable and unfair. We have particular concerns when calls are dropped without regard to whether there is a potential security or technical issue, and a per-call charge is imposed on the initial call and each successive call.³⁸

Among those calls most frequently dropped are cell phone calls and those calls wherein a caller attempts to set up a three-way call (or where an ICS provider's software perceives such an attempt, whether it is happening or not). The combination of dropped calls and per-call charges is problematic for ICS customers, as numerous parties have explained, because a customer may have his call dropped or disconnected prematurely and have to incur a duplicative per-call charge when he initiates a second call.³⁹ That combination however, also creates problems for ICS providers.

Numerous commenters urge the Commission to take action with respect to such dropped calls, which calls "necessitate call-backs (thus [requiring] having to pay another connection charge)"⁴⁰ The Wright Petitioners continue to advocate for elimination of "excessive rates charged merely for placing a call [so that] the impact of disconnected

³⁸ *Order* ¶ 86.

³⁹ *See, e.g.*, Human Rights Defense Center Comments at 10–12, WC Docket No. 12-375 (Dec. 20, 2013) ("HRDC FNPRM Comments"); Wright Petitioners' FNPRM Comments at 17–18.

⁴⁰ HRDC FNPRM Comments at 10; Wright Petitioners' FNPRM Comments at 17–18.

or substandard service [will] be minimized.”⁴¹ The Petitioners also note, however, that the *Order*’s safe harbors “effectively eliminated the per-call rates previously in place. Thus, while the ICS customers will still suffer the nuisance of reconnecting calls, they may not suffer the additional expense to reconnect a call.”⁴²

But the Petitioners highlight another legitimate concern with the *Order*’s framework, in that the Commission, even in adopting a per-minute interstate rate cap,

permits ICS providers the option to apportion the overall 15-minute rate as it sees fit. As a result, it still remains possible for an ICS provider to front-load its charges for an ICS call so that each call is charged the maximum amount permitted under the FCC’s rules. In such a case, therefore, the charges for reconnecting after a dropped Interstate ICS call would still be between \$1.80 and \$3.75.⁴³

The Petitioners advocate for the Commission to allow ICS customers whose calls are dropped to reinitiate such calls without being charged additional fees.⁴⁴

Pay Tel acknowledges the problem the Petitioners identify but disagrees with their solution. Instead, the Commission in setting its permanent rates should consider establishing per-minute (i.e., “postalized”) rates, one applicable to provision of ICS in jails and one applicable to provision of ICS in prisons. While it is true that certain fixed costs are incurred by ICS providers regardless of the length of the call,⁴⁵ there are various acknowledged reasons why a postalized rate structure makes sense in the ICS environment, and eliminating per-call charges would have numerous benefits for both

⁴¹ Wright Petitioners’ FNPRM Comments at 18.

⁴² *Id.*

⁴³ *Id.* (citing *Order* at ¶ 73 n.271).

⁴⁴ *Id.*

⁴⁵ See, e.g., Further Comments of Pay Tel at 6–7, WC Docket No. 12-375 (July 17, 2013) (“Pay Tel Further Comments”); Pay Tel Reply Comments at 8–12; Pay Tel Comments at 11–13.

customers and providers. Specifically, such elimination would lead to significant reductions in customer complaints regarding charges associated with dropped calls and in the amount of time providers are required to spend analyzing and resolving such complaints.

In Pay Tel's experience, approximately 60% of its calls are placed to wireless phones; many of these calls are the source of dropped calls due to issues inherent with the wireless nature of the service. With these calls, the "dropping" generally results from connectivity and service issues related to the called party's cellular provider, not from issues over which Pay Tel has any control. (This reality demonstrates a flaw in the Petitioners' proposed solution of allowing reinitiation of dropped calls for free, because, quite often, the ICS provider bears no responsibility for the fact the call was dropped in the first place.) Pay Tel's employees (and employees of other providers) are forced to spend an inordinate amount of time working to resolve customer queries and complaints regarding dropped calls. That is, where there is a per-call charge on a call and such call is subsequently dropped (e.g., because of a poor cell phone connection), the customer will regularly contact Pay Tel seeking a full or at least partial refund of his per-call charge. Pay Tel's employees must then spend a great deal of time and resources trying to discern the manner by which the call was dropped and whether the customer is entitled to any sort of refund.

Dropped calls and the payment issues related thereto are therefore frustrating and time-consuming for customers and providers alike. The Commission could help curtail these problems by prohibiting per-call charges altogether and mandating true per-minute rates for debit, prepaid and collect calls. Requiring providers to charge by the minute

would eliminate perceived provider abuses related to dropped calls, in that providers would have no financial incentive to drop calls because they would not receive the benefit of additional per-call charges associated with the re-initiation of such calls. Similarly, elimination of per-call charges would render less consequential the question regarding which party (cell phone carrier, ICS provider, etc.) deserves blame for a dropped call; a customer would simply be charged for the minutes used up to the point of the dropped call and would incur no “extra” or duplicative charge or fee for having to place a second call after his first call was dropped.

Additionally, eliminating per-call charges and establishing a per-minute, postalized rate applicable to all interstate and intrastate calls would also eliminate any potential for the rate arbitrage that is widespread today—and the related security concerns that go along with it.⁴⁶ By definition, if all rates were the same, arbitrage would not be possible.

III. The Commission Must Regulate Ancillary Fees as a Component of Comprehensive ICS Reform and Should Consider Establishing Caps on Those Fees Deemed Permissible

The Commission is well aware of the problems arising from the fact that some “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”⁴⁷ Pay Tel opposes these practices and has

⁴⁶ See, e.g., Pay Tel FNPRM Comments at 34–37.

⁴⁷ Order ¶ 167; see, e.g., Pay Tel Further Comments 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).

consistently advocated throughout this proceeding that the Commission regulate such ancillary charges and fees as an aspect of comprehensive ICS reform.⁴⁸

A. The Commission Should Consider Establishing Nationwide Safe Harbor Caps on Ancillary Fees Consistent with the Recent Proposed Order Issued by the Alabama PSC

Numerous commenters support capping certain ancillary fee charges and eliminating others altogether.⁴⁹ Pay Tel concurs, maintaining its position that the Commission should 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.⁵⁰ To the extent the Commission does exempt any ancillary charges from that general bar, such charges must be capped and should not be permitted to be used to generate profits.

Pay Tel notes that several commenters—ICS providers and inmate advocates alike—cited to the recent order issued by the Alabama PSC as an example of how to treat issues associated with ancillary fees.⁵¹ The Alabama PSC explained:

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

⁴⁸ See, e.g., Pay Tel Further Comments at 2–6; Pay Tel Comments at 14–16; Pay Tel Reply Comments at 3 n.6; Pay Tel May 31 Ex Parte at 1.

⁴⁹ See, e.g., NCIC Comments at 3, WC Docket No. 12-375 (Dec. 20, 2013) (“NCIC FNPRM Comments”); Wright Petitioners’ FNPRM Comments at 12–15 (arguing for total elimination of ancillary fees but advocating, in the alternative, for rate caps of certain fees and elimination of others).

⁵⁰ Pay Tel FNPRM Comments at 30–34.

⁵¹ See, e.g., NCIC FNPRM Comments at 3; Wright Petitioners’ FNPRM Comments at 13–14.

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.⁵²

The Alabama PSC requested specific cost data from ICS providers, reviewed that cost data, and, in the words of the Wright Petitioners, “made its reasoned decision to recommend adoption of . . . limitations on [certain] ancillary fees”⁵³ and to prohibit other ancillary fees altogether.⁵⁴ Among those ancillary fees that the *Alabama IPS Order* recommends prohibiting are account set-up fees, refund fees, and provider-assessed fines and penalties for prohibited behavior.⁵⁵ The *Alabama IPS Order* also 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.⁵⁶ Pay Tel has previously urged the Commission to use the *Alabama IPS Order* as a guidepost in setting caps on certain ancillary fees and eliminating others.⁵⁷ Critically, such fee caps are in line with those for which inmate

⁵² 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*”).

⁵³ Wright Petitioners’ FNPRM Comments at 13.

⁵⁴ *Alabama IPS Order* at 18–19.

⁵⁵ *Id.* at 19.

⁵⁶ *Id.* at 16.

⁵⁷ Pay Tel FNPRM Comments at 30–33.

activists, including Stephen Raher,⁵⁸ the Wright Petitioners and Prison Policy Initiative, have advocated.⁵⁹

Pay Tel acknowledges the public benefits of an approach similar to that taken in the *Alabama IPS Order* and encourages the Commission to use that Order in the manner advocated for by Network Communications International Corp. (“NCIC”), which argues that

[i]n lieu of creating a complex rate scheme for ancillary services involving ‘cost-based’ rates, safe harbor rates and rate caps . . . [the FCC should] establish a nationwide safe harbor, rate cap schedule for account funding fees based on the Alabama PSC’s Order. Fees for account services are unlikely to vary by jurisdiction, and a nationwide safe

⁵⁸ See Stephen A. Raher Comments at 5, WC Docket No. 12-375 (Dec. 20, 2013) (“While ICS provider cost will vary, there is no plausible justification for account-funding (or refunding) fees in excess of \$3, and in reality, most ICS provider costs for these transactions are likely below this threshold.”). It appears that Raher’s comments are indeed based on actual financial transaction agreement terms, but they do not fully appreciate payment processing costs. Payment processing involves two “buckets” of costs: the customer service portion and the software development portion. Transactions are processed in either of two ways: automated or with live assistance. Automated transactions which occur either via the Internet or through an automated phone system may indeed fit under the \$3.00 fee structure Raher promotes. However, when a live agent is involved to handle the transaction, costs go up significantly. In addition, due to the transient nature of these accounts and the absence of a refund fee, the transaction costs associated with refunding unused funds (or tracking such funds and remitting them in accordance with state Unclaimed Property Laws) must be anticipated and recovered through the initial funding fee.

The other significant costs not recognized by Raher are the development costs involved in creating fraud prevention criteria. Pay Tel, for example, has over a period of years developed multiple fraud prevention criteria and incorporated them into the payment process so that, when credit card payments are made via the phone or on the web, each payment is carefully screened through a number of varying criteria to look for suspicious factors. Some payments are immediately blocked, and the customer is routed to a customer service representative to request more identifying information. Some payments are flagged for tracking and investigation later. These expenses are significant, ongoing, and necessary in order to limit exposure to major fraud events with stolen credit cards.

⁵⁹ See Wright Petitioners’ FNPRM Comments at 14–16 (advocating for the Commission to look to the Alabama ICS Order for “guidance for ascertaining a cost-based rate” for fees “should the FCC elect to itemize the caps on ancillary fees” instead of prohibiting such fees altogether).

harbor, rate cap schedule will reduce the administrative compliance burden on ICS providers.⁶⁰

As the Wright Petitioners explain, the caps on ancillary fees proposed in the *Alabama IPS Order* come from a thorough analysis of cost data submitted by ICS providers and are therefore reliable.⁶¹

Embracing NCIC's idea of setting such a safe harbor rate, as the Commission has elected to do with respect to interstate rates, would entitle providers to a presumption that their rates are lawful and that they would not have to provide refunds as a result of any complaint proceeding.⁶² As with the interstate rates, an ICS provider charging above such fees would have to prove the reasonableness thereof through sufficient production of cost data justifying and substantiating them. Failure to adequately substantiate any fees charged in excess of the ancillary fee safe harbors would, as with the interstate rates, subject a violator to Commission enforcement action, including the possibility of penalties in the form of monetary forfeitures.⁶³ Establishment of such a safe harbor as applied to fees would give the Commission a means to effectively manage the problems associated with ancillary charges and would be consistent with the *Order's* overall framework, specifically its safe harbors as to interstate rate caps.

B. The Commission Should Provide a Mechanism By Which ICS Providers Can Seek Approval of New Ancillary Fees Should New Technologies—or Security Concerns—Require Them

⁶⁰ NCIC FNPRM Comments at 3.

⁶¹ See Wright Petitioners' FNPRM Comments at 12–15 (also citing to the efforts of the New Mexico Public Regulation Commission, which also sought and received cost data from ICS providers and capped ancillary fees as a result).

⁶² *Order* ¶ 60.

⁶³ *Id.* ¶ 118.

The Ohio Department of Rehabilitation and Correction (“ODRC”) is among the many correctional and confinement facilities worrying about the impact of the *Order’s* regulatory framework on ICS providers’ willingness and ability to embrace new technology that will improve both the provision of and security related to ICS.⁶⁴ The ODRC argues that the *Order’s* improperly-low interstate rate caps “will impede the continuing deployment of current-generation security measures and the development of next-generation security techniques,” which security measures and techniques do “not come cheap.”⁶⁵

The Commission must act to prevent the ODRC’s concerns regarding this deployment (or lack thereof) from becoming reality. There is no question that new technologies will continue to emerge that will affect and improve provision and quality of, and security related to, ICS. Providers will generally incur the up-front and continuing costs of adding such technological components to their ICS systems. Where such costs are directly and reasonably related to provision of ICS, providers should, consistent with the *Order*, be able to recover them.

Pay Tel would therefore urge the Commission to establish (to the extent it hasn’t already done so) a mechanism by which a provider that seeks to charge a new ancillary fee in order to recover its costs of providing additional technology can seek and receive Commission approval to do so. ICS providers must be able to respond and adapt to such technological changes rapidly and must know whether they will be permitted to recover costs associated therewith in real time. It would appear that such mechanism is already

⁶⁴ Ohio Dep’t of Rehabilitation and Correction Comments at 11–12, WC Docket No. 12-375 (Dec. 20, 2013).

⁶⁵ *Id.* at 11–12 (quoting Dissenting Statement of Commissioner Ajit Pai at 129).

contemplated—though insufficiently detailed—in the *Order*’s annual reporting requirements, which mandate that “ICS providers . . . file with the Commission their charges to consumers that are ancillary to providing the telecommunications piece of ICS.”⁶⁶ Although not deemed an “ancillary fee” in the *Order*, the “advanced security feature known as continuous voice biometric identification,”⁶⁷ which the Commission included in its interim ICS rates, serves as a good example here. As the Commission noted, ICS providers have incurred capital investments in order to provide biometric caller verification and other advanced security features.⁶⁸ As other, similar advanced security technology becomes available, ICS providers (and facilities) wishing to deploy such technology must be able to account for its costs (or, at a minimum, have a procedure by which they can quickly learn if such costs are not recoverable, in order to make informed decisions).

The Commission should clarify the method by which an ICS provider can seek authorization to charge new cost-based ancillary fees that are directly and reasonably related to the provision of ICS, including the method by which an ICS provider can provide cost-based justification for such fee (at the same time it makes its annual reporting filing). To the extent those methods are not incorporated into the *Order*, they should be added. Pay Tel would recommend that the Commission, in setting forth such a procedure, require that a provider’s request to charge a new, cost-based ancillary fee be approved or denied within 90 days.

⁶⁶ *Order* ¶ 116.

⁶⁷ *Id.* ¶ 27.

⁶⁸ *Id.* ¶ 53 n.196.

IV. The Commission Must Ensure Its Permanent Rate Structure Permits Confinement Facilities to Recover Their Costs Associated with ICS

Sheriffs continue to populate the record with evidence unequivocally demonstrating that jails and their administrators incur costs in providing ICS.⁶⁹

⁶⁹ See, e.g., Esteban M. Gonzalez, Chief Custody Deputy, Onondaga (N.Y.) County Sheriff's Office, to Marlene H. Dortch, Secretary, FCC at 2, WC Docket No. 12-375 (Dec. 20, 2013) ("The expense associated with these critical security features [related to ICS] cannot be minimized. Our security costs are built into our rate structure and are based on the specific needs, as presented to our ICS provider. The new rate caps adopted by the FCC will make the deployment of safety and security features economically infeasible for many [New York] correctional facilities."); Letter from Letter from Thomas A. Ferrara, Sheriff, Solano County (Cal.), to Marlene H. Dortch, Secretary, FCC at 1, WC Docket No. 12-375 (Dec. 17, 2013) ("The Order . . . creates a regulatory environment that jeopardizes these services [provided by jails to inmates] by prohibiting any revenue recovery by jails of the costs associated in administering inmate calling services and monitoring phone calls to protect the public."); 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

The extensive security features available with . . . [ICS] system[s] do come at a cost. Those features assist with security within the jail, police investigations outside the jail and avoiding victim contact in the community. The significant proposed changes [in the *Order*] threaten the availability of those features, which would potentially remove a valuable tool from law enforcement.⁷⁰

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 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”⁷¹ 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.

Whether through commissions (as explained above) or otherwise, the Commission should mandate that facilities are entitled to recover those costs related to facilities’ administrative and security-based ICS expenses. Dozens of sheriffs have explained to the Commission the costs their facilities incur as an aspect of their provision

comprehensive monitoring and reporting systems and capabilities that are required in order to effectively oversee secure inmate use of ICS).

⁷⁰ Letter from Col. Peter A. Meletis, Superintendent, Prince William-Manassas Regional Adult Detention Center, to Marlene H. Dortch, Secretary, FCC at 1, WC Docket No. 12-375 (Dec. 20, 2013).

⁷¹ *Order* ¶ 54.

of ICS and the need to recover them.⁷² The Commission, in the *Order*, recognizes that such costs exist and has hinted at establishing a mechanism for recovering them.⁷³

Pay Tel encourages the Commission to continue in that direction 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 from criminal activity. Such a cost-recovery mechanism must allow confinement facilities to be made whole for offering ICS in their facilities. Facilities are under no obligation to provide ICS, and they are unlikely to continue to do so if 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.

V. Existing Contracts Between ICS Providers and Facilities Should Be Grandfathered

⁷² See *supra* n.69.

⁷³ *Order* ¶ 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 Stay Petitions and Petition to Hold in Abeyance, In the Matter of Rates for Interstate Inmate Calling Services* at ¶¶ 39, 50, WC Docket No. 12-375 (Nov. 21, 2013) (“[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.

Some commenters, such as CenturyLink, urge the Commission to grandfather existing ICS contracts that specify end-user rates and/or require the payment of site commissions.⁷⁴ As CenturyLink notes, “ICS contracts are typically multi-year in term, requiring substantial up-front investment in specialized facilities.”⁷⁵ Pay Tel would agree, at least in part.

ICS providers who are bound to such contracts may be unable to alter certain material terms thereof midstream, including requirements that they make site commission payments. With respect to the facilities, “[j]ails must cope with stringent State budgetary concerns. Jails must operate on a balanced budget each year,”⁷⁶ and such budgets, to the extent they have already been set, have been done so in reliance on receipt of commission payments from ICS providers. If site commissions are prohibited, ICS providers will either have to continue to pay site commissions pursuant to contracts (without being able to recover such costs), or they may be forced to breach such contracts and to potentially leave jails without funds that they expected to receive. Pay Tel would therefore urge that the Commission permit the grandfathering of provider–facility contracts to provide a more orderly transition to a new regulatory environment.

⁷⁴ CenturyLink FNRPM Comments at 10.

⁷⁵ *Id.* at 11.

⁷⁶ American Jail Association Letter at 2.

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Respectfully submitted,

PAY TEL COMMUNICATIONS, INC.

A handwritten signature in blue ink, appearing to read "Marcus W. Trathen", written over a horizontal line.

By:

Marcus W. Trathen
Timothy G. Nelson
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Suite 1600
Wells Fargo Capitol Center
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304
mtrathen@brookspierce.com
tnelson@brookspierce.com