

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

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

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 9, 2013

Released: September 26, 2013

Comment Date: 30 days after date of publication in the Federal Register

Reply Comment Date: 45 days after date of publication in the Federal Register

By the Commission: Acting Chairwoman Clyburn and Commissioner Rosenworcel issuing separate statements. Commissioner Pai dissenting and issuing a statement.

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I. INTRODUCTION

1. Nearly 10 years ago Martha Wright, a grandmother from Washington, D.C., petitioned the Commission for relief from exorbitant long-distance calling rates from correctional facilities.¹ Tens of thousands of others have since urged the Commission to act, explaining that the rates inmates and their

¹ See generally Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 at 3 (filed Nov. 3, 2003) (First Wright Petition) (“Accordingly, Petitioners request that the Commission prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons and require such facilities to permit multiple long distance carriers to interconnect with prison telephone systems. . . .”). The Petitioners filed an alternative petition for rulemaking in 2007. See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petitioners’ Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007) (Alternative Wright Petition).

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.² 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.³ Lower recidivism means fewer crimes, decreases the need for additional correctional facilities, and reduces the overall costs to society.⁴ 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.⁵ One commenter states that the "[I]ack of regular contact with incarcerated parents has been linked to truancy, homelessness, depression, aggression, and poor classroom performance in children."⁶ 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.⁷ 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.⁸ While an inmate in New

² See, e.g., Petitioners 2013 Comments at 37-38; Letter from Drew Kukorowski, Research Associate, Prison Policy Initiative and Taren Stinebrickner-Kauffman, Founder and Executive Director, SumOfUs, to Julius Genachowski, Chairman, FCC, CC Docket No. 96-128 (filed Nov. 15, 2012) (including 36,690 public comments "supporting imposition of price caps on correctional facility telephone rates").

³ The Center on the Admin. of Criminal Law 2013 Comments at 10 (citing Nancy G. La Vigne, *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. OF CONTEMP. CRIM. JUSTICE 314, 316 (2005)); accord Letter from Roy "Lynn" McCallum, Jail Commander, Elmore County Sheriff's Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed April 22, 2013) ("We recognize the value of retaining family contact during incarceration. The reduction in recidivism is well documented."); see also AMY L. SOLOMON, JENNY OSBORNE, LAURA WINTERFIELD ET AL., *Putting Public Safety First: 13 Parole Supervision Strategies to Enhance Reentry Outcomes* at 29-31 (Washington, D.C.: The Urban Institute 2008), available at http://www.urban.org/UploadedPDF/411791_public_safety_first.pdf (last visited July 30, 2013).

⁴ See *infra* para. 43.

⁵ BRUCE WESTERN AND BECKY PETTIT, THE ECONOMIC MOBILITY PROJECT, *Collateral Costs: Incarceration's Effect on Economic Mobility* at 18-19 (THE PEW CHARITABLE TRUSTS 2010), [www.pewstates.org/uploadedfiles/PCS_Assets/2010/Collateral_costs\(1\).pdf](http://www.pewstates.org/uploadedfiles/PCS_Assets/2010/Collateral_costs(1).pdf).

⁶ The Phone Justice Commenters 2013 Reply at 4-5. Another commenter states that "[m]aintaining relationships with their incarcerated parents can reduce children's risks of homelessness and of involvement in the child welfare system." Letter from Margaret diZerega, Director, Family Justice Program, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Mar. 14, 2013) (Vera Mar. 14, 2013 *Ex Parte* Letter); see also Center on the Admin. of Criminal Law 2013 Comments at 11 ("A child that stays in touch with an incarcerated mother or father is less likely to drop out of school or be suspended.").

⁷ See *infra* Section III.B.4.

⁸ See *infra* Section III.B.3.

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.⁹ Also, deaf prisoners and family members in some instances pay much higher rates than hearing prisoners for equivalent communications with their families.¹⁰ 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.¹¹ 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.¹² 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.¹³

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.¹⁴ Following such reforms, there is significant evidence that call volumes increased,¹⁵ which shows the direct correlation of how these reforms promote the ability of inmates to stay connected with

⁹ See Letter from Alex Friedmann, Assoc. Director, HRDC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Rev. Exh. B (filed June 8, 2013) (HRDC June 8, 2013 *Ex Parte* Letter); see also Securus 2013 Comments, App. 2 (showing the wide range of rates in the various states).

¹⁰ Transcript of Reforming ICS Rates Workshop at 36-38, WC Docket 12-375 (filed July 16, 2013) (Transcript of Reforming ICS Rates Workshop) (Talila Lewis, Founder and President, HEARD, discussing ways in which deaf inmates are frequently charged higher ICS rates than hearing inmates). For purposes of this Order, the terms “the deaf” or “the deaf and hard of hearing” include people with speech as well as hearing disabilities. Our actions here will help both inmates with these disabilities as well as inmates who need to call people with such disabilities.

¹¹ See HEARD 2013 Comments at 5 n.13. HEARD also asserts that some inmates are charged an additional fee of up to \$8.00 to connect to TRS. *Id.*

¹² See *infra* para. 38.

¹³ For example, Petitioners point out that in Orange County, California, the Inmate Welfare Fund had a budget of \$5,016,429 in 2010, and of that amount, 74% of the funds were used for staff salaries, 0.8% was used for the actual services, supplies, and training for inmate educational programs, and 0.06% was used for services, supplies, and training for inmate re-entry programs. See Petitioners 2013 Reply at 26-27; see also Petitioners 2013 Reply, Exh. H (providing a list of states and counties that, pursuant to statute, extract revenues shared with ICS providers for non-inmate educational needs, including employee salaries and equipment, building renewal funds, salaries and benefits, states’ general revenue funds, and personnel training); PLS 2013 Comments at 7 (noting that commissions paid to county facilities in Massachusetts are placed in a fund available for use by the Sheriff, while commissions paid to the Department of Correction are transferred to the General Fund of the Commonwealth).

¹⁴ See Letter from Glenn B. Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 26, 2013) (Telmate July 26, 2013 *Ex Parte* Letter).

¹⁵ See *id.* at Attach. (bar graphs showing call volume increases in Oregon DOC); see also Transcript of Reforming ICS Rates Workshop at 253 (Richard Torgersrud, CEO, Telmate, stating that “[W]e have done this in Oregon Department of Corrections, Montana Department of Corrections and we’ve done it for Homeland Security where we have implemented 16 cents per minute or less for calls. In doing so, we’ve seen up to 300 percent increase in call volume.”); see also *id.* at 287 (Lee Petro, Counsel to Petitioners, noting that “Telmate references a Great Plains state where they reduced the rate down to, I guess their 16 cent rate, and their call volume went up by 233 percent. In New York they reduced their fees and the call volume went up 36 percent.”).

friends and family. There is also support in the record that ICS rate reform has not compromised the security requirements of correctional facilities.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ 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

¹⁶ See Transcript of Reforming ICS Rates Workshop at 186-87 (Jason Marks, former Commissioner, New Mexico Public Regulation Commission, stating that “there are no security problems in New Mexico”); see also Letter from Anthony Annucci, Acting Commissioner, State of New York Department of Corrections and Community Supervision, to Gregory Haledjian, Attorney-Advisor, FCC, WC Docket No. 12-375 at 1 (filed July 16, 2013) (NY DOCCS July 16, 2013 *Ex Parte* Letter) (discussing the New York statute that “requires the department to . . . ensure that any inmate phone call system . . . provides reasonable security measures to preserve the safety and security of each correctional facility”).

¹⁷ See *infra* Section III.C.3.

¹⁸ We find that the record provides ample justification for assuming a 15-minute call as the basis for our calculations. See *infra* note 232. Additionally, we address rates by adopting interim safe harbor rate levels and interim rate caps that work together. 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, reasonable, and fair.

¹⁹ We emphasize that ICS providers should not read this Order as providing a basis to increase rates up to either the interim safe harbor or interim rate caps. The goals of the reforms adopted herein are to reduce rates and ensure that rates are cost-based. This Order does not provide an independent basis for raising rates. Consistent with our requirement that rates be cost-based, providers may raise rates when necessary to ensure recovery of costs directly and reasonably related to the provision of ICS on a holding-company level.

²⁰ See *infra* para. 62.

ICS rates, and therefore may not be passed on to inmates and their friends and families.²¹ 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.²² 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.²³

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.²⁴ The Act further requires that our payphone regulations “benefit . . . the *general* public,” not just some segment of it.²⁵ 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.²⁶ The petition sought to prohibit exclusive ICS contracts and collect-call-only restrictions.²⁷ 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.²⁸ The Commission sought and received comment on both petitions.²⁹ In 2008, certain ICS providers placed in the record a cost study that quantified their interstate ICS costs.³⁰

²¹ See *infra* Section III.C.2.b.

²² See *infra* Section III.D.

²³ See *infra* Section III.I.

²⁴ See 47 U.S.C. §§ 151, 201(b).

²⁵ See 47 U.S.C. § 276(b)(1) (emphasis added).

²⁶ See *generally* First Wright Petition.

²⁷ *Id.*

²⁸ See *generally* Alternative Wright Petition.

²⁹ See *Petition For Rulemaking Filed Regarding Issues Related to Inmate Calling Services Pleading Cycle Established*, CC Docket No. 96-128, Public Notice, DA 03-4027, 2003 WL 23095474 (Wireline Comp. Bur. 2003); *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, CC Docket No. 96-128, Public Notice, 22 FCC Rcd 4229 (Wireline Comp. Bur. 2007) (*2007 Public Notice*).

³⁰ See *generally* Don J. Wood, Inmate Calling Services Interstate Call Cost Study (WOOD & WOOD 2008) CC Docket No. 96-128 (filed Aug. 15, 2008); Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Aug. 22, 2008) (Joyce Aug. 22, 2008 *Ex Parte* Letter) (attaching supplemental cost and usage data); Record submission by “several providers of inmate telephone service,” CC Docket No. 96-128 (filed Oct. 15, 2008) (amending supplemental cost and usage data) (collectively ICS Provider Data Submission).

10. In December 2012, the Commission adopted a notice of proposed rulemaking seeking comment on, among other things, the proposals in the Wright petitions.³¹ The *2012 ICS NPRM* 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.”³² The *2012 ICS NPRM* 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.³³

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.”³⁴ 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.”³⁵ On August 2, 2013, the CAC reiterated its request for the Commission to take action on “this long overdue issue” of high ICS rates.³⁶

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.³⁷ We conclude that our actions herein do not require us to abrogate existing contracts

³¹ See generally *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012) (*2012 ICS NPRM*). The *2012 ICS NPRM* incorporated relevant comments, reply comments and *ex parte* filings from the prior ICS docket, CC Docket No. 96-128, into WC Docket No. 12-375. See *2012 ICS NPRM*, 27 FCC Rcd at 16636, para. 15.

³² *2012 ICS NPRM*, 27 FCC Rcd at 16636, para. 16.

³³ See generally *2012 ICS NPRM*. While some commenters use the terms “debit” and “prepaid” interchangeably, in the *2012 ICS NPRM*, the Commission differentiated between the two, noting that for debit calling, “money is deducted from an account but the minutes are not purchased in advance,” *id.* at 16641, para. 33, whereas prepaid calls are always funded in advance. *Id.* We continue that distinction in this Order.

³⁴ See *FCC Consumer Advisory Committee, Recommendation Regarding Affordable Phone Access for Incarcerated Individuals and Families*, CC Docket No. 96-123 at 1 (filed Oct. 18, 2012).

³⁵ *Id.*

³⁶ See *FCC Consumer Advisory Committee, Further Recommendation Regarding Inmate Calling Rates*, WC Docket No. 12-375 (filed Aug. 5, 2013). The CAC reiterated its former recommendations about ICS-related issues, and additionally proposed that the Commission require ICS providers to: “proportionally discount rates for TTY and relay calls;” allow more time for such calls; and “report all ICS-related complaints” to the Commission, including disability access complaints.

³⁷ We distinguish our decision to regulate interstate ICS rates here from the Commission’s previous decision to rely on negotiated compensation for ICS. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd

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.³⁸ 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.”³⁹ The Commission has previously found that interstate ICS, typically a common carrier service, falls within the mandates of section 201.⁴⁰

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21233, 21269, para. 72 (1996) (*Payphone Order on Reconsideration*) (“[W]henver 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.”). In that proceeding, the question presented was whether ICS providers were entitled to compensation additional to that which they had already negotiated with correctional facilities. The Commission denied the request for additional compensation. Here, the question before us is whether negotiated rates result in unfairly high compensation for ICS providers and unjust and unreasonable rates for end users. We conclude that they do and that we are obligated to ensure that rates comply with our statutory mandates.

³⁸ See 47 U.S.C. § 201(b); see also Petitioners 2013 Comments at 5 (asserting that “there is no legitimate question that the Act provides the FCC with sufficient authority to regulate all ICS rates and practices”); GTL 2013 Comments at 33 (stating that, “taken together, Sections 201 and 276 appear to provide broad authority for the FCC to address interstate interexchange ICS rates”); Raheer 2013 Comments at 2 (contending that “there is no impediment to the Commission’s jurisdiction in these matters”); Securus 2013 Comments at 10 (asserting that “the Commission’s purview . . . remains interstate telephone rates”); CBC 2013 Reply at 2 (“A plain reading of §§ 276 and 201 of the Act indicates that the FCC has broad authority to regulate both interstate and intrastate inmate calling services to ensure that the rates of inmate calling services are reasonable.”) (emphasis in original omitted); Hamden Ancillary Charges PN Reply at 12 (stating that “the widely diverging regulations, items of call billing that are not tariffed, and broad discrepancies in calling rates that can only be characterized as arbitrary, all demonstrate that regulation at the state level has been ineffectual” and that “in the absence of federal regulation, meaningful reform of the nationwide ICS industry simply cannot be achieved”).

³⁹ See Petitioners 2013 Comments at 8 (“An ICS telephone call fits squarely within the definition of interstate or foreign communication by wire or radio.”); NASUCA 2013 Comments at 7 (stating that “this broadly conferred authority plainly reaches interstate ICS calling”); The Phone Justice Commenters 2013 Reply at 5 (“Section 201(b) of the Communications Act grants the Commission broad authority to regulate interstate ICS rates.”); Alternative Wright Petition at 11-12.

⁴⁰ See *Billed Party Preference For Interlata 0+ Calls*, CC Docket No. 92-77, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122, 6156, para. 59 (1998) (finding that inmate phone rates “must conform to the just and reasonable requirements of Section 201”) (*Second Report and Order and Order on Reconsideration*). We disagree with GTL’s assertion that, because it is a provider of “competitive, non-dominant services,” it is “not subject to rate regulation or cost justification requirements.” See GTL Ancillary Charges PN Comments at 2. GTL asserts that it must detariff its rates, make them available in a public location and on its website, and “make certain oral disclosures prior to the completion” of an ICS call, but beyond such requirements, it is “subject to less stringent regulatory burdens” than dominant providers. *Id.* at 3-4. GTL compares itself to “carriers that are not rate-regulated by [the] Commission, namely interexchange carriers, CMRS providers, and competitive local exchange carriers” who “are exercising ‘the freedom’ granted by the Commission to non-dominant carriers to make their own pricing decisions.” *Id.* at 5. We reaffirm our finding in the *Second Report and Order and Order on Reconsideration* that

(continued....)

14. In addition, section 276⁴¹ 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 ICS⁴²—“are fairly compensated for each and every completed intrastate and interstate call.”⁴³ The Commission has previously found the term “fairly compensated” permits a range of compensation rates that could be considered fair,⁴⁴ but that the interests of both the payphone service providers and the parties paying the compensation must be taken into account.⁴⁵ 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 276.⁴⁶ Indeed, several commenters state that the Commission can regulate ICS regardless of the underlying technology used to provide the service.⁴⁷ 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.”⁴⁸

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

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ICS rates must be just and reasonable under section 201(b) of the Act. ICS providers are not exempt from “rate regulation or cost justification requirements” simply because they claim non-dominant status. *See Second Report and Order and Order on Reconsideration*, 13 FCC Rcd at 6165, para. 59.

⁴¹ Section 276(b)(1) states that “within 9 months after February 8, 1996, the Commission shall take all actions necessary . . . to prescribe regulations” implementing subsections (b)(1)(A)—(E). 47 U.S.C. § 276(b)(1). Consistent with our prior interpretation of analogous statutory language, we believe this provision is best interpreted as permitting the Commission subsequently to change or adopt new regulations implementing section 276. As the Commission explained with respect to the similar six-month deadline imposed in section 251(d)(1), “the actions that were ‘necessary’ to implement section 251 at the time of the 1996 Act do not constitute the entire universe of regulations that may be necessary or appropriate to implement those provisions in the future.” *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17918, para. 767 n.1381 (2011) (*USF/ICC Transformation Order*), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

⁴² 47 U.S.C. § 276(d) (“As used in this section, the term ‘payphone service’ means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.”).

⁴³ *Id.* § 276(b)(1)(A); *see also* Petitioners 2013 Comments, Exh. A at 8-9 (citing *Wright v. Corrections Corp. of America*, C.A. No. 00-293 (GK), Memorandum Opinion, slip op. at 8-9 (D.D.C. Aug. 22, 2001)).

⁴⁴ *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3254-58, paras. 14-24 (2002) (*Inmate Calling Services Order on Remand and NPRM*).

⁴⁵ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 at 2570, para. 55 (1999) (*Payphone Third Report and Order*); *see also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21302-03, para. 82 (2002) (*Fifth Order on Reconsideration and Remand*) (holding that “fair” compensation under section 276 “implies fairness to both sides”).

⁴⁶ *See* 47 U.S.C. § 276.

⁴⁷ *See* Transcript of Reforming ICS Rates Workshop at 186, 221-22 (Statement of Jason Marks, former Commissioner, New Mexico Public Regulation Commission); NASUCA 2013 Reply at 2-3 (noting that “none of the commenters seriously challenge the Commission’s jurisdiction to regulate rates for ICS services.”); Petitioners 2013 Comments at 12-16.

⁴⁸ 47 U.S.C. § 276(c).

make available, so far as possible, to *all* the people of the United States” communications services “at reasonable charges.”⁴⁹ 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 276.⁵⁰ 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.⁵¹

17. *Prisons and Jails.* Prisons and jails are both core examples of facilities that constitute “correctional institutions” under section 276 and this Order.⁵² 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,”⁵³ often in contexts that explicitly make clear that both entities fall within the definition of “correctional institution.”⁵⁴ Similarly, in the *2012 ICS NPRM*, the Commission repeatedly used the more generic term “prison,”⁵⁵ noting, however, that jails are a particular subset of prisons (*i.e.*, that jails are “local prisons” to be distinguished from “state prisons”).⁵⁶ Finally, a number of commenters in this proceeding – including ICS providers – submitted data for both prisons and jails,⁵⁷ and/or otherwise stated or assumed within their written advocacy⁵⁸ that both entities would be subject to any new rules.⁵⁹ We do not

⁴⁹ *Id.* § 151 (emphasis added).

⁵⁰ *Id.* § 276(d) (defining “payphone service” to include “the provision of inmate telephone service in correctional institutions”). Throughout this Order and Further Notice we use “correctional facility” and “correctional institution” interchangeably. We also note that the requirements adopted in this Order apply to federal, state, and local correctional facilities.

⁵¹ Beyond the guidance provided in this section, to the extent there are questions about whether a particular facility is a “correctional institution” under this Order, such questions will be resolved on a case-by-case basis.

⁵² For these purposes, the term “jail” includes adult detention facilities (excluding secure mental health facilities) where individuals are held pending charges or pending trial. Moreover, we note that whether a particular facility is a correctional institution is a question of fact that focuses on the function of the facility. In this regard, we note that the name of a particular facility may not be dispositive. For instance, if a facility functions as a prison or jail, then it will be covered by our rules even if the facility does not include the term “prison” or “jail” in its name. *See e.g.*, <http://www.fairfaxcounty.gov/sheriff/adc.htm> (FAQs acknowledging that the Fairfax County Adult Detention Center is a “jail”).

⁵³ *See Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd 3248, paras. 6, 9, 10, 11, 19, 39, 40, 42, 72, 75, 77.

⁵⁴ *See, e.g., id.* at 3276, para. 72 (“Correctional facilities must balance the laudable goal of making calling services available to inmates at reasonable rates, so that they may contact their families and attorneys, with necessary security measures and costs related to those measures. For this reason, most prisons and jails contract with a single carrier to provide payphone service and perform associated security functions.”).

⁵⁵ *See 2012 ICS NPRM*, 27 FCC Rcd 16629, paras. 1, 4, 7, 12, 14, 26, 27, 31, 41, 43.

⁵⁶ *Id.* at para. 44 n.148; *see also id.* at para. 2 n.12. Similarly, the First Wright Petition and the Alternative Wright Petition repeatedly referred to “prisons,” noting that most “low-capacity prisons” are “locally-administered jails.” First Wright Petition at n.51.

⁵⁷ *See ICS Provider Data Submission* (data from seven ICS providers covering both prisons and jails); Securus 2013 Comments, Expert Report of Stephen E. Siwek (data covering both prisons and jails).

⁵⁸ *See generally* First Wright Petition (seeking relief from anticompetitive practices in prisons); Alternative Wright Petition (seeking the establishment of benchmark rates for prisons); Pay Tel Cost Study (cost study from a provider that serves primarily jails); Letter from Lee G. Petro, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 96-128 at 1 (filed Oct. 24, 2012) (“It was noted that not only would action on the Wright Petition

(continued....)

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.⁶⁰

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.”⁶¹ 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 276.⁶² Petitioners in this proceeding likewise made arguments based on the same assumption, as did a number of commenters in response to the 2012 ICS NPRM⁶³ as well as participants in the Reforming ICS Rates Workshop.⁶⁴ This common understanding of that statutory term was not disputed or called into

(Continued from previous page)

affect inmate prison phone rates, but also those phone rates charged at immigration detention centers.”); Letter from Holly S. Cooper, Assoc. Director, UC Davis Immigration Law Clinic, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 1 (filed Nov. 8, 2012) (“Immigrants in detention have a critical need for telephone access, and high phone rates leave them particularly vulnerable.”).

⁵⁹ “[T]he Commission must consider all aspects of ICS—interstate and intrastate, at all kinds and sizes of correctional facilities—as it engages in reform.” Pay Tel 2013 Comments at 2. ICS providers that have participated in this docket serve both prisons and jails. *See e.g.*, GTL 2013 Comments at 3-4 (GTL serves over 1,900 facilities); NCIC 2013 Comments at 2 (NCIC serves nearly 300 jails nationwide); Telmate July 26, 2013 *Ex Parte* Letter at 1-2 (Telmate serves state departments of corrections, ICE, and county and municipal jails.).

⁶⁰ Contrary to Commissioner Pai’s dissenting statement that “the record evidence simply does not support the Commission’s one-size-fits-all approach,” Dissenting Statement of Commissioner Ajit Pai at 116 (Dissent), the interim rates we adopt are based on the data most likely to approximate the actual costs of providing inmate calling services. *See infra* para. 69. Moreover, as explained below, higher cost providers have the flexibility to charge cost-based rates up to the interim rate cap, and we have a waiver process for any unique circumstances. *See id.* We seek comment in the Further Notice on whether we should draw such a distinction for purposes of regulating ICS. *See infra* para. 159.

⁶¹ *See, e.g.*, Black’s Law Dictionary 396, 1314 (9th ed. 2009) (definitions of “correctional institutions” and “prison”).

⁶² MCI 2004 Comments at 18 (“Correctional facilities, ranging from county jails, state prisons, federal prisons, to Immigration and Naturalization Service detention facilities, uniformly rely on a single ICS provider because doing so gives them the greatest ability to maintain prison security and protect the public.”); Coalition 2004 Comments at 6 (“There is a vast array of types of private correctional facilities. The Federal Bureau of Prisons, the Federal Bureau of Immigration and Customs Enforcement (‘BICE’), and many state and county governments send people to private facilities.”).

⁶³ NJAID/NYU IRC 2013 Comments at 5 (urging the Commission to “[p]revent future exploitation by prison telephone companies of vulnerable immigrant detainees, other persons held in correctional facilities, and their families”); AILA 2013 Comments at 1 (arguing that “[t]he exorbitant telephone rates paid by individuals in immigration detention are a well-documented concern,” and urging the FCC to regulate ICS rates for calls “made from correctional facilities to ensure just and reasonable rates for inmates, including individuals in immigration detention”); CIVIC 2013 Comments at 1, 4 (noting that “there are more than 400,000 men and women held in U.S. civil immigration detention each year,” and urging the Commission “to take action and cap the cost of interstate calls from prisons and detention centers” in order to help these detainees); Immigration Equality 2013 Comments at 1 (urging the Commission to “regulate the high cost of calls at immigration detention facilities”). *See also* 2012 ICS NPRM, 27 FCC Rcd at 16629, para. 1 n.6 (observing that “[r]ecently, there has been substantial renewed interest and comment in this docket highlighting . . . significant public interest concerns,” and citing, *inter alia*, Letter from Katherine Grincewich, Assoc. General Counsel, United States Conference of Catholic Bishops, to Chairman Julius Genachowski, FCC, CC Docket No. 96-128 (filed Oct. 12, 2012) (“urging the Commission to cap ICS rates and highlighting the problem of high ICS rates in immigrant detention centers”)).

⁶⁴ *See* Transcript of Reforming ICS Rates Workshop at 217-18 (amalia deloney, Assoc. Dir., Center for Media Justice, describing the monetary effects of immigrant detainees telephone calls); *id.* at 22-23 (Alex Friedman, Assoc. Dir., HRDC, discussing site Commission payments from jails, prisons, immigration detention facilities).

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.”⁶⁵ 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.⁶⁶

1. Current Structures for ICS Rates and Payment Options

21. ICS providers generally offer their services pursuant to contracts with correctional facilities.⁶⁷ These contracts vary by the correctional facilities and ICS providers involved, and the states and local jurisdictions in which the services are provided.⁶⁸ ICS rates can differ for local, intrastate long distance, and interstate long distance calls⁶⁹ and can include per-minute or per-call charges or both.⁷⁰ This

⁶⁵ Comments of NJAID/NYU IRC 2013 Comments at 1; *see also* <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm> (stating that “most” of the roughly 350 facilities that detain immigrants are currently jails “designed for penal, not civil, detention” and are not operated by ICE).

⁶⁶ *See* 47 U.S.C. §§ 201, 276.

⁶⁷ *See, e.g.*, GTL 2013 Comments at 4; Securus 2013 Comments at 2; CenturyLink 2013 Comments at 7-8.

⁶⁸ *See, e.g.*, Securus 2013 Comments at 2; GTL 2013 Comments at 14.

⁶⁹ *See, e.g.*, HRDC 2013 Comments, Exh. A (comparing local collect intrastate to local collect interstate rates, per state); *see also* Letter from Peter Wagner, Exec. Dir., Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 10-11 and Tbls. 8-9 (filed May 9, 2013) (Please Deposit All of Your Money Study) (noting different fees and “taxes” that Telmate charges for prepaid accounts, with resulting variety of fees, rates, and percentages, per state).

⁷⁰ *See, e.g.*, State of Maine Dept. of Corrections, Agreement to Purchase Services, *available at* http://prisonphonejustice.org/includes/_public/contracts/Maine/ME_contract_with_PCSGTL_20072012.pdf (ICS contract between GTL and Maine Department of Corrections dated July 24, 2007) (noting that in Maine, GTL charges a \$3.00 set up fee for collect and prepaid calls and a \$0.69 per-minute charge); *see also* HRDC June 8, 2013 *Ex Parte* Letter Rev. Exh. B; Letter from Jamie Susskind, Acting Legal Advisor to the Bureau Chief, Wireline Competition Bureau, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed June 6, 2013) (Susskind June 6, 2013 *Ex Parte* Letter) (noting that readily-available ICS contracts may be relevant to this proceeding and may be considered as part of the record).

varies, however, and some ICS contracts provide only for a per-minute charge⁷¹ while others provide only for a flat rate per call.⁷² 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.⁷³ 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.⁷⁴ 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.⁷⁵ ICS providers assert, however, that collect calling can pose billing and collection problems.⁷⁶

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.⁷⁷ An inmate's account can be funded by the inmate (with earned funds, for example) or by outside parties.⁷⁸ 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.⁷⁹ An aggregated list on the record of current ICS contract rates indicates that 36 states currently allow debit

⁷¹ See, e.g., Contract for Inmate Payphone and Associated Inmate Monitoring and Recording Equipment and Services (ITS), Contract Number 3999, Between Oregon Department of Corrections and Pinnacle Public Services LLC at Attach. 2, available at http://www.prisonphonejustice.org/includes/_public/contracts//Oregon/OR_contract_with_PPSTelmate_20122015.pdf (ICS contract between Telmate and Oregon Department of Corrections dated June 28, 2012) (establishing per-minute rates only for domestic ICS calls under the contract); see also Susskind June 6, 2013 *Ex Parte* Letter.

⁷² See, e.g., Attachment "A," Rate Fees and Costs, IT Professional Services Contract, Amendment No. 02, available at http://www.prisonphonejustice.org/includes/_public/rates//New%20Mexico/NM_phone_rates_2011.pdf (rate worksheet portion of ICS contract between Securus Technologies and New Mexico Corrections Department, dated June 28, 2010); see also HRDC June 8, 2013 *Ex Parte* Letter Rev. Exh. B (noting that in New Mexico, Securus charges a flat rate of \$0.65 for collect and debit calls and \$.59 for prepaid calls) (New Mexico ICS Contract); see also Susskind June 6, 2013 *Ex Parte* Letter.

⁷³ See 2012 ICS NPRM, 27 FCC Rcd at 16640-41, paras. 30-33; see also GTL 2013 Comments at 20; Securus 2013 Comments at 21-23.

⁷⁴ See generally First Wright Petition, Dawson Aff. at 4-5; see also HRDC 2013 Comments at 7. Collect calling is often the most expensive type of ICS calling. See HRDC 2013 Comments at 7.

⁷⁵ See, e.g., 2012 ICS NPRM, 27 FCC Rcd at 16632, para. 5; CenturyLink 2013 Comments at 12-13, n.27; CCA 2003 Comments at 16-21.

⁷⁶ See, e.g., Securus 2013 Comments at 4, 22 (asserting that called parties' LECs have refused payment and imposed penalties for telephone calls in which an end user claims to have not received or accepted an inmate's collect call).

⁷⁷ See 2012 ICS NPRM, 27 FCC Rcd at 16630, para. 2; see also Transcript of Reforming ICS Rates Workshop at 112-13 (Alex Friedmann, Assoc. Director, HRDC, stating that "the vast, vast, majority of prison phone calls, those rates are not paid by prisoners, they're paid by the call recipients, either through direct payment from collect calls, or through family members or loved ones placing money on prepaid accounts in their own name, or sending money into their loved ones in prison to set up debit accounts").

⁷⁸ See, e.g., CenturyLink 2013 Comments at 12 (stating that "funds are deposited by family members or others into inmates' bank or commissary accounts"); Securus 2013 Comments at 21-22 (stating that inmates can hold their own prepaid accounts or many, in some facilities, purchase calling cards from an institution's commissary); see also GTL 2013 Comments at 18.

⁷⁹ See GTL 2013 Comments at 20, Securus 2013 Comments at 21-22, T-Netix 2007 Comments at 13-14.

calling, and that debit calling is less expensive than collect calling in many of those states.⁸⁰ Some facilities allegedly do not favor debit calling because debit calling can be more administratively burdensome than collect calling.⁸¹

24. Prepaid calling refers to arrangements whereby the called party has a prepaid account set up with the ICS provider in advance.⁸² This account is often established and replenished by the inmates' friends and family members.⁸³ The record indicates that prepaid calling is generally less expensive than collect calling but can be about equal in rates to debit calling.⁸⁴ Some ICS contracts are limited to collect calling only⁸⁵ while others allow prepaid and/or debit calling options.⁸⁶

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.⁸⁷ 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.⁸⁸ 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.⁸⁹ 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

⁸⁰ See HRDC 2013 Comments at 7.

⁸¹ See, e.g., GTL 2013 Comments at 20-21 (asserting that debit calling “can actually increase some administrative costs depending on the characteristics of the inmate account”); CenturyLink 2013 Comments at 12-13 n.27; Securus 2013 Comments at 21 (noting that some correctional facilities forbid calling cards due to concerns about administrative burdens and potential violence).

⁸² See *2012 ICS NPRM*, 27 FCC Rcd at 16641, para. 33.

⁸³ See Securus 2013 Comments at 21.

⁸⁴ See HRDC 2013 Comments at 7-8 (noting that among 38 states that offer prepaid calling, prepaid rates are lower than or equal to collect rates in all 38 states); see also *2012 ICS NPRM*, 27 FCC Rcd at 16641, para. 33. For the regulatory purposes of this Order we treat debit and prepaid ICS calling as similar services.

⁸⁵ See, e.g., First Amended Contract for Inmate Telephone Services, available at http://www.prisonphonejustice.org/includes/_public/contracts//Georgia/GA_contract_with_MCIGTL_amendments11.pdf; (ICS contract between GTL and Georgia Department of Corrections dated May 3, 2001); see also HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (noting that Georgia only allows collect calling); see also Susskind June 6, 2013 *Ex Parte* Letter.

⁸⁶ See, e.g., CenturyLink 2013 Comments at 12-13 (estimating that approximately 70% of its ICS customers offer debit calling but noting that “debit calling varies widely by facility”); GTL 2013 Comments at 22 (noting that a “significant number” of correctional facilities offer either debit or prepaid calling but that debit calling “is not yet universally accepted”); see also *infra* Section III.G (addressing blocking of certain collect calls).

⁸⁷ See generally ICS Provider Data Submission. Providers that participated in the 2008 study include ATN, Inc., Custom Teleconnect, Inc., Embarq (now operating as CenturyLink), NCIC Inmate Telephone & Operator Services, Pay Tel Communications, Public Communications Services, Inc., and Securus Technologies, Inc. See ICS Provider Data Submission at 21.

⁸⁸ These estimates are based on per-minute costs and were derived from the per-call and per-minute data developed by the study, using an assumed 15-minute call duration. See *infra* note 232.

⁸⁹ See generally Securus 2013 Comments, Expert Report of Stephen E. Siwek.

divided the study sample into four groups, including one for state department of corrections facilities and three others for different-sized jail facilities.⁹⁰ 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.⁹¹ 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.⁹² Facilities of these sizes hold only a very small share of inmates nationally.⁹³ 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.⁹⁴ 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).⁹⁵

28. Although CenturyLink⁹⁶ did not file a cost study, it did file summary cost information for its ICS operations.⁹⁷ Specifically, CenturyLink reported that its per minute costs to serve state

⁹⁰ *Id.* at 2-3.

⁹¹ *See id.* at 3, 5, and 8, Tbls. 2, 5, and 9. The results are for all call types, as the study does not provide differentiated data for collect, debit, and, prepaid calls.

⁹² These estimates are based on call volume estimates by Pay Tel and the Commission. *See* Pay Tel Ancillary Charges PN Comments at 7 (assuming approximately 20 calls per occupied bed per month). Commission estimates are based on matching Securus jail facilities to population figures in the 2006 U.S. Bureau of Justice Statistics. *See* U.S. Bureau of Justice Statistics, Prisoners in 2011, *available at* <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4559> (last visited June 20, 2013); *see also* <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=530> (last visited June 20, 2013); *see also* Letter from Jamie N. Susskind, Acting Legal Advisor to the Bureau Chief, Wireline Competition Bureau, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed June 24, 2013) (Susskind June 24, 2013 *Ex Parte* Letter) (noting that certain readily-available information concerning data on the overall U.S. distribution of incarceration facility sizes may be used as a basis for this order). Pay Tel states that it “has no experience serving facilities as small as those depicted in the Securus Low 10. Presumably, these are small town police stations or remote police outposts, with extremely low call volume.” Pay Tel Ancillary Charges PN Comments at 7.

⁹³ The Commission estimates that nationwide, incarceration facilities of the sizes in Securus’ Medium 10 and Low 10 groups together hold approximately one percent of all inmates. *See generally* U.S. Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2005, *available at* <http://dx.doi.org/10.3886/ICPSR24642.v2> (last visited June 20 2013), and Census of Jail Facilities, *available at* <http://dx.doi.org/10.3886/ICPSR26602.v1> (last visited June 20, 2013); *see also* Susskind June 24, 2013 *Ex Parte* Letter.

⁹⁴ Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed July 23, 2013) (Pay Tel July 23, 2013 *Ex Parte* Letter). Pay Tel required confidential treatment for some of the data in its cost study. *See* Transcript of Reforming ICS Rates Workshop at 238 (noting that “PayTel provides inmate telephone service . . . to jails throughout the United States.”).

⁹⁵ Pay Tel July 23, 2013 *Ex Parte* Letter at Attach. 2 (Pay Tel Cost Summary).

⁹⁶ *See* Letter from John E. Benedict, VP – Federal Regulatory Affairs & Regulatory Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Aug. 2, 2013) (CenturyLink Aug. 2, 2013 *Ex Parte* Letter).

⁹⁷ We also note that CenturyLink’s predecessor, Embarq, participated in the 2008 ICS Provider Data Submission. *See supra* note 87.

departments of corrections facilities (excluding site commission payments) averaged \$0.116⁹⁸ and that its per-minute costs to serve county correctional facilities (excluding site commission payments) averaged \$0.137.⁹⁹

29. The record in this proceeding suggests that the costs of providing ICS are decreasing, in part due to technology advances.¹⁰⁰ 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).”¹⁰¹ As ICS moves increasingly to IP technology, we expect costs to decline as is the case for similar services that are not ICS.¹⁰² 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.”¹⁰³ In particular, they point to the replacement of live operators with automated systems,¹⁰⁴ the reduction or total absence of on-site service by the ICS providers,¹⁰⁵ the consolidation of ICS providers,¹⁰⁶ and the centralized application of requested security measures.¹⁰⁷ 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.¹⁰⁸

⁹⁸ See CenturyLink Aug. 2, 2013 *Ex Parte* Letter at 2. CenturyLink states that the state departments of corrections facilities it serves produced a median per-minute cost of \$0.108, a low per-minute cost of \$0.058 and high per-minute cost of \$0.188. See *id.* We note that the per-minute rate proposal in the Dissent appears to rely on CenturyLink’s high per-minute cost. See Dissent at 131 and n. 149.

⁹⁹ See CenturyLink Aug. 2, 2013 *Ex Parte* Letter at 3. CenturyLink states that the county correctional facilities it serves produced a median per-minute cost of \$0.135, a low per-minute cost of \$0.051, and a high per-minute cost of \$0.220. See *id.*

¹⁰⁰ See, e.g., Petitioners 2013 Comments at 18 (“[T]he only on-premises equipment at each correction and detention facility is a VoIP router, several workstations for the site’s guards, and the actual inmate telephone handsets. Once a call is initiated, it is forwarded to a centralized ICS calling center, where security measures are applied, and the call is then forwarded to the called party.”).

¹⁰¹ Turnkey 2013 Comments at 3.

¹⁰² See also Cisco “Next-Generation Cisco Unified Communications Platform Accelerates Return on Investment: white paper,” (Nov. 2009) available at https://www.cisco.com/en/US/prod/collateral/voicesw/ps6790/gatecont/ps5640/white_paper_c11-568504.pdf (last visited Aug. 2, 2013) (asserting a substantial cost savings from moving from traditional time division multiplexing to IP-based technologies, with a focus on a particular Cisco commercial solution).

¹⁰³ Petitioners 2013 Comments at 5.

¹⁰⁴ See, e.g., Petitioners 2013 Comments at 18 (“Moreover, the operator-assisted collect call function has been eliminated, and these services are now automated and provided by the ICS provider without the intervention of a live operator.”).

¹⁰⁵ See *id.*

¹⁰⁶ See, e.g., The Phone Justice Commenters 2013 Reply at 8 (asserting that three ICS providers have “exclusive control over ICS in state prisons in states where 90% of incarcerated persons live”); Letter from Lee Petro, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 24, 2013) (stating that “three ICS providers control[] at least 90% of the ICS market”) (Petitioners July 24, 2013 *Ex Parte* Letter).

¹⁰⁷ See, e.g., GTL 2007 Comments at 2-3; Telmate 2013 Comments at 2-3. Cost data Securus subsequently entered into the record, while not directly comparable, also suggests a decrease in its costs since the 2008 study. See generally Securus 2013 Comments, Expert Report of Stephen E. Siwek.

¹⁰⁸ See, e.g., Telmate 2013 Comments at 2-3 (asserting that it has invested in an all-IP network and offers “pioneering and innovative services,” that its platform is modern and efficient, and that “its debt-service and capital costs are far lower than those of other providers); see also Diane Myers, The Cost Advantages of Hosted Telephony, Infonetics Research Cost Analysis Paper, available at <http://www.infonetics.com/whitepapers/2010-Infonetics->

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30. Other developments also point to lower costs. These changes include lower “basic telecommunications costs.”¹⁰⁹ Consistent with recent trends in capital costs for the communications industry,¹¹⁰ some providers acknowledge that capital costs for on-site equipment are decreasing.¹¹¹ In addition, ICS providers and correctional facilities increasingly offer prepaid and debit calling as an alternative to collect calling.¹¹² Because every prepaid or debit call is paid,¹¹³ this trend is lowering provider costs by reducing uncollectibles.¹¹⁴ 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,¹¹⁵ a trend that will continue as these reforms continue to be implemented.¹¹⁶ Moreover, IP-transit charges, relevant for the supply of IP-based services, have also steadily fallen.¹¹⁷

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Research-The-Cost-Advantages-of-Hosted-Telephony-081210.pdf (last visited July 24, 2013) (discussing the cost benefits of a hosted versus premises-based approaches, which are the gains achieved by centralizing hardware, software and management functions in a single location).

¹⁰⁹ See GTL 2013 Comments at 19.

¹¹⁰ See, e.g., Petitioners 2013 Comments, Exh. C, Bazelon Decl. at 10-11 (asserting that hardware and software costs in the ICS industry have dropped dramatically in the last decade).

¹¹¹ See Pay Tel 2013 Comments at 13 (asserting that since the 2008 ICS Provider Data Submission was developed, “consistent with general industry trends, Pay Tel’s business model has shifted from a ‘customer premises’ model to a ‘centralized platform’ model” and that “there are now substantially more assets and personnel at the company’s main Data Center location and its disaster recovery site—and fewer assets at individual correctional facilities—than used to be the case”); see also Telmate 2013 Comments at 2 (noting that their capital costs are far lower than other ICS providers); Petitioners 2013 Comments at Exh. C, Bazelon Decl., 10-11 n.42 (citing Douglas Dawson affidavit before the Commonwealth of Massachusetts Department of Telecommunications and Cable in 2012, in which he states that “today there is very little capital investment made by [a] prison telephone provider at each prison”).

¹¹² See, e.g., Telmate 2013 Comments at 3 (asserting that by offering a combination of debit and prepaid calls, it is able to offer lower-cost calls for inmates and their friends and families while simultaneously increasing call volume); see also Letter from Monica S. Desai, Counsel for Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 3 (filed May 31, 2013) (Securus May 31, 2013 *Ex Parte* Letter) (“Today, approximately 80 percent of inmate telephone calls are made using prepaid accounts.”).

¹¹³ See GTL 2013 Comments at 19 (noting that “bad debt expense is expected to decline with increased use of prepaid calling plans”); see also CenturyLink 2013 Comments at 12 (stating that debit calling eliminates “bad debt/credit card charge-backs”); Telmate 2013 Comments at 3.

¹¹⁴ See, e.g., Securus 2013 Comments at 4, 22 (asserting that called parties’ LECs have refused payment and imposed penalties for calls in which an end user claims to have not received or accepted an inmate’s collect call).

¹¹⁵ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17932-36, paras. 798-801 and Fig. 9 (noting the transition to a bill-and-keep methodology and adoption of default transitional glide path toward bill-and-keep for terminating end office switching and certain transport rate elements).

¹¹⁶ See *id.*

¹¹⁷ Reduced transit charges reflect the overall trend for transmission costs, which can influence ICS costs for connectivity to PSTN gateways, SIP trunks and other related network costs. See, e.g., Telegeography, *IP Transit Price Declines Steepen* (August 2, 2012) available at <http://www.telegeography.com/products/commsupdate/articles/2012/08/02/ip-transit-price-declines-steepen>; see also Dr. Peering International, *Internet Transit Prices - Historical and Projected* (August 2010) available at <http://drpeering.net/white-papers/Internet-Transit-Pricing-Historical-And-Projected.php>.

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,¹¹⁸ general and administrative costs such as additional personnel to create and maintain individual customer accounts,¹¹⁹ and high corporate debt.¹²⁰ Some ICS providers also include “free-to-the-inmate” services such as free calls to public defenders, free calls for indigent inmates,¹²¹ and free visitation calls¹²² 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.¹²³

33. Finally, providers point to “site commissions” as a significant driver of increases to rates charged to inmates.¹²⁴ Site commissions are payments made from ICS providers to correctional facilities and related state authorities.¹²⁵ 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.¹²⁶ 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.¹²⁷ Site commission payments are currently

¹¹⁸ See GTL 2013 Comments at 19 (stating that the “development, installation, and maintenance of increasingly sophisticated software security features” result in increased costs); Telmate 2013 Comments at 15.

¹¹⁹ See Pay Tel 2013 Comments at 13 (stating that general and administrative costs have increased, such as “administration, support, and personnel resulting from the deployment of advanced technology”).

¹²⁰ See Telmate 2013 Comments at 13 (stating that some of the ICS providers that joined in the ICS Provider Data Submission “have issued large amounts of debt securities and are subject to substantial debt-service obligations, along with higher capital expenses”).

¹²¹ See, e.g., NCIC 2013 Comments at 2-3 (noting that free services provided by NCIC also include free calls to bail bondsmen, consulates, and embassies, free booking calls, and free calls to the facilities’ commissary provider to place orders.); Transcript of Reforming ICS Rates Workshop at 323-34 (Vincent Townsend, President, Pay Tel, discussing the variety of free calls for inmates that Pay Tel provides).

¹²² Pay Tel notes that up to 50% of its ICS calls are non-revenue calls. These include calls to commissary accounts and face-to-face visitation while speaking through a telephone handset. See Pay Tel 2013 Comments at 14; see also Transcript of Reforming ICS Rates Workshop at 324 (Vincent Townsend, President, Pay Tel).

¹²³ See, e.g., CenturyLink 2013 Comments at 7-8 (noting that security features lead to a wide variety of costs in ICS provisioning); NCIC 2013 Comments at 5-6. Other commenters disagree that security requirements contribute substantially to ICS providers’ costs or ultimately to rates. See Petitioners 2013 Comments at 2. While interstate ICS requires unique security measures, there is no evidence in the record that the costs of these additional security functions justify the higher interstate ICS rates that are in place today. Additionally, we do not find that security needs in those correctional facilities in which higher interstate ICS rates are charged are either more effective, or more expensive than, the security needs of those facilities in which lower interstate ICS rates are charged. See, e.g., NARUC 2013 Reply at 3 (“It does not appear from the record that all charges can be justified on the basis of additional security measures. In New York, the prison phone rates are \$0.048 per minute for local, intrastate and interstate calls, inclusive of all security features required by New York corrections officials.”).

¹²⁴ See 2012 ICS NPRM, 27 FCC Rcd at 16632, para. 5 (citing *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3253, para. 12).

¹²⁵ See, e.g., Transcript of Reforming ICS Rates Workshop at 54, 92, 120 (Hon. Patrick Hope, VA House of Delegates, stating that approximately \$3.5M annually from ICS in Virginia is deposited into Virginia’s general fund, which finances, among other things, roads, transportation, education, and health care).

¹²⁶ See GTL 2013 Comments at 10; Telmate 2013 Comments at 7.

¹²⁷ See Securus 2013 Comments, Hopfinger Decl. at 6. Some correctional facilities that receive percentage-based commissions may also require a “Minimum Annual Guarantee” (“MAG”) – that is, the ICS provider must contractually guarantee the facility will annually receive at least this MAG amount regardless of the amount of revenue brought in. *Id.*; see also Telmate 2013 Comments at 14-15 (discussing site commission payments).

prohibited in seven states, as well as at some federal detention facilities including dedicated facilities operated by ICE.¹²⁸

34. The record makes clear that where site commission payments exist, they are a significant factor contributing to high rates.¹²⁹ 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.¹³⁰ 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,¹³¹ 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.¹³² 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.

¹²⁸ See Letter from Lee G. Petro, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Exh. A, at 16 (filed July 27, 2011) (Petitioners July 27, 2011 *Ex Parte* Letter) (Nationwide *PLN* Survey Examines Prison Phone Contracts, Kickbacks) (Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island, and South Carolina have banned site commissions.). Although both Michigan and Rhode Island have prohibited "site commissions" per se, it is unclear from the ICS contracts in these two states whether they include some form of in kind payment; nonetheless, we include ICS rates from those states in our calculations below in order to maintain a consistent approach in the forward-looking reform efforts of this proceeding. See *infra* notes 235 and 237.

¹²⁹ See, e.g., GTL 2013 Comments at 12 (agreeing that where a commission is present, it is "the single largest component affecting the rates for inmate calling service" (quoting *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3252, para. 10)); HRDC 2013 Comments at 6, 15; Verizon 2013 Comments at 2; TechFreedom 2013 Comments at 2; The Phone Justice Commenters 2013 Reply at 9-11.

¹³⁰ See GTL 2013 Comments at 10 (noting that its commissions range from zero to 75% of gross ICS revenues); Verizon 2013 Comments at 2 (stating that when it provided ICS, it paid site commissions between 40-50% of the amounts billed); Telpmate 2013 Comments at 7 (listing current commissions paid to county- and municipal-level corrections departments: 67% in Osceola, Florida; 71% in Cobb County, Georgia; 81% in Fulton County, Georgia; and 86% in San Diego, California); HRDC 2013 Comments, Exh. C (asserting that in 2012, various ICS providers paid commissions ranging between 20% to 76.6%; that in Oklahoma, commissions can be as high as 76.6% of gross prison phone revenue; and that at least 26 states receive commissions of 40% or more of gross ICS revenue); PLS 2013 Comments at 6 (contending that in Massachusetts, half or more of an ICS telephone bill covers site commissions rather than the cost of service, and DOC consumers pay about 25% of their bills toward commissions). But see TurnKey 2013 Comments at 4-5 (asserting that high-quoted commission percentages are not accurate depictions of amounts being paid to jails, that the offered commission rates are inflated compared to actual commissions paid, and that commissions may only be paid for certain types of calls); Securus May 31, 2013 *Ex Parte* Letter at 2 (asserting that site commission are not "profit" and support correctional facilities and inmate services).

¹³¹ See, e.g., La. DOC 2013 Comments at 3-5 (asserting that commissions are used to pay for literacy training, GED, special education, job life skills, and vocational education); CSSA 2013 Comments at 1; County of Santa Clara DOC 2013 Comments at 2; MDOC 2013 Comments at 1; SDDOC 2013 Comments at 2; GTL 2013 Comments at 10-11.

¹³² See, e.g., Petitioners 2013 Reply at 26-27 and Exh. G. Petitioners provide a list of 13 states and counties that extract revenues shared with ICS providers for non-inmate educational needs, including employee salaries and equipment, building renewal funds, salaries and benefits, states' general revenue funds, and personnel training. Petitioners 2013 Reply at 26-27, Exh. H; see also PLS 2013 Comments at 7 (noting that commissions paid to county facilities in Massachusetts are placed in a fund available for use by the Sheriff, while commissions paid to the Department of Correction are transferred to the General Fund of the Commonwealth).

3. The Record on ICS Rates

35. The record contains data regarding interstate ICS rates, including an aggregation of ICS contract data¹³³ and current ICS contracts by state.¹³⁴ 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.¹³⁵

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.¹³⁶ 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).¹³⁷

37. One of the most significant factors in rate levels is whether the relevant state has reformed or addressed ICS rates.¹³⁸ 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.¹³⁹ States that have lowered rates have

¹³³ HRDC filed comments in response to the *2012 ICS NPRM* that included rate data from 2007/2008 and 2012 for most state departments of corrections. See HRDC 2013 Comments at Exhs. A, B.

¹³⁴ See Susskind June 6, 2013 *Ex Parte* Letter; see also *Data on Service Contracts Included in Record of Inmate Calling Service Rates Proceeding*, WC Docket No. 12-375, Public Notice, DA 13-1446 (Wireline Comp. Bur. rel. June 26, 2013) (notifying the public of the same).

¹³⁵ These are the costs of a 15-minute collect call in Alabama, Arkansas and Maryland, respectively. See HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (citing state departments of correction 2012 rates).

¹³⁶ The ratio of standard deviation to mean for ICS per minute call costs net of commissions is 75% greater than the corresponding ratio for total incarceration costs per inmate. See HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B; see also VERA INSTITUTE OF JUSTICE, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* at 10 (Jan. 2012; updated July 2012), <http://www.vera.org/pubs/price-prisons-what-incarceration-costs-taxpayers>. The calculation is for the set of states for which both ICS call costs net of commissions and incarceration cost data are available.

¹³⁷ See Term Contract Award, available at http://prisonphonejustice.org/includes/_public/contracts//Arkansas/AR_Contract_Extension_with_GTL_20122014.pdf (ICS contract between GTL and Arkansas Office of State Procurement, dated Feb. 7, 2012); First Amended Contract for Inmate Telephone Services, available at http://www.prisonphonejustice.org/includes/_public/contracts//Georgia/GA_contract_with_MCIGTL_amendments11.pdf (ICS contract between GTL and Georgia Department of Correction, dated May 3 2001); Contract Release: T-512, available at http://prisonphonejustice.org/includes/_public/contracts//Minnesota/MN_contract_with_GTL_20102013.pdf (ICS contract between GTL and Minnesota Materials Management Division, dated May 11, 2012); Notice to Friends and Families of New York State Inmates, available at http://prisonphonejustice.org/includes/_public/rates//New%20York/NY_prison_phone_rates_2010.pdf (letter from New York State Department of Correctional Services listing new, reduced ICS rates, dated Feb. 11, 2010); see also Susskind June 6, 2013 *Ex Parte* Letter. Cost data entered into the record shows that without site commission payments, the rates are still not cost-based. See, e.g., ICS Provider Data Submission.

¹³⁸ See The Phone Justice Commenters 2013 Comments at 10 (ICS “prices vary widely across states, even among states that use the same ICS provider.”); see *supra* Section III.B.3.

¹³⁹ See First Amended Contract for Inmate Telephone Service, available at http://www.prisonphonejustice.org/includes/_public/contracts//Georgia/GA_contract_with_MCIGTL_amendments11
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done so in different ways. Some have banned site commissions entirely,¹⁴⁰ and others permit only limited or sharply-reduced site commissions.¹⁴¹ Some states have imposed rate caps,¹⁴² disallowed or reduced per-call charges,¹⁴³ and required providers to offer less expensive calling options, such as prepaid or debit calling.¹⁴⁴

38. Site commission payments appear to be a particularly significant contributor to high rates. Several states have eliminated or reduced such payments,¹⁴⁵ and available data indicate that ICS rates in those states are substantially lower than those in states that require commission payments.¹⁴⁶ 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.¹⁴⁷ 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.”¹⁴⁸ 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.¹⁴⁹ 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

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11.pdf (ICS contract between GTL and Georgia Department of Corrections, dated May 3, 2001); Contract, *available at* http://prisonphonejustice.org/includes/_public/contracts//Minnesota/MN_contract_with_GTL_20102013.pdf; *see also* Division of Purchasing and Materials Mgmt., Contract Renewal Agreement, *available at* http://prisonphonejustice.org/includes/_public/contracts//Missouri/MO_contract_with_PCS_20062011_contract_amendment_ext_thru_oct_2011.pdf (ICS contract between Missouri and PCS dated May 10, 2011); HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B; *see also* Securus 2013 Comments, App. 2 (showing the wide range of rates in the various states).

¹⁴⁰ *See supra* note 128.

¹⁴¹ *See* Nationwide *PLN* Survey Examines Prison Phone Contracts, Kickbacks at 16 (Arkansas, Kansas, Montana, and New Hampshire have limited or sharply-reduced site commission payments).

¹⁴² Indiana has capped collect and debit ICS rates at \$0.24 per minute and Michigan has capped collect and pre-paid rates at \$0.23 per minute and debit rates at \$0.21 per minute. *See* Exhibit A: Offender Phone Rates and Commissions, *available at* http://prisonphonejustice.org/includes/_public/rates//Indiana/IN_phone_rates_2012_with_kickback_percentages.pdf (rate sheet for ICS contract between the Indiana Department of Correction and PCS, dated May 26, 2011); *see also* Change Notice No. 1 of Contract No. 071B1300208, *available at* http://prisonphonejustice.org/includes/_public/contracts/Michigan/mi_prison_phone_contract_with_pcs_change_notice_1_2011.pdf (ICS contract between MI Department of Technology Management and Budget Purchasing Operations and PCS, dated Apr. 23, 2011); *see also* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B.

¹⁴³ *See* CenturyLink 2013 Comments at 9 n.21 (stating that “some facilities require ICS providers to charge on a per-minute basis only,” not a per-call basis).

¹⁴⁴ *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (noting that in 2007, GTL’s contract in Rhode Island added debit calling and e-mail options, and eliminated site commission payments).

¹⁴⁵ Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island, and South Carolina have eliminated site commissions from ICS rates. *See* Petitioners 2013 Comments at 23; NARUC 2013 Reply at App. A (Resolution Urging the FCC to take Action to Ensure Fair and Reasonable Telephone Rates from Correctional and Detention Facilities, adopted Nov. 14, 2012).

¹⁴⁶ *See* Securus May 31, 2013 *Ex Parte* Letter at 2; MMTCC Comments at 4-5; HRDC Comments at 2, 14; *see also* NJ ISJ 2013 Reply at 2-3; Nationwide *PLN* Survey Examines Prison Phone Contracts, Kickbacks.

¹⁴⁷ HRDC 2013 Comments at 3.

¹⁴⁸ *Id.* (citing N.Y. Cor. Law § 623(3)).

¹⁴⁹ *See* HRDC 2013 Comments at 3.

reduction.¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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.¹⁵³

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.¹⁵⁴ Economic literature states that, in effectively competitive markets, firms expect to earn sufficient revenues to cover their long run economic costs, and not more.¹⁵⁵

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.¹⁵⁶ While the process of awarding contracts to provide ICS may include competitive bidding,¹⁵⁷ 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

¹⁵⁰ *See id.*

¹⁵¹ *See* CenturyLink 2013 Comments at 15. South Carolina’s site commission payments were previously 45%; Michigan’s site commission payments were 50.99%. *See id.*

¹⁵² NY DOCCS July 16, 2013 *Ex Parte* Letter at 1 (noting that New York has per-minute ICS rates of \$0.048, and describing the New York statute that requires the focus of ICS contracts to be to obtain the lowest per-minute cost of the call. The letter also describes the necessary balance between low calling rates and security, as the department can also “establish rules and regulations or departmental procedures to ensure that any inmate phone call system established by this section provides reasonable security measures to preserve the safety and security of each correctional facility, all staff and all persons outside a facility who may receive inmate phone calls.”); *see also* Indiana Commission 2013 Comments at 2-3 (Indiana has \$0.24 per-minute ICS rates. Its comments describe state legislation requiring that state contracting officials balance the competing goals of facility security with lower per-call charges, per-minute rates and commissions when entering into ICS contracts.); *see also* CenturyLink 2013 Comments at 14-15. *But see* Ala. Sheriff’s Assoc. 2013 Reply at 1 (“The revenue from inmate phone calls pays for the additional security measures necessary to maintain institutional security . . . Without these security measures, the risks to institutional security and public safety would quickly outweigh the benefits of allowing inmate telephone access.”).

¹⁵³ *See supra* note 15.

¹⁵⁴ *See 2012 ICS NPRM*, 27 FCC Rcd at 16042, para. 36.

¹⁵⁵ *See, e.g.*, Louis M. B. Cabral, Introduction to Industrial Organization, 85-86 (MIT PRESS: CAMBRIDGE, MA, 2000) (discussing perfect competition) 86-94 (discussing more realistic models of the world); *see also* Dennis Carlton and Jeffrey Perloff, Modern Industrial Organization at 6, 76-78 (PRENTICE HALL 4TH ED. 2004) (price being driven to long run cost under perfect competition, in contestable market, as a means of defining a barrier to entry).

¹⁵⁶ *See, e.g.*, Securus 2013 Comments at 2 (“The competition for service contracts is, to put it mildly, robust.”); CenturyLink 2013 Comments at 4 (“[M]argins on ICS contracts are already constrained by the robust competition that exists in the ICS market.”). *But see* TurnKey 2013 Comments at 1 (“As a general proposition, smaller ICS companies find that a level playing field does not exist when it comes to competing in the ICS market.”).

¹⁵⁷ We do not address or making any findings with regard to the process for awarding contracts to provide ICS.

parties to the agreements, and whose interest in just and reasonable rates is not necessarily represented in bidding or negotiation.¹⁵⁸

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,”¹⁵⁹ and that “under most contracts the commission is the single largest component affecting the rates for inmate calling service.”¹⁶⁰ 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.¹⁶¹ 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.”¹⁶² 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.”¹⁶³ Although one ICS provider asserts that “service providers compete vigorously with respect to rates”¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶

¹⁵⁸ See Petitioners 2013 Reply at 7 (“[T]he ICS consumer never benefits from the brief period of competition among ICS providers during . . . the RFP process.”).

¹⁵⁹ *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3253, para. 11 (“Instead, perversely, because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates.”); see also *id.* at 3253, 3256, 3259-80, paras. 11 nn.38-39, 19, 27-28 (the Commission has previously characterized ICS providers as enjoying location “monopolies” that contribute to higher ICS rates); Raheer 2013 Reply at 5 (“Competition in procurement should not be confused with a competitive market for purposes of rate-setting.”).

¹⁶⁰ *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3252-53, paras. 10, 12.

¹⁶¹ See *id.*; see also Telmate 2013 Comments at 6 (“competition for these commissions decrease incentives for cost-reduction and technological innovation”); Raheer 2013 Reply at 6 (“[P]rocurement processes in site-commission jurisdictions are likely to drive prices up because of the inherent conflict of interest that arises when the agency awarding the contract receives a profit interest in telephone revenues.”).

¹⁶² Letter from Jason Marks, Esq., to Mignon Clyburn, Acting Chair, FCC, WC Docket No. 12-375 at 1 (filed July 12, 2013) (Marks July 12, 2013 *Ex Parte* Letter).

¹⁶³ *Id.*

¹⁶⁴ GTL 2013 Comments at 14.

¹⁶⁵ See GTL 2013 Reply Exh. A at 56 (Florida Invitation to Negotiate (ITN) for Statewide Inmate Telephone Services listing five categories for which ICS providers may receive points in a bid process which include such things as technical response, initial cost sheets and statement of qualification); see also Transcript of Reforming ICS Rates Workshop at 315 (Richard Torgersrud, CEO, Telmate, describing State of Florida RFP that sought information on site commission payment levels when per-minute rates were \$0.11, \$0.12); Raheer 2013 Reply at 6 (“[T]o say that procurement officials are focused on ensuring just and reasonable rates ignores the reality of the procurement process, in which administrators are interested in many non-price attributes of bids.”).

¹⁶⁶ See PLS 2013 Comments at 7; Verizon 2013 Comments at 2 (explaining that competition for the contract tends to revolve around the commission percentage that the bidder is willing to pay the corrections facility, and the calling rates that the bidders will charge the collect call recipients of the inmates appear to be irrelevant to the process of selecting a provider). Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 26, 2013) (describing an RFP process that was modified after all provider proposals were received to require that the providers increase their ancillary charges, calling rates, and commission

(continued....)

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.¹⁶⁷ 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.¹⁶⁸ These rates discourage communication between inmates and their families and larger support networks, which negatively impact the millions of children with an incarcerated parent,¹⁶⁹ contribute to the high rate of recidivism in our nation's correctional facilities, and increase the costs of our justice system.¹⁷⁰ 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."¹⁷¹

43. Just, reasonable, and fair ICS rates provide benefits to society by helping to reduce recidivism.¹⁷² The Congressional Black Caucus cites "a powerful correlation between regular communication between inmates and their families and measurable decreases in prisoner recidivism rates."¹⁷³ In addition, NARUC formally endorsed "lower prison phone rates as a step to reduce recidivism and thereby lower the taxpayer cost of prisons."¹⁷⁴ 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."¹⁷⁵ Further, reducing recidivism would provide significant cost savings, as the annual cost to incarcerate one person is estimated at over \$31,000 per year¹⁷⁶ or between \$60 and \$70 billion per year nationwide.¹⁷⁷ Indeed, one

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payment in order to continue to be considered). *But see* GTL 2013 Comments at 13 (explaining that because GTL is a large ICS provider it can charge lower rates and still pay high commissions thanks to economies of scale and other efficiencies).

¹⁶⁷ See Alternative Wright Petition App. A at 33; App. C.

¹⁶⁸ See *supra* note 2.

¹⁶⁹ See *supra* note 5.

¹⁷⁰ See *infra* para. 43.

¹⁷¹ The Phone Justice Commenters 2013 Reply at 5; *see also* Transcript of Reforming ICS Rates Workshop at 48-52 (Charlie Sullivan, Founder, CURE, describing that women inmates receive few visitors during their incarceration).

¹⁷² Studies have shown that family contact during incarceration is associated with lower recidivism rates. See The Center on the Admin. of Criminal Law 2013 Comments at 9-10 (*citing* Nancy G. La Vigne, *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. OF CONTEMP. CRIM. JUSTICE 314, 316 (2005)).

¹⁷³ CBC 2013 Reply at 3 (*citing* various studies and congressional testimony); *see also* CJP 2013 Reply, App. at 8-9 (*citing* Minnesota Department of Corrections, THE EFFECTS OF PRISON VISITATION ON OFFENDER RECIDIVISM, a study that found more frequent contact with loved ones reduced the rates of recidivism).

¹⁷⁴ NARUC 2013 Reply at 6.

¹⁷⁵ Center on the Admin. Of Criminal Law 2013 Comments at 10.

¹⁷⁶ See Transcript of Reforming ICS Rates Workshop at 124 (Anne Boyle, Commissioner, Nebraska Public Service Commission).

¹⁷⁷ See Transcript of Reforming ICS Rates Workshop at 126 (Alex Friedmann, Assoc. Director, HRDC).

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.¹⁷⁸

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,¹⁷⁹ while another says that some public defenders "spend more than \$100,000 a year accepting collect calls from prisoners."¹⁸⁰ 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.¹⁸¹ 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.¹⁸² 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."¹⁸³ 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."¹⁸⁴ 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.¹⁸⁵ 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

¹⁷⁸ Petitioners 2013 Comments Exh. C, Bazelon Decl. at para. 48; Petitioners 2013 Reply, Exh. A, Bazelon Decl. at para. 10.

¹⁷⁹ See Mo Pub. Defender Sys. 2013 Comments at 1; see also The Phone Justice Commenters 2013 Comments at 12. Some commenters assert that high interstate ICS rates affect inmates' right to effective counsel. See, e.g., Mo Pub. Defender Sys. 2013 Comments at 1; CJP 2013 Comments at 2-3.

¹⁸⁰ CJP 2013 Comments at 2.

¹⁸¹ See NY DOCCS July 16, 2013 *Ex Parte* Letter at 2 ("The Department believes that a lower calling rate has also contributed to a lower rate of illicit cell phone use by inmates in New York. In 2012, the Department confiscated less than 100 cell phones, compared to over ten thousand annual seizures in comparably sized correctional systems.").

¹⁸² See 47 U.S.C. §§ 201(b), 276(b)(1)(A).

¹⁸³ *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606 at 16619-20, para. 44 (1997) (citing *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996)); see also, e.g., *MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982).

¹⁸⁴ *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d at 529; see also, e.g., *ALLTEL Corp. v. FCC*, 838 F.2d 551, 556-58 (D.C. Cir. 1988).

¹⁸⁵ See *infra* Section III.C.1.

considered fair, it has evaluated the question with reference to the costs of providing the relevant service, including in the context of ICS.¹⁸⁶ 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.”¹⁸⁷ There, however, the Commission was focused on fair compensation from the perspective of ensuring that payphone providers received compensation that was not too low.¹⁸⁸ 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.¹⁸⁹ 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

¹⁸⁶ *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3254-59, paras. 14-26 (2002) (interpreting what “fairly compensated for each and every call” means under section 276 in the context of ICS by reference to the costs of ICS).

¹⁸⁷ *Payphone Order on Reconsideration*, 11 FCC Rcd at 21269, para. 72.

¹⁸⁸ In particular, the Commission was explaining why it rejected ICS providers’ proposal that they be entitled to receive an additional \$0.90 federal rate element per call even though they were negotiating agreements for compensation. *Id.* Further, the Commission’s analysis in the underlying decision at issue in that Order on Reconsideration indicates that, in deferring to compensation amounts in negotiated agreements, the Commission was particularly focused on the adequacy of compensation from the perspective of the payphone service provider. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541, 20578-79, paras. 73-74 (1996) (*Payphone Report and Order*) (discussing how negotiations would enable payphone providers to adequately protect their interests against the backdrop of default Commission-specified compensation amounts and observing that a mandatory per-call recovery amount for ICS providers “could possibly lead to a double recovery of costs”).

¹⁸⁹ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 at 21302-03, para. 82 (2002) (“fair” compensation under section 276 “implies fairness to both sides”); *Payphone Third Report and Order* 14 FCC Rcd 2545 at 2570, para. 55 (“PSPs will be fairly compensated if, at a minimum, we . . . balance interests of PSPs and those parties that will ultimately pay the default compensation amount.”); see also *Payphone Report and Order* 11 FCC Rcd at 20568 para. 51 (stating the Commission’s intention to revisit the deregulated local coin rate if locational monopolies or other market failures allowed payphone owners to be overcompensated).

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.¹⁹⁰

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.¹⁹¹ 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."¹⁹² Beyond harming the end users paying ICS rates, excessive ICS rates, and the resulting negative consequences, harm the public more generally.¹⁹³ 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.

¹⁹⁰ 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 (including any applicable per-connection charges). *See infra* para. 88.

¹⁹¹ *See, e.g., 2012 ICS NPRM*, 27 FCC Rcd at 16637, para. 18 (seeking comment on the "costs associated with the per-call charge" and whether "a prohibition on per-call charges would result in below-cost service"); *id.* at 16637, para. 19 (seeking comment on "costs associated with call security and [whether they are] incurred on a fixed or per-call basis"); *id.* at 16637, para. 20 (stating that "[c]ommenters advocating an alternative per-minute rate cap should provide specific, detailed cost information and other relevant data to support their proposed per-minute rate caps"); *id.* at 16637-38, para. 21 (seeking evidence with respect to the claim that the Petitioners' "proposed per-minute rate caps are arbitrary and capricious because they would preclude providers from recovering their legitimate costs of providing service"); *id.* at 16638, para. 25 (seeking "comment on whether the ICS Provider Proposal has provided sufficient cost, demand, and revenue detail to allow the Commission to determine whether the proposed rates are just and reasonable"); *id.* at 16638, para. 26 (seeking "comment on whether the underlying cost and demand factors for public payphones and ICS are similar enough to justify using a cost methodology designed for public payphones to set ICS rates"); *id.* at 16642-43, para. 37 (seeking comment on the treatment of site commissions, including whether "location rents are not a cost of payphones, but should be treated as profit"); *id.* at 16642, para. 35 (seeking "comment on any other proposals parties contend address the concerns raised in this proceeding"); *see also* NASUCA 2013 Comments at 4 ("As a means of securing just and reasonable rates, the ICS rules adopted by the Commission should therefore require ICS providers to justify their rates and their costs. The rules should declare that rates for interstate ICS calls are unjust and unreasonable to the extent the rates exceed the reasonable costs of providing ICS, including a reasonable return.").

¹⁹² 47 U.S.C. § 276(b)(1).

¹⁹³ *See id.*

52. We recognize that the term “cost” is itself ambiguous, and a range of possible interpretations of this term might be reasonable.¹⁹⁴ 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).¹⁹⁵ 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.¹⁹⁶ On the other hand, costs not related to the provision of ICS may include, for

¹⁹⁴ See, e.g., *Verizon Comm. v. FCC*, 535 U.S. 467, 500 (2002).

¹⁹⁵ We acknowledge that ICS providers will have to apportion their costs between interstate and intrastate ICS calls. However, we leave it up to the individual providers to determine the best and most efficient way to do so for their companies. Contrary to the Dissent’s suggestion, we are not imposing rate-of-return regulation on ICS providers. Cost considerations may and frequently do play a role in rate cap regulatory regimes without *ipso facto* converting such regimes into rate of return regulation. Indeed, the Dissent itself acknowledges the need for cost data and thus a cost analysis for waiver requests, see n. 310 *infra*, and, as the Dissent notes, rate of return regulation is complex; it requires *ex ante* review, tariff filings, detailed cost support in compliance with various accounting rules, and a prescribed rate of return, among other things. Dissent at 128-129. However, the rate cap approach that we adopt here is fundamentally different than rate-of-return regulation. Our approach does not rely on a prescribed rate of return, *ex ante* review, tariff filings, or compliance with cost accounting rules. Instead, our approach is tailored to provide flexibility for the ICS providers. See, e.g., *infra* para. 69.

¹⁹⁶ Examples of costs that the Commission would likely find appropriate for inclusion in interstate ICS rates include costs that are closely related to the provision of interstate ICS. Such costs may include costs of the equipment housed in the confinement facility or in remote locations. Costs for originating, switching, and the transport and termination of calls, which permit calls to be originated and completed, will likely constitute recoverable costs. See, e.g. GTL 2013 Comments at 5 (“GTL provides durable telephone receivers to minimize prison maintenance costs. . . .”). Security features inherent in the ICS providers’ network would also likely constitute recoverable costs. See GTL 2013 Comments at 4-5; Securus 2013 Comments at 3; NSA 2013 Comments at 1; County of Santa Clara DOC 2013 Comments at 1. Examples of such costs include the costs of recording and screening calls, as well as the blocking mechanisms the ICS provider must employ to ensure that inmates cannot call prohibited parties. See, e.g., CenturyLink 2013 Comments at 8-9; GTL 2013 Comments at 4-5; Telmate 2013 Reply at 4-5. Moreover, ICS providers discuss the capital investments they have made for more sophisticated security features—including biometric caller verification based on voice analysis, and sophisticated tracking tools for law enforcement. See GTL 2013 Comments at 4-5; Securus 2013 Comments at 3; Letter from John E. Benedict, VP – Federal Regulatory Affairs & Regulatory Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 26, 2013) (CenturyLink July 26, 2013 *Ex Parte* Letter) (asserting that “in the past few years,” its calling platform “has been upgraded to include features such as voice biometrics, tracking location of cell phones receiving calls, link analysis software, audio word search, and contraband cell phone extraction equipment and integration”). We also would likely find the costs of the storage of inmate call recordings, which are necessary for court proceedings, and any reports that the ICS provider must provide to the confinement facility are recoverable as well as the costs of maintenance and repair of the ICS network. See GTL 2013 Comments at 9; County of Santa Clara DOC 2013 Comments at 1. Costs relating to billing and collection of ICS charges are also likely recoverable. See Securus 2013 Comments at 4; CenturyLink 2013 Comments at 7.

example, site commission payments,¹⁹⁷ 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.¹⁹⁸

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.¹⁹⁹ 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.”²⁰⁰ 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.²⁰¹ After carefully considering the record, we reaffirm the Commission’s previous holding and conclude that site commission payments²⁰² are not part of the cost of providing ICS and therefore not compensable in interstate ICS rates.²⁰³

¹⁹⁷ In this Order we find that site commissions are not recoverable through interstate ICS rates because the record makes clear that they are not a direct cost of providing interstate ICS. If commissions or other payments from ICS providers to correctional facilities reflect costs of providing ICS, providers have several avenues available to them. *See infra* note 203.

¹⁹⁸ *See, e.g.*, Pay Tel 2013 Comments at 13 (asserting that jail officials today are requiring ICS providers to integrate calling systems with other services such as commissary ordering and internal and external messaging); CenturyLink 2013 Comments at 8 (contending that ICS providers must at times bear the costs associated with “complex systems integrations with other providers/systems such as commissary banking/trust, and offender management databases”).

¹⁹⁹ *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3262, para. 38 (“[C]ommissions . . . represent an apportionment of profits between the facility owners and the providers of the inmate payphone service.”). We acknowledge that the term “site commission payments” is broad and what these payments reflect—and the terminology used to describe them—may vary from facility to facility. For purposes of this Order, our reference to “site commission payments” refers to payments in money or services from ICS providers to correctional facilities or associated government agencies, regardless of the terminology the parties to the agreement use to describe them.

²⁰⁰ *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3254-55, para. 15; *2012 ICS NPRM*, 27 FCC Rcd at 16642-43, para. 37. The Commission has used location rents and site commissions synonymously throughout its ICS proceedings. *See id.*

²⁰¹ *See supra* para. 53.

²⁰² Many commenters support this finding. *See* HRDC 2013 Reply at 4 (asserting that it is the responsibility of correctional agencies and legislatures to provide rehabilitative programs for prisoners); Petitioners 2013 Reply at 26-27; *see also* Hamden 2013 Reply at 3-4; NASUCA 2013 Comments at 3-4, 10 (asserting that the FCC has recognized that commissions are profits for ICS providers rather than costs of ICS); Petitioners 2013 Comments at 21-23 (asserting that it is an unjust and unreasonable practice to require ICS customers to contribute *solely* for the purpose of providing excess profits to be divided between the ICS provider and the corrective agency) (emphasis in original); PLS 2013 Comments at 4-5 (asserting that it is unjust and unreasonable to fund these rehabilitative activities as a hidden cost in telephone bills paid by the families of prisoners, explaining that such charges serve as a hidden tax on a largely low-income and vulnerable population); Verizon 2013 Comments at 3-5 (stating that commissions have their place and are often used to fund programs that benefit inmates but they should be funded from other sources); NASUCA 2013 Reply at 10-11 (arguing that the unsupported variability of commissions is an indicator that they do not provide a reasonable basis for rates).

²⁰³ Although it is clear that site commissions are a revenue stream to the correctional facility, we cannot foreclose the possibility that some portion of payments from ICS providers to some correctional facilities may, in certain circumstances, reimburse correctional facilities for their costs of providing ICS. As a result, we provide several

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55. We disagree with commenters²⁰⁴ 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).²⁰⁵ 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).²⁰⁶ 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.²⁰⁷ This argument is analogous to that considered in the *USF/ICC Transformation Order*,

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avenues for exploring this issue further. First, we set the interim safe harbors and interim rate caps at conservative levels above costs in our record. Second, any ICS provider seeking a waiver of the rate cap or seeking to justify costs between the safe harbor and the interim rate cap may provide specific details about payments to correctional facilities that it contends are compensable for costs meeting our cost standards through interstate ICS rates as articulated in this Order. Third, as part of the mandatory data collection we initiate below, we will seek further information on payments to correctional facilities and whether they cover any costs of service. Finally, in our accompanying Further Notice, we seek comment on whether we should categorically find that payments to correctional facilities are not compensable costs, or whether there are certain compensable costs that those payments can legitimately address. In his Dissent, Commissioner Pai notes that this Order recognizes that excluding site commissions from cost data used to develop our safe harbor benchmark and rate cap may be an "underinclusive approach given that correctional institutions themselves often incur costs to provide ICS and those costs may need to be included in any costs-of-service estimates." See Dissent at 116, n.44. While it is correct that the rates and cost studies that the Commission used as a basis for the safe harbor benchmarks and the interim rate caps do not include site commission payments, the Commission did not exclude them. Rather, the rates used to establish the safe-harbor benchmarks are rates for service in states that have prohibited site commission payments. Also, the ICS provider cost studies that we use as a basis for the interim rate caps adopted in the Order were prepared by the ICS providers to show costs of service excluding site commission payments. See *infra* para. 75. Furthermore, we do not remove costs or adjust inputs from the data used to establish the interim rate caps. For example, both cost studies used to establish the interim rate caps use an 11.25% rate of return to determine the cost of capital. We do not opine on whether this input is appropriate in this context. Instead, we accepted the figures in the cost study, as asserted, without considering whether they represent accurate levels of costs that are reasonably and directly related to provision of interstate ICS and, therefore, are appropriately recoverable through interstate ICS rates. Consequently, it is likely that these cost figures are overstated, but we accept that possibility as part of our decision to set conservative interim rate cap levels.

²⁰⁴ See GTL 2013 Comments at 12-13; Telmate 2013 Comments at 13-14.

²⁰⁵ We likewise disagree with commenters that suggest that the adoption of reasonable rates for interstate ICS requires the Commission to make judgments about the management and operation of correctional facilities. See, e.g., Securus 2013 Comments at 8-10; CCPS 2007 Comments at 4. The relevant Commission inquiries include whether rates are reasonable and whether costs are compensable. Articulating cost-based rates in other contexts has not required us to make judgments about how the customers of various communications providers run their businesses. For example, in determining whether location rents were compensable costs in the traditional payphone context, the Commission did not make any inquiry into the management or operation of the businesses in which payphones were located. See *Payphone Third Report and Order*, 14 FCC Rcd at 2615-16, paras. 154-56. Nor do we need to do so here.

²⁰⁶ Moreover, GTL argues that the FCC's prior conclusion did not take into account the fact that ICS "are quite different from the public payphone services that non-incarcerated individuals use" or that ICS "is economically different than other payphone services." GTL 2013 Comments at 12-13.

²⁰⁷ See, e.g., *Payphone Third Report and Order*, 14 FCC Rcd at 2615-16, paras. 154-56 (discussing location rents).

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.”²⁰⁸ 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).”²⁰⁹ 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.²¹⁰

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.²¹¹ 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.²¹²

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.²¹³ Law enforcement and correctional facilities assert that some or all of these programs would cease or be reduced if commission payments were not received²¹⁴ as no other funding source would be available.²¹⁵

²⁰⁸ Petitioners 2013 Comments at 21-22; *USF/ICC Transformation Order*, 26 FCC Rcd at 17876-77, para. 666.

²⁰⁹ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17876-77, para. 666.

²¹⁰ Cf. *USF/ICC Transformation Order*, 26 FCC Rcd at 17883-85, paras. 684-86 (adopting the proposal that “payments made by a LEC pursuant to an access revenue sharing arrangement should not be included as costs in the rate-of-return LEC’s interstate switched access revenue requirement because such payments have nothing to do with the provision of interstate switched access service”).

²¹¹ See GTL 2013 Comments at 3, 6, 10-11; Securus 2013 Comments at 9-10 (asserting that the authority to impose site commissions is within the correction agency’s authority and the Commission cannot prohibit providers from relying on site commissions “to generate the funds they require”); Telmate 2013 Comments at 16 (asserting that the FCC must carefully assess whether a decision to overrule state and local collection of ICS commissions should be made by Congress rather than by an independent administrative agency).

²¹² See Letter from Peter Wagner, Executive Director, Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-3 (filed Aug. 1, 2013) (noting that “an overly narrow concept of commissions leaves some glaring loopholes” that have made some state reform initiatives “far less effective than originally expected,” including some “rebranding” of commissions as “administrative fees, with no actual change;” and urging the Commission to “take an expansive view of the commission system” so that companies do not continue to exert a “wild west attitude” toward reform attempts).

²¹³ Some commenters indicate that site commission payments also may help cover the correctional facilities’ costs of facilitating phone calls, video visits, security monitoring, and administration of the phone system. See La. DOC 2013 Comments at 3-5; TurnKey 2013 Comments at 4 (explaining that jails have to provide staff supervision, some equipment, and space for inmates to call or video visit with friends and relatives); CSSA 2013 Comments at 1.

²¹⁴ See, e.g., La. DOC 2013 Comments at 3, Routt Cnty. Sheriff’s Office 2013 Comments at 1; San Diego Cnty. Sheriff’s Dep’t. 2013 Comments at 1; SDDOC 2013 Comments at 3.

²¹⁵ See Idaho DOC 2013 Comments at 1; La. DOC 2013 Comments at 5; County of Santa Clara DOC 2013 Comments at 2; NSA 2013 Comments at 2 (commenting that counties may need to increase taxes). *But see* Letter

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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.²¹⁶ 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.²¹⁷ 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.²¹⁸ 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.²¹⁹ 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.²²⁰ Our interim rate caps are based on cost studies that include the cost of advanced security features such as continuous voice biometric identification.²²¹

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.²²² Below, we adopt interim rate caps that include interim safe harbors setting boundaries for rates

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 from Michael S. Hamden to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, NSA Resolution, at 2 (filed Oct. 28, 2008) (NSA Resolution including language urging “the FCC to establish a firm ceiling for reasonable inmate calling rates and to enforce that ceiling”).

²¹⁶ See Letter from Jay Gainsboro, Founder, JLG Technologies to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 Attach. at 4 (filed July 17, 2013) (JLG White Paper). According to one report, inmates have been documented using ICS to order executions, to continue running organized crime operations; to continue the direction of large drug trafficking, manufacturing and distribution activities; to order or participate in gang activities; and even to conspire to commit acts of terrorism. *Id.*; see also NSA 2013 Comments at 1 (explaining that individuals in local jails try to continue their criminal activities on the outside via ICS while they are incarcerated, contact witnesses with wrongful intent, call their victims, and plot and plan criminal enterprises with regularity).

²¹⁷ See JLG White Paper at 4; see also Securus 2013 Reply at 1-2.

²¹⁸ See *supra* para. 53 & n.196.

²¹⁹ See generally JLG White Paper; see also NSA March 25, 2013 *Ex Parte* Letter at 1; Coconino Cnty. Sheriff’s Office 2013 Reply at 1; Deschutes Cnty. Sheriff’s Office 2013 Reply at 1; Thurston Cnty. Sheriff’s Office 2013 Reply at 1-2; OSSA 2013 Reply at 2.

²²⁰ See Transcript of Reforming ICS Rates Workshop, at 186-87 (Jason Marks, former Commissioner, New Mexico Public Regulation Commission, stating that “There are no security problems in New Mexico.”); NY DOCCS July 16, 2013 *Ex Parte* Letter at 1 (discussing the NY statute that requires the “department to . . . ensure that any inmate phone call system . . . provides reasonable security measures to preserve the safety and security of each correctional facility”).

²²¹ See Pay Tel Cost Summary at 3, 8, 15.

²²² See generally *2012 ICS NPRM*, 27 FCC Rcd at 16636-47, paras. 16-48. From the outset, Petitioners made clear that their proposed rate caps were designed to ensure that ICS rates better reflected the costs of providing ICS service. See, e.g., *Alternative Wright Petition* at 4, 16-18 (the Commission should base caps on charges for

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comparable services as well as service costs, because even though it “is not a pure cost-based methodology,” reliance on rates for comparable services “enables [the Commission] to bring rates closer to costs”). The Commission sought comment on these proposed caps, and on possible variations, seeking comment throughout the *2012 ICS NPRM* on ways of regulating ICS rates based on the costs of providing ICS. *See supra* para. 48 & n.191. Moreover, the “just and reasonable” standard under section 201(b) has traditionally been construed to require rates to be cost-based, absent Commission justification for a departure from that approach. *See supra* para. 45. The Commission also historically has evaluated the issue of fair compensation under section 276 with reference to the costs of providing the relevant service, including in the context of ICS. *See supra* para. 46. In this context, no one can be surprised that the Commission is now adopting caps and taking other steps to ensure that rates reflect costs.

More specifically, the Commission sought comment on how any caps should be set and how they should operate. *See, e.g., 2012 ICS NPRM*, 27 FCC Rcd at 16637, para. 20 (seeking comment on the cap proposal in the Alternative Wright Petition, including whether “the proposed rate caps [are] just and reasonable consistent with sections 201 and 276 of the Act,” and “[i]f not, [whether] different rate caps [would] be appropriate,” as well as the “factors [] the Commission [should] consider in determining an appropriate per-minute rate cap”); *id.* at 16638, para. 22 (seeking comment on “benefits to per-minute rate caps,” as well as “perceived problems or challenges associated with” such caps); *id.* at 16638, para. 23 (seeking comment on how the Commission should implement rate caps in the ICS market if it decided to do so). What we do here is establish a system that relies on rate caps as well as potential complaints that rates are not based on costs, which is the kind of variant on rate caps that was contemplated in the *NPRM*. The *2012 ICS NPRM* also specifically highlighted the relationship between possible rate caps and tailoring rates to the cost of providing service. For example, in earlier comments on these issues the GEO Group argued that there were variations among facilities in the costs of providing ICS and to reflect those in setting rate maximums the Commission would need to rely on facility-specific ICS cost evaluations. GEO Group 2007 Comments at 10-11. The *2012 ICS NPRM* sought comment on those arguments, in conjunction with asking how the Commission should implement rate caps if it decided to do so. *2012 ICS NPRM*, 27 FCC Rcd at 16638, para. 23 & n.76; *see also* Petitioners 2007 Reply at 15 (observing that “[s]ome opponents [of Petitioners’ proposal] go so far as to suggest that each prison facility should have its own individualized cost-based rate”) (citing GEO Group 2007 Comments at 10). The rate cap approach we adopt addresses both the concern about variability in ICS costs and the potential disconnect between a particular rate cap and the cost of providing ICS service. In particular, it sets caps at a level designed to reflect the evidence of potential variability in ICS costs, *see* Section III.C.3.b(i), while also operating in a manner that enables rates to be linked back to costs on an ongoing basis, similar to the rate benchmark advocated by NASUCA in its comments in response to the *2012 ICS NPRM*, *see infra* note 224. We thus disagree with the Dissent that there was inadequate notice for the Commission to specify a cost-based rate requirement as part of a rate cap framework such as the one adopted here. *See* Dissent at 112-116. The *2012 ICS NPRM* sought comment on the relevant issues and made clear that we were contemplating such a rule; at a minimum, it plainly left open the possibility that we would implement rate caps in a manner that addressed concerns about the variability in ICS costs, such that the notice “adequately frame[d] the subjects for discussion.” *Omnipoint v. FCC*, 78 F.3d 620, 631-32 (D.C. Cir. 1996) (citing precedent that “[a] final rule is not a logical outgrowth of a proposed rule ‘when the changes are so major that the original notice did not adequately frame the subjects for discussion,’” and holding that the Commission’s action there was a logical outgrowth of its notice where the notice had identified certain concerns about extending a rule but the record revealed ways to address those concerns, leading the Commission to modify the rule as the commenters proposed); *see also, e.g., Nat’l Mining Ass’n v. Mine Safety and Health Admin.*, 512 F.3d 696, 699-700 (D.C. Cir. 2008) (rule was a logical outgrowth of a proposal where the proposal suggested a particular rule but left open certain questions about how it would be implemented). Contrary to the Dissent’s claim, this conclusion is consistent with the recent *Time Warner* decision, which merely applied existing case law to find that a particular rule – the so-called “standstill” rule – was promulgated in violation of the APA. *Time Warner Cable Inc. v. FCC*, Nos. 11-4138(L), 11-5152(Con), slip op. (2d Cir. Sept. 4, 2013); *see* Dissent at 113, 115. There, the Commission had not provided notice of issues related to the standstill rule but nonetheless adopted it primarily based on the belief that it fell within the APA’s exception for procedural rules, *see* slip op. at 19. The Court found that the standstill rule was substantive, not procedural, and then held that the rule – once stripped of its presumed exemption under the APA – could not be considered a logical outgrowth of issues considered in the earlier *NPRM*, whose solicitations were so general that not a single party commented on the merits of a possible standstill provision. *Id.* at 60-63. In contrast, the framework at issue here was never viewed as exempt from the APA’s notice requirements; has evolved out of specific rate cap and cost issues teed up in the *2012 ICS NPRM*; and was the subject of extensive comments, reply comments, and ex parte submissions in the record, including the submission of cost studies intended to provide a basis for rates adopted by the Commission.

that will be treated as lawful absent a Commission decision to the contrary,²²³ and serve to minimize regulatory burdens on ICS providers.²²⁴ The interim rate cap framework we adopt enables providers to charge cost-based rates up to the interim rate caps.²²⁵

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.²²⁶ 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,

²²³ See *infra* Section III.H.

²²⁴ As described in greater detail below, our rate caps are similar to rate benchmarks proposed by NASUCA that would operate “without prejudice to any party’s ability to argue that a higher or lower rate is in fact just and reasonable in a particular case.” NASUCA 2013 Comments at 5-6. Because we conclude that our rate caps are set conservatively, *see infra* para. 83, we rely on a waiver process for ICS providers with costs that necessitate higher rates to justify rates above the rate caps. *See infra* Section III.C.3.b(ii). We also allow the Commission or others to challenge ICS providers’ rates set at or below the level of the cap if not cost-based, in which case we may require lower rates, potentially including refunds. *See infra* Section III.H.4. However, to ease administrability, provide additional protection for ICS providers under this interim framework, and focus the Commission’s resources where they are most likely to be beneficial, we insulate providers from the possibility of being subject to refunds when charging rates at or below the interim safe harbor levels. Consistent with our discussion above, *see supra* note 222, we disagree with the Dissent that there was insufficient notice to adopt rate caps that include a safe harbor mechanism. Dissent at 114-115.

²²⁵ As noted above, we emphasize that ICS providers should not read this Order as providing a basis to increase rates up to either the interim safe harbor or interim rate caps, though they may raise rates to the extent necessary to recover their direct and reasonable costs on a holding-company level. *See supra* note 19.

²²⁶ To ensure that ICS providers are fairly compensated, we adopt a number of provisions that will ensure providers have adequate flexibility to implement the rates we establish. We also note that the “fair” standard in section 276 considers the impact on consumers. *See supra* para. 14. An ICS provider will lose the benefit of the safe harbor if rates at any of the facilities it serves exceed the safe harbor rate levels. We impose this requirement for several reasons. First, the record makes clear that ICS providers typically serve multiple correctional facilities by providing many of the necessary functionalities out of centralized locations. *See, e.g.*, Pay Tel 2013 Comments at 13; Securus 2013 Comments at 4. Doing so significantly reduces the costs incurred on an individual facility basis. Moreover, the record indicates that ICS providers often obtain exclusive contracts for several facilities in a state, rather than specific rates per facility. *See, e.g.*, Request for Proposal for Contractual Services, Inmate Calling services RFP No. 2505Z1, available at <http://www.prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=Nebraska> (ICS contract between Public Communications Services, Inc. and Nebraska Department of Correctional Services, dated July 8, 2008); *see also* Susskind June 6, 2013 *Ex Parte* Letter. Second, we have adopted interim safe harbor rates at conservative levels to ensure that providers are fairly compensated across facilities with different cost levels. In doing so, we find it would be unreasonable to allow ICS providers to be subject to the burdens of a challenge for only their higher cost facilities while, at the same time, obtaining the benefits of the safe harbor to protect rates in their lower cost facilities. *See infra* para. 121.

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.²²⁷ 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.²²⁸ 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.²²⁹ We set our interim safe harbor at conservative levels to account for the fact that there may be cost variances among correctional facilities.²³⁰

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

²²⁷ HRDC 2013 Comments, Exh. A; HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B.

²²⁸ The state departments of correction that do not include commissions are Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island, and South Carolina. *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B. Although California expressly does not include commission payments in its ICS rates, analysis of its ICS contract indicates its ICS rates recover the costs of significant in-kind contributions that, under the contract, the ICS provider is required to make, in addition to the costs of ICS. *See* Standard Agreement, *available at* http://www.prisonphonejustice.org/includes/_public/rates//California/CA_current_rates_from_2012_contract.pdf (ICS rate sheet for contract between GTL and California Technology Agency, dated May 31, 2012). Because California's ICS rates recover the costs of required in-kind contributions, we find that these rates are dissimilar to the other seven states that have prohibited site commissions and we therefore do not include California in the subset of data used to derive the interim safe harbor.

²²⁹ Our use of these states' data does not indicate that we conclude these interstate rates are necessarily at cost. Instead, we select them because they exclude site commissions, which we find is the most important factor leading to interstate ICS rates being above cost. There may well be other factors driving these rates above what we would consider to be reasonable cost but we nevertheless include these states to make a conservative safe harbor rate level calculation.

²³⁰ *See infra* para. 69. We note that in this Order we are not simply "calling" our measures conservative, *cf.* Dissent at 120, but rather are relying on record evidence in a conservative fashion. Indeed, as we emphasize herein, the rates we set for the safe harbor and cap reflect costs that *exceed* the cost data that any party submitted in the record.

The Dissent also faults the Order for setting a uniform rate based on average costs of serving multiple facilities, claiming that a "one-size-fits-all" approach is inherently arbitrary. Dissent at 120-123. But the Dissent itself supports a uniform rate cap of 19 cents a minute for debit calls, to apply to all prisons regardless of size. Dissent at 131. Moreover, if this argument had merit, it would mean that the Commission never could base a rate on any approach that relied on the averaging of relevant record data. If this argument were to be accepted, it would lead to absurd results, requiring the Commission to eschew any form of averaging – whether across providers, across facilities, across geographic regions, or across calls – whenever there is some degree of "variability" in the averaged data. Dissent at 120-121. In the end, it would not be possible, much less practical, to set this kind of exquisitely granular rate – unsullied by any taint of averaging notwithstanding the Dissent's arguments. Requiring such an outcome would be at odds with the Commission's long-standing practice of basing prescribed rates on some form of averaged data. *See infra* note 280.

approaches are substantially similar.²³¹ 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.²³² 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.²³³ 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 category²³⁴ and average those rates to obtain an overall per minute average of \$0.1227, which we round to \$0.12 per minute.²³⁵ We therefore adopt \$0.12 as the safe harbor per minute

²³¹ See HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (citing states such as Arizona, Maryland, Missouri, Nebraska, New Hampshire, South Carolina, South Dakota, and Virginia where rates for pre-paid and debit calls are the same and are both below those for collect calls).

²³² We find that the record supports an average call duration of 15 minutes. The record contains various assertions as to the call duration that should be used for purposes of calculating ICS rates. Petitioners use a 15-minute call duration as the basis for their proposal. Petitioners 2013 Comments, Exh. C, Bazelon Decl. at 14. They also state that in 2010 the average duration for interstate ICS calls in California prisons was 12.1 minutes. *Id.* The flat interstate ICS rates in South Carolina are based on a maximum 15-minute call length. *See* State of South Carolina B&CB DSIT DOC Inmate Calling System Contract, *available at* http://www.prisonphonejustice.org/includes/_public/contracts//South%20Carolina/SC_contract_with_GTL_20112016_with_RFP.pdf at 17 (ICS contract between GTL and the South Carolina DOC dated April 22, 2011). The flat interstate ICS rates in New Mexico are based on a 20-minute maximum call length. *See* New Mexico ICS Contract, Attach. A. Securus states that the average duration of interstate calls across all of its facilities in 2012 was 11.63 minutes. Securus 2013 Comments, Expert Report of Stephen E. Siwek at 8. Given that lower rates tend to stimulate usage, it is reasonable to anticipate that call durations would tend to increase under our rates. We therefore utilize a 15-minute call duration to convert per-call charges to per-minute charges.

²³³ To derive this per minute average, we initially converted the per-call charges that some of the states include in their rates to per-minute charges using a 15-minute call duration. For example, the ICS provider for South Carolina's state prisons charges a \$0.75 per-call charge which was divided by 15 minutes to yield a per-minute charge of \$0.05. We added the resulting per minute amounts to the per-minute rates also charged by the providers for the eight states to derive a total per-minute charge for each state. Finally, we averaged the total per-minute charges for the seven states to arrive at the average per-minute rate of \$0.12. The rate data was submitted by HRDC. *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B.

²³⁴ *See supra* note 231.

²³⁵ Even with such rounding, we conclude that our interim safe harbor is conservative. Indeed, in evaluating the data from the states that have eliminated the use of commissions, we note that there are five state rates with a cluster within the \$0.04 - \$0.08 per minute range and two other states outside this cluster with significantly higher rates. *Compare* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (per-minute rates for interstate debit calls of \$0.043 for New Mexico, \$0.048 for New York, \$0.05 for Missouri and South Carolina, and \$0.08 for Nebraska) *with id.* (per-minute rates for interstate debit calls of \$0.21 for Michigan and \$0.348 for Rhode Island) (assuming a 15 minute call duration to translate per-call charges into effective per-minute rates). Given that evidence in the record does not suggest a dramatic difference in costs among states (and, indeed, such states may be served by the same ICS provider using common, centralized facilities), the states with higher rates are likely to include non-ICS costs and therefore could reasonably be excluded from the state rate data used to determine a reasonable interim safe harbor for interstate debit ICS rates. Excluding these states would result in an average per-minute rate of \$0.054, less than half the safe harbor debit rate we set above. Although evidence in the record suggests that some of the seven states that have eliminated commissions may continue to include significant non-ICS costs in setting rates, in the interest of being conservative in setting our interim safe harbor, we choose not to exclude these states from our calculation.

Moreover, looking at these states from a statistical perspective, the two states with higher rates, Michigan and Rhode Island, have an average debit cost of \$0.279 per minute whereas the other five states have an average debit cost of \$0.054 per minute, less than one-fifth of the Michigan and Rhode Island level. An analysis of variance (ANOVA) indicates that this difference of \$0.225 per minute is statistically significant ($p = 0.002$) under assumptions of

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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 15.²³⁶

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.²³⁷

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,²³⁸ 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.²³⁹ 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

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normality. That is, there is only one chance out of 500 that one would randomly draw a sample with these characteristics if all seven rates came from a normal distribution with a common mean and standard deviation. Consequently, statistical evidence indicates that Michigan and Rhode Island debit costs are drawn from a different distribution than the debit costs for the other five states.

²³⁶ See *infra* para. 88.

²³⁷ This interstate collect ICS rate is likewise conservative. The collect rate data of the seven states that have eliminated site commissions reflect substantially the same distribution pattern as did the debit and prepaid rates. See *supra* note 235. Five state rates are clustered in a relatively low range between \$0.04 and \$0.12 with the same two states' rates being significantly higher. Given the lack of record evidence suggesting a dramatic difference in costs among states, the states with higher rates likely include non-ICS costs and therefore could reasonably be excluded from the state rate data in a determination of a reasonable interim safe harbor for interstate collect ICS rates. Excluding these states would result in an average per-minute rate of \$0.074, or approximately half the safe harbor rate we set above for interstate ICS calling. In the interest of being conservative in setting our interim safe harbor, however, we choose to include these states from our calculation. A statistical analysis of the state rate data would also lead to exclusion of these two states. Consistent with our view that both Michigan and Rhode Island departments of corrections debit rates likely include non-ICS costs, which we consider irrelevant to the recovery of ICS, both states stand out as unusual in the distribution of per-minute rates for a 15-minute collect call. They are the only states with collect rates that exceed \$0.117 per minute. Taken together, Michigan and Rhode Island have an average collect rate of \$0.3085 per minute, while the other five state have an average collect rate of \$0.0742 per minute, less than one-fourth that of Michigan and Rhode Island. An analysis of variance (ANOVA) indicates that this difference of \$.234 per minute is statistically significant ($p = 0.0045$) under assumptions of normality. That is, there is only one chance out of 220 that one would randomly draw a sample that looked like this if all seven rates came from a normal distribution with a common mean and standard deviation. Consequently, the evidence indicates that Michigan and Rhode Island collect rates are drawn from a different distribution than the collect rates for the other five states.

²³⁸ See HRDC 2013 Comments, Exh. A; HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (New York charges \$0.048 per minute for all calls (\$0.72 total for a 15-minute call), New Mexico charges a flat rate of \$0.65 per call for all calls (\$0.043 per minute for a 15-minute call), and South Carolina charges effective rates of \$0.05 per minute for debit calls and \$0.12 per minute for collect calls (based on flat fees; assuming a 15 minute call)).

²³⁹ The states are Colorado, Connecticut, Florida, Louisiana, Massachusetts, Montana, New Hampshire, North Carolina, Oklahoma, and Vermont. See HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B. Per-call rates were translated into per-minute rates by assuming a 15 minute call duration.

their commissions are deducted.²⁴⁰ Additionally, our interim safe harbor rate levels closely approximate the rates currently being charged in ICE-dedicated facilities.²⁴¹

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.²⁴² 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.²⁴³ 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.²⁴⁴ Telmate also saw an increase of up to 300 percent in call volume when it lowered its rates elsewhere.²⁴⁵ Given the largely fixed cost nature of the ICS industry,²⁴⁶ 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.²⁴⁷

67. *Other Methodologies.* We find that using comprehensive state rate data²⁴⁸ to establish the interim safe harbor rates is preferable to other methodologies proposed in the record. For example,

²⁴⁰ The states are Connecticut, Florida, Indiana, Louisiana, Massachusetts, Montana, Oklahoma, North Carolina, and Wisconsin. *Id.* Per-call rates were translated into per-minute rates by assuming a 15 minute call duration.

²⁴¹ See Telmate July 26, 2013 *Ex Parte* Letter at 2 (Telmate and its licensee Talton Communications, Inc. provide ICS services to ICE detainees at prices of \$0.1235/minute (prepaid calling anywhere in the United States) and \$0.15/minute (collect calling anywhere in the US.).

²⁴² Petitioners 2013 Comments, Exh. C, Bazelon Decl. at 14; see also Securus 2013 Reply at 9-10 (agreeing with the percentage increase in usage but ascribing it to a single rate decrease by New York).

²⁴³ See NY DOCCS July 16, 2013 *Ex Parte* Letter at 2.

²⁴⁴ See Telmate 2013 Comments at 13.

²⁴⁵ See Telmate July 26, 2013 *Ex Parte* Letter at Attach; see also Transcript of Reforming ICS Rates Workshop at 253 (Richard Torgersrud, Chief Executive Officer, Telmate) (“we have done this in Oregon Department of Corrections, Montana Department of Corrections and we’ve done it for Homeland Security where we have implemented 16 cents per minute or less for calls. In doing so, we’ve seen up to 300 percent increase in call volume”).

²⁴⁶ See, e.g., CenturyLink 2013 Comments at 7 (“In general, the telecommunications business is a high fixed cost business, and most fixed costs are incurred before any revenues are generated. This is especially true in the ICS market.”).

²⁴⁷ Petitioners and Securus both attempt to quantify the elasticity of demand for ICS. Petitioners estimate the elasticity of demand to be -0.63 based on the increase in call volumes following New York’s rate reduction in 2007. Petitioners 2013 Comments, Exh. C, Bazelon Decl. at 22-23. Securus disputes in part Petitioners methodology and instead calculates a relatively higher demand elasticity of -0.72. Securus 2013 Reply, Expert Rebuttal Report of Steven E. Siwek at 4. Neither calculation takes into consideration the much more considerable call volume increases that took place in New York in subsequent years. See NY DOCCS July 16, 2013 *Ex Parte* Letter at 2 (reporting an estimated increase of approximately 160% between 2006 and 2013). This level of usage increase indicates that demand elasticity may be greater than estimated by either party. Additionally, Telmate reported data for the Oregon Department of Corrections that also show greater demand elasticity. See Telmate July 26, 2013 *Ex Parte* Letter, Attach. A at i (by lowering its rate for the Oregon Department of Corrections for all calls by approximately 43 percent, call volume increased approximately 48 percent).

²⁴⁸ See generally HRDC June 8, 2013 *Ex Parte* Letter at Rev. Exh. B.

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.²⁴⁹ Using their methodology, Petitioners propose a per-minute rate of \$0.07 for both collect and debit interstate ICS calls.²⁵⁰ Other commenters support Petitioners' approach.²⁵¹ Some ICS providers, however, oppose Petitioners' proposal, stating that interstate ICS is not comparable to prepaid calling card services²⁵² and that basing a methodology on such an assumption could preclude ICS providers from being fairly compensated.²⁵³ Some claim that the rate levels proposed by Petitioners, if adopted, would undermine ICS providers' financial viability.²⁵⁴ 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.²⁵⁵ 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.²⁵⁶

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.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹

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.²⁶⁰ 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

²⁴⁹ See Petitioners 2013 Comments at 3; see also *id.*, Exh. C, Bazelon Decl. at 9-17.

²⁵⁰ See Petitioners 2013 Comments at 3.

²⁵¹ See, e.g., NCL 2013 Reply at 2.

²⁵² See GTL 2013 Reply at 2 ("Traditional long distance service are not comparable to inmate calling services given that the services 'have significantly different architectures, features, operations and cost structures.'").

²⁵³ See Pay Tel 2013 Reply at 2 ("Petitioners' latest modification would drastically lower the proposed benchmark ICS rate cap to a punitive, unrealistic level.").

²⁵⁴ See, e.g., Telmate 2013 Reply at 2 ("The proposed rate cap of \$0.07 per minute . . . would . . . reduce margins for ICS providers so severely that many, if not most, firms would as a rational business matter be forced to consider abandoning the market in relatively short order.").

²⁵⁵ For example, prepaid calling cards do not include additional security features typically needed for ICS. See, e.g., CenturyLink 2013 Comments at 12 n.27; CCA 2007 Comments at 16-17.

²⁵⁶ Cf. *MCI v. FCC*, 143 F.3d 606, 608. The court rejected the Commission's payphone rate stating that "the Commission never explained why a market-based rate for coinless calls could be derived by subtracting costs from a rate charged for coin calls." *Id.* (emphasis in original).

²⁵⁷ See generally Securus 2013 Comments, Expert Report of Stephen E. Siwek.

²⁵⁸ See Petitioners 2013 Reply at 9; *id.* at Exh. A, Bazelon Reply Decl. at 7-9.

²⁵⁹ See *infra* note 278.

²⁶⁰ See Telmate 2013 Comments at 3 ("it is difficult to contemplate fashioning a single regulatory scheme applicable consistently nationwide"); Pay Tel 2013 Comments at 9 ("It is improper to paint either (all facilities or all providers) with one broad brush."); GTL 2013 Comments at 35; Securus 2013 Comments at 19; Pay Tel 2013 Reply at 6-7.

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,²⁶¹ possibly even curtailing ICS access.²⁶² 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.²⁶³ 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.²⁶⁴ 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.²⁶⁵ As we discuss above, the interim safe harbor levels and rate caps we adopt today are conservative numbers.²⁶⁶ Accordingly, we believe the rate framework we adopt today should not

²⁶¹ See Ala. Sheriffs Assoc. 2013 Reply at 1 (“If the FCC enacts price caps which severely reduce or eliminate the financial incentive of private telephone companies to provide inmate phone service, many correctional facilities will simply be unable to afford to provide phone services to inmates at all.”); OSSA 2013 Reply at 2 (“[T]he proposed ICS rate reforms proposed by petitioners may well reduce long-term inmate access to telephone services in correctional facilities.”).

²⁶² See Telmate 2013 Comments at 4 (“Without careful calibration, a federal cap to interstate inmate rates . . . could in fact kill the business by making it financially unprofitable overall.”); CenturyLink 2013 Comments at 18-19 (“Were the FCC to exercise its authority to cap the rates that ICS providers can charge for their services without corresponding adjustments being made by facilities and systems, the result would be to make the ICS market uneconomic to serve The net result would be to make it more, rather than less, difficult for inmates and their families to maintain telephonic contact with one another.”).

²⁶³ See, e.g., HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (citing states such as New Mexico, New York, Missouri and others with interstate ICS rates below those established here).

²⁶⁴ See Transcript of Reforming ICS Workshop at 202 (Jason Marks, former Commissioner, New Mexico Public Regulation Commission, stating that “by the time that we were . . . doing our rulemaking, our larger facilities actually had rates in place by contract that were lower than our caps”).

²⁶⁵ See, e.g., Rogers 2013 Comments at 8 (“ICS providers facing a price below cost could compensate by reducing the quality of service or investment in the network.”).

²⁶⁶ See *supra* paras. 61-62. In calculating these safe harbor rates, we included states that had removed commissions. We also evaluated the reasonableness of these rates by finding that a number of other states' rates were below these levels once commissions were removed. We note below, however, that there are other costs that are often included in ICS rates that we find today to not be directly and reasonably associated with the costs of ICS such that they be

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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,²⁶⁷ and concurrently includes quality of service standards, in addition to a 25 to 1 ratio of detainees to operable telephones.²⁶⁸ We encourage continued innovation and efficiencies to improve the quality of service for ICS.²⁶⁹

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.²⁷⁰ 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.²⁷¹

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.²⁷² The interim rate caps we establish are

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recovered within ICS rates. In the calculation of conservative safe harbor rates, we have not sought to back out those additional charges. *See infra* Section III.C.3.d

²⁶⁷ *See, e.g.*, Telmate July 26, 2013 *Ex Parte* Letter at 2.

²⁶⁸ *Performance-Based National Detention Standards 2011*, U.S. Immigration and Customs Enforcement at 359-61 (2011), available at <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>.

²⁶⁹ *See supra* paras. 28-30 (discussing decreasing costs of providing service due to technological advances).

²⁷⁰ These caps are subject to waiver under the Commission's rules in extraordinary circumstances and for good cause shown. *See* 47 C.F.R. § 1.3. Commissioner Pai's Dissent states that, given the requirements of the Order, "waiver requests will come in swiftly," that those requests "might apply to hundreds or thousands of facilities across the country, "and that he "cannot see how the Commission will process these waivers in an effective or timely manner." Dissent at 126-127. As an initial matter, the Order delegates authority to approve or deny waiver requests to the Commission's Wireline Competition Bureau. *See infra* Section III.C.3.b(ii). The Wireline Competition Bureau houses a significant portion of the Commission's expertise in evaluating service provider data to establish rates. Also, the Bureau uses this expertise to ensure that the Commission is able to carry out its statutory mandate to ensure that charges for communications services are just and reasonable and also to ensure that payphone providers are fairly compensated under Commission rules implementing section 276. *See* 47 U.S.C. §§ 201(b), 276. Two additional factors mitigate Commissioner Pai's concerns that the Commission will not be able to process waivers filed by ICS providers. First, the Order notes that the Commission will evaluate waiver petitions from ICS providers at the holding company level. Accordingly, if the three largest ICS providers each filed a waiver petition, those three petitions would account for over 90% of ICS provided in the country. *See* Petitioners July 24, 2013 *Ex Parte* Letter at 2. Second, the Bureau processes thousands of extraordinarily complex tariff filings each year, under extremely tight statutory timelines. *See* 47 U.S.C. § 204(A)(3) (establishing 15-day timeline for review of tariffs increasing rates) and, based on its experience, is well positioned to act on ICS waiver petitions.

²⁷¹ A rate that uses a rate structure that includes per-call charges will also be considered to be at or below the rate caps if the total charge for a 15-minute conversation is at or below the total charge for a 15-minute call using our interim rate caps. *See supra* Section III.C.3. Providers of ICS may also seek a waiver of our rate caps as we describe below. *See infra* Section III.C.3.b(ii).

²⁷² *See infra* Sections V.C.2 and III.I.

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.²⁷³ 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,²⁷⁴ respectively, assuming a 15-minute call duration.²⁷⁵ 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.²⁷⁶ 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.²⁷⁷ CenturyLink also submitted summary ICS cost data.²⁷⁸ 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.²⁷⁹ 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.²⁸⁰ While Pay Tel's cost data are characterized by certain

²⁷³ Because we conclude site commissions are not part of the cost of ICS, we do not include the site commission profits in setting either the debit, prepaid or collect rate caps. See *supra* Section III.C.2.b.

²⁷⁴ The calculation results in a \$0.236 per minute figure for a 15-minute collect call. See ICS Provider Data Submission at 4. We acknowledge that these data presumably account for bad debt – a persistent problem with collect calling. See *e.g.*, Securus 2013 Comments at 4-5. However, more recent data submitted into the record suggests that bad debt can account for anywhere between 2.9% and 17.6% of ICS revenues. See Securus 2013 Comments, Expert Report of Stephen E. Siwek, at 7. As such, we add one cent to this collect calling rate cap to account for this wide variation in bad debt costs.

²⁷⁵ See ICS Provider Data Submission at 4.

²⁷⁶ See Pay Tel Cost Summary.

²⁷⁷ The \$0.044 per minute average represents the total average cost per interstate minute of use, excluding commissions and weighted by call volume for the facility groups included in the study. See Securus 2013 Comments, Expert Report of Stephen E. Siwek, at 3, 5 and 8 (tables 2, 5 and 9).

²⁷⁸ See CenturyLink Aug. 2, 2013 *Ex Parte* Letter. We note that CenturyLink did not provide to the Commission the underlying data for its summary information. See *id.* at 1. Also, CenturyLink did not provide the methodology it used in developing its cost summary or the year(s) the data represent or how many years' worth of data were used to create its cost summary. See *id.* CenturyLink did not provide ICS costs broken out by debit/prepaid calling and collect calling as other providers did. See *id.* But *cf. generally* 2008 ICS Provider Data Submission and Pay Tel Cost Summary. Data in this format therefore does not allow for an apples-to-apples comparison with other data in the record.

²⁷⁹ See *supra* note 95.

²⁸⁰ *Id.* The Dissent raises the question whether setting our rate caps based on average cost data will ensure fair compensation. See Dissent at 120-121. The use of averaged rates and data is common in the communications industry and telecommunications regulation. For example, within the communications industry, both wireline and

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limitations,²⁸¹ 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.²⁸² 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).²⁸³ 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.²⁸⁴ The interim rate cap is also significantly higher than the cost study

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CMRS providers routinely offer regional or nationwide service at a single rate, in spite of the fact that offering service in this manner necessarily involves averaging of higher and lower per-customer costs. Additionally, in the context of industry regulation, the Commission has used average cost data in various settings, including to establish public payphone dial-around compensation. *See generally Payphone Third Report and Order*, 14 FCC Rcd 2545 (1999); *see also* 47 C.F.R. § 64.1801 (Commission rule on Geographic rate averaging and rate integration). ICS providers themselves have submitted average cost data in the record on multiple occasions. *See* ICS Provider Data Submission, Pay Tel Cost Summary, CenturyLink Aug. 2, 2013 *Ex Parte* Letter, Securus 2013 Comments, Expert Report of Stephen E. Siwek. ICS providers typically use uniform rates when they serve multiple correctional facilities with differing cost and demand characteristics under a single contract. *See, e.g.*, State of California, California Technology Agency, IWTS/MASS Agreement Number OTP 11-126805 (listing approximately 80 correctional facilities served through a common rate structure) (available at <http://prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=California>) (last visited Sept. 17, 2013). *See also infra* note 493. As a result, the fact that there may be variations in cost between different facilities does not by itself suggest that providers will be unable to be fairly compensated.

Furthermore, the use of average cost data is not common in rate of return regulation because a provider's rates, although often averaged across its own facilities, are generally premised on that provider's individual costs. Contrary to the claims of the Dissent, however, we are not engaging in rate-of-return regulation here. *See generally* Dissent. We establish rate caps under a framework that operates as a less burdensome approach to rate regulation. Our intent is to set caps at a level that will ensure fair compensation for ICS providers based on the highest cost data in the record. Providers who believe their costs exceed the rate caps may seek a waiver on the basis of their ICS operations as a whole. Additionally, as we discuss below, the average cost data is derived principally from data regarding smaller facilities with lower than average call volumes, likely resulting in rate caps that are higher than providers' actual costs. *See infra* paras. 77, 80.

²⁸¹ Pay Tel is a smaller provider that serves a relatively small share of inmates in the U.S. overall, and evidence from larger providers indicates that their costs are lower. *See* Securus 2013 Comments, Expert Report of Stephen E. Siwek. Also, Pay Tel does not report different costs for interstate and intrastate ICS calls, presumably reflecting the fact that it manages its ICS calls through common, centralized call management facilities. We therefore find it is reasonable to assume that its cost data is representative of both types of calls.

²⁸² *See* Pay Tel July 23, 2013 *Ex Parte* Letter. We appreciate Pay Tel's willingness to provide the kind of objective cost data that the Commission sought in the 2012 ICS NPRM in order to facilitate our data-driven analysis of ICS costs.

²⁸³ *See* ICS Provider Data Submission at 4 (based on a 15-minute call duration, the cost for debit calls was \$0.164 per minute); Securus 2013 Comments, Expert Report of Stephen E. Siwek (*see supra* note 277 for method of calculation). We also reject as unrepresentative using the cost data for individual facility groups contained in Securus' study as a potential basis for our rate caps. For example, Securus reports average per minute costs for its "Low 10" group of facilities of \$1.39 (without commissions). This, however, is approximately six times the per minute cost for collect calls reported by the 2008 study, a study in which Securus participated. Securus also reports that the average call volume for these facilities in 2012 was 191 calls, or approximately 16 calls per month per facility. *See id.* at 4, Table 3. To the extent there are providers that primarily or exclusively serve facilities with such low call volume, they may seek a waiver.

²⁸⁴ ICS Provider Data Submission at 4 ("The locations ranged from small county jails to large prison facilities."). The participating ICS providers also ranged from small to large companies. For example ATN, Inc. participated in

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submitted by Securus. Second, Pay Tel serves jails exclusively, which are generally smaller and which providers claim are more costly to serve than prisons.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸ 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.²⁸⁹ 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.²⁹⁰ 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

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the submission and serves approximately 150 correctional facilities. See www.atni.net (last visited Aug. 1, 2013). Another participating provider, Securus, was one of the largest providers at the time of the submission and currently “holds contracts with approximately 1,800 correctional authorities covering roughly 2,200 facility locations in 45 states around the country.” See Securus 2013 Comments, Hopfinger Decl. at 1.

²⁸⁵ See generally Pay Tel Ancillary Charges PN Comments.

²⁸⁶ Pay Tel's actual costs in 2012 are \$0.025 – 0.034 below the costs it projects for 2013-2015.

²⁸⁷ See generally *USF/ICC Transformation Order*, 26 FCC Rcd 17663.

²⁸⁸ The Dissent also raises questions about the use of average cost data from the ICS Provider Data Submission to set the rate cap for collect calls. See Dissent at 120-121. The stated purpose of that submission, however, is “to develop a rate structure and rate level that meets the definition of ‘fair compensation’ as set forth in section 276(b)(1)(A) of the 1996 Act.” ICS Provider Data Submission at 1; see also *supra* note 280.

²⁸⁹ We note that the ICS providers participating in the data submission also entered supplemental data in the record, enabling the analysis of the size and call volumes of the locations included in the study. See Joyce Aug. 22, 2008 *Ex Parte* Letter; record submission by “several providers of inmate telephone service,” to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Oct. 15, 2008). Notwithstanding, Petitioners note that the study did not contain all of the underlying cost data to support the cost conclusions contained in the data submission. See Letter from Frank W. Krogh, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Exh. A, Dawson Response at 2 (filed Dec. 23, 2008) (Petitioners Dec. 23, 2008 *Ex Parte* Letter).

²⁹⁰ See *supra* note 284.

structures.²⁹¹ Although from five years ago, the record indicates continued support for such data,²⁹² 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.²⁹³ First, costs to provide interstate ICS have, by many measures, declined since the ICS provider data was submitted.²⁹⁴ 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.²⁹⁵ 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.²⁹⁶ 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 rates²⁹⁷ and some commenters assert this data tends to overcompensate ICS

²⁹¹ ICS Provider Data Submission at 2.

²⁹² Pay Tel 2013 Comments at 12 (the ICS Provider Data Submission "generally remains a valid baseline for assessing ICS costs").

²⁹³ See *supra* para. 71. As noted above, in relying upon these cost studies for establishment of our rate caps, we do not conclude or even suggest that we believe such rates to be a representation of actual cost-based rates, as required and described in this Order. We believe these cost studies, although exclusive of site commissions, likely include significant other costs that are not reasonably and directly associated with the provision of ICS. Even so, as a conservative measure of an upper bounds of rates, we conclude that these studies are useful to enable us to establish an upper end rate cap for ICS rates and provide immediate relief for consumers.

²⁹⁴ See *e.g.*, Petitioners 2013 Comments at 2 (noting that the consolidation of ICS providers and centralized application of safety protocols has "led to the substantial reduction in the costs associated with providing ICS"); *but see* Securus 2013 Comments at 4 (asserting that "costs of service have decreased in some respects but increased in others"); CenturyLink 2013 Comments at 6-11; GTL 2013 Comments at 7-8. To the extent software costs have increased, centralized software is typically a substitute for higher-cost, on-premises equipment and is generally more efficient, particularly when those costs are spread over the higher call volumes enabled by centralized call management systems. To the extent site commissions have increased, we find those costs not to be recoverable through interstate ICS rates. See *supra* section III.C.2.b.

²⁹⁵ See U.S. Dept. of Justice, Bureau of Justice Statistics, Census of Jail Inmates: Individual-Level Data, 2005 (conducted by U.S. Dept. of Commerce, Bureau of the Census) (2007) available at <http://dx.doi.org/10.3886/ICPSR20367.v1>; U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of State and Federal Adult Correctional Facilities, 2005 (2007), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=530> (last visited June 11, 2013). Petitioners contend that the ICS Provider Data Submission "inflates the actual costs of providing interstate inmate calling services through the use of an unrepresentative sample of correctional facilities." Petitioners Dec. 23, 2008 *Ex Parte* Letter, Exh. A, Dawson Response at 1-2.

²⁹⁶ See GTL 2013 Comments at 13 ("because GTL is one of the largest providers in the market, it has economies of scale and efficiency"). GTL is generally acknowledged to be the largest ICS provider at this time. See, *e.g.*, The Phone Justice Commenters 2013 Comments at 9 ("GTL alone has contracts for over half of the state correctional departments, controlling the phone service of almost 57% of state prison inmates following several mergers over the last five years.").

²⁹⁷ This methodology determines rates based on the costs of the subset of payphone locations "where the payphone operator is able to just recoup its costs, including a normal rate of return on the asset, but is unable to make payments to the location owner" (effectively break-even locations). See *Payphone Third Report and Order*, 14 FCC Rcd at 2552, para. 15 n.20. Pay Tel states that the marginal location analysis methodology "recognizes . . . the challenges of providing ICS in small facilities" and "endorses" its use. Pay Tel 2013 Reply at 13. The Commission, however, has previously rejected its use in the context of ICS. See *Inmate Calling Services Order and NPRM*, 17 FCC Rcd at 3259-60, paras. 27-29. We find that Pay Tel's incorporation in the methodology of the ICS Provider Data Submission is acceptable here for the limited purpose of establishing ICS rate caps that are intended to set an upper limit on rates that can be cost-justified and that are interim in nature pending our development of other cost-based rates.

providers.²⁹⁸ Moreover, the rate is above the costs reported by Pay Tel, a provider serving exclusively smaller facilities and jails.²⁹⁹ 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.³⁰⁰ 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.³⁰¹

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.³⁰² 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.³⁰³ Petitioners assert that “technical innovations in the provision of prison phone services imply that variation in costs at different facilities has largely been eliminated.”³⁰⁴

²⁹⁸ Petitioners Dec. 23, 2008 *Ex Parte* Letter, Exh. A, Dawson Response at 2 (stating that the study “is limited entirely to data from unprofitable, “marginal” facilities ... and disproportionately reflects unusually low-volume, high-cost facilities [which] improperly inflates the results”).

²⁹⁹ While some commenters have asserted that ICS providers and correctional facilities incur additional site-specific costs of making ICS available, none has attempted to quantify these costs for the record. Providers are free to raise any such issues in a waiver petition. *See, e.g.*, Letter from American Jail Association to Commission's Secretary, FCC, WC Docket 12-375 at 2 (filed June 21, 2013) (AJA 2013 Comments) (“Local jail facilities should be able to recover the costs of monitoring and administrative costs of managing the Inmate Calling Service.”).

³⁰⁰ *See generally* *USF/ICC Transformation Order*, 26 FCC Rcd 17663.

³⁰¹ *See supra* paras. 4, 66 and note 15. We find the foregoing rationales displace the assertions made in the ICS Provider Data Submission that the study's results are “conservatively low,” particularly for the purposes of setting our rate cap. *See* ICS Provider Data Submission at 15. For example, we find that small jail locations are over-represented in the study, not under-represented as asserted; that it is premature to determine the actual cost of capital for ICS investments; and that, with widespread automation and centralized call management, various ICS costs have likely come down since the study.

Commissioner Pai's dissenting statement compares the \$0.21 per minute rate cap that the Order adopts for debit and prepaid calling to the \$0.208 four-year average (actual costs for 2012, and forward-looking projections for 2013-2015) of total per-minute costs for debit calling provided by PayTel and claims that “unless ... no jails have above-average costs ... a cap of 21 cents ... almost certainly means that a significant number of small jails will be capped at below-cost rates.” Dissent at 120. However, our approach is reasonable and consistent with the fair compensation mandate of section 276. Because each cap is set at a uniform level, without regard to the size of the facility being served, and application of the caps is evaluated on the basis of multiple facilities served by a provider, *see, e.g., infra* paras. 83 and 123, even if a provider may under-recover at some facilities, it may over-recover at others. *See* Transcript of Reforming ICS Rates Workshop at 254-5 (Richard Torgersrud, CEO, Telmate, stating “[w]hen we get a request to provide phones to a facility with 15 beds we do it because we represent that community or because we have a lot of facilities in that area, and we do it knowing that we can't possibly make money providing calls in that facility. But we do make profits in other facilities and it offsets.”) Moreover, insofar as a substantial portion of ICS costs are joint and common, *see, e.g., id.*, and economic theory does not suggest a single correct way of allocating such costs, we anticipate that a provider with average costs at or below the level of the caps will be able to allocate those joint and common costs in a way that enables it to charge rates at or below the caps, and consistent with the requirement for cost-based rates. Consequently, our framework will enable the provider to be fairly compensated since the caps are derived from the highest costs in the record.

³⁰² *See supra* note 260.

³⁰³ *See* ICS Provider Data Submission at 4. *See id.* at 21 (listing ICS providers participating in the submission). We do not find persuasive the Dissent's argument that because costs may vary by facility, uniform rate caps are inappropriate. Dissent at 120-121. *See supra* note 280.

³⁰⁴ *See* Petitioners 2013 Comments Exh. C, Bazelon Decl. at 5 (stating that “facility specific rates are unneeded”).

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.³⁰⁵ 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,³⁰⁶ while at least one other commenter advocates distinguishing between larger and smaller jails and between prison, jails and other “specialty locations.”³⁰⁷ 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.³⁰⁸

(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.³⁰⁹ Such a waiver petition would need to demonstrate good cause to waive the interim rate cap.³¹⁰ As with all waiver requests, the petitioner bears the burden of proof to show that good cause exists to support the request.³¹¹ 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.³¹² Moreover, the record indicates that ICS providers often obtain exclusive contracts for

³⁰⁵ See *Payphone Third Report and Order*, 14 FCC Rcd 2545, 2613 para. 149 (noting that “payphone unit requirements vary from site to site” and the “costs of operating payphones at differing locations also vary” but that “because we are establishing a compensation amount for all payphones, we use the average cost of a typical PSP.”).

³⁰⁶ See, e.g., Pay Tel 2013 Reply at 8-9.

³⁰⁷ CenturyLink Aug. 2, 2013 *Ex Parte* Letter at 2. Contrary to the Dissent’s suggestion that we “dismiss[] the importance of small jails,” as noted above, in establishing our interim framework, we examine and rely on data pertaining to these types of facilities. Dissent at 118. See, e.g., *supra* paras. 26, 77.

³⁰⁸ The Dissent asserts that by establishing rate caps before the record is supplemented, we have placed “the cart . . . in front of the horse.” Dissent at 123. However, the Commission is not required to defer action until it can assemble perfect data where, as here, it faces clear evidence of widespread unreasonable ICS charges. Rather, it may act on the basis of the record it has while assembling a more complete record for future action. See *Vonage Holding Corp. v. FCC*, 489 F.3d 1232, 1243 (D.C. Cir. 2007); *Am. Pub. Commc’ns Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000); *Sorenson Commc’ns v. FCC*, 659 F.3d 1035, 1046 (10th Cir. 2011). Indeed, “[w]here existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information.” *Am. Pub. Commc’ns Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000). Here, we have done neither more nor less than advised by the Court. We have (i) formulated a solution, (ii) to the best of our ability, (iii) on the basis of available information. That the Dissent dislikes our solution, or believes it could do a better job in formulating a solution, or suspects that a different solution would be supported by new evidence, does not vitiate our “broad discretion” to act in the public interest based on the record currently before us.

³⁰⁹ 47 C.F.R. § 1.3.

³¹⁰ We note that the Dissent also acknowledges that a waiver must be based on cost data. See Dissent at 126.

³¹¹ 47 C.F.R. § 1.3 (“Any provision of the rules may be waived . . . on petition if good cause therefor is shown.”).

³¹² See, e.g., Pay Tel 2013 Comments at 13; Securus 2013 Comments at 4.

several facilities in a state, rather than specific rates per facility.³¹³ 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.³¹⁴ 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.³¹⁵

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.³¹⁶ 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.³¹⁷ 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.³¹⁸ 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.³¹⁹ 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.³²⁰ 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

³¹³ See, e.g., Request for Proposal for Contractual Services, Inmate Calling Services RFP No. 2505Z1, available at http://www.prisonphonejustice.org/includes/_public/contracts/Nebraska/NEphone_contract_PCS_RFP_20082013.pdf (ICS contract between PCS and Nebraska Department of Correctional Services, dated July 8, 2008); see also Susskind June 6, 2013 *Ex Parte* Letter.

³¹⁴ See *infra* para. 123.

³¹⁵ See *supra* Sections III.C.3.b, III.C.3.d.

³¹⁶ See also Petitioners July 24, 2013 *Ex Parte* Letter at 2 (noting that the three largest ICS providers, who control “at least 90% of the ICS market,” were “remarkably silent” when asked to submit data regarding ancillary charges).

³¹⁷ See HRDC June 8, 2013 *Ex Parte* Letter, Rev. Ex. B (showing, for example, that CenturyLink assesses a \$3.95 per-call charge for all collect, prepaid, and debit calls made by Alabama Department of Corrections inmates).

³¹⁸ See *id.* (showing that providers serving state departments of corrections in Alabama, Alaska, Arkansas, Georgia, and Minnesota impose a \$3.95 per-call charge on ICS collect calls).

³¹⁹ See *id.*

³²⁰ See Petitioners 2013 Comments at 24 (“The record in this proceeding contains hundreds of complaints about the frequent disconnection of calls by the ICS providers.”); PLS 2013 Comments at 13 (citing the fact that of the 228 written ICS complaints received by the Massachusetts Department of Telecommunications and Cable in 2012 “[e]xperience with dropped calls was mentioned in 79% of the letters, while bad connections and/or poorly maintained equipment was mentioned in 68% of the complaints”).

generally prohibited by correctional facilities,³²¹ 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.³²² 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.³²³

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.³²⁴ 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.³²⁵ 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.³²⁶

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.³²⁷ ICS providers have the flexibility to satisfy the safe harbor³²⁸ either through a

³²¹ See Securus 2013 Comments, Hopfinger Decl. at 10 (“It has been the very clear policy of correctional facilities for decades that inmates cannot have three-way calls and cannot have a call forwarded to some number other than the number that was dialed and validated With Securus’ advanced technology, this type of behavior is detected and – if required by the correctional authority – will result in call disconnection. In my experience, the overwhelming majority of allegations of unwarranted ‘dropped calls’ are found to be false.”).

³²² See Petitioners 2013 Reply at 19 (citing one attorney stating that “calls to both his cellular phone and home phone were frequently dropped, and were generally preceded by a message stating that the system detected an attempt at a three-way call”); *id.* at 20 (citing “numerous accounts from attorneys that regularly receive inmate calls of such poor quality the inmates must yell into the phone in order to be heard”); *id.* at 22 (“One attorney stated that, of the three hundred inmate calls her office receives every month, [a]pproximately 15-20% of the calls have too much static to hear the other party.”).

³²³ See Petitioners 2013 Comments, Exh. C, Bazelon Decl. at 13. The Congressional Black Caucus similarly recommends elimination of a per-call charge which “significantly inflates already-exorbitant telephone rates, and further deters inmate calling activity.” CBC 2013 Reply at 4.

³²⁴ See, e.g., HRDC June 8, 2013 Ex Parte Letter, Rev. Exh. B; PLS 2013 Comments at 14-15; Petitioners Ancillary Charges PN Comments at 1-2.

³²⁵ See *infra* Section V.C.1.

³²⁶ See *infra* Section III.H.1.

³²⁷ See *supra* Sections III.C.3.a, III.C.3.b.

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 15.³²⁹ 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.³³⁰ 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.”³³¹ The record indicates that ICS providers also impose ancillary or non-call related charges on end users to make ICS calls,³³² for example to set up³³³ 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.³³⁴ These additional charges represent a significant cost to consumers.³³⁵ 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

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³²⁸ See *supra* para. 63.

³²⁹ See *infra* Section III.H.1.

³³⁰ Under the interim safe harbor for debit calls of \$0.16 per minute, for example, the total charge for a 15-minute call cannot exceed \$2.40. To illustrate, if a provider has a per-call charge of \$1.00, its per-minute rate must be \$0.093 or less to fall within the safe harbor. If a provider has a per-call charge of \$0.50, its per-minute rate must be \$0.126 or less to fall within the safe harbor. If a provider has a flat rate per call, that rate cannot exceed \$2.40 for a 15-minute call. Likewise, a rate will be considered consistent with our rate cap for a 15-minute conversation if it does not exceed \$3.75 for a 15-minute call using collect calling, or \$3.15 for a 15-minute call using debit, prepaid, or prepaid collect calling.

³³¹ *2012 ICS NPRM*, 27 FCC Rcd at 16641, para. 33.

³³² We use the term ancillary service charges throughout to refer to charges imposed on ICS end users that do not relate to the telecommunications costs of making an ICS call.

³³³ According to Petitioners, GTL charges \$9.50 to open a new pre-paid or debit account. See Petitioners 2013 Comments at 24-25.

³³⁴ See Petitioners 2013 Comments at 24; HRDC 2013 Comments at 8-9; Hamden 2013 Comments at 7-8; Pay Tel Comments at 15-16.

³³⁵ GTL charges \$9.50 to open a new pre-paid or debit account. An additional \$4.75 charge is added to the account by GTL when a party wishes to add \$25.00 to the balance, and a \$9.50 charge is added to the account when a party wishes to add \$50.00. If there is an outstanding balance at the end the month, GTL charges \$2.89 to send a paper bill to the account holder. Finally, if an inmate is released, and a balance remains in the account, GTL charges \$5.00 for the account holder to receive its refund. Securus charges \$7.95 each time an account is funded over the internet or on the telephone, and also charges a monthly fee of \$2.99 to maintain a wireless number on the account. In the event that the inmate is released, Securus will extract a \$4.95 charge from the refunded amount if the account balance exceeds \$4.95. See Petitioners 2013 Comments at 24-25; see also HRDC 2013 Comments at 8-9 (listing charges ranging from \$2.95 to \$15.75 that ICS providers charge in various states for setting up and funding accounts); Hamden Ancillary Charges PN Comments at 5 (asserting that “New Mexico ICS providers also generate revenue through imposing a wide variety of charges to establish pre-paid accounts and to maintain those accounts.”).

have been exhausted or the call activity resumes.”³³⁶ 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.³³⁷ 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.³³⁸

³³⁶ HRDC 2013 Comments at 8-9.

³³⁷ *See id.*

³³⁸ The Dissent claims that the *2012 ICS NPRM* “provides no basis” for regulating ancillary charges. Dissent at 115. Yet regulating ancillary charges was a necessary aspect of our cost-based reforms, as otherwise providers could simply increase their ancillary charges to offset lower rates subject to our caps. For that reason, many commenters properly understood that ancillary charges were part of the cost-based reform being considered. *See, e.g.*, Petitioners 2013 Comments at 3, 24-27; Pay Tel 2013 Reply at 2-3 & n.6; Telmate 2013 Reply at 3. Moreover, as the Dissent concedes, the Commission observed in the *2012 ICS NPRM* 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.” Dissent at 115 (citing *2012 ICS NPRM*, 27 FCC Rcd at 16641, para. 33). Those are the very kinds of issues that this Order addresses. Moreover, in connection with that observation, the *2012 ICS NPRM* cited the Petitioners’ reply comments filed in response to the Alternative Wright Petition, which raised issues regarding ancillary charges for prepaid services. *See id.* (citing Petitioners 2007 Reply at 29-30). The Commission also sought comment on per-call and per-minute rates for debit calls, and on other issues regarding debit calling (including the extent to which it is used today, and whether it should be mandated). *See, e.g.*, *2012 ICS NPRM*, 27 FCC Rcd at 16640-41, paras. 30-32. And the Commission broadly sought comment on “any proposals in the record that [were] not” expressly described in the *2012 ICS NPRM*. *2012 ICS NPRM*, 27 FCC Rcd at 16642, para. 35. Among the proposals for Commission action in the record at the time of the *2012 ICS NPRM* were a number identifying the need for Commission regulation to address excessive fees for ancillary services. *See, e.g.*, Letter from Cheryl A. Leanza, The Leadership Conference on Civil and Human Rights, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 2 (filed Mar. 22, 2012) (discussing “new abuses [that] have started to emerge, which include charging families to deposit money into prepaid accounts and exploiting new loopholes that enable the charging of service fees”); Petitioners July 27, 2011 *Ex Parte* Letter, Exh. A at 6 (filed July 27, 2011) (citing as illustrative of “price goug[ing]” numerous examples of ancillary charges); Letter from John Wesley Hall, President, National Association of Criminal Defense Lawyers, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 2 (filed July 6, 2009) (citing as “unconscionable practices” the examples of “‘Service/set-up’ fees (charged to customers setting up a required pre-pay account for the first time); ‘recharge fees’ (billed when a customer reopens an account); [and] ‘processing fees’ – imposed either by a service provider or a third party business – for processing a customer’s payment”); Letter from Thomas M. Susman, American Bar Association, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 3 n.4 (filed Jan. 15, 2009) (arguing that “additional fees are billed to consumers who wish to establish pre-paid accounts; charges are assessed to process customers’ payments, and funds held in accounts without activity for as little as 3 months are confiscated. These ‘tack-on’ charges dramatically increase the cost of communicating with incarcerated loved ones, but they do not appear as a part of the cost of the call reflected on a telephone bill.”); Letter from Michael S. Hamden, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Attach. at 14-15 (filed Oct. 28, 2008) (proposing that the Commission “close the door to mechanisms that would allow prison phone service providers to inflate service fees that unfairly and unjustifiably increase the price of prisoner phone calls” including “‘tack-on’” charges such as fees to establish a pre-paid account and fees to process payments).

The Commission’s request for comment on these kinds of record proposals, coupled with our other questions about regulation of debit calling and ancillary fees in the prepaid calling context, provided adequate notice that the Commission was contemplating the regulation of ancillary charges. *See, e.g.*, *CSX Trans. v. Surface Trans. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009) (*CSX Trans.*) (“a final rule represents a logical outgrowth where the NPRM expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a

(continued....)

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.³³⁹ 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.”³⁴⁰ 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 276.³⁴¹ 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.³⁴² The ICS provider will

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particular change”). This conclusion is bolstered by the fact that in June 2013, the Bureau asked parties to provide detailed “data and information” about the full range of “Ancillary ICS Fees,” including “account setup fees, account replenishment fees, account refund fees, account inactivity fees.” *More Data Sought on Extra Fees Levied on Inmate Calling Services*, WC Docket No. 12-375, Public Notice, 28 FCC Rcd 9080 (Wireline Comp. Bur. 2013); *see also* 78 Fed. Reg. 42034-01 (publishing the June 2013 Public Notice in the “Proposed Rules” section of the Federal Register). To be clear, we are not suggesting that this Bureau-level request itself provided notice with respect to ancillary charges. Rather, as indicated above, adequate notice with respect to ancillary charges was plainly provided to the public well before the release of the *Ancillary Charges PN*, and this notice generated an adequate record on which to base our requirements regarding ancillary charges, even without the additional comments submitted in response to the *Ancillary Charges PN*. However, it is instructive that no party argued in response to the Bureau’s public notice that they or the public in general lacked notice that ancillary fees were at issue. If the prospect of regulating ancillary charges had truly been sprung on the public at the eleventh hour, as the Dissent claims, one would have predicted that at least some parties would have said as much in their comments. We similarly disagree with the Dissent’s claim that the *Ancillary Charges PN* did not give parties sufficient time to file comments and replies on that discrete set of issues. Dissent at 115-116. We note that no one sought additional time to file comments, as is commonly the case when parties believe the comment pleading cycle is too abbreviated, and a number of parties did submit comments and replies within the time allotted. *But see* NASUCA Ancillary Charges PN Comments at 2.

As indicated above, moreover, the principal purpose of the *2012 ICS NPRM* was to consider ways to control ICS rates. This purpose could not be achieved if ancillary charges were not also controlled, since providers could increase those charges to make up for decreased charges elsewhere. Finally, as also noted above, the “just and reasonable” standard under section 201(b) has traditionally been construed to require rates to be cost-based, absent Commission justification for a departure from that approach. For all the foregoing reasons, parties “should have anticipated” the possibility that cost-based regulation of ancillary charges was possible, *see CSX Trans.*, 584 F.3d at 1081, and therefore, contrary to the Dissent’s claim, we provided a very strong “basis” for our actions today with respect to those charges.

³³⁹ 47 U.S.C. § 201(b) (emphasis added).

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

³⁴¹ Commission precedent supports our finding that charges other than those directly attributable to the provision of the service itself can be subject to section 201(b). *See, e.g., Kiefer v. Paging Network*, EB File No. 00-TC-F-002, Memorandum Opinion and Order, 16 FCC Rcd 19129 (2001) (evaluating reasonableness of a late payment fee under section 201(b)); *Long Distance Direct*, EB File No. ENF-99-01, Memorandum Opinion and Order, 15 FCC Rcd 3297 at 3302, para. 14 (2001) (“Section 201(b) of the Act prohibits ‘unjust and unreasonable’ practices by carriers ‘in connection with [interstate or foreign] communications service.’ LDDI’s inclusion of ‘membership’ and ‘other’ fees on Complainants’ telephone bills was an ‘unjust and unreasonable’ practice because the fees were unauthorized. That practice was ‘in connection with’ communication service because it was inextricably intertwined with LDDI’s long distance service.”).

³⁴² *See infra* Section III.H.4.

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.³⁴³

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.³⁴⁴ 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.³⁴⁵

95. Second, we clarify that ICS providers may not levy or collect an additional charge for any form of TRS call.³⁴⁶ 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

³⁴³ See Transcript of Reforming ICS Rates Workshop at 266 (Vincent Townsend, President, Pay Tel, asserting that if the Commission only addresses interstate ICS rates, ICS providers may have the incentive to increase ancillary charges to make up for the effects of rate reductions); see also *id.* at 136; (Talila Lewis, Founder and President, HEARD, asserting that other ICS fees will go up if the Commission only address ICS rates); HRDC 2013 Comments at 8 (urging the Commission to eliminate extra charges or “ICS providers could circumvent Commission-imposed caps on per-call and per-minute charges by simply increasing the extra fees or adding new account-related fees that effectively raise the overall costs of ICS calls”); Pay Tel 2013 Comments at 16 (arguing that interstate rate relief “will lack meaning and impact if these additional fees are not part of the equation because ICS providers will compensate for interstate rate caps by raising these fees on the very same inter-state customers”). Hamden Ancillary Charges PN Reply at 1 (asserting that, based on experiences of ICS reform in New Mexico, “the only prospect for meaningful reform and consumer protection rests with the FCC and the hope that it will adopt a comprehensive regulatory approach to ICS that governs not only per minute rates prohibits commissions, but one that also proscribes baseless ancillary fees”); CenturyLink July 26, 2013 *Ex Parte* Letter at 2 (asserting that “ancillary fees can have a major impact on calling costs” but asserting that “per-call or transaction fees are not inappropriate if they are recovering costs”).

³⁴⁴ *ICS 2012 NPRM*, 27 FCC Rcd at 16644, para. 42.

³⁴⁵ See *supra* Section III.C.3.

³⁴⁶ Section 225 defines TRS as “telephone transmission services that provide the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio.” 47 U.S.C. § 225(a)(3). There are several forms of TRS, depending on the particular needs of the user and the equipment available. See generally FCC, Telecommunications Relay Service (TRS), *available at* <http://www.fcc.gov/guides/telecommunications-relay-service-trs> (last visited July 15, 2013).

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.”³⁴⁷

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.³⁴⁸

97. We decline to take other actions related to deaf and hard of hearing inmates requested by commenters at this time.³⁴⁹ 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,³⁵⁰ allowed call durations for deaf and hard of hearing inmates,³⁵¹ or the types of TRS access technologies made available to inmates.³⁵²

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.³⁵³

³⁴⁷ 47 U.S.C. § 225(d)(1)(D). We find our action here to be consistent with section 276(b)(1)(A), as well. In implementing section 276, the Commission has observed that section 276(b)(1)(A) exempted, among other things, TRS calls from the per-call compensation requirement, and it required payphone service providers to provide free access to connect to TRS. *See, e.g., Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act Of 1996*, Report and Order, 11 FCC Rcd 20541, 20545, para. 6 (1996). *See also Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, Fifth Report and Order, 17 FCC Rcd 21233, 21244-45, para. 24 (2002) (“A call made from a payphone connects to a TRS facility via free local calling.”). However, if the outgoing portion of the TRS call is a long distance call, the caller has been required to pay for that. *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, 17 FCC Rcd at 21244-45, para. 24. Insofar as our actions here permit compensation for the ICS provided, just not for a greater charge than the services are provided to other users, we also find this consistent with the statutory framework of section 276. As noted below, however, we seek comment in the Further Notice on these issues.

³⁴⁸ *See infra* Section V.B. VRS is “[a] telecommunications relay service that allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users through video equipment. The video link allows the [communications assistant] to view and interpret the party’s signed conversation and relay the conversation back and forth with a voice caller.” 47 C.F.R. § 64.601(a)(27).

³⁴⁹ *See infra* Section V.B.

³⁵⁰ *See, e.g.*, ACLU 2013 Comments at 5, Embracing Lambs 2013 Comments at 2; HEARD 2013 Comments at 6, 9; NDRN 2013 Comments at 2-3; P&A 2013 Comments at 1; RBGG 2013 Comments at 2-3.

³⁵¹ *See, e.g.*, NDRN 2013 Comments at 3; HEARD 2013 Comments at 9; Embracing Lambs 2013 Comments at 1-2; Consumer Groups 2013 Comments at 4; P&A 2013 Comments at 2; RIT/NTID Student Researchers 2013 Comments at 6; RBGG 2013 Comments at 2.

³⁵² *See, e.g.*, ACLU 2013 Comments at 2-3; DisAbility Rights Idaho 2013 Comments at 1-2; Embracing Lambs 2013 Comments at 2; HEARD 2013 Comments at 4-6; NDRN 2013 Comments at 2; P&A 2013 Comments at 2; RIT/NTID Student Researchers 2013 Comments at 4.

³⁵³ *See* GTL 2013 Comments at 23; CenturyLink 2013 Comments at 13, Telmate 2013 Comments at 16-17; Verizon 2013 Comments at 5-6; NCL 2013 Reply at 2.

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.³⁵⁴ Such contracts may include change-of-law provisions,³⁵⁵ although some such provisions can be vague.³⁵⁶ 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.³⁵⁷ 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.³⁵⁸

99. The record in response was mixed.³⁵⁹ Several commenters advocate for a “fresh look” period to review and renegotiate existing contracts,³⁶⁰ some urge us to avoid delaying rate reform,³⁶¹ and others assert that any new rules should apply only to contracts entered into after the effective date of the rules.³⁶²

³⁵⁴ See CenturyLink 2013 Comments at 15-16 (explaining that it can take three or more years to recuperate its ICS costs).

³⁵⁵ See GTL 2013 Comments at 29-30, Letter from Lee G. Petro, Counsel to Petitioners, WC Docket No. 12-375 at 1, 2 (filed Aug. 2, 2013) (Petitioners Aug. 2, 2013 *Ex Parte* Letter) (stating that Petitioners’ review of “scores of publicly-available contracts, both for large state correctional authorities and small county facilities,” show that ICS contracts “routine[ly] include provisions reserving the right to amend or renegotiate the contracts in the event of a change in law.”). *But see* Securus May 31, 2013 *Ex Parte* Letter at 2 (asserting that most contracts do not contain change of law provisions).

³⁵⁶ See *e.g.*, CenturyLink 2013 Comments at 15-16; GTL 2013 Comments at 29-30.

³⁵⁷ See *2012 ICS NPRM*, 27 FCC Rcd at 16646, para. 46.

³⁵⁸ See *id.*

³⁵⁹ Compare, *e.g.*, Securus 2013 Comments at 11-12 (asserting that adopting rate caps would nullify existing, contracted rates in direct contravention of the *Sierra-Mobile* doctrine, and that the Constitution prevents existing contracts from being abrogated or altered by new regulations except in exigent circumstances not present here) with Petitioners 2013 Comments at 29 (observing that the Commission has confirmed that it has “undoubted power to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation,” and that similar fresh-look mandates “do not constitute a regulatory taking” since the proposed maximum rates would provide “the opportunity for adequate cost recovery); see also Telmate 2013 Comments at 16-17 (commenting that whether the Commission has the legal power to order a “fresh look” window does not seem open to question) but *cf.* Letter from Glenn Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed July 30, 2013) (asserting that Telmate has “reconsidered” its position on “contractual ‘fresh look,’” urges the Commission to take a “staggered” fresh look window).

³⁶⁰ See, *e.g.*, Petitioners 2013 Comments at 28-29; NASUCA 2013 Comments at 7 (advocating that the Commission should allow facilities and providers up to 180 days to reform contracts and rates in accordance with the rules); Telmate 2013 Comments at 16 (suggesting that the Commission should couple any rate reform with a “fresh look” window); TurnKey 2013 Reply at 5; AILA 2013 Comments at 3; NASUCA 2013 Reply at 11; see also HRDC 2013 Comments at 14 (urging the Commission to require that ICS providers comply with mandates by no later than six months or when the provider’s ICS contract is next renewed or extended, whichever comes first).

³⁶¹ See Telmate 2013 Comments at 17; HRDC 2013 Comments at 14 (commenting that it would not be just or reasonable to allow ICS providers to continue to charge existing high rates until their next contract renewal or extension); NASUCA 2013 Reply at 11 (commenting that to allow the various high-rate contracts to continue once the benchmark has been adopted would only exacerbate the harm that is currently being done to inmates and their friends and relatives).

³⁶² See CenturyLink 2013 Comments at ii, 15; GTL 2013 Comments at 29–30; CBC 2013 Comments at 2; La. DOC 2013 Comments at 8; Securus May 31, 2013 *Ex Parte* Letter at 2 (supporting an approach where new rates apply on a going-forward basis to contracts that are bid, signed, or re-negotiated after the effective date of the new rates).

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.³⁶³ 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.³⁶⁴

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.³⁶⁵ 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.³⁶⁶ To the extent that the contracts contain "change of law" provisions,

³⁶³ 47 U.S.C. §§ 201(b), 276(b)(1)(A).

³⁶⁴ See *supra* Sections III.C.2.b, III.C.3.d.

³⁶⁵ Even if our actions today were somehow construed as modifying particular contractual provisions or abrogating particular contracts, we still would be acting within our lawful authority. As an initial matter, section 276(b)(3) states, "[n]othing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 276(b)(3). This provision, by its terms, does not apply to agreements entered *after* the 1996 Act's adoption, thereby signaling Congress's intent that in the event of a conflict between Commission rules under section 276 and a post-1996 contract, the rules will take precedence. Furthermore, it is well established that "[u]nder the *Sierra-Mobile* doctrine, the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful, and to modify other provisions of private contracts when necessary to serve the public interest." *Western Union Tel. Co. v. FCC*, 815 F.2d 1495 at 1501 (D.C. Cir. 1987) (citations omitted); cf. *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385 at 5392-93, para.18 (2008) ("we find that we have ample authority to regulate telecommunications carriers' contractual conduct [under section 201(b) of the Act] even though it may have a tangential effect on MTE owners."). Here, we have adopted reforms to ensure that rates and charges for interstate ICS are just, reasonable, and fair under the Act and consistent with the public interest. To the extent that a contract between a facility and an ICS provider contains a rate that does not meet those legal standards, it would be in the public interest to mandate that the contracts be modified so that they reflect rates that comply with the relevant legal requirements. Accordingly, we would be acting within our authority to adopt these reforms even if we were understood to be directly modifying existing contracts.

³⁶⁶ See Petitioners Aug. 2, 2013 *Ex Parte* Letter at 2 (based on the record and Petitioners' review of scores of contracts, "it is clear that the parties to ICS contracts routinely reserve the right to amend or renegotiate contracts should there be changes in state or federal regulations") (attaching excerpts from ICS agreements, both for large state-run correctional authorities and smaller county facilities). *Contra* Dissent at 122-123.

those may well be triggered by the Commission's action today.³⁶⁷ 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.³⁶⁸ 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.³⁶⁹ 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.”³⁷⁰ The court reached this finding even though the relevant legislation effectively *eliminated* the market for private screening services.³⁷¹ 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.³⁷² 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.³⁷³ Nor do our actions represent a regulatory taking.³⁷⁴ The Supreme Court has stated that in evaluating regulatory takings

³⁶⁷ See Petitioners 2013 Comments at 28-29 (observing that the Florida DOC contract with Securus was amended on four separate occasions, each time changing the ICS rates, and noting that the ICS agreement with the Indiana Department of Corrections had also been amended); see also GTL 2013 Comments at 29 (asserting that ICS contracts “typically include change of law provisions”); Securus 2013 Comments at 3 (stating that contracts may, in “some instances,” be extended for a finite period).

³⁶⁸ See CenturyLink 2013 Comments at 15-16 (asserting that applying new rules to existing ICS contracts could result in the confiscation of ICS provider property); Securus 2013 Comments at 11-12 (arguing that the Constitution prevents existing contracts from being abrogated or altered by new regulations except in exigent circumstances not present here).

³⁶⁹ See, e.g., *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508–510 (1923) (holding that even where the government expressly targeted an existing contract the harmed party did not have a takings claim because the United States acquired the subject matter of the existing contract, and its losses were only “consequential”).

³⁷⁰ *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1380 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 1045 (2008).

³⁷¹ See *id.* at 1375.

³⁷² See *supra* para. 53.

³⁷³ See *Loretto v. Teleprompter Manhattan City Corp.*, 458 U.S. 419, 427 (1982) (“When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.”); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.”).

³⁷⁴ Cf. *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, WT Docket No. 99-217, 23 FCC Rcd 5385 at 5292-93, para. 18 (2008) (FCC prohibition on telecommunications exclusivity contracts pursuant to section 201(b) of the Act does not violate the Fifth Amendment); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20261-64, paras. 55-60

(continued....)

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.³⁷⁵ 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.³⁷⁶ Under these circumstances, any cognizable economic impact will not be sufficiently significant to implicate the takings clause.³⁷⁷ 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.³⁷⁸

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,³⁷⁹ 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.³⁸⁰ In addition, some states have already taken action consistent with what we adopt here today.³⁸¹ Given this background, any investment-backed expectations cannot reasonably be characterized as having been upset or impinged by our actions today.³⁸²

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.³⁸³ 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

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(2007) (*Video MDU Order*) (FCC prohibition on video exclusivity contracts pursuant to section 628 of the Act does not violate the Fifth Amendment), *aff'd*, *National Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

³⁷⁵ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

³⁷⁶ Moreover, we note that the record supports the notion that lower rates are likely to stimulate significant additional call volume, which should generate additional revenues for ICS providers. *See supra* Section III.C.3.

³⁷⁷ *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944) (where rates enable continued operation of regulated company, the company has no valid claim to compensation under the Takings Clause, even if the current scheme of regulated rates yields "only a meager return" compared to alternative rate-setting approaches).

³⁷⁸ *See supra* paras. 4, 66, 80, and n.15.

³⁷⁹ *See* First Wright Petition; Alternative Wright Petition; *see also* 2007 Public Notice, 22 FCC Rcd 4229.

³⁸⁰ *See supra* Sections III.C.2.b, III.C.3.

³⁸¹ *See supra* para. 4 and Section III.B.3.

³⁸² *See Video MDU Order*, 22 FCC Rcd at 20263, para. 58 (finding no improper interference with investment-backed expectations because, *inter alia*, "exclusivity clauses in MDU contracts have been under active scrutiny for over a decade"; "the Commission has prohibited the enforcement of such clauses in similar contexts"; and "States have also taken action to prohibit such clauses"); *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 226-27 (1986) (declining to find interference with investment-backed expectations where subjects of regulation long had been "objects of legislative concern," where "it was clear" that agency discretion to regulate, if exercised, would result in liability; and where affected entities had "more than sufficient notice" of possibility of regulation).

³⁸³ *See* 47 U.S.C. §§ 201, 276.

“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.³⁸⁴

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.³⁸⁵ 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.³⁸⁶ Calling options other than collect calling appear to have increased since the Alternative Wright Petition was filed.³⁸⁷ 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.³⁸⁸

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.³⁸⁹ 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.³⁹⁰ 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

³⁸⁴ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *see also Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254 at 1263 (D.C. Cir. 1993) (holding that a confiscatory “end result” may be established only upon a particularized showing that the rate order “threatens the financial integrity of the [regulated carrier] or otherwise impedes [its] ability to attract capital”); *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 at 1181 (D.C. Cir. 1987) (suggesting that federally prescribed rates could be confiscatory if a regulated company could provide its allegations that it “ha[d] been shut off from long-term capital, [was] wholly dependent for short-term capital on a revolving credit arrangement that [could] be cancelled at any time, and ha[d] been unable to pay dividends for four years”); *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101 at 1109 (D.C. Cir. 2011) (government action must “amount to a deprivation of all or most economic use” of property in order to amount to an unconstitutional regulatory taking) *cert. denied*, 131 U.S. 3003 (2011).

³⁸⁵ *See* Alternative Wright Petition at 23-27 (contending that all ICS providers should be required to offer debit calling at all facilities, and that prison administrators be required to permit the option of debit calling); First Wright Petition, Dawson Aff. 42-43 (asserting that, in the case of debit account or debit card calling, billing costs and uncollectibles “virtually disappear,” making debit calling much cheaper than collect calling).

³⁸⁶ *2012 ICS NPRM*, 27 FCC Rcd at 16640-41, paras. 30-33.

³⁸⁷ *See* CenturyLink 2013 Comments at 13 (estimating that approximately 70% of its ICS customers offer debit calling but noting that “debit calling varies widely by facility”); GTL 2013 Comments at 22 (noting that a “significant number” of correctional facilities “are becoming more open to debit calling,” but that debit calling “is not yet universally accepted”); *see also* Securus 2013 Comments at 21 (noting that some correctional facilities forbid calling cards due to administrative burdens and concerns about potential violence); PCS 2007 Comments at 6 (noting that it “offered debit service to all its facilities” but has only about 60% penetration among its Department of Corrections facilities).

³⁸⁸ *See* GTL 2013 Comments at 21-22 (noting that debit calling is not universally accepted and that some facilities “prefer not to give inmates the greater degree of latitude to direct their own calls”); Securus 2013 Comments at 21 (asserting that debit and prepaid options are increasingly prevalent but their “availability lies in the discretion of the resident correctional authority”); Telmate 2013 Comments at 17 and Telmate 2013 Reply at 9-10 (contending that ICS providers oppose a mandate to allow debit and prepaid calls because their calling systems and platforms are old and cannot support anything but collect calls); *see also* GA. COMP. R. & REGS. 515-12-1.30 (2013).

³⁸⁹ *See 2012 ICS NPRM*, 27 FCC Rcd at 16643-44, para. 40 (citing Alternative Wright Petition at 23-24).

³⁹⁰ *See id.*

family member.³⁹¹ 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.³⁹² Commenters agreed that billing-related call blocking occurs.³⁹³

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.³⁹⁴ 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.³⁹⁵ We establish lower interim rate caps and safe harbor rate levels for debit and prepaid calling herein.³⁹⁶ 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.³⁹⁷ We note that the record indicates the increased availability of calling options other than collect calling.³⁹⁸ In the accompanying Further Notice we seek comment about these options.³⁹⁹ 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,”⁴⁰⁰ poses a serious threat to the “ubiquity and

³⁹¹ See *id.*; see also GTL 2013 Comments at 24 (asserting that ICS providers “have no alternative but to block calls” to numbers served by LECs with which they do not have preexisting billing relationships because they would be completing calls with no way to bill and collect for the calls).

³⁹² See 2012 ICS NPRM, 27 FCC Rcd at 16643-44, para. 40.

³⁹³ For example, Securus stated that approximately three out of ten calls result in a billable call. See Securus 2013 Comments at 16. GTL acknowledges that billing-related call blocking is increasing. See GTL 2013 Comments at 24-25.

³⁹⁴ See GTL 2013 Comments at 25 (asserting that the best way to deter call blocking is to support increased use of debit or prepaid calling); Securus 2013 Comments at 22; Alternative Wright Petition at 7, 23-24.

³⁹⁵ As a result, providers would benefit from reduced costs for operators and billings and collection personnel. See CURE 2007 Comments at 9. We note that some ICS providers offer products designed to help inmates’ friends and families find the lowest-cost calling plan possible, through such features as remote kiosks for prepaid and debit services. See Securus Comments 2013 at Attach., Hopfinger Decl. at paras. 22-25 (describing prepaid cards sold at facility’s commissary, or funded by check, credit card, online banking, money order, via its website or through a toll-free number); Telmate Reply 2013 Comments at 3 (offering remote kiosk payments).

³⁹⁶ See *supra* Section III.C.3.

³⁹⁷ See, e.g., GTL 2013 Comments at 18 (asserting that “call volumes typically increase significantly as an inmate’s family and friends can more easily manage a prepaid account for budgeting purposes”).

³⁹⁸ See, e.g., HRDC 2013 Comments at Exh. B (chart showing 2012 interstate ICS rates in state correctional facilities include prepaid and debit options in all but five states); Securus 2013 Comments at 21-22; Telmate 2013 Comments at 11 (stating that all of Telmate’s platforms support debit and prepaid services).

³⁹⁹ See *infra* Section V.E.

⁴⁰⁰ *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629 at 11631 para. 5 (Wireline Comp. Bur. 2007) (*Call Blocking Declaratory Ruling*); see also *USF/ICC Transformation Order*, 26 FCC Rcd at 17903, para. 734; 18029 para. 973; *Blocking Interstate Traffic in Iowa*, FCC 87-15, Memorandum Opinion and Order, 2 FCC Rcd 2692 (1987) (denying application for review of a Bureau order that required petitioners to interconnect their facilities with those of an interexchange carrier in order to permit the completion of interstate calls over certain facilities).

seamlessness⁴⁰¹ of the network, and can be an unjust and unreasonable practice under section 201(b) of the Communications Act.⁴⁰² 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.⁴⁰³ They assert that uncollectible revenue associated with collect calls drives up providers' costs, which are ultimately passed along through ICS rates charged to consumers.⁴⁰⁴ Some commenters suggest that encouraging debit or prepaid calling is necessary to eliminate the issue of billing-related call blocking.⁴⁰⁵ 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.⁴⁰⁶ 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.⁴⁰⁷ Securus has implemented a similar strategy by allowing "a short conversation with the called party, after which the called party is invited to

⁴⁰¹ *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 at 9932-33, para. 24 (2001) (*Access Charge Reform*).

⁴⁰² *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11629, 11631, paras. 1, 5-6; *USF/ICC Transformation Order*, 26 FCC Rcd at 17903, 18029, paras. 734, 973; *Blocking Interstate Traffic in Iowa*, 2 FCC Rcd at 2692; *Telecommunications Research and Action Center and Consumer Action v. Central Corporation*, Memorandum Opinion and Order, 4 FCC Rcd 2157, 2159, para. 12 (1987).

⁴⁰³ See GTL 2013 Comments at 24 (asserting that ICS providers "have no alternative but to block calls" to numbers served by LECs with which they do not have preexisting billing relationships because they would be completing calls with no way to bill and collect for the calls); Alternative Wright Petition at 7, 23-24 (alleging that ICS providers are "increasingly unable or unwilling to enter into billing agreements with LECs," resulting in increased call blocking and fewer inmate calls); CURE 2007 Comments at 10 (noting that collect calls from penal facilities will be blocked if the recipient's telephone company does not have an established billing arrangement with the telephone company serving the prison).

⁴⁰⁴ See, e.g., GTL 2013 Comments at 20-21; NCIC 2013 Comments at 5; SDDOC 2013 Comments at 1; Pay Tel 2007 Comments at 10-11.

⁴⁰⁵ See, e.g., GTL 2013 Comments at 24-25 (asserting that the only practical way to deter call blocking is to support increased use of debit or prepaid calling); NASUCA 2013 Reply at 7 (noting that states that do not offer debit card and prepaid calling options should be encouraged to do so); CURE 2007 Comments at 10-11 (contending that mandating debit calling services would address call blocking because ICS providers would be assured of payment for an inmate's call).

⁴⁰⁶ See CenturyLink 2013 Comments at 17 (stating that it and other ICS providers operate different billing programs that "effectively address" the issue of a lack of traditional billing arrangements with CLECs and wireless providers); Securus 2013 Comments at 21 (asserting that, due to new products it has developed, as well as advanced technology available, it is increasingly rare that an inmate call is blocked due to lack of a billing arrangement); CCA 2007 Comments at 20 (noting that ICS providers generally have billing arrangements with major ILECs, contract with billing clearinghouses, and work with CLECs to arrange for "alternative means" for calls to be completed in cases where CLECs refuse to bill for collect calls); Pay Tel 2007 Comments at 14-15 (alleging that call blocking issues should not be blamed on ICS providers, as it is the CLECs and wireless carriers who refuse to enter into billing arrangements with the ICS providers, as well as refusing to populate the information database, or LIDB, in an attempt to avoid payment).

⁴⁰⁷ See Pay Tel 2013 Comments at 1-2; Pay Tel 2007 Comments at 23-24. Pay Tel allows an ICS call to go through and then sets up a direct billing relationship with the called party rather than having to rely on the called parties' phone service provider. See Pay Tel May 31, 2013 *Ex Parte* Letter at Attach., Presentation for Federal Communications Commission, 1. Pay Tel also says that "prepaid collect" calls account for approximately 61% of its ICS traffic. See Pay Tel 2013 Comments, Exh. 2.

set up a billing arrangement with Securus via oral instructions.⁴⁰⁸ CenturyLink has implemented a similar “prepaid collect” solution.⁴⁰⁹

113. Based on the availability of these “prepaid collect” services, the Commission’s long-standing position against unreasonable call blocking,⁴¹⁰ and the public interest benefits realized from encouraging inmates connecting with friends and families, we find billing-related call blocking⁴¹¹ by interstate ICS providers that do not offer an alternative to collect calling to be an unjust and unreasonable practice under section 201(b).⁴¹² As such, we prohibit ICS providers from engaging in billing-related call blocking⁴¹³ 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 courts⁴¹⁴ have routinely indicated that billing and collection services provided by a common carrier for its own customers are subject to Title II.⁴¹⁵

⁴⁰⁸ Securus 2013 Comments at 23.

⁴⁰⁹ See CenturyLink 2013 Comments at 17.

⁴¹⁰ See *supra* para. 111.

⁴¹¹ Consistent with prior Commission action, this prohibition also extends to providers of interconnected and of “one-way” VoIP traffic if those services are currently offered by ICS providers or are at some future time. See *USF/ICC Transformation Order*, 26 FCC Rcd at 18028-29, paras. 973-74 (prohibiting blocking of voice traffic to or from the PSTN by interconnected VoIP providers, or by providers of “one-way” VoIP).

⁴¹² We also believe that the section 276(b)(1) requirement that payphone services benefit the general public supports our action here. See 47 U.S.C. § 276(b)(1). Collect calling only mandates coupled with call blocking by ICS providers effectively act to prevent an inmate from completing ICS calls.

⁴¹³ By billing-related call blocking, we clarify that we include blocking collect calls for lack of a billing arrangement between the ICS provider and the called party’s provider.

⁴¹⁴ See *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”); Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, CG Docket Nos. 11-116, 09-158, CC Docket No. 98-170, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 4436, 4480, paras. 123-25 (2012) (*2012 Cramming Order*) (carrier practice of placing third-party charges on bills makes cramming possible and is subject to section 201(b)); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Second Recommended Decision, 13 FCC Rcd 24744, 24771-72, para. 70 & n.87 (1998) (“We believe that a carrier’s billing and collection practices for communications services are subject to regulation as common carrier services under Title II of the Act.”); *Pub. Serv. Comm’n of Maryland v. FCC*, 909 F.2d 1510, 1512 (D.C. Cir. 1990) (explaining that “[b]illing and collecting for a carrier’s own offering is part and parcel of providing that service in the first place, and since the service itself fell within the FCC’s jurisdiction, the billing and collecting process did as well”).

⁴¹⁵ In the *First Truth in Billing Order*, for example, the Commission rejected arguments that the *1986 Detariffing Order* precluded the Commission from regulating common carrier billing practices under Title II. See *Truth-in-Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7506-07, para. 25 (1999) (“The Commission has previously stated that it has jurisdiction under Title

(continued....)

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.⁴¹⁶ 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,⁴¹⁷ 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.⁴¹⁸ 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

(Continued from previous page) _____

II to regulate the manner in which a carrier bills and collects for its own interstate offerings, because such billing is an integral part of that carrier's communications service."); *Detariffing of Billing & Collection Servs.*, 102 F.C.C. 2d 1150, 1167-68 (1986) (*1986 Detariffing Order*), *recon. denied*, 1 FCC Rcd 445 (1986). The Commission relied on this finding more recently in regulating carrier "cramming" practices, finding that the *1986 Detariffing Order* "did not prevent it from requiring that carrier billing practices 'for and in connection with' telecommunications services must be just and reasonable" under section 201(b). *See 2012 Cramming Order*, 27 FCC Rcd at 4480, para. 123.

⁴¹⁶ We recognize that ICS providers currently are not required to tariff their interstate ICS, and we decline to require tariffing in this context. Although tariffing requirements can provide valuable protections in appropriate circumstances, we conclude that the more limited requirements we adopt are appropriate as part of this interim regulatory framework, subject to further consideration in the Further Notice. The approach adopted here thus allows ICS providers greater flexibility in how they offer ICS than would be the case under a tariffing regime. *See, e.g.*, 47 U.S.C. § 203 (requiring, among other things, filing of tariffs publicly with the Commission and advanced notice to the Commission of changes to a tariff; authorizing the Commission to reject tariff filings; and prohibiting deviations from the tariff); *American Tel. & Tel. Co. v. Central Office Tel.*, 524 U.S. 214, 227 (1998) (under the filed tariff doctrine, "the rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier") (citation omitted); 47 C.F.R. §§ 61.38, 61.39, 61.49 (supporting information required to be submitted with tariff filings; 47 C.F.R. Part 61, subparts B and F (tariff filing, formatting and notice requirements).

⁴¹⁷ One indicia of this would be a call to the same telephone number initiated shortly after a call to the same telephone number was disconnected.

⁴¹⁸ *See supra* Section III.C.3.d. *See generally* Please Deposit All of Your Money Study.

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.⁴¹⁹ Additionally, ICS providers that are non-dominant interexchange carriers⁴²⁰ must make their current rates, terms, and conditions available to the public via their company websites.⁴²¹ 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.⁴²² 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.⁴²³ 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.⁴²⁴ 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 charges⁴²⁵ 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

⁴¹⁹ See 47 C.F.R. § 64.710(a)(1).

⁴²⁰ See 47 C.F.R. § 42.10.

⁴²¹ See 47 C.F.R. § 42.10(b). In the *USTelecom Forbearance Order*, the Commission conditionally forbore from section 42.10(a) of its rules requiring that rates, terms and conditions be made publicly available at a physical location, as long as the information is available on a provider’s publicly-accessible website or the provider makes reasonable accommodations to provide the information to consumers without Internet access. See *Petition of USTelecom for Forbearance Under 47 U.S.C. Section 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order and Report and Order in WC Docket 10-132 and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7676-74, paras. 98-99 (2013).

⁴²² See 47 C.F.R. § 503(b); 47 C.F.R. § 1.80(a).

⁴²³ 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R. § 1.80(b)(2). Part 1.80(b) of the Commission’s rules was recently amended to increase penalty amounts to account for inflation. See *Amendment of Section 1.80(B) of the Commission’s Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, DA 13-1615 (Enf. Bureau rel. Aug. 2, 2013); see also 78 FR 49370.

⁴²⁴ See 47 U.S.C. § 214; 47 C.F.R. § 63.01(a) (granting domestic section 214 authority generally); *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, Report and Order, MM Docket No. 87-531, 14 FCC Rcd 11364, 11373-74, paras. 15-16 (1999) (stating that a carrier’s blanket section 214 authority can be revoked “when warranted in the relatively rare instances in which carriers may abuse their market power or their common carrier obligations”).

⁴²⁵ See *supra* Section III.C.1 and note 196.

interstate calls and \$0.14 per minute for collect interstate calls.⁴²⁶ 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.⁴²⁷ 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.⁴²⁸ 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.⁴²⁹

122. *Informal Complaints.* Parties may submit informal complaints to the Commission pursuant to section 1.41 of the Commission's rules.⁴³⁰ Unlike formal complaints, no filing fee is required.⁴³¹ We recommend that complaining parties submit any complaints through the Commission's website, at <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.⁴³²

⁴²⁶ We find that the record provides ample justification for assuming a 15-minute call as the basis for our calculations. *See supra* note 232. Additionally, we address rates by adopting interim safe harbor rate levels and interim rate caps that work together. 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, reasonable, and fair.

⁴²⁷ *See* 47 U.S.C. §§ 201, 208, 276.

⁴²⁸ 47 C.F.R. §1.720, *et seq.*

⁴²⁹ As noted above, a provider will lose the benefit of the safe harbor if its rates at any of the facilities it serves exceed the safe harbor rate levels. *See supra* note 226.

⁴³⁰ 47 C.F.R. § 1.41.

⁴³¹ Refunds to end users will not be available under the informal complaint process.

⁴³² As with our other complaint rules, the availability of complaint procedures does not bar the Commission from initiating separate and independent enforcement proceedings for potential violations. *See* 47 C.F.R. § 0.111(a)(16).

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 providers⁴³³ 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.⁴³⁴ 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.⁴³⁵ Finally, we will require ICS providers to submit forecasts, supported by evidence, of how they expect costs to change in the future.

⁴³³ ICS providers whose rates are at or below the applicable safe harbor rate level must comply with the mandatory data collection as well.

⁴³⁴ See 47 C.F.R. § 0.459. We will also provide parties that opportunity to comment on the data after it is submitted, provided that they abide by any relevant protective order, or other requirements, adopted in this docket.

⁴³⁵ For purposes of this data collection, data on intrastate demand includes both intrastate local and long distance.

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. FURTHER NOTICE OF PROPOSED RULEMAKING

128. We seek comment on additional measures we could take to ensure that interstate and intrastate ICS are provided consistent with the statute and public interest, the Commission's authority to implement these measures, and the pros and cons of each measure. We believe additional action on ICS will help maintain familial contacts stressed by confinement and will better serve inmates with special needs while still ensuring the critical security needs of correctional facilities of various sizes. Specifically, we seek comment on:

- Reforming intrastate ICS rates and practices;
- ICS for the deaf and hard of hearing community;
- Further reforms of interstate and intrastate ICS rates;
- Cost recovery in connection with the provision of ICS;
- Ensuring that charges ancillary to the provision of ICS are cost-based;
- ICS call blocking;
- Ways to foster competition to reduce rates within correctional facilities; and
- Quality of service for ICS.

A. Reforming Intrastate ICS

129. In this section, we seek comment on reforming intrastate ICS rates⁴³⁶ and practices to ensure that consumers across the country can benefit from a fair, affordable ICS rate framework that encourages inmates to stay connected with friends and family. As discussed below, we believe that intrastate reform is necessary and that the Commission has the authority to reform intrastate ICS rates. We seek comment on these issues.

1. Need for Intrastate Rate Reform

130. We commend states that have undertaken ICS reform. In particular, we encourage more states to eliminate site commissions, adopt rate caps, disallow or reduce per-call charges, or take other steps to reform ICS rates.⁴³⁷ The reforms adopted in the Order are structured in a manner to encourage other states to undertake reform and to give states sufficient flexibility to structure reforms in a manner that achieves just and reasonable rates. Even so, it is unlikely that all 50 states, Washington D.C., and the

⁴³⁶ In this Further Notice of Proposed Rulemaking, "intrastate ICS rates" means both local rates and intrastate long distance rates unless otherwise specified.

⁴³⁷ See *supra* paras. 4, 36-38.

U.S. territories will all engage in ICS reform in the near term. Indeed, several comments encourage the Commission to reform intrastate ICS rates as well as interstate ICS rates.⁴³⁸ As a result, if the Commission does not take action to reform unfair intrastate ICS rates, the unreasonably high rates will continue, many families will remain disconnected, and the available societal benefits will not be realized.

131. The Order explains the legal and policy reasons why the Commission needed to adopt reforms of interstate ICS rates.⁴³⁹ We believe the same legal and policy concerns identified in the Order apply equally with regard to high intrastate rates.⁴⁴⁰ For example, lower ICS rates result in increased communications between incarcerated parents and their children. Additionally, the record indicates that the lack of regular contact between incarcerated parents and their children is linked to truancy, homelessness, depression, aggression, and poor classroom performance.⁴⁴¹ Further, studies have demonstrated that increased contact with families during incarceration leads to lower rates of recidivism,⁴⁴² and associated lower taxpayer costs.⁴⁴³ Indeed, the record indicates that a significant number of ICS calls are intrastate, highlighting the need for reform of intrastate rates.⁴⁴⁴ We tentatively conclude and seek comment on the conclusion that intrastate ICS rate reform will yield these and other societal benefits in the same manner as interstate ICS rate reform.

132. As discussed in the Order, the variance in interstate ICS rates is significant (from an effective rate of \$0.043 per minute in New Mexico to \$0.89 per minute with a \$3.95 call set up charge in Georgia)⁴⁴⁵ and that such variance is unlikely to be based on the ICS providers' costs.⁴⁴⁶ In the Order, we

⁴³⁸ See e.g., CenturyLink 2013 Comments at 4; MICPR 2013 Comments at 1; Pay Tel 2013 Comments at 3; Legal Center and CODDC 2013 Comments at 4.

⁴³⁹ See *supra* Sections III.A, III.B.5-III.B.6.

⁴⁴⁰ See, e.g., Transcript of Reforming ICS Rates Workshop at 185-88 (Jason Marks, former Commissioner, New Mexico Public Regulation Commission, urging the Federal Communications Commission to “take a broad look at its jurisdiction” due to the need to reform ICS rates and fees together); *id.* at 265-66, 331 (Vincent Townsend, President, Pay Tel, requesting that the Federal Communications Commission take a “comprehensive approach” to ICS reform); Pay Tel 2013 Comments at 3 (urging the Commission to take a “holistic” approach to ICS reform, including “all aspects of local and non-local, intrastate and interstate calls at both prisons and jails” and noting that reforming only interstate rates will lead to “rate shopping” that [will] raise critical security and fraud concerns”); CenturyLink 2013 Comments at 4-5 (asserting that the “best way to achieve a fair and equitable resolution of the ICS issue is to adopt a holistic rate structure that addresses both intrastate and interstate ICS and balances the needs of all stakeholders”).

⁴⁴¹ See *supra* para. 2; see also The Phone Justice Commenters 2013 Reply at 4-5. Another commenter states that “[m]aintaining relationships with their incarcerated parents can reduce children’s risks of homelessness and of involvement in the child welfare system.” See Vera Mar. 14, 2013 *Ex Parte* Letter at 2; see also Center on the Admin. of Criminal Law 2013 Comments at 11 (“A child that stays in touch with an incarcerated mother or father is less likely to drop out of school or be suspended.”).

⁴⁴² See *supra* note 172.

⁴⁴³ See NARUC 2013 Reply at 6.

⁴⁴⁴ See, e.g., La. DOC 2013 Comments at 6 (asserting that the FCC regulates “only 4% of the calls made or 4% of the minutes used” in its facilities); Pay Tel 2013 Comments at 7 (asserting that in 2012, 84% of its calls in jail facilities were local calls); Telpate 2013 Comments at 3 (stating that “interstate traffic is a small percentage of ICS calling”); Pay Tel 2007 Comments at 6 (stating that in 2007, 81% of its calls in jail facilities were local calls).

⁴⁴⁵ See The Phone Justice Commenters 2013 Comments at 6 (citing Georgia Department of Corrections, Inmate Telephone System: GTL Customer User Guide, *available at* http://www.dcor.state.ga.us/pdf/GDC_GTL_user_manual.pdf (a long distance interstate telephone call has a \$3.95 connection surcharge and \$0.89 per-minute rate)); HRDC 2013 Comments at 3, 12 (stating that New Mexico has an interstate collect calling rate of \$0.043/min.).

⁴⁴⁶ The ratio of standard deviation to mean for ICS per minute call costs net of commissions is 75% greater than the (continued....)

conclude that competition and market forces have failed to ensure just, reasonable, and fair interstate ICS rates, and, for the same reasons, we tentatively conclude that the same failure has occurred for intrastate ICS rates as well.⁴⁴⁷ We invite comment on this analysis. Where states have failed to ensure just, reasonable, and fair ICS rates for intrastate services, is the Commission compelled to take action to ensure just, reasonable, and fair rates under section 276? Should the Commission only take action to reform intrastate ICS rates in states that have not reformed rates to levels that are at or below our interim safe harbor adopted above? Would doing so permit other states to adopt reforms?

133. For the same reasons we found that site commission payments are not part of the cost of providing interstate ICS, we tentatively conclude that site commissions should not be recoverable through intrastate rates, and seek comment on this tentative conclusion.⁴⁴⁸ Where states have prohibited site commission payments, we seek comment on whether the resulting intrastate ICS rates are just and reasonable and whether an average of such rates would provide a reasonable safe harbor for fair intrastate ICS rates.

134. The record also reflects that differing interstate, intrastate long distance and local rates have encouraged the use of technology to reduce the costs on families. In practice, call recipients obtain telephone numbers associated with a geographic area (either local or long distance) that corresponds to the lowest ICS rate for a particular correctional facility.⁴⁴⁹ Will the cost-based rates required by the Order create a market-based solution for driving intrastate rates to cost-based levels absent further regulatory actions? Also, does the existence of uniform ICS rates evidence ICS providers' ability to provide intrastate and interstate calls at the same rate level, and therefore support Commission action to ensure such uniformity among interstate and intrastate ICS rates?

2. Legal Authority

135. Several commenters in this proceeding have argued that the Commission has authority to regulate rates for intrastate ICS under section 276 of the Act,⁴⁵⁰ which directs the Commission to regulate the rates for intrastate and interstate payphone services and defines such services to include "the provision

(Continued from previous page) _____

corresponding ratio for total incarceration costs per inmate. See HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B; see also *The Price of Prisons: What Incarceration Costs Taxpayers* at 10, Fig. 4 (Vera, Jan. 2010, updated July 20, 2012), available at <http://www.vera.org/pubs/price-prisons-what-incarceration-costs-taxpayers> (last visited July 19, 2013).

⁴⁴⁷ See *supra* Sections III.B.4, III.B.6.

⁴⁴⁸ See *supra* para. 54.

⁴⁴⁹ See Letter from Phil Marchesiello, Counsel to Millicorp, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-144 at 4 n.4 (filed July 12, 2013) (Millicorp occasionally assigns non-local to the facility numbers to customers located internationally or if a customer resides near a correctional facility, and Millicorp numbers in that NPA-NXX are being blocked).

⁴⁵⁰ See, e.g., Hamden 2013 Comments at 5 (stating that section 276 "extends the Commission's authority over intrastate rates, in addition to interstate rates"); NASUCA 2013 Comments at 9 ("[T]he Commission has jurisdiction over all ICS calling, both interstate and intrastate . . ."); Pay Tel 2013 Comments at 6 & n.17 ("[t]here is no question but that the Commission has jurisdiction over intrastate inmate calling rates" under section 276); Letter from Lee G. Petro, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed June 19, 2013) ("[T]here should be no reasonable question that the FCC can address intrastate ICS rates in the instant proceeding . . ."). The questions in this section of the FNPRM pertain to the Commission's legal authority to regulate the rates paid by end users of intrastate ICS calls: e.g., rates paid by inmates for debit-based calling, and rates charged to called parties for collect calls accepted from inmates. This section does not address the Commission's legal authority to regulate payphone compensation between providers, which is well-established under section 276 and the Commission's implementing rules. See 47 U.S.C. § 276(b), 201(b); *ICS 2012 NPRM* at 16647, para. 49 n.158.

of inmate telephone service in correctional institutions, and any ancillary services.”⁴⁵¹ We agree and tentatively conclude that section 276 affords the Commission broad discretion to regulate intrastate ICS rates and practices that deny fair compensation, and to preempt inconsistent state requirements. We seek comment on this tentative conclusion and related issues below.⁴⁵²

136. While the Commission has broad jurisdiction over interstate telecommunications services, its authority over intrastate telecommunications is, except as otherwise provided by Congress, generally limited by section 2(b) of the Act, which states that “nothing in this Act shall . . . give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio.”⁴⁵³ As the Supreme Court has held, however, section 2(b) has no effect where the Communications Act, by its terms, unambiguously applies to intrastate services.⁴⁵⁴ That is the case here. Section 276(b)(1) expressly authorizes – indeed, instructs – the Commission to regulate intrastate payphone services:

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission *shall* take all actions necessary (including any reconsideration) to prescribe regulations that . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed *intrastate* and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation⁴⁵⁵

Furthermore, section 276(c) 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.”⁴⁵⁶

137. We also believe that our authority in this regard finds support in judicial precedent. In *Illinois Public Telecommunications Association v. FCC*, the D.C. Circuit upheld against jurisdictional challenge the Commission’s authority to regulate, and to preempt inconsistent state regulation of, the local coin rate for payphones:

⁴⁵¹ 47 U.S.C. §§ 276(b)(1)(A) & (d).

⁴⁵² NARUC has urged us to seek comment on these issues. NARUC 2013 Reply at 4 (stating that while the Commission’s authority with respect to interstate interexchange calling is clear, “the scope of the FCC’s authority to address intrastate, long-distance calls and/or operator services is not,” and requesting issuance of an FNPRM seeking comment on the “legal rationale” for any such authority); *see also* Transcript of Reforming ICS Rates Workshop at 185-88 (Jason Marks, former Commissioner, New Mexico Public Regulation Commission, urging the Commission to “take a broad look at its jurisdiction”); *id.* at 265-66, 331 (Vincent Townsend, President, Pay Tel, requesting a comprehensive approach to ICS reform that includes both interstate and intrastate rates).

⁴⁵³ 47 U.S.C. § 152(b).

⁴⁵⁴ *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999) (ruling that section 2(b) does not preclude the Commission from regulating intrastate telecommunications under the provisions of section 251); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 377 (1986) (*Louisiana Pub. Serv. Comm’n*) (section 2(b)’s jurisdictional fence may be breached when Congress used “unambiguous or straightforward” language to give the Commission jurisdiction over intrastate communications); *see also Ill. Pub. Telecomms. Ass’n v. FCC*, 117 F.3d 555, 561-62 (D.C. Cir. 1997) (*Ill. Pub. Telecomms. Ass’n*) (applying “unambiguous or straightforward” standard to find that section 276 unambiguously grants the Commission authority to regulate the rates for local coin payphone calls).

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

⁴⁵⁶ 47 U.S.C. § 276(c).

It is undisputed that local coin calls are among the intrastate calls for which payphone operators must be “fairly compensated;” the only question is whether in § 276 the Congress gave the Commission the authority to set local coin call rates in order to achieve that goal. We conclude that it did.⁴⁵⁷

Thus, we tentatively conclude these statutory provisions and associated case law permit the Commission to regulate intrastate ICS provider compensation, including end-user rates. We seek comment on this conclusion.

138. We also seek comment on whether and how the Commission’s potential regulation of intrastate ICS pursuant to section 276 might be informed by any relevant provisions within section 276, including, for example, (i) the introductory “purpose” clause of section 276(b)(1) (“In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to benefit the general public”); and (ii) section 276(b)(1)(A)’s requirement that regulations adopted by the Commission ensure that payphone service providers are compensated “per call” and for “each and every completed intrastate and interstate call.”

139. Commenters are asked to identify what, if any, limits apply to Commission authority to regulate intrastate ICS rates under section 276. We note that the Commission’s authority to regulate interstate ICS rates derives from both sections 276 and 201. We seek comment on whether this impacts the Commission’s authority to regulate intrastate ICS rates.⁴⁵⁸ For instance, section 201(b) authorizes this Commission to ensure that all charges “for and in connection with” an interstate common carrier communication service are just and reasonable.⁴⁵⁹ Does the absence of similar language in section 276 constrain our authority to regulate intrastate ICS rates in the same manner and to the same extent as interstate ICS rates? Alternatively, by broadly defining payphone service to also include “any ancillary services,” does section 276 effectively grant the Commission authority over intrastate rates that is similar in scope to authority under the “for and in connection with” provision in section 201(b)?

140. We seek comment on any sources of authority other than section 276 that would authorize the Commission to regulate intrastate ICS rates paid by end users. Does the provision of ICS – either in its current form or as it evolves to include new services and technologies – implicate the “impossibility” exception to section 2(b) of the Act, which allows a Commission regulation to preempt a state regulation when it is impossible to separate the interstate and intrastate components?⁴⁶⁰ Would

⁴⁵⁷ *Ill. Pub. Telecomms. Ass’n*, 117 F.3d at 562 (D.C. Cir. 1997) (finding that “compensation,” as used in section 276, is reasonably construed to encompass rates paid by callers and there is no indication that Congress intended to exclude local coin rates from that term); *see also id.* at 563 (because “the Commission has been given an express mandate to preempt State regulation of local coin calls [under section 276] . . . , the requirement that the FCC’s regulation be narrowly tailored simply does not come into play”). *Cf. New England Public Comm’ns Council, Inc. v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) (“Here we find that section 276 unambiguously and straightforwardly authorizes the Commission to regulate the BOCs’ intrastate payphone line rates.”), *cert. denied sub nom. North Carolina Payphone Ass’n v. FCC*, 541 U.S. 149 (2004); *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) (“It is true that § 276 substantially expands the Commission’s jurisdiction and gives it broad authority to regulate both intrastate and interstate payphone calls.”) (citing *Ill. Pub. Telecomms. Ass’n*, 117 F.3d at 561-62), *aff’d sub nom. Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007)).

⁴⁵⁸ Section 201(b), referring to section 201(a), extends only to “interstate or foreign communications.” 47 U.S.C. § 201.

⁴⁵⁹ 47 U.S.C. § 201(b).

⁴⁶⁰ *See, e.g., Louisiana Pub. Serv. Comm’n*, 476 U.S. at 375-76 n.4; *California v. FCC*, 75 F.3d 1350, 1359 (9th Cir. 1996), *cert. denied*, 517 U.S. 1216 (1996).

application of this exception here give the Commission any additional authority over intrastate ICS rates beyond what is already conferred by the preemption provision in section 276(c) and the “each and every intrastate . . . call” provision in section 276(b)(1)(A)?

141. We also ask whether there are other limits on our authority to regulate intrastate ICS rates. For instance, are intrastate ICS rates, as some commenters allege, tightly bound up with issues, such as inmate discipline and prison security, that are traditionally regulated by states, localities, or prison officials and, if so, does that limit the Commission’s ability to regulate intrastate ICS rates in ways that would not be applicable for interstate ICS rates?⁴⁶¹ Would Commission regulation of intrastate ICS rates, or any specific elements thereof, “present[] unsettled constitutional implications under the 10th and 11th Amendments,” as one commenter contends?⁴⁶² The record reflects only limited analysis in favor of these arguments, and we note that the proponents of these arguments have not cited any precedents that would preclude the Commission from exercising broad authority over intrastate ICS rates under section 276. Commenters should provide a complete supporting analysis and justification. We also invite comments on any other issues that may be relevant to assessing the scope of the Commission’s authority to regulate intrastate ICS rates.

B. Inmate Calling Services for the Deaf and Hard of Hearing Community

142. We seek comment on four additional issues raised in our record, including: (i) whether and how to discount the per-minute rate for ICS calls placed using TTYs,⁴⁶³ (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,⁴⁶⁴ (iii) the need for ICS providers to receive complaints on TRS service and file reports with the Commission,⁴⁶⁵ and (iv) actions the Commission can take to promote the availability and use of VRS and other assistive technologies in correctional facilities.⁴⁶⁶

143. *Rates for TTY Calls.* The record indicates that despite the fact that using TTY equipment is not the preferred form of TRS for many deaf and hard of hearing individuals, the equipment is still in widespread use in correctional facilities.⁴⁶⁷ Consistent with the Commission’s statement in the *2012 ICS NPRM*, commenters assert that TTY-to-voice calls take at least three to four times longer than voice-to-voice conversations to deliver the same conversational content, not including the time it takes to connect

⁴⁶¹ See GTL 2013 Comments at 33-35 (claiming that courts have “routinely ruled that the regulation of state and local corrections facilities must be left to the local authorities,” and have articulated a policy of “deference” to state and local administrators that it asserts should apply to the Commission’s regulation of intrastate ICS) (citing *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001); *United States v. Michigan*, 940 F.2d 143, 154-55 (6th Cir. 1991)).

⁴⁶² Telmate 2013 Comments at 7 (citing no precedents).

⁴⁶³ Commission rules define TTY as “text telephone” and as a “machine that employs graphic communication in the transmission of coded signals.” 47 C.F.R. § 64.601(a)(22). Video relay service, or VRS, is defined as a relay service that allows people with hearing or speech disabilities to use sign language to communication through video equipment. 47 C.F.R. § 64.601(a)(27). Telecommunications relay service, or TRS, is defined as a service that performs in a manner that is “functionally equivalent” of voice communications used by a hearing person, and may include text messaging, speech-to-speech devices, video relay services, and non-English relay services. 47 C.F.R. § 601(a)(22).

⁴⁶⁴ See, e.g., RBGG 2013 Comments at 3 (stating that many correctional facilities block calls to toll-free numbers); Embracing Lambs Ministry 2013 Comments at 1 (same).

⁴⁶⁵ See, e.g., Consumer Groups 2013 Comments at 5 (suggesting that the FCC require the filing of inmate ICS complaints).

⁴⁶⁶ See *supra* para. 96.

⁴⁶⁷ ACLU 2013 Comments at 3 (stating that a “sufficient number of people still use TTY equipment to support the continued presence of the technology in prisons”); Embracing Lambs 2013 Comments at 2; NDRN 2013 Comments at 2-3.

to the operator.⁴⁶⁸ Given this difference in communication speed, commenters argue that TTY users should be charged a discounted rate for TTY calls.⁴⁶⁹

144. We tentatively conclude that inmate calling service per-minute rates for TTY calls should be set at 25 percent of the safe harbor rate for inmate calls. The 25 percent figure is consistent with record evidence regarding the length of a conversational call via TTY as compared to regular voice calls.⁴⁷⁰ We seek comment on this proposal.

145. The Commission previously has noted that section 276(b)(1)(A) specifically exempts “telecommunications relay service calls for hearing disabled individuals” from the Commission-established “per call compensation plan” ensuring that ICS providers are “fairly compensated.”⁴⁷¹ No party has, to date, responded to the Commission’s request for comment on how it should take this exemption into account in examining rates. We also note that section 225(d)(1) of the Act requires the Commission to prescribe regulations that “require 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.”⁴⁷² We seek comment on whether sections 276 and 225 provide sufficient authority for us to adopt a discounted rate for TTY calls.

146. We also seek comment on how ICS providers should recover the costs of providing discounted TTY calls. One proposal would be to ensure that the safe harbor per-minute rate levels are set high enough to ensure that ICS providers recover the full cost of TTY calls. Given the very small number of deaf and hard of hearing inmates relative to the overall prison population,⁴⁷³ are the safe harbor rates adopted in today’s Order sufficient to allow recovery of the discount? What are the total number of TTY minutes of use compared to the total minutes of use charged by ICS providers? If the safe harbor rates adopted today are not sufficient to recover the cost of a TTY discount, by what amount would the rate need to be increased? If the Commission adopts a tiered rate structure as discussed below or reduces the safe harbor rates adopted in the Order, what effect would this have on the ability to recover the discount?

147. We also seek comment on allowing ICS providers to recover the cost of a TTY discount from the Telecommunications Relay Service Fund.⁴⁷⁴ What steps would the Commission need to take to allow ICS providers to obtain certification to request payment from the Fund?⁴⁷⁵ What types of data

⁴⁶⁸ See 2012 ICS NPRM, 27 FCC Rcd at 16644, para. 42; HEARD 2013 Comments at 5; Consumer Groups 2013 Comments at 2-3; Embracing Lambs 2013 Comments at 1; Legal Center and CODDC 2013 Comments at 2; NDRN 2013 Comments at 3. Commenters further assert that TTY-to-TTY calls take six to eight times as long as voice phone calls because of the use of TTYs on both sides of the call. See HEARD 2013 Comments at 5-6; see also RIT/NTID Student Researchers 2013 Comments at 5.

⁴⁶⁹ See Consumer Groups 2013 Comments at 4 (urging the Commission to “proportionally discount all relay calls by seventy-five percent”); P&A 2013 Comments at 2 (asking the Commission to reduce rates charged for TTY calls to “at least one half or one quarter . . . of the charges for voice calls”); HEARD 2013 Comments at 9; RIT/NTID Student Researchers 2013 Comments at 6 (stating that an 85 percent reduction in TTY-TTY calls would achieve an appropriate price reduction).

⁴⁷⁰ See *supra* note 468.

⁴⁷¹ 47 U.S.C. § 276(b)(1)(A).

⁴⁷² 47 U.S.C. § 225(d)(1).

⁴⁷³ See, e.g., Transcript of Reforming ICS Rates Workshop at 18 (introduction of Talila Lewis President, HEARD, which maintains a national database of approximately 500 deaf inmates).

⁴⁷⁴ The costs of providing TRS on a call are supported by shared funding mechanisms at the state and federal levels. The federal fund supporting TRS is the Interstate Telecommunications Relay Services Fund (TRS Fund or Fund). 47 C.F.R. § 64.604(c)(5)(iii).

⁴⁷⁵ See, e.g., 47 C.F.R. § 64.606.

would ICS providers need to submit to the Fund administrator when seeking compensation? What other steps would the Commission and the Fund administrator need to take to ensure that ICS providers are fully compensated for discounted TTY calls while protecting the TRS Fund against waste, fraud, and abuse?

148. *Access to 711 and State TRS Numbers.* We seek comment below on ICS call blocking practices generally.⁴⁷⁶ We note that commenters allege that many ICS providers block calls to toll-free numbers, including 711, which “impede[s] deaf inmates’ abilities to call a relay service provider from a TTY.”⁴⁷⁷ We seek specific comment on the practice of blocking calls to 711 and other TRS access numbers. Section 225 of the Act states that the Commission “shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.”⁴⁷⁸ Does section 225 of the Act provide to the Commission an independent source of authority to prevent such blocking? What actions, if any, should the Commission take to ensure that deaf and hard of hearing inmates are able to access TRS? What methodologies exist to enable deaf inmates to reach relay services utilizing 711 and 800 numbers while blocking access to all other 800 numbers?

149. *TRS Complaints and Reporting.* Commenters urge the Commission to require ICS providers to collect and report to the Commission: (i) data on TRS usage via ICS,⁴⁷⁹ and (ii) complaints from individuals that access TRS via ICS.⁴⁸⁰ We seek comment on these proposals. If the Commission were to require ICS providers to submit TRS usage data, what data would be appropriate? Would the data that TRS providers submit to the TRS Fund Administrator be an appropriate model?⁴⁸¹ Likewise, were the Commission to require the collection and reporting of user complaints, would the rules applicable to TRS providers serve as an appropriate model?⁴⁸² Are the Commission’s existing consumer complaint procedures sufficient to accommodate complaints of this type?⁴⁸³ We seek comment on the benefits and burdens, including on small entities, of imposing these reporting requirements.

150. *Availability of Assistive Technologies in Correctional Facilities.* As discussed above,⁴⁸⁴ we decline to mandate the types of TRS access technologies correctional facilities must make available to inmates. We note, however, that some correctional facilities already make VRS or other types of video communication available to inmates,⁴⁸⁵ and seek comment on how the Commission can facilitate the

⁴⁷⁶ See *infra* Section V.E.

⁴⁷⁷ See, e.g., RIT/NTID Student Researchers 2013 Comments at 1; see also NDRN 2013 Comments at 3 (stating “relay numbers should be accessible from *all* ICS”) (emphasis in original); P&A 2013 Comments at 2; HEARD 2013 Comments at 6; RBGG 2013 Comments at 3. See HEARD 2013 Comments at 7 (alleging that access to Spanish language relay services is particularly problematic).

⁴⁷⁸ 47 U.S.C. § 225(b)(1).

⁴⁷⁹ HEARD 2013 Comments at 9 (“All ICSs should be required to assemble and report data regarding the number of phone calls placed using TTYs and videophones.”).

⁴⁸⁰ HEARD 2013 Comments at 9 (“ICSs should file with the FCC, periodic reports regarding all telecommunications access grievances filed by prisoners with sensory disabilities.”); Consumer Groups 2013 Comments at 5.

⁴⁸¹ See 47 C.F.R. § 64.604(c)(5)(iii)(D).

⁴⁸² See 47 C.F.R. §§ 64.604(c)(1)-(2).

⁴⁸³ See FCC, Guide: How to File a Complaint, available at <http://www.fcc.gov/guides/how-file-complaint> (last visited July 16, 2013); 47 C.F.R. §§ 1.720-1.735.

⁴⁸⁴ See *supra* para. 97.

⁴⁸⁵ See, e.g., Transcript of Reforming ICS Rates Workshop at 90 (Talila Lewis, President, HEARD, asserting that video phones are already set up in some prisons); *id.* at 105 (Alex Friedmann, Assoc. Director, HRDC, stating that “a number of jails have gone over to video visits”); *id.* at 181 (Barry Marano, Case Mgmt. Counselor, Powhatan

(continued....)

availability of VRS and other forms of assistive technologies in correctional facilities. What assistive technologies and devices should ICS providers make available? What are the advantages and disadvantages of each? Would additional assistive technologies supplant or complement TTY technology in the prison context? How can the security concerns of correctional facilities be accommodated, especially where 700/800/900 number calls or IP enabled devices are used?

151. VRS communications require the interaction of three separate yet interlinked components: VRS access technologies, video communication service, and relay service provided by ASL-fluent communications assistants (CAs).⁴⁸⁶ We note that in the recently adopted *VRS Structural Reform Order*, the Commission directed the creation of a neutral video communication service provider and a VRS access technology reference platform – key elements of VRS service that will be operated pursuant to contract with the Commission or the TRS Fund Administrator and paid for out of the TRS Fund.⁴⁸⁷ We seek comment on whether the availability of the neutral video communication service provider and the VRS access technology reference platform could facilitate the introduction of VRS in correctional facilities. What features or requirements, if any, would correctional facilities require the neutral video communication service provider and the VRS access technology reference platform to offer before allowing their use by inmates? Would it be possible for the administrator(s) of the neutral video communication service provider and the VRS access technology reference platform to implement such requirements or features at a reasonable cost to the TRS Fund? What other factors, such as security issues unique to correctional facilities, may serve as a barrier to the introduction of VRS and other forms of Internet-based TRS in correctional facilities?

C. Further ICS Rate Reform

152. In the Order, we adopted interim safe harbor rate levels and interim rate caps based on a conservative analysis of rate and cost data in the record.⁴⁸⁸ In this section, we seek comment on additional reforms including further rate reductions.

1. Rate Structure

153. We seek comment on additional reforms and alternative ways of accomplishing interstate and intrastate rate reforms including the establishment of unified interstate and intrastate rates and various suggestions for a tiered rate structure. First, we note that in the Order we make clear that the rules we adopt apply to inmate telephone service provided to the full range of “correctional institutions,” including institutions such as prisons, jails and immigration detention facilities.⁴⁸⁹ Beyond the guidance already provided in the order, we seek comment on whether the Commission should provide a definition in the Commission’s rules or to provide a more exhaustive list of the kinds of facilities covered. Parties that support the adoption of a definition of “correctional institution” should suggest proposed rule language and the reasons to support the inclusion or exclusion of various facilities.

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Correctional Center, asserting that video-to video visitation occurs at the Powhatan facility); *see also* Letter from Glenn B. Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 25, 2013) (stating that Telmate offers video visitation at 49 correctional facilities, “with several more coming online in 2014 (comprising approximately 70% of total inmates served)”).

⁴⁸⁶ *See Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Notice of Inquiry, 25 FCC Rcd 8597, 8608, paras. 32-33 (2010).

⁴⁸⁷ *See Structure and Practices of the Video Relay Service Program*, Report and Order and Further Notice of Proposed Rulemaking, CG Docket Nos. 10-51, 03-123, 28 FCC Rcd 8618, 8644-47, 8656-61, paras. 53-61, 87-108 (2013).

⁴⁸⁸ *See supra* Sections III.C.3.

⁴⁸⁹ *See supra* Section III.A.2.

154. *Permanent Safe Harbors and Rate Caps.* We seek comment on the methodology the Commission should use to establish cost-based permanent safe harbors and rate caps to ensure just, reasonable rates and fair compensation to providers. We seek comment on maintaining the interim rate caps and safe harbor rate levels adopted in the Order and expanding that structure to encompass intrastate ICS rates. We note that both the safe harbors and rate caps are set at conservative levels fully supported by the record but are intended to be interim in nature while the Commission further analyzes data received from the mandatory data collection adopted in the Order in order to consider whether any permanent rates should be further refined. Should we maintain the current safe harbors and make them permanent or should they be reduced over time given that they were set at conservative levels? Should they be applied to intrastate rates? Do commenters propose any specific modifications to the interim rate caps and safe harbor rate levels adopted above? For example, we seek comment below on various tiered approaches. Should any permanent safe harbor or cap be based on a tiered approach? Should we adopt a mechanism to adjust any permanent safe harbor or rate cap over time to account for changing ICS provider costs, inflation, or other factors? We invite commenters to identify factors we should consider and to detail the proposed benefits of such modifications.

155. *All-Distance Rates.* Some providers recommend that the Commission adopt a rate structure that charges the same rate regardless of the distance or jurisdictional nature of the call.⁴⁹⁰ Under such a structure, “all calls are charged at the same per-minute rate regardless of distance, call type or jurisdictional classification.”⁴⁹¹ The Commission has, in other contexts, determined that the cost of calling today is distance insensitive.⁴⁹² We seek comment on parties’ experience with distance insensitive ICS rates. Do commenters believe such a rate structure would be useful in regulating ICS rates going forward? Why or why not? We note that some facilities already have such rates.⁴⁹³ Do such rates sufficiently deal with claimed cost differences between prisons and jails of varying sizes? Commenters suggest that after reducing and standardizing all ICS rates call volumes will increase, resulting in increased revenues.⁴⁹⁴ Is this suggestion correct? Have other commenters experienced such a change? We seek comment on the various ICS rate structures suggested in the record. In particular, would adoption of the Petitioner’s proposed rate of \$0.07 per minute bring about the benefits of a distance-insensitive rate claimed by proponents of such an approach?

156. *Tiered Rate Structure.* In the Order we adopted interim safe harbor rate levels and interim rate caps that are sufficiently conservative to enable providers to recover their costs and account for any potential differing characteristics associated with providing service to varying types and sizes of facilities.

157. In the *2012 ICS NPRM*, the Commission sought comment on the usefulness of a tiered rate structure based on volume of ICS minutes at the facility.⁴⁹⁵ In response, commenters suggested a

⁴⁹⁰ See *Telmate 2013 Comments* at 3. We note that *Telmate* refers to a uniform rate as a “postalized” rate. *Id.*

⁴⁹¹ See, e.g., *CenturyLink 2013 Comments* at 16-17; *Telmate 2013 Comments* at 12.

⁴⁹² See *USF/ICC Transformation Order*, 26 FCC Rcd at 17910-11, para. 751, citing generally *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000), rev’d and remanded *sub nom*, *Texas Office of Public Utility Counsel v. FCC*, 265 F. 3d 313 (5th Cir. 2001).

⁴⁹³ See, e.g., Letter from Glenn Manishin, Counsel to *Telmate*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 26, 2013) (noting that, through its licensee Talton Communications, it offers prepaid rates of \$.1235/minute prepaid calling for ICE detainees anywhere in the United States); *CenturyLink 2013 Comments* at 17 (asserting that “almost half of all DOCs have implemented postalized rates for in-state or all domestic calls”); *Telmate 2013 Comments* at 3, 12-13.

⁴⁹⁴ See *Telmate 2013 Comments* at 12-14.

⁴⁹⁵ See *2012 ICS NPRM*, 27 FCC Rcd at 16639-40, para. 28.

tiered rate structure with rate levels that vary according to a facilities' monthly volume of minutes.⁴⁹⁶ We again seek comment on a rate structure tiered by volume of minutes.⁴⁹⁷ We seek comment on whether a tiered rate structure would enable the Commission to adopt a lower rate for larger facilities. Have providers or jurisdictions adopted rate structures based on either call volume or inmate capacity? If so, what has been their experience? How do the costs of providing service differ among facilities for providers serving multiple facilities? Specifically, we seek identification of costs incurred individually by facility and what proportion of such costs make up the provider's total cost of providing service. We note that Securus, in response to the *2012 ICS NPRM*, submitted cost data broken out by four tiers of facility size.⁴⁹⁸ We seek comment on the call volume based tiers used in Securus' filing. Do commenters believe division by such call volume categories is a useful way to establish a tiered rate structure? Or is this type of division too subjective or too specific to be useful for the industry as a whole?

158. If the Commission were to adopt a tiered ICS rate approach by facility size, should the Commission use the breakdown of confinement facility sizes from the Bureau of Justice Statistics?⁴⁹⁹ Also, commenters indicate that centralization in call processing is prevalent in the ICS industry, and that this centralization has changed the costs of providing ICS.⁵⁰⁰ In light of this centralization, we seek comment on whether differences in the cost to provide ICS remain between differently sized facilities. We also seek comment on whether a tiered rate structure would be more applicable to the way ICS is provided in practice if the rate tiers varied by ICS provider size rather than by facility size.⁵⁰¹

159. *Tiered Rate Structure between Prisons and Jails.* Some parties claim that the differences between jails and prisons in terms of such factors as size and inhabitants' length of incarceration make the cost of service vary.⁵⁰² Others disagree.⁵⁰³ If the Commission were to adopt such a proposal, we seek

⁴⁹⁶ See, e.g., Raheer 2013 Comments at 2-6 (suggesting two tiers of regulation based on facility size); Pay Tel May 31, 2013 *Ex Parte* Letter at 2; Securus 2013 Comments at 18-19.

⁴⁹⁷ Parties urge the Commission to "consider a tiered rate structure that distinguishes between, at a minimum, ICS in jails and prison" Pay Tel May 31, 2013 *Ex Parte* Letter at 2.

⁴⁹⁸ See Securus 2013 Comments at 19, Expert Report of Stephen E. Siwek at 2.

⁴⁹⁹ See James J. Stephan & Georgette Walsh, *Census of Jail Facilities, 2006*, Bureau of Justice Statistics, Off. of Justice Programs, U.S. Dept. of Justice, December 20, 2011, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2205> (summary of data); Census of Jail Facilities, 2006, Study No. 26602, National Archive of Criminal Justice Data, available at <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/26602> (last visited June 11, 2013) (actual dataset).

⁵⁰⁰ See PLS 2013 Comments, Exh. 2, Dawson Amend. Aff. at 9-11 ("[T]he large providers like Securus and GTL have benefitted greatly by centralization and economies of scale . . . Today there is very little capital investment All of the brains of the prison calling network are housed now at large centralized locations."); Petitioners 2013 Comments at 2 ("[T]he consolidation of the ICS providers, and the centralized application of safety protocols, has led to the substantial reduction in the costs associated with providing ICS."). *But cf.* Securus 2013 Comments at 4 ("[A]lthough Securus has gained efficiencies through its deployment and use of a centralized, IP-based transmission network, its cost savings has been offset by an increase in the costs arising from regulatory compliance."); Pay Tel 2013 Comments at 13 ("Pay Tel's business model has shifted from a 'customer premises' model to a 'centralized platform' model . . . [this] has led to significant cost shifting. Specifically, general and administrative costs . . . have increased dramatically. On the other hand, capital costs for on-site equipment have seen a significant decrease.").

⁵⁰¹ "[B]ecause of the variety of options available and the varying needs of each correctional facility customer, pricing assumptions based on the size of a facility and the number of beds would ignore the economic realities of the ICS market." Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-144, 12-375 at 2 (filed July 29, 2013).

⁵⁰² See, e.g., Pay Tel 2013 Comments at 9-10, 23 (noting that approximately 47% of jail inmates are released in less than 24 hours and approximately 73% of jail inmates are released within 48 hours); Pay Tel 2007 Comments at 6-7; AJA 2013 Comments at 1-2.

comment on how to define “jails” and “prisons.”⁵⁰⁴ Should a jail be defined as a facility where inmates are incarcerated for less than one year? If not, what is the appropriate definition of a jail? Or should the Commission define prisons and all other facilities would be considered jails? We seek comment on whether jails have different communications needs and calling practices than inmates in longer-term facilities like prisons.⁵⁰⁵ Commenters advocating for such a difference should explain whether such differences apply uniformly to all jails, to smaller jails, or to jails with certain characteristics. We note that the record indicates that some jails benefit from technological developments that have centralized their ICS operations and lowered the costs of providing ICS.⁵⁰⁶ Should we adjust our regulations and adopt different results for prisons and jails, and if so, how? What cost considerations for the provision of ICS affect jails that may not affect, or that may be different from, those that affect prisons?⁵⁰⁷ Instead of treating all jails differently than prisons, should we have a tiered structure based on the size of the facility or jail? Do commenters suggesting that jails be treated differently believe that larger jails have characteristics and call volumes similar to prisons? If so, how would the Commission define “larger” jails? Should a facility be considered a “larger jail” if it has more than 100, 200, 500 or 1000 beds? Would a tiered approach, which would permit higher rates for smaller facilities, adequately address any unique needs of jails? We also seek comment on the impact of ICS provider call processing centralization for prisons and jails. Does this centralization diminish or eliminate differences between the cost to provide ICS in prisons and jails? Are there other distinctions between different types of correctional institutions that the Commission should incorporate as it considers additional rate reforms? Commenters advocating such distinctions should address the considerations noted above with respect to possible distinctions between “jails” and “prisons,” including how the different facilities should be defined, the basis for drawing the distinctions, and specifically how the distinctions should be reflected in our rules.

160. *Per-Call Cap.* We seek comment on whether the Commission should adopt an overall maximum per-call cap. We note that some states, for example, have created flat-rated rate structures (such as those found in New Mexico and South Carolina) with only a per-call charge, irrespective of the length of the call.⁵⁰⁸ Similarly, Washington, D.C. has adopted a \$1.75 per-call intrastate cap.⁵⁰⁹ Securus suggests that the Commission adopt an \$8.00 maximum charge for interstate ICS calls “no matter how long the call, no matter the size of the facility, and no matter the location of the originating facility.”⁵¹⁰

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⁵⁰³ See Letter from Lee G. Petro, Counsel for Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 16, 2013) (Petitioners’ July 16, 2013 *Ex Parte* Letter) (noting that a Bureau of Justice Statistics Study showed that in 2011, 39% of inmates were serving their sentences in local jails and over 50% of the inmates in Louisiana were confined in local jails).

⁵⁰⁴ There was an insufficient record to pursue a proposal like that set forth in the Dissent. See Dissent at 111, 131 (proposing to adopt different interstate ICS rates for large jails and prisons).

⁵⁰⁵ See, e.g., Transcript of Reforming ICS Rates Workshop at 240-45 (Mitch Lucas, Assistant Sheriff, Charleston County Sheriff’s Office and 1st Vice President, AJA, discussing differing communications needs of jails); *id.* at 265-68 (Vincent Townsend, President, Pay Tel, discussing differences between ICS in prisons and jails); see also Pay Tel July 3, 2013 *Ex Parte* Letter (discussing differences in ICS jail costs and rates).

⁵⁰⁶ See, e.g., Pay Tel July 3, 2013 *Ex Parte* Letter at Attach. 1-2 (Changes in ICS Costs in Jails: 2008 to the Present) (asserting that ICS providers in most jails use a “centralized broadband-based platform” in which “call management functions are handled remotely in a central office”).

⁵⁰⁷ Commenters have said that “[j]ails are more likely to be smaller and need some sort of exemption from the otherwise prevailing rate caps.” Marks July 12, 2013 *Ex Parte* Letter at 3.

⁵⁰⁸ See Securus 2013 Comments at 6; Petitioners 2013 Comments at 20, 23; HRDC 2013 Comments at 2, 5.

⁵⁰⁹ See DC PSC 2013 Comments at 1-2.

⁵¹⁰ Securus July 16, 2013 *Ex Parte* Letter at 1. This charge would be comprised of a per-call charge and per-minute charges but the per-minute charges would “stop being assessed once the total price of the call reaches \$8.00.” *Id.*

We seek comment on whether the Commission should adopt an overall rate cap and the caps that have been adopted by states and proposed by Securus. How does such overall rate cap ensure that rates are just, reasonable, and fair? Is a per-minute rate cap also necessary to ensure that shorter calls are cost-based and reasonable?

161. *Per-Call Charges.* In the Order, we adopted an interim rate structure with safe harbor levels and rate caps.⁵¹¹ While we adopted per-minute rate levels to effectuate these rate structure elements, we also provided some flexibility in implementation. ICS providers electing to take advantage of the safe harbor rate levels are permitted to use a rate structure that includes per-call charges.

162. Although we permit the use of per-call charges in the Order, we express serious concerns about such charges.⁵¹² With the significant automation of a modern ICS network, are there any costs that are uniquely incurred during the call initiation phase that would be inappropriate, or difficult, to recover through a pure per-minute rate structure? Some states and facilities have eliminated per-call charges and are presumably able to provide full-cost recovery for ICS providers.⁵¹³ What are the experiences of parties (facilities, ICS providers, and ICS users) where per-call charges have been eliminated? What is the experience with such rate structures and do they offer benefits that do not exist with per-minute rate structures? What is the experience for providers and users with these flat-rated rate structures given the identified risks of per-call charges in the ICS context? Are providers able to recover the costs of calls with such a rate structure? Do the benefits of leaving flexibility to the states, facilities, and ICS providers, outweigh the issues associated with per-call charges?

2. Determining Costs for ICS Rates

163. In the Order, the Commission adopted interim rate caps and safe harbor rate levels for interstate ICS.⁵¹⁴ The Order also required ICS providers to file certain ICS-related data to enable the Commission to begin the process of establishing permanent rates.⁵¹⁵ As part of this process, we seek comment on whether there are additional factors, including possibly declining costs related to technological innovations, that the Commission should consider in order to refine its findings in the Order and how the Commission should proceed in establishing ICS rates for interstate and intrastate ICS. Additionally, we note that the Order adopts a historical cost methodology for the interim rules and we seek comment on the what measure of cost – e.g., historical, forward looking – should be adopted for the permanent rate structure.⁵¹⁶

164. *Impact of Technology Innovations.* The record highlights significant changes in the technology and the equipment used to provide ICS.⁵¹⁷ In some facilities, Telmate offers video

⁵¹¹ See *supra* Section III.C.3.

⁵¹² See *supra* Section III.C.3.c.

⁵¹³ See NY DOCCS July 16, 2013 *Ex Parte* Letter at 2 (“Today the cost of a 20-minute call for an inmate in DOCCS is \$.96. The call rate includes a flat \$.048 per minute charge, for both local and long distance calls, with no connection fee.”); see also HRDC 2013 Comments at 5 (“With respect to per-call charges, some states currently do not include per-call charges in their ICS rate structures but only have a per-minute charge for both interstate collect and debit calls. Those states include Indiana, Michigan, New Jersey, New York, Oregon and Texas.”).

⁵¹⁴ See *supra* Sections III.C.3.

⁵¹⁵ See *supra* Section III.I.

⁵¹⁶ See *supra* para. 52.

⁵¹⁷ See, e.g., Telmate 2013 Comments at 2 (noting its “pioneering and innovative services, such as virtual, IP-powered visitations” and its modern and efficient equipment platforms); Pay Tel 2013 Comments at 13 (stating that it is moving from a “customer premises” to a “centralized platform” model); Petitioners 2013 Comments at 17-18 (stating that “each of the major ICS providers now route each call through their centralized calling centers – which

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conferencing between inmates and their families, e-mail and voice mail services for inmates, a secure social media alternative, and a secure photo-sharing service for inmates and their families.⁵¹⁸ The Virginia DOC expanded its video visitation program in 2010 and offers numerous visitor centers sites at which an inmate's friends and family can connect through videoconferencing.⁵¹⁹ We seek comment on the impact of technological advancements on the ICS industry. Have such advancements reduced the cost of providing ICS?⁵²⁰ We seek comment on specific ways in which advanced services help to address security concerns and whether such advancements reduce costs. We also invite comment on ways in which advanced services could affect access for inmates with disabilities, and communications between abled inmates and their friends and family with disabilities.⁵²¹

165. We seek comment on the future of voice-based services in correctional settings. In the non-ICS context, voice calling minutes have been falling while other forms of communications (*e.g.*, text messaging, email, social networks) have been growing in importance. We seek comment on the frequency of such alternatives in correctional facilities and, where applicable, the impact on ICS calling volumes. How have ICS providers introduced such alternatives while still providing adequate security capabilities, and why? We seek comment on our legal authority to regulate the rates for such alternative services.

3. International ICS

166. We seek comment on the prevalence of international calling and whether the Commission should take action to reform ICS rates for international calls. The record indicates that although it is feasible to make international calls, international ICS calling is not always an available option for inmates.⁵²² Do facilities block international calls for security reasons? If so, we seek comment on what specific reasons justify blocking international calls. Several commenters assert that the lack of

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are located hundreds, if not thousands, of miles from both the caller and the person receiving the call"); *id.* at Exh. D.

⁵¹⁸ See Telmate 2013 Comments at 15. See, *e.g.*, Transcript of Reforming ICS Rates Workshop at 258-9, 334-5 (Richard Torgersrud, CEO, Telmate); see also Les Zaitz, *New Technology Helps Oregon Inmates Stay Connected*, OregonLive (Sept. 12, 2012), available at http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/09/new_technology_helps_oregon_in.html (last visited July 31, 2013).

⁵¹⁹ See, *e.g.*, "Virginia Visitation Program," Virginia Department of Corrections, available at <http://vadoc.virginia.gov/offenders/prison-life/videoVisitation.shtm> (last visited July 11, 2013) (Virginia Department of Corrections website explaining the Video Visitation Program, listing rates and providing directory of participating visitor centers. It states that "Video Visitation is a way for families to meet with their imprisoned family or friends without having to invest the time and money in traveling long distances to correctional facilities."). Other providers offer video visitation through JPay or HomeWav. See, *e.g.*, Transcript of Reforming ICS Rates Workshop at 106 (Alex Friedmann, Assoc. Director HRDC); *id.* at 292-93 (Mitch Lucas, Assistant Sheriff, Charleston County Sheriff's Office and 1st Vice President, AJA).

⁵²⁰ For example, Pay Tel asserts that ICS providers in most jails use a centralized broadband-based platform in which call management functions are handled remotely in a central location. Pay Tel 2013 Comments at 13.

⁵²¹ See Americans with Disabilities Act, 42 U.S.C. § 1.2101 *et seq.*

⁵²² See, *e.g.*, Telmate July 26 *Ex Parte* Letter at 1 (asserting that "International services (with instructions in a wide variety of different languages) are offered to all facilities" with which Telmate has an ICS contract). GTL includes an "Invitation to Negotiate" from the Florida Department of Corrections that mandates live operator assistance for international calls as the only exception to its no-operator calling rule. See GTL 2013 Reply Exh. 1 at 27 (noting that "[a]t no time shall an inmate be automatically connected to a 'live operator'" but that "the only exception to this requirement is that international collection calls through a live operator will be allowed when the country being called accepts collect calls"). Securus provides a U.S. Department of Justice Federal Bureau of Prisons' Program Statement regarding "Telephone Regulation for Inmates" that includes provisions for international calling but states that "staff will not place collect telephone calls to foreign countries for inmates" and that such calls, as with domestic calls, are subject to the availability of inmate funds. See Securus 2013 Comments, Exh. 12 at 15, 21.

availability of international calling is particularly burdensome to immigrant inmates and their families.⁵²³ Do most facilities allow international calling? If not, why not? How are such calls priced? Are any additional restrictions applied to such calls, such as time-of-day restrictions or prior-permission requirements? Should the Commission require the availability of international calls, and what would be the source of legal authority that would authorize the Commission adopt such a requirement? If we were to adopt such a requirement, what rates should apply to international calls and how should the Commission set such rates? We seek comment as to whether these rates are appropriate and compensatory.

D. Ancillary Charges

1. Background

167. In response to inquiries in the *2012 ICS NPRM*,⁵²⁴ the record indicates that ICS providers impose charges on inmates and ICS call recipients that do not recover the costs of providing phone service but rather recover costs associated with functions ancillary to provisioning ICS such as initiating, maintaining and closing debit or prepaid ICS accounts, sending a paper bill or sending calls to a wireless number.⁵²⁵ The Order adopted requirements that such ancillary service charges related to ICS be cost-based and provides enforcement mechanisms applicable to any challenges.⁵²⁶ The Bureau released a Public Notice on June 26, 2013 seeking additional comment on these charges including: “the level of each fee, the total amount of revenue received from each fee, and the cost of providing the service for which the fee recovers.”⁵²⁷ The record received indicates that providers are charging a variety of fees at fee levels ranging from no fee for account replenishment when a paper check is sent in the mail, to a \$7.95 processing fee for payment by credit or debit card, and \$11.95 processing fee for payment through Western Union, among others.⁵²⁸

2. Discussion

168. In the Order, we require charges for any services that are ancillary to the costs of providing ICS to be cost-based,⁵²⁹ and require ICS providers to submit cost data for these ancillary service charges as part of the mandatory data request.⁵³⁰ Here we seek comment on how the Commission can ensure, going forward, that ancillary charges are just, reasonable, and cost-based. For example, the record

⁵²³ See, e.g., AILA 2013 Comments at 2 (asserting that asylum and immigration applicants must gather substantial information from their home countries, much of which must be coordinated by telephone from a correctional facility); see also Immigration Equal. 2013 Comments at 2 (stating that the majority of detained immigrants have no legal representation in immigration court and must communicate with the outside world on their own, primarily through collect calls).

⁵²⁴ For example, the Commission acknowledged “outstanding questions with prepaid calling such as: how to handle monthly fees; how to load an inmate’s account; and minimum required account balance.” *2012 ICS NPRM*, 27 FCC Rcd at 16641, para. 33. See also *supra* note 338.

⁵²⁵ See *supra* para. 90.

⁵²⁶ See *supra* para. 91.

⁵²⁷ *More Data Sought on Extra Fees Levied on Inmate Calling Services*, WC Docket No. 12-375, Public Notice, 2013 WL 3270975, DA 13-1445 at 1 (Wireline Comp. Bur. rel. June 26, 2013).

⁵²⁸ Petitioners July 17, 2013 Comments at Attach., “Securus Tariffs” at 1; see also Pay Tel July 17, 2013 Comments at 4 (payment processing fee using Western Union is \$5.95 for Pay Tel and as high as \$12.95 for other vendors); Prison Policy Initiative July 17, 2013 Comments at 2 (noting that GTL charges \$4.75 for a web payment of \$25 and \$9.50 for a \$50 payment—these charges are per phone line, not per account).

⁵²⁹ See *supra* Section III.C.1.

⁵³⁰ See *supra* Section III.I.

reflects that ICS providers typically use third parties to process debit and prepaid transactions,⁵³¹ and there are concerns that the charges passed on to inmates or their called parties are not entirely cost-based.⁵³² Is this accurate? If so, what are the actual costs charged to the ICS providers by such third parties? We seek comment on whether the Commission should identify certain ancillary charges that are unreasonable practices and therefore prohibited under the Act?

169. The record indicates that some ICS providers offer “no fee” options for replenishing debit or prepaid accounts.⁵³³ What are commenters’ experiences with such options? We request that commenters describe any other no- or low-fee options offered by ICS providers. Should the Commission mandate that ICS providers offer such no or low fee options? We seek comment on this approach, including our legal authority to mandate a no or low fee option.

170. Likewise, we seek comment on the cost drivers underlying ICS providers’ ancillary service charges. Are charges for these services currently cost-based? Will our complaint process ensure that charges for services that are ancillary to the telecommunications costs of providing ICS are cost-based on an ongoing basis? Do commenters believe that the costs underlying ancillary service charges should be treated as compensable though ICS rates? Can we set a safe harbor rate that will ensure that charges for such ancillary services are cost-based? How would such a safe harbor work? If we set such a safe harbor, what kind of process should be available to ICS providers that believe they cannot recover their costs for such ancillary services? What information should we require the ICS providers to submit to support such requests?⁵³⁴

171. Finally, we seek comment on whether some ancillary services charges constitute unjust and unreasonable practices, in violation of section 201(b), or a practice that would lead to unfair rates in violation of section 276, regardless of the level of the charge, because how such charges are imposed make ICS too expensive and thus unavailable to some consumers. The Commission has consistently held that practices may be unjust and unreasonable without regard to the charges related to those practices.⁵³⁵ Examples of practices that we believe may be unjust and unreasonable to the extent they impose *de*

⁵³¹ See Pay Tel May 31, 2013 *Ex Parte* Letter at Attach., Presentation for Federal Communications Commission at 3 (showing partnerships with third parties Money Gram and Western Union to facilitate alternative payment options).

⁵³² See *id.* at 3 (comparing Pay Tel’s third party fees to those of other ICS providers); see also NCIC 2013 Comments; Securus 2013 Comments; Expert Report of Stephen E. Siwek.

⁵³³ See Pay Tel May 31, 2013 *Ex Parte* Letter at Attach. Account Statement, 2 (“There is no payment processing fee when payments are mailed to Pay Tel.”); see also Letter from Monica Desai, Counsel to Securus Technologies, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (filed May 31, 2013) (stating that Securus does not charge a fee to establish a prepaid calling account or for “standard payment methods”).

⁵³⁴ See NARUC Ancillary Charges PN Reply at 1 (noting the “few comments filed” in relation to the Commission’s public notice seeking comment on ancillary cost data, it asserts that “if the providers fail to submit this cost data – which is basically in their sole possession – the FCC would be entitled to, and should, construe that failure against the providers. This would lead to a long-overdue order reducing the price . . . of inmates’ calls.”); see also Petitioners July 24, 2013 *Ex Parte* Letter at 2 (noting that the three largest ICS providers, who control “at least 90% of the ICS market” were “remarkably silent” when asked to submit data regarding ancillary charges).

⁵³⁵ See e.g., *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Declaratory Ruling, 27 FCC Red 1351 (Wireline Comp. Bur. 2012) (determining that certain practices negatively affecting call completion in rural areas may constitute an unjust practice prohibited by section 201(b) of the Act); see also Transcript of Reforming ICS Rates Workshop at 330 (Lee G. Petro, Counsel to Petitioners, arguing that section 201 of the Act gives the Commission the authority to set aside unjust and unreasonable practices such as fees to load money onto a prepaid account).

minimis costs to the ICS provider include imposing inactivity charges on a customer's prepaid account,⁵³⁶ and charging a customer to close an account and refund their money to them.⁵³⁷ We seek comment on whether we should consider these charges, or any other ancillary service charges, to be unjust and unreasonable.

E. Prohibiting Call Blocking

1. Background

172. 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 “risks degradation of the country’s telecommunications network”⁵³⁸ and poses a serious threat to the “ubiquity and seamlessness”⁵³⁹ of the network. The issue of call blocking has arisen in multiple contexts in the ICS industry.⁵⁴⁰ Throughout this proceeding ICS providers have offered various justifications for their call blocking practices. Here we seek additional comment on these practices which break down into two fundamental types. We invite commenters to address any other types of blocking and we seek comment on whether we need to address blocking beyond the two specific types described below.

2. Billing-Related Call Blocking

173. The Commission sought information in the *2012 ICS NPRM* on billing-related call blocking.⁵⁴¹ In the Order above we conclude that billing-related call blocking of interstate ICS calls is only permissible if the ICS provider offers a “prepaid collect” option, as described above.⁵⁴² We seek comment on whether our conclusion resolves the issues surrounding billing-related blocking of interstate ICS calls. Additionally, we seek comment on whether we should extend our prohibition on blocking to intrastate ICS calls. In particular, we invite comment on whether it is possible to block only interstate calls while not blocking intrastate calls, or whether such a separation is impracticable. In light of our mandate above for “prepaid collect,” do the problems Petitioners describe remain?⁵⁴³ Or is it correct, as commenters have said, that such “products help to ensure that inmates reach their intended parties regardless of their billing status”?⁵⁴⁴ Does our mandate regarding “prepaid collect” options address ICS providers’ problems of uncollectibles? What other options are there to prevent call blocking due to a lack of a billing relationship between the ICS provider and the called parties’ provider, whether ILEC, CLEC, wireless provider or VoIP provider? Should we prohibit ICS providers from entering into a new contract or contract extension for ICS that include collect calling-only requirements unless they offer an alternative prepaid collect calling option? What would be our authority for doing so? We also seek comment on whether our mandate should apply only to interstate collect-only calling, or whether it should

⁵³⁶ See, e.g., Letter from Peter Wagner, Executive Director, Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2-3 (filed July 17, 2013) (noting fees imposed by different providers for inactivity on an inmate’s account).

⁵³⁷ See Transcript of Reforming ICS Rates Workshop at 135 (Cheryl Leanza, President, A Learned Hand, LLC, discussing various fees imposed by providers on inmate calling plans); see also Letter from Peter Wagner, Executive Director, Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed July 5, 2013) (noting prepaid account refund fees of up to \$10 per account).

⁵³⁸ *USF/ICC Transformation Order*, 26 FCC Rcd at 18029, para. 973 (internal quotation marks omitted).

⁵³⁹ *Access Charge Reform*, 16 FCC Rcd at 9932-33, para. 24.

⁵⁴⁰ See *supra* Section III.G.

⁵⁴¹ See *2012 ICS NPRM*, 27 FCC Rcd at 16643-44, para. 40.

⁵⁴² See *supra* para. 113.

⁵⁴³ See *supra* paras.108-109.

⁵⁴⁴ Securus 2013 Comments at 23.

also apply to intrastate collect-only calling. Can the two be separated? Under what authority could we mandate a prepaid collect calling option for intrastate ICS?

174. Finally, one ICS provider suggests that the best way to deal with billing-related call blocking is to encourage the use of prepaid or debit ICS accounts.⁵⁴⁵ We seek comment on the usefulness and ubiquity of debit and prepaid calling in correctional facilities and whether we should mandate that ICS providers offer such services.⁵⁴⁶ Under what authority can we mandate provision of such services?

3. Non-Geographically Based Telephone Number Call Blocking

175. Consumers today can and do obtain telephone numbers that do not reflect their geographic location. In the ICS context, doing so may enable consumers to be charged a lower rate depending on the differences among local, intrastate long distance, and interstate long distance rates.⁵⁴⁷ The Commission sought comment on this practice in the *ICS 2012 NPRM*.⁵⁴⁸ Given the Commission precedent largely prohibiting call blocking, with limited exceptions, we seek comment on whether any types of ICS call blocking may be necessary or appropriate, particularly in relation to non-geographically based telephone numbers. If such blocking is necessary, how can this need be reconciled with Commission precedent? To the extent that commenters assert that blocking occurs to address security concerns, we seek comment on the reason and frequency of such blocking. We seek comment on whether there are any additional concerns that could justify blocking outgoing ICS calls to non-geographically based telephone numbers. Given the Commission's policy against unreasonable call blocking, we are skeptical of the need for call blocking and seek alternatives to blocking that maintain the ubiquity of the national telecommunications network while balancing security needs.

F. Exclusive ICS Contracts

176. We conclude in the Order that competition does not effectively constrain rates for interstate ICS to ensure that such rates are just, reasonable, and fair.⁵⁴⁹ While the Commission found that there is competition among ICS providers to provide service to correctional facilities, it concluded that there is not sufficient competition within facilities to ensure that rates are just and reasonable to end users because of exclusive contract arrangements.⁵⁵⁰ We seek comment in this section on whether we should encourage competition within correctional facilities to reduce rates.

177. We generally seek comment on whether there are ways to foster competition to constrain rates to just, reasonable, and fair levels within correctional facilities. When the Commission previously sought comment on allowing multiple providers to serve correctional facilities, correctional facilities and ICS providers generally opposed the allowance of multiple providers because of security concerns.⁵⁵¹

⁵⁴⁵ See GTL 2013 Comments at 24-25.

⁵⁴⁶ See *supra* Section III.G.

⁵⁴⁷ See *supra* para. 134. For ease of reference, we will refer to these telephone numbers that do not reflect geographic location in the Further Notice of Proposed Rulemaking as “non-geographic numbers.”

⁵⁴⁸ See *2012 ICS NPRM*, 27 FCC Rcd at 16644, para. 41.

⁵⁴⁹ See *supra* Section III.B.4.

⁵⁵⁰ See *id.* As discussed above, ICS contracts are typically exclusive contracts to serve the relevant correctional facility for a period of years. See *supra* Section III.E.

⁵⁵¹ Specifically, they claimed that the high cost security needs of ICS, such as the ability to identify a called party in real time to prevent imminent criminal activity, preclude the allowance of multiple ICS providers in a single facility. See, e.g., La. DOC 2013 Comments at 2-3 (asserting that “free market place options” such as multiple providers are “not feasible in the secure environments of our facilities” and listing such concerns as the ability to “control offender telephone usage,” monitor transfers between institutions, and prevent criminal activities); GTL 2013 Comments at 23 (asserting that the “unique security needs of correctional facilities necessitate the use of exclusive contracts” and opining that if multiple providers were operating within a single facility, “no one provider would be responsible for

(continued...)

What has changed, if anything, in the last decade that may allow for competition among ICS providers within a single facility? If commenters believe that security concerns still provide a reason for not allowing multiple ICS providers within a facility, we seek comment on what the specific concerns are. For example, could a facility have uniform security requirements that would apply to any provider offering service in the facility? What are the advantages and disadvantages of such an approach? In its comments, Verizon states that allowing multiple ICS providers to serve inmates at a correctional facility could promote competition among ICS providers.⁵⁵² Verizon also raises the question of whether the security concerns justifying exclusive contracts have been superseded by any technological advances. Do technological advances change the equation?⁵⁵³ If so, could we expect in the future to rely on competition to ensure just, reasonable, and fair ICS rates for inmates and ICS providers? Are there rules or requirements the Commission could adopt to facilitate such a transition? We seek comment on these issues and the Commission's authority to adopt rules and requirements to facilitate such a transition.

G. Quality of Service

178. In the Order, we observe that, given our conservative safe harbor and rate cap scheme, quality of service should not be negatively impacted by the ICS rates we adopt, and we further encourage continued innovation and efficiencies to improve quality of service.⁵⁵⁴ Here, we seek comment on whether it is necessary for the Commission to develop minimum federal quality of service standards that would apply to all facilities. For example, ICE set forth national detention standards, which established requirements for effective communication,⁵⁵⁵ sufficient access,⁵⁵⁶ and daily maintenance.⁵⁵⁷ Under these standards, facilities must maintain at least a 25 to 1 ratio of detainees to operable telephones.⁵⁵⁸ Do prison and jail facilities currently have similar rules or regulations in place to secure the quality of inmate calling services? Have states adopted any regulations of this sort? We seek comment on whether national standards are necessary. Should we establish rules regarding the quality of inmate phone calls, the number of phones in a facility, or the maintenance of telephones? If adoption of such national standards would be beneficial, under what authority could the Commission adopt such rules? We also seek comment on whether we should require ICS providers to include the ratio of telephones to inmates per facility in their annual certification filings. Commenters advocating for such an approach should specify the Commission's legal authority to adopt their proposals.

H. Cost/Benefit Analysis of Proposals

179. Acknowledging the potential difficulty of quantifying costs and benefits, we seek to determine whether each of the proposals above will provide public benefits that outweigh their costs, and we seek to maximize the net benefits to the public from any proposals we adopt. For example,

(Continued from previous page) _____
security procedures" and that it is "highly likely that the facilities' overall costs" would increase); *Telmate 2013 Comments* at 5-6 (stating that a "single-provider model" for ICS is still required for security purposes).

⁵⁵² See *Verizon 2013 Comments* at 6; *NJ ISJ 2013 Reply* at 4-5.

⁵⁵³ See, e.g., *TurnKey 2013 Reply* at 2 (explaining that TurnKey provides video visitation and email services at rates significantly below the rates the large ICS provider charges for equivalent phone services, and that TurnKey's rates for video visitation services are also three times lower than the ICS provider's rates for the same services).

⁵⁵⁴ See *supra* para. 71.

⁵⁵⁵ See *Performance-Based National Detention Standards 2011*, U.S. Immigration and Customs Enforcement, at 359 (2011), available at <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf> (last visited July 31, 2013).

⁵⁵⁶ *Id.* at 360.

⁵⁵⁷ *Id.* at 361.

⁵⁵⁸ *Id.* at 360.

commenters have argued that inmate recidivism is decreased with regular family contact.⁵⁵⁹ Accordingly, we seek specific comment on the costs and benefits of the proposals above and any additional proposals received in response to this Further Notice. We also seek any information or analysis that would help us to quantify these costs or benefits. Further, we seek comment on any considerations regarding the manner in which the proposals could be implemented that would increase the number of people who benefit from them, or otherwise increase their net public benefit. We request that interested parties discuss whether, how and by how much they will be impacted in terms of costs and benefits of the proposals included herein. We recognize that the costs and benefits may vary based on such factors as the correctional facility served and ICS provider. We request that parties file specific analyses and facts to support any claims of significant costs or benefits associated with the proposals herein.

VI. PROCEDURAL MATTERS

A. Filing Instructions

180. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). Comments and reply comments on this FNPRM must be filed in WC Docket No. 12-375.

- Electronic Filers: Direct cases and other pleadings may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

⁵⁵⁹ See Letter from Cheryl Leanza, Policy Advisor, United Church of Christ, OC Inc., and the Leadership Conference Education Fund, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 1 (filed June 18, 2012) ("Communication with families will combat recidivism, which is extremely expensive. A report by the Pew Center on the States found that more than four in ten offenders return to state prisons within three years of being released and reducing recidivism by just ten percent could save the states more than \$653 million in one year. While communication is not a silver bullet, evidence shows it helps to reduce recidivism.").

B. Ex Parte Requirements

181. The proceeding this Further Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁵⁶⁰ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

C. Paperwork Reduction Act Analysis

182. 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.

183. This Further Notice does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

D. Congressional Review Act

184. 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).

E. Final Regulatory Flexibility Analysis

185. As required by the Regulatory Flexibility Act of 1980, *see* 5 U.S.C. § 604, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules, as proposed, addressed in this Order. The FRFA is set forth in Appendix C.

⁵⁶⁰ 47 C.F.R. §§ 1.1200 *et seq.*

F. Initial Regulatory Flexibility Analysis

186. As required by the Regulatory Flexibility Act of 1980 (RFA),⁵⁶¹ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this Notice, of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth as Appendix D. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided on or before the dates indicated on the first page of this Notice. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).⁵⁶²

VII. ORDERING CLAUSES

187. 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 Further Notice of Proposed Rulemaking 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.

188. IT IS FURTHER ORDERED that Part 64 of the Commission's Rules, 47 C.F.R. Part 64, is AMENDED as set forth in Appendix A. These rules shall become effective 90 days after publication in the Federal Register, except for § 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.

189. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order and Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁶¹ See 5 U.S.C. § 603.

⁵⁶² See 5 U.S.C. § 603(a).

APPENDIX A**Final Rules**

1. Add new subpart EE to part 64 to read as follows:

Subpart EE – INMATE CALLING SERVICES**§ 64.6000 Definitions**

As used in this subpart:

- (1) 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;
- (2) 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;
- (3) Consumer means the party paying a Provider of Inmate Calling Services;
- (4) Debit calling means a calling arrangement that allows a Consumer to pay for Inmate Calling Services from an existing or established account;
- (5) Inmate means a person detained at a correctional institution, regardless of the duration of the detention;
- (6) Inmate calling services means the offering of interstate calling capabilities from an Inmate Telephone;
- (7) 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;
- (8) Prepaid calling means a calling arrangement that allows Consumers to pay in advance for a specified amount of Inmate Calling Services;
- (9) 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;
- (10) 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.

NOTE TO § 64.6010: See FCC 13-113, paras.50-52 (discussion of cost basis in this context).

§ 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.

APPENDIX B

List of Commenting Parties to WC Docket No. 12-375

Organization(s) Submitting Comments	Abbreviated Citation
Adair County Sheriff's Office	Adair Cnty. Sheriff's Office
Alabama Sheriffs Association	Ala. Sheriffs Assoc.
American Civil Liberties Union	ACLU
American Immigration Lawyers Association	AILA
American Jail Association	AJA
Arizona Department of Corrections	ADC
Asian American Justice Center The Center for Media Justice Communications Workers of America Free Press The Leadership Conference on Civil and Human Rights National Association for the Advancement of Colored People National Council of La Raza National Hispanic Media Coalition National Organization for Women Foundation National Urban League New America Foundation's Open Technology Institute Public Knowledge United Church of Christ Office of Communications Inc.	The Phone Justice Commenters
California Department of Corrections and Rehabilitation	CDCR
California State Sheriffs' Association	CSSA
Center on the Administration of Criminal Law	Center on the Admin. of Criminal Law
CenturyLink	CenturyLink
Clackamas County Sheriff's Office	Clackamas Cnty. Sheriff's Office
Clark County Sheriff's Office	Clark Cnty. Sheriff's Office
Coconino County Children of Incarcerated Parents (CIP) Task Force	Coconino Cnty. CIP
Coconino County Sheriff's Office	Coconino Cnty. Sheriff's Office
Community Initiatives for Visiting Immigrants in Confinement	CIVIC
Community Justice Project	CJP
Congressional Black Caucus	CBC
County of Santa Clara Department of Corrections	County of Santa Clara DOC
Deschutes County Sheriff's Office	Deschutes Cnty. Sheriff's Office
DisAbility Rights Idaho	DisAbility Rights Idaho
Elmore County Sheriff's Office	Elmore Cnty. Sheriff's Office
Embracing Lambs Ministries	Embracing Lambs
Global Tel*Link Corporation	GTL

Helping Educate to Advance the Rights of the Deaf	HEARD
Human Rights Defense Center	HRDC
Idaho Department of Correction	Idaho DOC
Idaho Sheriffs' Association	ISA
Immigration Equality	Immigration Equality
Indiana Utility Regulatory Commission	Indiana Commission
Jefferson County Sheriff's Office	Jefferson Cnty. Sheriff's Office
Lake County Sheriff	Lake County Sheriff
The Leadership Conference on Civil and Human Rights	The Leadership Conference
Legal Center for People with Disabilities and Older People Colorado Developmental Disabilities Council	Legal Center and CODDC
Louisiana Department of Public Safety & Corrections	La. DOC
Marion County Detention Center	Marion Cnty. Det. Ctr.
Martha Wright, <i>et. al.</i> The D.C. Prisoners' Legal Services Project, Inc. Citizens United for Rehabilitation of Errants Prison Policy Initiative The Campaign for Prison Phone Justice	Petitioners
Media Action Grassroots Network	MAG-Net
MetroPCS Communications, Inc.	MetroPCS
Michael S. Hamden	Hamden
Michael Rogers	Rogers
Michigan Citizens for Prison Reform	MICPR
Minority Media and Telecommunications Council	MMTC
Mississippi Department of Corrections	MDOC
Missouri State Public Defender System	Mo. Pub. Defender Sys.
Moultrie County Sheriff's Office	Moultrie Cnty. Sheriff's Office
National Association of Regulatory Utility Commissioners	NARUC
National Association of State Utility Consumer Advocates	NASUCA
National Association of the Deaf Telecommunications for the Deaf and Hard of Hearing, Inc. Deaf and Hard of Hearing Consumer Advocacy Network Association of Late-Deafened Adults, Inc. Hearing Loss Association of America California Coalition of Agencies Serving the Deaf and Hard of Hearing Cerebral Palsy and Deaf Organization	Consumer Groups
National Consumers League	NCL
National Disability Rights Network	NDRN
National Sheriffs' Association	NSA
Network Communications International Corp.	NCIC
Nevada Department of Corrections	NDOC

New Jersey Advocates for Immigrant Detainees New York University School of Law Immigrant Rights Clinic	NJAID/NYU IRC
New Jersey Institute for Social Justice	NJ ISJ
Oregon State Sheriffs' Association	OSSA
Pay Tel Communications, Inc.	Pay Tel
Prison Law Office	Prison Law Office
Prisoners Legal Services of Massachusetts	PLS
Protection and Advocacy for People with Disabilities, Inc.	P&A
Public Service Commission of the District of Columbia	DC PSC
Rochester Institute of Technology Student Researchers National Technical Institute for the Deaf	RIT/NTID Student Researchers
Rock County Sheriff	Rock Cnty. Sheriff
Rosen Bien Galvan & Grunfeld LLP	RBGG
Routt County Sheriff's Office	Routt Cnty. Sheriff's Office
San Diego County Sheriff's Department	San Diego Cnty. Sheriff's Dep't
Securus Technologies, Inc.	Securus
South Dakota Department of Corrections	SDDOC
Stephen A. Raher	Raher
T.W. Vending, Inc. d/b/a TurnKey Corrections	TurnKey
TechFreedom	TechFreedom
Telmate, LLC	Telmate
Texas Civil Rights Project	TCRP
Texas Jail Project	Tex. Jail Project
Thurston County Sheriff's Office	Thurston Cnty. Sheriff's Office
Vera Institute of Justice	Vera
Verizon and Verizon Wireless	Verizon

APPENDIX C

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) in WC Docket 12-375.² The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA.³ The Commission did not receive comments directed toward the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁴

A. Need for, and Objectives of, the Report and Order

2. The Report and Order (Order) 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.⁵ 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.

3. 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.⁶ 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.⁷

4. 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 (Further Notice) seeks comment on additional ICS issues.

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

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

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16653-57 (2012) (2012 ICS NPRM).

³ See *id.* at 16649, para. 56.

⁴ See 5 U.S.C. § 604.

⁵ See generally 2012 ICS NPRM, 27 FCC Rcd 16629.

⁶ 47 U.S.C. § 201(b).

⁷ 47 U.S.C. § 267(b)(1).

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

6. 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.⁸ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁰ 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).¹¹

7. **Small Businesses.** Nationwide, there are a total of approximately 27.9 million small businesses, according to the SBA.¹²

8. **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.¹³ According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.¹⁴ Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1,000 employees or more.¹⁵ Thus, under this size standard, the majority of firms can be considered small.

9. **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.¹⁶ According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.¹⁷ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹⁸ Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the Commission’s action.

⁸ 5 U.S.C. § 604(a)(3).

⁹ 5 U.S.C. § 601(6).

¹⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

¹¹ 15 U.S.C. § 632.

¹² See SBA, Office of Advocacy, “Frequently Asked Questions,” available at http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf (last visited June 26, 2013).

¹³ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁴ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

¹⁵ See *id.*

¹⁶ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁷ See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

¹⁸ See *id.*

10. **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.¹⁹ According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.²⁰ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.²¹ Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the Commission's action.

11. 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."²² 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.²³ 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.

12. **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.²⁴ 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.²⁵ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.²⁶ 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.²⁷ In addition, 72 carriers have reported that they are Other Local Service Providers.²⁸ Of the 72, 70 have 1,500 or fewer employees and two have more than 1,500 employees.²⁹ Consequently, the Commission estimates that most providers of competitive local exchange service,

¹⁹ See 13 C.F.R. § 121.201, NAICS code 517110.

²⁰ See *Trends in Telephone Service* at Table 5.3.

²¹ See *id.*

²² 5 U.S.C. § 601(3).

²³ See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (filed May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a); see also 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

²⁴ See 13 C.F.R. § 121.201, NAICS code 517110.

²⁵ See *Trends in Telephone Service* at Table 5.3.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

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

13. **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.³⁰ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.³¹ Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.³² Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the Commission's action.

14. **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.³³ According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.³⁴ Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.³⁵ Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by the Commission's action.

15. **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.³⁶ According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.³⁷ Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.³⁸ Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by the Commission's action.

16. **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.³⁹ According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.⁴⁰ Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.⁴¹ Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the Commission's action.

³⁰ See 13 C.F.R. § 121.201, NAICS code 517110.

³¹ See *Trends in Telephone Service* at Table 5.3.

³² See *id.*

³³ See 13 C.F.R. § 121.201, NAICS code 517911.

³⁴ See *Trends in Telephone Service* at Table 5.3.

³⁵ See *id.*

³⁶ See 13 C.F.R. § 121.201, NAICS code 517911.

³⁷ See *Trends in Telephone Service* at Table 5.3.

³⁸ See *id.*

³⁹ See 13 C.F.R. § 121.201, NAICS code 517110.

⁴⁰ See *Trends in Telephone Service* at Table 5.3.

⁴¹ See *id.*

17. **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.⁴² According to Commission data,⁴³ 535 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.⁴⁴ Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the Commission's action.

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

18. *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.⁴⁵ The Order requires that all ICS providers file annually data on their interstate and intrastate ICS rates and minutes of use.⁴⁶ 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.⁴⁷ The Commission also requires ICS providers to file their charges to consumers that are ancillary to providing the telecommunications portion of ICS.⁴⁸ 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.⁴⁹

19. *Data Collection.*⁵⁰ 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.

20. 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,

⁴² See 13 C.F.R. § 121.201, NAICS code 517110.

⁴³ See *Trends in Telephone Service* at Table 5.3.

⁴⁴ See *id.*

⁴⁵ See *supra* Section III.C.3.

⁴⁶ See *supra* Section III.H.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *supra* Section III.I.

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.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

21. 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.”⁵¹

22. 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.

23. *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 websites. Thus, this additional filing requirement should entail minimal additional compliance burden, even for the largest ICS providers.

24. The information on providers' websites is not certified and is generally not available in a format that will provide the per-call details that the Commission requires to meet its statutory obligations. Thus, the Commission further requires each provider to annually certify its compliance with other portions of the Order, 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 website, are minimally burdensome.

25. *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.

⁵¹ 5 U.S.C. § 603(c)(1)–(c)(4).

26. 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 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.

F. Report to Congress

27. 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 1996.⁵² 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.⁵³

⁵² 5 U.S.C. § 801(a)(1)(A).

⁵³ *See id.* § 604(b).

APPENDIX D**Initial Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (Further Notice). Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Notice

2. In today's Order, the Commission adopted rules to ensure that rates for interstate calling from correctional institutions are just and reasonable, and to that end, established calling rates for interstate inmate calling services (ICS). This Further Notice seeks comment on additional measures the Commission could take to ensure that interstate and intrastate ICS are provided consistent with the statute and public interest, the Commission's authority to implement these measures, and the pros and cons of each measure. The Commission believes that additional action on ICS will help maintain familial contacts stressed by confinement and will better serve inmates with special needs while still ensuring the critical security needs of correctional facilities of various sizes. Specifically, the Further Notice seeks comment on:

- Reforming intrastate ICS rates and practices;
- ICS for the deaf and hard of hearing community;
- Further reforms of interstate and intrastate ICS rates;
- Cost recovery in connection with the provision of ICS;
- Ensuring that charges ancillary to the provision of ICS are cost-based;
- ICS call blocking;
- Ways to foster competition to reduce rates within correctional facilities; and
- Quality of service for ICS.

B. Legal Basis

3. The legal basis for any action that may be taken pursuant to the Further Notice is contained in sections 1, 2, 4(i)-(j), 201(b) and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b) and 276.

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁵ In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.⁶ A “small-business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁷

5. **Small Businesses.** Nationwide, there are a total of approximately 27.9 million small businesses, according to the SBA.⁸

6. **Wired Telecommunications Carriers.** The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.⁹ According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.¹⁰ Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1,000 employees or more.¹¹ Thus, under this size standard, the majority of firms can be considered small.

7. **Local Exchange Carriers (LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹² According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.¹³ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹⁴ Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by our action.

⁴ See 5 U.S.C. § 603(b)(3).

⁵ See 5 U.S.C. § 601(6).

⁶ See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁷ See 15 U.S.C. § 632.

⁸ See SBA, Office of Advocacy, “Frequently Asked Questions,” http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf (last visited July 30, 2013).

⁹ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁰ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

¹¹ See *id.*

¹² 13 C.F.R. § 121.201, NAICS code 517110.

¹³ See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

¹⁴ See *id.*

8. **Incumbent Local Exchange Carriers (incumbent LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁵ According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.¹⁶ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹⁷ Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

9. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”¹⁸ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.¹⁹ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

10. **Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁰ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.²¹ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.²² In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.²³ In addition, 72 carriers have reported that they are Other Local Service Providers.²⁴ Of the 72, 70 have 1,500 or fewer employees and two have more than 1,500 employees.²⁵ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by our action.

¹⁵ See 13 C.F.R. § 121.201, NAICS code 517110.

¹⁶ See *Trends in Telephone Service* at Table 5.3.

¹⁷ See *id.*

¹⁸ 5 U.S.C. § 601(3).

¹⁹ See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a); see also 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

²⁰ See 13 C.F.R. § 121.201, NAICS code 517110.

²¹ See *Trends in Telephone Service* at Table 5.3.

²² See *id.*

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

11. **Interexchange Carriers (IXCs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁶ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.²⁷ Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.²⁸ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by our action.

12. **Local Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁹ According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.³⁰ Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.³¹ Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our action.

13. **Toll Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³² According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.³³ Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.³⁴ Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

14. **Other Toll Carriers.** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁵ According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.³⁶ Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.³⁷ Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by our action.

²⁶ See 13 C.F.R. § 121.201, NAICS code 517110.

²⁷ See *Trends in Telephone Service* at Table 5.3.

²⁸ See *id.*

²⁹ See 13 C.F.R. § 121.201, NAICS code 517911.

³⁰ See *Trends in Telephone Service* at Table 5.3.

³¹ See *id.*

³² See 13 C.F.R. § 121.201, NAICS code 517911.

³³ See *Trends in Telephone Service* at Table 5.3.

³⁴ See *id.*

³⁵ See 13 C.F.R. § 121.201, NAICS code 517110.

³⁶ See *Trends in Telephone Service* at Table 5.3.

³⁷ See *id.*

15. **Payphone Service Providers (PSPs).** Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁸ According to Commission data,³⁹ 535 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 531 have 1,500 or fewer employees and four have more than 1,500 employees.⁴⁰ Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

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

16. In this Further Notice, the Commission seeks public comment on options to reform the inmate calling service market. Possible new rules could affect all ICS providers, including small entities. In proposing these reforms, the Commission seeks comment on various options discussed and additional options for reforming the ICS market.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”⁴¹

18. The Further Notice seeks comment from all interested parties. The Commission is aware that some of the proposals under consideration may impact small entities. Small entities are encouraged to bring to the Commission’s attention any specific concerns they may have with the proposals outlined in the Further Notice. In addition, the Commission seeks updated data, as described in the Further Notice, from small entities that may be impacted by Commission action on ICS.

19. The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the Further Notice, in reaching its final conclusions and taking action in this proceeding. Specifically, the Commission will conduct a cost/benefit analysis as part of this Further Notice and consider the public benefits of any such requirements it might adopt, to ensure that they outweigh their impacts on small businesses.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

20. None.

³⁸ See 13 C.F.R. § 121.201, NAICS code 517110.

³⁹ See *Trends in Telephone Service* at Table 5.3.

⁴⁰ See *id.*

⁴¹ 5 U.S.C. § 603(c)(1)–(c)(4).

**STATEMENT OF
ACTING CHAIRWOMAN MIGNON CLYBURN**

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

For ten years, family, friends and legal representatives of inmates have been urging the courts and waiting for the FCC to ease the burden of an exorbitant inmate calling rate structure. Their wait is at long last over. Borrowing from a 1964 anthem inspired by challenges of his time, the immortal songwriter Sam Cooke sang that it's been a long, long time in coming, but change has finally come.

Today's Order reforms the rates and charges for interstate inmate calling services and provides immediate and meaningful relief, particularly for low income families across this nation. This Order fulfills our obligation to ensure just, reasonable and fair phone rates for all Americans, including the millions with loved ones in prison.

This all began with one Washington, D.C. grandmother, Mrs. Martha Wright, who spoke truth to power in 2003, and reminded us that one voice can still spur a movement and drive meaningful change.

Mrs. Wright once talked with her grandson Ulandis, who is here with us today, a couple of times a week, about 15 minutes each call. For this minimal contact she often paid more than \$100 a month – no small change for a retired nurse. In 2003, she filed a petition with the FCC asking for help. Others who were paying a high toll for interstate inmate calls would follow her lead and after many twists and turns – we are finally here.

I am happy that Mrs. Wright's grandson and many of her fellow petitioners are our special guests today. Millions will benefit from your perseverance and your willingness to take a stand. Thank you for seeing us through to this important day.

Mrs. Wright's story, and those of many others, reveals many common themes that illustrate why the change we put forth is so very necessary. Too often, families are forced to choose between spending scarce resources to stay in touch with their loved ones or covering life's basic necessities. One family member described how communicating with her husband is a "great hardship," but that the few minutes that they are able to talk each week, "have changed his life." Another parent told us how he has spent significant amounts of money to receive collect calls from his son -- calls that he "cannot afford," but accepts because his son's "emotional health and survival in prison is important" to him.

And, just yesterday, I spoke with Monalisa Johnson, a woman I met behind the stage at the Urban League convention. You see, nine months ago her daughter began serving a 10-year sentence in Georgia, and now the "new line item" in Ms. Johnson's monthly budget includes a \$600 per month charge to stay in touch from New York. She pays \$21 for a 15-minute call, which she describes as "highway robbery."

We've heard from inmates – many of whom are concerned about the financial burden that calling their parents, significant others, and children can impose. Too often, they are unable to make a simple phone call on birthdays and other special occasions, and from these stories and thousands more we have learned just how much of a difference telephone contact can make. As one inmate said: "To be able to actually hear your loved ones helps to strengthen the relationship...unlike any letter that one can write."

These are not isolated anecdotes.

There are 2.7 million children with at least one parent in prison and they often want and need to maintain a connection. In addition to coping with the anxiety associated with a parent who is not there on

a daily basis, these young people are often suffering severe economic hardships, which are exacerbated by unaffordable inmate calling costs.

In the meantime, 700,000 inmates are released from correctional facilities each year. It's critical for them to have strong support structures in order to re-assimilate successfully. Studies have shown that having meaningful contact beyond prison walls can make a real difference in maintaining community ties, promoting rehabilitation, and reducing recidivism. Making these calls more affordable can facilitate all of these objectives and more.

So how much money are we really talking about? We've learned that rates can be as high as \$17 for a 15-minute call, and that inmates can pay as much as a \$4 connection charge each time and that calls made to, or coming from, one who is deaf or hard of hearing can be, and often are, even more expensive. For families on a fixed income or barely managing to get by, personal engagement is much too often beyond reach.

But today's Order takes action. It requires interstate rates to be cost-based. In other words, rates and other charges to and from these facilities will be tied to the actual costs of providing inmate calling service. The Order sets forth a framework that provides for immediate relief from high long distance phone rates.

We adopt interim interstate rate caps and safe harbors to provide relief to families, without delay, from exorbitant rates while permitting providers to secure reasonable compensation.

This Order will reduce rates that may run from over \$17 to a maximum cap of \$3.75. The rate structure we adopt is grounded in the record, based on data that include security costs, yields fair compensation to providers, and provides to these families the just and reasonable rates that this Commission is charged with ensuring under the Communications Act.

All rates and charges, including ancillary charges must be based on the provider's actual costs. Those in violation of this requirement could be subject to enforcement and required to provide refunds to consumers.

Today's Order takes a measured but firm approach to reform. We also make clear that site commissions are not related to the cost of providing inmate calling services, and therefore cannot be included in the interstate rate. We also address related practices that drive up rates and make it difficult for families and friends to communicate.

At the same time, this Order recognizes and puts measures in place to ensure that security is not compromised. Inmate calling services require additional security to prevent inmates from using phones to break the law or violate facility rules. Tying rates to actual costs is fair, is guided by the law, and will provide significant financial relief for families, without sacrificing the requisite security protocols.

I am also pleased that today's Order takes steps toward future reforms. First, the reform includes a mandatory data collection that will enable the Commission to refine these interim rates going forward and to take additional action, including ensuring that rates for intrastate calls are just, reasonable and fair. And, through our Further Notice, we will collect information to determine how to best move forward on additional reforms, including for deaf and hard of hearing communities.

I would like to thank the many Members of Congress for their attention to this issue and our partners in the states, who have provided us with valuable examples of their own reforms. Thank you to my colleagues for their expedited consideration of this Order, and a special thank you to Commissioner Rosenworcel for her support on this important milestone.

Finally, thank you to the Wireline Competition Bureau, in coordination with the Office of General Counsel, as well as other Offices and Bureaus for your tireless work on this item. These dedicated public servants truly went above and beyond the call of duty, working long nights (well after the air conditioning went off) and weekends, sacrificing quality time with their family and friends. This list includes: Julie Veach, Pam Arluk, Larry Barnes, Randy Clarke, Robin Cohn, Lynne Engledow, Doug Galbi, Victoria Goldberg, Kalpak Gude, Greg Haledjian, Derian Jones, Melissa Kirkel, Rhonda Lien, Travis Litman, Eric Ralph, Deena Shetler, Jamie Susskind, Don Sussman, David Zesiger, Sean Lev, Suzanne Tetreault, Diane Griffin Holland, Marcus Maher, Rick Mallen, Claude Aiken, Larry Schecker, Jim Carr, Nick Alexander, and Rosemary McEnery. I would like to thank my staff, especially Rebekah Goodheart. I am grateful to you for seeing this through, and Angie Kronenberg, formerly of my office, who passed to Rebekah an incredibly stable baton.

But the most important people in the room for me today are the petitioners and their families, led by Mrs. Martha Wright. Because of your courage and persistence, millions of families across the country, will soon realize more just and reasonable rates.

And to you, those hundreds of persons in at least five cities across this nation, participating in watch parties organized by the campaign for Prison Phone Justice, and thousands more who worked for and will forever benefit from today's action, we thank you.

It's been a long time coming, and not in time to directly benefit Mrs. Wright, but a change has finally come. Thank you.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

When I step back from the record in this proceeding, there is one number that simply haunts me—perhaps because I am a parent. Across the country, 2.7 million children have at least one parent in prison. That is 2.7 million children who do not know what it means to talk regularly with their mother or father. After all, families with an incarcerated parent are often separated by hundreds of miles. They may lack the time and means to make regular visits. So phone calls may be the only way to stay in touch. Yet when the price of single phone call can be as much as you and I spend for unlimited monthly plans, it is hard to keep connected. Reaching out can be an impossible strain on the household budget. This harms the families and children of the incarcerated. But it goes far beyond that. It harms all of us because we know that regular contact between prisoners and family members reduces recidivism.

Today, this changes. After a long time—too long—the Commission takes action to finally address the high cost that prison inmates and their families must pay for phone service. This is not just an issue of markets and rates; it is a broader issue of social justice.

We establish a framework that will immediately reduce interstate inmate calling service rates. Consistent with our statutory mandate to ensure that rates are just and reasonable, we require that going forward the rates at issue are cost-based. We also set standards for ancillary charges and per-call fees and put an end to billing-related call blocking. In addition, we lower the exorbitant cost of inmate calls for the deaf and hard of hearing. In the Further Notice of Proposed Rulemaking, we seek comment on a range of other issues, including intrastate rate practices.

This effort has my unequivocal support.

So thank you to the Wireline Competition Bureau for your work on this proceeding. Thank you also to the many advocates for justice who pressured this agency to help relieve this burden borne by the families of those in prison.

On a personal level, thank you to Martha Wright for long ago bringing this issue to our attention. Thank you to Bethany Fraser for your powerful personal story and willingness to describe what this means for the children of the incarcerated. Finally, we would not be here if it was not for the leadership of acting Chairwoman Clyburn. She saw a great wrong and has put us on the path toward making it right. Her advocacy on this issue on behalf of prisoners and their kin has been relentless. As a result, more families will be able to stay connected—and more children will be able to keep in touch with an incarcerated parent. Thank you.

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

Not long after I started working at the U.S. Senate Judiciary Committee in 2005, my boss, former Senator Sam Brownback, championed the Second Chance Act.¹ The bill recognized in its findings that family support was the most important factor in helping released prisoners reenter society and in reducing recidivism.² As the Senator shepherded the bill through the Committee, I got an up-close understanding of the social and economic challenges faced by those who are incarcerated and their families. How gratifying it was for so many, then, to see President Bush sign the Second Chance Act just three years later.³

This experience informs my approach to our work on this item. I believe that the government should usually stay its hand in economic matters and allow the price of goods and services to respond to consumer choice and competition. But sometimes the market fails. And when it does, government intervention carefully tailored to address that market failure is appropriate.

The provision of inmate calling services (ICS) is one such market. Inmates cannot choose their carrier, and carriers do not compete with each other for an inmate's calls. Instead, a prison administrator signs an exclusive contract with a single carrier. The decision to enter into such a contract often is driven by commissions and in-kind services offered to the prison by a prospective carrier.⁴ As such, the incentives of prison administrators and inmates may not align. This means that we cannot necessarily count on market competition to keep prices for inmate calling services just and reasonable.

For this reason, I welcomed the opportunity to address the petition filed by Martha Wright almost a decade ago, when she came to the FCC seeking redress for the high rates she paid to speak with her then-incarcerated grandson. Having reviewed the record thoroughly, I am convinced that we must take action to meet our duties under the law, not to mention our obligations of conscience. Indeed, the FCC should have acted years ago. I said last December and I say again here: Ms. Wright expected and deserved better.

It is therefore with a heavy heart that I am dissenting from this item. In an effort to seek common ground, I offered a simple proposal to cap interstate rates, with one rate for large jails and a lower rate for prisons. My proposal would have cut interstate rates for prisoners in 36 states (and slashed exorbitant rates by more than 50 percent in 26 states) while balancing the need for security. It would have been easy for the FCC to administer and easier for the courts to sustain. I am disappointed that we were unable to achieve consensus and move forward unanimously.

Instead of instituting simple rate caps, as I had proposed, the *Order* essentially imposes full-scale rate-of-return regulation on ICS providers. I have no doubt that the *Order's* approach was crafted with the best of intentions. But I cannot support it. To put it simply, I do not believe that it is within the Commission's competence to micromanage the prices of inmate calling services. Nor do we have the

¹ Second Chance Act of 2005, S. 1934, 109th Cong., 1st Sess. (2005), available at <http://go.usa.gov/jf4C>.

² *Id.* § 2(14).

³ Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008), available at <http://go.usa.gov/jf4R>; see also "President Bush Signs H.R. 1593, the Second Chance Act of 2007," available at <http://go.usa.gov/jf4W>.

⁴ See, e.g., *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Remand & Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3253, para. 12 (2002); Telmate Comments at 6 ("[C]ompetition for these commissions decreases incentives for cost-reduction and technological innovation.").

resources to review the effectively-tariffed rates of ICS providers, to sort out legitimate costs from illegitimate costs, and to separate intrastate costs from interstate costs, possibly in every one of the thousands of correctional institutions in America. I am not sure how we will handle all of the disputes that are likely to arise with the limited and already-hardworking staff we have.

I also believe that the Commission's decision to impose a one-size-fits-all safe harbor and cap on all correctional institutions is a serious mistake. Based on the record, the rates set forth in the item are likely too low for most jails (the majority of jails in our nation hold fewer than 100 inmates), secure mental health facilities, and juvenile detention centers. The end result could be that some facilities receive limited phone service or no service at all. This could disconnect some inmates from their families entirely. For other facilities, the arbitrarily low rate will likely mean fewer security measures. As the National Sheriffs' Association puts it, this would pose "a substantial security risk to inmates and jail staff and to public safety in the community at large."⁵

Had we charted a different course—say, by applying reasonable caps on interstate rates—we could have substantially reduced interstate calling rates in a way that would have easily survived judicial scrutiny. As it stands, however, I believe that the *Order* may not withstand a court challenge. No party could have foreseen the reach of today's *Order* when we opened this proceeding last December. The notice of proposed rulemaking teed up a per-minute rate cap and other discrete proposals, but the *Order* codifies *de facto* rate-of-return regulation. Moreover, the record evidence simply does not support the Commission's approach. Indeed, the *Order* recognizes that we do not have the data to establish long-term rates and accordingly commences a mandatory data collection—which underscores that the cart is before the horse. All of this portends protracted litigation, which jeopardizes the very benefits this *Order* is supposed to provide to inmates and their families. As Ms. Wright and the other petitioners know all too well, justice delayed is justice denied.

I.

I'll start with the *Order*'s legal flaws. In my view, the *Order* fails to comply with the Administrative Procedure Act (APA) for two principal reasons. In terms of process, parties were not provided with requisite notice of the rules the Commission adopts today. Additionally, these rules are arbitrary and capricious in light of the evidence contained in the record.

A.

On the issue of notice, no party could have foreseen the reach of the *Order* when we opened this proceeding last December. In our unanimous Notice of Proposed Rulemaking (*Inmate Calling NPRM*), the Commission teed up several discrete proposals to regulate the rates of interstate inmate calls: eliminating per-call charges,⁶ capping per-minute rates,⁷ using a "marginal location methodology" to establish just and reasonable caps,⁸ using tiered pricing to set differing caps for higher-volume and lower-volume facilities,⁹ establishing different caps for collect calls and debit calls,¹⁰ capping interstate rates at

⁵ Letter from Sheriff (ret.) Aaron D. Kennard, Executive Director, National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (July 31, 2013).

⁶ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16637, paras. 18–19 (2012).

⁷ *Id.* at 16637–38, paras. 20–23.

⁸ *Id.* at 16638–39, paras. 24–26.

⁹ *Id.* at 16639–40, para. 28.

¹⁰ *Id.* at 16640–41, paras. 30–32.

intrastate long-distance rates,¹¹ requiring ICS providers to offer debit or prepaid calling options,¹² and mandating a certain amount of free calling for each inmate per month.¹³

Notably, *de facto* rate-of-return regulation was not on the table.¹⁴ Instead, that option was proposed by the National Association of State Utility Consumer Advocates (NASUCA) in its comments, three full months after we adopted the *Inmate Calling NPRM*.¹⁵ Although the Commission can address comments in the record (and indeed must respond to significant ones), the APA does not allow for such informal methods to propose rules. Rather, an agency “must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.”¹⁶

The *Order* attempts to establish notice partly by pointing to language in the *Inmate Calling NPRM* seeking “comment on any other proposals parties contend address the concerns raised in this proceeding.”¹⁷ But a jejune request for comment on “any other proposals” did not apprise stakeholders that rate-of-return regulation was under consideration.¹⁸ This omission matters. The D.C. Circuit has instructed that “[a]gency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making.”¹⁹ And the Second Circuit just recently chided the Commission for “solicitations . . . too general to provide adequate notice that a [particular] rule was under consideration.”²⁰

Unfortunately, that is exactly what happened here. Had the Commission sought comment on imposing rate-of-return regulation upon ICS providers, the record almost surely would look quite different than it does today.²¹ But instead, after parties provided extensive commentary on the specific ideas set forth in the *Inmate Calling NPRM*, the Commission adopted far more onerous rate-of-return regulation—a scheme that was nowhere mentioned in the *Inmate Calling NPRM*. It is therefore unsurprising that no party other than NASUCA, to my knowledge, discussed it as an option for regulating

¹¹ *Id.* at 16641, para. 34.

¹² *Id.* at 16641–42, paras. 33, 36.

¹³ *Id.* at 16643, para. 39.

¹⁴ The *Order* implicitly acknowledges as much when it describes the *Inmate Calling NPRM* as proposing “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” but not the cost-based, rate-of-return methodology the *Order* in fact adopts. See *Order* at para. 10.

¹⁵ NASUCA Comments at 4 (“As a means of securing just and reasonable rates, the ICS rules adopted by the Commission should therefore require ICS providers to justify their rates and their costs. The rules should declare that rates for interstate ICS calls are unjust and unreasonable to the extent the rates exceed the reasonable costs of providing ICS, including a reasonable return.”).

¹⁶ *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983) (emphasis in original); see also *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (explaining that a proposal “not published in the Federal Register” expressing the views of a party but “not the Commission” does not satisfy the APA’s requirements); *Shell Oil Co. v. EPA*, 950 F.2d 741, 760 (D.C. Cir. 1991).

¹⁷ *Inmate Calling NPRM*, 27 FCC Rcd at 16642, para. 35; see *Order* at para. 59.

¹⁸ *Cf. Time Warner Cable Inc. v. FCC*, Nos. 11-4138(L), 11-5152(Con), slip op. at 61 (2d Cir. Sept. 4, 2013) (agency solicitation of comment on whether it “should adopt additional rules” to protect programming networks from retaliation did not provide adequate notice regarding a particular rule—the standstill rule—designed “to provide such protection”).

¹⁹ *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 549.

²⁰ *Time Warner Cable Inc.*, slip op. at 61.

²¹ See *id.* at 62.

ICS rates.²² And given ICS providers' comments strenuously opposing a rate cap, it strains credulity to think that they would have chosen to stay silent about rate-of-return regulation had they realized it was a possible endpoint.²³

The *Order* also attempts to establish notice by citing a variety of paragraphs in which the Commission sought information about "costs."²⁴ But just because we sought information about "costs" as an input in evaluating eight discrete proposals does not mean that *every* possible "cost-based" solution is a logical outgrowth of the *Inmate Calling NPRM*,²⁵ let alone a cost-based solution as complex as the one contained in the *Order*. The *Order* admits that "cost"-based ratemaking is itself ambiguous²⁶ and could mean ratemaking based on historical costs,²⁷ projected costs,²⁸ or even forward-looking modeled costs.²⁹ That not a single commenter to my knowledge (and the *Order* cites none) discussed these issues simply confirms that no one realized that granular rate-of-return regulation was imminent.

The *Order* lastly attempts to establish notice by pointing to various questions about how to establish rate caps.³⁰ But no one doubts the notice for the rate caps adopted in the *Order* (rule 64.6030). The question is whether there was notice for an independent rule, the rate-of-return regulations contained in rule 64.6010. And in my view there was not, given the lack of any discussion in the *Inmate Calling NPRM* of requiring rates to be cost based (rather than simply capped), let alone any mention of rate-of-return regulation.

Notice deficiencies extend to at least two further aspects of the rate-of-return system adopted by the *Order*. *First*, the safe harbor adopted by the *Order* only makes sense as part of a rate-of-return

²² As such, the *Order*'s claim that the framework adopted by the Commission here was the subject of "extensive comments, reply comments, and ex parte submissions in the record" is simply wrong. See *Order* at note 222. Indeed, the *Order* does not cite *any* submission from *any* service provider commenting on rate-of-return regulation. Instead, the lengthiest discussion of the subject comes from the Wright Petitioners themselves, who explained why rate caps (as proposed in the *Inmate Calling NPRM*) were superior to traditional rate-of-return regulation. Martha Wright *et al.* Comments at 32 ("[T]he FCC has previously found that the adoption of price caps provide a powerful incentive for service providers to become more efficient. . . . The price cap regime was imposed because of a concern that traditional rate-of-return regulation did not result in sufficient incentives to improve efficiency. Indeed, the FCC's previous reviews of rate-of-return regulation over many years led it to conclude that, under certain circumstances, rate-of-return regulated firms have an incentive to raise rather than lower their costs by increasing investment in the asset base on which the regulated return is calculated well beyond the efficient level.").

²³ For all of these reasons, a generic request for comment on "any other proposals" is best seen as an indication that the agency may consider in a Further Notice any ideas raised in the record that are beyond the initial NPRM. Indeed, the Commission does just that with its Further Notice to extend today's action to intrastate rates—a proposal that originated in comments and inspired discussion in the record (unlike rate-of-return regulation).

²⁴ See *Order* at note 191 (citing *Inmate Calling NPRM*, 27 FCC Rcd at 16637–38, 16642–43, paras. 18–21, 25–26, 37); *id.* at note 222 (citing *Inmate Calling NPRM*, 27 FCC Rcd at 16637–38, paras. 20, 22–23 & n.76).

²⁵ See *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Ass'n, Inc. v. Donovan*, 453 U.S. 913 (1981).

²⁶ *Order* at para. 52; see also *id.* at para. 163 (seeking comment on whether the Commission should continue to measure cost for purposes of rate-of-return regulation based on "historical" or "forward looking" costs).

²⁷ 47 C.F.R. § 61.39 (setting forth tariffing parameters for historical "cost schedule" carriers).

²⁸ 47 C.F.R. § 69.106 (setting forth access charges for non-price cap incumbents based on their "projected annual revenue requirement," *i.e.* their projected costs).

²⁹ *Verizon Comm. Inc. v. FCC*, 535 U.S. 467, 500 (2002) (upholding the FCC's decision to use a forward-looking cost model to establish "cost-based" rates).

³⁰ See *Order* at note 222.

system—indeed, the safe-harbor rule explicitly ties itself to the rate-of-return ratemaking rule.³¹ And just as the *Inmate Calling NPRM* did not propose *de facto* rate-of-return regulation, so too did it fail to fairly apprise commenters that a safe harbor might be a part of that regulation.³²

Second, the *Order* extends rate-of-return regulation to ancillary charges, even though the *Inmate Calling NPRM* did not make any such proposal, did not propose capping or otherwise regulating such charges, and did not even contain the phrase “ancillary charges.” At most, the *Inmate Calling NPRM* 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.”³³ But the Commission didn’t make that comment—the Wright petitioners did.³⁴ And the *Inmate Calling NPRM* repeated it not in the context of proposing to regulate such charges but as a counterweight to assertions that prepaid calling should be an “alternative to collect and debit calling.”³⁵ At most, the questions posed in the *Inmate Calling NPRM* could form a basis for regulating ancillary charges related to prepaid calling *if* we were to make the offering of prepaid calling an alternative to other forms of regulation.³⁶ But the *Order* does not take that step. As the Second Circuit recently reminded the Commission, “[e]ven if it was the FCC’s intent to solicit comment on a [particular] rule, ‘an unexpressed intention cannot convert a final rule into a logical outgrowth that the public should have anticipated.’”³⁷ Accordingly, the *Inmate Calling NPRM* provides no basis for rate-of-return regulation of all ancillary charges.

The *Order* appropriately does not attempt to rely on the public notice titled “More Data Sought on Extra Fees Levied on Inmate Calling Services” to satisfy the notice-and-comment requirement with respect to ancillary charges.³⁸ For one thing, that public notice did not seek to expand the scope of the *Inmate Calling NPRM*, but instead to “seek[] comment on certain issues raised in the *Rates for Interstate Inmate Calling Services NPRM* that is intended to refresh the record regarding rates for interstate ICS calling.”³⁹ For another, that public notice could not have expanded the scope of the *Inmate Calling*

³¹ See Rule 64.6020(a) (“A Provider’s rates are presumptively in compliance with section 64.6010 (subject to rebuttal) . . .”).

³² As before, the only party to argue for a safe harbor in the context of rate-of-return regulation was the National Association of State Utility Consumer Advocates. See NASUCA Comments at 5–6 (discussing a “benchmark” rate similar to the safe harbor rate adopted in the *Order*).

³³ *Inmate Calling NPRM*, 27 FCC Rcd at 16641, para. 33; *Order* at para. 90 (relying on this observation for purposes of complying with the Administrative Procedure Act). The *Order* also relies on a few disparate filings made between 2008 through 2013 that mention ancillary charges and the need for some sort of regulation of them. See *Order* at note 338. But expecting the public to piece together a hodgepodge of comments strewn over several years is hardly the fair notice required by the Administrative Procedure Act and does not make “clear that the agency [is] contemplating a particular change.” *CSX Trans. v. Surface Trans. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

³⁴ *Inmate Calling NPRM*, 27 FCC Rcd at 16641, para. 33 (“Petitioners note that . . .”); see Martha Wright *et al.* Alternative Wright Petition Reply at 29–30.

³⁵ *Inmate Calling NPRM*, 27 FCC Rcd at 16641, para. 33 (noting that prepaid ICS calling is offered “usually at a discount” to collect or debit calling).

³⁶ The *Inmate Calling NPRM* asked the following questions: “If these issues can be sufficiently addressed, is prepaid calling a viable ICS option? Do any ICS providers currently offer prepaid calling? What are some other concerns or considerations with prepaid calling?” *Id.* (footnote omitted).

³⁷ *Time Warner Cable Inc.*, slip op. at 61 (quoting *Council Tree Commc’ns, Inc. v. FCC*, 619 F.3d 235, 254 (3d Cir. 2010) (internal quotation marks omitted)).

³⁸ *Order* at note 338 (“To be clear, we are not suggesting that this Bureau-level request itself provided notice with respect to ancillary charges . . .”).

³⁹ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Public Notice at 2 (Wireline Comp. Bur. June 26, 2013).

NPRM given that the Wireline Competition Bureau cannot propose rules on its own.⁴⁰ For yet another, that public notice was not published in the Federal Register until July 15, just two days before comments and nine days before replies were due.⁴¹ An agency must provide commenters “enough time with enough information,”⁴² so that “[t]he opportunity for comment [is] a meaningful opportunity.”⁴³ Two days for comments and one more week for replies is surely insufficient.

B.

Lack of notice is not the *Order*’s only legal infirmity. Also problematic is the fact that the record evidence simply does not support the Commission’s one-size-fits-all approach or its chosen safe harbor and rate cap.

The Commission establishes an across-the-board safe harbor of 12 cents a minute and an across-the-board cap of 21 cents a minute for debit calls at *all* correctional institutions. It does not matter whether an ICS provider is serving a prison with thousands of inmates or a county jail with fewer than twenty beds. The same safe harbor and cap applies.

Yet the record is replete with evidence that the costs⁴⁴ of serving a statewide prison system are different than the costs of serving large county jails, which in turn are much different than the costs of serving small jails, secure mental health facilities, and juvenile detention centers.⁴⁵ One provider’s cost study, for example, shows that it costs 12 cents more a minute to serve midsize jails than statewide prisons or the largest jails—and the cost of serving the smallest jails tops \$1.39 a minute.⁴⁶ Another provider shows that the average cost of serving jails is almost 20 percent higher than that of serving state prisons, and the highest-cost jail the company serves costs 20 percent more than the most expensive prison.⁴⁷ Again, the smallest institutions like jails with fewer than 100 beds, secure mental health

⁴⁰ See 47 C.F.R. § 0.291(e).

⁴¹ See 78 Fed. Reg. 42034 (July 15, 2013).

⁴² *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2010).

⁴³ *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (*Rural Cellular Ass’n I*).

⁴⁴ For purposes of making apples to apples comparisons, all cost data discussed here exclude site commissions, which the *Order* recognizes may be an underinclusive approach given that correctional institutions themselves often incur costs to provide ICS and those costs may need to be included in any cost-of-service estimates. See *Order* at note 203.

⁴⁵ See, e.g., Pay Tel Reply at 8 (“Generally speaking, the inherent and fundamental differences between state prison and county jail calling result in increased costs to providers servicing local facilities.”); NCIC Comments at 3–4 (“The Market Analysis explored by Petitioners using the Federal Bureau of Prisons and Department of Correction facilities to determine their benchmark rates completely disregards the diversity of specific service costs relating to city holding facilities, county jails and privately owned facilities.”); CenturyLink Comments at 7 (“There is an incredibly wide variance in the costs associated with providing interstate ICS to different facilities.”); Global Tel*Link Comments at 6–7 (“Petitioners’ desire to impose a one-size-fits-all approach in the form of nationwide rate caps is wholly at odds with the enormous variability among correctional institutions across the United States.”); Letter from Glenn B. Manishin, Counsel for Telmate, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (July 26, 2013) (“[T]here are substantial differences in terms of scale, capacity, broadband costs and inmate ‘churn’ between larger state department of corrections (‘DOC’) systems and the thousands of smaller county and municipal jails served by ICS providers like Telmate.”).

⁴⁶ See Expert Report of Stephen E. Siwek on behalf of Securus Technologies, Inc., WC Docket No. 12-375, at 3, 5 (Mar. 25, 2013) (Siwek Report) (calculated by subtracting site commissions from costs and dividing by the number of minutes), available at <http://go.usa.gov/jM7V>.

⁴⁷ Letter from John E. Benedict, Vice President – Federal Regulatory Affairs & Regulatory Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2–3 (Aug. 2, 2013) (CenturyLink Report) (noting (continued....))

facilities, and juvenile correctional facilities are in a whole other category of costs; for these facilities, costs “vary widely” and go up to 70.9 cents per minute.⁴⁸ Even the 2008 cost study relied upon by the Commission showed an increase in the average per-minute cost of 20 percent when it was adjusted to include small facilities “whose traffic characteristics cause them to represent locations at which cost recovery is unlikely.”⁴⁹

Why does the cost of ICS vary widely between prisons, large jails, and smaller correctional institutions? The record suggests several explanations. One is that the majority of costs for ICS are fixed and do not vary with the length or number of calls. As such, the fewer minutes of use at a given facility, the greater the average cost per minute.⁵⁰ This means that the average cost per minute in a jail can be much higher than the average cost per minute in a prison, both because of size differences and because phone calls made by prison inmates tend to last longer on average than calls placed by those in jail.⁵¹ Another explanation is that jails experience a significantly heavier turnover of inmate populations than do prisons: 62.2 percent per week in jails versus just 1.01 percent in prisons.⁵² Because the costs for setting up payment features such as debit account creation and maintenance and for activating security features such as approved calling lists are incurred for each new inmate, even jails comparable in size to prisons are likely to cost more to serve.⁵³ Yet another explanation is that inmates in jails are more likely than inmates in prison to use free telephone services—to call an attorney, for example—increasing the costs of service while reducing the volume over which fixed costs can be spread.⁵⁴

The *Order* sets out five reasons for ignoring this variability and adopting a single set of safe harbors and a single set of caps to apply to all facilities. None of them carry the day, in my view. *First*, the *Order* asserts that the 2008 cost study submitted by ICS providers reported average costs across a

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CenturyLink’s per-minute costs of 11.6 cents for prisons on average, 13.7 cents for jails on average, 18.8 cents for the highest cost prison, and 22 cents for the highest cost jail).

⁴⁸ *Id.* at 2.

⁴⁹ Don J. Wood, Inmate Calling Services Interstate Call Cost Study, CC Docket No. 96-128, at 4–5 (Aug. 15, 2008) (Wood Report), available at <http://go.usa.gov/jMA4>; see also Telmate Comments at 15 (reporting that average per-minute costs for prepaid calling are 40 percent higher for “county” facilities than the average for “all” facilities but not explaining whether those costs include site commissions).

⁵⁰ Wood Report at 5; Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 4 (July 23, 2013) (Pay Tel Report); see also, e.g., CenturyLink Comments at 7.

⁵¹ See Siwek Report at 8 (average length of interstate call made in state prisons is 12.51 minutes compared to 7.10 minutes in small jails).

⁵² Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (July 3, 2013).

⁵³ Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. (Aug. 1, 2013) (“In the jail market, Pay Tel’s typical customer accepts calls for less than a week and then closes his prepaid account and requests a refund of any available balance. Conversely, at the prison level, a single account remains in place anywhere from six months to several years.”).

⁵⁴ Telmate Comments at 15 (reporting that 21 percent of minutes from county facilities are free vis-à-vis 12 percent of minutes from all facilities); Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. (Aug. 1, 2013) (“Jails require ICS providers to provide free calls to specific telephone numbers (e.g., bail bondsmen, public defenders, etc.), . . . 33% of inmates who are booked make *only* free calls and are then released (meaning ICS providers do not see a penny for provision of services to these inmates) . . . ” (emphasis in original)).

variety of facilities, rendering appropriate a single safe harbor and a single cap.⁵⁵ But that study did not claim that costs were the *same* across all facilities; indeed, the supplements to that study showed that the costs of providing service varied significantly from one facility to the next.⁵⁶ Using the same 15-minute methodology as the *Order*, the lowest per-minute debit rate at a facility was 7.1 cents, the highest was \$1.59, the unweighted average was 30.6 cents, and the standard deviation was 32.6 cents. For collect calls, the lowest was 12.9 cents, the highest was \$2.05, the unweighted average was 42.8 cents, and the standard deviation was 42.3 cents.⁵⁷

Second, the *Order* suggests that because we have adopted a “uniform rate” for public payphones, a single safe harbor and cap is suitable here as well.⁵⁸ But different records justify different rules. In the public payphone context, the Commission found insufficient evidence that costs varied significantly from one payphone to the next⁵⁹ where the number of calls varied by up to 46 percent at a particular location.⁶⁰ In contrast, the record here specifically demonstrates that the costs of service are higher at jails than in prisons and even higher at small correctional institutions.⁶¹ And call volumes vary much more dramatically with ICS. Small institutions might have only about 1,200 monthly minutes of use whereas prisons have up to 15,000 times as much traffic.⁶²

Third, the *Order* dismisses the importance of small jails, stating that “[f]acilities of these sizes hold only a very small share of inmates nationally.”⁶³ Hence, the *Order* concludes that cost data for these facilities “do not necessarily reflect the costs of serving [the] vast majority of inmates that generate nearly all calls.”⁶⁴ This might be a good argument for exempting such facilities from the safe harbor and rate

⁵⁵ See *Order* at para. 81 (“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.”).

⁵⁶ See Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Attach. (Aug. 22, 2008); Report of Several Providers of Inmate Telephone Service, CC Docket No. 96-128 (Oct. 15, 2008).

⁵⁷ *Id.* (redacted numbers reverse-engineered from unredacted information).

⁵⁸ *Order* at para. 81 (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2613, para. 149 (1999) (*Payphone Third Report and Order*)); see also *id.* at note 280 (noting that “[t]he use of averaged rates and data is common in the communications industry and telecommunications regulation”).

⁵⁹ *Payphone Third Report and Order*, 14 FCC Rcd at 2613–15, paras. 149–53 (noting that while payphone costs may differ from one location to the next, “there is no support in the record for MCI’s assertion that the fixed costs at a marginal payphone location will be significantly different from the fixed costs at an average payphone location” and verifying “that a marginal location can support an average payphone”).

⁶⁰ *Payphone Third Report and Order*, 14 FCC Rcd at 2607–08, para. 140 (noting the number of monthly calls per payphone ranged from 478 to 700 in the record).

⁶¹ The *Order*’s primary response to this record evidence appears to be the assertion of one party that “technical innovations in the provision of prison phone services imply that variation in costs at different facilities has largely been eliminated.” *Order* at para. 81 (quoting Martha Wright *et al.* 2013 Comments, Exh. C at 5 (Bazelon Report)). The problem with that assertion is that the commenter never discussed the variation in *costs* between state prisons, county jails, and small correctional institutions but instead focused on the variation in *rates* among state prisons. See Bazelon Report at 15–16 (“The underlying costs of providing prison phone service may vary somewhat state by state, but nothing that would support the variation [in rates] reported in Table 1.”).

⁶² See Siwek Report at 2 (reporting that the “low 10” institutions had between 885 and 1,668 minutes of calling each month, whereas state prisons had between 2,488,244 and 120,643,191 minutes).

⁶³ *Order* at para. 26.

⁶⁴ *Id.*

cap. But so long as the Commission insists on subjecting small jails to each, it cannot refuse to take into account the uncontroverted cost data for small jails on the grounds that they don't house many inmates.⁶⁵ Indeed, the Commission's deliberate refusal to take account of different costs of serving different types of facilities defines arbitrary decision-making.⁶⁶ The *Order*, moreover, ignores the reality that a substantial percentage of facilities covered by our rules will in fact be small jails. After all, most jails in our nation have fewer than 100 inmates, and about 35 percent of jails house fewer than 50.⁶⁷

Fourth, the *Order* suggests that setting uniform safe harbors and caps without regard to the size of the facility being served is reasonable because "ICS providers typically use uniform rates when they serve multiple correctional facilities with differing cost and demand characteristics under a single contract"⁶⁸ and thus "even if a provider may under-recover at some facilities, it may over-recover at others."⁶⁹ Such assertions might have some relevance if the *Order* only regulated state prison systems (where statewide contracts appear to be the norm) or if small facilities were only covered if part of a larger contract. But the *Order* insists that its safe harbors and caps apply to all correctional institutions, without exception, and there is absolutely no evidence in the record that jails in different counties are covered under the same contracts or that county jails are covered under the same contracts as state prisons.

Indeed, the *Order* conspicuously does not claim (and cannot claim) that ICS providers set uniform rates across all of the facilities they serve. The record evidence contradicts such a claim generally,⁷⁰ and there is zero evidence in the record that ICS providers set uniform rates across local jails in different counties. Moreover, the *Order* contains no credible explanation for why any provider would continue to serve any county jail where it is unable to recoup all of its costs. After all, providers are under no legal obligation to provide inmate calling services to any particular correctional facility. Should they make the rational business decision to withdraw from facilities where they would have to operate at a

⁶⁵ To be fair, the *Order* includes some small jail data in calculating the collect call rate cap. See *Order* at note 307. But that does not change the fact that, even in that calculation, the higher cost of serving small jails is offset by averaging with the cost of serving larger facilities, nor does it address the propriety of applying the other caps to small jails.

⁶⁶ See *United States Telephone Ass'n v. FCC*, 188 F.3d 521, 525 (D.C. Cir. 1999) (finding FCC's rate determination arbitrary and capricious where agency eliminated outlying data points in reaching a judgment and did not explain "why the outliers were unreliable or their use inappropriate").

⁶⁷ U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Census of Jail Facilities (2006)*, available at <http://dx.doi.org/10.3886/ICPSR26602.v1>.

⁶⁸ *Order* at note 280. The *Order* supports this claim by pointing to a contract with the state of California's prison system, another with the state of Nebraska's prison system, and a third with U.S. Immigration and Customs Enforcement at the Department of Homeland Security. See *id.* at note 226 (citing ICS contract between Public Communications Services, Inc. and Nebraska Department of Correctional Services, dated July 8, 2008, available at <http://www.prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=Nebraska>); *id.* at note 280 (citing State of California, California Technology Agency, IWTS/MASS Agreement Number OTP 11-126805, available at <http://prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=California>, and citing note 493, which in turn cites Letter from Glenn Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed July 26, 2013)). Although note 493 also cites two additional comments, those comments discuss "postalized" rates within a facility (*i.e.*, the same rates for local and long-distance calls), not uniform rates across facilities.

⁶⁹ *Order* at note 301.

⁷⁰ For example, the letter touted by the *Order* for its discussion of a contract with U.S. Immigration and Customs Enforcement at the Department of Homeland Security goes on to explain the different rates that same ICS provider offers for state prisons and county jails. See Letter from Glenn Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed July 26, 2013).

loss, inmates in those facilities ultimately will suffer.⁷¹ And even if a provider for some reason chooses to engage in cross-subsidization between prisons and county jails, uniform safe harbors and caps mean that long-term prison inmates will be forced to subsidize the calls of short-term jail inmates.

Fifth, the *Order* suggests that because the safe harbor and cap are set conservatively, they already account for cost variances across facilities.⁷² Unfortunately, calling a measure “conservative” 34 times doesn’t make it so.⁷³

Consider the cap on debit rates. The *Order* primarily relies on Pay Tel’s cost data to establish a cap of 21 cents per minute.⁷⁴ But Pay Tel’s *average* costs were 20.8 cents. Unless this is a most unusual situation in which no jails have above-average costs—a Bizarro Lake Wobegon—a cap of 21 cents almost certainly means that a significant number of small jails will be capped at below-cost rates. Other evidence in the record leads to a similar conclusion. The Siwek Report points to smaller correctional facilities where costs average \$1.39 per minute, a figure almost seven times the rate cap.⁷⁵ And CenturyLink reports that its highest-cost large jails cost 22 cents a minute to serve, not including an additional 4 cents for more recent security features.⁷⁶ Moreover, CenturyLink explains that smaller jails with 100 or fewer inmates “are much costlier to serve, with CenturyLink’s costs to serve as high as [70.9 cents] per minute.”⁷⁷ So the evidence in the record demonstrates that a rate cap for debit calls of 21 cents per minute is not a conservative approach—it is arbitrarily low as applied to jails.

So too with the cap on collect rates. The 25 cent cap here is based on a 24.6 cent *average* cost of service in 2008.⁷⁸ Right off the bat, this means costs in many facilities are likely to be above the cap, as true for the cap on debit rates. And the 24.6 cent average is only true if you both assume the average call lasts 15 minutes and include only the 25 least expensive locations in that study. Using the actual average call length (12 minutes), the average cost jumps to 27.8 cents per minute. Including the three highest cost locations, the average cost jumps to 28.3 cents. Taking into account both of these adjustments pushes the average cost up to 33.6 cents. So based on a full and fair review of the record, average costs of the facilities in that study are more than 34 percent above the cap. And even that assumes that costs have

⁷¹ Although the *Order* quotes a single ICS provider that occasionally serves small facilities at a loss when it “represent[s] that community or . . . ha[s] a lot of facilities in that area,” *Order* at note 301, it is naïve to expect that charitable intentions will lead ICS providers to serve all the small institutions with below-cost rates.

⁷² See, e.g., *Order* at para. 62 (“We set our interim safe harbor at conservative levels to account for the fact that there may be cost variances among correctional facilities.”); *id.* at para. 79 (noting that the data underlying the cap calculation “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” (indirectly citing Wood Report at 4)); *id.* at note 230 (“[W]e are not simply ‘calling’ our measures conservative . . . but rather are relying on record evidence in a conservative fashion.”).

⁷³ Cf. Inigo Montoya, *The Princess Bride* (Act III Communications 1987) (“You keep using that word. I do not think it means what you think it means.”).

⁷⁴ *Order* at para. 76.

⁷⁵ The fact that *average* costs in the Siwek Report (referred to by the *Order* as the cost study submitted by Securus, see *Order* at para. 77) were below the cap does nothing to establish that 21 cents per minute is a reasonable cap as applied to jails when that same study shows that costs in small jails averaged \$1.39 a minute.

⁷⁶ CenturyLink Report at 3.

⁷⁷ *Id.* This information, as well as other data described above, simply cannot be squared with the Commission’s claim that the interim rate caps were established “us[ing] the highest costs in the record.” *Order* at para. 74; see also *id.* at note 230 (“[T]he rates we set for the safe harbor and cap reflect costs that *exceed* the cost data that any party submitted in the record.”).

⁷⁸ *Order* at para. 78.

held steady over the past five years. The record, however, shows that the cost of security measures such as biometric voice scanning and real-time monitoring have actually increased over time.⁷⁹

Next, consider the safe harbor. It is based on the *prison* rates of seven states that have eliminated site commissions. No data for jails (service to which, again, requires higher per-minute costs) was used to calculate the safe harbor, even though that benchmark applies to jails. It is therefore not surprising that the safe harbor is below the average per-minute costs of serving jails.

Additionally, the safe harbor of 12 cents does not make sense even as applied to prisons. While acknowledging that rates charged for services do not necessarily correlate with the costs,⁸⁰ the item nevertheless concludes that a subset of seven states that have eliminated site commissions in prisons “provides a reasonable basis for establishing a conservative proxy for cost-based rates.”⁸¹ And yet, the safe harbor is based on *averaging*, so some prison rates in these states will by definition come out above the benchmark. So it is that rates in Michigan and Rhode Island are above the benchmark even though both states have adopted the reforms the *Order* suggests are necessary to correlate rates with costs.⁸² (Ironically, even though the rates in Rhode Island are used to compute the safe harbor, ICS providers there cannot continue to charge those rates going forward given that they are not only above the safe harbor but also above the cap.)

The Commission’s calculations also skew the average rate of these seven states lower than it actually is. For example, the *Order* assumes the average ICS calls lasts 15 minutes (rather than 12⁸³) because it “anticipate[s] that call durations would tend to increase under our rates.”⁸⁴ And the *Order* rounds the average rate down (which would place the average rate itself outside the safe harbor) rather than up. Taking the less aggressive approach in each situation would have yielded safe harbors two cents

⁷⁹ See, e.g., Pay Tel Report at 3 (noting that the use of continuous biometric identification, once unavailable, now costs Pay Tel 1.93 cents per minute); CenturyLink Report at 2 (asserting that “current generation security features” require payments of 4 cents a minute to third-party software vendors); Securus Supplement at 5–6 (Mar. 27, 2013) (“Another area in which Securus’s costs have gone up is software development. Because of the unique nature of inmate telephone services, in 2012 alone Securus spent over \$4.5 million on the development of safety, security, and investigative software for its inmate telephone systems.”); Securus Reply (Declaration of Kelly Solid) (Apr. 22, 2013) (describing the proprietary THREADS software program that mines inmate calling data “to predict, prevent, or address activity that would be harmful to inmates or the general public,” such as apprehending an escapee or preventing attempts to assassinate law enforcement officials”).

⁸⁰ Record evidence suggests that the rates charged in many jurisdictions do not correlate with the costs. Even in states that have adopted reforms, there is evidence that ICS providers have raised ancillary charges to offset revenue losses from low interstate calling rates. See, e.g., Michael S. Hamden Ancillary Charges PN Comments at 5 (asserting that “New Mexico ICS providers also generate revenue through imposing a wide variety of charges to establish pre-paid accounts and to maintain those accounts”); Michael S. Hamden Ancillary Charges PN Reply at 1. Cf. *MCI Telecomm. Corp. v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998) (“The Commission never explained why a market-based rate for coinless calls could be derived by subtracting costs from a rate charged for coin calls. If costs and rates depend on different factors, as they sometimes do, then this procedure would resemble subtracting apples from oranges.”).

⁸¹ *Order* at para. 62.

⁸² To try to get out of this box, the item later concludes that something must be rotten in the States of Michigan and Rhode Island. See *Order* at notes 235, 237. But it cites no evidence in support of that assertion. Furthermore, if this is true, then it begs the question of why these two states were used to calculate the safe harbor in the first place. Cf. *id.* at note 237 (“A statistical analysis of the state rate data would also lead to exclusion of these two states.”).

⁸³ The average duration in California prisons was 12.1 minutes in 2010, Bazelon Report at 14, and the average call duration across Securus-served facilities was 11.63 minutes in 2012, Siwek Report at 8.

⁸⁴ *Order* at note 232.

higher than those adopted in the *Order*.⁸⁵ And again, the result would be even higher for jails (two additional cents higher), where the average call lengths are even shorter and less price elastic.⁸⁶

Considering all these facts together, I believe that the decision to establish a safe harbor and cap that applies to all correctional institutions, regardless of their size and regardless of their nature, is arbitrary. I also believe that the specific safe harbor and cap chosen by the Commission are not supported by substantial evidence. By ignoring the differences between prisons and jails (among other things), the Commission has “fail[ed] to consider an important aspect of the problem” before us.⁸⁷ And by setting a safe harbor and cap that is unreasonably low for jails, especially smaller ones, the Commission has made a decision that “runs counter to the evidence” in the record.⁸⁸

To be sure, the *Order* affixes an “interim” label on the safe harbor and the cap as well as the rate structure and rate levels adopted. Perhaps this is meant to invoke courts’ “particularly deferential” review of interim rules.⁸⁹ The problem is that such deference is premised on “[a]voidance of market disruption pending broader reforms”⁹⁰ and the agency “act[ing] to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated.”⁹¹ Neither factor obtains here. In fact, the interim rules in this case will significantly disrupt the market given that 21 state prison systems (and the Federal Bureau of Prisons) have interstate rates above the cap and another 11 have rates above the safe harbor, not to mention the thousands of jails and smaller facilities with ICS that will be affected. This approach is intended to perturb, not preserve, the status quo.⁹²

Nor does the “interim” designation bridge the evidentiary gap that will persist until the completion of the mandatory data collection appended to the *Order*.⁹³ The data collection seeks the costs

⁸⁵ Specifically, the average rate for collect calls would have been 16 cents (rounded up from 15.21 cents) and for debit/prepaid calls 14 cents (rounded up from 13.03 cents).

⁸⁶ See CenturyLink Comments at 11 (noting that call lengths in jail do not appear to be particularly sensitive to price). The average call length was 10.45 minutes for midsize jails and 7.1 minutes for small jails. Siwek Report at 8. For midsize jails, the average rate for collect calls would have been 17 cents (rounded up from 16.03 cents) and for debit/prepaid calls 14 cents (rounded up from 13.57 cents). For small jails, the average rate for collect calls would have been 20 cents (rounded up from 19.02 cents) and for debit/prepaid calls 16 cents (rounded up from 15.58 cents).

⁸⁷ *Motor Vehicle Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸⁸ *Id.* The *Order* sets up a straw man by arguing that under my approach, “the averaging of relevant record data” would never be allowed. See *Order* at note 230. The permissibility of averaging costs depends upon the particular market and particular record at issue. And my position, as explained in detail above, is that relying on an average-cost approach is arbitrary in light of the nature of the market for ICS and the record compiled in this proceeding. By contrast, where providers are required by law to serve all locations within a geographic area, then an average-cost approach could well have merit.

⁸⁹ *Rural Cellular Ass’n I*, 588 F.3d at 1105; see also *Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1095 (D.C. Cir. 2012).

⁹⁰ *Rural Cellular Ass’n I*, 588 F.3d at 1106 (quoting *Competitive Telcomms. Ass’n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002)).

⁹¹ *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

⁹² Given that today’s *Order* is not an interim rule as envisioned by these precedents, I need not broach the question of whether Congress intended courts to apply a more deferential standard to interim rules. Cf. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (rejecting a change in the standard of deference where “statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action”).

⁹³ It is worth noting too that interim rules can remain in place for a significant period of time. Compare *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-

(continued....)

of all ICS providers to serve all their facilities, including how joint and common costs are apportioned among facilities, as well as certain rate and usage information.⁹⁴ With this cost information, the Commission could determine how to adequately address the cost variability shown in the present record. But without it, the cart at this point stands in front of the horse.⁹⁵

For all of these reasons, I fear the *Order* invites protracted litigation, which may tie up the agency for years to come and delay any hope of reducing the most egregious ICS rates in the near term.⁹⁶

II.

Leaving aside the *Order*'s legal infirmities, I cannot support an *Order* that we cannot administer with consequences we cannot control. I would have supported action to institute simple and reasonable rate caps. But this item instead combines *de facto* rate-of-return regulation for ICS providers at all correctional institutions in America, which we will not be able to administer effectively, with a flawed rate cap that will result in county jails, secure mental health facilities, and juvenile detention centers scaling back their security measures or even terminating inmate calling services entirely.

A.

To understand the challenges of administering the *Order*, consider what it requires. *First*, each ICS provider must adjust its interstate ICS rates and ancillary charges so that they are “cost based.” If the Commission determines those rates are not cost based, it may reduce an ICS provider’s rates, impose forfeitures, and require refunds. *Second*, each ICS provider must determine whether *all* of those cost-based rates fall beneath the safe harbor or *any* of those cost-based rates rise above the cap. *Third*, each

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10593, Report and Order, 27 FCC Rcd 10557, 10558, 10561, paras. 1, 7 (2012) (suspending certain rules on an “interim” basis and stating that a data collection will commence by October 22, 2012), *with* Comment Deadlines Extended in Special Access Proceeding, WC Docket No. 05-25, RM-10593, Public Notice (July 31, 2013) (noting that the Office of Management and Budget has not yet approved the special access data collection and collection will not likely commence until “the end of this year or early next year”).

⁹⁴ *Order* at para. 125.

⁹⁵ I do not suggest that the Commission must “assemble perfect data” before acting nor that the Commission must set an “exquisitely granular rate[,] unsullied by any taint of averaging,” as hyperbolically suggested by the *Order*. See *Order* at notes 230, 308; *cf. infra* Part III. But I do insist that any solution adopted actually be supported by the record. So do the courts. See *State Farm*, 463 U.S. at 43 (agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made”) (internal quotation marks and citation omitted). If the record contains uncontroverted evidence that the costs of serving different correctional institutions varies widely, as it does here, the Commission must either tailor its solution to that evidence or defer action until it obtains new evidence. It is arbitrary and capricious for the Commission to set aside the record evidence (by averaging) and adopt far-reaching regulations in the hope that later data will justify them.

⁹⁶ I tend to doubt the *Order*'s severability clause will help the Commission avoid or escape the thicket. That clause notes that even though “[a]ll of the rules . . . are designed to work in unison,” “[i]f 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.” *Order* at para. 127. Practically speaking, of course, the severability clause may mean nothing at all. After all, some rules (like the safe harbor) make no sense without others (like the requirement that all interstate ICS rates be cost-based). And courts do not accept without question agencies’ assessments of what rules can stay and what rules can go. Perhaps for these reasons, we rarely include such clauses when we adopt rules and have done so only three times in the last decade by my count. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17241, n.139 (2011); *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18149, para. 1405 (2011); *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 06-121 et al., Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2018, para. 12 (2008) (subsequent history omitted).

ICS provider must report annually on the rates charged, minutes billed, calls disconnected, and other information for each correctional institution it serves. And *fourth*, each ICS provider must document its costs for the past year and report those costs to the Commission on an institution-by-institution basis. Together these requirements amount to the imposition on ICS providers of all-out rate-of-return regulation, with its requisite cost studies, separations, cross-subsidizations, tariffing, and other accoutrements. I'll address each piece in turn.

1.

First, all interstate ICS rates and all ancillary charges must be cost based.⁹⁷ In this context, this means that rates must be based on “historical costs that are reasonably and directly related to the provision of ICS” plus some return on investment.⁹⁸ To calculate this, an ICS provider must record and document its costs of providing service. It must distinguish between eligible costs (such as “costs of the equipment housed in the confinement facility,” the costs of “originating, switching, and the transport and termination of calls,” “the costs of recording and screening calls,” the costs of “blocking mechanisms,” the costs of “biometric caller verification,” the costs of “storage of inmate call recordings,” and the costs of “billing and collection”⁹⁹) and ineligible costs (such as some, but not all, site commissions¹⁰⁰). If the provider uses the same equipment or personnel to provide ICS and another service (for example, if a jail requires that ICS be integrated with commissary ordering), the provider must figure out some way to unbundle the eligible costs from the ineligible costs. For capital investments, the provider must determine an amortization schedule, a depreciation method, the appropriate rate of return, and a tax rate. After answering all these questions, the ICS provider will presumably have determined its historical costs.

But there's more. While some costs will be tied to the provision of a service at a particular facility, many ICS costs today are joint and common costs, such as corporate operating expenses (including the cost of complying with FCC rules) or the cost of a centralized inmate calling recording platform that serves multiple facilities. For these costs, the ICS provider must apportion them among the prisons, jails, and other correctional institutions it serves and between ICS and “ancillary” services in a just and reasonable manner. Then, at least for ICS, the provider must separate the costs of interstate service from the costs of intrastate service since only interstate costs can factor into interstate rates. And then the ICS provider must translate those interstate, eligible costs into per-call and per-minute rates.

To administer this same process for incumbent rate-of-return carriers, the Commission has rules spanning at least five different parts of the Code of Federal Regulations. Part 64 explains how carriers must allocate costs between eligible and ineligible services.¹⁰¹ Part 32 explains how carriers should account for their different categories of expenses.¹⁰² Part 36 explains how carriers should separate their interstate costs from their intrastate costs.¹⁰³ Part 65 explains how carriers should calculate their rates of return.¹⁰⁴ And Part 69 explains how carriers should translate their interstate costs into interstate rates.¹⁰⁵

⁹⁷ See Rule 64.6010.

⁹⁸ *Order* at para. 52.

⁹⁹ *Id.* at note 196. Notably, the *Order* only states that these costs are “likely” eligible.

¹⁰⁰ *Id.* at note 203.

¹⁰¹ 47 C.F.R. Part 64, Subpart I (Allocation of Costs).

¹⁰² 47 C.F.R. Part 32 (Uniform System of Accounts for Telecommunications Companies).

¹⁰³ 47 C.F.R. Part 36 (Jurisdictional Separations Procedures; Standard Procedures for Separating Telecommunications Property Costs, Revenues, Expenses, Taxes and Reserves for Telecommunications Companies).

¹⁰⁴ 47 C.F.R. Part 65 (Interstate Rate of Return Prescription Procedures and Methodologies).

¹⁰⁵ 47 C.F.R. Part 69 (Access Charges).

But this *Order* leaves most of the questions on how to actually implement such regulation wholly unanswered. For example, must ICS providers follow the principles of Part 32 accounting, or may they employ Generally Accepted Accounting Principles (GAAP)? Should the rate of return be the same as for rural incumbent local exchange carriers (11.25 percent) or should it reflect the ICS market? And what adjustments to rate-of-return accounting are necessary given that ICS providers compete against each other for contracts that last only a few years (by contrast, rate-of-return principles were developed to police state-granted monopolies)?

Complicating this exercise for ICS providers is that most are not free to adjust their rates unilaterally. Instead, most ICS rates are subject to contracts between the ICS provider and the correctional institution—contracts that will remain in place even after the *Order* becomes effective.¹⁰⁶ As such, an ICS provider must renegotiate existing contracts or pursue other legal recourse, all in the next 90 days,¹⁰⁷ in addition to calculating new, cost-based rates for interstate ICS calls and ancillary charges.

If an ICS provider's rates are challenged, things get even more complicated. The Commission may investigate their rates, whether or not inmates file complaints. ICS providers bear the burden of production in all such cases, meaning they must submit all documentation necessary to prove that their rates are just and reasonable. And ICS providers will usually bear the burden of proof.¹⁰⁸ The Commission must then evaluate on a facility-by-facility basis which costs are legitimate and which are not, and determine whether it agrees with the way the ICS provider accounted for its costs, separated them, and translated them into rates.

If the Commission disagrees with the ICS provider's accounting after the fact, the provider must lower its rates. In ordering rate changes, the Commission reserves the right to decide that "[s]ome averaging of costs must occur" so that it may "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."¹⁰⁹ In other words, after the Commission looks at the costs of serving each of a provider's facilities, it might order an ICS provider to start cross-subsidizing—charging inmates at one facility more in order to reduce the cost of serving another facility. But the *Order* provides no guidance as to when the Commission may impose this remedy.

In some cases, the Commission may order refunds and forfeitures, but the *Order* does not mention how the former would be implemented. How far back would refunds go? How long must ICS providers track who paid how much at a particular rate? If an inmate has already left the jail or prison, must the ICS provider track him or her down? May the ICS provider include the cost of administering refunds in its rates going forward? None of these questions is asked, much less answered.

2.

Second, the *Order* establishes both a safe harbor (of 12 cents minute) and a cap (of 21 cents) for debit and prepaid calls, and a higher safe harbor (14 cents) and cap (25 cents) for collect calls.¹¹⁰ For ease of discussion, let's focus on a provider's debit rates.

Take first the safe harbor. To qualify for it, an ICS provider's rates must be 12 cents a minute or less. But having rates at a particular facility or within a particular state below 12 cents is not sufficient—

¹⁰⁶ *Order* at para. 100 ("Nothing in this Order directly overrides such contracts.").

¹⁰⁷ Note that the effective date of the *Order* is 90 days after publication in the Federal Register. For ease of exposition, I assume that such publication will occur shortly after release.

¹⁰⁸ *Order* at para. 121. The ICS provider always bears the burden of proof for ancillary charges. For ICS rates, the burden may shift to complainants if the provider meets the safe harbor, as discussed below.

¹⁰⁹ *Order* at para. 123.

¹¹⁰ Notably, there is no safe harbor for, and no cap on, ancillary charges.

the safe harbor applies only if *all* of an ICS provider's rates are below 12 cents.¹¹¹ If the rates for a single facility are above that benchmark, the ICS provider will not qualify for the safe harbor at *any* facility. Because there is uncontroverted evidence in the record that the cost of serving many county jails is far above 12 cents a minute,¹¹² this means that one of two things will happen. Either ICS providers will continue to provide service to county jails and none of them will qualify for the safe harbor, so it will be a dead letter. Or in order to qualify for the safe harbor, ICS providers will stop providing service to numerous jails across the country.¹¹³

Moreover, the "safe harbor" is a bit of a misnomer since it provides no refuge from complaints. The *Order* explicitly states that "[p]arties can file a complaint challenging the reasonableness of interstate ICS rates" even if those rates are within the safe harbor.¹¹⁴ If those rates are challenged, the Commission will have to decide whether they are cost-based and may reduce a provider's rates even further below the safe harbor. To be sure, the provider will benefit from a rebuttable presumption that its rates are just and reasonable, but rebuttable means that the safe harbor isn't really safe.

Next, turn to the cap of 21 cents. If any of an ICS provider's cost-based rates are above the cap, the Commission's message appears to be "too bad." Unless the Commission decides to grant a special dispensation, providers serving county jails will be subject to what is perhaps best described as negative rate-of-return regulation. Under the *Order*, a provider cannot charge cost-based rates at a small jail with above-average costs unless and until the Commission grants a waiver for "extraordinary circumstances." In deciding whether to grant such a waiver, the Commission may examine not just the costs of serving that one facility, but its costs of serving each and every facility, including "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."¹¹⁵

Given that the record shows that the cost of serving jails, and especially small jails, can be significantly higher than 21 cents a minute, there are sure to be many jails, juvenile correctional institutions, and secure mental health facilities, with costs above the cap.¹¹⁶ Given that the *Order* requires ICS providers to charge below-cost rates at such facilities until the Commission says otherwise, either providers will stop serving smaller jails or the waiver requests will come in swiftly. And given that our country has 2,859 jails, of which 1,681 have fewer than 100 beds and 1,129 have fewer than 50 beds,¹¹⁷

¹¹¹ *Order* at notes 226, 429.

¹¹² *See supra* Part I.B.

¹¹³ Theoretically, an ICS provider could raise rates in some facilities (such as the prisons of New York and New Mexico) in order to reduce rates below cost in others (e.g., county jails). But the *Order* offers no meaningful guidance as to when (and to what extent) such cross-subsidization would be permissible, other than to say that "ICS providers should not read this *Order* as providing a basis to increase rates" unless "necessary to ensure recovery of costs directly and reasonably related to the provision of ICS on a holding-company level." *Order* at note 19; *see also id.* at note 225. So the Commission has put a Sword of Damocles over the ICS providers that continue to serve jails, as the Commission could well decide after the fact that a provider's decision to cross-subsidize is unjust and unreasonable. So while, as explained earlier, it is naive to expect that charitable intentions will lead ICS providers to serve all small correctional institutions with below-cost rates, expecting them to serve institutions where they will lose money *and* where doing so may invite enforcement action by the Commission is less an indication of naiveté than wishful thinking.

¹¹⁴ *Id.* at para. 120.

¹¹⁵ *Id.* at paras. 82–83.

¹¹⁶ As I explain above, the cap is not "conservative," and I do not see the basis for the *Order*'s "expect[ation] that the rates of most facilities, whether jails or prisons, large or small, should fall below this rate." *Id.* at para. 77.

¹¹⁷ U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of Jail Facilities (2006), available at <http://dx.doi.org/10.3886/ICPSR26602.v1>.

the waiver requests might apply to hundreds or thousands of facilities across the country.¹¹⁸ I cannot see how the Commission will process these waivers in an effective or timely manner considering our limited resources. Indeed, recent experience counsels otherwise.¹¹⁹

And assume that the Commission finds, after a grueling review, that an ICS provider has justified its waiver request. What then? Presumably the provider may, at that point, raise its rates above the cap. But how can the ICS provider recoup the revenues it lost while the Commission required it to charge below-cost rates? The short answer is it cannot. And thus the rate-of-return regulations adopted in the *Order* are a one-way ratchet—all designed to lower rates regardless of the consequences.

3.

Third, each ICS provider must file by April a list of the interstate and intrastate rates it charges at each correctional institution it serves, as well as the “their charges to consumers that are ancillary to providing the telecommunications piece of ICS.”¹²⁰ This is effectively a tariffing requirement that allows the Commission to scrutinize the rates of all providers, especially given that ICS providers must update these filings every year going forward. May an ICS provider change its rates between filings? Perhaps. Will the Commission require providers to update their filing if they do? Not yet. But will the Commission likely cast a skeptical eye on rate increases between filings? Almost certainly. And where we will get the resources to review the effectively tariffed rates at each of the thousands of correctional institutions in America? I don’t know. In order to administer the rules contained in this *Order*, the Commission may need to create its own Bureau of Prisons.

4.

Finally, there is the massive data collection. Each ICS provider must document its costs for the past year and report them to the Commission on an institution-by-institution basis. Those costs must be broken down into five separate categories (connections, equipment, maintenance, security, and ancillary), which must be apportioned among three methods of cost accrual (fixed, per call, and per minute), and which must then again be divided between direct costs and joint and common costs. In addition, ICS providers must report the costs for establishing, maintaining, and closing debit and prepaid accounts, for sending paper statements, and for calling wireless phones, as well as the rates they charge for these services. And ICS providers must report “data on their interstate and intrastate long distance and local demand (*i.e.*, minutes of use) and . . . apportion the minutes of use between interstate and intrastate calls.”¹²¹ For jails alone, that’s 122,937 separate pieces of information.¹²² How we will review that information, check it for errors, and analyze it within a reasonable time frame is a mystery.

¹¹⁸ The *Order* suggests that because the three largest ICS providers “account for over 90% of ICS provided in the country,” processing waiver requests will not be a problem. *Order* at note 270. But that statistic is irrelevant for these purposes. The vast majority of ICS minutes come from state and federal prisons, where providers are unlikely to require waivers. The question instead is whether the Bureau has the capacity to process waivers covering the country’s 2,859 jails, each of which may face different costs of service.

¹¹⁹ *Cf. Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663,17842, para. 544 (2011) (directing the Wireline Competition Bureau to process waivers filed by Tribal or insular carriers for certain new universal service rules to complete review within 45 days of the record closing).

¹²⁰ *Order* at para. 116.

¹²¹ *Id.* at para. 125.

¹²² The calculation is 43 pieces of information collected from each of the 2,859 jails in the United States. U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of Jail Facilities (2006), *available at* <http://dx.doi.org/10.3886/ICPSR26602.v1>.

What is more, the mere fact of this data collection means that the safe harbor is ephemeral. Even if an ICS provider qualifies for the safe harbor (an uncertain proposition for the reasons described above), it must submit data that the Commission may well use to require that provider's rates to be reduced even further.¹²³

As if all these administrative problems were not enough, the Commission proposes to expand these same rules to local and intrastate services. This novel interpretation of section 276 would empower the Commission to preempt the role of state regulatory commissions in overseeing local and intrastate long-distance rates.¹²⁴ And it would foist even more work on our already-crowded plate.

5.

The *Order* rejects the rate-of-return label for its approach, instead terming it alternately a “rate cap regulatory regime[,]” a “rate cap approach,” “rate caps . . . similar to rate benchmarks,” a “rate cap framework,” “rate caps under a framework,” a “kind of variant on rate caps,” “rate caps that include a safe harbor mechanism,” “a system that relies on rate caps as well as potential complaints that rates are not based on costs,” or even “caps and . . . other steps to ensure that rates reflect costs.”¹²⁵ But whatever it's called, the name matters less than the substance. And the substance of the *Order* is *de facto* rate-of-return regulation.

At its core, rate-of-return regulation is about limiting the profits providers make by tying rates to historical costs plus a rate of return; it's the regulatory equivalent of a cost-plus contract.¹²⁶ As outlined above, that's exactly what the *Order* requires: “[I]nterstate ICS rates . . . must be cost-based,”¹²⁷ and costs are defined as “historical costs”¹²⁸ plus a “reasonable return on investment.”¹²⁹ The fact that the *Order* also caps the rates of ICS providers does not convert this rate-of-return regulation into something else; indeed, the Commission has used caps to supplement rate-of-return regulation before.¹³⁰

In rebuttal, the *Order* suggests that its approach is “fundamentally different than rate-of-return regulation” because it “does not rely on a prescribed rate of return, ex ante review, tariff filings, or compliance with cost accounting rules.”¹³¹ Set aside for the moment whether this assertion is true—whether, for example, the *Order* does not rely on tariff filings (despite the annual rate-filing requirement)

¹²³ *Order* at note 433.

¹²⁴ An ICS provider in today's market usually plays three separate roles under the statute: a payphone service provider (providing the equipment to connect to the network), a local exchange carrier (providing the connection to the local network), and an interexchange carrier (providing the connection beyond the local area). We have never before suggested that section 276 allows us to evaluate whether intrastate rates and practices are just and reasonable (a la section 201) for local exchange carriers and interexchange carriers just because they connect to a payphone.

¹²⁵ *Order* at para. 59 & notes 195, 222, 224, 280.

¹²⁶ See *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6787, 6789, paras. 1, 22 (1990) (*Price Cap Order*).

¹²⁷ *Order* at para. 50; see also *id.* at para. 119 (“we require ICS providers to charge cost-based rates and charges”); *id.* at para. 120 (“we require all interstate ICS rates and charges to be cost-based”).

¹²⁸ *Id.* at para. 52.

¹²⁹ *Id.* at para. 53.

¹³⁰ See 47 C.F.R. § 69.104 (prescribing caps for the subscriber line charge for rate-of-return carriers).

¹³¹ *Order* at note 195. I note that I cannot find any source—and the *Order* cites none—suggesting that all (let alone any) of the proffered regulatory methods are necessary requirements of rate-of-return regulation. By my reading, the Commission has used these methods in numerous circumstances, sometimes as part of rate-of-return regulation and sometimes not. See, e.g., *Price Cap Order*, 5 FCC Rcd at 6787–91, paras. 5–37 (maintaining the use of these methods for price-cap regulation).

or does not require compliance with cost accounting rules (despite the fact that ICS providers must allocate their costs as specified in the *Order*) or does not require ex ante review (despite the fact that carriers may not charge cost-based rates above the cap without ex ante review). The larger problem with this argument is that it seeks to sell a bug of the *Order* as a feature—the lack of clarity over how the Commission will implement its rate-of-return regulation (such as the prescribed rate of return) will lead to less certainty and more *ex post* decision-making. After all, ICS providers are not going to be able to choose whatever rate of return they desire; the *Order* even suggests that the 11.25 percent rate of return assumed by ICS providers “likely” overstates the cost of capital.¹³² As the Commission goes about implementing this *Order*, it eventually will have to reveal to service providers what their rate of return may be. In short, whatever label the *Order* slaps on this package of new rules, it cannot deny that the contents constitute *de facto* rate-of-return regulation.¹³³

B.

Turning from administrative difficulties to unintended consequences, I believe, as set forth above, that the rates in the item are below the costs of serving most jails (the majority of jails in our nation hold fewer than 100 inmates), secure mental health facilities, and juvenile detention centers. This arbitrarily low rate will impede the continuing deployment of current-generation security measures and the development of next-generation security techniques. The end result will be more crime. Over time, I also fear that ICS providers will reduce service to some facilities and entirely eliminate service to others.

No one disputes that public safety and security are important. Although many use ICS only for its intended purposes—staying in touch with friends and family—not all inmates are so benign. Some “[i]nmates utilize the telephone to communicate with individuals in the community to conspire and carry out serious criminal activities” such as intimidating witnesses and crime victims or coordinating gang activity.¹³⁴ Indeed, the *Order* appropriately notes that “security features, such as call recording and monitoring . . . advance the safety and security of the general public.”¹³⁵

And yet, security does not come cheap. ICS providers are constantly developing and deploying new security techniques, many of which are required just to keep pace with the tactics of certain inmates. For example, “inmates try to hide their identities through pin sharing, pin stealing, and/or three-way calls” in 1 out of every 14 calls, and biometric identification technologies have allowed for increased detection of such activities.¹³⁶ The cost of these new techniques may be significant, adding two to four cents per minute on top of the other costs (including call monitoring and recording) of a call.¹³⁷ If an ICS

¹³² *Order* at note 203.

¹³³ The *Order* also tries to ditch the rate-of-return label by noting that the safe harbor and cap are based on averages and claiming that “the use of average cost data is not common in rate of return regulation because a provider’s rates, although often averaged across its own facilities, are generally premised on that provider’s individual costs.” *Order* at note 280. That just proves the point, though, since the requirement that each ICS provider’s rates be cost based apparently means “averag[ing] across its own facilities, . . . that provider’s individual costs.” See, e.g., *id.* at note 301 (suggesting an ICS provider may average its costs among its facilities in establishing rates); *id.* at para. 83 (suggesting that an ICS provider seeking a waiver must average its costs among its facilities in establishing rates).

¹³⁴ Letter from Danielle Burt, Counsel for JLG Technologies, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. A at 3 (July 30, 2013) (JLG *Ex Parte* Letter); see also Statement of Commissioner Ajit Pai, Promoting Technological Solutions to Combat Contraband Wireless Device Use in Correctional Facilities, GN Docket No. 13-111, available at <http://go.usa.gov/jM75>.

¹³⁵ *Order* at para. 2.

¹³⁶ JLG *Ex Parte* Letter at 1 (reporting that “JLG’s biometric based 3-way call detection technology detected at least one 3-way call on 3.8% of the suspicious calls that its systems uncovered”).

¹³⁷ JLG *Ex Parte* Letter at 1 (reporting that JLG charges ICS providers 2 cents a minute for its technology); Pay Tel Report at 3 (noting third-party expenses for biometric analysis of 1.93 cents a minute); CenturyLink Report at 2 (noting a cost of 4 cents a minute for “current generation technologies”).

provider's costs of providing service are already just below or at the cap (as is likely the case at some jails), these security features will likely never be deployed since there will be no way for the ICS provider to recover the additional costs without going through the trouble of seeking a waiver from the Commission. And what about those jails where the cost of providing service is just above the cap? Far from taking on additional security costs, many of them will aim to reduce costs to get under the cap, and existing security measures could end up being jettisoned in the process.

Those who protect our safety day in and day out agree that maintaining security measures are vital. The National Sheriffs' Association explains that "dangerous individuals in local jails . . . try to continue their criminal activities on the outside while they are incarcerated," "contact witness[es] with wrongful intent," "call their victims," and "plot and plan criminal enterprises . . . with startling regularity, literally every day."¹³⁸ The sheriff of Rock County, Wisconsin, writes that current technology measures have "uncover[ed] information that assisted with the prosecution of an attempted homicide," "led to countless drug investigations, and dramatically reduced the amount of contraband that enters our facility."¹³⁹ The sheriff's office of Deschutes County, Oregon, explains that recording calls and verifying the voice of the caller before connecting a call have "reduced the amount of witness tampering and violations of no-contact orders."¹⁴⁰

And they too believe that burdensome rate regulation, like that adopted today, will undermine that security. The California State Sheriffs' Association argues that rate regulation "would seriously hamper the ability of California Sheriffs to effectively secure and manage their jails."¹⁴¹ The sheriff of Marion County, Oregon, explains that such regulation "will have serious impacts on the safety and security of correctional facilities."¹⁴² The Captain of the Detention Division of the Elmore County Sheriff's Office, Idaho, fears the "extremely detrimental" effects of losing the security measures he calls "critical for the safety of staff and inmates, as well as for the continued reduction and prosecution of crimes."¹⁴³ And the sheriff's office of Coconino County, Arizona, believes that unduly low rates will end the "technological advances and free services that have been so effective in the prevention and prosecution of crimes. . . . The only ones to benefit are those people involved in criminal activity, as preventing and prosecuting crime will become much more difficult."¹⁴⁴ Indeed, the record contains overwhelming opposition to today's *Order* from our nation's sheriffs.¹⁴⁵ These are front-line perspectives from those who put their lives on the line every day to keep us safe. While the Commission must take into account the interests of inmates and their families, we must also do what's right for crime victims, witnesses, and other law-abiding Americans.

¹³⁸ Comments of Sheriff Larry D. Amerson, President, National Sheriffs' Association.

¹³⁹ Comments of Robert D. Spoden, Rock County Sheriff, Janesville, Wisconsin.

¹⁴⁰ Comments of Captain Michael Espinoza, Deschutes County Sheriff's Office, Bend, Oregon.

¹⁴¹ Comments of Keith Royal, Sheriff, Nevada County, and President, California State Sheriffs' Association.

¹⁴² Comments of Jason Myers, Marion County Sheriff, Salem, Oregon on behalf of the Oregon State Sheriffs' Association.

¹⁴³ Comments of Rob "Lynn" McCallum, Captain, Detention Division, Elmore County Sheriff's Office, Mountain Home, Idaho.

¹⁴⁴ Comments of Kurt Braatz, Commander, Detention Services, Coconino County Sheriff's Office, Flagstaff, Arizona.

¹⁴⁵ See also Comments of John Buncich, Lake County Sheriff, Lake County, Indiana; Comments of Todd L. Thomas, Chief Deputy of Corrections, Thurston County Sheriff's Office, Olympia, Washington; Comments of Vaughn Killeen, Executive Director, Idaho Sheriffs' Association; Comments of Craig Roberts, Sheriff, Clackamas County Sheriff's Office, Portland, Oregon; Comments of Robert D. "Bobby" Timmons, Executive Director, Alabama Sheriffs Association.

Moreover, when faced with this loss of security measures, America's smaller correctional institutions will then be put to a choice: endanger the public or eliminate service. In the words of the Oregon State Sheriffs' Association: "If correctional facilities cannot ensure that inmate phone calls do not present threats to the safety of the facility and the public, many will choose—or be forced—to restrict phone access or remove phones entirely."¹⁴⁶ Ironically, this means that some of the inmates and families today's *Order* is meant to serve may soon be prevented from connecting with one another at *any* price.

III.

The *Order*'s approach was not inevitable. I proposed to my colleagues that we cap interstate calling rates for prisons at 19 cents a minute for debit calls, with higher rates for collect calls and for ICS provided at the largest jails in the country.¹⁴⁷ There is APA notice for such an approach: The Alternative Wright Petition proposed capping the interstate rates of ICS providers, and so did the *Inmate Calling NPRM*.¹⁴⁸ The record evidence supports that approach, too. The highest cost in the record of providing current service to a prison is 18.8 cents a minute,¹⁴⁹ and there is no evidence in the record that the cost of serving state prisons—the largest correctional institutions where ICS providers experience the greatest economies of scale—exceeds 19 cents a minute. And that approach is administratively feasible.¹⁵⁰ For a bright line eliminates the need for cost studies, investigations, and tariffs and grants an actual safe harbor to all those providers below the cap. And the consequences of my proposal are easily foreseen: The elimination of the most egregious rates in the country at prison payphones without any loss of security or access.

* * *

In conclusion, I very much hope that my concerns about today's *Order* prove to be unfounded. I hope that these rules will be easy to administer. I hope no inmates will lose access to calling services. And I hope that security inside and outside of prisons does not suffer. But because I can only make these statements out of hope rather than belief, I must respectfully and regretfully dissent.

¹⁴⁶ Comments of Jason Myers, Marion County Sheriff, Salem, Oregon on behalf of the Oregon State Sheriffs' Association; *see also* Comments of Vaughn Killeen, Executive Director, Idaho Sheriffs' Association ("If the FCC enacts price caps which severely reduce or eliminate the financial incentive of private telephone companies to provide inmate phone service (and the security features that are imperative to such services), some jails will simply be unable to afford to provide phone services to inmates at all.").

¹⁴⁷ Because the record contains widely varying information on the costs of serving the country's smaller jails, and we lack detailed data regarding the costs of serving juvenile correctional institutions and secure mental health facilities, I would have deferred consideration of rate caps for those facilities until after our Further Notice of Proposed Rulemaking.

¹⁴⁸ Indeed, the *Order* does not dispute that there was notice for such an approach—appropriately so. In the *Inmate Calling NPRM*, we asked "[i]f the Commission decides to implement rate caps in the ICS market how should we?", noted that "parties argue that differences between correctional facilities including size, location, security levels, facility age and staffing levels will not allow a one size fits all solution," and then asked "[h]ow can the Commission establish a solution that addresses the many variations among confinement facilities?" *Inmate Calling NPRM*, 27 FCC Rcd at 16638, paras. 22–23. Applying one per-minute cap to prisons, applying another to large jails, and deferring consideration of rates involving small correctional institutions responds directly to these questions.

¹⁴⁹ CenturyLink Report at 2 (noting that the cost to serve its most expensive prison is 18.8 cents a minute).

¹⁵⁰ Notably, this simple cap would not have required rate-of-return regulation for those with rates at or below the cap (thus eliminating the need for a safe harbor), would not have required tariffing, would not have applied to those facilities that are most likely to have costs above the cap, and would have allowed those serving high-cost facilities covered by the cap to seek a waiver based on their costs without any cross-subsidy requirements.