

## EPA APPROVED MISSISSIPPI NON-REGULATORY PROVISIONS

Name of non-regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/ effective date	EPA approval date	Explanation
Transportation Conformity Interagency Consultation And General Provisions.	DeSoto County portion of Memphis, TN-AR-MS 2008 8-hour Ozone Nonattainment Area	May 31, 2013	11-13-13 [Insert citation of publication].	

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[FR Doc. 2013-27019 Filed 11-12-13; 8:45 am]

BILLING CODE 6560-50-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 64

[WC Docket No. 12-375; FCC 13-113]

### Rates for Interstate Inmate Calling Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission) adopts rule changes to bring high interstate inmate calling service (ICS) rates into compliance with the statutory mandate of being just, reasonable, and fair. This action is intended to bring rate relief to inmates and their friends and families who have historically been required to pay above-cost rates for interstate ICS.

**DATES:** This final rule is effective February 11, 2014 except for 47 CFR 64.6060 and Section III.I which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections.

**FOR FURTHER INFORMATION CONTACT:** Lynne Engledow, Wireline Competition Bureau, Pricing Policy Division, (202) 418-1520 or [lynne.engledow@fcc.gov](mailto:lynne.engledow@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Report and Order and Further Notice of Proposed Rulemaking in WC Docket No. 12-375, FCC 13-113, adopted on August 9, 2013 and released on September 26, 2013. The full text of this document is available for public inspection during regular business hours in the Commission's Reference Center, 445 12th Street SW., Room CY-A257, Washington, DC 20554. The full text of this document may be

downloaded at the following Internet address: <http://www.fcc.gov/documents/>—. The complete text may be purchased from Best Copy and Printing, Inc., 445 12th Street SW., Room CY-B402, Washington, DC 20554. To request alternative formats for persons with disabilities (e.g., accessible format documents, sign language, interpreters, CARTS, etc.), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 or (202) 418-0432 (TTY). The Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

### I. Introduction

1. Nearly 10 years ago Martha Wright, a grandmother from Washington, DC, petitioned the Commission for relief from exorbitant long-distance calling rates from correctional facilities. Tens of thousands of others have since urged the Commission to act, explaining that the rates inmates and their friends and families pay for phone calls render it all but impossible for inmates to maintain contact with their loved ones and their broader support networks, to society's detriment. Today, we answer those pleas by taking critical, and long overdue, steps to provide relief to the millions of Americans who have borne the financial burden of unjust and unreasonable interstate inmate phone rates.

2. This Order will promote the general welfare of our nation by making it easier for inmates to stay connected to their families and friends while taking full account of the security needs of correctional facilities. Studies have shown that family contact during incarceration is associated with lower recidivism rates. Lower recidivism means fewer crimes, decreases the need for additional correctional facilities, and

reduces the overall costs to society. More directly, this helps families and the estimated 2.7 million children of incarcerated parents in our nation, an especially vulnerable part of our society. One commenter states that the "[l]ack of regular contact with incarcerated parents has been linked to truancy, homelessness, depression, aggression, and poor classroom performance in children." In this Order we help these most vulnerable children by facilitating contact with their parents. By reducing interstate inmate phone rates, we will help to eliminate an unreasonable burden on some of the most economically disadvantaged people in our nation. We also recognize that inmate calling services (ICS) systems include important security features, such as call recording and monitoring, that advance the safety and security of the general public, inmates, their loved ones, and correctional facility employees. Our Order ensures that security features that are part of modern ICS continue to be provided and improved.

3. Our actions address the most egregious interstate long distances rates and practices. While we generally prefer to promote competition to ensure that inmate phone rates are reasonable, it is clear that this market, as currently structured, is failing to protect the inmates and families who pay these charges. Evidence in our record demonstrates that inmate phone rates today vary widely, and in far too many cases greatly exceed the reasonable costs of providing the service. While an inmate in New Mexico may be able to place a 15 minute interstate collect call at an effective rate as low as \$0.043 per minute with no call set up charges, the same call in Georgia can be as high as \$0.89 per minute, with an additional per-call charge as high as \$3.95—as much as a 23-fold difference. Also, deaf prisoners and family members in some instances pay much higher rates than hearing prisoners for equivalent communications with their families. For example, the family of a deaf inmate in Maryland paid \$20.40 for a *nine minute*

call placed via Telecommunications Relay Service (TRS)—an average rate of \$2.26 per minute. A significant factor driving these excessive rates is the widespread use of site commission payments—fees paid by ICS providers to correctional facilities or departments of corrections in order to win the exclusive right to provide inmate phone service. These site commission payments, which are often taken directly from provider revenues, have caused inmates and their friends and families to subsidize everything from inmate welfare to salaries and benefits, states' general revenue funds, and personnel training.

4. We applaud states such as New Mexico and New York that have already accomplished reforms, and thereby shown that rates can be reduced to reasonable, affordable levels without jeopardizing the security needs of correctional facilities and law enforcement or the quality of service. Similarly, we acknowledge that some federal agencies, such as the Department of Homeland Security's Immigration Customs and Enforcement (ICE), have taken similar measures to provide lower rates, resulting in nationwide calling rates of \$0.12 a minute without additional fees or commissions at ICE facilities. Following such reforms, there is significant evidence that call volumes increased, which shows the direct correlation of how these reforms promote the ability of inmates to stay connected with friends and family. There is also support in the record that ICS rate reform has not compromised the security requirements of correctional facilities. Thus, these examples disprove critics who fear that reduced rates will undermine security or cannot be implemented given provider costs. Our actions build upon these examples by reducing rates, while balancing the unique security needs of facilities and ensuring that inmate phone providers receive fair compensation and a reasonable return on investment.

5. While some states have taken action to reduce ICS rates, the majority have not. We therefore take several actions to address interstate rates. We require inmate phone providers to charge cost-based rates to inmates and their families, and establish "safe-harbor" rates at or below which rates will be treated as lawful (*i.e.*, just, reasonable, and fair) unless and until the Commission issues a finding to the contrary. Specifically, we adopt interim safe harbor rates of \$0.12 per minute for debit and prepaid interstate calls and \$0.14 per minute for collect interstate calls. Based on the evidence in this record, we also set an interim hard cap on ICS providers' rates of \$0.21 per

minute for interstate debit and prepaid calls, and \$0.25 per minute for collect interstate calls. This upper ceiling ensures that the highest rates are reduced immediately to the upper limit of what can reasonably be expected to be cost-based rates. Interstate ICS rates at or below the safe harbor are presumed just, reasonable, fair and cost-based. Rates between the interim safe harbor and the interim rate cap will not benefit from this presumption.

6. We base the safe harbor rate levels and rate caps on data and cost studies presented by parties and/or taken directly from ICS provider service contracts in the record. The safe harbor rate levels are derived from ICS rates in seven states that have prohibited site commission payments from ICS providers to facilities. The interim rate caps adopted are based on (1) the highest total-company costs presented in a cost study provided by Pay Tel, an ICS provider that exclusively serves jails, and (2) the highest collect calling cost data presented in the 2008 ICS Provider Data Submission, compiling data from seven different ICS providers that serve various types and sizes of correctional facilities. We based the interim rate caps on these high levels, without attempting to exclude any unrecoverable costs or adjust any inputs, in order to ensure that the cap levels were a conservative estimate of the levels under which all ICS providers could provide service. Even so, we provide a waiver process to account for any unique circumstances.

7. In addition to immediate rate reform, we find that site commission payments and other provider expenditures that are not reasonably related to the provision of ICS are not recoverable through ICS rates, and therefore may not be passed on to inmates and their friends and families. We require that charges for services ancillary to the provision of ICS must be cost-based. We prohibit special charges levied on calls made using teletypewriter (TTY) equipment or other technologies used to access TRS. While we find that the record fully supports the safe harbor and rate caps adopted here, we seek additional information that could allow us to refine these rates in the future. Accordingly, we require all ICS providers to submit data on their underlying costs so that the Commission can develop a permanent rate structure, which could include more targeted tiered rates in the future.

8. The Communications Act (Act) requires that interstate rates be just and reasonable for *all* Americans—there is no exception in the statute for those who are incarcerated or their families.

The Act further requires that our payphone regulations "benefit . . . the general public," not just some segment of it. Our actions in this Order, while long overdue, fulfill these statutory mandates while taking into account the legitimate and unique requirements for security and public safety in the provision of inmate phone services and the benefits to society of increased communications between inmates and their families. Our work, however, is not done, and we continue in the Further Notice (or FNPRM) our efforts to ensure that these rates are just, reasonable, and fair to the benefit of both providers and the general public.

## II. Procedural Background

9. In 2003, Mrs. Wright and her fellow petitioners (Petitioners), which included current and former inmates at Corrections Corporations of America-run confinement facilities, filed a petition with the Commission seeking to initiate a rulemaking to address high ICS rates. The petition sought to prohibit exclusive ICS contracts and collect-call-only restrictions. In 2007, the same petitioners filed a second rulemaking petition, seeking to address ICS rates by requiring a debit-calling option in correctional facilities, prohibiting per-call charges, and establishing rate caps for interstate, interexchange ICS. The Commission sought and received comment on both petitions. In 2008, certain ICS providers placed in the record a cost study that quantified their interstate ICS costs.

10. In December 2012, the Commission adopted a notice of proposed rulemaking seeking comment on, among other things, the proposals in the Wright petitions. The 2012 ICS NPRM, 78 FR 4369, Jan. 23, 2013, sought comment on the two petitions and proposed ways to "balance the goal of ensuring reasonable ICS rates for end users with the security concerns and expense inherent to ICS within the statutory guidelines of sections 201(b) and 276 of the Act." The 2012 ICS NPRM, 78 FR 4369, Jan. 23, 2013, sought comment on other issues affecting the ICS market, including possible rate caps for interstate ICS; the ICS Provider Data Submission; collect, debit, and prepaid ICS calling options; site commissions; issues regarding disabilities access; and the Commission's statutory authority to regulate ICS.

11. The FCC's Consumer Advisory Committee (CAC) adopted a recommendation in 2012 finding that ICS rates may be "unreasonably high and unaffordable" and that such high ICS rates challenge the "national goal of

the reduction of recidivism among inmates.” The CAC recommended that the Commission: ensure that the rates for ICS calls are reasonable; restrict “commissions” paid to correctional institutions; encourage the use of “prepaid debit accounts” or use of other “low-cost minutes;” and continue to allow collect calls “with charges that are a reasonable amount above the actual cost of providing the call.” On August 2, 2013, the CAC reiterated its request for the Commission to take action on “this long overdue issue” of high ICS rates.

### III. Ensuring That Rates for Interstate Inmate Calling Services Are Just, Reasonable, and Fair

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. We address what appropriate costs are and conclude, among other things, that site commission payments, in and of themselves, are not a cost of providing the communications service—ICS. We then address several interrelated rate issues, including rate levels and options for provider compliance with our rules including “safe harbor” rate levels. We require that ancillary service charges also be cost-based. We address rates for the use of TTY equipment. We conclude that our actions herein do not require us to abrogate existing contracts between correctional facilities and ICS providers; to the extent that any agreement may need to be revisited, it is only because those agreements cannot supersede our authority over rates charged to end users. Finally, we address collect-calling only requirements at correctional facilities, require an annual certification filing, and initiate a mandatory data collection, directing all ICS providers to file data regarding their ICS costs. These actions take into account the needs of ICS providers for adequate cost recovery and the need for just, reasonable, and fair rates for ICS consumers while meeting the unique security needs inherent in the provision of ICS.

#### A. Statutory Requirements for ICS

##### 1. Statutory Standards for ICS Rates and Practices

13. The Communications Act requires ICS rates, charges, and practices to be just, reasonable, and fair. Section 201(b) provides that “charges, practices, classifications, and regulations for and in connection with [interstate common carrier] service, shall be just and reasonable,” and grants the Commission authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.” The Commission has previously found that interstate ICS, typically a common carrier service, falls within the mandates of section 201.

14. In addition, section 276 directs the Commission to “establish a per call compensation plan to ensure that all payphone service providers”—which the statute defines to include providers of ICS—“are fairly compensated for each and every completed intrastate and interstate call.” The Commission has previously found the term “fairly compensated” permits a range of compensation rates that could be considered fair, but that the interests of both the payphone service providers and the parties paying the compensation must be taken into account. Section 276 makes no mention of the technology used to provide payphone service and makes no reference to “common carrier” or “telecommunications service” definitions. Thus, the use of VoIP or any other technology for any or all of an ICS provider’s service does not affect our authority under section 276. Indeed, several commenters state that the Commission can regulate ICS regardless of the underlying technology used to provide the service. Finally, section 276 provides that “[t]o the extent that any State requirements are inconsistent with the Commission’s regulations, the Commission’s regulations on such matters shall preempt such State requirements.”

15. Our exercise of authority under sections 201 and 276 is further informed by the principles of Title I of the Act. Among other things, that provision states that it is the Commission’s purpose “to make available, so far as possible, to *all* the people of the United States” communications services “at reasonable charges.” The regulation of interstate ICS adopted in this Order advances those objectives.

##### 2. Types of Facilities

16. The rules we adopt herein apply to interstate ICS provided in “correctional institutions” as that term

is used in section 276. Accordingly, the scope of facilities covered by this Order is coextensive with the scope of the term “correctional institutions” in the statute and includes, for example, prisons, jails and immigration detention facilities.

17. *Prisons and Jails.* Prisons and jails are both core examples of facilities that constitute “correctional institutions” under section 276 and this Order. The Commission has long made clear that its ICS rules apply at a minimum to inmate telephone service in prisons and jails. For instance, the 2002 *Inmate Calling Services Order on Remand and NPRM* repeatedly referred to “prisons” and “jails,” often in contexts that explicitly make clear that both entities fall within the definition of “correctional institution.” 67 FR 17009, April 9, 2002. Similarly, in the 2012 *ICS NPRM*, the Commission repeatedly used the more generic term “prison,” noting, however, that jails are a particular subset of prisons (*i.e.*, that jails are “local prisons” to be distinguished from “state prisons”). 78 FR 4369, Jan. 23, 2013. Finally, a number of commenters in this proceeding—including ICS providers—submitted data for both prisons and jails, and/or otherwise stated or assumed within their written advocacy that both entities would be subject to any new rules. We do not distinguish in this Order between prisons and jails, in part because our record does not permit us to draw any clear distinctions. Because both are included within the scope of this Order, however, there is no need at this time to draw any distinction.

18. *Immigration Detention Facilities.* Immigration detention facilities also are a type of “correctional institutions.” The term is widely understood to include “facility[ies] of confinement.” This common understanding of the term has long been reflected in advocacy regarding the lawfulness of ICS rates under section 276. As early as 2004, for example, commenters made arguments predicated on the assumption that immigration detention facilities are a type of “correctional institution” under section 276. Petitioners in this proceeding likewise made arguments based on the same assumption, as did a number of commenters in response to the 2012 *ICS NPRM* as well as participants in the Reforming ICS Rates Workshop. This common understanding of that statutory term was not disputed or called into question by any evidence in the record. As such, “correctional institution” as used within section 276 includes immigration detention facilities.

19. Additional support for this finding derives from the largely fungible nature of jails and facilities where immigrants are detained when viewed from the standpoint of detained immigrants. As commenters have pointed out, of the nearly 400,000 immigrants detained in this country each year, many are “held in local jails and prisons that have contracted with Immigration Customs and Enforcement.” This fact suggests a rough functional equivalence between jails and prisons on the one hand, and immigration detention facilities on the other—particularly from the perspective of the would-be users of ICS (*i.e.*, apprehended immigrants who may be detained either in a jail or some other facility, depending on happenstance). Moreover, treating the two categories of institutions differently would result in disparate treatment among immigrant detainees. For instance, if immigration detention facilities were excluded from the scope of “correctional institution,” immigrant detainees in jails would receive a “fair” rate for phone calls while immigrant detainees in ICE facilities would not. This kind of disparate treatment would not be just or consistent with the public interest, and for this reason as well we find it reasonable that “correctional institutions” includes immigration detention facilities.

#### B. Need for Reform

20. In this section, we first describe the different categories of rates and charges for ICS and the different options that end users have to pay for them. We then explore the record on the costs of providing ICS, and the record on rates, and find that in most facilities the rates for interstate ICS far exceed the cost of providing ICS. To assess why this occurs, we look at competition in the market for ICS, which, in this case, does not adequately exert downward pressure on end-user rates. We examine the societal impacts of high ICS rates, and we conclude that we must take action to meet our statutory mandate that all rates be just, reasonable, and fair.

#### 1. Current Structures for ICS Rates and Payment Options

21. ICS providers generally offer their services pursuant to contracts with correctional facilities. These contracts vary by the correctional facilities and ICS providers involved, and the states and local jurisdictions in which the services are provided. ICS rates can differ for local, intrastate long distance, and interstate long distance calls and can include per-minute or per-call charges or both. This varies, however,

and some ICS contracts provide only for a per-minute charge while others provide only for a flat rate per call. It is important to note that the *users* of ICS—the inmates and the family and friends whom they call—are not party to these contracts. Rather, the correctional institution agrees to an amount that *it* is willing to allow the ICS provider to charge.

22. The inmates who use ICS (or the persons called by those inmates) typically pay for calls by using collect, debit, or prepaid payment options. These methods differ as to who pays for the call and when payment is received. Collect calls occur when an inmate places a call with the assistance of a live operator or an automated recording, and the called party is billed after the call is completed. Correctional facilities use collect calling due to the relative ease of administering such calls, as well as the high degree of security and control involved. ICS providers assert, however, that collect calling can pose billing and collection problems.

23. Debit calling involves an arrangement whereby the charges are deducted from an inmate’s pre-existing account that often can be used to pay for a variety of goods and services within a correctional facility. An inmate’s account can be funded by the inmate (with earned funds, for example) or by outside parties. Inmates typically place debit calls by dialing into a central number and using a personal identification number (PIN) or by entering the numbers listed on a physical debit card. An aggregated list on the record of current ICS contract rates indicates that 36 states currently allow debit calling, and that debit calling is less expensive than collect calling in many of those states. Some facilities allegedly do not favor debit calling because debit calling can be more administratively burdensome than collect calling.

24. Prepaid calling refers to arrangements whereby the called party has a prepaid account set up with the ICS provider in advance. This account is often established and replenished by the inmates’ friends and family members. The record indicates that prepaid calling is generally less expensive than collect calling but can be about equal in rates to debit calling. Some ICS contracts are limited to collect calling only while others allow prepaid and/or debit calling options.

#### 2. The Record on ICS Costs

25. In this section, we highlight aspects of the record regarding the costs of providing ICS. In 2008, seven ICS providers filed a cost study based on

proprietary cost data for certain correctional facilities with varying call cost and call volume characteristics. The study apportioned interstate ICS costs into per minute and per call categories and calculated the resulting averages for both debit and collect calls. The results of the study indicated that the per-call cost for debit calls was \$0.16 per minute and the per-call cost for collect calls was \$0.25 per minute. The providers subsequently provided additional usage data and cost calculations but did not otherwise make the underlying proprietary cost information available.

26. In response to the 2012 ICS NPRM, Securus filed a report analyzing per-call and per-minute costs of ICS for certain correctional facilities it serves. The report was based on 2012 data and analyzed cost, call volume, site commission and other data according to type and size of facility. It divided the study sample into four groups, including one for state department of corrections facilities and three others for different-sized jail facilities. The report contained total cost data for the facilities but did not otherwise provide disaggregated cost data. Using this data, the Commission calculated an average per-minute cost for interstate calls from all facilities included in the report to be \$0.12 per minute with commissions and \$0.04 per minute without them. We note that the two groups in the Securus report with the smallest facilities (“Medium 10” and “Low 10”) are estimated to have fewer than 50 (“Medium 10”) and fewer than 5 (“Low 10”) inmates per facility, respectively. Facilities of these sizes hold only a very small share of inmates nationally. Thus, the data for the “Medium 10” and “Low 10” groups do not necessarily reflect the costs of serving vast majority of inmates that generate nearly all calls. Nonetheless, for completeness we included those data in calculating the averages mentioned above.

27. Pay Tel also filed financial and operational data for its ICS operations, which it states are exclusively in jails, not prisons. The filing contained comprehensive cost, capitalized asset, call volume, and other actual and projected data. The non-confidential cost summary included in the filing reported actual and projected 2012–2015 average total costs for collect and debit per-minute calling of approximately \$0.23 and \$0.21, respectively, (including the cost of an advanced security feature known as continuous voice biometric identification).

28. Although CenturyLink did not file a cost study, it did file summary cost

information for its ICS operations. Specifically, CenturyLink reported that its per minute costs to serve state departments of corrections facilities (excluding site commission payments) averaged \$0.116 and that its per-minute costs to serve county correctional facilities (excluding site commission payments) averaged \$0.137.

29. The record in this proceeding suggests that the costs of providing ICS are decreasing, in part due to technology advances. As one smaller ICS provider stated, “[g]iven modern-day technology, the costs for providing secure phone and video services to correctional facilities are low (and are getting lower).” As ICS moves increasingly to IP technology, we expect costs to decline as is the case for similar services that are not ICS. Some commenters and the Petitioners posit that “[t]echnology has driven the actual cost of ICS calls to a fraction of what they were when the petitions were filed.” In particular, they point to the replacement of live operators with automated systems, the reduction or total absence of on-site service by the ICS providers, the consolidation of ICS providers, and the centralized application of requested security measures. The ability to centrally provision across multiple facilities is especially salient given that the spread of hosted and/or managed service capabilities can result in reduced total cost of ownership for solutions such as VoIP with more centralized—that is, cloud-based—remote services, provided over IP packet based networks.

30. Other developments also point to lower costs. These changes include lower “basic telecommunications costs.” Consistent with recent trends in capital costs for the communications industry, some providers acknowledge that capital costs for on-site equipment are decreasing. In addition, ICS providers and correctional facilities increasingly offer prepaid and debit calling as an alternative to collect calling. Because every prepaid or debit call is paid, this trend is lowering provider costs by reducing uncollectibles. Indeed, Pay Tel was a participant in the 2008 cost study, which concluded the difference between the costs of debit and collect calls was \$0.09. In its 2013 submission, Pay Tel’s costs indicate the differential between the costs of debit and collect calls had fallen to \$0.02, with the collect calling costs decreasing significantly.

31. Further, the Commission adopted comprehensive intercarrier compensation reforms, which have reduced the costs of transport and certain long distance charges for ICS

providers, a trend that will continue as these reforms continue to be implemented. Moreover, IP-transit charges, relevant for the supply of IP-based services, have also steadily fallen.

32. Notwithstanding these lower cost trends, some providers assert their costs have stayed the same or increased due to factors such as investments in enhanced features, general and administrative costs such as additional personnel to create and maintain individual customer accounts, and high corporate debt. Some ICS providers also include “free-to-the-inmate” services such as free calls to public defenders, free calls for indigent inmates, and free visitation calls as a portion of their costs of providing ICS. They also highlight the need to provide security features that are necessary to the provision of ICS though there is insufficient evidence to indicate that the costs of providing such security features have increased since the ICS Provider Data Submission.

33. Finally, providers point to “site commissions” as a significant driver of increases to rates charged to inmates. Site commissions are payments made from ICS providers to correctional facilities and related state authorities. Since the First Wright Petition was filed in 2003, the record indicates that there has been a significant increase in site commission payments made in connection with the provision of ICS. Such payments can take the form of a percentage of gross revenue, a signing bonus, a monthly fixed amount, yearly fixed amount, or in-kind contributions. Site commission payments are currently prohibited in seven states, as well as at some federal detention facilities including dedicated facilities operated by ICE.

34. The record makes clear that where site commission payments exist, they are a significant factor contributing to high rates. Site commission payments are often based on a percentage of revenues ICS providers earn through the provision of ICS, and such percentages can range from 20 to 88 percent. While the record indicates that site commission payments sometimes fund inmate health and welfare programs such as rehabilitation and educational programs; programs to assist inmates once they are released; law libraries; recreation supplies; alcohol and drug treatment programs; transportation vouchers for inmates being released from custody; or other activities, in accordance with the decisions of prison administrators and other local policymakers, such payments are also used for non-inmate needs, including employee salaries and benefits,

equipment, building renewal funds, states’ general revenue funds, and personnel training. Thus, it is clear that the level of such payments varies dramatically and their use and purposes differ significantly, from funding roads to purposes that ultimately benefit inmate welfare.

### 3. The Record on ICS Rates

35. The record contains data regarding interstate ICS rates, including an aggregation of ICS contract data and current ICS contracts by state. Some of the rates for interstate calls are very high by any measure. While most Americans have become accustomed to paying no additional charge for individual long distance calls, inmates, or those whom they call, pay as much as \$17.30, \$10.70 or \$7.35 for a 15-minute interstate collect call, depending upon the facility where the inmates are incarcerated.

36. Some states and federal agencies, such as ICE, have reformed ICS rates and achieved significantly lower rates. Additionally, interstate ICS rates vary significantly and in ways that are unlikely to be based on ICS providers’ costs. Individual ICS providers charge widely varying rates in the different facilities they serve, notwithstanding their ability to share the costs of serving multiple facilities using centralized call routing and management and security platforms. For example, ICS provider GTL has entered into contracts to charge both one of the highest rates for a 15-minute collect call (\$17.30 in Arkansas, Georgia, and Minnesota) and one of the lowest (\$0.72 in New York).

37. One of the most significant factors in rate levels is whether the relevant state has reformed or addressed ICS rates. For example, an interstate collect call in Missouri (a state that has reformed ICS rates) can cost as little as \$0.05 per minute for a 15-minute call, while the same call in Georgia, a state that has not undertaken rate reform, can be as high as \$0.89 per minute, plus an additional per-call charge as high as \$3.95—as much as a 23 fold difference. States that have lowered rates have done so in different ways. Some have banned site commissions entirely, and others permit only limited or sharply-reduced site commissions. Some states have imposed rate caps, disallowed or reduced per-call charges, and required providers to offer less expensive calling options, such as prepaid or debit calling.

38. Site commission payments appear to be a particularly significant contributor to high rates. Several states have eliminated or reduced such payments, and available data indicate that ICS rates in those states are

substantially lower than those in states that require commission payments. For example, in New Mexico, after site commissions were prohibited, ICS rates fell from \$10.50 for a 15-minute interstate collect call to \$0.65 for the same 15-minute call based on revised ICS rates—a 94 percent reduction. Similarly, New York ended site commission payments in 2008, “taking the position that the state prison system shall not accept or receive revenue in excess of its reasonable operating cost for establishing and administering its ICS, while ensuring that the system provides reasonable security measures to preserve the safety and security of prisoners, correctional staff, and call recipients.” New York’s prison phone rates prior to ending its commission payments were \$1.28 per call plus \$0.068 per minute for all categories of calls, or \$2.30 for a 15-minute call. Today, New York rates are \$0.048 per minute for all categories of calls with no per-call charges, or \$0.72 for a 15-minute call—a 69 percent reduction. When site commission payments were eliminated in South Carolina and Michigan, the average cost of a 15-minute call went down, from \$2.70 to \$1.35 and from \$5.30 to \$1.10, respectively. There is no evidence in this record that these reformed rates are below cost or insufficient to cover necessary security features of the ICS networks, or do not provide fair compensation for ICS providers. Moreover, ICS providers have seen significant increases in call volumes in states in which rates have been lowered, often providing additional revenue even as rates decrease.

#### 4. Competition in the ICS Market

39. The Commission traditionally prefers to rely on market forces, rather than regulation, to constrain prices and ensure that rates are just and reasonable. The 2012 ICS NPRM sought comment on the competitive nature of the ICS market and whether such competition constrains ICS rates. 78 FR 4369, Jan. 23, 2013. Economic literature states that, in effectively competitive markets, firms expect to earn sufficient revenues to cover their long run economic costs, and not more.

40. In response to the 2012 ICS NPRM, some commenters suggest that the ICS market is competitive but, in so doing, these commenters focus on competition among providers to obtain contracts from correctional facilities, not whether there is competition within the facility giving inmates competitive options for making calls. While the process of awarding contracts to provide ICS may include competitive bidding,

such competition in many instances benefits correctional facilities, not necessarily ICS consumers—inmates and their family and friends who pay the ICS rates, who are not parties to the agreements, and whose interest in just and reasonable rates is not necessarily represented in bidding or negotiation.

41. Thus, the Commission has previously found that competition during the competitive bidding process for ICS “does not exert downward pressure on rates for consumers,” and that “under most contracts the commission is the single largest component affecting the rates for inmate calling service.” We reaffirm those findings here. Indeed, as the Commission has found, competition for ICS contracts may actually tend to increase the rate levels in ICS contract bids where site commission size is a factor in evaluating bids. For example, a former Commissioner on the New Mexico Public Regulation Commission, Jason Marks, has stated that the interstate ICS market is characterized by “reverse competition” because of its “setting and security requirements.” He further asserts that “reverse competitive markets are ones where the financial interests of the entity making the buying decision can be aligned with the seller, and not the buyer” and that such competition “is at its most pernicious in the inmate phone service context because buyers not only do not have a choice of service providers, they also have strong reasons not to forego using the service entirely.” Although one ICS provider asserts that “service providers compete vigorously with respect to rates” it is clear from requests for proposals (RFPs) in the record that, at best, end user rates are but one of many factors that correctional facilities use to judge competing bids. The record also indicates that some correctional facilities may base their selection of a contractor largely on the amount of cash and/or in-kind inducement offered rather than being driven by proposals focused on high quality service at the most affordable rates for consumers. In sum, market forces do not appear to constrain ICS rates. Absent Commission action here, it is clear that we will not have met our statutory obligation to ensure that rates are just, reasonable, and fair.

#### 5. Societal Impacts of High ICS Rates

42. Excessive ICS rates also impose an unreasonable burden on some of the most economically disadvantaged in our society. Families of incarcerated individuals often pay significantly more to receive a single 15-minute call from prison than for their basic monthly

phone service. We have received tens of thousands of comments from individuals, including many personal stories from inmates, their family members and their friends about the high price of staying in touch using ICS. These rates discourage communication between inmates and their families and larger support networks, which negatively impact the millions of children with an incarcerated parent, contribute to the high rate of recidivism in our nation’s correctional facilities, and increase the costs of our justice system. Familial contact is made all the more difficult because “mothers are incarcerated an average of 160 miles from their last home, so in-person visits are difficult for family members on the outside to manage.”

43. Just, reasonable, and fair ICS rates provide benefits to society by helping to reduce recidivism. The Congressional Black Caucus cites “a powerful correlation between regular communication between inmates and their families and measurable decreases in prisoner recidivism rates.” In addition, NARUC formally endorsed “lower prison phone rates as a step to reduce recidivism and thereby lower the taxpayer cost of prisons.” As the Center on the Administration of Criminal Law explains, “a reliable way of decreasing the likelihood that prisoners will re-offend is to foster the growth of a family support structure that gives inmates a stake in the community to which they return and can provide them with the tools and incentives they need to succeed upon release.” Further, reducing recidivism would provide significant cost savings, as the annual cost to incarcerate one person is estimated at over \$31,000 per year or between \$60 and \$70 billion per year nationwide. Indeed, one study indicates that a one percent reduction in recidivism rates would translate to more than \$250 million in annual cost savings across the United States.

44. Just and reasonable interstate ICS rates will produce further societal benefits by providing the justice system with cost savings and improved representation for inmates. Some public defenders and court-appointed lawyers limit the number of collect calls they accept because the cost of calls from correctional facilities has become overly expensive. One commenter states that the cost to one public defenders’ office for such collect calls rose to \$75,000 in one year alone, while another says that some public defenders “spend more than \$100,000 a year accepting collect calls from prisoners.” Commenters assert a correlation between lower rates and a lower incidence of contraband

cell phone use in correctional facilities, noting that efforts including “good security measures for both visitation and perimeter security” are also contributing factors. Reforms are necessary to ensure that these benefits, which unquestionably are in the public interest and will not be accrued in the absence of ICS rate reform, are realized.

#### 6. Reforms Are Necessary To Ensure That Interstate ICS Rates Are Just, Reasonable, and Fair

45. Based on the record, we conclude that the marketplace alone has not ensured that interstate ICS rates are just and reasonable and that they are fair to consumers, as well as providers. The Commission must therefore take action to establish just, reasonable, and fair rates. As the Commission has previously explained, “the just and reasonable rates required by Sections 201 and 202 . . . must ordinarily be cost-based, absent a clear explanation of the Commission’s reasons for a departure from cost-based ratemaking.” Thus, although the Commission “is not required to establish purely cost-based rates,” it “must, however, specially justify any rate differential that does not reflect cost.” The Commission has not previously justified such a departure in the context of ICS rates, nor do we find a basis in this record to do so now. Given our findings above that the rates for ICS frequently are well in excess of the costs reasonably incurred in providing those services, we conclude that the rate reforms we begin in this Order are necessary to ensure they are just and reasonable.

46. Likewise, under section 276, although the Commission has previously found the term “fairly compensated” to be ambiguous, and acknowledged that a range of compensation rates could be considered fair, it has evaluated the question with reference to the costs of providing the relevant service, including in the context of ICS. As noted above, the Commission traditionally prefers to rely on market forces, rather than regulation, to constrain rates. Thus, the Commission indicated in 1996 that it preferred to defer to the results of commercial negotiations, and in a 1996 order stated that “whenever a PSP is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied.” There, however, the Commission was focused on fair compensation from the perspective of ensuring that payphone providers received compensation that was not too low. As the Commission has recognized,

the concept of fairness encompasses both the compensation received by ICS providers and the cost of the call paid by the end-user. Given the significant record evidence regarding the many exorbitant rates for ICS today, except in areas where states have undertaken reform, continuing to rely upon negotiated agreements in this context will not adequately ensure fairness to the end-user paying the cost of the ICS because evidence is clear that this process does not constrain unreasonably high rates. We thus find the rate reforms begun in this Order are necessary to implement section 276(b)(1)’s “fair compensation” directive.

#### C. Framework for Just, Reasonable, and Fair ICS Rates

47. In this section, we create a new framework to ensure that interstate ICS rates are just and reasonable, as required by section 201(b), and provide fair compensation to providers and consumers of interstate ICS consistent with section 276. We require ICS rates to be cost-based. We identify the costs that are and are not to be included in determining whether a rate is consistent with the statute.

48. We address rates by adopting interim safe harbor rate levels and interim rate caps that work together to ensure that ICS rates are just, reasonable, and fair to both providers and end users. We adopt interim safe harbor interstate rate levels for prepaid and debit calls and separately for collect calls, and we will presume that interstate ICS rates at or below the safe harbors are cost-based and therefore just and reasonable under section 201(b) and fair under section 276. Specifically, we adopt initial interim safe harbor rates of \$0.12 per minute for debit and prepaid interstate ICS calls and \$0.14 per minute for collect interstate ICS calls. We adopt an interim rate cap of \$0.21 per minute for debit and prepaid interstate calls, and \$0.25 per minute for collect interstate calls.

49. As of the effective date of this Order, ICS providers’ interstate per-minute rates must be at or below the interim rate cap levels. An ICS provider may elect to charge rates at or below the interim interstate safe harbor rates and benefit from a presumption that such rates are just, reasonable, fair, and cost-based. Rates above the safe harbor will not benefit from such a presumption.

#### 1. Interstate ICS Rates and Charges Must Be Cost-Based

50. As discussed above, the Commission typically focuses on the costs of providing the underlying service when ensuring that rates for

service are just and reasonable under section 201(b). Likewise, the cost of providing payphone service generally has been a key point of reference when the Commission evaluates rules implementing the fair compensation requirements of section 276(b)(1)(A). In the 2012 ICS NPRM the Commission sought comment on ways of regulating ICS rates based on the costs of providing ICS. 78 FR 4369, Jan. 23, 2013. Although the Commission theoretically might deviate from such an approach, we find no basis to do so here and conclude that interstate ICS rates, which include per-minute charges, per-call charges, and ancillary charges and other fees charged in connection with such service, must be cost-based.

51. Section 276(b)(1) states that the Commission’s regulations implementing that provision should, among other things, “promote the widespread deployment of payphone services to the benefit of the general public.” Beyond harming the end users paying ICS rates, excessive ICS rates, and the resulting negative consequences, harm the public more generally. Since cost-based rates help avoid such negative consequences, this statutory language supports our reliance on such an approach. Our mandate to carry out our responsibilities under section 276(b)(1), along with the same underlying policy considerations, likewise persuades us that requiring cost-based interstate ICS rates will best implement section 201(b), as well.

52. We recognize that the term “cost” is itself ambiguous, and a range of possible interpretations of this term might be reasonable. For purposes of the interim rules and requirements adopted in this Order, we evaluate whether ICS rates are cost-based by relying on historical costs. We expect that historical cost information will be most readily available to ICS providers for production to the Commission as needed, making this approach readily administrable for purposes of interim rules that will represent an improvement over the *status quo* for interstate ICS rates, while we consider possible further reforms as part of the FNPRM. We discuss in further detail below the types of historical costs that are reasonably and directly related to the provision of ICS to be included in those rates.

#### 2. Costs of Providing Interstate ICS

##### a. General Standard

53. In this section, we conclude that only costs that are reasonably and directly related to the provision of ICS, including a reasonable share of common costs, are recoverable through ICS rates



consistent with sections 201(b) and 276(b)(1). Such compensable costs would likely include, for example, the cost of capital (reasonable return on investment); expenses for originating, switching, transporting, and terminating ICS calls; and costs associated with security features relating to the provision of ICS. On the other hand, costs not related to the provision of ICS may include, for example, site commission payments, costs of nonregulated service, costs relating to general security features of the correctional facility unrelated to ICS, and costs to integrate inmate calling with other services, such as commissary ordering, internal and external messaging, and personnel costs to manage inmate commissary accounts.

#### b. Site Commission Payments

54. The Commission has previously held that site commissions are—for purposes of considering ICS rates under section 276—an apportionment of profit, not a cost of providing ICS. In the *2012 ICS NPRM*, the Commission sought comment on its prior conclusion that site commission payments, or “location rents are not a cost of payphones, but should be treated as profit.” 78 FR 4369, Jan. 23, 2013. Site commission payments are not costs that are reasonably and directly related to the provision of ICS because they are payments made to correctional facilities or departments of corrections for a wide range of purposes, most or all of which have no reasonable and direct relation to the provision of ICS. After carefully considering the record, we reaffirm the Commission’s previous holding and conclude that site commission payments are not part of the cost of providing ICS and therefore not compensable in interstate ICS rates.

55. We disagree with commenters who argue that site commission payments should be treated as compensable ICS cost for the purpose of determining whether rates are just or reasonable under section 201(b). These commenters argue that the analysis conducted by the Commission with respect to fair compensation under section 276 for payphone providers is fundamentally different from determining whether a service provider’s rates comply with section 201(b). We need not determine whether the standards for determining compliance with section 276 and section 201(b) are identical because under the “fair compensation” requirement of section 276 or the “just and reasonable” requirement of section 201(b), we reach the same conclusion: site commission payments are not a

compensable category of ICS costs because they are not costs that are reasonably and directly related to provision of ICS. While we appreciate the view that these excess revenues are paid to correctional facilities and thus may not be “profits” to ICS providers in the sense that they can keep these excess revenues and use them for whatever purpose they like, they are excess revenues above costs nonetheless. This argument is analogous to that considered in the *USF/ICC Transformation Order*, where the Commission determined that “excess revenues that are shared in access stimulation schemes provide additional proof that the LEC’s rates are above cost.” There, the Commission concluded that “how access revenues are used is not relevant in determining whether switched access rates are just and reasonable in accordance with section 201(b).” The same principle applies here: the fact that payments from excess revenues are made to correctional facilities is not relevant in determining whether ICS rates are cost-based and thus just, reasonable, and fair under sections 201(b) and 276. Moreover, even if site commission payments are viewed as a cost rather than as excess revenues, they still would not be reasonably and directly related to the provision of ICS because, as noted above, they are simply payments made for a wide range of purposes, most or all of which have no reasonable and direct relation to the provision of ICS.

56. We also disagree with ICS providers’ assertion that the Commission must defer to states on any decisions about site commission payments, their amount, and how such revenues are spent. We do not conclude that ICS providers and correctional facilities cannot have arrangements that include site commissions. We conclude only that, under the Act, such commission payments are not costs that can be recovered through interstate ICS rates. Our statutory obligations relate to the rates charged to end users—the inmates and the parties whom they call. We say nothing in this Order about how correctional facilities spend their funds or from where they derive. We state only that site commission payments as a category are not a compensable component of interstate ICS rates. We note that we would similarly treat “in-kind” payment requirements that replace site commission payments in ICS contracts.

57. The record reflects that site commission payments may be used for worthwhile causes that benefit inmates by fostering such objectives as

education and reintegration into society. Law enforcement and correctional facilities assert that some or all of these programs would cease or be reduced if commission payments were not received as no other funding source would be available. Although these causes may contain worthy goals, we are bound by our statutory mandate to ensure that end user rates are “just and reasonable,” and “fair,” taking into account end users as well as ICS providers. The Act does not provide a mechanism for funding social welfare programs or other costs unrelated to the provision of ICS, no matter how successful or worthy.

58. We also are cognizant of the critical security needs of correctional facilities. For example, the U.S. Department of Justice has chronicled hundreds of criminal convictions involving the use of ICS as part of the criminal activity. Moreover, according to one commenter, a disproportionately large percentage of ICS-enabled crimes target and victimize vulnerable populations consisting of victims, witnesses, jurors, inmates, and family members of these individuals. While our actions to establish interim ICS safe harbors and rate caps prohibit the recovery of site commission payments, we include costs associated with security features in the compensable costs recoverable in ICS rates. Security monitoring helps correctional facilities identify potential altercations; monitor inmates who the facility is concerned may be suicidal; prevent criminal activity outside of the jail; prevent violation of no-contact orders and witness tampering; and aid in the prosecution of criminal cases. Our actions in this Order take into account security needs as part of the ICS rates as well as the statutory commitment to fair compensation. Indeed, data from facilities without site commission payments, which form the basis for our interim safe harbor rates, demonstrate the feasibility of providing ICS on an on-going basis to hundreds of thousands of inmates without compromising the levels of security required by these states’ correctional facilities. Our interim rate caps are based on cost studies that include the cost of advanced security features such as continuous voice biometric identification.

#### 3. Interim Interstate Rate Levels

59. In the *2012 ICS NPRM*, the Commission sought comment not only on various rate cap alternatives, but also on other possible ways of regulating ICS rates, as well as any other proposals from parties. 78 FR 4369, Jan. 23, 2013.



Below, we adopt interim rate caps that include interim safe harbors setting boundaries for rates that will be treated as lawful absent a Commission decision to the contrary, and serve to minimize regulatory burdens on ICS providers. The interim rate cap framework we adopt enables providers to charge cost-based rates up to the interim rate caps.

#### a. Interim Safe Harbors for Interstate ICS Rates

60. We adopt interim safe harbor rates of \$0.12 per minute for debit and prepaid interstate ICS calls and \$0.14 per minute for collect interstate ICS calls. Rates at or below these interim interstate safe harbor rate levels will be treated as lawful, *i.e.*, just and reasonable under section 201(b) of the Act and ensuring fair compensation under section 276(b)(1)(A) of the Act, unless and until the Commission makes a finding to the contrary. Providers will have the flexibility to take advantage of the interim safe harbor rates if they so choose. Providers that elect to take advantage of the safe harbors will enjoy the presumption that their rates are lawful and will not be required to provide refunds in any complaint proceeding.

#### (i) Methodology for Setting Interim Safe Harbor Per-Minute Rate Levels

61. We base our methodology for setting conservative interim interstate ICS safe harbor rate levels on our analysis of rate data in the record. In particular, the record includes detailed data on interstate ICS rates charged by ICS providers serving various types of correctional facilities. Specifically, HRDC filed detailed and comprehensive 2012 ICS rate data for virtually all of the state departments of corrections in the country. We conclude that these data provide a reasonable basis for establishing safe harbor rates that are intended to approximate the costs of providing interstate ICS—costs that include fair compensation (including a reasonable profit) and include full recovery for security features the correctional facilities have determined to be necessary to protect the public safety. Further, these safe harbor rates are validated by other evidence in the record.

62. The comprehensive rate data submitted by HRDC include data for seven states that have excluded site commission payments from their rates. Rates in every state, including the non-commission states, were included by ICS providers in their bids for state ICS contracts, such that we can presume that they are high enough to cover the providers' costs. We find that this subset

of rates, derived from states that have eliminated site commissions and maintained adequate security, is the most relevant to our approach to determining the costs that should still be recoverable through interstate ICS rates. The subset provides a reasonable basis for establishing a conservative proxy for cost-based rates. We set our interim safe harbor at conservative levels to account for the fact that there may be cost variances among correctional facilities.

63. We first derive an interim safe harbor rate for interstate ICS debit and prepaid calls. We establish a single rate for both debit and prepaid calls, given the evidence that costs for both billing approaches are substantially similar. We begin by calculating the average per-minute interstate ICS debit and prepaid call rates of the seven identified state departments of corrections. We assume a call duration of 15 minutes for purposes of our calculation. We then total the charges for a 15-minute call for each state, taking into account per-minute as well as per-call charges. We divide that total by 15 to calculate an average per-minute rate for each state. Finally, we average those per-minute rates across the seven relevant states. This calculation results in an average rate of \$0.1186 per minute for a 15-minute debit call. We similarly calculate the same states' prepaid interstate ICS calling rates, to obtain an average prepaid rate of \$0.1268 per minute. Given the similarities of debit and prepaid charges, we group the two into a single category and average those rates to obtain an overall per minute average of \$0.1227, which we round to \$0.12 per minute. We therefore adopt \$0.12 as the safe harbor per minute rate for interstate ICS debit and prepaid calls. As described in more detail below, ICS providers have the flexibility to satisfy the safe harbor either by certifying that the per-minute rate is at or below the safe harbor or by demonstrating that their total charge for a 15-minute call is at or below the safe harbor per-minute rate times 15.

64. We derive a corresponding interim safe harbor rate level for interstate ICS collect calls by utilizing the data provided by HRDC for the interstate ICS collect calling rates for the same set of states. Employing the same methodology utilized by ICS debit and prepaid calls, we determine the average rate for a 15-minute interstate ICS collect call for these states to be \$0.1411 per minute, which we round to \$0.14 per minute. We therefore adopt \$0.14 per minute as the safe harbor rate for interstate ICS collect calls.

65. Other data in the record further validate that the interim interstate safe harbor rates we establish here are just, reasonable, and fair. In addition to being higher than rates currently charged by several state departments of corrections without site commissions, our \$0.12 per minute safe harbor debit call rate is at or above the rate that would result if site commissions were deducted from the rates in ten states that allow them. Similarly, there are nine states with site commission payments in their rates whose interstate ICS collect rates are at or below our \$0.14 per minute safe harbor collect call rate when their commissions are deducted. Additionally, our interim safe harbor rate levels closely approximate the rates currently being charged in ICE-dedicated facilities.

66. Data in the record on the demand stimulation effects of lower rates further validate the conservative nature of our safe harbor rates and the likelihood that the safe harbors will provide fair compensation to ICS providers. There is general agreement in the record that lower rates will stimulate additional ICS usage, which will help to offset any revenue declines ICS providers might experience from lower rates. For example, petitioners cite an immediate increase in call volume of 36 percent following a significant reduction of ICS rates by New York in 2007. The New York State Department of Corrections and Community Supervision reported that call volumes continued to increase following their ICS rate reductions—from a total of 5.4 million calls in 2006 to an estimated 14 million calls in 2013—an increase of approximately 160 percent. Also, Telmate reported a 233 percent increase in call volume in one state when it brought its interstate ICS rates down to the \$0.12 per minute level of its local ICS rates. Telmate also saw an increase of up to 300 percent in call volume when it lowered its rates elsewhere. Given the largely fixed cost nature of the ICS industry, call volume increases are likely to generate significant revenues for ICS providers without resulting in significant cost increases. Such revenue increases are likely to offset in part the revenue declines ICS providers might otherwise experience from lower rate levels.

67. *Other Methodologies.* We find that using comprehensive state rate data to establish the interim safe harbor rates is preferable to other methodologies proposed in the record. For example, Petitioners propose a rate-setting methodology that combines an analysis of prevailing non-ICS prepaid calling card rates with estimates of the additional costs necessary to provide

ICS. Using their methodology, Petitioners propose a per-minute rate of \$0.07 for both collect and debit interstate ICS calls. Other commenters support Petitioners' approach. Some ICS providers, however, oppose Petitioners' proposal, stating that interstate ICS is not comparable to prepaid calling card services and that basing a methodology on such an assumption could preclude ICS providers from being fairly compensated. Some claim that the rate levels proposed by Petitioners, if adopted, would undermine ICS providers' financial viability. We do not find on the basis of this record that using commercial prepaid calling card rates is a reasonable starting point for calculating ICS calling rates given the significant differences between the two services, most notably, security requirements. Further, Petitioners' proposed methodology relies on combining prepaid calling card rates with ICS providers' costs. Because the two sets of data are not necessarily related, it would be difficult for us to adopt this methodology as the basis for our rates without further explanation.

68. We also decline to base our safe harbor rates on the call volume, cost, commission, and revenue data submitted by Securus or the cost data submitted by CenturyLink. While Securus' data provide some insight into the costs of its ICS operations, we have concerns about relying entirely on these data to calculate rates, in part because Securus did not provide the disaggregated data used to derive the report's total cost results, and the data it submitted did not distinguish between collect, debit, or prepaid calls. Similarly, consistent with our discussion below, we decline to base our safe harbors on the cost data CenturyLink submitted given the absence of underlying data, the lack of a description of its methodology, and the lack of a distinction between debit, prepaid and collect calling costs.

69. *Additional Considerations.* We disagree with concerns that it is not feasible to adopt uniform rates for all correctional facilities, particularly with regard to the safe harbors we are establishing here. Our safe harbors are not binding rates but are designed to give providers that elect to use them an administratively convenient pricing option that offers a rebuttable presumption of reasonableness. If providers serving jails or other facilities with different cost characteristics do not choose to use them, they may price their service up to the rate caps we establish below or seek a waiver of those caps. Ultimately, we believe that the safe harbors are set at levels that are likely

to ensure fair compensation for providers serving a significant proportion of inmates. Accordingly, we find that it is reasonable to establish a uniform set of interim safe harbor rate levels for providers serving different sizes and types of correctional facilities. Ultimately, we conclude that by setting the interim safe harbor rates at reasonable levels and providing flexibility to providers implementing the rates, including the ability to charge cost-based rates up to the interim rate cap, our interim interstate safe harbor rates will ensure that ICS providers are fairly compensated.

70. Because we find that the interim safe harbor rates we establish here will provide fair compensation to ICS providers and will encourage continued investment and deployment of ICS to the general public, we do not find persuasive the assertion that regulation of interstate ICS would negatively impact ICS providers generally, possibly even curtailing ICS access. Rather, our finding is supported by the fact that many state departments of correction make ICS available to inmates at rates lower than those we implement here and nonetheless operate in a safe, secure, and profitable manner. Moreover, testimony in our record indicates that following a legislative mandate to lower rates in New Mexico, the New Mexico Corrections Department released an RFP for ICS that prescribed even lower rates than those adopted in the state's reform proceeding. ICS continues to be made available to inmates even at these lower rates.

71. Additionally, by using existing rates from states that have prohibited site commission payments to derive the interim safe harbors, we believe that our reforms will not impact security or innovation in the ICS market. Indeed, we note that innovation will continue to drive down costs through automation and centralization of the security features correctional facilities require. Some commenters have raised concerns that decreasing ICS rates will result in a lower quality of service for inmate calling. As we discuss above, the interim safe harbor levels and rate caps we adopt today are conservative numbers. Accordingly, we believe the rate framework we adopt today should not negatively impact quality of service. For example, ICE has rates for all long distance calls for their detainees on par with those we adopt today, and concurrently includes quality of service standards, in addition to a 25 to 1 ratio of detainees to operable telephones. We encourage continued innovation and

efficiencies to improve the quality of service for ICS.

72. In summary, on the effective date of this Order, which is 90 days following its publication in the **Federal Register**, all rates, fees, and ancillary charges for interstate ICS must be cost-based. ICS providers that elect to utilize the safe harbor to establish cost-based interstate ICS rates as of that date must lower their interstate ICS rates to or below \$0.12 per minute for debit and prepaid interstate calls and \$0.14 per minute for collect interstate calls for their rates to be presumed to be just, reasonable and fair. Separately, in the accompanying Further Notice we seek comment on adopting permanent safe harbors.

#### b. Interim Rate Caps for Interstate ICS Rates

73. We adopt interim rate caps to place an upper limit on rates providers may charge for interstate ICS. As explained below, the interim rate caps we establish are \$0.21 per minute for debit and prepaid interstate calls and \$0.25 per minute for collect interstate calls. We adopt the interim rate caps to provide immediate relief to consumers. As of the effective date of this Order (90 days after **Federal Register** publication), providers' rates for interstate ICS must be at or below these levels.

74. We believe that the rate caps we establish here are set at sufficiently conservative levels to account for all costs ICS providers will incur in providing ICS pending our further examination of such costs through the accompanying FNPRM and data collection. The interim rate caps we establish are not a finding of cost-based ICS rates because we use the highest costs in the record, which include the costs of advanced ICS security features, to set an upper bound for interstate rates that will be subject to cost justification. We also establish a waiver process to accommodate what we expect to be the rare provider that can demonstrate that recovery of its ICS costs requires rates that exceed our caps.

#### (i) Methodology for Establishing Interim Rate Caps

75. To establish interim interstate ICS rate caps, we identify the relevant ICS provider cost data available in the record, which consists principally of the ICS Provider Data Submission, cost filings by Pay Tel (an ICS provider that exclusively serves jails), Securus, and CenturyLink (ICS providers that serve a variety of type and sizes of correctional facilities). In 2008, the ICS Provider Data Submission identified the cost of debit and the adjusted cost of collect

ICS calls as being \$0.164 per minute and \$0.246 per minute, respectively, assuming a 15-minute call duration. Both Pay Tel and Securus were participants in the 2008 study. In its recent cost study, Pay Tel reports average actual and projected costs for debit and collect ICS calls of \$0.208 per minute and \$0.225 per minute, respectively, inclusive of additional fees for continuous voice biometric identification service, or \$0.189 and \$0.205 per minute without such costs. Securus submitted total cost data for a subset of the facilities it serves that on a minute-weighted basis averaged \$0.044 per minute for all types of calls. CenturyLink also submitted summary ICS cost data. All these costs were reported excluding site commission payments.

76. *Debit and Prepaid Call Rate Cap.* We establish an interim rate cap for debit and prepaid interstate ICS calls of \$0.21 per minute based on the public debit call cost data included in Pay Tel's cost submission. The costs reported by Pay Tel for debit calling represent the highest, total-company costs of any data submission in the record and therefore represent a conservative approach to setting our interim debit and prepaid rate cap. Specifically, Pay Tel reported that the average of its actual and projected 2012–2015 debit calling costs, excluding commissions and including continuous voice biometric identification fees, is \$0.208 per minute. While Pay Tel's cost data are characterized by certain limitations, we conclude that Pay Tel's public cost submission provides a sound basis to derive the conservative high-end estimate that we use to set the debit and prepaid interim rate cap. This is true for a number of reasons.

77. First, this interim rate cap for debit calls is significantly higher than the per-minute cost for debit calling reported in the 2008 ICS Provider Data Submission (\$0.164 per minute, assuming a 15-minute call duration) or by Securus (\$0.044 per minute for all call types). The 2008 ICS Provider Data Submission is the only multi-provider cost sample in the record and includes debit call cost data from locations with varying cost and call volume characteristics, and is \$0.05 per minute lower than our interim debit and prepaid rate cap. The interim rate cap is also significantly higher than the cost study submitted by Securus. Second, Pay Tel serves jails exclusively, which are generally smaller and which providers claim are more costly to serve than prisons. As a result, we expect that the rates of most facilities, whether jails or prisons, large or small, should fall

below this rate. Third, we include Pay Tel's estimated *increases* in cost projections used to calculate our rate caps, despite record evidence showing that many ICS costs are significantly *decreasing*. We thus accept at face value Pay Tel's projected costs—costs that it reports to be increasing—which may include costs that we would conclude, after a thorough review, may not be related to the provision of ICS, and costs that it may have the incentive to overstate as the Commission evaluates reform. Finally, we note that Pay Tel's and all ICS providers' transport and termination costs will continue to decline pursuant to the Commission's intercarrier compensation reform, further reducing the cost of providing the transport and termination of ICS. For all these reasons, we find Pay Tel's debit calling cost data to be an appropriately conservative basis for our debit and prepaid rate cap and adopt a \$0.21 per minute interim rate cap for debit and prepaid interstate ICS calls.

78. *Collect Call Rate Cap.* We use a similar approach to establish the \$0.25 per minute interim rate cap for interstate ICS collect calls. The costs reported by the ICS Provider Data Submission represent the highest costs of any data submitted in the record and represent a conservative approach to setting our interim collect rate cap. Specifically, the ICS Provider Data Submission reported an effective per minute cost for ICS collect calls of \$0.246 per minute, assuming a 15-minute call duration. We base our collect call rate cap on this record information and note that this cost is higher than both Pay Tel's and Securus' reported costs of collect calls (\$0.225 per minute for collect calls and \$0.124 per minute for all calls, respectively). Additionally, we take a conservative approach by setting the rate caps above the level we believe can be cost-justified while the Bureau reviews ICS provider rates and cost data submitted pursuant to the data collection and evaluates the record in response to the Further Notice.

79. The 2008 ICS Provider Data Submission represents an appropriately conservative foundation for our collect call rate cap. These data represent the highest cost of a per-minute collect call in the record, and includes cost data from locations with varying cost and call volume characteristics. The ICS Provider Data Submission states that its purpose is to “[p]rovide the basis for rates” and to “[p]rovide cost information necessary to develop cost-based rate levels and rate structures.” Although from five years ago, the record indicates continued support for such data, and, as an ICS provider-submitted

cost study, it presumably ensures fair compensation to ICS providers.

80. We find that the 2008 ICS Provider Data Submission on which we base our interim ICS collect rate cap likely overstates ICS providers' costs in a number of respects. First, costs to provide interstate ICS have, by many measures, declined since the ICS provider data was submitted. Second, smaller, potentially higher-cost facilities are over-represented in the data submission's sample, as compared with the national distribution of sizes of correctional facilities. Third, the sample does not include cost data from the largest ICS provider, which cites economies of scale and efficiencies that it claims it enjoys, making it one of the lowest cost ICS providers. The ICS Provider Data Submission also uses a marginal location analysis similar to an analysis that the Commission has used in the past to calculate payphone rates and some commenters assert this data tends to overcompensate ICS providers. Moreover, the rate is above the costs reported by Pay Tel, a provider serving exclusively smaller facilities and jails. Further, as we noted above, all ICS providers' transport and termination costs will continue to decline pursuant to the Commission's intercarrier compensation reform, further reducing interstate ICS providers' costs. Finally, the record supports the notion that lower rates will increase call volumes, providing an additional offset to compensation foregone as a result of lower rates.

81. We disagree with commenters who assert it is not feasible to adopt uniform rates—in this instance our rate caps—for correctional facilities generally. We base our rate caps on the highest cost data available in the record, which we anticipate will ensure fair compensation for providers serving jails and prisons alike. We note that ICS providers themselves submitted a single set of costs for the multiple providers participating in the ICS Provider Data Submission, regardless of the differing sizes of the correctional institutions they served. Petitioners assert that “technical innovations in the provision of prison phone services imply that variation in costs at different facilities has largely been eliminated.” Further, the Commission previously has set a uniform rate for other interstate telecommunications services, including for public payphones, the costs of which also vary by location. Moreover, even if we were to attempt to differentiate our rate caps on the basis of size or type of correctional facility, the record contains conflicting assertions as to what those distinctions should be. Some assert we

should distinguish between jails and prisons, while at least one other commenter advocates distinguishing between larger and smaller jails and between prison, jails and other "specialty locations." Given the interim nature of our rate caps and the accompanying Further Notice, providers and other parties will have ample opportunity to assert that we should establish different rate caps for different types of providers and more precisely on what those distinctions should be based.

(ii) Waivers

82. An ICS provider that believes that it has cost-based rates for ICS that exceed our interim rate caps may file a petition for a waiver. Such a waiver petition would need to demonstrate good cause to waive the interim rate cap. As with all waiver requests, the petitioner bears the burden of proof to show that good cause exists to support the request. The following factors may be considered in a request to waive the interim rate caps: costs directly related to the provision of interstate ICS and ancillary services; demand levels and trends; a reasonable allocation of common costs shared with the provider's non-inmate calling services; and general and administrative cost data.

83. We reiterate that the interim rate caps are set at conservative levels. Accordingly, we expect that petitions for waiver of the interim rate caps would account for extraordinary circumstances. Further, we will evaluate waivers at the holding company level. We conclude that reviewing ICS rates at the holding company level is reasonable for several substantive and administrative reasons. First, the centralization of security and other functionalities provided by ICS providers that serve multiple correctional facilities has significantly reduced the cost incurred on an individual facility for some providers. Moreover, the record indicates that ICS providers often obtain exclusive contracts for several facilities in a state, rather than specific rates per facility. Second, we have adopted interim interstate safe harbor rates and interim interstate rate caps at conservative levels to ensure that all providers are fairly compensated. As a result, we believe it is appropriate to evaluate waivers at a holding company level to obtain an accurate evaluation of the need for a waiver. Additionally, reviewing petitions in this manner is significantly more administratively feasible and will allow the Commission to address waiver petitions more

expeditiously. Unless and until a waiver is granted, an ICS provider may not charge rates above the interim rate cap and must comply with all aspects of this Order including requirements that ancillary services charges must be cost-based as described.

84. We delegate to the Wireline Competition Bureau (Bureau) the authority to request additional information necessary for its evaluation of waiver requests and to approve or deny all or part of requests for waiver of the interim rate caps adopted herein. We note that evaluation of these waiver requests will require rate setting expertise, and that the Bureau is well suited to timely consider any waiver requests that are filed. Because we will consider waiver requests on a holding company basis, waiver requests from the three largest ICS providers would cover over 90 percent of ICS provided in the country. ICS provider waiver petitions may be accorded confidential treatment as consistent with rule 0.459.

c. Interim Rate Structure

85. Some ICS rates include per-call charges—charges that are incurred at the initiation of a call regardless of the length of the call. The record indicates concerns that these per-call charges are often extremely high and therefore unjust, unreasonable, and unfair for a number of reasons. First, it is self-evident that per-call charges make short ICS calls more expensive particularly if evaluated at the effective per-minute rate. For example, several state departments of correction allow \$3.95 per-call and \$0.89 per-minute charges for collect interstate ICS calls. Under such an arrangement, the effective *per minute* rate for a one minute call is \$4.84, whereas the effective *per minute* rate for a 15 minute call is \$1.15, making the price for a shorter call disproportionately high. Second, commenters raise issues regarding per-call charges that may be unjust, unreasonable, and unfair because callers are often charged more than one per-call charge for a single conversation when calls are dropped, which the record reveals can be a frequent occurrence with ICS. Although some ICS providers contend that calls are usually terminated when callers attempt either to set up a three-way call or to forward calls, practices that are generally prohibited by correctional facilities, other commenters maintain that calls are dropped because of faulty call monitoring software or poor call quality, leaving consumers no alternative but to pay multiple per-call charges for a single conversation. Finally, some commenters question whether high per-

call charges are justified by cost. In particular, Petitioners state that "[t]here are very few cost components that change with the number of call initiations and that do not vary with the length of the call," and recommend eliminating per-call charges.

86. We are concerned about the evidence regarding current per-call rates and associated practices. 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. As a result, we conclude that unreasonably high per-call charges and/or unnecessarily dropped calls that incur multiple per-call charges are not just and reasonable.

87. At the same time, we recognize that states that have reformed ICS rates and rate structures have addressed such concerns in different ways. Indeed, not all such states have eliminated per-call charges. Some have significantly reduced or capped such costs in seeking to bring the overall cost of a call to just, reasonable and fair levels. Many of these pioneering state efforts form the foundation of the initial reforms we adopt today, and we are reluctant to disrupt those efforts pending our further evaluation of these issues in the Further Notice. As a result, we do not prohibit all per-call charges in this Order. Nonetheless, because our questions about the ultimate necessity and desirability of per-call charges remain, particularly as we seek comment on further reforming ICS rates more generally, we ask questions about whether rate structure requirements are necessary to ensure that the cost of a conversation is reasonable in the Further Notice. We also require ICS providers to submit data on the prevalence of dropped calls and the reason for such dropped calls as part of their annual certification filing.

88. Our interim rate structure will help address concerns raised about unreasonable per-call charges while we consider further reforms in the Further Notice. As described above, we adopt interim safe harbor rate levels and interim rate caps to ensure the overall cost of a 15-minute call is just, reasonable, and fair. ICS providers have the flexibility to satisfy the safe harbor either through a certification that the per-minute rate is at or below the safe harbor, or by demonstrating that the cost of a 15-minute call (including any per-

connection charges) is at or below the safe harbor per-minute rate times 15. Thus, where an ICS provider elects to take advantage of the interim safe harbor rate levels described above, we allow the provider flexibility to determine whether its rate structure should include per-call charges. Specifically, we allow ICS providers to calculate whether their rates are at or below the interim safe harbor levels or the interim rate caps by calculating their compliance on the basis of a 15-minute call. Because our interim safe harbors constrain the cost of a 15-minute conversation to a level we find to be just, reasonable, and fair, we find it is appropriate to afford ICS providers such flexibility.

89. Providers electing not to use the safe harbor but to charge rates at or below the interim rate cap will have similar flexibility but will not benefit from the presumption that the rates and charges are just and reasonable and, as a result, could be required to pay refunds in any enforcement action.

#### d. Ancillary Charges

90. In the 2012 ICS NPRM, the Commission observed that “there are outstanding questions with prepaid calling such as: how to handle monthly fees; how to load an inmate’s account; and minimum required account balance.” 78 FR 4369, Jan. 23, 2013. The record indicates that ICS providers also impose ancillary or non-call related charges on end users to make ICS calls, for example to set up or add money to a debit or prepaid account, to refund any outstanding money in a prepaid or debit account, or to deliver calls to a wireless number. These additional charges represent a significant cost to consumers. For example, prepaid account users who accept calls from prisoners and detainees in certain facilities may incur a \$4.95 monthly “inactivity fee” if their account “exceeds 180 days of no call activity until the funds have been exhausted or the call activity resumes.” End users may also be assessed a \$4.95 fee to close their account, and a \$4.95 “refund fee” when requesting a refund of money remaining in an account. We question whether such charges are reasonable in and of themselves and note that the levels of such charges do not appear to be cost-based.

91. Although we are unable to find ancillary charges per se unreasonable based on the record, we have sufficient information and authority to reach several conclusions regarding ancillary charges. First, as stated earlier, interstate ICS rates must be cost-based, and to be compensable costs must be reasonably

and directly related to provision of ICS. Ancillary service charges are no exception; they also fall within this standard and the Commission has the jurisdiction and authority to regulate them. Section 201(b) of the Act requires that “all charges, practices, classifications, and regulations for and in connection with” communications services be just and reasonable. Section 276 of the Act defines “payphone service” to encompass “the provision of inmate telephone service in correctional institutions, and any ancillary services,” and requires that providers be “fairly compensated.” The services associated with these ancillary charges are “in connection with” the inmate payphone services for purposes of section 201(b) and “ancillary” for purposes of section 276. As such, they fall within the standards we articulate above for determining which costs are compensable through interstate ICS rates. Therefore, even if a provider’s interstate ICS rates are otherwise in compliance with the requirements of this Order, the provider may still be found in violation of the Act and our rules if its ancillary service charges are not cost-based.

92. Therefore, parties concerned that any ancillary services charge is not just, reasonable and fair can challenge such charges through the Commission’s complaint process. The ICS provider will have the burden of demonstrating that its ancillary services charges are just, reasonable, and fair. We also caution ICS providers that the Bureau will review data submissions critically to ensure that providers are not circumventing our reforms by augmenting ancillary services charges beyond the costs of providing such services.

93. In addition, we will take additional steps to gather further information that will inform how we address ancillary services. As part of the mandatory data request we initiate below, we require ICS providers to submit information on every ancillary services charge, and identify the cost basis for such charges. In our accompanying Further Notice, we seek comment on additional steps the Commission can take to address ancillary services charges and ensure that they are cost-based. We note that section 201 governs unjust and unreasonable practices and section 276 governs payphones, which expressly includes ancillary services, and seek comment in the Further Notice as to whether the imposition of ancillary services charges is a just, reasonable, and fair practice.

#### D. Inmate Calling Services for the Deaf and Hard of Hearing

94. The Commission sought comment in the 2012 ICS NPRM on deaf or hard of hearing inmates’ access to ICS during incarceration. 78 FR 4369, Jan. 23, 2013. Our actions today will be of significant benefit to deaf and hard of hearing inmates and their families. First, the per-minute rate levels we adopt in this Order will result in a significant rate reduction for most, if not all, interstate calls made by deaf and hard of hearing inmates.

95. Second, we clarify that ICS providers may not levy or collect an additional charge for any form of TRS call. Such charges would be inconsistent with section 225 of the Act, which requires that “users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination.”

96. Third, we seek comment in the Further Notice below on additional issues relating to ICS for the deaf and hard of hearing, including: (i) Whether and how to discount the per-minute rate for ICS calls placed using TTYs, (ii) whether action is required to ensure that ICS providers do not deny access to TRS by blocking calls to 711 and/or state established TRS access numbers, (iii) the need for ICS providers to receive complaints on TRS service and file reports with the Commission, and (iv) actions the Commission can take to promote the availability and use of Video Relay Service (VRS) and other assistive technologies in prisons.

97. We decline to take other actions related to deaf and hard of hearing inmates requested by commenters at this time. While we strongly encourage correctional facilities to ensure that deaf and hard of hearing inmates are afforded access to telecommunications that is equivalent to the access available to hearing inmates, we decline at this time to mandate the number, condition, or physical location of TTY and other TRS access technologies (e.g., devices and/or applications used to access VRS) or the times they are physically available to inmates, allowed call durations for deaf and hard of hearing inmates, or the types of TRS access technologies made available to inmates.

#### E. Existing ICS Contracts

##### 1. Background

98. The record indicates that contracts for the provision of ICS usually are

exclusive contracts between ICS providers and correctional facilities to serve the relevant correctional facility. The ICS end users (*i.e.*, the inmates and outside parties with whom they communicate via ICS) are not parties to such agreements. Contracts between ICS providers and facilities typically establish an initial term of three to five years, with one-year extension options. Such contracts may include change-of-law provisions, although some such provisions can be vague. In the 2012 ICS NPRM, the Commission sought comment on whether it would be appropriate to mandate a “fresh look” period for existing contracts, or whether any new ICS rules should apply only to contracts entered into after the adoption of the new rules. 78 FR 4369, Jan. 23, 2013. The Commission also sought comment on typical ICS contract terms, as well as how change-of-law contract provisions would interact with any new Commission rules or obligations.

99. The record in response was mixed. Several commenters advocate for a “fresh look” period to review and renegotiate existing contracts; some urge us to avoid delaying rate reform; and others assert that any new rules should apply only to contracts entered into after the effective date of the rules.

## 2. Discussion

100. The reforms we adopt today are not directed at the contracts between correctional facilities and ICS providers. Nothing in this Order directly overrides such contracts. Rather, our reforms relate only to the relationship between ICS providers and end users, who, as noted, are not parties to these agreements. Our statutory obligations require us to ensure that rates and practices are just and reasonable, and to ensure that payphone compensation is fair both to end users and to providers of payphone services, including ICS providers. We address, for example, ICS providers’ responsibility to charge just, reasonable and fair rates to inmates and the friends and family whom they call via ICS, and we find that certain categories of charges and fees are not compensable costs of providing ICS reasonably and directly related to the provision of ICS and hence may not be recovered in ICS rates.

101. Agreements between ICS providers and correctional facilities—to which end users are not parties—cannot trump the Commission’s authority to enforce the requirements of the Communications Act to protect those users within the Commission’s jurisdiction under sections 201 and 276. We thus do not, by our action, explicitly abrogate any agreements between ICS

providers and correctional facilities. To the extent that any particular agreement needs to be revisited or amended (a matter on which we do not take a position), such result would only occur because agreements cannot supersede the Commission’s authority to ensure that the rates paid by individuals who are not parties to those agreements are fair, just, and reasonable.

102. To the extent that any contracts are affected by our reforms, we strongly encourage parties to work cooperatively to resolve any issues. For example, ICS providers could renegotiate their contracts or terminate existing contracts so they can be rebid based on revised terms that take into account the Commission’s requirements related to inmate phone rates and services. We find that voluntary renegotiation would be in the public interest, and observe that the record reflects that, at least in some instances, contracts between ICS providers and correctional and detention facilities are updated and amended with some regularity. To the extent that the contracts contain “change of law” provisions, those may well be triggered by the Commission’s action today. We further note that the reforms we adopt today will not take effect immediately but, rather, will take effect 90 days after the Order and FNPRM are published in the **Federal Register**. Parties therefore will have time to renegotiate contracts or take other appropriate steps.

### *F. Commission Action Does Not Constitute a Taking*

103. We reject arguments that our reforms adopted herein effectuate unconstitutional takings. It is well established that the Fifth Amendment does not prohibit the government from taking lawful action that may have incidental effects on existing contracts. Although we do not concede that any incidental effects would “frustrate” the contractual expectations of ICS providers, even if that were the case, such “frustration” would not state a cognizable claim under the Fifth Amendment. In *Huntleigh USA Corp. v. United States*, for instance, the court found that Congress’s decision to create the Transportation Security Agency “had the effect of ‘frustrating’ [a private security company’s] business expectations, which does not form the basis of a cognizable takings claim.” The court reached this finding even though the relevant legislation effectively *eliminated* the market for private screening services. Here, far from eliminating the ICS market, our regulations are designed to allow providers to recover their costs of

providing ICS, including a reasonable return on investment. In this context, any incidental effect on providers’ contractual expectations does not constitute a valid property interest under the Fifth Amendment.

104. Moreover, even assuming, *arguendo*, that a cognizable property interest could be demonstrated by ICS providers, we still conclude that our actions would not give rise to unconstitutional takings without just compensation. As an initial matter, our ICS regulations do not involve the permanent condemnation of physical property and thus do not constitute a *per se* taking. Nor do our actions represent a regulatory taking. The Supreme Court has stated that in evaluating regulatory takings claims, three factors are particularly significant: (1) The economic impact of the government action on the property owner; (2) the degree of interference with the property owner’s investment-backed expectations; and (3) the “character” of the government action. None of these factors suggests a regulatory taking here.

105. First, our regulation of end-user ICS rates and charges will have minimal adverse economic impact on ICS providers. As explained elsewhere in this Order, ICS providers are entitled to collect cost-based rates and will have opportunities to seek waivers to the extent the framework adopted in this Order does not adequately address their legitimate costs of providing ICS. Under these circumstances, any cognizable economic impact will not be sufficiently significant to implicate the takings clause. Even beyond that, the record supports the notion that lower rates are likely to stimulate additional call volume, enabling ICS providers to offset some of the impacts of lower rates without incurring commensurate added costs.

106. Second, our actions do not improperly impinge upon investment-backed expectations of ICS providers. The Commission has been examining new ICS regulations for years, and various proposals—including rate caps and the elimination of compensation in ICS rates for site commissions—have been raised and debated in the record. In addition, some states have already taken action consistent with what we adopt here today. Given this background, any investment-backed expectations cannot reasonably be characterized as having been upset or impinged by our actions today.

107. Third, our action today substantially advances the legitimate governmental interest in protecting end-user consumers from unjust,

unreasonable and unfair interstate ICS rates and other unjust and unreasonable practices regarding interstate ICS—an interest Congress has explicitly required the Commission to protect. Moreover, the Commission is taking a cautious approach in lowering end-user ICS rates, and is carefully calibrating that approach to ensure that all parties are compensated fairly for their part of the ICS while simultaneously lowering ICS rates for all end users. In short, the rules at issue here are consistent with takings jurisprudence and will not wreak on ICS providers the kind of “confiscatory” harm—*i.e.*, “destroy[ing] the value of [providers’] property for all the purposes for which it was acquired”—that might give rise to a tenable claim under the Fifth Amendment’s Takings Clause.

#### *G. Collect Calling Only and Billing-Related Call Blocking*

108. In the First Wright Petition, the Petitioners requested that the Commission require ICS providers and prison administrators to offer debit calling, the rates for which Petitioners assert are typically lower than collect calling. In the 2012 ICS NPRM, the Commission requested comment on various issues related to prepaid calling and debit calling issues, including issues related to the security of debit calling and any increased cost or administrative workload associated with debit and prepaid calling. 78 FR 4369, Jan. 23, 2013. Calling options other than collect calling appear to have increased since the Alternative Wright Petition was filed. The record indicates that some facilities require the ICS provider to offer debit or prepaid calling for inmates, and other facilities or jurisdictions preclude options other than collect calling.

109. The 2012 ICS NPRM also sought comment on Petitioners’ claims that ICS providers block collect calls to numbers served by terminating providers with which they do not have a billing arrangement. 78 FR 4369, Jan. 23, 2013. The 2012 ICS NPRM noted that in facilities where collect calling is the only calling option available, inmates may be unable to complete any calls. For example, if an inmate tries to call a family member whose phone service provider does not have a billing relationship with the ICS provider, then the ICS provider will prevent the call from going through, and the inmate cannot call his or her family member. The 2012 ICS NPRM asked if this blocking practice existed and whether there are ways, while other than mandating debit calling, to prevent billing-related call blocking. 78 FR 4369,

Jan. 23, 2013. Commenters agreed that billing-related call blocking occurs.

110. *Availability of Debit and Prepaid Calling.* We believe the availability of debit and prepaid calling in correctional facilities will address the problem of call blocking associated with collect calling by enabling service providers to collect payment up front, which eliminates the risk of nonpayment and renders billing-related call blocking unnecessary. We find that debit or prepaid calling yield significant public interest benefits and facilitate communication between inmates and the outside world. For example, the record indicates that debit and prepaid calling can be less expensive than collect calling because they circumvent the concerns of bad debt associated with collect calling and the expense of subsequent collection efforts. We establish lower interim rate caps and safe harbor rate levels for debit and prepaid calling herein. Additionally, the use of prepaid calling helps the called parties to better manage their budget for ICS, thus making inmate contact with loved ones more predictable. We note that the record indicates the increased availability of calling options other than collect calling. In the accompanying Further Notice we seek comment about these options. Additionally, we strongly encourage correctional facilities to consider including debit calling and prepaid calling as options for inmates, so they can more easily and affordably communicate with friends and family.

111. *Call Blocking.* The Commission has a long-standing policy that largely prohibits call blocking. Specifically, the Commission has determined that the refusal to deliver voice telephone calls “degrade[s] the nation’s telecommunications network,” poses a serious threat to the “ubiquity and seamlessness” of the network, and can be an unjust and unreasonable practice under section 201(b) of the Communications Act. Throughout this proceeding ICS providers have offered various justifications for their blocking practices.

112. Some ICS providers claim that they block calls to terminating providers with whom they do not have prior billing relationships to avoid potentially significant uncollectibles. They assert that uncollectible revenue associated with collect calls drives up providers’ costs, which are ultimately passed along through ICS rates charged to consumers. Some commenters suggest that encouraging debit or prepaid calling is necessary to eliminate the issue of billing-related call blocking. Other ICS providers note, however, that due to technical advancements and new

product developments, they do not block calls due to lack of a billing arrangement, and describe solutions they have implemented to address the problem of billing-related call blocking. For example, Pay Tel offers a “prepaid collect” service which allows an inmate to initiate a free call and at its conclusion, Pay Tel offers to set up a direct billing arrangement with the call recipient to pay for any future calls. Securus has implemented a similar strategy by allowing “a short conversation with the called party, after which the called party is invited to set up a billing arrangement with Securus via oral instructions. CenturyLink has implemented a similar “prepaid collect” solution.

113. Based on the availability of these “prepaid collect” services, the Commission’s long-standing position against unreasonable call blocking, and the public interest benefits realized from encouraging inmates connecting with friends and families, we find billing-related call blocking by interstate ICS providers that do not offer an alternative to collect calling to be an unjust and unreasonable practice under section 201(b). As such, we prohibit ICS providers from engaging in billing-related call blocking of interstate ICS calls unless the providers have made available an alternative means to pay for a call, such as “prepaid collect,” that will avoid the need to block for lack of a billing relationship or to avoid the risk of uncollectibles. We also note that the rates for these types of calls are subject to the debit/prepaid interim rate caps or safe harbor rate levels adopted in this Order. We expect this prohibition to have less of an impact on ICS providers serving facilities that make prepaid and debit calling available as an alternative means to pay for a call than it will have on ICS providers serving facilities where collect calling is the only option offered.

114. Absent these requirements, inmates at facilities that impose collect-only restrictions and are served by ICS providers that block calls to providers with whom they do not have a billing relationship would have no way to place calls to friends or family served by providers lacking such a billing relationship. The Commission has the authority to mandate that ICS providers implement solutions to address billing-related call blocking under section 201(b). The “prepaid collect” requirement regulates the manner in which ICS providers bill and collect for inmate calls. With regard to common carriers, the Commission and courts have routinely indicated that billing and collection services provided by a



common carrier for its own customers are subject to Title II.

#### H. Enforcement

115. In this section, we explain the enforcement procedures to ensure compliance with the Act, our rules, and requirement that all ICS interstate rates and charges, including ancillary charges, be cost-based. First, we require that ICS providers file annually with the Commission information on their ICS rates as well as a certification of compliance with the requirements set forth in this Order. Second, we remind ICS providers of the requirement to comply with existing Commission rules. Finally, we remind parties that our enforcement and complaint process may result in monetary forfeiture and/or refunds to ICS end users.

##### 1. ICS Provider Certification Requirement

116. We establish annual certification requirements to facilitate enforcement and as an additional means of ensuring that each and every ICS providers' rates and practices are just, reasonable, and fair and remain in compliance with this Order. First, we require all providers of ICS to file annually by April 1st data regarding their interstate and intrastate ICS rates, with local or other categories of rates broken out separately to the extent they vary, and minutes of use by correctional facility, as well as average duration of calls. Having comprehensive ICS rate information available in a common format will simplify the Commission's task of reviewing these rates and will provide consumers and advocates with an additional resource for understanding them. We require ICS providers to submit annually, by state, their overall percentage of calls disconnected by the provider for reasons other than expiration of time, such as security, versus calls that the inmate or called party disconnected voluntarily. We also require ICS providers to file with the Commission their charges to consumers that are ancillary to providing the telecommunications piece of ICS. These include, for example, charges to open a prepaid account, to add money to a prepaid account, to close a prepaid account, to receive a paper statement, to receive ICS calls on a wireless phone, or any other charges to inmates or other end users associated with use of ICS. These data will assist the Commission in monitoring the effectiveness of the reforms we adopt today and in addressing the issues raised in the attached Further Notice.

117. We further require an officer or director of each ICS provider annually

to certify the accuracy of the data and information in the certification, and the provider's compliance with all portions of this Order, including the requirement that ICS providers may not levy or collect an additional charge for any form of TRS call, and the requirement that ancillary charges be cost-based. We find this to be a minimally burdensome way to ensure compliance with this Order. To ensure consistency with other reporting requirements and to minimize burden on ICS providers, we delegate to the Bureau the authority to adopt and implement a template for submitting the required data, information, and certifications.

##### 2. Compliance With Existing Rules

118. We remind ICS providers of their ongoing responsibilities to comply with our existing rules. For example, providers of inmate operator services are required to make certain oral disclosures prior to the completion of the calls. Specifically, section 64.710 of our rules requires providers of inmate operator services to disclose to the consumer the total cost of the call prior to connecting it, including any surcharges or premise-imposed fees that may apply to the call as well as methods by which to make complaints concerning the charges or collection practices. Additionally, ICS providers that are non-dominant interexchange carriers must make their current rates, terms, and conditions available to the public via their company Web sites. Any violation of such responsibilities or failure to comply with existing rules may subject ICS providers to enforcement action, including, among other penalties, the imposition of monetary forfeitures. In the case of carriers, such penalties can include forfeitures of up to \$160,000 for each violation or each day of a continuing violation, up to a maximum of \$1,575,000 per continuing violation. Where the Commission deems appropriate, such as in particularly egregious cases, a carrier may also face revocation of its section 214 authorization to operate as a carrier. We caution ICS providers that, in order to avoid the potential imposition of these and other penalties, they must comply with all existing rules and requirements.

##### 3. Investigations

119. In this Order, we require ICS providers to charge cost-based rates and charges to inmates and their families, and establish "safe-harbor" rates at or below which rates will be presumed just and reasonable. Specifically, we adopt interim safe harbor rates of \$0.12 per minute for debit and prepaid interstate

calls and \$0.14 per minute for collect interstate calls. Based on the evidence in this record, we also set an interim hard cap on ICS providers' rates of \$0.21 per minute for interstate debit and prepaid calls, and \$0.25 per minute for collect interstate calls. This upper ceiling ensures that the highest rates are reduced without delay. Although we expect the vast majority of providers to be at or below our safe harbor rate levels, we provide this cap to accommodate unique circumstances. ICS providers may elect to charge cost-based rates between the interim safe harbor and the interim cap. We delegate to the Bureau the authority to investigate ICS provider rates and take appropriate actions in such investigations, including the ordering of refunds.

##### 4. Complaints

120. As discussed above, we require all interstate ICS rates and charges to be cost-based, including ancillary charges, per-call or connection charges, and per-minute rates. We note that ICS providers' interstate rates that are at or below the relevant safe harbor rate levels will be treated as lawful until the Commission has issued a decision finding otherwise. Parties can file a complaint challenging the reasonableness of interstate ICS rates and ancillary charges under sections 201 and 276 of the Act, but to the extent that any such complaint challenges rates that are within our safe harbor, the complainant must overcome a rebuttable presumption that such rates are just, reasonable, and fair. Accordingly, those rates may be challenged but any rate prescription rising out of such a proceeding will be forward-looking and will not include refunds.

121. *Formal Complaints.* Complaints against ICS providers under the rules we adopt herein should follow the process set forth in the Commission's formal complaint rules. Compliance with our safe harbor ICS rates will establish a presumption that such rates are just, reasonable, and fair. An ICS provider will bear the burdens of production and persuasion in all complaints challenging whether its ICS rates and/or ancillary charges are just, reasonable, and fair in compliance with sections 201 and 276 of the Act.

122. *Informal Complaints.* Parties may submit informal complaints to the Commission pursuant to section 1.41 of the Commission's rules. Unlike formal complaints, no filing fee is required. We recommend that complaining parties submit any complaints through the Commission's Web site, at <http://>

[esupport.fcc.gov/complaints.htm](http://esupport.fcc.gov/complaints.htm). The Consumer and Governmental Affairs Bureau will also make available resources explaining these rules and facilitating the filing of informal complaints. Although individual informal complaints will not typically result in written Commission orders, the Enforcement Bureau will examine trends or patterns in informal complaints to identify potential targets for investigation and enforcement action.

123. If, after investigation of an informal or formal complaint, it is determined that ICS providers interstate rates and/or charges, including ancillary charges, are unjust, unreasonable or unfair under sections 201 and 276 lower rates will be prescribed and ICS providers may be ordered to pay refunds. In addition to refunds, providers may be found in violation of our rules and face additional forfeitures. We also interpret the language in section 276 that ICS providers be “fairly compensated” for each and every completed call to require that an ICS provider be fairly compensated on the basis of either the whole of its ICS business or by groupings that reflect reasonably related cost characteristics, and not on the basis of a single facility it serves. Indeed, we doubt that a party could reasonably claim that the Commission must individually determine the costs of each call. Some averaging of costs must occur, and there is no logical reason that it must occur at the facility level. Finally, we note that this approach is consistent with our traditional means of evaluating providers’ costs and revenues for various types of communications services.

#### *I. Mandatory Data Collection*

124. To enable the Commission to take further action to reform rates, including developing a permanent cap or safe harbor for interstate rates, as well as to inform our evaluation of other rate reform options in the Further Notice, we require all ICS providers to file data regarding their costs to provide ICS. All such information should be based on the most-recent fiscal year data at the time of Office of Management and Budget approval, may be filed under protective order, and will be treated as confidential. Such information will also ensure that rates, charges and ancillary charges are cost-based.

125. Specifically, we require all ICS providers to provide data to document their costs for interstate, intrastate long distance and intrastate local ICS for the past year. The collection of intrastate data is necessary to allow us to assess

what costs are reasonably treated as jurisdictionally interstate. 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 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.

126. These data will guide the Commission as it evaluates next steps in the Further Notice. To ensure consistency and to minimize the burden on ICS providers, we delegate to the Bureau the authority to adopt a template for submitting the data and provide instructions to implement the data collection. We also delegate to the Bureau authority to require an ICS provider to submit additional data that the Bureau deems necessary to determine cost-based rate levels for that provider.

#### **IV. Severability**

127. All of the rules that are adopted in this Order are designed to work in unison to ensure just, reasonable, and fair interstate ICS rates. However, each of the reforms we undertake in this Order serves a particular function toward this goal. Therefore, it is our intent that each of the rules adopted herein shall be severable. If any of the rules is declared invalid or unenforceable for any reason, it is our intent that the remaining rules shall remain in full force and effect.

#### **V. Procedural Matters**

##### *A. Paperwork Reduction Act Analysis*

128. This Report and Order contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in the proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

##### *B. Congressional Review Act*

129. The Commission will send a copy of this Report and Order and Further Notice of Proposed Rulemaking in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA). *See* 5 U.S.C. 801(a)(1)(A).

##### *C. Final Regulatory Flexibility Analysis*

130. The Regulatory Flexibility Act (RFA), requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” Accordingly, we have prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the possible impact of the *Report and Order* on small entities.

131. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) in WC Docket 12–375. The Commission sought written public comment on the proposals in the NPRM, including

comment on the IRFA. The Commission did not receive comments directed toward the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

#### 1. Need for, and Objectives of, the Report and Order

132. The Report and Order (Order) adopts rules to ensure that interstate inmate calling service (ICS) rates in correctional institutions are just, reasonable, and fair. In the initiating NPRM, the Commission sought information on issues related to the ICS market, ICS rates, and provider costs and ancillary fees. In this Order, the Commission addresses interstate ICS rates, site commission payments, ancillary fees, ICS for deaf and hard-of-hearing inmates, ICS call types, and enforcement and data collection requirements.

133. Evidence in the Commission's record demonstrates that ICS rates today vary widely, and in far too many cases greatly exceed the reasonable costs of providing the service. In the Order, the Commission has found that a significant factor driving these excessive rates is site commission payments: Fees paid by ICS providers to correctional facilities or departments of corrections in order to win the exclusive right to provide ICS. The Commission's actions in the Order are required by the Communications Act, which mandates that the Commission ensure that interstate rates are just and reasonable for all Americans. Similarly, Congress made clear in the Act that any compensation under Section 276 should be fair and "benefit . . . the general public," not just some segment of it.

134. In the Order, the Commission sets an interim cap on interstate ICS rates and establishes safe harbor rates. Additionally, the Commission mandates that any site commission payments recovered in end-user rates must be based upon ICS related costs. Similarly, in the Order, the Commission concludes that ancillary charges, such as account set-up fees, fees to receive a paper statement, or fees to refund an outstanding account balance, must also be cost-based. The Further Notice of Proposed Rulemaking (FNPRM) seeks comment on additional ICS issues.

#### 2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

135. The Commission did not receive comments specifically addressing the rules and policies proposed in the IRFA.

#### 3. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

136. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

137. *Small Businesses.* Nationwide, there are a total of approximately 27.9 million small businesses, according to the SBA.

138. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year. Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1,000 employees or more. Thus, under this size standard, the majority of firms can be considered small.

139. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers. Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees. Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the Commission's action.

140. *Incumbent Local Exchange Carriers (incumbent LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest

applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers. Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the Commission's action.

141. The Commission has included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope. The Commission has therefore included small incumbent LECs in this RFA analysis, although it emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

142. *Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. In addition, 72 carriers have reported that they are Other Local Service Providers. Of the 72, 70 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange

service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the Commission's action.

143. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the Commission's action.

144. *Local Resellers*. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by the Commission's action.

145. *Toll Resellers*. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by the Commission's action.

146. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest

applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the Commission's action.

147. *Payphone Service Providers (PSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 535 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 531 have 1,500 or fewer employees and four have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the Commission's action.

#### 4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

148. *Monitoring and Certification*. The Order takes steps to reform ICS by requiring providers to charge cost-based rates, adopting interim rate caps for collect calling and prepaid and debit calling, and adopting safe-harbor rates, at or below which ICS rates will be presumed to be just, reasonable, and fair. The Order requires that all ICS providers file annually data on their interstate and intrastate ICS rates and minutes of use. The adopted monitoring requirements will facilitate enforcement and act as an additional means of ensuring that ICS providers' rates and practices are just, reasonable, fair and in compliance with the Order. The Commission also requires ICS providers to submit annually their overall percentage of dropped calls versus completed calls, as well as the number of dropped calls by state. The Commission also requires ICS providers to file their charges to consumers that are ancillary to providing the telecommunications portion of ICS. The Commission further requires each provider to annually certify its compliance with other portions of the

Order, including that ICS providers may not levy or collect an additional charge for any form of TRS call and that ancillary service charges be cost-based.

149. *Data Collection*. In order to allow the Commission to establish a permanent cap on interstate rates and to inform the Commission's evaluation of other rate reform options in the Further Notice, the Commission requires all ICS providers to file data regarding their costs to provide ICS. All such information should be based on the most-recent fiscal year at the time of Office of Management and Budget approval, may be filed under protective order, and will be treated as confidential.

150. The Commission has identified five basic categories of costs that ICS providers incur: (1) Telecommunications costs, or interconnection fees; (2) equipment investment costs; (3) equipment installation and maintenance costs; (4) security costs for monitoring, call blocking, (5) costs that are ancillary to the provision of telecommunications service and (6) other relevant cost data as outlined in the Bureau-produced data template discussed below. For each of the first four categories, ICS providers must identify the fixed costs, the per-call costs and the per-minute costs to provide each of these cost categories of ICS. Furthermore, for each of these categories (fixed, per-call and per-minute costs), ICS providers must identify both the direct costs, and the joint and common costs. For the joint and common costs, providers must explain how these costs, and recovery of them, are apportioned among the facilities they serve, as well as the services to which they provide. For the fifth category, we 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 other charges ancillary to the provision of telecommunications 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. All ICS providers must provide data on their interstate and intrastate demand and to apportion the minutes of use between interstate and intrastate calls. The Commission delegates to the Wireline Competition Bureau (Bureau) the authority to adopt a template for submitting the data.

##### 5. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

151. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”

152. The Commission needs access to data that are comprehensive, reliable, sufficiently disaggregated, and reported in a standardized manner. The Order recognizes, however, that reporting obligations impose burdens on the reporting providers. Consequently, the Commission limits its collection to information that is narrowly tailored to meet its needs.

153. *Monitoring and Certification.* The Commission requires ICS providers to submit annually their overall percentage of dropped calls versus completed calls, as well as the number of dropped calls by state. The Commission requires ICS providers to file their charges to consumers that are ancillary to providing the telecommunications piece of ICS. Providers are currently required to post their rates publicly on their Web sites. Thus, this additional filing requirement should entail minimal additional compliance burden, even for the largest ICS providers.

154. The information on providers’ Web sites is not certified and is generally not available in a format that will provide the per-call details that the Commission requires to meet its statutory obligations. Thus, the Commission further requires each provider to annually certify its compliance with other portions of the Order, including the requirement that ICS providers may not levy or collect an additional charge for any form of TRS call, and that ancillary service charges are cost-based. The Commission finds that without a uniform, comprehensive dataset with which to evaluate ICS providers’ rates, the Commission’s analyses will be incomplete. The Commission recognizes that any information imposes burdens, which may be most keenly felt by smaller

providers, but concludes that the benefits of having comprehensive data substantially outweigh the burdens. Additionally, some of these potential burdens, such as the filing of rates currently required to be posted on an ICS provider’s Web site, are minimally burdensome.

155. *Data Collection.* The Commission requires ICS providers to provide their costs for five basic categories of ICS costs. These data will provide the Commission with sufficient information to establish permanent ICS rate caps. The Commission delegates to the Bureau the authority to adopt a template for submitting the data.

156. The Commission is cognizant of the burdens of data collections, and has therefore taken steps to minimize burdens, including directing the Bureau to adopt a template for filing the data that minimizes burdens on providers by maximizing uniformity and ease of filing, while still allowing the Commission to gather the necessary data. The Commission also finds that without a uniform, comprehensive dataset with which to evaluate ICS providers’ costs, its analyses will be incomplete, and its ability to establish rate permanent ICS rate caps in the future will be severely impaired. The Commission thus concludes that requiring ICS providers to report this cost data appropriately balances any burdens of reporting with the Commission’s need for the data required to carry out its statutory duties.

##### 6. Report to Congress

157. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

##### VI. Ordering Clauses

158. Accordingly, *it is ordered* that pursuant to sections 1, 4(i), 4(j), 201, 225, 276, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 201, 225, 276, 303(r), the Report and Order and FNPRM in WC Docket No. 12–375 *are adopted*, effective 90 days after publication in the **Federal Register**, except those rules and requirements involving Paperwork Reduction Act burdens, as discussed below.

159. *It is further ordered* that Part 64 of the Commission’s Rules, 47 CFR Part 64, is *amended* as set forth in Appendix A. These rules shall become effective 90 days after publication in the **Federal Register**, except for § 64.6060 of the Commission’s Rules and the Mandatory Data Collection requirement as discussed in Section I of the Order, which *will become effective* immediately upon announcement in the **Federal Register** of OMB approval.

160. *It is further ordered* that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Order and FNPRM, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

##### List of Subjects in 47 CFR Part 64

Inmate calling services,  
Telecommunications.

Federal Communications Commission.

**Marlene H. Dortch,**  
*Secretary.*

In consideration of the foregoing, the Federal Communications Commission amends 47 CFR part 64 as follows:

##### PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows:

**Authority:** 47 U.S.C. 154, 254(k); 403(b)(2)(B), (c), Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 227, 228, 254(k), 616, 620, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96, unless otherwise noted.

■ 2. Add new subpart FF to part 64 to read as follows:

##### Subpart FF—Inmate Calling Services

Sec.

64.6000 Definitions.

64.6010 Cost-based rates for inmate calling services.

64.6020 Interim safe harbor.

64.6030 Inmate calling services interim rate cap.

64.6040 Rates for Telecommunications Relay Service (TRS) calling.

64.6050 Billing-related call blocking.

64.6060 Annual reporting and certification requirement.

##### Subpart FF—Inmate Calling Services

##### § 64.6000 Definitions.

As used in this subpart:

*Ancillary charges* mean any charges to Consumers not included in the charges assessed for individual calls and that Consumers may be assessed for the use

of Inmate Calling Services. Ancillary Charges include, but are not limited to, fees to create, maintain, or close an account with a Provider; fees in connection with account balances, including fees to add money to an account; and fees for obtaining refunds of outstanding funds in an account;

*Collect calling* means a calling arrangement whereby the called party agrees to pay for charges associated with an Inmate Calling Services call originating from an Inmate Telephone;

*Consumer* means the party paying a Provider of Inmate Calling Services;

*Debit calling* means a calling arrangement that allows a Consumer to pay for Inmate Calling Services from an existing or established account;

*Inmate* means a person detained at a correctional institution, regardless of the duration of the detention;

*Inmate calling services* means the offering of interstate calling capabilities from an Inmate Telephone;

*Inmate telephone* means a telephone instrument or other device capable of initiating telephone calls set aside by authorities of a correctional institution for use by Inmates;

*Prepaid calling* means a calling arrangement that allows Consumers to pay in advance for a specified amount of Inmate Calling Services;

*Prepaid collect calling* means a calling arrangement that allows an Inmate to initiate an Inmate Calling Services call without having a pre-established billing arrangement and also provides a means, within that call, for the called party to establish an arrangement to be billed directly by the Provider of Inmate Calling Services for future calls from the same Inmate;

*Provider of Inmate Calling Services, or Provider*, means any communications service provider that provides Inmate Calling Services, regardless of the technology used.

#### **§ 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.

#### **§ 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.

#### **§ 64.6030 Inmate calling services interim rate cap.**

No provider shall charge a rate for Collect Calling in excess of \$0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of \$0.21 per minute. A Provider's rates shall be considered consistent with this section if the total charge for a 15-minute call, including any per-call or per-connection charges, does not exceed \$3.75 for a 15-minute call using Collect Calling, or \$3.15 for a 15-minute call using Debit Calling, Prepaid Calling, or Prepaid Collect Calling.

#### **§ 64.6040 Rates for Telecommunications Relay Service (TRS) calling.**

No Provider shall levy or collect any charge in addition to or in excess of the rates for Inmate Calling Services or charges for Ancillary Charges for any form of TRS call.

#### **§ 64.6050 Billing-related call blocking.**

No Provider shall prohibit or prevent completion of a Collect Calling call or decline to establish or otherwise degrade Collect Calling solely for the

reason that it lacks a billing relationship with the called party's communications service provider unless the Provider offers Debit Calling, Prepaid Calling, or Prepaid Collect Calling.

#### **§ 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 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.

[FR Doc. 2013-26378 Filed 11-12-13; 8:45 am]

BILLING CODE 6712-01-P