

MAR 20 2014

Federal Communications Commission  
Office of the Secretary

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	79 Fed. Reg. 11
Rates for Inmate Calling Services	)	OMB Control No. 3060-XXXX
Data Collection	)	WC Docket 12-375

**COMMENTS OF TELMATE, LLC**

Telmate, LLC (“Telmate”), by its attorneys, hereby responds to the *Notice of Public Information Collection*,<sup>1</sup> in which the Federal Communications Commission (“Commission” or “FCC”) requests comments about whether the data collection imposed by its *Interim ICS Rate Order* is incompatible with the Paperwork Reduction Act (“PRA”).<sup>2</sup>

The data collection mandated by the *Interim ICS Rate Order* is incompatible with a recent order of the United States Court of Appeals for the District of Columbia (“D.C. Circuit”), which stayed much of the *Interim ICS Rate Order* – including regulations justifying and authorizing the collection of such cost data.<sup>3</sup> Because the Commission cannot legally impose cost-based rate regulation or require the detailed annual reporting of cost data at this time, the

<sup>1</sup> *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission*, Comments Requested, 79 Fed. Reg. 11 (Jan. 16, 2014).

<sup>2</sup> *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking at ¶ 182, WC Docket No. 12-375, FCC 13-113 (rel. Sept. 26, 2013) (“Interim ICS Rate Order”) (“This Report and Order contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in the proceeding.”).

<sup>3</sup> *Securus Techs., Inc. v. FCC*, Order, No. 13-1280 (Jan. 13, 2014) (“Stay Order”) (staying parts of the *Interim ICS Order*, including §§ 64.6010 (Cost-Based Rates for Inmate Calling Services), 64.6020 (Interim Safe Harbor), and 64.6060 (Annual Reporting and Certification Requirements)).

mandatory collection of such data is not useful and, thus, incompatible with the PRA. For that reason alone, the Office of Management and Budget (“OMB”) should not approve it.

Separately, the Commission’s mandatory data collection makes no effort to reduce the burden faced by ICS providers. It does not seek consistency with existing reporting and recordkeeping practices; it is unmoored from any plan to analyze the collected data; and, it ignores less burdensome but statistically significant alternatives. For these independent reasons, too, OMB should not approve the data collection.

## **I. PROCEDURAL BACKGROUND**

### **A. FCC Interim ICS Rate Order**

In November 2003, petitioners Martha Wright et al. (“petitioners”) first asked the Commission to review the rates charged by providers of inmate calling services (“ICS”).<sup>4</sup> In March 2007, three and a half years later, petitioners again asked the Commission to regulate ICS rates.<sup>5</sup> Neither petition proposed cost-based, rate-of-return regulation of ICS rates. The Commission sought and received comments on both petitions, but did not take further action at that time.<sup>6</sup>

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<sup>4</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 (Nov. 3, 2003).

<sup>5</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petitioners’ Alternative Rulemaking Proposal, CC Docket No. 96-128 (Mar. 1, 2007).

<sup>6</sup> *Petition For Rulemaking Filed Regarding Issues Related to Inmate Calling Services Pleading Cycle Established*, CC Docket No. 96-128, Public Notice, DA 03-4027, 2003 WL 23095474 (Wireline Comp. Bur. 2003); *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, CC Docket No. 96-128, Public Notice, 22 FCC Rcd 4229 (Wireline Comp. Bur. 2007).

In December 2012, more than 10 years after the first petition and more than 5 years after the second, the Commission issued a formal notice of proposed rulemaking to consider ICS rates.<sup>7</sup> Like the petitions giving rise to the proceeding, the NPRM did not contemplate cost-based, rate-of-return regulation.<sup>8</sup>

On September 26, 2013, the Commission released an *Interim ICS Rate Order*, adopted by two of the three sitting commissioners, which – to the surprise of the ICS providers – created a cost-based, rate-of-return regime for regulating ICS rates. As part of the transition to that regime, the *Interim ICS Rate Order* also established an interim ICS rate cap of \$0.21 per minute for debit and prepaid interstate calls and \$0.25 cents per minute for collect interstate calls – to be applied to large and small correctional institutions alike.<sup>9</sup> Moreover, “to enable the Commission to take further action to reform rates,” the *Interim ICS Rate Order* required all ICS providers to file certified annual cost reports and submit to a mandatory collection of cost data.<sup>10</sup>

The annual cost reporting requirement, if not stayed by the United States Court of Appeals for the District of Columbia, would have required ICS providers to submit a certified report containing,

“by correctional institution; by jurisdictional nature to the extent that there are differences among interstate, intrastate, and local calls; and by the nature of the billing arrangement to the extent there are differences among Collect Calling, Debit Calling, Prepaid Calling, Prepaid Collect Calling, or any other type of billing arrangement:

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<sup>7</sup> *Rates for Inmate Calling Services*, Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 12-167 (rel. Dec. 28, 2012) (“NRPM”).

<sup>8</sup> See *Interim ICS Rate Order*, Dissenting Statement of Commissioner Ajit Pai at 122-15 & n.22 (“Pai Dissent”) (refuting as “simply wrong” the Commission’s attempt to link generic requests for alternative proposals to the unnoticed cost-based, rate-of-return regulation that the Commission ultimately adopted).

<sup>9</sup> *Interim ICS Rate Order* ¶¶ 48, 73, 119; 47 C.F.R. § 64.6030.

<sup>10</sup> *Id.* ¶ 124; see generally 47 C.F.R. § 64.6060.

- (i) Rates for Inmate Calling Services, reporting separately per-minute rates and per-call or per-connection charges;
- (ii) Ancillary charges;
- (iii) Minutes of use;
- (iv) The average duration of calls;
- (v) The percentage of calls disconnected by the Provider for reasons other than expiration of time; [and]
- (vi) The number of calls disconnected by the Provider for reasons other than expiration of time.”<sup>11</sup>

“This is effectively a tariffing requirement that allows the Commission to scrutinize the rates of all providers . . . .”<sup>12</sup>

Separately, as part of the mandatory data collection, the *Interim ICS Rate Order* again asks ICS providers to submit the same cost information that would have been required in the annual reports:

[W]e require all ICS providers to provide data to document their costs for interstate, intrastate long distance and intrastate local ICS for the past year. \* \* \* We have identified five basic categories of costs that ICS providers incur: (1) telecommunications costs and interconnection fees; (2) equipment investment costs; (3) equipment installation and maintenance costs; (4) security costs for monitoring, call blocking; (5) costs of providing ICS that are ancillary to the provision of ICS, including any costs that are passed through to consumers as ancillary charges; and (6) other relevant cost data as outlined in the data template discussed below. For each of the first four categories, we require ICS providers to identify the fixed costs, the per-call costs and the per-minute costs. Furthermore, for each of these categories (fixed, per-call and per-minute costs), we require ICS providers to identify both the direct costs, and the joint and common costs. For the joint and common costs, we require providers to explain how these costs, and rates to recover them, are apportioned among the facilities they serve as well as the services that they provide. For the fifth category, we

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<sup>11</sup> 47 C.F.R. § 64.6060.

<sup>12</sup> Pai Dissent at 127.

require ICS providers to provide their costs to establish debit and prepaid accounts for inmates in facilities served by them or those inmates' called parties; to add money to those established debit or prepaid accounts; to close debit or prepaid accounts and refund any outstanding balance; to send paper statements; to send calls to wireless numbers; and of other charges ancillary to the provision of communications service. We also require ICS providers to provide a list of all ancillary charges or fees they charge to ICS consumers and account holders, and the level of each charge or fee. We require all ICS providers to provide data on their interstate and intrastate long distance and local demand (i.e., minutes of use) and to apportion the minutes of use between interstate and intrastate calls. Finally, we will require ICS providers to submit forecasts, supported by evidence, of how they expect costs to change in the future.

All told, this is a “massive” amount of data.<sup>13</sup> In fact, “[f]or jails alone, that’s 122,937 separate pieces of information” nationwide.<sup>14</sup>

The *Interim ICS Rate Order* thus directs ICS providers to (1) report annually on the rates charged, minutes billed, calls disconnected, and other information for each correctional institution it serves, and (2) perform a one-time collection of such cost data and report it to the Commission. “Together these requirements amount to the imposition on ICS providers of all-out rate-of-return regulation, with its requisite cost studies, separations, cross-subsidizations, tariffing, and other accoutrements.”<sup>15</sup>

#### **B. D.C. Circuit Order Staying Interim ICS Rate Order**

On November 14, 2013, Securus Technologies, Inc. (“Securus”) petitioned the D.C. Circuit for review of the *Interim ICS Rate Order*. Telmate, other ICS providers, and several correctional facilities subsequently joined the appeal.<sup>16</sup> Within weeks of Securus’s petition, a

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 124.

<sup>16</sup> *Securus Techs., Inc. v. FCC*, Order, No. 13-1280 (D.C. Cir. Jan. 13, 2014) (“Stay Order”).

host of ICS providers (Securus, Global Tel\*Link, and CenturyLink Public Communications, Inc.) and correctional facilities (Mississippi Department of Corrections and South Dakota Department of Corrections) moved to stay all or part of the *Interim ICS Rate Order*, arguing among other things that the *Interim ICS Rate Order* imposed new, complex, and incomprehensible rate regulation without notice and in excess of the Commission's authority.

In response to those motions, and recognizing "the stringent requirements for a stay pending court review," the D.C. Circuit stayed most of the *Interim ICS Rate Order*, including the cost-based rule (64.6010) and the two regulations deriving from it (64.6020 and 64.6060).<sup>17</sup> Rule 64.6010 concerns the Commission's authority to implement a cost-based rate regime;<sup>18</sup> rule 64.6020 concerns the Commission's authority to exempt certain presumptively reasonable rates from cost-based review (which is unnecessary without cost-based rate regulation);<sup>19</sup> and, rule 64.6060 concerns the Commission's authority to mandate certified annual reporting of ICS data, including rates, ancillary charges, use, duration, and certain disconnection numbers (which, again, is unnecessary without cost-based rate regulation).<sup>20</sup>

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<sup>17</sup> See *supra* at note 3 (staying 47 C.F.R. §§ 64.6010, 64.6020, and 64.6040).

<sup>18</sup> 47 C.F.R. § 64.6010 ("Cost-Based Rates for Inmate Calling Services. All rates charged for Inmate Calling Services and all Ancillary Charges must be based only on costs that are reasonably and directly related to the provision of ICS.").

<sup>19</sup> 47 C.F.R. § 64.6020 ("Interim Safe Harbor. (a) A Provider's rates are presumptively in compliance with § 64.6010 (subject to rebuttal) if: (1) None of the Provider's rates for Collect Calling exceed \$0.14 per minute at any correctional institution, and (2) None of the Provider's rates for Debit Calling, Prepaid Calling, or Prepaid Collect Calling exceed \$0.12 per minute at any correctional institution. (b) A Provider's rates shall be considered consistent with paragraph (a) of this section if the total charge for a 15-minute call, including any per-call or per-connection charges, does not exceed the appropriate rate in paragraph (a)(1) or (2) of this section for a 15-minute call. (c) A Provider's rates that are consistent with paragraph (a) of this section will be treated as lawful unless and until the Commission or the Wireline Competition Bureau, acting under delegated authority, issues a decision finding otherwise.").

<sup>20</sup> 47 C.F.R. § 64.6060 ("Annual Reporting and Certification Requirement. (a) All Providers must submit a report to the Commission, by April 1st of each year, regarding their interstate and

In deciding to stay parts of the *Interim ICS Order*, the D.C. Circuit necessarily concluded that it likely will reject the Commission's decision-making.<sup>21</sup> As a result, the Commission cannot and likely will not be able to impose cost-based rates or require the related reporting obligations as outlined in the *Interim ICS Rate Order*.

### C. FCC Order Granting Pay Tel Waiver of Interim Interstate ICS Rates

Telmate, like seemingly all other stakeholders, reads the D.C. Circuit's Stay Order to negate the mandatory data collection that is inexorably linked to the stayed cost-based rate rule.<sup>22</sup> Nevertheless, in a recent order temporarily exempting Pay Tel from the rate caps announced in the *Interim ICS Rate Order*, the Commission announced a different interpretation. In a footnote, the Commission stated its opinion that the Stay Order "[left] in place . . . the Commission's

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intrastate Inmate Calling Services for the prior calendar year. The report shall contain: (1) The following information broken out by correctional institution; by jurisdictional nature to the extent that there are differences among interstate, intrastate, and local calls; and by the nature of the billing arrangement to the extent there are differences among Collect Calling, Debit Calling, Prepaid Calling, Prepaid Collect Calling, or any other type of billing arrangement: (i) Rates for Inmate Calling Services, reporting separately per-minute rates and per-call or per-connection charges; (ii) Ancillary charges; (iii) Minutes of use; (iv) The average duration of calls; (v) The percentage of calls disconnected by the Provider for reasons other than expiration of time; (vi) The number of calls disconnected by the Provider for reasons other than expiration of time; (2) A certification that the Provider was in compliance during the entire prior calendar year with the rates for Telecommunications Relay Service as required by § 64.6040; (3) A certification that the Provider was in compliance during the entire prior calendar year with the requirement that all rates and charges be cost-based as required by § 64.6010, including Ancillary Charges. (b) An officer or director from each Provider must certify that the reported information and data are accurate and complete to the best of his or her knowledge, information, and belief.”).

<sup>21</sup> The four-part test for evaluating motions for stay asks, among other things, whether “the petitioner made a strong showing that it is likely to prevail on the merits of its appeal.” *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>22</sup> See, e.g., *Rates for Interstate Inmate Calling Services*, Consolidated Comments of Wright *et al.*, WC Docket No. 12-375 (Mar. 11, 2014) (“Securus and several other ICS providers have gone to the extreme step of obtaining an order staying the FCC’s data collection rules so that they will not have to provide cost studies”).

provision for a one-time, mandatory data collection that will enable the Commission to establish permanent rules.”<sup>23</sup> The OMB must not approve this collection.

## II. INTRODUCTION

The D.C. Circuit’s Stay Order postponed indefinitely the Commission’s authority to impose the cost-based, rate-of-return regulation outlined in the *Interim ICS Rate Order*. It specifically stayed the cost-based and related reporting regulations, including the rule that would have required annual reporting and certification of interstate and intrastate rates and charges at each correctional institution.

Yet pursuant to its footnote announcement, the Commission apparently is seeking to collect under a different name the same cost data that, according to the D.C. Circuit, it has no right to demand. Because the Commission is asking ICS providers to supply the very same information that the D.C. Circuit ruled they are under no obligation to report, the data collection arguably is unenforceable (unless and until rules 64.6010 and 64.6060 are affirmed). For this reason alone, the Office of Management and Budget (“OMB”) should not approve the collection.

But even if the Commission could collect the cost data it seeks, the Stay Order makes such data useless to the Commission. The Stay Order indefinitely precludes the Commission from imposing cost-based rates as outlined in the *Interim ICS Rate Order*, and the facility-specific, cost-based data described in the mandatory collection are thus of little use to the agency. A burdensome data collection with no practical value is incompatible with the PRA, and for this reason, too, the Office of Management and Budget (“OMB”) should not approve it.

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<sup>23</sup> *Rates for Interstate Inmate Calling Services; Pay Tel Commc’ns, Inc.’s Petition for Waiver of Interim Interstate ICS Rates*, Order at n.10, WC Docket No. 12-375 (ICS providers must comply with the “one-time, mandatory data collection that will enable the Commission to establish permanent rules.”).

Finally, even if the data collection were enforceable and even if the Commission could derive something more than hypothetical use from the ICS cost data, the Commission should not be allowed to demand this massive collection because it failed to minimize the burden of producing such data. For example, notwithstanding the self-evident burden ICS providers face in collecting such information,<sup>24</sup> the Commission failed to seek consistency with existing reporting and recordkeeping practices, failed to link the data with any plan for analyzing it, and failed to consider less burdensome but statistically significant alternatives (e.g., collecting cost data from certain representative facilities, highest- and lowest-cost facilities, a statistically significant sample of all facilities, etc.) Moreover, notwithstanding the self-evident burden FCC staff face in analyzing such information, the Commission failed to identify the resources needed and available to process the massive amount of data.<sup>25</sup> On these independent bases, also, the Office of Management and Budget (“OMB”) should not approve the mandatory data collection.

### **III. THE COMMISSION’S MANDATORY COLLECTION OF COST DATA IS INCOMPATIBLE WITH THE PRA**

Federal agencies cannot demand information from regulated entities without first justifying the need for such information.<sup>26</sup> The Commission has failed to do so. Before mandating a data collection, an agency must:

(3) certify (and provide a record supporting such certification, including public comments received by the agency) that each collection of information submitted to the Director for review under section 3507 –

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<sup>24</sup> See, e.g., Pai Dissent at 127 (“For jails alone, that’s 122,937 separate pieces of information.”).

<sup>25</sup> See, e.g., *id.* (“How we will review that information, check it for errors, and analyze it within a reasonable time frame is a mystery.”)

<sup>26</sup> See Paperwork Reduction Act of 1995, Public Law No. 104-13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. §§ 3501-3520.

(A) is necessary for the proper performance of the functions of the agency, including that the information has practical utility;

(B) is not unnecessarily duplicative of information otherwise reasonably accessible to the agency;

(C) reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency; \* \* \*

(E) is to be implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond; \* \* \*

(H) has been developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected, including the processing of the information in a manner which shall enhance, where appropriate, the utility of the information to agencies and the public; [and]

(I) uses effective and efficient statistical survey methodology appropriate to the purpose for which the information is to be collected . . . .<sup>27</sup>

The term “practical utility” means “the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account . . . the agency’s ability to process the information it collects . . . in a useful and timely fashion.”<sup>28</sup>

Here, the Commission seeks to collect cost data from ICS providers that, by law, it cannot use to regulate them. The Commission has made no effort to minimize the burden to the ICS providers, who do not maintain the information now being sought. Moreover, the Commission has not announced any plan for such data, other than an abstract assertion that such information will help the Commission “take further action to reform rates.” The Commission has neither certified the office responsible for developing the scope of the mandatory data collection, nor has it allocated any resources for managing its use. Furthermore, the Commission

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<sup>27</sup> 44 U.S.C. § 3506(c)(3) (emphasis added).

<sup>28</sup> 5 C.F.R. § 1320.3(l) (implementing the PRA).

has ignored survey methodology that could dramatically reduce the scope of work without significantly diminishing the value of such information (if any) to the Commission. In short, the Commission has completely ignored the substance of the PRA, and the OMB should not approve the this useless, burdensome, and poorly-conceived collection.

**A. The Mandatory Data Collection Has No Practical Utility, and It Is Duplicative of Information That the D.C. Circuit Has Said the FCC May Not Request**

The D.C. Circuit's Stay Order indefinitely precludes the Commission from imposing on ICS providers cost-based rates, and it precludes the Commission from demanding from ICS providers certified annual cost-based data reports (the contents of which mirror that now sought under the heading "data collection"). Thus, the information being sought through the mandatory data collection has no actual utility to the Commission, which has been precluded from using it to impose cost-based rates. The mandatory data is therefore without practical utility and its collection violates the PRA.<sup>29</sup>

Taken as a whole, the Commission released its *Interim ICS Rate Order* to usher-in a new cost-based regulatory regime for ICS rates.<sup>30</sup> Consistent with that new cost-based model, the Commission demanded annual certification and reporting of cost data, and a mandatory collection of cost data. The mandatory collection, like the annual reports, was intended to help the Commission "ensure that [ICS providers'] rates, charges and ancillary charges are cost-

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<sup>29</sup> See 44 U.S.C. 3506(c)(3)(A).

<sup>30</sup> See *Interim ICS Rate Order* ¶ 12 ("In this Order, we take several actions to ensure that interstate ICS rates are just, reasonable, and fair as required by the Communications Act. First, we examine the statute and the current state of the ICS market and conclude that the current market structure is not operating to ensure that rates are consistent with the statutory requirements of sections 201(b) and 276 to be just, reasonable, and fair. Thus, we require that interstate ICS rates be cost-based.")

based” (i.e., it was indented to help the Commission implement Rule 64.6010).<sup>31</sup> So, if the Commission legally could require ICS providers to charge only cost-based rates, then the mandatory data collection – while still unjustifiably burdensome and ill-conceived – at least might be said to offer something more than theoretical utility.

But the D.C. Circuit’s Stay Order relieves the data of actual usefulness. The Stay Order expressly and indefinitely stays Rule 64.6010, effectively prohibiting the Commission from requiring that “[a]ll rates charged for Inmate Calling Services and all Ancillary Charges must be based only on costs that are reasonably and directly related to the provision of ICS.”<sup>32</sup> Moreover, it invalidates the regulations deriving from the cost-based requirement, such as Rule 64.6060, which would have required ICS providers to report certified cost data annually.<sup>33</sup>

The impropriety of the annual report regulation is particularly telling, because the information requested in those impermissible annual reports mirrors that requested in the mandatory data collection requirement. In their annual reports, ICS providers were to document “their interstate and intrastate Inmate Calling Services for the prior calendar year.”<sup>34</sup> These reports were to include rates and per-call charges, ancillary charges, minutes, average duration, and disconnections.<sup>35</sup> They were to be segregated by institution, by jurisdiction (interstate, intrastate, and local), and again by billing arrangement.

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<sup>31</sup> *Id.* ¶ 124.

<sup>32</sup> Stay Order; 47 C.F.R. 64.6010 (stayed by the D.C. Circuit).

<sup>33</sup> Stay Order (staying 47 C.F.R. §§ 64.6010, 64.6020, and 64.6060); *see also Securus Techs., Inc. v. FCC*, Motion of Global Tel\*Link for Partial Stay Pending Judicial Review at 20, No. 13-1280 (Nov. 25, 2013) (urging the court to “stay the [Interim ICS Rate] Order’s cost-based rule, 47 C.F.R. § 64.6010, and the regulations that derive from it, *see id.* §§ 64.6020 (safe-harbor rule), 64.6060 (annual reporting requirement) . . .”).

<sup>34</sup> 47 C.F.R. § 64.6060(a).

<sup>35</sup> 47 C.F.R. § 64.6060(a)(1).

Likewise, the mandatory data collection would ask “all ICS providers to provide data to document their costs for interstate, intrastate long distance and intrastate local ICS for the past year.”<sup>36</sup> The collection would include costs related to rates and per-call charges, including ancillary charges and minutes. It would be segregated or apportioned by category (i.e., connections, equipment, maintenance, security, ancillary, and other), by institution, by jurisdiction (i.e., interstate, intrastate, and local), by accrual method (i.e., fixed, per call, and per minute), and again by cost type (i.e., direct, joint and common). The collection would also include costs for establishing, maintaining, and closing debit and prepaid accounts, for sending paper statements, and for calling wireless phones, as well as the rates they charge for these services.

The overlap between the mandatory data collection, which the Commission now seeks to require, and the annual reporting requirement, which the D.C. Circuit has said the Commission may not require, is undeniable. Equally undeniable is the uselessness of such cost information in a regulatory environment where the Commission has been precluded from imposing cost-based rates. The mandatory data collection cannot have practical utility where, as a matter of law, the agency collecting it cannot use it for its intended purpose. For the same reason, the mandatory data collection is inconsistent with the PRA and the OMB must not approve it at this time.

**B. The Mandatory Data Collection Does Not Seek to Reduce the Burden on the ICS Providers and Is Inconsistent With Existing Reporting and Recordkeeping Practices**

Even assuming that the Commission could use the cost data it now seeks, the data collection requirements still would violate the PRA because the Commission has neither sought

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<sup>36</sup> *Interim ICS Rate Order* ¶ 125.

to minimize the burden on the ICS providers nor sought to align the data collection more reasonably with ICS providers' existing reporting and recordkeeping practices.<sup>37</sup>

The mandatory data collection is “massive” data collection.<sup>38</sup> As Commissioner Pai observed,

Each ICS provider must document its costs for the past year and report them to the Commission on an institution-by-institution basis. Those costs must be broken down into five [or six] separate categories (connections, equipment, maintenance, security, and ancillary [or if none apply, then “other”]), which must be apportioned among three methods of cost accrual (fixed, per call, and per minute), and which must then again be divided between direct costs and joint and common costs. In addition, ICS providers must report the costs for establishing, maintaining, and closing debit and prepaid accounts, for sending paper statements, and for calling wireless phones, as well as the rates they charge for these services. And ICS providers must report “data on their interstate and intrastate long distance and local demand (i.e., minutes of use) and . . . apportion the minutes of use between interstate and intrastate calls.” For jails alone, that’s 122,937 separate pieces of information.<sup>39</sup>

Each ICS provider is directed to base its collection “on the most-recent fiscal year data at the time of [OMB] approval.”<sup>40</sup> The requirement would “BECOME EFFECTIVE immediately upon announcement in the Federal Register of OMB approval.”<sup>41</sup>

This is an impossible ask. The request sounds much like a full utility rate case, complete with separations study, cross-subsidization study, and other accoutrements. Large, incumbent utilities and telephone companies have permanent, full-time staffs that dedicate themselves to collecting, verifying, and supplying this information. Telmate does not. Telmate is a relatively

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<sup>37</sup> See 44 U.S.C. §§ 3506(c)(3)(C), (E).

<sup>38</sup> Pai Dissent at 127.

<sup>39</sup> *Id.*

<sup>40</sup> *Interim ICS Rate Order* ¶ 124.

<sup>41</sup> *Id.* ¶ 188.

young telecommunications company and one of the fastest growing inmate telephone system and service providers in North America. Having only entered the ICS market in 2005, Telmate already serves over 240 correctional facilities across 40 U.S. states and two Canadian provinces – including federal facilities, city jails, and county jails. This competition effects positive change in an industry where 90% of the country is served by just three providers, and it inures to the benefit of correctional facilities and inmates alike. But a relatively young, relatively small company like Telmate cannot afford to hire a staff of regulatory accountants to comply with a single data collection. Nor could it possibly comply “immediately.”

Telmate simply does not have the personnel needed to segregate its costs among 240 facilities, 42 jurisdictions, 3 jurisdiction types, six cost categories, three cost accrual methods, two cost types, and a handful of others (i.e., for establishing, maintaining, and closing debit and prepaid accounts, for sending paper statements, and for calling wireless phones, as well as rates charged each). It does not regularly maintain all of this information in the normal course of its business, and it cannot afford to create this infrastructure to satisfy a single request that, in light of the D.C. Circuit Stay Order, provides no discernable countervailing benefit to the Commission.

Had the Commission asked whether such a collection were viable, Telmate would have expressed its doubts in advance of the *Interim ICS Rate Order*.<sup>42</sup> But, notwithstanding the Commission’s statutory obligation to certify that the mandatory data collection “(C) reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency; . . . [and] (E) is to be implemented in ways consistent and compatible, to the

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<sup>42</sup> See, e.g., *Rates for Interstate Inmate Calling Services*, Comments of Telmate, LLC at 1, 18, WC Docket No. 12-375 (Mar. 25, 2013) (noting generally the “significant data collection and analytical challenges in fashioning a new regulatory regime for inmate services and in considering reform of ICS rates”).

maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond,” the Commission did not ask and its *Interim ICS Rate Order* does not seek to limit in any meaningful way the burden on ICS providers.<sup>43</sup> The mandatory data collection is thus inconsistent with the PRA and the OMB must not approve it.

**C. The Commission Developed This Massive Data Collection Without Having Identified an Office to Use the Information Collected**

The mandatory data collection was not “developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected, including the processing of the information in a manner which shall enhance, where appropriate, the utility of the information to agencies and the public.”<sup>44</sup> Indeed, even upon release of its *Interim ICS Rate Order*, the Commission still had no idea how it might implement the collection and review of the requested data. After wondering “where [the Commission] will get the resources to review the effectively tariffed rates at each of the thousands of correctional institutions in America,” Commissioner Pai answered, “I don’t know.”<sup>45</sup> Similarly, he observed that it remains “a mystery” “[h]ow [the Commission] will review that information, check it for errors, and analyze it within a reasonable time frame . . . .”<sup>46</sup>

Suffice to say that, if at the time the Commission issues an order its members had no idea who might or how they might analyze massive amounts of data due “immediately” after OMB approval, then such collection could not have satisfied the PRA. Thus, the OMB must not approve it.

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<sup>43</sup> 44 U.S.C. § 3506(c)(3).

<sup>44</sup> 44 U.S.C. § 3506(c)(3)(H).

<sup>45</sup> *Pai Dissent* at 127.

<sup>46</sup> *Id.*

**D. The Commission Failed to Consider Effective and Efficient Alternatives**

Before mandating a data collection, an agency must certify that it “uses effective and efficient statistical survey methodology appropriate to the purpose for which the information is to be collected . . . .”<sup>47</sup> Yet the commission has failed to consider a number of alternatives that would reduce the burden on ICS providers without discernable erosion of information quality.

Telmate, for example, serves 240 facilities of varying sizes across 42 jurisdictions. Compiling cost data for each service provided at each facility is, as described above, a massive undertaking that exceeds the resources available to Telmate. But, given a better understanding of the Commission’s goals, Telmate might be able to identify certain representative facilities from which it reasonably could collect cost information. It might, for example, be able to identify high- and low-cost prisons and jails that bound the spectrum of reasonable costs. It might also be able to sample a statistically significant cross-section of all facilities, which might help color the spectrum of reasonable costs.

The Commission, however, did not consider any effective and efficient alternatives – likely because its blunderbuss approach is consistent with the cost-based regulatory model imposed by the *Interim ICS Rate Order* (but subsequently stayed by the D.C. Circuit). The Commission cannot claim now that its massive cost-based data collection was for another purpose, when it has not considered alternative methods that could have satisfied that need (whatever it might be) to a statistically significant degree. The PRA demands that the Commission seek to minimize the effect that its data collection has on ICS providers, and it has failed to do so. The OMB should not approve the data collection.

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<sup>47</sup> 44 U.S.C. § 3506(c)(3) (emphasis added).

## CONCLUSION

The mandatory data collection, which collects massive amounts of cost-based data for the stated purpose of ensuring that providers' rates and charges are cost-based, is inconsistent with the D.C. Circuit's stay of the *Interim ICS Rate Order* and incompatible with the Paperwork Reduction Act. The data collection has no practical utility because, without authority to impose cost-based rates (an authority the D.C. Circuit has indefinitely curtailed), the Commission has no actual use for this data – a logic further evidenced by the overlap between this request and the reporting regulation stayed by the D.C. Circuit. Furthermore, this data collection does not seek to reduce the burden faced by ICS providers, does not seek consistency with existing reporting and recordkeeping practices, is untethered to any plan for analyzing the resulting data, and ignores less burdensome but statistically significant alternatives. For these independent reasons, OMB should not approve the data collection.

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Respectfully submitted,

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