April 29, 2021

FACT SHEET[*]

Rates for Interstate Inmate Calling Services

Third Report and Order, Order on Reconsideration, and
Fifth Further Notice of Proposed Rulemaking – WC Docket No. 12-375

Background: Egregiously high rates and charges, and associated unreasonable practices, for telephone service impedes incarcerated individuals' ability to stay connected with family and loved ones. Never have such connections been as vital as they are now, as many correctional facilities have eliminated in-person visitation in response to the COVID-19 pandemic. This item would respond to these exigent circumstances by substantially adopting the proposals from the *2020 ICS Notice*.

What the *Third Report and Order* Would Do*:*

It would implement, in substantial part, the proposals in the *2020 ICS Notice* to:

- Lower the interstate interim rate caps to new interim caps of $0.12 per minute for prisons and $0.14 per minute for jails with populations of 1,000 or more, providing relief to the vast majority of incarcerated people.
- Reform the current treatment of site commission payments, allowing an $0.02 additional allowance for negotiated site commission payments to prisons and jails.
- Eliminate the separate interstate collect calling rate cap, lowering rates in all facilities.
- Cap, for the first time, international calling rates.
- Reform the ancillary service charge rules for third-party financial transaction fees.
- Adopt a new mandatory data collection to gather data to set permanent rates.
- Reaffirm providers' obligations regarding access for incarcerated people with disabilities.

What the *Order on Reconsideration* Would Do*:*

- Reaffirm the Commission's finding in the *2020 ICS Order* that the jurisdictional nature of a telephone call for purposes of charging consumers depends on the physical location of the originating and terminating endpoints of the call.

What the *Fifth Further Notice of Proposed Rulemaking* Would Do*:*

- Seek comment on issues including the provision of communications services to incarcerated individuals with disabilities; adoption of permanent interstate and international rate caps; reform of the treatment of site commission payments; and reforms to the ancillary service charges rules.

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[*] This document is being released as part of a "permit-but-disclose" proceeding. Any presentations or views on the subject expressed to the Commission or to its staff, including by email, must be filed in WC Docket No. 12-375, which may be accessed via the Electronic Comment Filing System (https://www.fcc.gov/ecfs/). Before filing, participants should familiarize themselves with the Commission's ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. *See* 47 CFR § 1.1200 *et seq*.

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

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

THIRD REPORT AND ORDER, ORDER ON RECONSIDERATION, AND FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING*

Adopted: [] **Released: []**

Comment Date: [[30]] days after date of publication in the Federal Register
Reply Comment Date: [[60]] days after date of publication in the Federal Register

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* This document has been circulated for tentative consideration by the Commission at its May 20, 2021 open meeting. The issues referenced in this document and the Commission's ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Acting Chairwoman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The FCC's *ex parte* rules apply and presentations are subject to "permit-but-disclose" *ex parte* rules. *See, e.g.*, 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. *See* 47 CFR §§ 1.1200(a), 1.1203.

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I. INTRODUCTION

1. Unlike virtually everyone else in the United States, incarcerated people have no choice in their telephone service provider. Instead, their only option typically is to use a service provider chosen by the correctional facility, and once chosen, that service provider typically operates on a monopoly basis. Egregiously high rates and charges and associated unreasonable practices for the most basic and essential communications capability—telephone service—impedes incarcerated peoples' ability to stay connected with family and loved ones, clergy, and counsel, and financially burdens incarcerated people and their loved ones. Never have such connections been as vital as they are now, as many correctional facilities have eliminated in-person visitation in response to the COVID-19 pandemic.

2. In August 2020, the Commission unanimously adopted a *Notice* proposing to reduce interstate rates and, for the first time, to cap international rates. Today, we move forward as proposed, lowering interstate rates and charges for the vast majority of incarcerated people, limiting international rates for the first time, and making other reforms to our rules.

3. Specifically, the Report and Order:

- Lowers the interstate interim rate caps of $0.21 per minute for debit and prepaid calls from prisons and jails with 1,000 or more incarcerated people to new lower interim caps of $0.12 per minute for prisons and $0.14 per minute for larger jails.
- Reforms the current treatment of site commission payments to permit recovery only of the portions of such payments related specifically to calling services and requires them to

be separately listed on bills.

  - Where site commission payments are mandated by federal, state, or local law, providers may pass these payments through to consumers, without any markup, as an additional component of the new interim interstate per-minute rate caps.
  - Where site commission payments result from contractual obligations or negotiations with providers, providers may recover from consumers no more than the $0.02 per minute for prisons and $0.02 per minute for larger jails, as proposed in the *2020 ICS Notice*.
  - Therefore, consistent with the proposal in the *2020 ICS Notice*, the maximum total interstate rate caps are $0.14 per minute for prisons and $0.16 per minute for jails with 1,000 or more incarcerated people.

- Eliminates the current interim interstate collect calling rate cap of $0.25 per minute resulting in a single uniform interim interstate maximum rate cap of $0.21 per minute for all calls for all facilities, consistent with the proposal in the *2020 ICS Notice*.
- Caps, for the first time, international calling rates at the applicable total interstate rate cap, plus the amount paid by the calling services provider to its underlying wholesale carriers for completing international calls, consistent with the *2020 ICS Notice*.
- Reforms the ancillary service third-party transaction fee caps for (1) calls that are billed on a single per-call basis, and (2) charges for transferring or processing third-party financial transactions, as proposed in the *2020 ICS Notice*.
- Adopts a new mandatory data collection to obtain more uniform cost data based on consistent prescribed allocation methodologies to determine reasonable permanent cost-based rate caps for facilities of all sizes, as suggested in the *2020 ICS Notice*.
- Reaffirms providers' obligations regarding functionally equivalent access for incarcerated people with disabilities, consistent with the *2020 ICS Notice* and federal law.

4. Next, we adopt an Order on Reconsideration denying GTL's petition for reconsideration of the *2020 ICS Order on Remand*, and reiterate that the jurisdictional nature of a telephone call for purposes of charging consumers depends on the physical location of the originating and terminating endpoints of the call. To the extent the endpoints of any particular call could be either intrastate or interstate and such endpoints are not known or easily knowable, consistent with our precedent, rates or charges for such calls may not exceed any applicable federally prescribed rates or charges.

5. Finally, we adopt a Fifth Further Notice of Rulemaking to obtain evidence necessary to make further progress toward accomplishing the critical work that remains. To that end, the Further Notice seeks more detailed comments from stakeholders, including but not limited to, about the provision of communications services to incarcerated people with hearing and speech disabilities; the methodology to be employed in setting permanent interstate and international rate caps; general reform of the treatment of site commission payments in connection with interstate and international calls; the adoption of an on-going periodic cost data collection to ensure rates are just and reasonable; and additional reforms to our ancillary service charges rules.

6. We expect today's actions to have immediate meaningful and positive impacts on the ability of incarcerated people and their loved ones to satisfy our universal, basic need to communicate.[1]

[1] Although we use various terminology throughout this item to refer to the intended beneficiaries of our actions herein, unless context specifically indicates otherwise, these beneficiaries are broadly the people placing and receiving inmate calling services (ICS) calls, whether they are incarcerated people, members of their family, or other loved ones and friends. We also may refer to them, generally, as consumers.

II. BACKGROUND

7. Access to affordable communications services is critical for everyone in the United States, including incarcerated members of our society. Studies have long shown that incarcerated people who have regular contact with family members are more likely to succeed after release and have lower recidivism rates. Because correctional facilities generally grant exclusive rights to service providers, incarcerated people must purchase service from "locational monopolies" and subsequently face rates far higher than those charged to other Americans.

A. Statutory Background

8. The Communications Act of 1934, as amended (Communications Act or Act) divides regulatory authority over interstate, intrastate, and international communications services between the Commission and the states.[2] Section 2(a) of the Act empowers the Commission to regulate "interstate and foreign communication by wire or radio."[3] This regulatory authority includes ensuring that "[a]ll charges, practices, classifications, and regulations for and in connection with" interstate or international communications services are "just and reasonable" in accordance with section 201(b) of the Act.[4] Section 201(b) also provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out" these provisions.[5]

9. Section 2(b) of the Act preserves states' jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service."[6] The Commission is thus "generally forbidden from entering the field of intrastate communication service, which remains the province of the states."[7] Stated differently, section 2(b) "erects a presumption against the Commission's assertion of regulatory authority over intrastate communications."[8]

10. Section 276 of the Act directs the Commission to prescribe regulations that ensure that payphone service providers, including inmate calling services providers, "are fairly compensated for each and every completed intrastate and interstate call using their payphone."[9] Although the Telecommunications Act of 1996 (1996 Act) amended the Act and "chang[ed] the FCC's authority with respect to some intrastate activities,"[10] with respect to section 276, the U.S. Court of Appeals for the District of Columbia Circuit has held that "the strictures of [section 2(b)] remain in force."[11] Accordingly, that court concluded that section 276 does not authorize the Commission to determine "just and reasonable" rates for intrastate calls, and that the Commission's authority under that provision to

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[2] *E.g.*, *Global Tel*Link v.* FCC, 866 F.3d 397, 402 (D.C. Cir. 2017) (*GTL v. FCC* or *GTL*).

[3] 47 U.S.C. § 152(a).

[4] 47 U.S.C. § 201(b).

[5] *Id.*

[6] 47 U.S.C. § 152(b).

[7] *GTL v. FCC*, 866 F.3d at 403 (quoting *New England Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) (citing 47 U.S.C. § 152(b)).

[8] *Id.* at 403, 409; *see also id.* at 403 ("This is 'not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction' in interpreting the Act's provisions." (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373 (1986) (*Louisiana Public Service Commission*))).

[9] 47 U.S.C. § 276(b)(1)(A); *see also* 47 U.S.C. § 276(d) (defining "payphone service" to include "the provision of inmate telephone service in correctional institutions, and any ancillary services"). The statute explicitly exempts telecommunications relay service calls for hearing disabled individuals from the requirement that providers must be compensated for "each and every" completed call. *Id.* § 276(b)(1)(A).

[10] *GTL v. FCC*, 866 F.3d at 403.

[11] *Id.*

ensure that providers "are fairly compensated" both for intrastate and interstate calls does not extend to establishing rate caps on intrastate services.[12]

B. History of Commission Proceedings Prior to 2020

11. In 2003, Martha Wright and her fellow petitioners, current and former incarcerated people and their relatives and legal counsel (Wright Petitioners), filed a petition seeking a rulemaking to address "excessive" inmate calling services rates.[13] The petition sought to prohibit exclusive inmate calling services contracts and collect-call-only restrictions in correctional facilities.[14] In 2007, the Wright Petitioners filed an alternative petition for rulemaking in which they emphasized the urgency of the need for Commission action due to "exorbitant" inmate calling services rates.[15] The Wright Petitioners proposed benchmark rates for interstate long distance inmate calling services calls and reiterated their request that providers offer debit calling as an alternative option to collect calling.[16] The Commission sought and received comment on both petitions.[17]

12. In 2012, the Commission commenced an inmate calling services rulemaking proceeding by releasing the *2012 ICS Notice* seeking comment on, among other matters, the proposals in the Wright Petitioners' petitions and whether to establish rate caps for interstate inmate calling services calls.[18]

13. In the *2013 ICS Order*, in light of record evidence that rates for calling services used by incarcerated people greatly exceeded the reasonable costs of providing those services, the Commission adopted interim interstate rate caps of $0.21 per minute for debit and prepaid calls and $0.25 per minute for collect calls.[19] In the First Mandatory Data Collection, the Commission required all inmate calling services providers to submit data on their underlying costs so that the agency could develop permanent

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[12] *Id.* at 409-12. Judge Pillard dissented from this view, finding permissible the Commission's contrary interpretation of the meaning of "fairly compensated" in section 276. *Id.* at 419-23 (Pillard, J., dissenting).

[13] Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128, at 1 (filed Nov. 3, 2003), https://ecfsapi.fcc.gov/file/6515782164.pdf.

[14] *Id.* at 3.

[15] Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128, at 2 (filed Mar. 1, 2007), https://ecfsapi.fcc.gov/file/6518908681.pdf.

[16] *Id.* at 5, 10.

[17] *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, CC Docket No. 96-128, Public Notice, 22 FCC Rcd 4229 (WCB 2007); *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 FCC LEXIS 7261 (WCB 2003).

[18] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16629-30, 16636, paras. 1, 17 (2012) (*2012 ICS Notice*).

[19] These interim interstate rate caps were first adopted in 2013, *Rates for Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14111, para. 5 (2013) (*2013 ICS Order*), and readopted in 2015, *Rates for Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763, 12770, para. 9 tbl. 1 (2015) (*2015 ICS Order* or *2015 ICS Notice*), and remain in effect as a result of the vacatur, by the D.C. Circuit, of the permanent rate caps adopted in the *2015 ICS Order*. *GTL v. FCC*, 866 F.3d at 404. Under the Commission's rules, "Debit Calling" means "a presubscription or comparable service which allows an Inmate, or someone acting on an Inmate's behalf, to fund an account set up [through] a Provider that can be used to pay for Inmate Calling Services calls originated by the Inmate." 47 CFR § 64.6000(g). "Prepaid calling" means "a presubscription or comparable service in which a Consumer, other than an Inmate, funds an account set up [through] a Provider of Inmate Calling Services. Funds from the account can then be used to pay for Inmate Calling Services, including calls that originate with an Inmate." *Id.* § 64.6000(p). "Collect calling" means "an arrangement whereby the called party takes affirmative action clearly indicating that it will pay the charges associated with a call originating from an Inmate Telephone." *Id.* § 64.6000(d).

rate caps.[20] In the *2014 ICS Notice*, the Commission sought comment on reforming charges for services ancillary to the provision of inmate calling services and on establishing rate caps for both interstate and intrastate calls.[21]

14. The Commission adopted a comprehensive framework for interstate and intrastate inmate calling services in the *2015 ICS Order*, including limits on ancillary service charges[22] and permanent rate caps for interstate and intrastate inmate calling services calls in light of "egregiously high" rates for inmate calling services calls.[23] The Commission set tiered rate caps of $0.11 per minute for prisons; $0.14 per minute for jails with average daily populations of 1,000 or more; $0.16 per minute for jails with average daily populations of 350 to 999; and $0.22 per minute for jails having average daily populations of less than 350.[24] The Commission calculated these rate caps using industry-wide average costs based on data from the First Mandatory Data Collection and stated that this approach would allow providers to "recover average costs at each and every tier."[25] The Commission also readopted the interim interstate rate caps it had adopted in 2013, and extended them to intrastate calls, pending the effectiveness of the new rate caps, and sought comment on whether and how to reform rates for international inmate calling services calls.[26] At the same time, the Commission adopted a Second Mandatory Data Collection to

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[20] *2013 ICS Order*, 28 FCC Rcd at 14111-12, paras. 5, 7.

[21] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170, 13179, para. 19 (2014) (*2014 ICS Notice*). Ancillary service charges are fees that providers assess on calling services used by incarcerated people that are not included in the per-minute rates assessed for individual calls. 47 CFR § 64.6000(a).

[22] *2015 ICS Order*, 30 FCC Rcd at 12838-39, paras. 144-45. Because of continued growth in the number and dollar amount of ancillary service charges that inflated the effective price paid for inmate calling services, the Commission limited permissible ancillary service charges to only five types and capped the charges for each: (1) Fees for Single-Call and Related Services—billing arrangements whereby an incarcerated person's collect calls are billed through a third party on a per-call basis, where the called party does not have an account with the inmate calling services provider or does not want to establish an account; (2) Automated Payment Fees—credit card payment, debit card payment, and bill processing fees, including fees for payments made by interactive voice response, web, or kiosk; (3) Third-Party Financial Transaction Fees—the exact fees, with no markup, that providers of calling services used by incarcerated people are charged by third parties to transfer money or process financial transactions to facilitate a consumer's ability to make account payments via a third party; (4) Live Agent Fees—fees associated with the optional use of a live operator to complete inmate calling services transactions; and (5) Paper Bill/Statement Fees—fees associated with providing customers of inmate calling services an optional paper billing statement. 47 CFR §§ 64.6000(a), 64.6020.

[23] The Commission relied on section 276 and section 201(b) of the Act to adopt its rate caps for both intrastate and interstate inmate calling services. *2015 ICS Order*, 30 FCC Rcd at 12768, 12813-18, paras. 7, 106-16.

[24] *Id.* at 12775, para. 22.

[25] *2015 ICS Order*, 30 FCC Rcd at 12790, para. 52 & n.170. The Commission did not include site commission payments in its permanent rate caps finding these payments were not costs reasonably related to the provision of inmate calling services. *See 2015 ICS Order*, 30 FCC Rcd at 12818-19, paras. 117-18; *see also 2013 ICS Order*, 28 FCC Rcd at 14124-25, paras. 33-34 (describing site commissions as "payments made from [inmate calling services] providers to correctional facilities and related state authorities" and recognizing that 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"); *Implementation of Pay Telephone Reclassification & 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, 3262, para. 38 (2002) (*2002 Pay Telephone Order*) (describing site commissions as "location rents that are negotiable by contract with the facility owners and represent an apportionment of profits between the facility owners and the providers of the inmate payphone service").

[26] *2015 ICS Order*, 30 FCC Rcd at 12769, 12771, paras. 9, 11; *see also Wireline Competition Bureau Addresses Applicable Rates for Inmate Calling Services and Effective Dates for Provisions of the Inmate Calling Services Second Report and Order*, WC Docket No. 12-375, Public Notice, 31 FCC Rcd 2026, 2026-28 (WCB 2016).

identify trends in the market and form the basis for further reform as well as an annual filing obligation requiring providers to report information on their current operations, including their interstate, intrastate, and international rates as well as their ancillary service charges.[27]

15. In the *2016 ICS Reconsideration Order*, the Commission reconsidered its decision to entirely exclude site commission payments from its 2015 permanent rate caps.[28] The Commission increased those permanent rate caps to account for claims that certain correctional facility costs reflected in site commission payments are directly and reasonably related to the provision of inmate calling services.[29] The Commission set the revised rate caps at $0.13 per minute for prisons; $0.19 per minute for jails with average daily populations of 1,000 or more; $0.21 per minute for jails with average daily populations of 350 to 999; and $0.31 per minute for jails with average daily populations of less than 350.[30]

C. Judicial Actions

16. In January 2014, in response to providers' petitions for review of the *2013 ICS Order*, the D.C. Circuit stayed the application of certain portions of the *2013 ICS Order* but allowed the Commission's interim rate caps to remain in effect.[31] Later that year, the court held the petitions for review in abeyance while the Commission proceeded to set permanent rates.[32] In March 2016, in response to providers' petitions for review of the *2015 ICS Order*, the D.C. Circuit stayed the application of the *2015 ICS Order*'s permanent rate caps and ancillary service charge caps for Single Call Services[33] while the appeal was pending.[34] Later that month, the court stayed the application of the Commission's interim rate caps to intrastate inmate calling services.[35] In November 2016, the D.C. Circuit also stayed the *2016 ICS Reconsideration Order*, pending the outcome of the challenge to the *2015 ICS Order*.[36]

17. In 2017, in *GTL v. FCC*, the D.C. Circuit vacated the permanent rate caps adopted in the *2015 ICS Order*.[37] First, the panel majority held that the Commission lacked the statutory authority to cap intrastate calling services rates.[38] The court explained that the Commission's authority over intrastate calls is, except as otherwise provided by Congress, limited by section 2(b) of the Act and nothing in section 276 of the Act overcomes this limitation.[39] In particular, section 276 "merely directs the Commission to 'ensure that all providers [of calling services to incarcerated people] are fairly

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[27] *2015 ICS Order*, 30 FCC Rcd at 12862, 12891-92, paras. 198, 266-67.

[28] *See Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order on Reconsideration, 31 FCC Rcd 9300 (2016) (*2016 ICS Reconsideration Order*).

[29] *See generally id.* at 9307, para. 12.

[30] *Id.*

[31] *Securus Techs., Inc. v. FCC*, No. 13-1280, 2014 U.S. App. LEXIS 13669, at *3 (D.C. Cir. Jan. 13, 2014).

[32] *GTL v. FCC*, 866 F.3d at 405 (citing *Securus Techs., Inc. v. FCC*, No. 13-1280, 2014 U.S. App. LEXIS 25157, at *3 (D.C. Cir. Dec. 16, 2014)).

[33] Single-Call Services mean "billing arrangements whereby an Inmate's collect calls are billed through a third party on a per-call basis, where the called party does not have an account with the Provider of Inmate Calling Services or does not want to establish an account." 47 CFR § 64.6000(a)(2).

[34] *GTL v. FCC*, 866 F.3d at 405 (citing *GTL v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016)).

[35] *Id.* at 405-06 (citing *GTL v. FCC*, No. 15-1461 (D.C. Cir. Mar. 23, 2016)).

[36] *Id.* at 406 (citing *Securus Techs., Inc. v. FCC*, No. 16-1321, 2016 U.S. App. LEXIS 24370, at *4 (D.C. Cir. Nov. 2, 2016)).

[37] *Id.*at 402, 415.

[38] *Id.* at 408-12.

[39] *See GTL v. FCC*, 866 F.3d at 409-12.

compensated' for their inter- and intrastate calls,"[40] and it "is not a 'general grant of jurisdiction' over intrastate ratemaking."[41] The court noted that it "need not decide the precise parameters of the Commission's authority under § 276."[42]

18. Second, the D.C. Circuit concluded that the "Commission's categorical exclusion of site commissions[43] from the calculus used to set [inmate calling services] rate caps defie[d] reasoned decision making because site commissions obviously are costs of doing business incurred by [inmate calling services] providers."[44] The court noted that some site commissions were "mandated by state statute," while others were "required by state correctional institutions" and were thus also a "condition of doing business."[45] The court directed the Commission to "assess on remand which portions of site commissions might be directly related to the provision of [inmate calling services] and therefore legitimate, and which are not."[46] The court did not reach the providers' remaining arguments "that the exclusion of site commissions denies [them] fair compensation under [section] 276 and violates the Takings Clause of the Constitution because it forces providers to provide services below cost." Instead, the court stated that the Commission should address these issues on remand when revisiting the categorical exclusion of site commissions.[47]

19. Third, the D.C. Circuit held that the Commission's use of industry-wide averages in setting rate caps was arbitrary and capricious because it lacked justification in the record and was not supported by reasoned decision making.[48] More specifically, the court found the Commission's use of a weighted average per-minute cost to be "patently unreasonable" given that such an approach made calls with above-average costs unprofitable and thus did "not fulfill the mandate of § 276 that 'each and every'" call be fairly compensated.[49] Additionally, the court found that the *2015 ICS Order* "advance[d] an efficiency argument—that the larger providers can become profitable under the rate caps if they operate more efficiently—based on data from the two smallest firms," which "represent[ed] less than one percent of the industry," and that the *Order* did not account for conflicting record data.[50] The court therefore vacated this portion of the *2015 ICS Order*.[51]

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[40] *Id.* at 409 (quoting 47 U.S.C. § 276(b)(1)(A)).

[41] *Id.* at 412 (internal citation omitted).

[42] *Id.*

[43] *See* 47 CFR § 64.6000 (defining site commissions as "any form of monetary payment, in-kind payment, gift, exchange of services or goods, fee, technology allowance, or product that a Provider of Inmate Calling Services or affiliate of a Provider of Inmate Calling Services may pay, give, donate, or otherwise provide to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide Inmate Calling Services, a governmental agency that oversees a correctional facility, the city, county, or state where a facility is located, or an agent of any such facility").

[44] *GTL v. FCC*, 866 F.3d at 413.

[45] *Id.*

[46] *Id.* at 414.

[47] *GTL v. FCC*, 866 F.3d at 414. Judge Pillard dissented from this view, noting that site commissions are not legitimate simply because a state demands them. *Id.* at 424 (Pillard, J., dissenting).

[48] *GTL v. FCC*, 866 F.3d at 402, 415. Judge Pillard also dissented on this point, noting that the Commission has "wide discretion" under section 201 of the Act to decide "which costs to take into account and to use industry-wide averages that do not necessarily compensate 'each and every' call." *Id.* at 424-25 (Pillard, J., dissenting).

[49] *GTL v. FCC*, 866 F.3d at 414 (internal citation omitted).

[50] *Id.* at 415 (internal citation omitted).

[51] *Id.* at 417.

20. Finally, the court remanded the ancillary service charge caps.[52] The court held that the Commission "had no authority to impose ancillary fee caps with respect to intrastate calls."[53] Because the court could not "discern from the record whether ancillary fees can be segregated between interstate and intrastate calls," it remanded the issue so the Commission could determine whether it could segregate ancillary fee caps on interstate calls (which are permissible) and on intrastate calls (which are impermissible).[54] The court also vacated the video visitation annual reporting requirements adopted in the *2015 ICS Order*.[55]

21. In December 2017, after it issued the *GTL v. FCC* opinion, the D.C. Circuit in *Securus v. FCC* ordered the *2016 ICS Reconsideration Order* "summarily vacated insofar as it purports to set rate caps on inmate calling service" because the revised rate caps in that *2016 Order* were "premised on the same legal framework and mathematical methodology" rejected by the court in *GTL v. FCC*.[56] The court remanded "the remaining provisions" of that *Order* to the Commission "for further consideration . . . in light of the disposition of this case and other related cases."[57] As a result of the D.C. Circuit's decisions in *GTL* and *Securus*, the interim rate caps that the Commission adopted in 2013 ($0.21 per minute for debit/prepaid calls and $0.25 per minute for collect calls) remain in effect for interstate inmate calling services calls.

D. 2020 Rates and Charges Reform Efforts

22. *2020 ICS Order on Remand and Notice*. In February 2020, the Wireline Competition Bureau (Bureau or WCB) issued a public notice seeking to refresh the record on ancillary service charges in light of the D.C. Circuit's remand in *GTL v. FCC*.[58] In the *Ancillary Services Refresh Public Notice*, the Bureau sought comment on "whether each permitted [inmate calling services] ancillary service charge may be segregated between interstate and intrastate calls and, if so, how."[59] The Bureau also defined jurisdictionally mixed services as "'[s]ervices that are capable of communications both between intrastate end points and between interstate end points'" and sought comment on, among other issues, how the Commission should proceed if any permitted ancillary service is "jurisdictionally mixed" and cannot be segregated between interstate and intrastate calls.[60]

23. In August 2020, the Commission adopted the *2020 ICS Order on Remand* and *2020 ICS*

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[52] *GTL v. FCC*, 866 F.3d at 402, 415. The D.C. Circuit held that "the Order's imposition of ancillary fee caps in connection with interstate calls is justified" given the Commission's "plenary authority to regulate interstate rates under § 201(b), including 'practices . . . for and in connection with' interstate calls." *Id.* at 415.

[53] *GTL v. FCC*, 866 F.3d at 415.

[54] *Id.*

[55] *Id.* at 402.

[56] *Securus Techs., Inc. v. FCC*, No. 16-1321, 2017 U.S. App. LEXIS 26360, at *4-5 (D.C. Cir. Dec. 21, 2017) (*2017 Securus*).

[57] *Id.* at *5.

[58] *Wireline Competition Bureau Seeks to Refresh the Record on Ancillary Service Charges Related to Inmate Calling Services*, WC Docket No. 12-375, Public Notice, 35 FCC Rcd 189, 189 (WCB 2020) (*Ancillary Services Refresh Public Notice*). This Public Notice was published in the Federal Register. FCC, Wireline Competition Bureau Seeks to Refresh the Record on Ancillary Service Charges Related to Inmate Calling Services, 85 Fed. Reg. 9444 (Feb. 19, 2020).

[59] *Ancillary Services Refresh Public Notice*, 35 FCC Rcd at 190. The Bureau also sought comment on any steps the Commission should take to ensure, consistent with the D.C. Circuit's opinion, that providers of interstate inmate calling services do not circumvent or frustrate the Commission's ancillary service charge rules. *Ancillary Services Refresh Public Notice*, 35 FCC Rcd at 191.

[60] *Id.* at 190.

Notice.[61] The Commission responded to the court's remands and took action to comprehensively reform inmate calling services rates and charges.[62] First, the Commission addressed the D.C. Circuit's directive that the Commission consider whether ancillary service charges—separate fees that are not included in the per-minute rates assessed for individual inmate calling services calls—can be segregated into interstate and intrastate components for the purpose of excluding the intrastate components from the reach of our rules.[63] The Commission found that ancillary service charges generally are jurisdictionally mixed[64] and cannot be practicably segregated between the interstate and intrastate jurisdictions except in the limited number of cases where, at the time a charge is imposed and the consumer accepts the charge, the call to which the service is ancillary is clearly an intrastate call.[65] As a result, the Commission concluded that inmate calling services providers are generally prohibited from imposing any ancillary service charges other than those permitted by the Commission's rules and providers are generally prohibited from imposing charges in excess of our applicable ancillary service fee caps.[66]

24. Second, the Commission proposed rate reform of the inmate calling services within its jurisdiction.[67] As a result of the D.C. Circuit's decisions, the interim interstate rate caps of $0.21 per minute for debit and prepaid calls and $0.25 per minute for collect calls that the Commission adopted in 2013 remain in effect today.[68] Commission staff performed extensive analysis of the data it collected in the Second Mandatory Data Collection[69] as well as the data in the April 1, 2020, annual reports. Based on

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[61] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking, 35 FCC Rcd 8485 (2020) (*2020 ICS Order on Remand* or *August 2020 ICS Notice or 2020 ICS Notice*).

[62] *2020 ICS Order on Remand*, 35 FCC Rcd at 8485, para. 2.

[63] *GTL v. FCC*, 866 F.3d at 415.

[64] *Ancillary Services Refresh Public Notice*, 35 FCC Rcd at 190 (quoting *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22413, para. 17 (2004) (*Vonage Order*)).

[65] *2020 ICS Order on Remand*, 35 FCC Rcd at 8495, para. 28.

[66] *Id*.

[67] *Id*. at 8486, para. 3.

[68] *2013 ICS Order*, 28 FCC Rcd at 14111, para. 5 (adopting interim rate caps); *2015 ICS Order*, 30 FCC Rcd at 12768, 12813-18, paras. 7, 106-16 (adopting permanent rate caps); *2016 ICS Reconsideration Order*, 31 FCC Rcd at 9307, para. 12 (revising permanent rate caps); *GTL v. FCC*, 866 F.3d at 415 (vacating permanent rate caps); *2017 Securus*, 2017 U.S. App. LEXIS 26360, at *4-5 (vacating revised rate caps).

[69] In the *2015 ICS Order*, the Commission directed that the Second Mandatory Data Collection be conducted "two years from publication of Office of Management and Budget (OMB) approval of the information collection." *2015 ICS Order*, 30 FCC Rcd at 12862, para. 198. The Commission received OMB approval in January 2017, and Federal Register publication occurred on March 1, 2017. FCC, Rates for Interstate Inmate Calling Services; Correction, 82 Fed. Reg. 12922 (Mar. 8, 2017), *correcting* FCC, Rates for Interstate Inmate Calling Services, 82 Fed. Reg. 12182 (Mar. 1, 2017). Accordingly, on March 1, 2019, inmate calling services providers submitted their responses to the Second Mandatory Data Collection. *See Wireline Competition Bureau Reminds Providers of Inmate Calling Services of the March 1, 2019 Deadline for Data Collection Responses*, WC Docket No. 12-375, Public Notice, 34 FCC Rcd 515 (WCB 2019) (*2019 Data Collection Public Notice*). WCB and Office of Economics and Analytics (OEA) undertook a comprehensive analysis of the Second Mandatory Data Collection responses, and conducted multiple follow-up discussions with providers to supplement and clarify their responses, in order to conduct the data analysis upon which the proposals in the *August 2020 ICS Notice* are based. *See, e.g.*, Letter from Chérie R. Kiser, Counsel for GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed May 19, 2020) (GTL Amended Description and Justification) (amending GTL's Second Mandatory Data Collection response "to address questions raised by Commission staff"); Letter from Sharon R. Warren, Consultant to Crown Correctional Telephone, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed May 5, 2020); Letter from Sharon R. Warren, Consultant to Network Communications International Corp., to Marlene H. Dortch,

(continued….)

that analysis, the Commission proposed to lower the interstate rate caps to $0.14 per minute for debit, prepaid, and collect calls from prisons and $0.16 per minute for debit, prepaid, and collect calls from jails. In so doing, the Commission used a methodology that addresses the flaws underlying the Commission's 2015 and 2016 rate caps (which used industry-wide averages to set rate caps) and that is consistent with the mandate in section 276 of the Act that inmate calling services providers be fairly compensated for each and every completed interstate call.[70] The Commission also proposed to adopt a waiver process that would permit providers to seek waivers of the proposed rate caps on a facility-by-facility or contract basis if the rate caps would prevent a provider from recovering the costs of providing interstate inmate calling services at a facility or facilities covered by a contract.[71] The *2020 ICS Notice* also proposed "to adopt a rate cap formula for international inmate calling services calls that permits a provider to charge a rate up to the sum of the inmate calling services provider's per-minute interstate rate cap for that correctional facility plus the amount that the provider must pay its underlying international service provider for that call on a per-minute basis (without a markup)."[72] The Commission explained that this cap "would enable inmate calling services providers to account for widely varying costs," be consistent with the "just and reasonable' standard in section 201(b) of the Act, and comport with the "fair compensation" provision of section 276 of the Act.[73]

25. In response to the *2020 ICS Notice*, the Commission received over 90 comments and reply comments and 9 economic studies. Filers included providers of calling services to incarcerated people, public interest groups and advocates for the incarcerated, telecommunications companies, organizations representing individuals who are deaf or hard of hearing, and providers of telecommunications relay service.

26. *Intrastate Rate Reform Efforts*. By April 1 of each year, inmate calling services providers file annual reports with the Commission that include rates, ancillary service charges, and site commissions. In an effort to compare interstate inmate calling services rate levels with intrastate rate levels, Commission staff analyzed the intrastate rate data submitted as part of the providers' April 1, 2020, annual reports. Commission staff's review revealed that intrastate rates for debit or prepaid calls exceed interstate rates in 45 states, with 33 states allowing rates that are at least double the Commission's interstate cap and 27 states allowing "first-minute" charges that can be more than 25 times that of the first minute of an interstate call.[74] For example, one provider reported a first-minute intrastate rate of $5.34 and additional per-minute intrastate rates of $1.39 while reporting the per-minute interstate rate of $0.21 for the same correctional facility. Similarly, another provider reported a first-minute intrastate rate of

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Secretary, FCC, WC Docket No. 12-375 (filed May 5, 2020) (explaining Network Communications International Corp.'s amendment to its Mandatory Data Collection responses in response to questions raised by Commission staff); Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Apr. 28, 2020) (Pay Tel Amended and Supplemental Second Mandatory Data Collection Response) (amending Pay Tel's Second Mandatory Data Collection response and noting questions raised by Commission staff).

[70] The Commission's methodology included a proposed 10% reduction in GTL's costs to account, in part, for seemingly substantially overstated costs. *2020 ICS Notice*, 35 FCC Rcd at 8517-20, paras. 92-98.

[71] *2020 ICS Notice*, 35 FCC Rcd at 8523-24, paras. 108-11.

[72] *Id*. at 8530, para. 124.

[73] *2020 ICS Notice*, 35 FCC Rcd at 8530, 8532, paras. 124, 130.

[74] Letter from Ajit V. Pai, Chairman, FCC, to Brandon Presley, President, NARUC (July 20, 2020), https://docs.fcc.gov/public/attachments/DOC-365619A1.pdf; *see also* Letter from Brandon Presley, President, NARUC, and Ajit V. Pai, Chairman, FCC, to The Honorable Andrew Cuomo, Governor, State of New York, and Chair, National Governors Association, and The Honorable Asa Hutchinson, Governor, State of Arkansas, and Vice Chair, National Governors Association (Sept. 22, 2020), https://docs.fcc.gov/public/attachments/DOC-367049A1.pdf (Sept. 22, 2020, Letter to National Governors Association).

$6.50 and an additional per-minute intrastate rate of $1.25 while reporting the per-minute interstate rate of $0.25 for the same correctional facility. Further, Commission staff identified instances in which a 15-minute intrastate debit or prepaid call costs as much as $24.80—almost seven times more than the maximum $3.15 that an interstate call of the same duration would cost.

27. In light of these data, in September 2020, former Chairman Pai and Brandon Presley, then president of the National Association of Regulatory Utility Commissioners (NARUC), jointly sent a letter to the co-chairs of the National Governors Association urging state governments to take action to reduce intrastate rates and related fees.[75] At least one state has enacted a law to reduce intrastate inmate calling services rates and fees,[76] at least one state commenced a regulatory proceeding aimed at reducing intrastate inmate calling services rates and fees,[77] and several states are considering legislation.[78]

III. THIRD REPORT AND ORDER

28. In this Third Report and Order, we take several important steps to provide significant financial relief to incarcerated people and their families, all substantially consistent with the *August 2020 ICS Notice*, except where the record evidence requires us to take a more conservative approach. We take these actions now in light of the exigent circumstances facing incarcerated people as they continue to deal with hardships related to the pandemic. First, we reform per-minute inmate calling services rates on an interim basis, capping interstate rates at $0.12 per minute for prisons and $0.14 per minute for larger jails. Second, we reform the current treatment of site commissions by adopting two distinct site commission-related rate components reflecting the different types of site commissions: site commission payments that providers are obligated to pay under formally codified laws or regulations; and payments that providers agree, by contract, to make. Third, we cap international calling rates for the first time. These and other reforms adopted here will enable consumers—incarcerated people and their families—to obtain essential communications capability at just and reasonable rates while we remain faithful to our obligations under section 276 of the Act.

29. The reforms we adopt today reflect our findings, as detailed below, regarding the monopoly power that each calling service provider has over the individual correctional facilities it serves; the numerous negative impacts the providers' exercise of that market power has had on incarcerated people, their families and communities, and society as a whole; and the substantial record evidence of the need for at least interim reforms to our rate caps and related regulations. In these circumstances, we exercise our authority under section 201(b) of the Act to "prescribe such rules and regulations as may be necessary" to ensure that "[a]ll charges [and] practices . . . for and in connection with [interstate and

[75] Sept. 22, 2020, Letter to National Governors Association.

[76] An Act Concerning the Fee Charged for a Phone Call by an Inmate in a Correctional Facility; And for Other Purposes, 2021 Arkansas Laws Act 702 (S.B. 550) (Apr. 13, 2021) (capping the cost per minute for inmate calling services calls and limiting the types of permitted ancillary services that providers may charge).

[77] *See, e.g.*, Public Utilities Commission of the State of California, Order Instituting Rulemaking to Consider Regulating Telecommunications Services Used by Incarcerated People, Rulemaking 20-10-002 (Oct. 6, 2020).

[78] *See, e.g.*, S.B. 387, 81st (2021) Sess. (Nev. 2021) (directing the Public Utilities Commission of Nevada to regulate suppliers of inmate calling services and adopt rate caps and certain limitations on charges for inmate calling services); H.B. 1201, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021) (requiring the Public Utilities Commission to establish maximum per-minute rates for telephone calls made to or from correctional facilities; S.B. 303, 67th Reg. Sess. (Mont. 2021) (decreasing the cap on intrastate fees to $0.05 per minute from the current $0.10 per minute); H.B. 219, 2021 Gen. Sess. (Utah 2021) (imposing limits on the rate an incarcerated person may be charged for telephone use which must be lesser of the corresponding rate set by the FCC and the rate established by the Utah Department of Corrections); S.B. 1776, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (prohibiting the Department of Corrections from entering a contract or agreement for inmate telephone services that allows the department to receive excess revenue); H.B. 1484, Ind. Gen. Ass., 2021 Sess. (Ind. 2021) (requiring intrastate inmate calling services rates to adhere to the caps for comparable interstate rates set by the FCC).

international] communication service" by wire or radio are 'just and reasonable.'"[79] This provision provides the Commission with ample authority to regulate the interstate and international rates and the practices of providers of calling services for incarcerated people, including setting interim rate caps for interstate and international calls given that providers have monopoly power in the facilities they serve.[80]

30. Although the record makes clear that the current interim rate caps for calling service to prisons and larger jails are unreasonably high, limitations in the reported data —arising in significant part from shortcomings in certain providers' responses to the Second Mandatory Data Collection—make us wary of establishing permanent rate caps based on the current record. Nor does the record allow us to reasonably set permanent or even new interim interstate rate caps for jails with less than 1,000 average daily population, adjust our caps on ancillary service fees beyond the new cap on fees for single-call services and third-party-financial transaction fees, or ensure that incarcerated people with disabilities have any greater access to functionally equivalent communications capabilities than they have today. We therefore institute a Mandatory Data Collection to provide the Commission and interested parties with more complete and accurate data regarding the costs of providing inmate calling services. We anticipate that those data, in combination with the record developed in response to the attached Fifth Further Notice of Proposed Rulemaking, will enable us to take these important steps in the near future. We also delegate authority to the Consumer and Governmental Affairs Bureau (CGB) to undertake a separate data collection related to service providers' costs and other key aspects of their provision of telecommunications relay services (TRS) and other assistive technologies if necessary to help us resolve the critically important disability access issues we explore in the Further Notice.

A. Unique Marketplace for Telephone Services Provided to Incarcerated People

31. The Commission has previously determined that providers of telephone services to incarcerated people have monopoly power in the facilities they serve.[81] We reaffirm this long-established finding, one that applies equally not only to the rates and charges for calling services provided to incarcerated people, including ancillary services, but also to providers' practices associated with their provision of calling services.

32. The record demonstrates, as the Commission previously found and reiterated in the *August 2020 ICS Notice*, that incarcerated people have no choice in the selection of their calling services provider.[82] The authorities responsible for prisons or jails typically negotiate with the providers of inmate calling services and make their selection without input from the incarcerated people who will use the

[79] 47 U.S.C. § 201(b).

[80] The Commission has previously exerted jurisdiction over rates where it found it necessary to constrain monopoly power exercised by competitive LECs. *See Access Charge Reform et al.*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9162, para. 119 (2004) ("[A]n [interexchange carrier] may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power.").

[81] *See 2002 Pay Telephone Order*, 17 FCC Rcd at 3252-53, para. 10; *see also GTL v. FCC*, 866 F.3d at 404 ("Winning [inmate calling services] providers thus operate locational monopolies with a captive consumer base of inmates . . . .").

[82] *See, e.g., 2002 Pay Telephone Order*, 17 FCC Rcd at 3253, para. 12 (finding that "neither the inmates who initiate the call nor the individuals who bear the cost of inmate calls—most often the inmates' families—have a choice among providers"); *2020 ICS Notice*, 35 FCC Rcd at 8520-21, para. 100 (acknowledging that incarcerated people are unable to choose an inmate calling services provider "other than the provider the correctional facility selects"); *see also, e.g.*, National Association of State Utility Consumer Advocates Comments at 1 (NASUCA Comments); Wright Petitioners et al. Comments (Public Interest Parties Comments) Appx. A, Coleman Bazelon et al., The Brattle Group, Brattle Report at 8 (Public Interest Parties Brattle Report). For these consumers, the relevant market is the incarcerating facility.

service.[83] Once the facility makes its choice—often resulting in contracts with providers lasting several years into the future—incarcerated people in such facilities have no means to switch to another provider, even if the chosen provider raises rates, imposes additional fees, adopts unreasonable terms and conditions for use of the service, or offers inferior service.[84] On the contrary, correctional authorities exercise near total control over how incarcerated people are able to communicate with the outside world.[85] This control extends to control over visitation rights, the use of traditional mail and courier services, and the ability to use any form of electronic communication.[86] Indeed, the only way an incarcerated person may legally communicate with the outside world is with the explicit permission of the correctional authority. Therefore, no competitive forces within the facility constrain providers from charging rates that far exceed the costs such providers incur in offering service.[87]

33. Some commenters argue the market for inmate calling services is competitive because

[83] Prison Legal News, *The Price to Call Home: State-Sanctioned Monopolization in the Prison Phone Industry* (Oct. 2012), https://www.prisonlegalnews.org/news/2012/oct/15/the-price-to-call-home-state-sanctioned-monopolization-in-the-prison-phone-industry/ (explaining that a "government entity has an incentive to select the highest bidder and that the actual consumers have no input in the bidding process"); Prison Phone Justice, *About* (Mar. 18, 2019), https://www.prisonphonejustice.org/about/ ("Prisoners—quite literally a captive market—are forced to rely upon monopolistic, predatory operators chosen for them by state agencies.") (emphasis omitted).

[84] ASL Services Holdings, LLC dba GlobalVRS Reply at 2-3 (GlobalVRS Reply) (acknowledging that one of the restrictions on incarcerated people is their inability to choose a service provider); Human Rights Defense Center Comments at 2 (asserting that the inmate calling services providers "exploit their captive market"); *2020 ICS Notice*, 35 FCC Rcd at 8521, para. 100 (explaining that by requiring the incarcerated person to use the provider selected by the correctional facility, the facility effectively creates a monopoly for inmate calling services within a prison or jail); *see also GTL v. FCC*, 866 F.3d at 404; Securus Technologies, LLC, Comments at 27 (Securus Comments) (recognizing that "correctional facilities generally choose a single [inmate calling services provider] for each facility").

[85] *See* Pay Tel Communications, Inc. Reply (Pay Tel Reply) Exh. A, Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Exh. B at 6-7 (filed July 3, 2013) (Pay Tel July 3, 2013, *Ex Parte*) (describing the limits on the pre-approved numbers that the incarcerated person may call and on the number of calls the person may make); GTL Comments at 33 (acknowledging "correctional facility-imposed limits on access to telephones and associated limits on call lengths"); Securus Comments at 9 (describing a service for correctional facilities to use to verify that the number being called is in a "Personal Allowed Number List" and to enforce time limits).

[86] *See, e.g.*, 18 U.S.C. § 1791 (pursuant to the Cell Phone Contraband Act of 2010, it is a crime for someone in a federal prison to possess a cell phone); GlobalVRS Reply at 3 (acknowledging that one of the restrictions on incarcerated people is limited access to real time text); Federal Bureau of Prisons, *Stay in Touch*, https://www.bop.gov/inmates/communications.jsp (last visited Feb. 9, 2021) (restricting whom the inmate may email and how long the messages may be, precluding attachments, and specifying that the messages will be screened for content, while also requiring the incarcerated person to use a service that does not provide access to the Internet but relays emails to and from the Internet); Contra Costa County, California, *Outgoing Inmate Mail*, https://www.contracosta.ca.gov/DocumentCenter/View/379/OUTGOING-INMATE-MAIL (last visited Feb. 9, 2021) (explaining that indigent incarceratd people may send no more than two non-legal letters per week); Contra Costa County, California, *Visiting Rules and Regulations*, https://www.contracosta.ca.gov/DocumentCenter/View/382/Visting-Rules-and-Regulations-2?bidId= (last visited Feb. 9, 2021) (listing restrictions on visitation including requiring the visitor to follow a strict dress code and to not bring a purse or cell phone, and stating that the individual facility determines the number of visitors allowed at one time); Federal Bureau of Prisons, *Correspondence* at 2 (Apr. 5, 2011) ("The Warden or designee must give prior approval for an inmate to receive or send a package."), https://www.bop.gov/policy/progstat/5265_014.pdf (referenced in Federal Bureau of Prisons, *Stay in Touch*, https://www.bop.gov/inmates/communications.jsp (last visited Apr. 26, 2021)).

[87] *See 2020 ICS Notice*, 35 FCC Rcd at 8520-21, para. 100; *2016 ICS Reconsideration Order*, 31 FCC Rcd at 9304, para. 7; *see also United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (*United States v. Microsoft*) (explaining that direct evidence of monopoly power is evidence that a firm "can profitably raise prices substantially above the competitive level"); *cf. AT&T Corp. v. FCC*, 292 F.3d 808, 809 (D.C. Cir. 2002) (*AT&T v. FCC*).

providers of those services bid against each other to win contracts with correctional facilities.[88] GTL, in particular, makes much of this claim.[89] Because correctional officials typically allow only one provider to serve any given facility, however, there are no competitive constraints on a provider's rates once it has entered into a contract to serve a particular facility.[90] The Commission has observed that "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."[91] Thus, even if there is "competition" in the bidding market as some providers assert, it is not the type of competition the Commission recognizes as having an ability to "exert downward pressure on rates for consumers."[92]

B. Impact on Consumers and Society

34. The Commission has long recognized the far-ranging consequences that high calling rates inflict on incarcerated people, their families, and society as a whole.[93] The record in this proceeding confirms that excessive telephone rates continue to impose an unreasonable burden on the ability of incarcerated people—one of the most economically disadvantaged segments of our population—to maintain vital connections with the outside world.[94] And reduced prison visitation as a result of the

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[88] *See, e.g.*, Securus Comments Attach. C, Harold Furchtgott-Roth, Report on the Economic Aspects of the Federal Communications Commission's Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking in WC Docket 12-375, at 12 (Securus Furchtgott-Roth Report); GTL Reply Attach., Paul E. Godek, Economists Incorporated, Supplemental Report in Support of Comments of Global Tel*Link Corporation Regarding the FCC's Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking at 6-7 (GTL Godek Reply Report); Pay Tel Reply Attach., Reply Report of Don J. Wood at 6 (Pay Tel Wood Reply Report).

[89] GTL Comments Attach., Paul E. Godek, Economists Incorporated, Report in Support of Comments of GTL Regarding the FCC's Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking at 10 (GTL Godek Report); Letter from Chérie R. Kiser, Counsel for GTL and Its Subsidiaries, Cahill Gordon & Reindel LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach., Paul E. Godek, Economists Incorporated, Second Supplemental Report in Support of Comments of Global Tel*Link Corporation Regarding the FCC's Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking at 3, 7 (filed Apr. 26, 2021) (GTL Apr. 26, 2021, *Ex Parte* Godek Report)..

[90] Some experts representing inmate calling services providers recognize this to be the case. *See* Pay Tel Comments Attach., Expert Report of Don J. Wood at 6 n.7 (Pay Tel Wood Report).

[91] *2002 Pay Telephone Order*, 17 FCC Rcd at 3253, para. 12.

[92] *Id.*; *2013 ICS Order*, 28 FCC Rcd at 14129, para. 41 (reaffirming finding); *see also AT&T v. FCC*, 292 F.3d at 809 (citation omitted) (recognizing that competitive local exchange carriers (LECs) "possess a 'series of bottleneck monopolies over access to each individual end user'" even though each competitive LEC has a "small market share").

[93] *E.g.*, *2013 ICS Order*, 28 FCC Rcd at 14130, para. 42 (finding excessive rates "impose an unreasonable burden" on families of incarcerated people and discourage communication between incarcerated people and their support network); *2020 ICS Order on Remand*, 35 FCC Rcd at 8487, para. 5 ("Unconscionably high [inmate calling services] rates inflict significant economic, social, and emotional harms impacting some of the most vulnerable members of society."); *2014 ICS Notice*, 29 FCC Rcd at 13181, para. 23 (acknowledging that the level of site commission payments "has potentially life-altering impacts on prisoners and their families").

[94] MediaJustice et al. Comments at 2 (MediaJustice Comments) ("The economic burden [of inmate calling services] on already low-income people is intense . . . ."); Prisoners' Legal Services et al. Comments at 3 (Prisoners' Legal Services Comments) (arguing that even with the proposed rate reductions, inmate calling services charges "will continue to place a tremendous burden on low-income parents and children or spouses who need to speak several times a day, <u>especially</u> during the pandemic" (emphasis in original)); Multicultural Media, Telecom and Internet Council et al. Reply at 2 (Multicultural Media et al. Reply) (explaining that "a disproportionate number of incarcerated people are racial minorities from low-income families"); Letter from Jesse Hahnel, Executive Director, National Center for Youth Law, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Apr. 21, 2021) (National Center for Youth Law Apr. 21, 2021, *Ex Parte*) (emphasizing the importance of calling services for

(continued….)

COVID-19 pandemic has made these consequences even more dire, exacerbating the urgent need for inmate calling rate reform.[95]

35. A national survey identified the cost of phone calls as the primary barrier preventing incarcerated people from keeping in touch with loved ones.[96] As one commenter sums it up: "A sentence to jail or prison should not include the additional punishment of being cut off from family, friends, legal assistance, and community resources."[97] Studies confirm that incarcerated people who have regular contact with family members are more likely to succeed after release and have lower recidivism rates because they are able to maintain vital support networks.[98]

36. The high cost of calling services causes damaging consequences not only for incarcerated people but also for their families. The record suggests that as many as 34% of families go into debt to keep in touch with an incarcerated family member.[99] Some low-income families are forced "to choose between calling an incarcerated family member and buying essential food and medicines."[100] Rate reform will reduce these financial burdens and also promote increased communication[101] which preserves essential family ties, allowing incarcerated people "to parent their children and connect with their spouses, helping families stay intact," and decreasing the trauma suffered by children whose parents have been incarcerated.[102]

37. The benefits of lowering inmate calling services rates also ripple throughout communities and

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incarcerated youth and explaining that the vast majority of incarcerated youth come from low-income families who are the least able to pay for these vital calls).

[95] Human Rights Defense Center Comments at 2; Leadership Conference on Civil and Human Rights et al. Reply at 1 (Leadership Conference Reply).

[96] San Francisco Financial Justice Project Comments at 1-2 (citation omitted) (Financial Justice Project Comments).

[97] Verizon Comments at 3.

[98] *See, e.g.*, *2015 ICS Order*, 30 FCC Rcd at 12766-67, para. 3 & n.13 (citing research and explaining that "family contact during incarceration reduces recidivism and allows inmates to be more present parents for the 2.7 million children who suffer when an incarcerated parent cannot afford to keep in touch"); Worth Rises, Request for Emergency Action and Relief, WC Docket No. 12-375, at 4 (filed Apr. 7, 2020), https://ecfsapi.fcc.gov/file/10407148512696/Worth%20Rises%20-%20Emergency%20Request%20(12-375).pdf (maintaining that "lack of communication [between incarcerated people and their families] disrupts the real connections needed for successful reentry into society"); Letter from Cheryl A. Leanza, Policy Advisor, United Church of Christ, OC Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2-3 (July 29, 2020) (Public Interest Parties July 29, 2020, *Ex Parte*) (explaining that "family contact has consistently been shown to lower recidivism"); National Center for Youth Law Apr. 21, 2021, *Ex Parte* at 2-3 (discussing the benefits of interactions with family members for incarcerated youth).

[99] Ella Baker Center for Human Rights et al., *Who Pays? The True Cost of Incarceration on Families* at 16 (Sept. 2015), http://whopaysreport.org/who-pays-full-report/.

[100] Multicultural Media et al. Reply at 3.

[101] Financial Justice Project Comments at 1 (identifying a 41% increase in call volume overnight when San Francisco County made calls free); Worth Rises Comments at 11 (explaining that when New York City made calls from correctional facilities free in May 2019, the call volume increased by 40%). *But see* GTL Comments at ii (arguing that lower rates may not lead to an increase in call volume).

[102] *See* Verizon Comments at 3; Prisoners' Legal Services Comments at 1; Public Interest Parties Comments at 2; Public Interest Parties Reply at 2; Episcopal Church and United States Conference of Catholic Bishops Reply at 1 (Episcopal Church Reply); MediaJustice Comments at 1; Prisoners' Legal Services Comments Attach. 1, Massachusetts Prison and Jail Phone Rates Reform Background Sheet at 1 (Prisoners' Legal Services Massachusetts Background Sheet).

society in other tangible and intangible ways.[103] For example, making communications less costly and easier to use for incarcerated people promotes their ability to plan for housing, employment, and successful integration into communities once released from prison.[104] In financial terms, increased communications helps reduce repeated incarceration, which benefits society by saving millions of dollars in incarceration-related costs annually.[105] Additionally, the record shows that the ability to communicate regularly with families "reduces foster placement of children of incarcerated people, which result[s] in measurable savings to society of tens of millions of dollars per year."[106]

38. The COVID-19 pandemic has intensified the need to reform inmate calling services rates. Even before the pandemic, it could be impractical, costly, and time-prohibitive for family members to make regular visits to those in prisons often located hundreds of miles away.[107] But as a result of the pandemic, most jails and prisons have prohibited or severely limited in-person visitation.[108] Thus, telephone calls have become even more of "an essential lifeline for connection"—adding to the exigency and importance of the reforms that we adopt today.[109]

C. Interim Interstate Rate Cap Components

39. In the *2020 ICS Notice*, the Commission proposed to adopt permanent interstate rate caps of $0.14 per minute for all calls from prisons and $0.16 per minute for all calls from jails.[110] These proposed caps included an allowance of $0.02 per minute added to provider-related rate caps of $0.12 and $0.14 per minute, respectively, to account for the costs correctional facilities incur that are reasonably related to the provision of inmate calling services.[111] The proposed rate caps generated extensive debate in the record, with providers contending that the available data do not justify any reduction in the existing interstate rate caps of $0.21 per minute for debit and prepaid calls, and public interest groups suggesting even lower rates than those the Commission proposed.[112]

40. After carefully considering the record, including data from the Second Mandatory Data Collection and commenting parties' analyses of those data, and refining our analysis based on record feedback, we take the following actions. First, as proposed in the *August 2020 Notice*, we eliminate a separate rate cap for all collect calls. Second, we adopt new interim provider-related interstate rate caps of $0.12 per minute for calling services provided to incarcerated people in prisons and $0.14 per minute

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[103] Worth Rises Comments at 10; *see* Episcopal Church Reply at 2.

[104] Prisoners' Legal Services Massachusetts Background Sheet at 1.

[105] *2013 ICS Order*, 28 FCC Rcd at 14130-31, para. 43.

[106] Public Interest Parties Comments at 2.

[107] Multicultural Media et al. Reply at 3.

[108] Public Interest Parties Comments at 2.

[109] *See* Episcopal Church Reply at 2; Worth Rises Reply at 1.

[110] *2020 ICS Order on Remand*, 35 FCC Rcd at 8486, para. 3.

[111] *2020 ICS Notice*, 35 FCC Rcd at 8520, para. 99.

[112] *See, e.g.*, GTL Comments at 4 (arguing that the existing rate cap system should be left in place); Pay Tel Comments at 15-19 (arguing that the Commission's rate cap proposal does not account for variances of costs incurred by providing inmate calling services at facilities of different sizes); Prisoners' Legal Services Comments at 3 (advocating for lower interstate rate caps than the Commission proposed); Public Interest Parties Comments at 6-9 (recommending the Commission lower the proposed rate caps); Securus Comments at 49 (stating the proposed rate caps are insufficient to allow providers to recover all of their costs); Worth Rises Comments at 1, 4 (finding that the Commission's reliance on self-reported data has artificially inflated the proposed rate caps, and proposing rate caps be set to $0.05 for both jails and prisons). Although collect calls are subject to a separate rate cap of $0.25 per minute under the existing interim interstate caps, as discussed below, the parties agree that there is no longer a need to maintain this distinction. *Infra* Part III.C.1.

for calling services provided to incarcerated people in larger jails, as proposed in the *August 2020 Notice*.[113] We refrain from adopting new interim rate caps for jails with average daily populations below 1,000, which remain subject to the interstate total per-minute rate cap of $0.21. Next, we adopt new interim facility-related rate caps associated with site commission payments. Together, these rate cap components result in new lower total interstate rate caps that will remain interim in status, pending a further data collection which we also adopt today in order to facilitate our adoption of permanent interstate rate caps.

41. Consistent with the *2020 ICS Notice*, the new interim interstate rate cap components will apply to all calls that a provider identifies as interstate as well as to all calls that the provider cannot definitively identify as intrastate, as determined through the application of the Commission's traditional end-to-end jurisdictional analysis, which we affirm in the companion Order on Reconsideration we adopt today.[114] Under this analysis, the jurisdictional nature of a call "depends on the physical location of the endpoints of the call and not on whether the area code or NXX prefix of the telephone number, or the billing address of the credit card associated with the account, are associated with a particular state."[115] Thus, to the extent that a provider cannot determine that the physical endpoints of a call are within the same state, that provider must comply with our new interim interstate rate caps for that call.

1. Eliminating Separate Rate Caps for Collect Calls

42. Consistent with the proposal in the *2020 ICS Notice*, we eliminate the separate interim rate cap that has applied to interstate collect calls since 2013.[116] The record overwhelmingly supports this action, which recognizes the limited role that collect calls play in today's inmate calling services marketplace and the relatively small, if any, difference in cost between collect and non-collect inmate calling services calls.

43. Under the interim rate caps the Commission first adopted in 2013, interstate debit and prepaid calls are capped at $0.21 per minute, while interstate collect calls are capped at $0.25 per minute.[117] In the *2015 ICS Order*, the Commission adopted a two-year phasedown for collect calls, after which rate caps for those calls were to be the same as those of debit and prepaid calls.[118] The Commission found that the number of collect calls had dropped significantly over the preceding few years and predicted that the number of collect calls "will most likely be at a nominal level in two years."[119] Although this phasedown

[113] As we explain below, and in recognition of the concerns raised by various commenters, we do not establish new interim rate caps for jails having average daily populations below 1,000. Those facilities remain subject to the maximum total per-minute rate cap of $0.21. *See 2013 ICS Order*, 28 FCC Rcd at 14147, para. 73 (setting interim rate caps of $0.21 for debit and prepaid calling and of $0.25 for collect calls); *infra* Part III.C.1.

[114] *See 2020 ICS Notice*, 35 FCC Rcd at 8510, para. 70; *infra* Part IV; *see also* GTL Comments at 14-15; Securus Comments at 39. Securus asks that we forbear from enforcing the end-to-end analysis reflected in the Enforcement Bureau's November 2020 Enforcement Advisory to per-minute interstate rates. *See* Securus Comments at 39; *Enforcement Bureau Reminds Providers of Inmate Calling Services that They Are Responsible for Complying with the Commission's Rules Relating to Those Services*, Enforcement Advisory, WC Docket No. 12-375, 35 FCC Rcd 12999 (EB 2020) (Enforcement Advisory). We decline to do so at this time. As we explain in the Order on Reconsideration, the end-to-end analysis is, and has been, the generally applicable jurisdictional standard for determining the jurisdiction of a telephone call in the absence of an express Commission determination that some other method is permissible. As the Commission has never expressly permitted another method of jurisdictional classification for inmate calling services calls, the end-to-end analysis continues to apply to those calls. *See infra* Part IV.

[115] *See, e.g.*, *2020 ICS Notice*, 35 FCC Rcd at 8503, para. 53; *Vonage Order*, 19 FCC Rcd at 22413, para. 17.

[116] *See 2020 ICS Notice*, 35 FCC Rcd at 8510, para. 72.

[117] 47 CFR § 64.6030.

[118] *See 2015 ICS Order*, 30 FCC Rcd at 12805-08, paras. 84-92.

[119] *Id.* at 12805-06, paras. 86-87, 89.

was vacated by the D.C. Circuit in *GTL* as part of that court's larger vacatur of the *2015 ICS Order*, the court did not criticize the Commission's phasedown of collect calls.[120]

44. In the *2020 ICS Notice*, the Commission proposed to eliminate the distinct rate cap for collect calls, given "the absence of any data demonstrating a material difference in the costs of providing these different types of calls."[121] Commenters overwhelmingly support this proposal, with both providers and public interest groups agreeing that there is no longer any need for a separate rate cap for collect calls.[122] Both Securus and GTL point out that collect call volumes continue to decline.[123] And commenters agree that there are no longer significant cost differences between collect calls and debit or prepaid calls.[124] Indeed, the record provides no support for a separate rate cap for collect calls, and comments make clear that eliminating the "collect-only" rate cap will benefit all stakeholders by making it easier for providers to administer, and for consumers to understand, rate caps for interstate and international calls.[125]

45. We find that the lack of cost disparity in providing prepaid, debit, or collect calling services, coupled with the low and ever-diminishing demand for collect calls and the benefits to all stakeholders from having a single cap for all calls from a facility, support ending the distinction between prepaid, debit, and collect calling rates.[126] We therefore eliminate the separate interim cap for interstate collect calls for jails with average daily populations below 1,000 that remain subject to the 2013 interim rate caps. As a result of this change, all interstate calls from jails with average daily populations below 1,000 will be subject to a single, uniform, interim rate cap of $0.21 per minute. All interstate calls from prisons and larger jails will be subject to the new uniform interim rate caps we adopt today for each type of facility, without regard to whether the interstate calls are collect, debit, or prepaid, as those terms are defined in our rules.

2. Setting a Threshold of 1,000 Average Daily Population for Larger Jails

46. We adopt an average daily population threshold of 1,000 or greater to differentiate larger jails from smaller jails and apply our new interim provider-related and facility-related rate caps to larger jails, while leaving jails with average daily populations below 1,000 subject to the existing total interim rate cap of $0.21 per minute for all interstate calls. This larger jail threshold is aligned with the approach the Commission adopted in 2015, when it likewise used an average daily population of 1,000 to distinguish between rate cap tiers.[127] As one commenter points out, many of the cost analyses in the record segment

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[120] *See GTL v. FCC*, 866 F.3d at 414-15.

[121] *2020 ICS Notice*, 35 FCC Rcd at 8510, para. 72.

[122] GTL Comments at 11; Securus Comments at 35; Public Interest Parties Comments at 9-10.

[123] *See* GTL Comments at 11 (pointing out that "use of collect calls is declining"); Securus Comments at 39-40 (discussing "the decline in volume of traditional collect calling"); *see also 2020 ICS Notice*, 35 FCC Rcd at 8510, para. 72 (recognizing that "collect calling is no longer a popular method of inmate calling, and data show that the number of collect calls is small and has been declining").

[124] Public Interest Parties Comments at 9 ("[T]he data in the record [do] not show different costs based on the type of call—prepaid/debit and collect calls all show the same cost structure."); Securus Comments at 39-40 ("[T]here is no significant cost difference" between collect and debit/prepaid calls.); *see also* GTL Comments at 11 (stating that the cost differences between prepaid/debit and collects calls "are minimal").

[125] *See* GTL Comments at 11; Public Interest Parties Comments at 9.

[126] *See* Securus Comments at 35 ("[T]he distinction between collect calls and prepaid/debit calls . . . no longer adds value to consumers nor drives meaningful cost implications for providers.").

[127] In the *2015 ICS Order*, the Commission adopted 1,000 average daily population as the larger jail size threshold. *2015 ICS Order*, 30 FCC Rcd at 12785-86, paras. 44, 46 (adopting rate tiers based on the following average daily population for jails: 0-349, 350-999, and 1,000 and greater, and noting that WCB had determined different potential contract size numbers for jails which include 1-99, 100-349, 350-999, and 1,000 average daily population and

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jails by reference to the same 1,000 average daily population figure,[128] a fact that supports our decision to set the average daily population threshold at 1,000 here. Numerous commenters have advanced the 1,000 average daily population figure to segment their own data analyses and resultant proposals, and none have criticized this cutoff as irrational or unduly difficult to administer.[129]

47. Our decision to exclude jails having average daily populations below 1,000 from the new interim caps is based on record evidence suggesting that providers incur higher costs per minute for jails with average daily populations below 1,000 than for larger jails. Securus asserts that "small jails are more expensive to serve than larger jails."[130] Securus points to its cost study showing "a strong and consistent relationship between cost and facility size."[131] Pay Tel also broadly argues that inmate calling services "costs vary substantially based on facility size."[132] More specifically, Pay Tel explains that its "experiences regarding its costs of providing ICS" demonstrate that costs increase "in terms of jail" average daily population, providing further evidence that providers incur greater costs to serve smaller jails.[133] We agree with these commenters that, based on the current record, providers appear to incur somewhat higher costs in serving jails with average daily populations less than 1,000 than larger jails and we find this evidence credible and sufficient to support a cutoff of 1,000 average daily population for distinguishing larger jails from those with average daily population below 1,000 for purposes of applying our new interim rate caps.

48. The available data in this record, preclude any specific determination of the extent to which the costs of providing calling services vary with jail size, and we therefore disagree with the Public Interest Parties' assertion that "size does not impact costs,"[134] at least on the basis of this record.[135] Given this, we take a bifurcated approach with regard to our new interim rate caps for jails. First, because we are convinced that providers' costs of serving larger jails are likely below the industry average for all jails,[136] we use the available data to set interim provider-related rate caps for larger jails. These interim caps are separate from those we set for prisons. Second, because the available data do not allow us to

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greater, and that the U.S. Department of Justice's Bureau of Justice Statistics collected jail data based on the following facility sizes: 0-49; 50-99; 100-249; 250-499; 500-999; and 1,000 or greater).

[128] *See, e.g.*, Pay Tel Comments at 17.

[129] *See* National Sheriffs' Association Comments at 7; Pay Tel Comments at 2, 13, 16-17; Securus Comments at 40; Securus Comments Attach. B, Robert O. Fisher et al., FTI Consulting, Inc., Inmate Calling Services Cost Analysis for Securus at 1, 13, 17-21 (Securus Cost Study); NCIC Inmate Communications Reply at 3 (NCIC Reply) (citing National Sheriffs' Association Comments at 7); National Sheriffs' Association Reply at 2; Pay Tel Reply at 11; Pay Tel Wood Reply Report at 17-19. Although some commenters have argued that turnover may provide a more accurate indicator of costs, we have not received turnover-rate data in the record and must work with the data provided. *See* Pay Tel Reply at 8. However, we find that the cost data available from jails with average daily populations less than 1,000, including turnover and admission rates, deserves further investigation, and specifically seek such data in the Further Notice we issue today accompanying this Report and Order. *See infra* Part VI.B.2.

[130] Securus Comments at 40.

[131] *Id.*

[132] Pay Tel Comments at 15.

[133] *Id.* at 15-17 & Exh. B at 7; Pay Tel Comments, WC Docket No. 12-375, at 11-25, 32-37 (filed Jan. 12, 2015) (explaining that "not only does it cost more to provide [inmate calling services] in jails than in prisons, but also that it costs more to provide [inmate calling services] in smaller jails than larger ones").

[134] Public Interest Parties Reply Appx. A, Coleman Bazelon et al., Brattle Group, Brattle Report at 5 (Public Interest Parties Brattle Reply Report).

[135] For example, the Second Mandatory Data Collection did not collect data on turnover rates so we cannot determine how that variable affects providers' or facilities' costs.

[136] *See* Securus Comments at 40.

quantify the extent to which providers' cost of serving jails with average daily populations below 1,000 exceed the industry average,[137] we defer further rate cap setting with respect to these jails until such time as we are able to gather and analyze additional cost information.[138] On the record before us, we find it reasonable and appropriate to exclude these jails from the new interim rate caps we adopt today for interstate calls.[139]

3. Accounting for Providers' Costs

49. *Deciding to Adopt Separate Interim Interstate Provider-Related Rate Caps for Prisons and Larger Jails*. In the *2020 ICS Notice*, the Commission found that the reported data showed greater variations from mean costs for jails than for prisons (and therefore a greater standard deviation from the mean for jails than for prisons).[140] These greater variations from mean costs were one reason that led the Commission to propose a higher interstate rate cap for jails than for prisons.[141] After analyzing the record, consistent with the proposal in the *2020 ICS Notice*, we adopt separate interim interstate provider-related rate caps for prisons and larger jails.

50. As set forth in Appendix F, our refined analysis suggests that it costs service providers approximately 22% more to provide calling services in jails than in prisons.[142] That analysis also shows greater variations from mean costs for jails.[143] At least one commenter provides credible evidence that providers generally incur higher costs to serve jails than prisons and therefore "support[s] the Commission's proposal to establish separate rate ceilings for prisons and jails."[144] Pay Tel agrees that the evidence demonstrates greater costs per minute for jails than prisons, and explains that its examination of the reported costs of three of the six providers that serve both types of facilities shows that the costs of serving jails are roughly 40% higher.[145]

51. Not all commenters agree with drawing a distinction between prisons and jails. The Public Interest Parties point out that some providers have argued that there are no real cost differences between serving prisons and jails and therefore there is no basis for a separate, higher cap for jails.[146] They urge

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[137] *See generally* Appx. E, *infra* (discussing the difficulties posed by the data in calculating the prison and jail cost differential).

[138] In today's Further Notice, we seek detailed information on provider costs associated with serving jails with average daily populations below 1,000.

[139] As explained in Part III.C.2 above, we also use the 1,000 average daily population threshold to distinguish larger jails for purposes of the facility-related rate component.

[140] *2020 ICS Notice*, 35 FCC Rcd at 8514, paras. 74, 84. A mean is the arithmetic average of numbers in a distribution. A standard deviation is a measure of dispersion calculated as the square root of the average of the squared differences from the mean. *See* G. Udny Yule & M.G. Kendall, An Introduction to the Theory of Statistics 105, 126 (14th ed. 3rd Impression) (1958), https://archive.org/details/in.ernet.dli.2015.233345/page/n6/mode/2up.

[141] *2020 ICS Notice*, 35 FCC Rcd at 8514, paras. 74, 84.

[142] *See* Appx. F (describing the results of the refined "double selection Lasso" analysis which suggest a 22% difference in cost between facility types); *see also* Appx. G, tbl. 5 (analyzing contract-level cost differences and finding that providers' costs of serving larger jails appear 25% higher than their costs of serving prisons). Securus Cost Study at 1, 17.

[143] Appx. E, *infra*.

[144] Securus Comments at 40 (highlighting that "jails are more expensive to serve than prisons, and that small jails are more expensive to serve than large jails"). Securus also concludes that, for jails, costs per minute decrease as facility size increases, and that costs per minute for prisons are lower than for jails. Securus Cost Study at 1, 17.

[145] *See* Pay Tel Reply at 7; Pay Tel Wood Reply Report at 11-13.

[146] Public Interest Parties Comments at 9-10 (citing *2015 ICS Order*, 30 FCC Rcd at 12778, para. 29); Worth Rises Comments at 5 (explaining that "there are many jail systems with remarkably similar profiles to existing prisons

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that we move towards a unitary rate structure that would "eliminate the multi-tier rate structure for jails" and create a "unified rate cap for prisons and jails."[147] Although the record indicates that some jails bear the characteristics we otherwise associate with prisons, on this record we are not persuaded that these situations are the norm, and we find that, overall, the evidence suggests higher provider costs at jails than prisons. At the same time, we reject the notion that we should delay any action until the Commission collects more detailed cost data.[148] We have sufficient record evidence now to set interim rate caps for prisons and larger jails, consistent with our obligations and authority under the Act.[149] We therefore find it appropriate to set different interstate provider-related rate caps for prisons than for jails on an interim basis.[150]

52. *Methodology*. As with any exercise in cost-based ratemaking, setting reasonable interim interstate provider-related rate caps for inmate calling services requires a determination of the costs providers incur in providing those services. Traditionally, agencies have set regulated rates through company-specific cost-of-service studies that measure the regulated firms' total cost of providing the regulated service using the firms' accounting data.[151] Regulators typically establish rules that specify how costs, including those arising from affiliate transactions, are to be accounted for, apportioned between the firms' regulated operations and nonregulated operations, and assigned to, or allocated among, different jurisdictions and services.[152]

53. The Commission's approach toward regulating inmate calling services rates has been less prescriptive. The Commission, to date, has not adopted accounting rules for calling service providers. Nor has it specified complex rules for directly assigning or allocating a provider's and its affiliates' costs between their calling services operations and nonregulated operations, or assigning or allocating a provider's calling services costs to or among the providers' contracts or facilities. And it did not require calling service providers to submit cost of service studies requiring each provider to show in detail each step of its costing process.

54. Instead, the Commission has relied on data obtained through Mandatory Data Collections to set reasonable cost-based rate caps for inmate calling services. The Second Mandatory Data Collection, in particular, required every calling service provider to submit detailed information regarding its operations, costs, and revenues, including: (1) lists of its inmate calling services contracts and the

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systems, including size, geography, and security needs" and that providers should therefore not have a higher rate cap "merely for serving jails").

[147] Public Interest Parties Comments at 9-10; *see also* Worth Rises Comments at 4 (asking the Commission to lower rate caps for prisons and jails to no more than $0.05 per minute).

[148] *See, e.g.*, Pay Tel Comments at 4 (suggesting that the data on which the Commission relied are unsuitable for ratemaking); Securus Comments at 2 (explaining that Securus is "concerned that the Commission has not received from all providers adequate data in the comparable sets necessary to appropriately evaluate cost structure").

[149] 47 U.S.C. § 201.

[150] We do not, however, distinguish between prisons and larger jails for purposes of our facility-related rate component designed to recover portions of contractually-prescribed site commission payments. As explained in Part III.C.4 below, there is record support that the same facility-related allowance for prisons and larger jails is appropriate and we proceed that way on an interim basis. To the extent that the record developed in response to today's Further Notice reveals that we should distinguish between prisons and larger jails, we will revisit that at such time as we develop permanent rate caps.

[151] The costs of service include operating expenses (e.g., operating, maintenance and repair, and administrative expenses), depreciation expenses (the loss of value of the firm's assets over time due to wear and tear and obsolescence), cost of capital (the cost incurred to finance the firm's assets with debt and equity), and income and other tax expenses.

[152] *See, e.g.*, 47 CFR pts. 32, 36, 68, 69.

correctional facilities to which they apply; (2) the average daily populations, number of calls annually, and minutes of use annually at each of those facilities; (3) the direct costs of providing inmate calling services on a total company basis and at each of those facilities; and (4) the indirect costs of providing inmate calling services on a total company basis.[153] Providers were required to provide information about costs in several steps. First, providers had to identify which of their and their corporate affiliates' total costs were directly attributable to inmate calling services and which were directly attributable to other operations. Providers were then required to allocate the remainder of their costs and their affiliates' total costs—the costs identified as indirect costs or overhead—between inmate calling services and other, nonregulated, operations. Providers were then required to allocate the inmate calling services portion of their direct costs to specific facilities but were not required to allocate their indirect costs to specific facilities.[154]

55. In the *2020 ICS Notice*, the Commission proposed to use data from the Second Mandatory Data Collection, as compiled into a database by Commission staff, to calculate the costs each provider incurs in providing inmate calling services under each of its contracts for prisons and jails separately.[155] The Commission proposed to calculate the mean (or arithmetical average) of those costs, add one standard deviation to that mean, and use the resulting sum to determine the provider cost portions of the interstate rate caps.[156] The Commission reasoned that this "mean contract costs per minute . . . plus one standard deviation" methodology would allow the vast majority of providers to recover at least their reported costs under each of their contracts.[157]

56. *Reliance on Data from the Second Mandatory Data Collection.* As proposed in the *2020 ICS Notice*, our interim rate cap methodology begins with the calculation of mean contract costs paid per minute in the provision of calling services to incarcerated people.[158] To perform this calculation, we rely on the 2018 data submitted in response to the Second Mandatory Data Collection, as supplemented and clarified by the providers in response to follow-up discussions with Commission staff, as the Commission proposed in the *2020 ICS Notice*.[159] This approach reflects both the robustness and the limitations of the data submitted in response to the Second Mandatory Data Collection. On the one hand, those data provide an unprecedented wealth of information about the inmate calling services industry and individual calling service providers. The reported information allows us to perform sophisticated analyses that help us estimate the providers' actual costs of providing interstate inmate calling services.[160]

57. On the other hand, as the Commission explained in the *2020 ICS Notice*, the collected data have certain limitations. First, although the Commission had sought facility-level data in the Second Mandatory Data Collection, in many instances, providers reported data only at the contract level, reflecting the fact that "many providers assess their inmate calling services operations on a contract-by-

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[153] *See* Inmate Calling Services Mandatory Data Collection, WC Docket No. 12-375, General Instructions, https://docs.fcc.gov/public/attachments/DOC-343708A3.docx (Second Mandatory Data Collection Instructions); Appx. E, *infra*. Direct costs are costs that are "completely attributable" to a particular service such as inmate calling services. Second Mandatory Data Collection Instructions at 3. Indirect costs are all costs related to a service other than direct costs and include "overhead, depreciation, or other costs that are allocated among different products or services." *Id.* Determining a company's indirect costs requires a calculation: subtracting the company's indirect costs from its total costs.

[154] *2019 Data Collection Public Notice*; Second Mandatory Data Collection Instructions at 10-11.

[155] *2020 ICS Notice*, 35 FCC Rcd at 8513, para. 83.

[156] *Id.*

[157] *Id.* at 8513, 8514-15, paras. 83, 87.

[158] *2020 ICS Notice*, 35 FCC Rcd at 8511, para. 78.

[159] *Id.* at 8512, para. 78 n.196.

[160] *See* Appendices E-H, *infra*.

contract basis, although many contracts include multiple correctional facilities."[161] Given the lack of facility-level data, the Commission proposed to analyze the information on a contract, rather than a facility, basis and sought comment on this approach.[162] Second, the Commission recognized that some providers had interpreted different steps in the cost reporting instructions for the Second Mandatory Data Collection in different ways.[163] The Commission sought comment on the submitted data and asked commenters to identify other data issues for consideration.[164]

58. The Public Interest Parties argue that the 2018 data "provide more than sufficient evidence to support immediate rate reform."[165] We agree. As the Public Interest Parties' expert asserts, variations in internal cost records among providers affect how costs are reported, not the overall level of costs.[166] In other words, the lack of uniformity in cost data reporting need not result in further delay in our rate reform efforts.[167] Further, as explained in Appendix E, providers' reports of call minutes and revenues are likely to be accurate down to the level of the contract. All providers bill on a per-minute basis, and revenue tracking, and thus reported revenues, are also likely to be reliable because providers are incentivized to accurately track them.[168] Accordingly, we find the reported minutes of use and revenue data to be reliable and suitable for setting interim interstate rate caps.

59. Certain providers argue that the 2018 cost data from the Second Mandatory Data Collection are unsuitable for setting new rate caps. Securus, for example, contends that the Commission should not rely on the 2018 data because providers did not report their costs using a consistent methodology.[169] In particular, Securus emphasizes that because providers were not required to, and did not, disclose how they calculated their direct costs or how they allocated indirect costs between regulated and nonregulated services, "each company's measure of 'costs' is unique to itself and inconsistent with that of every other company."[170] Pay Tel and its outside consultant highlight "numerous inconsistencies in the manner in which costs were reported" which, they argue, make the data unsuitable for cost-based ratemaking.[171] Pay Tel's outside consultant points to providers' differing understandings of how to report direct and indirect costs and the accuracy of reported direct costs based on the chosen allocator for those costs.[172] For its part, GTL finds it unsurprising that "there are differences in the data among [inmate calling services] providers given the different reporting methodolog[ies] because no uniform accounting is required or necessary."[173] GTL also notes that calling service providers are not subject to Part 32 accounting rules or

[161] *2020 ICS Notice*, 35 FCC Rcd at 8512, paras. 78-79.

[162] *Id.* para. 79.

[163] *Id.* at 8512, para. 80.

[164] *Id.*

[165] Public Interest Parties Reply at 3.

[166] Public Interest Parties Brattle Reply Report at 3.

[167] *Id.*

[168] *See generally* Appx. E, *infra*.

[169] Securus Comments at 11-16.

[170] *Id.* at 13.

[171] Pay Tel Comments at 4; Pay Tel Wood Report at 7-11.

[172] Pay Tel Wood Report at 8-9 (explaining that while some providers track direct costs through, for example, costs associated with equipment, telecommunications facilities, sales, or ongoing product support at specific facilities, others track such costs using allocators like the number of phones or shares of minutes or revenues that "have a more tenuous connection" to a specific location or contract).

[173] GTL Reply at 6.

any other uniform system of accounts.[174] We do not find these concerns sufficient to justify abandoning any reforms at this time, and find that "variations in internal cost records and lack of a common methodology" do not preclude us from lowering egregiously high interstate rates now on an interim basis while waiting to obtain more reliable and consistent cost data.[175] In sum, the 2018 data from the Second Mandatory Data Collection are the best data available upon which we may, and do, reasonably rely here.[176]

60. The limitations in the cost data identified in the record do, however, warrant a departure from the approach the Commission proposed in the *2020 ICS Notice*. That approach was premised on the Commission's ability to calculate providers' collective mean contract costs of providing inmate calling services to prisons and jails with a high degree of accuracy. Based on that premise, the Commission proposed relying on single measures of the industry-mean costs of providing calling services to permanently cap the interstate rate for prisons and jails, respectively.[177]

61. After carefully considering the record, including providers' criticisms of the approach proposed in the *2020 ICS Notice*, we take a different approach than the one the Commission originally proposed and rely on the costs providers reported in response to the Second Mandatory Data Collection to develop separate zones, or ranges, of cost-based rates for prisons and larger jails from which we select the respective interim interstate provider-related rate caps.[178] First, the costs, as reported in response to the Second Mandatory Data Collection, allow us to calculate ceilings—or upper bounds—above which any interstate rate caps for prisons and larger jails would be unreasonably high. Second, we adjust the reported data to correct for outliers and contracts with reported costs that are significantly higher than other providers. These adjusted data allow us to calculate floors—or lower bounds—below which any interstate rate caps for prisons and larger jails could be perceived as unreasonably low on the current record. These upper and lower bounds thus establish zones of reasonableness from which we select the interim interstate provider-related rate caps.

62. The approach we take here is fully consistent with judicial precedent and a logical outgrowth from the approach proposed in the *2020 ICS Notice*. Courts widely recognize that an agency may reasonably rely on the best available data where perfect information is unavailable.[179] Indeed, the

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[174] *Id.*; Pay Tel Wood Report at 6 ("There are no Part 32 accounting rules and no Uniform System of Accounts that apply to how . . . books and records are kept or how categories of cost are reported.").

[175] Public Interest Parties Reply at 4-5.

[176] *See, e.g.*, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021) (*Prometheus*) (explaining that "while the FCC did not have perfect empirical or statistical data" it "made a reasonable predictive judgment based on the evidence it had" in concluding that certain media ownership rules no longer served the public interest); *Am. Pub. Gas Ass'n v. Federal Power Comm'n*, 567 F.2d 1016, 1046 (D.C. Cir. 1977) (*American Public Gas v. FPC)* (concluding that the Federal Power Commission's choice "to use the best available data, and to make whatever adjustments appeared necessary and feasible" in a gas rate proceeding was not unreasonable); *see also MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340-42 (D.C. Cir. 1980) (*MCI v. FCC*) (explaining that years-long ratemaking delays resulting from a desire to obtain better or perfect data undermine the Commission's credibility and the requirement of just and reasonable rates under the Act).

[177] *2020 ICS Notice*, 35 FCC Rcd at 8513-15, paras. 83-89.

[178] *See infra* paras. 81-92.

[179] *American Public Gas v. FPC*, 567 F.2d at 1044 (After the Federal Power Commission (FPC) had relied on unverified data supplied by the American Gas Association, the court held that the FPC's approach in using these data was not unreasonable, articulating the "best available data" rule: "[T]he Commission's choice to use the best available data, and to make whatever adjustments appeared necessary and feasible, is within its competence. Courts cannot fairly demand the perfect at the expense of the achievable."); *see also Prometheus*, 141 S. Ct. at 1159-60; *MCI v. FCC*, 627 F.2d at 340-42 (explaining that "[t]he best must not become the enemy of the good, as it does when the FCC delays making any determination").

Supreme Court has recognized that the available data may not always settle a particular issue and that in such cases an agency must use its judgment to move from the facts in the record to a policy conclusion.[180] Here, we apply our judgment to the record before us and reach results that rationally connect "the facts found and the choice[s] made."[181] Importantly, by setting lower bounds that adjust for anomalies in the reported data, we minimize our reliance on data that we find inaccurate or unreliable.[182]

63. We recognize, of course, that our reliance on imperfect data is not ideal, but a lack of perfect data is not fatal to agency action. The D.C. Circuit has held that an agency's decision should be upheld when from "among alternatives all of which are to some extent infirm because of a lack of concrete data, [the agency] has gone to great lengths to assemble the available facts, reveal its own doubts, refine its approach, and reach a temporary conclusion."[183] Here, we have undertaken a robust analysis of all the data in the record and fully accounted for why the rate methodology we employ is reasonable, despite some providers' failure to meaningfully respond to Commission data requests and inaccuracies in their reported data. In the process, we explain our misgivings about reliance on certain data and lay out our rationale for adopting these rate caps as an interim step, with a commitment going forward to collect further data to be used to set permanent rate caps.

64. GTL and Pay Tel claim that the absence of the Commission's underlying work papers limits their "ability to comment on the methodology" proposed in the *2020 ICS Notice* and prevents them from determining whether the adjustments to the data proposed in that *Notice* are appropriate.[184] We find these assertions to be meritless. The record in this proceeding contradicts these views, as do the comments GTL and Pay Tel themselves offer concerning the Commission's methodology and treatment of data.[185] Contrary to these providers' claims, the database on which the calculations in the *2020 ICS Notice* relied was made available to interested parties in this proceeding, subject to the terms of a protective order;[186] and the record reflects that at least two parties have been able to replicate the Commission's rate cap

[180] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*. 463 U.S. 29, 52 (1983) (*State Farm*).

[181] *State Farm*, 463 U.S. at 43 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

[182] *See District Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56 (D.C. Cir. 2015); *Kennecott v. EPA*, 780 F.2d 445, 458 (4th Cir. 1985); *Citizens Telecomms. Co. of Minnesota v. FCC*, 901 F.3d 991, 1014 (8th Cir. 2018) (*Citizens*) (explaining that "the FCC was not unreasonable in declining to use the limited data at hand when it had doubts about the reliability of that data").

[183] *Nat'l Ass'n of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1141-42 (D.C Cir. 1984) (*NARUC*); *see also Prometheus*, 141 S. Ct. at 1159 (highlighting that the Commission had "acknowledged the gaps in the data" it relied on in evaluating the continuing need for certain media ownership rules).

[184] GTL Comments at 9 n.34 (stating that "[t]he Commission has not provided its underlying work papers or other data supporting its analysis, which limits GTL's ability to comment on the methodology used by the Commission to determine its proposed rate caps"); Pay Tel Comments at i, 5 n.15 (claiming that by withholding work papers, the Commission has rendered the data set irreconcilable).

[185] *2020 ICS Notice*, 35 FCC Rcd at 8511-17, paras. 78-91; GTL Comments at 21 (objecting to the Commission's adjustment of GTL's data due to GTL's use of revenue as a cost allocator); Pay Tel Wood Report at 19-25 (critiquing the Commission's cost allocation methodology); Pay Tel Wood Reply Report at 4-5 (summarizing comments on the record and the expert's own report discussing and critiquing the Commission's cost allocation methodology).

[186] *Wireline Competition Bureau and Office of Economics and Analytics Make Inmate Calling Services Database Available to Eligible Individuals Pursuant to Protective Order*, WC Docket No. 12-375, Public Notice, 35 FCC Rcd 10456 (2020); *see also* GTL Godek Report at 12-14 (using the Commission's dataset to discuss differences in the inmate calling services provider-submitted data). We also refer to this inmate calling services database as the "dataset."

analysis on their own, on the basis of the data available to them.[187] The Commission made the underlying data available and specified its analytical approach. We are not required to do more.

65. *Allocation of Indirect Costs Based on Minutes of Use.* Consistent with the approach proposed in the *2020 ICS Notice*, our rate cap methodology relies on providers' collective mean contract costs per paid minute of use, plus one standard deviation.[188] Because the instructions for the Second Mandatory Data Collection did not require providers to allocate their indirect costs (including their overhead costs) of providing inmate calling services among contracts,[189] we need to adopt a mechanism for allocating those costs. In the *2020 ICS Notice*, the Commission proposed allocating the providers' indirect costs of providing inmate calling services among contracts based solely on relative minutes of use, a method that apportions a provider's indirect costs among its individual calling services contracts in proportion with each contract's share of the total minutes of use reported by that provider.[190] The Commission sought comment on this proposal and on whether a different allocator would more effectively capture how costs are caused.[191] We adopt the proposed minute of use method of allocation for our new interim rate caps as one of only two reasonable allocation methods based on the current record.

66. Parties disagree whether minutes of use provides an appropriate method for allocating indirect costs, with some comments pointing out its shortcomings and others supporting its use.[192] Although several parties argue that minutes of use does not provide an appropriate allocation method,[193] our independent analysis shows that, while imperfect, minutes of use provides the most reasonable allocator given the data before us. Specifically, after examining seven potential allocators—minutes of use, average daily population, number of calls, revenue, contracts, facilities, and direct costs—for allocating providers' indirect costs among contracts, we find minutes of use both reasonable and preferable to each potential alternative.[194] Although none of these allocators fully capture the reasons for which providers incur inmate calling services costs, minutes of use constitutes the best available allocator under the circumstances because it produces plausible per-minute rates while ensuring that most calling services contracts would remain commercially viable, even assuming the accuracy of providers' reported costs.

67. We calculated the per-minute caps that would apply under each potential allocator to compare

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[187] *See* Public Interest Parties Brattle Report at 10; Securus Comments Attach. D, FTI Consulting, Inc., Declaration of Robert O. Fisher, Brian F. Pitkin & Steven E. Turner at 6 (Securus FTI Report) (observing that Securus's expert could replicate all of the Commission's data tables within a reasonable degree of variance).

[188] *2020 ICS Notice*, 35 FCC Rcd at 8513-15, paras. 83-89.

[189] Second Mandatory Data Collection Instructions at 6-11. These overheads include costs attributable to inmate calling services and to particular contracts, but not reported as such by the provider. *See* Second Mandatory Data Collection Instructions at 6-11.

[190] *2020 ICS Notice*, 35 FCC Rcd at 8513, para. 81.

[191] *Id.*

[192] *See, e.g.*, GTL Comments at 21 (arguing that revenue is an appropriate cost allocation method for inmate calling services); Pay Tel Wood Report at 10 (arguing that minutes of use and the Commission's methodology "creates the appearance that costs vary less among locations/contracts than they actually do"); Securus Comments at 41 (asserting that "[i]t is to be expected that allocating indirect costs based on minutes of use will result in relatively uniform costs per minute, particularly when several providers indicated very little direct cost instead of attributing most of their cost as indirect"); Free Press Comments at 4 (supporting the Commission's longstanding position that revenue should not be used for cost allocation purposes); Public Interest Parties Reply at 4 (supporting the Commission's use of minutes of use as the cost allocator").

[193] *E.g.*, GTL Comments at 21; Pay Tel Wood Report at 10; Securus Comments at 41.

[194] *2020 ICS Notice*, 35 FCC Rcd at 8513, para. 82 (rejecting allocations based upon contracts and facilities), 8559-60; Appx. E, *infra* Part B.

the allocators.[195] We find that only minutes of use ($0.149) and number of calls ($0.208) produce results below the current cap for prepaid and debit calls. In contrast, the implied per-minute rate caps for the revenue ($0.333), direct costs ($2.417), average daily population ($11.114), facilities ($303.685), and contracts ($318.636) allocators all suggest that interstate inmate calling services rate caps are presently unreasonably low, a proposition that not even any of the providers has tried to argue. This disparity is one of the reasons we find that minutes of use and number of calls are the only plausible allocators among the available alternatives.[196]

68. Understanding that there is an element of circularity in using a minutes-based cost allocator when setting per-minute rate caps,[197] we further evaluated whether each potential allocator produces per-minute costs that are consistent with the rates currently set by providers. Specifically, we calculated the percentage of contracts for which the provider reported per-minute revenues that are greater than the per-minute costs allocated to each contract under each allocator.[198] Minutes of use yielded a higher percentage of viable contracts than did any other cost allocator.[199] This confirms that minutes of use is the allocator that is most consistent with provider cost recovery, as it is illogical to assume that providers are entering into a significant number of contracts that are not commercially viable (i.e., that do not allow providers to recover their costs).[200] We therefore find minutes of use preferable to number of calls and use it in our provider-related rate caps calculations.[201]

69. We recognize that our choice of allocator is affected, in part, by our decision to continue to require providers to charge per-minute rates for inmate calling services.[202] But changing that rate

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[195] *See* Appx. E, *infra* tbl. 3. We refer to these per-minute caps as "implied rate caps." Our calculations employed the mean contract costs per minute plus one standard deviation methodology proposed in the *2020 ICS Notice*. For simplicity, we performed these calculations collectively for all facilities, rather than separately for different types or sizes of facilities. *Id.*

[196] We recognize, as Securus and Pay Tel point out, allocating indirect costs based on minutes of use results in relatively uniform costs per minute in comparison to the other allocation methods. Securus Comments at 41; Pay Tel Wood Report at 20. We also agree that this relative uniformity will necessarily result in a lower standard deviation from the mean for a minutes of use allocator than for any alternative method. Securus Comments at 41; Pay Tel Wood Report at 20 (implying that the Commission chose minutes of use "to minimize the standard deviation"), and the standard deviation we calculate for minutes of use ($0.056) is significantly lower than those for each of the other potential allocators. *See* Appx. E, *infra* tbl. 3 (showing standard deviations ranging from $0.056 for minutes to $300.136 for contracts). But the implied rate caps for revenue ($0.220 = $0164 + $0.056) and direct costs ($0.284 = $0228 + $0.0506) would exceed current interstate rate levels if the standard deviation for those allocators were reduced to $0.056, and the implied rate caps for average daily population ($0.789), facilities ($16.485), and contracts ($18.499) would exceed those levels even without any standard deviation component.

[197] *See* Appx. E, *infra*; Securus FTI Report at 16-17.

[198] *See* Appx. E, *infra* tbl. 4.

[199] Minutes of use yielded 87.3% of contracts with per-minute provider revenues greater than their per-minute allocated costs. The next closest allocators are direct costs at 81.6% and number of calls at 81.3%. *See* Appx. E, *infra* tbl. 4.

[200] *See* Appx. E, *infra*.

[201] The comparison of our per-minute cap to per-minute revenues is not subject to the objection that using a per-minute allocator will produce relatively uniform costs per minute in comparison to the other allocation methods.

[202] Pay Tel Wood Report at 20 (noting "the ubiquity of call minute pricing supports the development of rate caps on a per-[minute-of-use (MOU)] basis, and therefore supports the calculation of costs on a per-MOU basis"); Securus FTI Report at 13-16 (arguing in favor of allocating costs by calls). We also reject most of the cost allocators for additional reasons that are not subject to the objection that using a per-minute allocator will produce relatively uniform costs per minute in comparison to the other allocation methods. For example, use of the facility and direct cost allocator would require throwing our substantial amounts of data, while the remaining data would include egregious flaws, making any resulting cost allocation arbitrary. *See* Appx. E, *infra* Part E. This critique applies to a

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structure would likely impose significant burdens on providers, and we find no basis for requiring such a change in connection with our adoption of new interim rate caps. We also cannot meaningfully assess, on the record before us, how different rate structures would affect incarcerated persons and their families. We therefore defer action on alternative rate structures—under which calling services consumers might be charged a predetermined monthly fee for unlimited calls, for example—pending the development of a more complete record in response to the Further Notice.[203]

70. Some commenters contend that the available data preclude us from allocating providers' costs with sufficient precision to support any changes in interstate rate caps.[204] Pay Tel emphasizes that "the observed inability of many [inmate calling services] providers to track and assign direct costs" results in high levels of indirect costs to be allocated, which makes providers' costs appear more "homogenous" across locations and contracts than is actually the case.[205] Securus's outside experts are particularly critical of using minutes of use as the only allocator, arguing that "the majority of [providers'] costs, which include connectivity to the facilities, developing and implementing the call platform, on-site equipment and SG&A [(selling, general, and administrative expenses)], do not vary by the number of minutes."[206]

71. We find that such issues do not require us to postpone reforming our interstate rate caps pending the availability of better data that might allow us to allocate providers' indirect costs in a more cost-causative manner.[207] We find that the better course is to adopt interim interstate provider-related rate caps for prisons and larger jails now, using the available data, while requiring that providers submit more accurate, consistent, and disaggregated data that will allow us to set permanent interstate provider-related rate caps for all correctional facilities that more closely reflect providers' costs of serving individual correctional facilities. As the D.C. Circuit has explained, "[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."[208] Consistent with this principle, we choose "to use the best available data, and to make whatever adjustments appear[] necessary and

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more limited extent to average daily population, but it would still be a poor choice relative to the alternatives of call minutes or number of calls. *See* Appx. E, *infra* Part E. Another example is our exclusion of the revenue allocator. *See* Appx. E, *infra* Part E.

[203] *See* Appx. E, *infra* Part E. This reasoning is again is not subject to the objection that using a per-minute allocator will produce relatively uniform costs per minute in comparison to the other allocation methods.

[204] Pay Tel Comments at 4-8 (arguing the dataset is unreliable for the purposes of reasoned ratemaking); Securus Comments at 10-15 (arguing that given the inherent flaws with the dataset, the Commission should not rely on it in establishing rate caps); Securus FTI Report at 24-25 (asserting that setting rate caps based on a dataset that is not a normal distribution is inappropriate); GTL Comments at 20 (stating there are inconsistencies in reporting the data including differing allocation methods).

[205] Pay Tel Wood Report at 22. We agree there is some merit in these observations, particularly that the collected data appears to obscure cost differences between prisons and jails.

[206] Securus FTI Report at 15.

[207] We are not required to pursue "the perfect at the expense of the achievable." *American Public Gas v. FPC*, 567 F.2d at 1046 (internal quotation marks and citation omitted).

[208] *Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000) (*American Public Communications*) (upholding Commission action that had relied on disputed cost data) (internal citations omitted); *see also NARUC*, 737 F.2d at 1131-42 (finding that an agency had not acted arbitrarily or capriciously when it has made "rational choices from among alternatives all of which are to some extent infirm because of a lack of concrete data, and has gone to great lengths to assemble the available facts, reveal its own doubts, refine its approach, and reach a temporary conclusion"); Public Interest Parties Brattle Reply Report at 15.

feasible" to ensure that interstate inmate calling services rates are just and reasonable.[209]

72. We independently reject the "use of direct costs to allocate indirect costs" and related approaches at this time.[210] Pointing to its own cost-tracking processes, Pay Tel argues that allocating indirect costs based on directly attributable costs would be "not only reasonable and consistent with prior Commission conclusions" but also "consistent with how [inmate calling services] providers incur costs."[211] Although we agree that allocating indirect costs based on directly attributable costs could yield reasonable results when providers have properly identified their directly attributable costs, the data from many of the providers fall far short of that mark. Indeed, allocation by direct costs would require us to ignore all data submitted by the two providers that reported no direct costs.[212] Similarly, this approach also would allocate essentially all of GTL's costs on the basis of bad debt, a measure that bears little, if any, relationship to the reasons GTL incurs costs in its provision of inmate calling services.[213] Accordingly, we find allocating indirect costs based on direct costs would provide less reliable results than allocating indirect costs based on minutes of use. We likewise reject the use of facilities to allocate costs, as providers often failed to report where multiple facilities were supplied under a single contract. In light of the drawbacks to these approaches, we have a higher degree of confidence in providers' reported minutes of use by contract.

73. We similarly decline at this time to divide indirect costs into "shared costs" and "common costs" and develop separate allocators for each set of costs, as Securus suggests, because the available data do not allow us to make such granular distinctions.[214] We likewise reject any allocation key based on percentages of total company revenue.[215] The Commission has long disclaimed this allocation methodology because it fails to provide a reliable method for determining costs, given that "revenues measure only the ability of an activity to bear costs, and not the amount of resources used by the activity."[216]

74. *Accurate Analysis Compels Adjustments to GTL's Reported Cost Data.* As the Commission recognized in the *2020 ICS Notice*, the critical question posed by our reliance on the available data is how to address the various issues reflected in the cost data reported by GTL, the largest provider of inmate

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[209] *See American Public Gas v. FPC*, 567 F.2d at 1044-46 (upholding an agency's decision to rely on the best available data in setting rates for new natural gas).

[210] Securus Comments at 15, 41 (suggesting that providers should be required to follow a standard cost-causation modeling methodology to attribute costs to specific products and, where not possible, allocate those costs across products in a cost-causative matter); Pay Tel Wood Report at 21, 26 (maintaining that Securus's suggested approach is "reasonable and consistent with prior Commission conclusions").

[211] Pay Tel Wood Report at 21.

[212] The providers that did not report direct costs are {[ ]}. *See* Appx. E, *infra* Part F.

[213] Alone among providers, GTL reported a bad debt expense as their only identifiable direct cost. The evidence supports no relationship between bad debt expense and cost causation, and the bad debt expense amounts only to {[ ]}, making any related assumptions even more speculative. *See* Appx. E, *infra* Part E.

[214] The available data do not allow us to analyze or allocate costs on the basis that Securus suggests. What Securus identifies as "common costs" most closely tracks the "indirect costs" reported in the Second Mandatory Data Collection. Second Mandatory Data Collection Instructions at 3 (defining "indirect costs" to mean "any cost related to a service that is not completely attributable to that service (e.g., overhead, depreciation, or other costs that are allocated among different products or services)").

[215] GTL Comments at 21 (defending its use of revenues to allocate costs).

[216] *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, 1318, para. 160 (1987) (internal quotation marks omitted); *see 2020 ICS Notice*, 35 FCC Rcd at 8513, para. 82 (discussing flaws with allocating costs by revenue).

calling services, with an estimated market share approaching 50%.[217] Today, we confirm the Commission's preliminary assessment that the issues plaguing GTL's cost data render those data unreliable.[218] In particular, we find it likely that GTL's submissions significantly overstate its actual costs of providing inmate calling services. As a consequence, including GTL's cost data as reported in our calculations for the entire industry skews the results, particularly given GTL's market share.[219] We conclude that we must make certain adjustments to GTL's reported data if we are to arrive at a more accurate estimate of industry costs.[220]

75. The most fundamental problem with GTL's data is that its reported costs are significantly higher than the costs reported by other providers, a result that is inconsistent with GTL's market position. On a company-wide basis, GTL's total costs per minute dwarf the industry: GTL's reported unit costs, which do not rely on cost allocation,[221] are higher than those of all but one (much smaller) provider, and are nearly {[ ]} the average of all the other providers excluding GTL.[222] These results are inconsistent with the record evidence establishing that providers are able to achieve significant economies of scale.[223] As the largest inmate calling services provider, GTL should be better enabled to spread its fixed costs over a relatively large portfolio of contracts relative to other providers, especially because GTL serves a higher proportion of larger facilities than other providers. Instead, taking GTL's reported costs at face value would imply that it achieves essentially no economies of scale—a result contrary to rational expectation and unsupported by any comments in the record.[224] GTL's unit costs are also high when compared with the providers that are most like it. GTL's unit costs are nearly {[ ]} times those of Securus, the second largest provider, nearly {[ ]} times those of CenturyLink, and nearly {[ ]} times

[217] *2020 ICS Notice*, 35 FCC Rcd at 8513, 8517-19, paras. 82, 92-96. One estimate from 2017 placed GTL's market share between 46% and 52.9% before it acquired Telmate, a company whose market share was between 1.9% and 3.1%. *See* Peter Wagner, Prison Policy Initiative, *Prison Phone Giant GTL Gets Bigger, Again* (Aug. 28, 2017), https://www.prisonpolicy.org/blog/2017/08/28/merger/. Our internal analysis suggests GTL's share is around {[ ]}. *See 2020 ICS Notice*, 35 FCC Rcd at 8518, para. 94 n.226; *infra* Part VI.G.

[218] *2020 ICS Notice*, 35 FCC Rcd at 8518, para. 94 n.228 (explaining that GTL "is a reasonably effective competitor, which in turn suggests it is not a high cost provider, and therefore, its reported costs are likely significantly overstated").

[219] *See generally* Appx. E, *infra* tbl. 2.

[220] Courts have upheld the Commission's exclusion or substitution of flawed or inadequate data when the Commission has explained the evidence and demonstrated a rational connection between the facts found and the choice made, as we do here. *See, e.g.*, *State Farm*, 463 U.S. at 52; *American Public Communications*, 215 F.3d at 55 (upholding the Commission's decision to exclude data on the basis of reliability); *see also Citizens*, 901 F.3d at 1014 (explaining that "the FCC was not unreasonable in declining to use the limited data at hand when it had doubts about the reliability of that data").

[221] Unit costs are measured as the quotient of reported total costs and reported minutes.

[222] *See* Appx. E, *infra* tbl. 2 (noting that GTL's reported unit costs are {[ ]}, while unit costs for the industry average excluding GTL are {[ ]}. This remains true for GTL's allocated costs per minute for prisons or larger jails—both are higher than nearly all other providers' allocated costs, regardless of facility type. Despite being the largest provider, and commanding a disproportionate share of the larger contracts, GTL reports an average contract per-minute cost of {[ ]}, approximately {[ ]} times larger than its nearest peers in size, Securus and CenturyLink, and more than {[ ]} times larger than the average contract per-minute costs of the next largest provider, ICSolutions. Staff analysis of the Second Mandatory Data Collection; *see also* Appx. G, *infra* fig. 1.

[223] *See, e.g.*, Securus Cost Study at 21 (recognizing that as a larger provider, it experiences economies of scale not available to smaller providers, such as greater purchasing power and the ability to share common costs among a large number of products and services).

[224] The record is bereft of any explanation why GTL might incur higher inmate calling services costs than the rest of the industry.

those of ICSolutions.[225] Of equal concern, GTL uniquely reports large losses across all inmate calling services operations, totaling nearly {[ ]} of GTL's reported costs.[226] GTL's total revenues are {[ ]} less than its reported costs, suggesting that GTL operates these facilities at a cumulative loss—an irrational result contradicted by GTL's longevity in the market, the depth of its market presence, and common sense.[227]

76. GTL's accounting practices also prevent reliance on GTL's reported data. In contrast to every other provider and the costs they reported, GTL alone reported "bad debt expense" as its only cost directly related to the provision of inmate calling services, though it almost certainly incurs other costs that are causally related to providing inmate calling services.[228] As the record reflects, even a cursory analysis of GTL's own reported costs demonstrates the absurdity of this result: GTL's reported direct costs "represent only 0.01% of its Total [inmate calling services] costs, effectively reporting a cost structure that is 0% direct and 100% indirect."[229] Compounding this problem, GTL then allocated its indirect costs between its inmate calling services operations and its other operations based on the percentages of total company revenue each operation generated, which fails to reflect the purposes for which GTL incurs costs.[230]

77. Considering the impact that overstatements of this magnitude by the market's largest provider would have on its analysis, the Commission has repeatedly tried to obtain more accurate and complete data from GTL. These efforts began with several calls between staff and GTL representatives that sought to obtain a fuller explanation of the composition of the data provided by GTL in response to the Second Mandatory Data Collection. Following from these efforts, on July 15, 2020, before the release of the *2020 ICS Order on Remand*, the Wireline Competition Bureau directed GTL to provide "additional documents and information regarding GTL's operations, costs, revenues, and cost allocation procedures" to supplement GTL's previously filed submissions, and to enable the Commission "to make a full and meaningful evaluation of GTL's cost data and methodology."[231] This directive encompassed 14 separate categories of additional information.[232] GTL's response, however, provided little additional information that would enable us to determine the costs it actually incurs in providing calling services to incarcerated people. Instead, GTL objected to the requests on multiple grounds, routinely asserting that the Bureau sought information that GTL cannot provide and arguing that it does not maintain records that would allow it to respond.[233] Without the requested information, and in light of the issues we describe above, we

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[225] *See* Appx. E, *infra* tbl. 2. Securus's reported unit costs are {[ ]}; CenturyLink's reported unit costs are {[ ]}; and ICSolutions' reported unit costs are {[ ]}.

[226] *See* Appx. E, *infra* Part D (discussing reported costs and revenues).

[227] GTL is the only provider which records making a loss. *See* Appx. E, *infra* Part F. *See generally* GTL Amended Description and Justification.

[228] *2020 ICS Notice*, 35 FCC Rcd at 8519, para. 95; Securus Comments at 12; *see also* Public Interest Parties Brattle Reply Report at 13; *2020 ICS Notice*, 35 FCC Rcd at 8516-17, paras. 92-93; GTL Amended Description and Justification at 9.

[229] Pay Tel Wood Report at 8-9.

[230] *2020 ICS Notice*, 35 FCC Rcd at 8512-13, 8518-20, paras. 80-82, 94-98; *see also* Public Interest Parties Brattle Report at 6-7 (arguing that GTL's approach will overstate inmate calling services costs).

[231] Letter from Kris Anne Monteith, Chief, Wireline Competition Bureau, to Chérie R. Kiser, Counsel for GTL and Its Subsidiaries, Cahill Gordon & Reindel LLP, 35 FCC Rcd 7028, 7028 (WCB July 15, 2020) (GTL Letter). This followed up on the Bureau's prior efforts to obtain additional information from GTL. *See* GTL Amended Description and Justification (amending GTL's Second Mandatory Data Collection response "to address questions raised by Commission staff"); *see also* GTL Letter, 35 FCC Rcd at 7028.

[232] GTL Letter, 35 FCC Rcd at 7029-34.

[233] These objections included, *inter alia*, that the Bureau's requests lacked relevance, placed an undue burden on GTL, and were overbroad. *See* Letter from Chérie R. Kiser, Counsel for GTL and Its Subsidiaries, Cahill Gordon &

(continued….)

are unable to take GTL's reported costs at face value in our analyses.[234] We therefore adjust GTL's reported cost data with data that more accurately reflect the underlying characteristics of the prisons and larger jails that GTL serves.[235] Specifically, as we explain below, in establishing the lower bounds of our zones of reasonableness we use a generally accepted statistical tool—the *k*-nearest neighbor method—to replace the data reported for each prison and larger jail contract served by GTL with the weighted average of the data for the three most comparable (i.e., nearest neighbor) contracts served by other providers.[236]

78. *Ancillary Service Costs.* In the *2020 ICS Notice*, the Commission observed that its proposed rate cap calculations did not account for revenues earned from certain ancillary services even though providers reported the costs of these services as inmate calling services costs in their responses to the Mandatory Data Collection.[237] The Commission sought comment on whether it should exclude the costs of these services from its rate cap calculations.[238]

79. Based on the record before us, we find that there is no reliable way to exclude ancillary service costs from our provider-related rate cap calculations at this time. Accordingly, those costs will remain as a part of the industry costs that we use in our calculations of those interim rate caps. The instructions for the Second Mandatory Data Collection required certain ancillary service revenues to be reported separately, but providers were not required to report their ancillary service costs separately from other inmate calling services costs.[239] Further, providers were not required to separately report costs relating to any specific ancillary service,[240] and no commenter has suggested a way of identifying the providers' ancillary service costs.[241] As a result, we cannot isolate with any degree of accuracy the costs providers incur in providing ancillary services from their overall cost data.

80. We recognize that this approach will result in interim interstate rate caps that allow for the recovery of costs incurred in the provision of ancillary services that calling services consumers already pay for through separate charges and fees, a result that substantially increases the likelihood that our interim caps are too high. We intend to collect detailed data on ancillary services costs from each inmate calling services provider in our next data collection and to use those data to set permanent provider-

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Reindel LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Sept. 14, 2020) (GTL Sept. 14, 2020, Letter). GTL Sept. 14, 2020, Letter at 1-33, Attach., Documents - GTL Response to Request #14.

[234] Two commenters share our concerns and urge that we adjust GTL's data. *See, e.g.*, Free Press Comments at 4 (supporting the Commission's proposed discount for GTL's claimed capital costs, even though it appears that the 10% discount is not enough and that the Commission should identify other ways GTL's costs are inflated and consider expanding the discount to account for them); Public Interest Parties Comments at 5 (arguing that the proposed 10% reduction to GTL's data is necessary but is not sufficient to account for the inconsistencies in GTL's reporting).

[235] *See American Public Communications*, 215 F.3d at 56 (upholding Commission action which relied on disputed cost data, stating that "we cannot require an agency to enter precise predictive judgments on all questions as to which neither its staff nor interested commenters have been able to supply certainty").

[236] We describe this method in greater detail and show its application to GTL's data in Appendix G, *infra*.

[237] *2020 ICS Notice*, 35 FCC Rcd at 8515-16, para. 90.

[238] *Id.*

[239] Second Mandatory Data Collection Instructions at 9-10 (requiring the reporting of automated payment fee revenues and paper bill/state fee revenues separately, for example).

[240] *See generally id.*

[241] The Public Interest Parties argue that we should deduct all revenues from ancillary services from the costs that go into our per-minute rate cap calculations. Public Interest Parties Brattle Report at 8-9. We decline to take this step because doing so would lower the rate caps equally for all providers and therefore disproportionately affect those providers having the lowest ancillary service revenues.

related rate caps that eliminate this problem.[242]

81. *Implementing the Zone of Reasonableness Approach*. We determine the levels of the interim interstate provider-related rate caps using a zone of reasonableness approach. In the *2020 ICS Notice*, the Commission proposed to set separate caps for prisons and all jails at the mean contract costs per paid minute plus one standard deviation, as calculated separately for each of those two categories of facilities.[243] After considering the record, including comments that make clear that limitations in the available data make it impossible for us to estimate true mean contract costs per paid minute with any degree of precision,[244] we find that a zone of reasonableness approach is particularly well-suited to our task because it will allow us to use different measures of mean contract costs per paid minute to establish separate ranges of rates—one for prisons and another for larger jails—from which we can select just and reasonable interim provider-related rate caps.[245]

82. It is well-established that rates are lawful if they fall within a zone of reasonableness.[246] Precedent also teaches that we are "free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and competing interests."[247] A zone of reasonableness approach allows us to reconcile, to the extent possible on the record before us, the providers' and their customers' competing concerns regarding the rates incarcerated people and those they call pay to communicate. We therefore rely on a zone of reasonableness approach to set rates in this instance, which helps avoid giving undue weight to the assumptions that would lead to either unduly high or unduly low per-minute rate caps.

83. Given the available data, any upper and lower bounds based on those data are necessarily estimates. We find it likely that our estimates overstate providers' inmate calling services costs. All providers have an incentive to overstate their costs in their responses to the Commission's data collections, as this would lead to higher interstate rate caps, thus resulting in both higher revenues and higher profits. In addition, imprecisions in the instructions for the Second Mandatory Data Collection regarding fundamental steps in the costing process, such as how providers should make sure that their

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[242] *See infra* Part III.H.3 (instituting an additional data collection).

[243] *2020 ICS Notice*, 35 FCC Rcd at 8514, para. 84. (discussing cost variations between prisons and jails and seeking comment on this approach).

[244] *See, e.g.*, GTL Comments at 20 (stating there are inconsistencies in the data); Pay Tel Comments at 4-8 (arguing the dataset is unreliable for the purposes of reasoned ratemaking); Public Interest Parties Comments at 4-9 (discussing deficiencies in the data); Pay Tel Reply at 5-7; Securus Comments at 10-13 (identifying issues with the submitted data); Securus FTI Report at 24-25 (finding the dataset non-representative), at 30 (stating that the cost data lead to misleading conclusions); *see also 2020 ICS Notice*, 35 FCC Rcd at 8511-13, paras. 78-82 (highlighting shortcomings in providers' Second Mandatory Data Collection responses).

[245] As a result of our new approach, which differs from the approach proposed in the *2020 ICS Notice*, we find that comments critical of the data analysis, including proposed adjustments to data, underlying the rate caps proposed in the *2020 ICS Notice* are now moot. *See, e.g.*, Securus Comments at 20-23 (arguing that the Commission's proposed goodwill adjustment is unjustified); Securus Furchtgott-Roth Report at 15-22 (opining on the impropriety of excluding goodwill from costs); Pay Tel Wood Report at 13-17 (suggesting that the Commission's underlying analysis did not produce reliable results); Public Interest Parties Comments at 6-9 (discussing methodological flaws in the Commission's calculations).

[246] *See, e.g.*, *Verizon v. FCC*, 535 U.S. 467, 487-88 (2002); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (*Permian Basin*); *NARUC*, 737 F.2d at 1141 (explaining that when "a figure selected by the agency reflects its informed discretion, and is neither patently unreasonable nor 'a dictate of unbridled whim,' then the agency's decision adequately satisfies the standard of review"); *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) (*Natural Gas Pipeline*) (describing a "zone of reasonableness" within which the agency is free to fix a rate).

[247] *Permian Basin*, 390 U.S. at 767; *see Natural Gas Pipeline*, 315 U.S. at 586 (explaining that ratemaking involves the making of "pragmatic adjustments"); *see also FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 602-03 (1944) (*Hope Natural Gas*) (describing the ratemaking process and the balancing of interests).

costs of providing inmate calling services exclude all costs properly assignable to their non-inmate calling services operations, enabled providers to inflate their reported costs. We find that this combination of incentives and reporting latitude almost certainly resulted in some overstatement of the providers' costs of providing inmate calling services.[248] Additionally, because the instructions for the Second Mandatory Data Collection did not require providers to separate the costs they incur in providing ancillary services from their total inmate calling services costs, our bounds include ancillary services costs for which providers separately recover fees and charges under our rules. Each of these factors skew the cost data upwards, resulting in upper and lower bounds that are likely higher than any bounds based on more accurate data.

84. Our zone of reasonableness approach involves three distinct steps. We begin by using data that providers submitted in response to the Second Mandatory Data Collection to establish upper bounds of potentially reasonable interstate provider-related rate caps for prisons and larger jails, respectively. Because the data we use in setting the upper bounds significantly overstate the providers' actual mean contract costs per minute of providing inmate calling services beyond the general factors we have just discussed, we then make reasonable, conservative adjustments to the reported data and use those data to establish the lower bounds of our zones of reasonableness.[249] Finally, we rely on our analysis of the record evidence and on our agency expertise to pick, from within those zones, reasonable interim interstate provider-related rate caps for prisons and larger jails.

85. *Determining Upper Bounds for the Zones of Reasonableness.* We find that the method proposed in the *2020 ICS Notice*, taking the sum of the mean contract costs per minute plus one standard deviation relative to that mean, provides a reasonable method for determining the upper bounds of the zones of reasonableness for prisons and for larger jails.[250] Under this approach, using the data submitted by all 12 providers, the mean contract cost per minute for prisons is $0.092, and the standard deviation relative to this mean is $0.041 per minute, resulting in a mean plus one standard deviation of $0.133 per minute.[251] Similarly, the mean contract cost per minute for larger jails is $0.100, and the standard deviation from that mean is $0.118 per minute, making the mean plus one standard deviation $0.218 per minute.[252]

86. We find that these upper bounds overstate, by a wide margin, the providers' actual costs of providing interstate inmate calling services for two reasons beyond the general effects we recounted above. First, at least two providers, GTL and Securus, calculated the return component of their costs using the prices their current owners paid to purchase the companies, rather than the amounts that they

[248] *See* Second Mandatory Data Collection Instructions at 7-11; *2020 ICS Notice*, 35 FCC Rcd at 8513, para. 82 (discussing inmate calling services providers that used relative revenues to allocate their indirect costs among contracts).

[249] We describe these adjustments fully in Appendix G, *infra*.

[250] One standard deviation from the mean of a normal distribution accounts for approximately 68% of the data, with half of the remaining 32% being above the mean and half below the mean, thus creating an additional buffer making it more likely that a provider will be able to recover its costs for any particular contract or facility. *See* Appx. E, *infra*; *2020 ICS Notice*, 35 FCC Rcd at 8513-14, para. 83 (describing the method of calculation); *see also* Public Interest Parties Brattle Report at 11 ("In the FCC rates, 62% of the contracts have costs lower than the mean. Using the mean plus one standard metric, 93% get reimbursed at a rate higher than their per-minute costs.").

[251] We calculate these statistics for prisons after removing the cost-per-minute outlier related to GTL's contract for juvenile prisons in Maryland. By comparison, the mean cost per minute for prisons based on the data for the 12 responding providers including this outlier is $0.149, and the standard deviation is $0.658 per minute, resulting in the mean plus one standard deviation being $0.807 per minute. Appendix E explains why we exclude the Maryland juvenile prison contract. Appx. E, *infra* Part B.

[252] *See* Appx. E, *infra* Part E (discussing and reviewing the calculation of the mean and standard deviation for larger jails).

and the prior owners had invested in property used to provide interstate inmate calling services.[253] Use of those purchase prices to calculate GTL's and Securus's costs is inconsistent with the well-established principle that the purchase prices of companies that possess market power "are not a reliable or reasonable basis for ratemaking."[254] Instead, the return component of GTL's and Securus's costs is properly calculated using the original cost of the property they use to provide inmate calling services at the point that property was first dedicated to public use through its use in the provision of inmate calling services.[255] And, contrary to GTL's argument,[256] the Commission has long held that payphone calling providers, including inmate calling services providers, possess monopoly power when (as is the case with GTL and Securus) they have obtained the exclusive right to provide calling services to correctional facilities.[257] We reiterate that finding and, to eliminate any possible doubt, apply it to the purchase prices which GTL and Securus used in calculating the return component of their costs.

87. Second, and more significantly, these upper bounds incorporate GTL's costs as reported, even though (1) GTL admits that it lacks the accounting records that it would need to determine its actual costs of providing inmate calling services and (2) GTL's reported costs far exceed those reported by other providers serving comparable facilities.[258] Despite these shortcomings, the data from the providers' Second Mandatory Data Collection responses provide the best available data for determining the upper bounds of the zones of reasonableness.[259] We therefore use $0.133 per minute as the upper bound for

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[253] Securus Cost Study at 12; *2020 ICS Notice*, 35 FCC Rcd at 8517, para. 92 (explaining that GTL calculates the return component of costs by using "the invested capital of GTL") (citing GTL Amended Description and Justification at 10); *see also Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1984) (recognizing that regulated rates are "calculated to generate a reasonable return on the *original cost*" of property dedicated to public use) (emphasis in original). Under rate-of-return ratemaking, a company's cost of service equals a return component (i.e., allowed rate of return times the company's rate base) plus the expenses the company incurs in providing the regulated service. The use of the sale prices of a company as what amounts to its rate base absent a showing specifically justifying that practice is inconsistent with fundamental ratemaking principles. *See Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, CC Docket No. 86-497, Order on Reconsideration, 4 FCC Rcd 1697, 1703, para. 58 (1989) (*Rate Base Reconsideration Order*); *American Tel. and Tel. Co*., Docket No. 19129, Phase II Final Decision and Order, 64 F.C.C.2d 1, 39-40, paras. 116-20 (1977) (*AT&T Phase II Order*) (rejecting AT&T's attempt to earn a return on "the amount of investment capital" its investors had provided to AT&T, rather than on AT&T's prudent investment in property used and useful in the provision of service to the public).

[254] *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, CS Docket No. 94-28, Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 2220, 2244, para. 52 (1996); *see, e.g., Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990); *see also* Public Interest Parties Reply at 7-9 (arguing that the inclusion of GTL's invested capital when calculating rates is inconsistent with the principle that the purchase prices of companies possessing market power are not a reliable or reasonable basis for ratemaking).

[255] *See Rate Base Reconsideration Order*, 4 FCC Rcd at 1703, para. 58; *see also Louisiana Public Service Commission*, 476 U.S. at 355, 365 ("The total amount that a carrier is entitled to charge for services, its 'revenue requirement,' is the sum of:" (a) its current operating expenses, including taxes and depreciation expenses;" plus (b) "a return on its investment 'rate base.' The original cost of a given item of equipment enters the rate base when that item enters service.").

[256] GTL Comments at 18-19; *see also* Securus Furchtgott-Roth Report at 16-18.

[257] *See 2002 Pay Telephone Order*, 17 FCC Rcd at 3252-53, para. 10; *supra* Part III.C; *see also GTL v. FCC*, 866 F.3d at 404 (discussing winning bidders' "locational monopolies").

[258] *See* Appx. G, *infra* Part B (indicating that GTL's average per-minute reported costs for prisons and larger jails are about twice as high as those of all other providers); GTL Sept. 14, 2020, Letter *passim*.

[259] *NARUC*, 737 F.2d at 1141-42 (upholding the Commission's ratemaking action when a lack of concrete data rendered alternative options "to some extent infirm"); *MCI v. FCC*, 627 F.2d at 340-42 (stating that "[t]he best must

(continued….)

determining a reasonable interstate provider-related rate cap for prisons and $0.218 per minute as the upper bound for determining a reasonable interstate provider-related rate cap for larger jails. In establishing these upper bounds, we are well-aware that the industry's actual mean contract costs of providing inmate calling services plus one standard deviation are significantly lower.

88. *Determining Lower Bounds for the Zones of Reasonableness.* We find the approach we use to determine the upper bounds of the zones of reasonableness—relying on data from the Second Mandatory data collection and calculating the mean cost per minute plus one standard deviation relative to that mean separately for prisons and larger jails—provides an appropriate starting point for determining the lower bounds of the zones. Because of the shortcomings in the providers' reported data, we adjust those data using generally accepted statistical tools to remove outlier contracts and to replace GTL's reported data with data derived from contracts comparable to those GTL serves.[260] Under this approach, the mean cost per minute for prisons is $0.052, the standard deviation relative to that mean is $0.012, and the mean plus one standard deviation is $0.064 per minute. Similarly, the mean cost per minute for larger jails is $0.065, the standard deviation from that mean is $0.015, and the mean plus one standard deviation is $0.080 per minute.[261] These numbers—$0.064 per minute and $0.080 per minute—constitute the lower bounds of our zones of reasonableness for prisons and larger jails, respectively.

89. The construction of the lower bound begins by removing three outlying observations that skew the data and that would otherwise render the mean and standard deviation to be less precise measures of the data's central tendency.[262] These three outlier contracts report costs of {[ ]} per minute for larger jails in Williamson, Texas, San Luis, Arizona, and West Texas, Texas, respectively.[263] To put these cost levels in context, {[ ]} per minute is the highest cost per minute for any contract regardless of facility type or size, and {[ ]} and {[ ]} per minute are approximately three times and twice as large as the cost per minute for the next highest larger jail contract. Excluding these three outliers, costs per minute for larger jail contracts range from $0.03 to $0.17.[264] Nothing in the record supports using such extreme costs to set provider-related rate caps. Further, these contracts would remain outliers, even under alternative methods of outlier identification proposed in the record.[265]

90. Next, we substitute reasonable surrogates for GTL's reported cost data to address significant

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not become the enemy of the good," when holding that a lengthy delay caused by the Commission awaiting perfect data was unreasonable).

[260] The related assumptions and adjustments are described at greater length below, and in Appendix G, *infra*, (reviewing the data and concluding that these adjustments are reasonable); *see also* Public Interest Parties Brattle Report at 14.

[261] *See* Appx. G, *infra* (discussing and reviewing the calculations of the mean and standard deviation of the adjusted contract cost data for prisons and larger jails).

[262] The central tendency of a distribution refers to the degree to which data is clustered around a central value, frequently measured by the mean, median, or mode. In general, the data's dispersion (as measured by the standard deviation) and central tendency are the main properties defining a distribution.

[263] The outliers we address here were identified using the Grubbs method, a statistical approach we describe at length in Appendix G, *infra*.

[264] *See, e.g.*, Appx. G, *infra* Part A (reviewing these observations and the magnitude by which they differ from the rest of the dataset). As we describe in Appendix E, a single observation from a prison contract reports a cost per minute of {[ ]}, which we conclude is clearly erroneous and omit in entirety. Appx. E, *infra* Part B.

[265] *See, e.g.*, Securus Comments at 14 (identifying an alternative method using 1.5 times the interquartile range of the dataset to identify outliers, which would also identify and exclude these observations); Securus Cost Study at 14-16 (discussing the use of 1.5 times the interquartile range to exclude outliers); *see also* Appx. E, *infra* (identifying several additional reasons why these contracts are considered outliers).

and unresolved issues with those data, as identified in the *2020 ICS Notice* and discussed more fully in this Report and Order.[266] These issues remain unresolved—and incurable on the record before us—because GTL failed to provide meaningful cost data in its Second Mandatory Data Collection response or in its response to the Bureau's July 15, 2020 Letter, or to suggest any alternative means of assisting the Commission in its efforts to estimate GTL's costs of providing inmate calling services. We find that the best way to address this situation is to adjust GTL's reported contract-level cost data using the *k*-nearest neighbor method.[267] Specifically, we replace the cost-per-paid-minute data reported for each prison and larger jail contract served by GTL with the weighted average of the data for the three most comparable (i.e., nearest neighbor) contracts served by other providers. To determine a contract's "neighbors," we compare its average daily population, total inmate calling services minutes, total commissions paid, and facility type to all other contracts in our dataset.[268] This approach reasonably preserves the non-cost information GTL reported for the prisons and larger jails it serves, while reducing the likelihood that the cost data for those facilities are overstated to a significant extent. We find that this approach, in combination with the removal of outlier observations as described above, provides a reasonable method for determining the lower bounds of the zones of reasonableness.

91. In the *2020 ICS Notice*, the Commission proposed to reduce GTL's reported costs by 10% in order to address its data reporting issues, an approach we now abandon in light of convincing opposition in the record.[269] Instead, we rely on the *k*-nearest neighbor method, rather than alternative methods for addressing the deficiencies in GTL's reported data, because we find it provides the best approach for setting the lower bounds of the zones of reasonableness. In particular, although the Winsor method also would provide a reasonable method for replacing GTL's data with surrogate data, that method would simply replace GTL's outlier data with the next-highest observation, as opposed to the multifactor comparison provided by our adopted approach.[270] In other words, the Winsor method would adjust costs downward to the next-highest observation without consideration of whether the contract with the next highest costs is similar in any other dimensions, such as minutes of use or average daily population. We find the *k*-nearest neighbor method's reliance on three comparable contracts makes it a superior tool for

[266] *2020 ICS Notice*, 35 FCC Rcd at 8518-20, paras. 94-98; *see Boroughs of Ellwood City, Grove City, New Wilmington, Wampum, & Zelienople, Pa. v. FERC*, 731 F.2d 959, 965 (D.C. Cir. 1984) (declining to disturb the agency's interim decision to proceed with establishing a uniform method of calculating rate base elements despite a temporary sacrifice in accuracy). As we recount above, alone among providers, GTL reported no direct costs for inmate calling services other than bad debt costs, although it certainly incurs other costs that are causally related to providing inmate calling services. Additionally, GTL's reported costs are much higher than most other providers, in contradistinction to our expectations of economies of scale. In fact, GTL's total revenues per minute from prisons are less than its allocated costs per minute, the only provider for which this is true. *See generally* Appx. G, *infra*.

[267] *See American Public Communications*, 215 F.3d at 56 (upholding Commission action that relied on disputed cost data, stating that "we cannot require an agency to enter precise predictive judgments on all questions as to which neither its staff nor interested commenters have been able to supply certainty"). We describe this method in greater detail and show its application to GTL's data in Appendix G, *infra*.

[268] *See* Appx. G, *infra* (discussing the *k*-nearest neighbor approach).

[269] *See 2020 ICS Notice*, 35 FCC Rcd at 8517-18, para. 93. Commenters addressing this proposal were nearly unanimous in rejecting it. Some commenters observe that a 10% decrease would fail to resolve all of the issues presented by GTL's reported data, while others argue this approach suffers fundamental methodological flaws of its own. *See, e.g.*, GTL Godek Report at 20 (contending that the proposed 10% discount lacks an economic basis); Public Interest Parties Comments at 5 (describing the reduction as "necessary but not sufficient"); Securus Comments at 20, 22-23 (criticizing the proposal for conflating financial data with accounting data); Securus Furchtgott-Roth Report at 17-21; Worth Rises Comments at 3-4 (arguing that a 10% decrease was inadequate to resolve all the flaws in GTL's reported data).

[270] Public Interest Parties Brattle Report at 14 n.70 (describing winsorization as "a technique where the outlier values are substituted with the highest value in the distribution without outliers," and citing Bonifacio Llamazares, *An Analysis of Winsorized Weighted Means*, 28 Group Decision and Negotiation 907-33 (2019)).

addressing the dataset before us because it identifies a greater degree of similarity between observations.

92. We also considered removing all of GTL's data from our lower bound calculations, an approach on which the Commission sought comment in the *2020 ICS Notice*.[271] We find this approach too sweeping, however, because it would exclude all of GTL's prisons and larger jails from our analysis. GTL's Second Mandatory Data Collection response includes extensive non-cost information on these facilities, regarding matters such as average daily population and paid minutes of use, that depict the inmate calling services operations of roughly {[ ]} of all prisons and larger jails, or roughly {[ ]} of reported average daily population for those facilities. Excluding this information from our analysis would create a significantly incomplete picture of the industry, resulting in considerably less accurate estimates of industrywide mean contract costs.[272] Additionally, the remaining contract information from GTL's data provides necessary distinguishing characteristics that informed our selection of the nearest neighboring contracts.

93. *Determining Interim Interstate Provider-Related Rate Caps for Prisons and Larger Jails.* The upper bound of the zone of reasonableness for the provider-related rate cap for prisons is $0.133 per minute and the lower bound is $0.0643 per minute. For larger jails, the upper bound is $0.218 per minute and the lower bound is $0.0802 per minute. Based on our analysis of the available information, we find that $0.12 per minute will provide a reasonable interim interstate provider-related rate cap for prisons and that $0.14 per minute will provide a reasonable interim interstate provider-related rate cap for larger jails. Significantly, our analysis confirms that these interim interstate rate caps will allow most, if not all, providers to recover their costs (as reported in their responses to the Second Mandatory Data Collection and allocated among their contracts as described above) of providing interstate calling services to incarcerated people.[273] And, because those fully distributed costs likely overstate the actual costs of providing inmate calling services under any particular contract, we find it unlikely that any provider will be unable to recover its actual costs of providing interstate inmate calling services under any contract. To the extent that there are some small number of situations where a provider cannot recover its actual costs of providing interstate inmate calling services under our interim caps, we adopt a waiver process that will allow us to grant relief from those caps if we find such relief is warranted based on our analysis of data that allows us to more accurately and precisely identify that provider's cost of providing interstate inmate calling services than can be achieved using the data currently before us.

94. A provider-related rate cap component of $0.12 per minute for prisons is $0.02 above the midpoint between the upper and lower bounds of the zone of reasonableness (approximately $0.10). The providers' incentives to overstate costs provide a compelling reason to give less weight to the upper bound estimate. We find that removal of outliers as reflected in the lower bound number based on our statistical approach to be appropriate as a general matter, given the need to measure the central tendency of the data as accurately as possible. We are reluctant to give this adjustment too much weight at this time, however, because we do not know the precise reason why these outlier estimates are so high. Although we also find the adjustment to GTL's costs to be fully justified, we are reluctant to place too much weight on this adjustment because this is an empirical approximation relying on the consistency and validity of the contract data reported by all other firms. After closely examining the imperfect data reported by providers that have an incentive to overstate their costs, and after developing the calculation of both of the upper and lower bounds, we find that an interim provider-related rate component of $0.12 per minute for prisons will allow providers to recover their actual costs of providing inmate calling services at those facilities, and the foregoing reasons counseling less reliance on the upper bound make

[271] *See 2020 ICS Notice*, 35 FCC Rcd at 8518, para. 94 (recognizing that GTL appeared to overstate its inmate calling services costs).

[272] *See* Appx. G, *infra*.

[273] *See* Appx. E, *infra* Part F (showing that under the interim caps, providers will recover their fully distributed reported costs for approximately {[ ]} of prison contracts and {[ ]} of larger jail contracts).

this choice even more conservative, thereby ensuring that the providers will receive reasonable compensation for their services.

95. Likewise, we find that an interim rate cap of $0.14 per minute for larger jails will enable providers to recover their costs of providing interstate inmate calling services. In selecting this value, we assign significant weight to the result from the cost study conducted by Securus's outside consultant. This estimate, suggesting that Securus's cost of serving larger jails is at most {[ ]} per minute, is based on highly disaggregated cost data and a relatively sophisticated set of cost allocation procedures tailored specifically to the business of providing inmate calling services and appears to be consistent with cost-causation principles.[274] This number is the maximum per-minute cost estimate among the estimates Securus's consultant developed for Securus's larger jails, and we find that it provides a cushion large enough for providers to earn at least a normal risk-adjusted rate of return. Further, because there are relatively few providers for larger jails, as compared to the larger number of both large and small providers that serve jails with average daily populations less than 1,000, we would expect a small variance in the true per-minute costs of providing inmate calling services at larger jails, relative to the overall variance. A rate cap of $0.14 per minute provides an even larger cushion, further ensuring that providers will have the opportunity to recover actual costs.

96. A provider-related rate cap component of $0.14 per minute for larger jails is just below the midpoint between the upper and lower bounds of the zone of reasonableness (approximately $0.15), but still well above the lower bound of approximately $0.08. As with prisons, the providers' incentives to overstate their costs provide a compelling reason to give less weight to the upper bound estimate. We again are reluctant to place too much weight on the GTL data adjustment for the reasons discussed regarding prisons. After closely examining the data, we find that an interim provider-related rate component of $0.14 per minute for larger jails will enable the majority of providers to recover their actual costs of providing inmate calling services at those facilities. Further, we note that this $0.02 differential between the rates we select for prisons and larger jails approximates the 22% cost differential shown in the record.[275]

97. As we describe in Appendix E, we find that setting the provider-related rate component at these levels for prisons and larger jails will allow providers at substantially all facilities to recover their reported costs.[276] The responses to the Second Mandatory Data Collection provide data for 129 prisons and 182 larger jails.[277] Following the process outlined in Appendix E, we find that 66 prisons and 15 larger jails reported per-minute costs above the respective interim provider-related rate caps.[278] Looking at these outliers more closely, however, reveals that all but three of these facilities (66 prisons and 12 larger jails) are served by GTL, which lacked the records to accurately determine its costs of providing calling services to incarcerated people.[279] This alone creates doubt as to whether these facilities should be viewed as legitimate outliers, rather than simply illustrations of the issues we observe throughout GTL's reported data.[280] The remaining facilities (three larger jails) all exhibit per-minute costs that exceed their

[274] Securus Cost Study at 1 fig. 1 (identifying the maximum per-minute cost for Securus jails with an average daily population over 1,000 as {[ ]}).

[275] *See, e.g.*, Appx. E, *infra*.

[276] Analysis of contract revenues and underlying contract characteristics also suggests a significant majority of these contracts would be viable at our proposed caps. *See generally* Appx. E, *infra*.

[277] *See generally id.* (reporting the number of facilities of different types reflected in the data).

[278] *See generally id. See also* Securus Comments at 20 (arguing that "the Commission should calculate how many facilities will have contract costs above rate caps and explain why they will not be fully compensated").

[279] *See* Appx. G, *infra*; *supra* paras. 88-89.

per-minute revenues, suggesting that the actual costs of providing inmate calling services to them are lower than our estimates.[281] Finally, we reiterate that to the extent the actual costs of serving a facility exceed the applicable interim rate cap, a provider may request a waiver using the process set forth in this Report and Order.[282]

98. The record supports these interim rate cap choices. The cost study presented by Securus's outside consultant estimates that Securus incurs maximum per-minute costs of {[ ]} to serve prisons and {[ ]} to serve larger jails, exclusive of site commissions.[283] Although we find that these figures are likely overstated,[284] the study's cost estimates suggest that interim provider-related rates caps of $0.12 for prisons and $0.14 for larger jails will provide a cushion large enough for the providers at those facilities to earn at least a normal risk-adjusted rate of return on their capital investment in providing inmate calling services.[285] Although we do not agree with every aspect of this study, we find that a number of factors support its credibility and that it therefore provides valuable supporting evidence that the rate caps we choose here provide an adequate interim allowance for differences among providers and markets, relative to the average inmate calling services costs reflected in the data filed in response to the Second Mandatory Data Collection.[286]

99. Our analysis of the mean per-minute revenues from prisons and larger jails further corroborates our choices. As discussed in Appendix E, our revenue analysis indicates that it will be commercially viable for providers to serve the vast majority of prisons and larger jails under the provider-related rate caps we adopt today.[287] For example, as the Appendix illustrates, approximately 74% of prisons and 65% of larger jails have reported per-minute revenues net of site commissions under those interim caps.[288] Because profit-maximizing firms are unlikely to bid for contracts at which they will operate at a loss, this suggests the interim interstate caps will not undermine providers' profitability.[289] And a large portion of the remaining prisons and larger jails—those with per-minute revenues that are higher than $0.12 and $0.14 per minute, respectively—have allocated per-minute costs less than the applicable interim provider-elated rate caps, which likewise suggests they will remain profitable under

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[280] Repeating this analysis after adjusting GTL's cost data using the *k*-nearest neighbor approach used to set the lower bound shows that all of GTL's facilities would have per-minute costs below the interim interstate provider-related rate caps. *See* Appx. G, *infra*.

[281] *See, e.g.*, Appx. E, *infra*.

[282] As indicated in the *2020 ICS Notice*, "the Commission has permitted inmate calling services providers to file a petition for a waiver if it believed it could not recover its costs under the Commission-adopted rate caps." *2020 ICS Notice*, 35 FCC Rcd at 8523-24, para. 108 (citing *2013 ICS Order*, 28 FCC Rcd at 14153, para. 82); *see 2015 ICS Order*, 30 FCC Rcd at 12871, para. 219. We refine our waiver procedure today. *Infra* Part III.C.5.

[283] *See* Securus Cost Study at 2-4 (discussing source materials and methodologies); Appx. E, *infra* Part F (same).

[284] *See* Appx. E, *infra* Part F.

[285] As the {[ ]} per minute cost has been specifically developed for providers at these largest jails, and there are relatively few of these providers, we would not expect there to be a big variance in the true per-minute costs of providing inmate calling services at these jails. *See generally* Securus Cost Study at 17, fig. 8; Appx. E, *infra* Part E (observing that, using a simple average methodology, Securus calculated costs plus a standard deviation of {[ ]} for its prisons and {[ ]} for its larger jails).

[286] *See generally* Appx. E, *infra* Part E (discussing the abundant rationale in favor of credibility).

[287] *See generally* Appx. E, *infra* Part F (reviewing the revenue analysis).

[288] Revenues net of site commissions are reported revenues minus reported site commission payments.

[289] We expect these revenues to cover costs of service below $0.12 per-minute for prisons and $0.14 per minute for larger jails, because higher costs would make such contracts unprofitable, and providers would have no reason to voluntarily accept such terms. *See* Appx. E, *infra* Part F.

those caps.[290] In total, therefore, our interim rate caps will allow approximately 81% of all prison contracts and approximately 96% of all larger jail contracts to cover the costs the providers reported in response to the Second Mandatory Data Collection.[291] These percentages would be even higher if we were to exclude the providers' costs of providing ancillary services and otherwise rely on the providers' actual, rather than reported, costs.[292] These percentages are also higher if we allow for the increased call minutes that will likely result because our new interim caps will, by lowering prices, increase call volumes.[293] And these cost recovery figures ignore that all costs are likely overstated, such that there is further reason to believe these percentages would be even higher in practice.

4. Accounting for Correctional Facility Costs

100. Based on the record, we adopt additional new rate cap components (the facility-related rate components) reflecting two different types of site commission payments[294]—those required under codified law or regulations and those payments prescribed under negotiated contracts—made to correctional facilities.[295] The *2020 ICS Notice* proposed to permit providers to recover an additional $0.02 per minute for all types and sizes of facilities to account for the costs correctional facilities incur that are directly related to the provision of inmate calling services.[296] We adopt a modified version of that proposal based on record evidence that $0.02 per minute for every facility may not permit recovery of all legitimate facility costs related to inmate calling services, and may not be required at others.[297] For the time being, we decline to adopt defined facility-related rate components for jails with average daily populations below 1,000. Instead, for prisons and larger jails only, we adopt two distinct site commission-related rate components reflecting the different types of site commissions: site commission payments that providers are obligated to pay under formally codified laws or regulations and payments

[290] *See* Appx. E, *infra* Part F (concluding that 89% of the larger jails that present high revenues (greater than $0.14 per minute) have allocated per-minute costs of less than $0.14, and that 27% of high-revenue prisons (greater than $0.12 per minute) have allocated per-minute costs of less than $0.12).

[291] *See generally* Appx. E, *infra*.

[292] *See* Appx. E (observing that "our revenue analysis includes revenues from automated billing and paper billing fees, our cap only applies to per call fees" and that "providers can earn additional revenues through these fees").

[293] See Appx. E, *infra* Part F.

[294] *See* 47 CFR § 64.6000(t) (defining site commissions). Site commission payments are payments made by calling services providers to correctional facilities and broadly encompass any form of monetary payment, in-kind payment requirement, gift, exchange of services or goods, fee, technology allowance, product or the like. They can be expressed in a variety of ways, including as per-call or per-minute charges, a percentage of revenue, or a flat fee. *2015 ICS Order*, 30 FCC Rcd at 12818, para. 117 & n.371.

[295] *See, e.g.*, *GTL v. FCC*, 866 F.3d at 413 (explaining that site commissions can be "mandated by state statute" or "required by state correctional institutions as a condition of doing business with [inmate calling services] providers"); GTL Godek Reply Report at 8 (highlighting that site commissions are "determined by the facilities or by regulations"); GTL Apr. 26, 2021 *Ex Parte* Godek Report at 6 (commenting that site commissions "are determined by one or more of the following conditions: they can be a) set or constrained by regulation, b) set by the facility at some level or within some range, and c) determined as part of the competitive bidding process established by the facility").

[296] *2020 ICS Notice*, 35 FCC Rcd at 8520-23, paras. 99-107.

[297] *See, e.g.*, California State Sheriffs' Association Comments at 2 (cautioning that a one-size-fits-all approach may not allow for consideration of the "many variables" associated with the cost of providing inmate calling services); National Sheriffs' Association Comments at 1 (highlighting that the proposed $0.02 allowance "does not accurately capture the costs for smaller jails"); Securus Comments at 33 (emphasizing that "a 'one-size-fits-all' allowance for site commissions does not apply to the varying needs of each agency for site commissions"); Pay Tel Reply at 11 (explaining that the Commission's proposed $0.02 "flat" recovery across all facilities is at odds with the Commission's prior conclusions regarding the impact of facility size on costs).

that providers agree, by contract, to make.

101. With regard to the former type of site commission, we adopt a legally-mandated facility rate component that reflects payments that providers make to correctional facilities pursuant to federal, state, or local law, regulation, statute, or other rule or law that operates independently of the contracting process between correctional institutions and providers.[298] These mandatory payments take varied forms, including per-call charges[299] or prescribed revenue percentages,[300] and may be imposed on calling service providers by state and local governments through statutes, regulations, or local ordinances. Given the codified nature of these payments, for the purpose of the interim actions we take herein and based on the current record, we recognize them as a cost that providers may recover through rates for interstate and international inmate calling services, consistent with section 276's fair compensation provision.[301] Providers may recover the costs of these payments, without any markup, as a separate component of the total permissible interstate and international rate caps we adopt today.

102. Next, we adopt a contractually-prescribed facility rate component that permits providers to recover, as a component of their total per-minute interstate and international calling rates for prisons and larger jails, that portion of such site commission payments that we determine for the purpose of this interim action is reasonably related to the facility's cost of enabling inmate calling services at that facility. Site commission payments prescribed under negotiated contracts impose contractual obligations on the provider and, in our judgment, on the current record, reflect not only correctional officials' discretion as to whether to request site commission payments as part of requests for proposals,[302] and if so in what form and amount,[303] but also providers' voluntary decisions to offer payments to facilities that are mutually beneficial[304] in the course of the bidding and subsequent contracting process.[305] Providers may recover up

[298] *See, e.g.*, GTL Comments at 28-30 (providing examples of state and local site commission requirements); Securus Comments at 32-33 (contrasting jurisdictions prohibiting site commissions with those that require them).

[299] *See, e.g.*, Tenn. Code Ann. § 41-7-104 (West 2013) (requiring a fee of $0.10 for each completed inmate calling services call).

[300] *See, e.g.*, Tex. Gov't Code Ann. § 495.027(a) (West 2021) (requiring a commission amounting to 40% of gross revenue).

[301] *GTL v. FCC*, 866 F.3d at 413.

[302] *See* GTL Godek Report at 21 (highlighting that "site commissions . . . are determined through the various competitive processes used in the award of [inmate calling services] contracts"); Pay Tel Comments at 10 (explaining that "facilities generally impose these . . . required costs on [inmate calling services] providers as a condition precedent to the providers' ability to offer [inmate calling services] that flows through the site-commission-imposing correctional facility"); Securus Comments at 26-27.

[303] Where a law, rule, or regulation merely allows a correctional facility to collect site commissions, or requires a correctional facility to collect some amount of site commission payment but does not prescribe any specific amount, site commissions arising from this type of law would also fall into the category of a site commission payment prescribed by contract, because the correctional facilities and providers can negotiate, in their discretion, regarding how much the providers will pay in site commissions. *See, e.g.*, Wis. Stat. Ann. § 301.105 (West 2020) ("The department shall collect moneys for commissions from telephone companies for contracts to provide telephone services to inmates."); Or. Rev. Stat. Ann. § 169.681 (West 2020) (limiting site commission fees to $0.05 per minute or less).

[304] *See, e.g.*, Agreement for the Installation, Configuration and Maintenance of an Inmate Telephone System Between Department of Correction, City of New York, and Securus at 14, 19, paras. 3.51, 9.7 (July 16, 2014), https://www.prisonphonejustice.org/media/publications/2019_Amended_NYC_Securus_Contract.pdf (Securus-New York City Contract) (City of New York contract with Securus, providing for a revenue share model of 81.1% with minimum $5 million guarantee in exchange for Securus's exclusive right to serve the City's correctional facilities not only for interstate and intrastate phone calls but also for "messaging," "email," and all other "existing and future inmate related communications"). This contract was subsequently amended (Amendment 3, executed May 1, 2019) to exclude all revenue-share payments, among other changes, resulting from changes in the applicable local law. *See* New York City Council, Local Law No. 2018/144 (codified at N.Y.C. Admin. Code § 9-154 (West 2021)).

to $0.02 per minute to account for these facility costs.

103. To promote increased transparency regarding the total rates charged to consumers of inmate calling services, we require providers to clearly label a legally-mandated facility rate component or a contractually-prescribed facility rate component, as applicable, in the rates and charges portion of an calling services consumer's bill, including disclosing the source of such provider's obligation to pay that facility-related rate component.[306]

104. Finally, to avoid any confusion, we reiterate that nothing in this section, or any other section of this Report and Order, is intended to result in a higher permissible *total* rate cap for any interstate call from any size facility than the $0.21 that existed for interstate debit and prepaid calls before today and that continues to apply to all providers for all types of calls from jail facilities with average daily population below 1,000.[307] During the eight-year period that providers have been subject to the $0.21 rate cap for all facilities, they have had the ability to avail themselves of a waiver process if they deemed that rate cap to be insufficient to enable them to recover their inmate calling services costs. With the exception of a single temporary waiver request relating specifically to the interim rate caps dating back to 2014, no other provider has sought a waiver of the $0.21 interstate rate cap claiming that cap fails to permit recovery of that provider's costs at any size facility.[308] The absence of further waiver requests over the past eight years leads us to conclude that $0.21 is sufficient for providers to recover their costs,

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[305] The fact that a state law specifically permits certain correctional facilities to recover site commissions from providers but does not mandate such payments does not change the nature of these discretionary payments. *See, e.g.*, Or. Rev. Stat. Ann. § 169.681 (West 2020) (limiting site commission fees to $0.05 per minute or less); Securus Comments at 28 (describing Cal. Penal Code § 4025(d) (West 2021) which specifically allows sheriffs to receive commission payments from inmate calling services providers); *see also, e.g.*, Response of GTL to Request for Information and Documents Regarding GTL's Inmate Calling Services Costs, WC Docket No. 12-375, Attach. (Documents – GTL Response to Request #14) (filed Sept. 14, 2020) {[

]}; Response of GTL to Request for Information and Documents Regarding GTL's Inmate Calling Services Costs, WC Docket No. 12-375, Attach. (Documents – GTL Response to Request #14) (filed Sept. 14, 2020) {[

]}.

[306] Providers that make no site commission payments (and thus are not permitted to pass any facility-related rate component on to consumers) are not required to include a facility-related rate component line item on end user bills.

[307] *See supra* Part III.C.1.

[308] *See Rates for Interstate Inmate Calling Services*; *Pay Tel Communications, Inc.'s Petition for Waiver of Interim Interstate ICS Rates*, WC Docket No. 12-375, Order, 29 FCC Rcd 1302 (WCB 2014). We note that Securus filed a general "me too" waiver request in 2014 asking the Commission to extend Pay Tel's limited waiver to all other providers serving the same size jails. *See Rates for Interstate Inmate Calling Services*; *Securus Technologies, Inc., Petition to Expand Pay Tel Waiver*; *Securus Technologies, Inc., Petition for Leave to Add Fee for Voice Biometrics Technology*, WC Docket No. 12-375, Order, 29 FCC Rcd 5973 (WCB 2014) (*Securus Waiver Order*). The Commission denied Securus's waiver request without prejudice as Securus failed to make an adequate showing for a waiver to be granted, and also failed to provide sufficient, or any, cost and revenue data to support its claims. *Securus Waiver Order*, 29 FCC Rcd at 5978, para. 12. In addition, a handful of other waiver requests relating to other sections of the inmate calling services rules have also been filed but these waivers typically related to timeframes within which new regulations associated with ancillary services reforms became effective. *See, e.g.*, GTL Petition for Waiver of Deadline to Implement Rule 64.6110 for Prisons, WC Docket No. 12-375 (filed Jan. 5, 2016), https://ecfsapi.fcc.gov/file/60001400604.pdf; GTL Petition for Waiver of Deadline to Implement Rule 64.6100(a) for Prisons, WC Docket No. 12-375 (filed Jan. 8, 2016), https://ecfsapi.fcc.gov/file/60001402728.pdf; GTL Petition for Waiver of Deadline to Implement Rules 64.6080 and 64.6090 for Jails, WC Docket No. 12-375 (filed June 1, 2016), https://ecfsapi.fcc.gov/file/60002090309.pdf.

including any costs related to site commission payments. Thus, no provider may assess a provider-related rate component and facility-related rate component that, added together, results in a total interstate rate for any interstate call from any size facility of more than $0.21. Operationally, providers remain free to impose the legally-mandated facility rate component at the level specified by the relevant statute or rule. If the resulting cumulative total rate exceeds $0.21 per minute, providers would need to charge a lower provider-related rate. Based on our understanding and awareness of the various state statutes or rules that underlie legally-mandated facility rate components, we do not expect this to occur, however. Nevertheless, providers that cannot cover their inmate calling services costs under the $0.21 per minute total maximum rate cap may seek a waiver of our interim rate caps.

105. *Background*. The Commission has historically described site commission payments as "a division of locational monopoly profit."[309] Over the past five years, however, the Commission has recognized that site commissions may not always exclusively compensate correctional facilities "for the transfer of their market power over inmate calling services to the inmate calling services provider;" in some instances, site commission payments may serve in part to compensate correctional facilities for costs that the facilities "reasonably incur in the provision of inmate calling services."[310] Although the Commission and the D.C. Circuit each have recognized the distinction between portions of these payments,[311] we agree with commenters that it is "difficult to disentangle which part of the site commission payment goes towards reasonable costs and which portion is due to the transfer of market power."[312]

106. Although the Commission declined to permit the recovery of any portion of site commission payments to account for facility-related costs in the *2015 ICS Order*,[313] the Commission explained that record evidence suggested that if "facilities incurred any legitimate costs in connection with [inmate calling services], those costs would likely amount to no more than one or two cents per billable minute."[314] In 2016, when the Commission reconsidered its decision to categorically exclude site commissions in the *2015 ICS Order*, it concluded that some facilities likely incur costs directly related to the provision of inmate calling services that may amount to more than one or two cents a minute.[315] The Commission therefore increased the rate caps it had adopted in the *2015 ICS Order* to "better ensure that providers are able to receive fair compensation for their services" by adopting an additive to the 2015 rate

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[309] *See, e.g.*, *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, 2562 para. 37 (1999) (*1999 Pay Telephone Order*); Public Interest Parties Comments at 7 n.36; Letter from Cheryl A. Leanza, Policy Advisor, United Church of Christ, OC Inc. & Al Kramer, Senior Fellow, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed Mar. 28, 2021) (UCC and Public Knowledge Mar. 28, 2021, *Ex Parte*) (highlighting that the Commission "rejected that these locational payments could be treated as costs" in the *1999 Pay Telephone Order*).

[310] *See, e.g.*, *2020 ICS Notice*, 35 FCC Rcd at 8520, para. 100; *see also* Public Interest Parties Comments at 7 n.36.

[311] *GTL v. FCC*, 866 F.3d at 414 ("We also leave it to the Commission to assess on remand which portions of site commissions might be directly related to the provision of [inmate calling services] and therefore legitimate, and which are not."); *2013 ICS Order*, 28 FCC Rcd at 14135-36, para. 54 n.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 [inmate calling services] providers to some correctional facilities may, in certain circumstances, reimburse correctional facilities for their costs of providing [inmate calling services]").

[312] Public Interest Parties Brattle Reply Report at 14.

[313] *2015 ICS Order*, 30 FCC Rcd at 12835, para. 139 (leaving the issue of site commissions "to [inmate calling services] providers and facilities to negotiate the amount of any payments from the providers to the facilities, provided that those payments do not drive the provider's rates above the applicable rate cap").

[314] *Id.*

[315] *2016 ICS Reconsideration Order*, 31 FCC Rcd at 9309, para. 17.

caps that differed among facility size.[316] The data and other evidence supporting the 2016 facility-cost additives suggested that per-minute facility costs associated with inmate calling services were higher in smaller facilities than in larger ones, so the Commission adopted a tiered framework for site commission payments based on facilities' average daily populations.[317] These rate tiers mirrored the tiers the Commission had used to establish the permanent rate caps adopted in the *2015 ICS Order*.[318]

107. The D.C. Circuit's 2017 vacatur of the *2015 ICS Order* rate caps in *GTL v. FCC*, based in part on the finding that the Commission's decision to categorically exclude site commission payments from those rate caps was arbitrary and capricious,[319] led the Commission to ask questions in the *2020 ICS Notice* aimed at determining "which portions of site commissions might be directly related to the provision of inmate calling services and therefore legitimate, and which are not."[320] The *2020 ICS Notice* proposed a $0.02 per minute additive based on staff "analysis of the costs correctional facilities incur that are directly related to providing inmate calling services and that the facilities recover from calling service providers as reflected by comparing provider cost data for facilities with and without site commissions."[321] The Commission sought comment on its analysis, including whether it should vary the allowance for site commission payments based on a facility's average daily population.[322] It also sought comment on whether a $0.02 per minute allowance would be adequate to cover the costs that jails with average daily populations less than 1,000 incur in connection with the provision of interstate and international inmate calling services.[323] The Commission asked correctional facilities to "provide detailed information concerning the specific costs they incur in connection with the provision of inmate calling services."[324]

108. *Full Recovery of Site Commissions Is Not Required*. Some providers argue that the Commission must allow for full recovery of all site commission payments because inmate calling services providers "are required to pay site commissions and have no say in the elimination or substantial reduction of such commissions."[325] We disagree.

109. The D.C. Circuit held that, because the Commission acknowledged that some portion of some providers' site commission payments might represent "legitimate" costs of providing inmate calling services, the Commission could not reasonably "categorically exclude[] site commissions and then set the rate caps at below cost."[326] "Ignoring costs that the Commission acknowledges to be legitimate," the court explained, "is implausible."[327] But the court left it to the Commission to determine "*which portions* of site commissions *might be directly related to the provision of ICS and therefore legitimate*, and which

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[316] *Id.* at 9307, para. 12.

[317] *Id.* at 9307, 9311, paras. 12, 22.

[318] *2015 ICS Order*, 30 FCC Rcd at 12787, para. 48.

[319] *GTL v. FCC*, 866 F.3d at 417. Because the revised rate caps adopted on reconsideration in 2016 to provide for the recovery of site commission costs were based on the same methodology the court had vacated in *GTL v. FCC*, the D.C. Circuit also vacated and remanded the *2016 ICS Reconsideration Order*. *2017 Securus*, 2017 U.S. App. LEXIS 26360, at *4-5.

[320] *2020 ICS Notice*, 35 FCC Rcd 8522, para. 103.

[321] *2020 ICS Notice*, 35 FCC Rcd at 8522, para. 103; *see also 2020 ICS Notice*, 35 FCC Rcd at 8572, Appx. H.

[322] *Id.* at 8522, para. 103.

[323] *Id.* para. 104.

[324] *Id.* paras. 103-04.

[325] Securus Comments at 29; *see* GTL Comments at 30; Pay Tel Comments at 8-9.

[326] *GTL v. FCC*, 866 F.3d at 413 (internal quotation marks omitted).

[327] *Id.*

are not."[328]

110. Under section 201(b), the Commission has a duty to ensure that "charges" and "practices" "for and in connection with" interstate and international telecommunications services—including inmate calling services—are not "unjust or unreasonable."[329] As explained, incarcerated people and the people they call have no choice in their telephone service provider.[330] Instead, each correctional facility has a single provider of inmate calling services that operates as a monopolist within that facility. And very often, correctional authorities award the monopoly franchise for inmate calling services based in part on what portion of inmate calling services revenues a provider has offered to share with the facility.[331] Without effective regulation, providers bidding for a facility's monopoly franchise compete to offer the highest site commission payments, which they then recover through correspondingly higher rates charged to incarcerated people and their families.

111. As discussed in greater detail below, in view of these market dynamics, and based on the record, we reject the claim that any and all site commission payments that a provider might elect to offer a correctional facility in the course of contract negotiations for the facility's monopoly franchise are "real, required costs [forced] on [inmate calling services] providers as a condition precedent to the providers' ability to offer [inmate calling services]."[332] That claim is at odds with well-established principles of ratemaking.[333] And the providers' position has no limiting principle. Under their logic, incarcerated people and the people with whom they communicate by telephone may be forced to pay rates for the calling services they use that cover items wholly unrelated to those services.[334] This cannot be reconciled with our statutory duty to ensure that incarcerated people and the people with whom they speak are

[328] *Id.* at 414 (emphasis added); *see also* UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 5 (explaining that the D.C. Circuit's remand "left it open to the Commission, based on a reasoned analysis, to conclude that no portion of the site commissions are part of the legitimate cost of providing the service if that is what the record reveals").

[329] 47 U.S.C. § 201(b).

[330] *See supra* Part III.A.

[331] *See, e.g.*, Human Rights Defense Center Comments at 2 (highlighting that calling service providers "surrendered larger and larger shares of their billed phone rates as kickbacks to the detention facilities that offered them monopoly contracts").

[332] Pay Tel Comments at 10; *see also* GTL Reply at 11 (claiming that site commissions are "a condition of doing business").

[333] *See, e.g.*, *NARUC v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) ("[A] common test for the lawfulness of rates is their connection to the reasonably-incurred costs of providing the regulated service."); *NAACP v. FPC*, 425 U.S. 662, 666-69 (1976) (holding that the Federal Power Commission's statutory authority to "establish 'just and reasonable' rates" gave the agency 'ample authority' to prevent a regulatee from charging consumers for "unnecessary or illegitimate costs" that the regulatee might incur through "racially discriminatory employment practices"); *see also infra* paras. 114-35 (discussing contractually-prescribed and legally-mandated site commissions in the context of the longstanding section 201(b) framework recognizing that just and reasonable rates are focused on recovering prudently incurred investments and expenses that are used and useful in the provision of the regulated services).

[334] *See, e.g.*, Human Rights Defense Center Comments at 3 (explaining that "no one really knows how much these . . . companies spend in kickbacks, criminal bribes, campaign donations, lobbying and other expenses to secure these contracts"); Peter Wagner & Alexi Jones, Prison Policy Initiative, *On Kickbacks and Commissions in the Prison and Jail Phone Market* (Feb. 11 2019), https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions/ (Prison Policy Initiative Site Commissions Briefing) (referencing campaign contributions and payments to "influential sheriff-led associations"); *2015 ICS Order*, 30 FCC Rcd at 12825, para. 127 (explaining that site commissions "fund a wide and disparate range of activities, including general governmental or correctional activities unrelated to the costs of providing [inmate calling services] by either the provider or the facility").

charged "just and reasonable" rates for inmate calling services.[335]

112. Neither *GTL v. FCC* nor section 276 of the Act compels a different conclusion. As we have observed, and as the court acknowledged in *GTL v. FCC*, the Commission is entitled "to assess on remand which portions of site commissions might be directly related to the provision of [inmate calling services] and therefore legitimate, and which are not."[336] And "fair" compensation for providers of inmate calling services, under section 276, does not mean that providers must be able to recover, through rates for interstate and international inmate calling services, revenue-sharing payments that they agree voluntarily to make to encourage a correctional facility to select them as the monopoly franchise holder for inmate calling services (both interstate/international and intrastate) and often other nonregulated services, too.[337]

113. On the present record, we cannot conclude that Commission precedent requires that we treat site commissions *solely* as a division of locational monopoly profits none of which recoverable through rates, as the United Church of Christ and Public Knowledge urge.[338] The United Church of Christ

[335] The claim that any and all site commission payments are costs reasonably related to the provision of interstate and international inmate calling services is particularly implausible with respect to future contracts. At least where site commissions are not required under formally codified laws or regulations, providers of inmate calling services cannot reasonably contend that they are bound to offer, or agree to pay, site commissions that are uneconomical for them on a going forward basis. The record before us suggests that if, in the wake of this Report and Order, providers of inmate calling services should offer to pay site commissions at levels higher than they can recover through interstate and international inmate calling services rates, that is because they expect to profit from obtaining the franchise at a given facility in other ways (e.g., by recovering the cost of the site commission payments they offer through intrastate inmate calling services rates or through revenue generated by providing other, nonregulated services). *See, e.g.*, Public Interest Parties July 29, 2020, *Ex Parte* at 5 (discussing the bundling of products and services); Prison Policy Initiative Site Commissions Briefing (alleging that providers make money by "bundling other profitable services into the contract, and sharing none of this additional revenue with the facilities"); Letter from Stephen Raher, Pro Bono Counsel, Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed Mar. 23, 2021) (Prison Policy Initiative Mar. 23, 2021, *Ex Parte*) (providing evidence that inmate calling services providers bundle voice service with other nonregulated services). Even with respect to existing contracts, we disagree that any and all site commissions that a provider has agreed to pay are costs reasonably related to the provision of interstate and international inmate calling services. As we discuss above, *see supra* Part II, the Commission's proceeding on how to regulate rates for interstate inmate calling services has been underway for many years. Throughout this period, providers have understood that the Commission might seek to bar the recovery of some or all site commissions through interstate rates. *See 2014 ICS Notice*, 29 FCC Rcd at 13187, para. 37. Under the circumstances, whatever the providers offered to pay, they offered at their own risk. *See infra* paras. 116-22.

[336] *GTL v. FCC*, 866 F.3d at 414; *see also id.* at 425 (Pillard, J., dissenting) (highlighting that "the majority invites the FCC to determine whether 'some portions of site commissions' are illegitimate and non-compensable"). Due to the D.C. Circuit's remand on the issue of site commissions, we decline NCIC's recommendation that the Commission simply "not disturb site commissions." *See* Letter from Glenn S. Richards & Lee G. Petro, Counsel for NCIC, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Apr. 22, 2021). To leave the issue of site commissions untouched by our actions today would be contrary to our mandate to ensure just and reasonable rates under section 201(b) of the Act.

[337] *See 2002 Pay Telephone Order*, 17 FCC Rcd at 3255-56, para. 18 (explaining that compensation is fair if each call "recovers at least its incremental costs, and no one service [(e.g., interstate calling services)] recovers more than its stand-alone cost"); UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 7 ("There was no intent that the Commission make sure that every particular call was compensated at or above its cost."); c*f.* Public Interest Parties Reply at 13 (explaining that the allowance for site commissions "allows for a reasonable *portion* of the cost of a site commission to be compensated on a per-call basis" under section 276 of the Act) (emphasis added).

[338] UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 1-2. *See also* Letter from Cheryl A. Leanza, Policy Advisor, United Church of Christ, Office of Communications Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Apr. 26, 2021) (UCC Apr. 26, 2021 *Ex Parte*) (arguing that "site commission

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and Public Knowledge rely on the Commission's conclusion in the *1999 Pay Telephone Order* that site commissions "should be treated as a form of profit rather than a cost."[339] The Commission reasoned that site commission payments are not costs because the ability to offer a site commission payment occurs "only when a particular payphone location generates a number of calls that exceeds the break-even number of calls" thereby producing "additional profit" that can be paid to the location owner.[340] As explained above, while the Commission has *historically* viewed site commissions as a division of monopoly profits, it took a different view in later decisions.[341] For example, in the *1999 Pay Telephone Order* the Commission reasoned that site commission payments are not costs because the ability to offer a site commission payment occurs "only when a particular payphone location generates a number of calls that exceeds the break-even number of calls" thereby producing "additional profit" that can be paid to the location owner.[342] The *1999 Pay Telephone Order* also expressed confidence that providers reasonably could expect there to be locations where they would be allowed to operate payphones without paying locational rent.[343] On the current record, we are not persuaded that we can apply those conclusions regarding locational rents from the traditional payphone context at the time of the *1999 Pay Telephone Order* to site commission payments in the inmate calling service context today given their tension with the Commission's views regarding the recoverability of certain correctional facility costs in the *2016 ICS Reconsideration Order*,[344] as well as the D.C. Circuit's rejection of the categorical exclusion of site commission payments from recovery in inmate calling service rates at issue in *GTL v. FCC*.[345] Thus, while we conclude that full recovery of site commissions is not required, we cannot conclude on the current record that no recovery of site commissions is justified.[346]

114. *Legally-Mandated vs. Contractually-Prescribed Site Commission Requirements.* On the record now before us, we see a meaningful difference between site commission payments in an amount that is prescribed under formally codified laws or regulations and other site commission payments that ultimately are embodied in contracts with correctional facilities or systems. We draw this distinction based on an updated, more nuanced analysis of the marketplace circumstances that result in site commission payments, viewed through the framework for cost recovery under section 201(b) of the Act.

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payments are not mandated by either federal law or court precedent and that, in fact, the FCC precedent requires the opposite").

[339] UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 1-2; *1999 Pay Telephone Order*, 14 FCC Rcd at 2562, para. 37 n.72.

[340] *1999 Pay Telephone Order*, 14 FCC Rcd at 2562, para. 37 n.72.

[341] *See supra* para. 105. The United Church of Christ and Public Knowledge also argue that we cannot "treat the costs of communications providers for incarcerated people differently from the costs of communications providers via payphones when the economic incentives and factual circumstances are nearly identical and both are governed by the same statute." UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 2. As the Commission has recognized since 2002, however, calling services for the incarcerated are "are economically different than other payphone services." *2002 Pay Telephone Order*, 17 FCC Rcd at 3253, para. 12. Our actions here reflect a reasonable approach to responding to *GTL v. FCC* and Commission precedent in the inmate calling services context in light of the current record.

[342] *1999 Pay Telephone Order*, 14 FCC Rcd at 2562, para. 37 n.72.

[343] *1999 Pay Telephone Order*, 14 FCC Rcd at 2615-16, para. 156.

[344] *2016 ICS Reconsideration Order*, 31 FCC Rcd at 9307, para. 12.

[345] *GTL v. FCC*, 866 F.3d at 413.

[346] For this reason, and on the record before us, we disagree with the Public Interest Parties insofar as they suggest that it may be reasonable to fully exclude site commission payments. *See* Public Interest Parties Reply at 7; Public Interest Parties Brattle Report at 14; *see also* GTL Reply at 10 (arguing that the Public Interest Parties' position on the full exclusion of site commission payments conflicts with section 276 of the Act).

115. In *GTL v. FCC*, the D.C. Circuit rejected the FCC's categorical exclusion of site commission payments from costs to be recovered through inmate calling services rates in the regulations under review.[347] In significant part, the D.C. Circuit reasoned:

> The FCC's suggestion that site commissions "have nothing to do with the provision of [inmate calling services]," Order, 30 FCC Rcd. at 12822 (internal quotation marks omitted), makes no sense in light of the undisputed record in this case. In some instances, commissions are mandated by state statute, Rates for Interstate Inmate Calling Services, 27 FCC Rcd. 16629, 16643 (2012), and in other instances commissions are required by state correctional institutions as a condition of doing business with [inmate calling services] providers, 17 FCC Rcd. at 3252-53. "If agreeing to pay site commissions is a condition precedent to [inmate calling services] providers offering their services, those commissions are 'related to the provision of [inmate calling services].'" Joint Br. for Pet'rs at 21. And it does not matter that the states may use the commissions for purposes unrelated to the activities of correctional facilities. The [inmate calling services] providers who are required to pay the site commissions as a condition of doing business have no control over the funds once they are paid. None of the other reasons offered by the Commission to justify the categorical exclusion of site commissions passes muster.[348]

As we have already discussed when explaining why the Commission is not required under *GTL* to allow the full recovery of any and all site commissions, as some providers contend,[349] the court's statements rejecting "the categorical exclusion of site commissions" from the rate analysis in the *2015 ICS Order* must be interpreted in the context of the court's express recognition that it is "[up] to the Commission to assess on remand which portions of site commissions might be directly related to the provision of [inmate calling services] and therefore legitimate, and which are not."[350] In light of that recognition, we read the analysis excerpted above as turning on the particularities of the *2015 ICS Order* and its underlying record.[351] We now revisit and revise both our understanding and expectations regarding the operation of the inmate calling services marketplace and our approach to evaluating what nexus to interstate and international inmate calling services is required for a cost to warrant recovery through the rates for those services. The predicates for our actions regarding site commission payments in this Report and Order thus differ materially from the predicates underlying the D.C. Circuit's analysis in *GTL v. FCC*.

116. *More Nuanced Understanding of the Inmate Calling Services Marketplace.* With respect to the inmate calling services marketplace, rather than the two basic scenarios of site commission payments identified by the D.C. Circuit in *GTL v. FCC* based on prior Commission decisions, we identify three conceptual scenarios where site commission payments can arise. First, site commission payments at a specified level sometimes are mandated by state statute—or perhaps by some other legal compulsion like a rule or regulation, that operates independently of the inmate calling contracting process.[352] Second,

[347] *GTL v. FCC*, 866 F.3d at 412-14.

[348] *GTL v. FCC*, 866 F.3d at 413.

[349] *See supra* paras. 108-13.

[350] *GTL v. FCC*, 866 F.3d at 414.

[351] *2015 ICS Order*, 30 FCC Rcd at 12824-26, para. 127 (cited in *GTL v. FCC*, 866 F.3d at 413).

[352] *See, e.g.*, *GTL v. FCC*, 866 F.3d at 413; *2012 ICS Notice*, 27 FCC Rcd at 16643, para. 38; Tenn. Code Ann. § 41-7-104 (West 2013) (requiring a fee of $0.10 for each completed inmate calling services call); Tex. Gov't Code Ann. § 495.027(a) (West 2021) (requiring a commission amounting to 40% of gross revenue). As discussed above, some laws permit—but do not require—correctional institutions to collect site commissions, and others require site

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there can be situations where the correctional institution's request for proposal, or the like, asks bidders to agree to pay site commissions at a specified level.[353] Third, in other situations, no state law compels site commission payments and the correctional institution soliciting bids does not request any specific payment (even if it indicates that offers to pay site commissions will influence bid selection).[354]

117. In light of *GTL v. FCC*,[355] we wish to examine how the *2002 Pay Telephone Order*—which recognized the use of competitive bidding to award exclusive access to a single provider, and stated that "[t]o have a realistic chance of winning a contract, the bidder must include an amount to cover commissions paid to the correctional facility"[356]—applies in each of these three conceptual scenarios.

118. In the case of the first scenario—where state law requires site commission payments at a particular level—the *2002 Pay Telephone Order* seems a reasonable description today. Although some parties have advocated that the Commission preempt or otherwise prohibit the payment of site commissions, the Commission has not yet taken that step.[357] Consequently, as the law stands today, it is reasonable to conclude that neither correctional institutions nor providers can avoid the need for site commission payments in this scenario. By that logic, under scenario one, for a provider to gain access to a correctional institution to provide inmate calling services, it must include the site commission payment required by statute or rule.

119. At the other extreme, in the case of the third scenario, we think a more nuanced understanding is warranted. When no site commission payment is legally compelled, and the correctional institution soliciting bids does not request any specific payment, providers are free to seek to serve the correctional institutions without offering site commission payments. On the current record, we conclude that whether a provider would have "a realistic chance of winning a contract"[358] without a site

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commission payments but do not specify any particular level. *See supra* note 303, 305. We do not consider those to fall within category one—instead, they fall within category two and/or three (depending on how the correctional institution approaches the request for proposal process).

[353] *See, e.g.*, Request for Proposals for Inmate Telephone System and Services, Los Angeles County Sheriff's Department, Bid No. RFP 388-SH, Appx. C, Telephone Rates and Payment Schedule at 1-2 (Dec. 31, 2009), http://shq.lasdnews.net/shq/contracts/388-SH/Bulletin_1.pdf (requiring a Minimum Annual Guarantee of $15,000,000 for the Sheriff's department, $59,000 for the probation department, and a county commission rate of a minimum of 53% of total billable amounts for each year of the agreement).

[354] E.g., Request for Proposal # 2019-016, Inmate Telephone Services, Union County Government, 36 (due Oct. 16, 2018), https://www.unioncountync.gov/application/files/4315/3737/2144/2019-016_Inmate_Telephone_Services_RFP_FINAL.pdf (While providing blank spaces for the commission percentage, the request for proposal warns: "Failure to state commissions as a percentage of gross revenue, using only rates and fees that are compliant with all pertinent regulations, will cause Proposer's proposal to be deemed non-compliant and ineligible for contract award."); Request for Proposal, Offender/Client/Resident Phone/Kiosk/Debit-Credit Card System, 88 (due Sept. 10, 2018), https://www.bidnet.com/bneattachments?/525586332.pdf (while not providing a specific amount for the commission, the request for proposal provides: "The State reserves the right to negotiate commission with the Successful Respondent.") (emphasis added); Request for Proposal, Incarcerated Individual Communications Systems (IICS), Iowa Telecommunications and Technology Commission, RFP 19-000, at 11, 27, 37, Attach. 4 at 60 (due Feb. 24, 2020), https://bidopportunities.iowa.gov/Home/GetBidOpportunityDocument/cebe908e-8e04-4831-b3fa-5cef01140258 (explaining that the "current phone system is not a commission based service," that "the current vendor is paid a fixed monthly cost," and that the bidder can suggest a percentage, so that the inmate calling services provider would collect the funds and pay a commission, if the bidder elects to operate that way).

[355] *GTL v. FCC*, 866 F.3d at 413 (citing *2002 Pay Telephone Order*, 17 FCC Rcd at 3252-53, para. 10).

[356] *2002 Pay Telephone Order*, 17 FCC Rcd at 3252, para. 10.

[357] *2016 Reconsideration Order*, 31 FCC Rcd at 9319-20, paras. 35-38.

[358] *2002 Pay Telephone Order*, 17 FCC Rcd at 3252, para. 10; *see also, e.g.*, *2020 ICS Order on Remand*, 35 FCC Rcd at 8491-92, para. 16 (discussing Commission precedent and describing "site commissions" as "payments made

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commission payment turns not on any inherent feature of the provision of inmate calling services, but on competing bidders' discretionary business decisions informed by a range of regulatory and marketplace considerations that could affect those entities' judgments about which strategies will prove more or less profitable.[359] Indeed, it is increasingly clear that when providers offer site commission payments as part of their bids, they do so to gain a benefit for themselves, rather than to satisfy a formal precondition of access to a correctional facility.[360] For one, Securus reports that "it has made commission-free offers a standard offering and attempted to renegotiate contracts with many of its correctional facility partners."[361] In addition, a number of jurisdictions have limited or entirely eliminated site commission payments.[362] This undercuts the view that, from the correctional institution's perspective, site commission payments are inherently necessary to allow a provider access to its facilities.[363] Further, since at least the *2012 ICS Notice* it has been clear that the Commission might deem site commission payments unrecoverable through inmate calling services rates.[364] Because providers have for many years lacked any reasonable certainty of recovering site commissions through end-user rates, we find that providers who agree to pay site commissions in this context either anticipate that they will benefit from doing so even if they cannot recover the cost of commissions through rates,[365] or are willing to assume the risk of nonrecovery through

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by inmate calling services providers to correctional facilities or state authorities that are often required to win the contract for provision of service to a given facility").

[359] *See 2015 ICS Order*, 30 FCC Rcd at 12836, para. 142 (explaining that providers "are in the best position to decide whether to bid to offer service subject to the contours of the request for proposal" and that there is no obligation "to submit bids or to do so at rates that would be insufficient to meet the costs of serving the facility").

[360] *See GTL v. FCC*, 866 F.3d at 416 (noting petitioners—calling service providers, state and local correctional authorities, and correctional facility organizations—argued that "site commissions are 'incentive payments designed to influence a correctional authority's selection of its monopoly service provider'").

[361] Securus Comments at 30.

[362] *See, e.g.*, Prisoners' Legal Services Comments at 5-6 (identifying three Massachusetts counties that eliminated site commissions); Worth Rises Comments at 11 (discussing New York City, N.Y., Code § 9-154, which requires New York City to provide domestic inmate calling services at no cost to incarcerated people or the receiving parties and prevents the city from receiving revenue from inmate calling services); *2015 ICS Order*, 30 FCC Rcd at 12787-88, para. 49 (discussing actions in Ohio, West Virginia, and New Jersey).

[363] Indeed, in San Francisco, incarcerated people and their loved ones pay nothing for their telephone calls—including for site commissions—while the city and GTL have agreed that payment under the contract will not exceed $1,590,616 for the initial term of three years. *See* Agreement between the City and County of San Francisco and GTL, Contract ID 1000017882 at 3, § 3.3.1 (Aug. 1, 2020), https://sfgov.org/financialjustice/sites/default/files/2020-08/GTL%20Contract%20No.%2017882%20-%20FINAL%20SIGNED%2007.30.2020_0.pdf. As one commenter has explained, the "innovative cost structure" embodied in this contract "better reflects the cost of service paid by the vendor to provide access to phones in all county jails." Financial Justice Project Comments at 2. While we do not know whether there is some portion of the overall contract that goes to facility costs, the limitation on the overall payment under the contract undercuts the notion that correctional facilities view site commissions as required in all circumstances. Further, and most importantly, the fact that incarcerated people in San Francisco still have access to calling services strongly suggests that facilities do not require these types of payments to continue to allow calling services.

[364] *2012 ICS Notice*, 27 FCC Rcd at 16632-33, paras. 5, 7 (seeking comment on site commission payments and the possibility of denying recovery for those payments through inmate calling services rates).

[365] *See, e.g.*, *2020 ICS Notice*, 35 FCC Rcd at 8520, para. 100 (recognizing that other than "compensat[ing] correctional facilities for the costs they reasonably incur in the provision of inmate calling services," site commission payments "compensate those facilities for the transfer of their market power over inmate calling services to the inmate calling services provider"); Public Interest Parties Brattle Report at 10 (observing that site commission "payments have two components: they may compensate correctional facilities for the costs they reasonably incur in the provision of inmate calling services to the extent any such costs exist, and they compensate those facilities for the transfer of their market power over inmate calling services to the inmate calling services

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rates for other reasons. Site commission payments in this scenario are thus not reasonably understood as a condition precedent to doing business at the correctional institution.

120. This leaves the second scenario—where state law does not compel site commissions at a specified level, but a correctional institution requests specified site commissions anyway. Superficially, this could seem analogous to the first scenario; upon analysis, we find it more akin to the third scenario. Under our current understanding of the marketplace dynamics at play, we do not agree that providers of inmate calling services can reasonably claim they are compelled to offer to pay site commissions at levels that they cannot recover through interstate and international rates as a precondition of providing interstate and international inmate calling services. Indeed, while facilities may include a site commission component in the request for proposal's description along with other bid "requirements," we understand that most, if not all, requests for proposals include some form of an "exception" provision that enables bidding providers to explain why they are deviating from the request for proposal's bidding specifications or requirements, and that gives the issuer the discretion to accept such bids nonetheless.[366] In this scenario, a correctional institution is under no legal compulsion to insist upon receiving site commission payments, or payments at a particular level. If no provider accedes to the institution's request for such payments, the institution will be constrained to entertain noncompliant offers if it wants the individuals in its custody to have access to interstate and international inmate calling services. Given the well-documented benefits, for communities and correctional institutions alike, in allowing incarcerated people access to inmate calling services,[367] we do not anticipate that correctional facilities would forgo making

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provider."); Public Interest Parties Brattle Reply Report at 14 (similar, and further observing that "[w]hether or not any providers possess market power in the market for [inmate calling services], *all* providers have market power from the exclusivity of all [inmate calling services] contracts"); Prisoners' Legal Services Comments at 5 n.17 (In Bristol, Massachusetts, Securus must provide the county with a $100,000 per year "technology grant" that is "'for the exclusive right to provide inmate telephone services.'" (citation omitted)); Securus-New York City Contract at 14, 31, paras. 3.51, 9.7 (City of New York contract with Securus, providing for a revenue share model of 81.1% with a minimum $5 million guarantee in exchange for Securus's exclusive right to serve the City's correctional facilities).

[366] *See, e.g.*, Request for Proposal, Addendum No. 1, Inmate Telephone & Video Visitation Services, County of Fresno, at 7 (July 24, 2014), http://www2.co.fresno.ca.us/0440/BidDocuments/915-5281/915-5281%20Add%201.pdf (stating that the county wants the current commission rate of 56%, but "would consider a different rate if services/hardware levels are increased"); Request for Proposal, Comprehensive Inmate Communications Services, Alabama Department of Corrections, RFP 2018-05, at 70, 75 (Nov. 27, 2018), http://doc.state.al.us/images/RFP/RFP%202015-05%20Final.pdf (explaining that the Alabama Department of Corrections "currently receives an average monthly . . . revenue share of between $300,000.00 and $350,000.00," that the award may be made on the basis of cost alone or on the basis of quality alone, and that bids may be rejected in the best interest of the state); *see also* Request for Proposal (RFP) No. 1790-16474 for Corrections Communication System, Office of the Chief Procurement Officer, Cook County Government, at 17, 27, paras. 6.1, 8.17 (June 23, 2017), https://www.prisonphonejustice.org/2017/IL/il-cook-county-rfp-2017/ (an example of a general exception provision providing discretion by the reviewers to consider bids that do not contain all the requirements and providing for an explanation of exceptions to specifications and general conditions). While we do not have comprehensive visibility into the requirements of all requests for proposals industry wide, the presence of the "exception" language in each of the foregoing examples persuades us that such language is likely to be representative of requests for proposals generally.

[367] *Supra* Part I; GTL Comments at 2 nn.3-4 (discussing the recidivism-reducing effect of inmate calling services on preparing incarcerated people to rejoin society); Prisoners' Legal Services Massachusetts Background Sheet at 1; Verizon Comments at 3; Episcopal Church Reply at 2; *see also* Council of Economic Advisors, Returns on Investments in Recidivism-Reducing Programs, at 3 (May 2018), https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/05/Returns-on-Investments-in-Recidivism-Reducing-Programs.pdf; U.S. Government Accountability Office, Child Welfare: More Information and Collaboration Could Promote Ties Between Foster Care Children and Their Incarcerated Parents, at 11 (Sept. 2011), https://www.gao.gov/assets/590/585386.pdf; Nicholas Zill, *Better Prospects, Lower Costs: The Case for Increasing Foster Care Adoption*, at 3 (May 2011), https://web.archive.org/
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interstate and international inmate calling services available merely because providers decline to pay site commissions (or to pay them at the facilities' desired levels)—at least insofar as facilities do not incur financial losses in making those services available. Consistent with this view, we note that, in the past, both providers and other advocates have recommended that the Commission restrict site commission payments, without manifesting concerns that the result would be that correctional institutions would eliminate or substantially limit communications services for incarcerated people, particularly so long as correctional institutions remained able to recover the otherwise-uncompensated costs (if any) they themselves incur to enable the provision of those communications services.[368] Such restrictions or denials based on a lack of site commission payments above and beyond the level needed for correctional institutions to recover any costs they incur in making inmate calling services available also could have legal implications that make them unlikely.[369]

121. Thus, although it seems prudent, for interim purposes on the present record, to anticipate that correctional institutions will insist on site commissions at the level that enables them to recover any costs they incur in making inmate calling services available,[370] we find no basis to assume that they would insist on site commission payments above that level, absent voluntary action by providers to offer such site commission payments. For one, providers can anticipate that correctional institutions will not formally insist on site commission payments above the level required to cover the institutions' own costs if the alternative is to go without inmate calling services (and all the other services typically offered by providers) at the facility. To the extent that providers nonetheless offer site commissions above that level, we regard that as a marketplace choice different in kind from the scenario where site commissions at a given level are required by a statute or rule. Separately, we reach the same conclusion when considering the broader context in which calling service providers bid. In a world in which providers of interstate and international inmate calling services bid to supply solely those services—unbundled from intrastate inmate calling services, email, and messaging services, and other services that the record suggests that

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web/20151005185803/https:/www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf.

[368] *See, e.g.*, *2015 ICS Order*, 30 FCC Rcd at 12824-26, para. 127 (discussing advocacy favoring a prohibition on site commission payments and observing that of those opposed to such action, "many . . . appear to be concerned mostly with ensuring that facilities can recover costs they incur in allowing access to [inmate calling services]"); *2016 ICS Reconsideration Order*, 31 FCC Rcd at 9319-20, paras. 36-37 & n.146 (discussing advocacy favoring a prohibition on site commission payments); *2016 ICS Reconsideration Order*, 31 FCC Rcd at 9319-20, para. 37 (quoting concerns from NCIC that "prohibiting or capping site commissions . . . will lead to a reduction in inmate access" if the restrictions "will result in facilities being unable to recover their [inmate calling services]-related costs").

[369] *See, e.g.*, *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) ("Although prisoners have a First Amendment right to telephone access, this right is subject to reasonable limitations arising from the legitimate penological and administrative interests of the prison system."); *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) (finding that "federal court opinions have previously held that persons incarcerated in penal institutions retain their First Amendment rights to communicate with family and friends, and have recognized that 'there is no legitimate governmental purpose to be attained by not allowing reasonable access to the telephone," although "an inmate 'has no right to unlimited telephone use'") (internal citations omitted); *Benzel v. Grammer*, 869 F.2d 1105, 1108 (8th Cir. 1989) ("Although in some instances prison inmates may have a right to use the telephone for communication with relatives and friends, prison officials may restrict that right in a reasonable manner, 'subject to rational limitations in the face of legitimate security interest[s] of the penal institution.'") (internal citations omitted). *But see, e.g.*, *Arsberry v. Illinois*, 244 F.3d 558, 564-65 (7th Cir. 2001) ("Not to allow [prisoners] access to a telephone might be questionable on other grounds, but to suppose that it 'would infringe the First Amendment would be doctrinaire in the extreme.'") (internal citations omitted).

[370] Where correctional institutions have such costs, we would expect that their requests for proposals would formally request site commission payments of at least that level, putting them in scenario two, rather than scenario three.

providers in fact bid to supply alongside interstate and international calling services[371]—providers would not offer to pay site commissions that they could not recover through rates, and facilities (at least so long as they were recovering their own costs) would not insist upon receiving such payments. Even if a request for proposal stated that a specific site commission was required from any prospective bidder, providers would know that—without any formally codified legal mandate to demand site commissions—the correctional institution responsible for the request for proposal would not ultimately be able to demand site commissions that no provider would be able to recover through rates. Thus, if providers offer site commissions at levels that are not recoverable under the Commission's interstate and international rate caps, we believe that they do so as a matter of their own business judgment—as discussed above under the third scenario. As with the third scenario, simplistic labels do not adequately convey the full marketplace context necessary to an understanding of site commissions in the second scenario. Consequently, we do not regard site commissions under the second scenario as a condition precedent of doing business at correctional institutions—at least above the level required for institutions to recover of any costs they incur in making inmate calling services available.

122. In sum, with respect to scenarios two and three discussed above, we reject any claim that site commission payments are somehow 'required,' or determined by the correctional institution: we find on this record that providers offer such payments voluntarily, in their own business judgment.[372] Whereas some commenters attempt to analogize site commissions of this kind to payments that landowners demand in exchange for granting access to rights-of-way or the like,[373] we conclude that, at most, inmate calling providers appear concerned about a collective action problem that makes providers, as a group, reluctant to limit or omit site commission payments in their bids for fear that competitors fail to do so, and that correctional institutions will select competitors that do offer site commissions (or offer higher site commissions) instead. A collective action problem of that kind is not sufficient to require that we allow full recovery of site commission payments through end-user rates.

123. *Revisions in the Approach to Evaluating Cost Recovery.* In evaluating this more nuanced understanding of the operation of various types of site commission payments in the inmate calling services marketplace, we consider which costs reflected in site commission payments are so related to the provision of inmate calling services that they should be recoverable, at the present time, through interstate and international inmate calling services rates under section 201(b) of the Act and relevant precedent.[374] Updating our approach to cost recovery in this manner accounts for the *GTL v. FCC* decision and the legal approach the Commission set out in the *2020 ICS Notice*.

124. Prior to the *GTL v. FCC* decision, the Commission evaluated cost recovery in a manner

[371] *See, e.g.*, Securus-New York City Contract at 14, 19, paras. 3.51, 9.7 (giving Securus the exclusive right to provide interstate and intrastate telephone service as well as other nonregulated services such as messaging and email); Prison Policy Initiative Mar. 23, 2021, *Ex Parte* at 1, Attach. (explaining that 12 of 13 California jurisdictions analyzed by the Prison Policy Initiative in connection with a California Public Utilities Commission proceeding required voice service to be bundled with other services, including video calling).

[372] *See, e.g.*, NCIC Comments at 5; Pay Tel Comments at 10-11; Securus Comments at 25-30; GTL Godek Reply Report at 8, para. 20.

[373] *See, e.g.*, Securus Comments at 29-30.

[374] We thus reject as inapposite attempts to rely by analogy on what the Commission has done in other contexts under different statutory schemes. *See, e.g.*, *Implementation of Sections of the Cable Television and Consumer Protection and Competition Act of 1992*; *Rate Regulation*, MM Docket No. 92-266, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 FCC Rcd 1164, 1217, 1219-20, paras. 98, 101-02 (1993) (*1993 Cable Television Consumer Protections Act Order*) (explaining how the evaluation of recovery of the cost of franchise flows from the requirements of the Cable Act of 1992); *see also 1993 Cable Television Consumer Protections Act Order*, 9 FCC Rcd at 1211-12, para. 90 (rejecting telephone company arguments that the approach to cost recovery for cable operators should be the same as that used for common carriers subject to price cap regulation).

that sought to effectuate its theory of legal authority, which relied on the combination of sections 201(b) and 276(b)(1) of the Act.[375] The Commission described its general approach to inmate calling services cost recovery in the *2013 ICS Order*, which "conclude[d] that only costs that are reasonably and directly related to the provision of [inmate calling services], including a reasonable share of common costs, are recoverable through [inmate calling services] rates consistent with sections 201(b) and 276(b)(1)."[376] Beyond discussing illustrative examples, the Commission did not otherwise elaborate on the framework for evaluating what costs would or would not be recoverable. Applying that approach in the order under review in *GTL v. FCC*, the Commission concluded that "the site commissions [inmate calling services] providers pay to some correctional facilities are not reasonably related to the provision of [inmate calling services] and should not be considered in determining fair compensation for [inmate calling services] calls," going on to quote one party as stating "that site commissions often 'have nothing to do with the provision' of [inmate calling services]."[377]

125. In light of the *GTL v. FCC* decision, it is necessary to update and more thoroughly explain our approach to evaluating cost recovery. In the *2020 ICS Notice*, the Commission did not propose revisiting whether section 276(b)(1) represented a grant of regulatory authority for the Commission to prevent excessive inmate calling services rates.[378] Rather, the Commission proceeded based on its authority under section 201(b).[379] In the specific context of whether and to what extent site commission payments should be recoverable costs in interstate and international inmate calling services rates, the Commission sought comment on whether particular approaches would "result in unjust and unreasonably high rates for incarcerated people and their loved ones to stay connected,"[380] consistent with the "just and reasonable" standard in section 201(b) of the Act.[381]

126. Given our focus on applying our section 201(b) authority, it makes sense to evaluate cost recovery—otherwise described as an evaluation of whether the costs are directly and reasonably related to the provision of inmate calling services—under the longstanding principles the Commission has relied upon when implementing section 201(b) in the past. Under this framework, just and reasonable rates are focused on recovering prudently incurred investments and expenses that are used and useful in the provision of the regulated service for which rates are being set.[382] In applying this framework, the Commission considers whether the investment or expense "promotes customer benefits, or is primarily for the benefit of the carrier."[383] The Commission not only has applied this in the context of carriers

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[375] *See, e.g.*, *2013 ICS Order*, 28 FCC Rcd at 14133-37, paras. 50-53, 55.

[376] *2013 ICS Order*, 28 FCC Rcd at 14134-35, para. 53.

[377] *2015 ICS Order*, 30 FCC Rcd at 12821-22, para. 123 (quoting Letter from Andrew D. Lipman, Morgan, Lewis, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 9 (filed Apr. 8, 2015)).

[378] *2020 ICS Notice*, 35 FCC Rcd at 8525-26, paras. 112-15 (discussing the role of section 276 in the Commission's analysis).

[379] *See, e.g.*, *2020 ICS Order on Remand*, 35 FCC Rcd at 8486-87, paras. 4, 6; *2020 ICS Notice*, 35 FCC Rcd at 8509, 8529-30, paras. 68, 123-24.

[380] *2020 ICS Notice*, 35 FCC Rcd at 8520, para. 101.

[381] 47 U.S.C. § 201(b).

[382] *See, e.g.*, *Sandwich Isles Communications, Inc.*, WC Docket No. 10-90, Order on Reconsideration, 34 FCC Rcd 577, 580, para. 7 (2019) (*Sandwich Isles Reconsideration Order*) (discussing the standard and citing precedent such as *AT&T Phase II Order*, 64 F.C.C.2d at 38, paras. 111-13 and *AT&T Communications Revisions to Tariff F.C.C. Nos. 1, 2, 11, 13, and 14 Application for Review*, CC Docket No. 87-611, Memorandum Opinion and Order, 5 FCC Rcd 5693, 5695, para. 17 (1990) (*1990 AT&T Tariff Investigation Order*)).

[383] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 17997 n.47 (2007); *see also, e.g.*, *1990 AT&T Tariff Investigation Order*, 5 FCC Rcd at 5695, para. 17.

operating under rate-of-return context, but rates set on that basis also were used as the foundation for price caps.[384]

127. *Contractually-Prescribed Site Commission Payments*. Given the regulatory backdrop and the state of the record here, we conclude that contractually-prescribed site commission payments that simply compensate a correctional institution for the costs (if any) an institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people, can, at least at this time, be considered a prudent expense the provider incurs, at least as long as the Commission continues to permit providers of interstate and international inmate calling services to continue to make site commission payments. In *GTL* the court faulted the Commission's "categorical exclusion of site commissions from the calculus used to set [inmate calling services] rate caps,"[385] and even the *2016 ICS Reconsideration Order* found that "it is reasonable for [correctional] facilities to expect providers to compensate them for those costs[]" the facilities incur to enable the provision of inmate calling services.[386] Against that backdrop, the record here does not persuade us to reach a contrary conclusion in our analysis under section 201(b). In light of the regulatory backdrop and current state of the record, we likewise find that contractually-prescribed site commission payments that simply compensate a correctional institution for costs an institution incurs to enable access for incarcerated people to interstate and international inmate calling services can, at least at this time, be considered used and useful in the provision of interstate and international inmate calling services. In the *2016 ICS Reconsideration Order* the Commission found that "some facilities likely incur costs that are directly related to the provision of [inmate calling services],"[387] and determined that "it is reasonable for those facilities to expect [inmate calling services] providers to compensate them for those costs . . . [as] a legitimate cost of [inmate calling services] that should be accounted for in [the] rate cap calculations."[388] The current record here again does not persuade us to reach a contrary conclusion in our analysis under section 201(b). While a different record might persuade us to reach a different conclusion in the future, under this record we will treat such payments as prudently incurred expenses used and useful in the provision of interstate and international inmate calling services.

128. By contrast, we find that contractually-prescribed site commission payments do not warrant recovery insofar as they exceed the level needed to compensate a correctional institution for the costs (if any) an institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people. First, we conclude that such expenses are not prudently incurred. Under Commission precedent, expenses are imprudent if they are excessive.[389] We find that to be the case here. As demonstrated by our marketplace analysis above, we are not persuaded that a correctional institution would decline to make inmate calling services available to its incarcerated people absent contractually-prescribed site commission payments above and beyond any amount necessary to recover the institution's costs to enable inmate calling services to be provided to its incarcerated people. That alone persuades us that such payments are excessive. Separately, we also conclude that the imprudence of such expenses is confirmed by the ongoing regulatory scrutiny and questions about recovery through interstate inmate calling services rates that have surrounded site commission payments since the *2012 ICS*

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[384] *See, e.g.*, *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6816, 6823, paras. 246, 301 (1990) (*LEC Price Cap Order*); *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3092, para. 436 (1989).

[385] *GTL v. FCC*, 866 F.3d at 413.

[386] *2016 ICS Reconsideration Order*, 31 FCC Rcd at 9307, para. 12.

[387] *Id.*

[388] *Id.*

[389] *See, e.g.*, *Sandwich Isles Reconsideration Order*, 34 FCC Rcd at 580, para. 7; *1990 AT&T Tariff Investigation Order*, 5 FCC Rcd at 5695, para. 17; *AT&T Phase II Order*, 64 F.C.C.2d at 38, para. 112.

Notice. This further bolsters our conclusion that such site commission payments are imprudent.

129. As an independent, alternative basis for rejecting recovery through interstate and international inmate calling services rates, we find that contractually-prescribed site commission payments, insofar as they exceed the level needed to compensate a correctional institution for the costs (if any) an institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people, are not used and useful in the provision of interstate and international inmate calling services. The used and useful concept is designed, in part, based on the principle that regulated entities "must be compensated for the use of their property in providing service to the public."[390] "Equally central to the used and useful concept, however, is the equitable principle that the ratepayers may not fairly be forced to pay a return except on investment which can be shown directly to benefit them."[391] And it is that element of the used and useful analysis that we find dispositive here. Under our marketplace analysis of contractually-prescribed site commission payments, we are unpersuaded that site commission payments above the level needed to compensate a correctional institution for costs the institution reasonably incurs to make interstate and international inmate calling services available are required to ensure that incarcerated people have access to those services. Instead, we conclude that such payments are a means (sometimes the sole or at least primary means) by which a given provider seeks to overcome its competitors to become the exclusive provider of multiple services, including nonregulated services, at a correctional facility. And the record does not reveal that correctional institutions, in contracting with providers that offer comparatively higher contractually-prescribed site commission payments, are somehow benefitting customers of interstate and international inmate calling services as compared to the selection of some other provider. Rather, we conclude here that given the anomalous nature of the inmate calling services marketplace, the primary benefits flow to the chosen provider—which overcame its competitors and now has the exclusive ability to serve the correctional facility—and the correctional facility itself (or the state or local government more generally), which can avail itself of the revenue stream such site commission payments provide, all to the detriment of interstate and international inmate calling services customers.

130. Where site commissions of a particular level are not required under formally codified

[390] *AT&T Phase II Order*, 64 F.C.C.2d at 38, para. 112. We do not view site commission payments—whatever their origin—as involving the use of provider property and investment in a manner analogous to the circumstances addressed in our provider-based rate caps. As a result, even for those site commission payments that we find recoverable through interstate and international inmate calling services rate caps under our interim rules, we are not persuaded that we should allow more than a pass-through and instead should go further and provide for providers to make a profit on those site commission payments. Viewed one way, the site commission payments that we find permissible to recover are akin to exogenous costs—"costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers"—which, in the event of cost increases, result in upward adjustment of price caps without guaranteeing carriers profit on those exogenous costs. *LEC Price Cap Order*, 5 FCC Rcd at 6807, para. 166. Our permitted recovery of certain site commission payments through interstate and international inmate calling services charges could be viewed as an analogous adjustment to the rate cap we set for the provider-specific costs. Independently of that precedent, we separately justify our decision as a matter of the flexibility provided by the "just and reasonable" framework of section 201(b) of the Act under the particular circumstances here. Specifically, we find it likely that setting providers' interstate and international rates in a manner that provides for a profit on the providers' site commission payments is likely to exacerbate the already-perverse incentives of providers and correctional institutions (as well as state or local governments mandating site commission payments at specified levels) to increase the magnitude of site commission payments to the ultimate detriment of customers of interstate and international inmate calling services. By contrast, we are not persuaded that allowing more than a pass-through of the site commission expenses that we find prudently incurred and used and useful here is necessary to ensure the continued economic viability of the provision of interstate and international inmate calling services. Thus, we conclude that our approach adequately accounts for the use of providers' property in the provision of interstate and international inmate calling services balanced with the equitable interest of customers of interstate and international inmate calling services.

[391] *AT&T Phase II Order*, 64 F.C.C.2d at 38, para. 113.

laws or rules external to the contracting process, providers of inmate calling services cannot reasonably contend that they are bound to offer, or agree to pay, site commissions above the level for which recovery is permitted going forward under the Commission's rules. In this way, to the extent providers' concerns stem from a collective action problem in the marketplace, the Commission's rules could help address that issue. The record before us further suggests that if, in the wake of this Report and Order, providers of inmate calling services should offer to pay site commissions at levels higher than they can recover through interstate and international inmate calling services rates, that is because they expect to profit from obtaining the franchise at a given facility in other ways—e.g., by recovering the cost of the site commission payments they offer through intrastate inmate calling services rates or through revenue generated by providing other, nonregulated services.[392] While our analysis might have particular force in the case of newly entered or renewed contracts, even with respect to existing contracts the analysis above justifies our refusal to set rates in a way designed to recover contractually-prescribed site commission payments above the level needed for a correctional institution to recover its costs of making inmate calling services available to its incarcerated people.

131. *Legally-Mandated Site Commission Payments*. We next conduct the cost recovery analysis for scenario one (referred to for convenience as "legally-mandated site commission payments"). Our analysis begins the same as for contractually-prescribed site commission payments. For the same reasons explained above in that context, given the regulatory backdrop we find on the record here that legally-mandated site commission payments, insofar as they simply compensate a correctional institution for the costs (if any) an institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people, are at least plausibly a prudent expense that is used and useful in the provision of interstate and international inmate calling services.

132. Our analyses of contractually-prescribed and legally-mandated site commission payments part ways when it comes to site commission payments insofar as they exceed the level that simply compensates a correctional institution for any costs the institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people—at least up to the level of the site commission payment specified by law or rule.[393] As a threshold matter, we conclude on this record that making legally-mandated site commission payments at the level required by the relevant statute or rule is a prudent expense. We do not find it excessive or otherwise imprudent because, under the currently applicable law, we see no evidence that either the provider or the correctional institution could agree to a lower amount (or no site commissions at all).

133. Whether legally-mandated site commission payments at the level specified by the statute or rule are "used and useful" in providing interstate and international inmate calling services—to the extent that exceeds the level of a facility's recovery of its own costs of making inmate calling services available to its incarcerated people—is a closer call. At first blush, the used and useful analysis would seem to be the same for both contractually-prescribed site commission payments and legally-mandated site commission payments—i.e., the expenses would not be used and useful in either case. But at least on an interim basis, we see enough distinctions between contractually-prescribed and legally-mandated site commission payments to warrant a different outcome in our used and useful analysis on the record here. For one, in a jurisdiction that has codified a requirement that providers of inmate calling services pay site commissions at a specified level, facilities have no immediate ability to entertain offers from providers

[392] *See, e.g.*, Public Interest Parties July 29, 2020, *Ex Parte* at 5 (discussing the bundling of products and services); Prison Policy Initiative Site Commissions Briefing (alleging that providers make money by "bundling other profitable services into the contract, and sharing none of this additional revenue with the facilities"); Prison Policy Initiative Mar. 23, 2021, *Ex Parte* at 1-2.

[393] We are not aware of situations where a statute or rule external to the contracting process requires a specific site commission and the provider nonetheless pays a site commission even higher than such level. Should such a situation occur, we would find such expenses both imprudent and not used and useful for the same reasons discussed in connection with contractually-prescribed site commission payments, discussed above. *See supra* paras. 127-30.

that wish to supply a facility without paying the site commission demanded. And absent further legislative process to amend the governing statute or rule that requires site commissions, facilities must elect to forgo making interstate and international inmate calling services available if they cannot collect the legally-mandated site commission payments. In this sense, by contrast to contractually-prescribed site commission payments, we think legally-mandated site commission payments are qualitatively different. Additionally, by agreeing to pay site commissions that are required by statute or ordinance, providers do not obtain any benefit or leverage over competing providers. For this reason, too, legally-mandated site commissions do not, in our judgment, reflect the independent business judgment of service providers in the same way that contractually-prescribed site commissions do. On balance, then, based on the current record we find legally-mandated site commission payments at the level required by the relevant statute or rule to be used and useful in the provision of interstate and international inmate calling services, again, like with contractually-prescribed site commissions, as long as the Commission continues to permit providers of interstate and international inmate calling services to continue to make these site commission payments. We emphasize that this is a close question, however, and reiterate that a different record might persuade us to reach a different conclusion in the future.[394]

134. While formally distinct from our prudence and used and useful analysis, we take comfort that our conclusion with respect to legally-mandated site commission payments is unlikely to cause long-term harm. For one, we only adopt interim rules here, and if subsequent events or additional arguments or evidence come forward justifying a different outcome, we can revisit our decision at that time. In addition, on balance we find legally-mandated site commission payments less pernicious than contractually-prescribed site commission payments. The legislative process is transparent, and laws are enacted by elected officials who are accountable to their constituents. At least as an interim matter, while we collect additional information on this subject in today's Further Notice, we take comfort in the legislative process as a potential check on the ability of providers and governmental authorities to impose unjust and unreasonable rates for interstate and international inmate calling services.

135. For these reasons, and taking into account the court's vacatur in *GTL*, we will permit providers of inmate calling services to recover through interstate and international rates—as a line item distinct from the generally applicable interim interstate and international provider-related rate cap component—any site commissions that they pay pursuant to formally codified federal, state, or local statutes, regulations or ordinances, so long as the total per-minute rate that users pay does not exceed the $0.21 cap, which remains, as it has since 2013, the highest permissible rate for interstate debit and prepaid calls,[395] and by this Report and Order, the highest permissible rate for collect calls too.[396]

136. *Determining the Appropriate Contractually-Prescribed Facility Rate Component.* We permit providers of prisons and larger jails to recover no more than $0.02 per minute over and above the otherwise applicable provider-related rate cap to account for site commissions actually paid but not required by formally codified law or regulation. The total rate charged for interstate inmate calling services is also bound by the overall upper limit of $0.21 per minute that has been effective since 2013.

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[394] *See, e.g.*, UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 4 (highlighting Judge Pillard's position in dissent in *GTL v. FCC* that simply because a state requires certain site commissions does not make them legitimate costs of providing inmate calling services).

[395] *See supra* para. 104. Operationally, providers remain free to impose a legally-mandated site commission facility charge at the level specified by the relevant statute or rule, consistent with the analysis above. If their resulting cumulative rate otherwise would exceed the current $0.21 per minute rate cap, they would need to charge a lower provider-related rate to stay within that rate cap under our rules. As explained above, *supra* para. 104, providers have been operating under the $0.21 per minute rate cap since 2013, and despite the opportunity to justify a waiver of that cap, no provider has done so. Consequently, we decline to presume, for purposes of establishing new rules, that aggregate interstate and international inmate calling services charges above that level will be justified, although, as before, a waiver process is available if a provider seeks to make that case.

[396] *See supra* Part III.C.1.

137. We reach our decision to adopt a $0.02 per-minute facility-related rate component for prisons and larger jails on two separate and independent bases.[397] First, this allowance is based on estimates of the portion of site commissions that are legitimately related to inmate calling services based on the methodology first described in Appendix H of the *2020 ICS Notice* but since updated with corrected cost data consistent with the record.[398] As the Public Interest Parties' expert suggests, that methodology reflects the Commission's "reasonable attempt" in light of "data limitations on site commissions" to compare per-minute costs for facilities that are paid site commissions and those that are not as a way to "isolate the gap in costs that could be covered by site commission payments."[399] This methodology, derived from cost and site commission data that providers reported in response to the Second Mandatory Data Collection, incorporated no correctional facility-provided cost data. Thus, the Commission's proposed methodology reflected its reasoned judgment as to the best estimation of legitimate facility costs related to inmate calling services in the absence of cost data from correctional facilities themselves. The Public Interest Parties agree that the proposed $0.02 allowance for all facilities "strikes an appropriate balance between the statutory mandates that [inmate calling services] providers receive fair compensation and that [inmate calling services] rates are just, reasonable and promote access to [inmate calling services] by incarcerated people and their families and support networks."[400] They explain that the site commission allowance is not designed to necessarily compensate providers for the entirety of all site commission payments,[401] pointing out that would be inconsistent with the *GTL* decision, which recognized as "legitimate" only those site commissions that are "directly related to the provision of [inmate calling services]."[402]

138. Our updated site commission analysis in Appendix H reflects even lower potential estimates for legitimate facility costs related to inmate calling services. As explained above, the record convinces us that adjustments and corrections to the cost data underlying the *2020 ICS Notice* proposals were necessary for determining the provider-related rate component,[403] and we updated our site commission analysis using these revised cost data. This updated analysis supports a facility-related rate component of less than the $0.02 allowance we originally calculated.[404] However, we are unwilling to reduce the $0.02 allowance at this time, especially on an interim basis, given record opposition to that allowance on the basis that it is too low, was not based on facility-provided cost data, and relied on cost

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[397] *Supra* Part III.C.3.

[398] *See* Appx. E, *infra* (updating cost data from that used in the *2020 ICS Notice* consistent with the record). We continue to rely on this methodology because it most conservatively estimates the site commission allowance by rounding up and applying the same rate to jails and prisons to "ensure we do not harm unusual prison contracts." *See 2020 ICS Notice*, 35 FCC Rcd at 8572, Appx. H, para. 2; Public Interest Parties Brattle Report at 9. The Public Interest Parties' expert replicated the Commission's initial analysis and concluded the proposed $0.02 facility-cost allowance estimate is "reasonable" given the difficulty of disaggregating the portion of site commission payments directly attributable to inmate calling services from the portion that is due to the transfer of market power. *See* Public Interest Parties Brattle Reply Report at 14. Because the Commission's initial analysis, like our updated analysis, continues to be based on imperfect cost data that is not sufficiently disaggregated so as to reflect potential differences in costs for smaller jail facilities as commenters claim, we limit our actions here to only prisons and larger jails as well.

[399] Public Interest Parties Brattle Reply Report at 14.

[400] Public Interest Parties Reply at 10.

[401] *Id*.

[402] *GTL v. FCC*, 866 F.3d at 414.

[403] *See supra* Part III.C.3.

[404] Indeed, these updated data show that prison contracts without site commissions had per-minute allocated costs which were on average $0.008 higher than prison contracts that required the payment of site commissions, whereas the gap for jails was $0.004. *See* Appx. H, *infra*.

data aggregated for the most part at the contract level rather than facility level where size variations would likely be reflected.[405] And, as discussed below, we have independent record data that supports the $0.02 allowance.

139. Several commenters oppose the $0.02 allowance as too low for two primary reasons.[406] First, providers criticize the Commission's methodology for estimating reasonable facility costs in the *2020 ICS Notice* insofar as this methodology "fails to consider whether any characteristics *other* than facility costs might affect whether a particular contract pays a site commission."[407] Second, the National Sheriffs' Association and others argue that $0.02 per minute is inappropriate for smaller jails,[408] and claim that adopting a uniform $0.02 per-minute allowance for all facilities conflicts with the approach the Commission took in the *2016 ICS Order*, which adopted additive amounts to the rate caps to account for site commissions based on facility size.[409]

140. We agree that the *2020 ICS Notice* methodology resulted in a proposed facility-related rate component that does not distinguish between different types of site commission payments and that may not sufficiently reflect that smaller correctional facilities might face higher facility costs related to inmate calling services than the initially calculated $0.02. We therefore depart from our initial proposal to apply a specific uniform facility cost allowance cap to *all* facilities for *all* types of site commissions in two ways to address these criticisms.

141. First, we distinguish between the two distinct types of site commission payments and permit providers, when serving prisons and larger jails, to recover each in a distinct manner. For payments required under codified law or regulation, as explained above, we permit recovery of the full commission amount, without markup, provided that the total interstate rate charged for interstate inmate calling services at those facilities does not exceed the $0.21 per-minute rate that represents the highest interstate rate cap currently in effect for debit and prepaid calls for any size correctional facilities. Second, for contractually-prescribed site commission payments, we adopt a $0.02 cap on recovery through interstate rates but limit its applicability solely to prisons and larger jails.

142. We limit the applicability of the $0.02 cap for recovery of contractually-prescribed site commission payments to prisons and larger jails, in response to criticism that this value would not be sufficient to recover the alleged higher facility-related costs incurred by jails with average daily populations below 1,000. Likewise, we do not adopt a separate legally-mandated rate component for these facilities. Instead, inmate calling services for jails with average daily populations below 1,000 will remain subject only to the single, aggregate $0.21 per-minute total rate cap. We agree that the cost data methodology underlying the calculation of the contractually-prescribed facility rate component may have masked facility size cost variations due to the aggregated nature of those data. Given that these data obscure cost differences at the level of provider contracts, it is likely to be even harder to identify the variation, among jail contracts of different sizes, in costs that are in some cases incurred by providers and

[405] *See, e.g.*, GTL Comments at 26; Pay Tel Comments at 11-12; Securus Comments at 33.

[406] GTL Comments at 26-27; Pay Tel Comments at 11; Securus Comments at 31-34; *see also* California State Sheriffs' Association Comments at 1-2; National Sheriffs' Association Comments at 7-8; GTL Apr. 26, 2021 *Ex Parte* Godek Report at 4-6.

[407] GTL Comments at 28 (arguing that state law and correctional facility policy account for variances in site commission payments); Securus Comments at 32 (suggesting that state law can have an effect on whether site commissions are paid) (emphasis in original).

[408] California State Sheriffs' Association Comments at 1-2; National Sheriffs' Association Comments at 7; Pay Tel Comments at 12-13; National Sheriffs' Association Reply at 2; NCIC Reply at 3 (explaining that the proposed $0.02 allowance for jails "may fail to adequately remunerate smaller jails").

[409] Pay Tel Comments at 12.

in other cases incurred by incarceration authorities.[410] Thus, our decision to limit adopting a facility-related rate component to only prisons and larger jails on this interim basis, as we do for the provider-related rate component, and to refrain from changing the current interim rate cap of $0.21 for jails with average daily populations less than 1,000, should address the concern raised in the record about facility size variations in facility-related costs for jails with average daily populations less than 1,000.

143. In addition to comparing providers' cost data with and without site commissions to determine a conservative estimate of facilities cost from data that was provided solely by providers and not facilities, the second and separate basis for reaching a decision to adopt $0.02, as the contractually-prescribed facility-related rate component for contractually-prescribed site commissions applicable in prisons and larger jails, is record data and information reintroduced by Pay Tel and the National Sheriffs' Association that independently supports a $0.02 allowance for correctional facility costs at these size facilities.[411] The Commission has previously relied on these data and thus, we conclude they are largely credible insofar as they come from the National Sheriffs' Association, "which, as an organization representing sheriffs, is well situated to understand and estimate the costs that facilities face to provide [inmate calling services]."[412] Indeed, in the *2015 ICS Order*, while declining to establish any additional rate component to reflect facility costs related to inmate calling services, the Commission, in referring to record evidence at that time that included this same National Sheriffs' Association data, stated "[w]e note, however, that evidence submitted . . . indicates that if facilities incurred any legitimate costs in connection with [inmate calling services], those costs would likely amount to no more than *one or two cents* per billable minute."[413]

144. Some commenters contend that the numbers contained in these data support a $0.02 allowance for prisons and larger jail facilities,[414] while also lending support for the argument advanced by other commenters that facility-related inmate calling services costs are higher for jails with fewer incarcerated people[415] and that such costs decrease with an increase in facility size.[416] According to these data, facilities with average daily populations of 1,000 and up, can have site commission costs as low as $0.003 per minute, up to 85% less than the $0.02 allowance we adopt here.[417] One reason commenters assert that jails with average daily populations less than 1,000 may have higher site commission costs is that they have higher weekly inmate-turnover rates and shorter lengths of stay than larger jails. This higher turnover causes such jails to incur much greater costs, including costs related to "setting up an account, funding an account, closing an account . . . administering account funds after an inmate's

[410] *See supra* Part III.C.2.

[411] National Sheriffs' Association Comments at 7 (referring to the 2015 cost survey); Pay Tel Comments at 12 (referring to data submitted by the National Sheriffs' Association); National Sheriffs' Association Comments, WC Docket No. 12-375, at 3 (filed Jan. 12, 2015) (National Sheriffs' Association Jan. 12, 2015, Comments).

[412] *2016 ICS Reconsideration Order*, 31 FCC Rcd at 9316, para. 28.

[413] *2015 ICS Order*, 30 FCC Rcd at 12835, para. 139 (emphasis added).

[414] *See* National Sheriffs' Association Comments at 8 (supporting a $0.02 rate for jails with an average daily population of 2,500 or greater); National Sheriffs' Association Reply at 2 (implying that the proposed $0.02 figure could be sufficient for larger jails); Pay Tel Reply at 11 (showing the site commission allowances adopted in the *2016 ICS Reconsideration Order*, which were based, in part, on the National Sheriffs' Association data).

[415] National Sheriffs' Association Jan. 12, 2015, Comments, Exh. A, NSA Member Data Summary – ADP 1-99 at 1 (providing survey results showing that jails with fewer incarcerated people have higher costs than larger jails).

[416] *See, e.g.*, National Sheriffs' Association Comments at 9 (explaining that jails with fewer incarcerated people have higher turnover rates than larger jails and thus less time to recover the costs of processing newly incarcerated people).

[417] National Sheriffs' Association Jan. 12, 2015, Comments, Exh. A, NSA Member Data Summary – ADP 1,000+ at 1.

release" or "enrolling inmates for voice biometrics."[418] "On average, jails with an [average daily population] of 2,500 or more inmates held inmates about twice as long (34 days) as jails with an [average daily population] of less than 100 inmates (15 days)."[419] Other commenters have found similar cost differentials between larger jails and jails with fewer incarcerated people, regardless of the data sets they rely upon.[420] Some of this cost difference can likewise be attributed to "differences in officer, supervisor and other employee hours spent on various duties; the compensation rates for officers, supervisors and other employees; and differences in minutes of use."[421] While we recognize that the data in the National Sheriffs' Association survey are more than five years old, they are the best data available from correctional facility representatives regarding their estimated costs related to inmate calling services that correctional facilities incur. Although the Commission asked correctional facilities to provide detailed information about their specific costs, nothing more current was submitted.[422] Nevertheless, we find the survey results for facilities with average daily population greater than or equal to 1,000 largely sufficient to support our interim $0.02 allowance for prisons and larger jail facilities in the absence of more current data.

145. We are concerned, however, that some of the facilities included in the National Sheriffs' Association survey report an exceedingly high number of hours of correctional facility officials' time compared to most other reporting facilities.[423] For example, one facility with an average daily population of approximately 1,500 reports approximately 694 total hours per week on inmate calling services-related activities, roughly 400 hours more than the next highest facility with an equal or lower average daily population. Given a total 168 hours in a week (7 days per week x 24 hours per day), this equates to more than 17 full-time 40-hour-a-week correctional facility personnel (or four full time personnel working 24 hours a day every day) devoting all their time to inmate calling services. We do not find these data credible when comparing them to data of similarly sized reporting facilities *that have no incentive* to under-report their hours or costs. For example, more than 80% of the larger jails having the same or less average daily population as the facility reporting 694 hours report total hours spent on inmate calling services at fewer than 250 total hours a week and, of those facilities, roughly half spend fewer than 100 hours a week on inmate calling services-related activities.[424] Indeed the majority of facilities between 1,000 and 1,500 average daily population report average total costs per minute less than $0.02. Nevertheless, in the absence of any other facility-provided data for purposes of our interim rate caps, we conclude that reliance on these data best balances our objectives to ensure just and reasonable rates under section 201 of the Act with the requirement to ensure fair compensation under section 276 of the Act. We

[418] National Sheriffs' Association Comments at 7 n.6 (identifying various inmate calling services tasks performed at jails); Pay Tel Reply at 8-9 (noting the costs to release incarcerated people as well, such as costs involved in "closing an account, and administering account funds after an inmate's release");.

[419] U.S. Department of Justice, Bureau of Justice Statistics, 2018 Jail Report at 8 (Mar. 2020), https://www.bjs.gov/content/pub/pdf/ji18.pdf; *see* Pay Tel Wood Reply Report at 13 (asserting that turnover "directly drives many of the costs incurred by both [inmate calling services] providers and the operators of confinement facilities"). Further, the record suggests that this trend continues as jail size falls even further; e.g., as jails with an average daily population below 50 have an "average time in jail of 11.2 days." National Sheriffs' Association Comments at 9.

[420] *See* Pay Tel Comments at 17 (observing an average cost per minute of $0.102 for jails of 1-99 average daily population, compared to an average cost per minute of $0.060 for jails of over 1,000 average daily population).

[421] National Sheriffs' Association Comments at 9. In the Further Notice we adopt today, we seek comment on the effect of turnover on facility costs. *See infra* Part VI.B.3.

[422] *2020 ICS Notice*, 35 FCC Rcd at 8522, para. 103.

[423] *See* National Sheriffs' Association Jan. 12, 2015, Comments, Exh. A, NSA Member Data Summary – ADP 1,000+ at 1 (showing at line 15, Provider ID 148 having an average daily population of 1,525 and an average reported cost per minute of $0.176).

[424] And the remaining facilities of the same or smaller average daily population report total hours less than 300, well less than half the amount of time claimed by the facility reporting 694 hours.

therefore conclude that a $0.02 allowance for the contractually-prescribed facility rate component is reasonable for this interim step based on this record until more updated facility-related data are submitted into the record.

146. In adopting the $0.02 allowance, we decline the Public Interest Parties' suggestion that we round the $0.02 figure down to $0.01 based on the analysis done for the *2020 ICS Notice*.[425] The Public Interest Parties' experts argue that the rounding adjustment is appropriate given typical rounding conventions.[426] In the *2020 ICS Notice*, the Commission calculated the difference in mean costs per minute for contracts with and without site commissions, which came out to $0.013.[427] The Commission explained that it rounded this figure upward "to allow for individual contracts for which this matters more than the average contract."[428] Our revised calculations reflect even lower numbers as we have noted, yet we see no reason to adjust our proposed conservative approach here for this interim solution, particularly in light of the reintroduction of the National Sheriffs' Association facility-related data. To the extent that there are contracts covered by the new interim rate caps that we adopt today where the facility-related costs to provide inmate calling services are higher than our even lower revised calculations or the previously calculated $0.013, particularly in light of the fact that National Sheriffs' Association prefers a higher rate for larger jails,[429] we maintain the more conservative $0.02 rate cap component as our interim contractually-prescribed facility rate component at this time.

147. The Public Interest Parties also raise concerns about "double counting costs"[430] in both the provider-related and facility-related rate cap components. As they explain, "[t]he base rate (i.e., the mean plus one standard deviation) is calculated based on the full data set which includes observations of contracts that pay commissions and those that do not."[431] Facilities that do not require site commissions "already incorporate the unobserved or unreported costs that this adjustment is intended to account for."[432] Site commission payments have been removed from the calculation to determine the new lower provider-related interim rates we adopt today. Unlike the Commission's proposal in the *2020 ICS Notice* where all providers would have been able to recover the $0.02 rate component for all facilities regardless of whether site commissions were actually paid, under our rules adopted today providers that do not pay site commission payments may not assess the separate facility-related rate components on inmate calling services customers. We find that this addresses the potential double counting concern raised by the Public Interest Parties. We also reject the arguments of Prisoners' Legal Services of Massachusetts that "[t]here is no need or justification for a two cent markup on telephone rates."[433] These commenters highlight that "[i]n three of six recently negotiated Massachusetts county contracts, the sheriffs voluntarily eliminated their commissions."[434] While eliminating site commission payments related to interstate and international inmate calling services altogether may be a laudable objective, on the record before us and taking into account the D.C. Circuit's decision in *GTL*, we decline to do so at this time.[435]

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[425] Public Interest Parties Comments at 8; Public Interest Parties Reply at 10.

[426] Public Interest Parties Brattle Report at 19.

[427] *2020 ICS Notice*, 35 FCC Rcd at 8572, Appx. H, para. 2.

[428] *Id.*

[429] National Sheriffs' Association Comments at 8 (seeking $0.05 for jails between 350-2,499 average daily population).

[430] Public Interest Parties Reply at 10.

[431] Public Interest Parties Brattle Report at 15.

[432] *Id.*

[433] Prisoners' Legal Services Comments at 5.

[434] *Id.*

[435] *See GTL v. FCC*, 866 F.3d at 414.

148. We also reject the National Sheriffs' Association's request that we establish a rate component of $0.05 for facilities having an average daily population between 350 and 2,499.[436] The National Sheriffs' Association's proposal covers a much greater range of jail facilities than we have determined we can reasonably address based on the current record; accordingly, we decline to adopt its proposal. We are not confident that the data we currently have can reasonably estimate legitimate facility-related costs for smaller facilities.[437] And, our interim rate components will cover facilities with average daily populations of 1,000 or more—i.e., facilities that the survey data suggest can accommodate less than the $0.02 per minute we adopt as an interim measure.[438]

149. Some providers oppose our calculated $0.02 number because it is lower than their average site commission payments across all their contracts.[439] We find their arguments unpersuasive and contrary to law. For example, GTL argues that its site commissions average is {[ ]} per minute and that the site commissions for {]} of its jail contracts exceed the Commission's proposed rate cap.[440] Securus explains that in 2018 and 2019, the company incurred approximately {[ ]} million in site commission expenses, of which roughly {[ ]} was associated with inmate calling services.[441] Securus also highlights that site commissions paid over the same period increased with facility size, ranging from {[ ]} per minute for the facilities with the fewest incarcerated people to {[ ]} per minute for the largest facilities.[442] The problem with both GTL's and Securus's claims is that their figures are based on *total* site commissions paid, and fail to isolate or otherwise account for only those portions of payments related to reasonable facility-related costs of providing inmate calling services. In other words, their calculations vastly overstate legitimate facility-related costs because they include the full site commission payments, under the mistaken view that they should be permitted to recover the entire amount of site commission payments from incarcerated people or the loved ones they call. We agree with the Public Interest Parties that such analysis "includes site commission payments that compensate correctional facilities for the transfer of market power from the facility to the [inmate calling services] provider that should not reasonably be included in the cost base."[443] Given the failure to isolate inmate calling services-related costs from the site commission figures provided by GTL and Securus, we are not persuaded that they represent reasonable allowances for inmate calling services-related facility costs. Furthermore, these figures include site commission payments that would fall into the category of the legally-mandated facility rate component that we separately adopt today that permits providers to recover these site commission payments in a manner other than through the $0.02 contractually-prescribed facility-related rate component. To rely on the Securus or GTL averages to arrive at a facility-related rate component for prisons and larger jails would necessarily result in double recovery with respect to many of these payments.

150. *Security and Surveillance Costs*. We cannot determine, based on the current record, whether security and surveillance costs that correctional facilities claim to incur in providing inmate

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[436] National Sheriffs' Association Comments at 8

[437] *Supra* Part III.C.2.

[438] *See supra* Part III.C.2.

[439] *See* GTL Comments at 26-27; Securus Cost Study at 13.

[440] GTL Comments at 26-27.

[441] Securus Cost Study at 13.

[442] *Id.* Securus's figures run counter to the claims of other commenters and correctional facility evidence showing that facility costs per calling minute tend to decrease as facility size increases. *See* National Sheriffs' Association Comments at 7-8; Pay Tel Comments at 13; Pay Tel Reply at 10; National Sheriffs' Association Jan. 12, 2015, Comments, Exh. A (showing costs for facilities of different sizes).

[443] Public Interest Parties Brattle Reply Report at 15; *see also* National Sheriffs' Association Comments at 6 (recognizing that "at least some portion of commission payments are not locational rents").

calling services are "legitimate" inmate calling services costs that should be recoverable through interstate and international calling rates. The *2020 ICS Notice* sought comment on this issue,[444] and the record is mixed. Several commenters support the exclusion of security and surveillance costs from the base of recoverable inmate calling services costs under section 276, arguing that these tasks are "not related to the provision of communication service and provide no benefit to consumers."[445] As Worth Rises explains, security and surveillance services "used in a prison or jail reflect policy decisions made by administrators that differ dramatically from one state or county to another and even one facility to another" and are "generally not responsive to any local, state, or federal law requirements, and are thus incredibly varied."[446] And the United Church of Christ and Public Knowledge argue that costs associated with monitoring, call blocking, and enrolling incarcerated people in voice biometrics systems are security costs not related to "communications functions."[447] GTL and the National Sheriffs' Association argue that "correctional facilities incur administrative and security costs to provide incarcerated people with access to [inmate calling services]" and that these costs should be recovered through calling rates.[448] The data provided by the National Sheriffs' Association suggest that correctional facilities do include security and surveillance costs that they assert could reasonably be related to providing calling services.[449] These data and descriptions also suggest a troubling and apparent duplication of some of the same security functions claimed by providers in their costs.[450] The National Sheriffs' Association also asserts that the data suggest that it is possible to arrive at a per-minute cost to perform these duties.[451]

151. We are skeptical of these data given the wide unexplained variations that appear across some of the facilities. At the same time, we recognize that the data upon which the National Sheriffs' Association relies are self-reported costs purportedly incurred in relation to inmate calling services.[452] Those data do not suggest a methodology that would permit the Commission to verify or otherwise isolate legitimate telephone calling-related security and surveillance costs, such as costs associated with court-ordered wiretapping activity, from general security and surveillance costs in correctional facilities that would exist regardless of inmate calling services. As Worth Rises emphasizes, isolating and thus being able to quantify calling-related security and surveillance costs is an important step in determining how, if

[444] *2020 ICS Notice*, 35 FCC Rcd at 8523, para. 107.

[445] MediaJustice Comments at 2 ("The Commission should not incorporate the cost of security and surveillance in rates."); Worth Rises Comments at 8; Public Interest Parties Reply at 9 ("Constant observation of incarcerated people is a core function of jail and prison facilities, not a function specific only to [inmate calling services].").

[446] Letter from Bianca Tylek, Founder and Executive Director, Worth Rises, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Mar. 24, 2021) (Worth Rises Mar. 24, 2021, *Ex Parte*).

[447] UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 3; UCC Apr. 26, 2021 *Ex Parte* at 1 (highlighting that security services "are separate from the services provided to two people communicating with each other" and should not be treated as "mandatory elements of the rate").

[448] GTL Comments at 28; National Sheriffs' Association Comments at 3 (listing various security and administrative functions).

[449] National Sheriffs' Association Jan. 12, 2015, Comments at 3 (listing various security responsibilities related to the provision of inmate calling services including call monitoring and responding to "system alerts").

[450] National Sheriffs' Association Comments at 4 ("It is clear that Sheriffs and jails perform some of the same functions that [inmate calling services] providers perform in some cases and, presumably, whose cost were included in the cost studies filed with the Commission.").

[451] *Id.* (explaining that data obtained from a cost survey (that the National Sheriffs' Association provided in 2015) were used to calculate the "per minute cost to perform duties associated with [inmate calling services] for each jail").

[452] National Sheriffs' Association Jan. 12, 2015, Comments at 4 nn.4-5.

at all, such costs should be recovered through rates.[453]

152. On the present record, however, commenters have not provided the Commission with any plausible method for doing so, much less a methodology for determining recoverable security and surveillance costs, if any, versus non-recoverable costs. In the absence of an ability to distinguish or quantify security cost duplication at this time, we seek comment on this issue in the Further Notice so we can continue to evaluate whether and, if so, how to exclude these costs from interstate and international inmate calling services rates.[454]

153. *Takings*. In *GTL v. FCC*, the D.C. Circuit directed that the Commission address on remand whether "the exclusion of site commissions . . . violates the Takings Clause of the Constitution because it forces providers to provide services below cost."[455] Consistent with that directive, the *2020 ICS Notice* sought comment on the takings issue with respect to site commission payment cost recovery.[456] The Commission indicated it did not believe that there were any potential taking concerns arising from the rate cap proposals in the *2020 ICS Notice*.[457] We find that the Takings Clause is not implicated by the actions we take today in adopting separate and distinct facility-related rate components that providers may recover.

154. As an initial matter, the interim rate cap reforms we adopt in this Report and Order with respect to site commission payments are based on a cautious, data-driven approach to lowering total interstate rate caps, carefully balancing the needs of providers to receive fair compensation while ensuring just and reasonable rates and practices. The D.C. Circuit's concern about takings due to the categorical exclusion of any portion of site commission payments in the *2015 ICS Order* is obviated by our two-part facility-related rate component mechanism.

155. As the Supreme Court has recognized, the "guiding principle has been that the Constitution protects utilities from being limited to a charge for their properly serving the public which is so 'unjust' as to be confiscatory."[458] As a general matter, "[r]ates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' rate base."[459] In making this evaluation, "it is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."[460] Whether a given rate is confiscatory "will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of

[453] *Cf.* Worth Rises Comments at 9 (suggesting that isolating security and surveillance costs would facilitate greater visibility into provider rate structures and bids).

[454] *See infra* Part VI.B.3.

[455] *See 2020 ICS Notice*, 35 FCC Rcd at 8522, para. 105 n.254 (citing *GTL v. FCC*, 866 F.3d at 414); *see also* U.S. Const. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.").

[456] *See 2020 ICS Notice*, 35 FCC Rcd at 8523, para. 105.

[457] *See id.*

[458] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (*Duquesne Light*).

[459] *Hope Natural Gas*, 320 U.S. at 605; *see also, e.g.*, *Verizon v. FCC*, 535 U.S. at 524 (A rate is "so unjust as to be confiscatory" where it "threaten[s] an incumbent's financial integrity." (quoting *Duquesne Light*, 488 U.S. at 307 (internal quotation marks omitted))); *Ill. Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1263 (D.C. Cir. 1993) (*1993 Illinois Bell*) (rejecting a takings claim where "[t]here simply has been no demonstration that the FCC's rate base policy threatens the financial integrity of the [service providers] or otherwise impedes their ability to attract capital").

[460] *Hope Natural Gas*, 320 U.S. at 602.

capital upon which the investors are entitled to earn that return."[461] In evaluating the "total effect" of a rate on a company, courts do not consider the profitability of a company's nonregulated lines of business.[462] Carriers face a "heavy burden" to prevail on a takings claim and must demonstrate that a rate "threatens [the carrier's] financial integrity or otherwise impedes [its] ability to attract capital."[463]

156. Considered in their totality, our interim per-minute provider-related rate caps and allowances for site commissions do not threaten providers' financial integrity such that they could be considered confiscatory. The rate caps and site commission allowances are based on data supplied by providers and, as applicable to site commissions, correctional facilities. Neither correctional facilities nor providers have incentives to understate their costs in the context of a rate proceeding, lest the Commission adopt rates that are below cost. Indeed, the manner in which these cost data were collected gave "providers every incentive to represent their [inmate calling services] costs fully, and possibly, in some instances, even to overstate these costs."[464] Thus, there is no reason to believe that the data understate the actual costs of providing interstate and international inmate calling services.

157. Further, as the Commission observed in 2015, "[t]he offering of [inmate calling services] is voluntary on the part of the [inmate calling services] providers, who are in the best position to decide whether to bid to offer service subject to the contours of the request for proposal. There is no obligation on the part of the [inmate calling services] provider to submit bids or to do so at rates that would be insufficient to meet the costs of serving the facility or that result in unfair compensation."[465] And unlike the rate caps adopted in 2015, our new interim rate framework includes an explicit allowance for site commission payments. Considering these circumstances, we conclude that the "total effect" of our interim rate regime is not confiscatory and reject arguments that the reforms adopted here will result in unconstitutional takings.[466]

158. Our actions also do not constitute a *per se* taking as they do not involve the permanent condemnation of physical property.[467] Nor do our actions represent a regulatory taking.[468] The Supreme Court has stated that in evaluating regulatory takings, three factors are particularly significant: (1) the economic impact of the government action on the property owner; (2) the degree of interference with the

[461] *Duquesne Light*, 488 U.S. at 310.

[462] *See, e.g.*, *Brooks-Scanlon Co. v. R.R. Comm'n*, 251 U.S. 396, 399 (1920) (A company cannot "be compelled to spend" revenues from its unregulated sawmill and lumber business "to maintain a [rate-regulated] railroad" that regularly operates at a loss.); *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 594 (6th Cir. 2001) (The rate freeze mandated by state law did "not include any provisions which adequately safeguard against imposition of confiscatory rates," and the carriers were "not required to subsidize their [rate] regulated services with income from rates . . . deemed to be competitive, or with revenues generated from unregulated services.").

[463] *Hope Natural Gas*, 320 U.S. at 602; *1993 Illinois Bell*, 988 F.2d at 1263; *see also Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 437 (5th Cir. 1999) (stating that to succeed on a takings claim, a party must demonstrate that the losses caused by the regulation in question "are so significant that the 'net effect' is confiscatory").

[464] *2015 ICS Order*, 30 FCC Rcd at 12799, para. 73.

[465] *Id.* at 12836, para. 142.

[466] GTL Comments at 30; Securus Comments at 31.

[467] *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 categorial duty to compensate the former owner.").

[468] GTL Comments at 31 n.157.

property owner's investment-backed expectations; and (3) the "character" of the government action.[469] None of these factors suggest a regulatory taking here.

159. First, the interim steps we take with respect to inmate calling services rates including site commission payments are unlikely to have adverse economic impacts on providers. Providers have a waiver mechanism available to them should they find that in limited instances, the rate cap components do not cover the legitimate costs of providing inmate calling services. And, as explained above, the Supreme Court has long recognized, when a regulated entity's rates "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed," 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.[470]

160. Second, these interim actions do not improperly impinge on providers' reasonable investment-backed expectations. The Commission has long been examining how to address inmate calling services rates and charges and has taken incremental steps to address areas of concern as they arise.[471] Various proposals, especially those targeting rate reform, have been raised and extensively debated in the record. Given this background, we are not persuaded that any reasonable investment-backed expectations can be viewed as having been upset or impinged by our actions here.[472]

161. Third, our actions today substantially advance the legitimate governmental interest in protecting incarcerated people, and the familial and other support systems upon which they rely through telephone service, from unjust and unreasonable interstate and international inmate calling services rates and charges. This is an interest that Congress has required the Commission to protect.[473] Thus, our actions do not compel a physical invasion of providers' property, but merely "adjust[] the benefits and burdens of economic life to promote the common good" by ensuring that providers are fairly compensated while also directly protecting the interests of ratepayers and, indirectly, the broader public.[474]

162. *Recovering Facility-Related Rate Components on Consumers' Bills*. Having adopted the two aforementioned distinct facility-related rate components today to account for payments required under codified law and our reasonable estimate of legitimate correctional facility costs, we also find it necessary to ensure increased transparency in the rates and charges imposed upon incarcerated people and their loved ones for interstate and international inmate calling services. Under our interim rules, we adopt different caps on the facility-related rate component of interstate and international inmate calling services depending on the circumstances that led to the site commission payment. In contrast to someone's status as an inmate of a prison versus a jail, or of a jail of a particular size—for which we also have differing rates caps—we find it less likely that customers of interstate and international inmate calling services will know the circumstances that led to a given provider's site commission payment. Absent information

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

[470] *Hope Natural Gas Co.*, 320 U.S. at 605.

[471] *See generally 2013 ICS Order*; *2015 ICS Order*; *2020 ICS Order on Remand and Notice*.

[472] *See, e.g.*, *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, 20263, para. 58 (2007) (concluding that there was no interference with investment-backed expectations as "exclusivity clauses in [multiple dwelling unit (MDU)] contracts have been under active scrutiny for over a decade"); *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 226-27 (1986) (declining to find interference with investment-backed expectations where the subjects of regulation had been of "legislative concern" for years).

[473] 47 U.S.C. § 201(b).

[474] *Penn Central*, 438 U.S. at 124.

separately breaking out the facility-related rate component of the service charge, and some identifier tying the charge to the relevant category under the Commission's rules, customers will be substantially less able to evaluate their bills and monitor whether they are receiving the protections of Commission rate caps to which they are entitled. To this end, we exercise our authority to require providers choosing to recover the facility-related rate components in their total interstate or international inmate calling services rates to include those rate components separately on inmate calling services bills.[475] The facility-related rate components on such bills should contain the source of the obligation underlying that component, the amount of the component on a per unit basis, and the total interstate or international rate component resulting from the facility-related rate component charged for interstate or international calls and reflected on bills. We provide more detailed guidance on the mechanics of implementing these requirements later in this section.

163. The Commission has previously found that it has the jurisdiction 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."[476] In the *2013 ICS Order*, the Commission used this authority to address billing-related call blocking, explaining that "the Commission and the courts have routinely indicated that billing and collection services provided by a common carrier for its own customers are subject to Title II" of the Act.[477] And, in adopting ancillary service charge rules in the *2015 ICS Order*, the Commission reaffirmed its jurisdiction to regulate the manner in which providers bill and collect charges associated with inmate calling services.[478] Because these facility-related rate components concern the "manner" in which calling service providers bill for their interstate and international services, we conclude that we have the necessary authority to require implementation as specified herein.

164. The strong public interest in facilitating greater transparency with respect to site commission payments likewise justifies the disclosure of facility-related rate component information. Given that incarcerated people and their loved ones ultimately bear the burden of these payments through the total per-minute rates charged by providers, there is a strong interest in transparency regarding the charges that incarcerated people and their families bear. Absent our requirements we find a substantial risk that billing information will lack the detail about correctional facility-related charges necessary for consumers to ensure they are receiving the protections of our rate caps in that regard.

165. Calling service providers in this proceeding have similarly encouraged us to account for the effect of state law in assessing site commission payments. GTL explains that there are "significant variances in site commission requirements," some of which are driven by state law.[479] And Securus points to variations in state laws governing site commissions that "might affect whether a particular contract pays a site commission."[480] Securus expressly encourages us to treat site commissions "separate

[475] We believe that the requirements we adopt advance truthfulness and accuracy in billing, consistent with the Commission's existing Truth-In-Billing rules. 47 CFR §§ 64.2400-64.2401. To the extent that the requirements of these rules differ from the requirements of our Truth-In-Billing rules with respect to the detail and specifications required or otherwise, we make clear that these more specific billing requirements for the facility-related component of interstate and international inmate calling services charges are controlling over the more general Truth-In-Billing rules to the extent of any divergence—but only to that extent. Providers thus must treat our interstate and international inmate calling services disclosure requirements as controlling within their self-described scope and otherwise comply with the more general Truth-In-Billing rules.

[476] *Truth-In-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7507, para. 25 (1999).

[477] *2013 ICS Order*, 28 FCC Rcd at 14168, para. 114 (citations omitted).

[478] *2015 ICS Order*, 30 FCC Rcd at 12860, para. 194.

[479] GTL Comments at 28.

[480] Securus Comments at 32.

and distinct from the provider base rate."[481] Securus highlights that "[t]his would allow the Commission to set a lower rate ceiling based on non-commission costs, and would increase public transparency of [inmate calling services] provider costs."[482] We agree. By accounting for legally-mandated and contractually-prescribed site commissions separately, we are better able to account for certain variances in site commission costs and increase transparency to end users with respect to what portion of their total interstate and international rates relate to site commission payments.

166. Our treatment of correctional facility-related costs as a separate and distinct rate component from the lower provider-related interim rate caps we adopt is consistent with *GTL v. FCC*. While the D.C. Circuit rejected the "categorical exclusion" of site commission costs from "the calculation used to set [inmate calling services] rate caps,"[483] nothing in the court's decision dictates how we implement recovery of such costs. The facility-related rate components we adopt herein merely disaggregate correctional facility-related costs from provider-related costs and direct providers to recover these costs through separate interim rate components.

167. *Mechanics of the Legally-Mandated Facility Rate Component*. For providers subject to site commission payments required under codified laws or regulations, we permit providers to pass through to consumers this cost of providing inmate calling services, without any mark up, capped at the maximum total interstate rate cap currently in effect for debit and prepaid calls from any size correctional facilities.[484] We agree, for present purposes, that site commissions prescribed under formally codified laws are meaningfully distinguishable from contractually negotiated site commission payments.[485] At least on the current record, while we collect additional information through today's Further Notice, we consider it prudent to regard site commissions of this type as reasonably related to the provision of inmate calling services.

168. Consistent with our transparency objectives, providers shall: (1) specify the federal, state, or local law, regulation, statute, or other rule or law that operates independently of the contracting process between correctional institutions and providers giving rise to the mandatory nature of the obligation to pay; (2) disclose the amount of the payment on the applicable per-unit basis, e.g., per-call or per-minute if based on a revenue percentage; and (3) identify the total amount of this facility rate component charged for the interstate and international calls on the bill. For example, a provider serving a local jail in Tennessee is required to collect $0.10 for each completed telephone call.[486] In issuing an inmate calling services customer bill, that provider must clearly label[487] the legally-mandated facility-related rate component, specify section 41-7-104 of the Tennessee Code as the relevant statutory code section giving rise to the obligation, specify the amount as $0.10 per call, and include a line item indicating the total charge to the customer resulting from multiplying the $0.10 per call charge by the number of interstate and international calls. Similarly, for a statutory obligation to remit a percentage of

[481] *Id.* at 35. Pay Tel also supports "the adoption of a specific rate element intended to offset facility costs as a reasonable means of compensating facilities for cost incurred." Pay Tel Comments at 14.

[482] Securus Comments at 35.

[483] *GTL v. FCC*, 866 F.3d 413.

[484] Providers may never charge a total rate for interstate calls that exceed $0.21, the highest interstate rate cap permissible as a result of today's actions. As we indicated, nothing we do today increases any interstate calling rate above the $0.21 rate cap in effect prior to today for prepaid and debit calls from all sizes and types of facilities. *Supra* Part I.

[485] *See supra* paras. 116-22.

[486] Tenn. Code Ann. § 41-7-104 (West 2020).

[487] Providers are not required to use the terms "legally-mandated facility rate component" or "contractually-prescribed facility rate component," but may do so if they choose. Other terms may be appropriate as long as providers clearly label the facility-related rate components.

gross revenue, like the 40% reflected in the Texas code,[488] we require a provider to identify the Texas code section, specify that it requires an additional 40% charge on top of the applicable per-minute interstate or international provider-related rate component, and include a line item reflecting how much of the total interstate and international rate charges are attributable to the mandatory 40% charge. We recognize the possibility that not all mandatory site commission payments may be easily expressed as a percentage of revenue or easily converted to a per-call or per-minute rate. Under these circumstances, providers must use their best judgment to comply with our billing-related disclosure obligations to reflect the legally-mandated rate component in the manner we prescribe for interstate and international calls on their inmate calling services customer bills. We direct the Bureau staff to assist with questions that may arise on a case-by-case basis should providers encounter difficulty implementing our billing transparency requirements.

169. *Mechanics of the Contractually-Prescribed Facility Rate Component*. Providers subject to contractually-prescribed site commissions pursuant to contract with correctional facilities or agencies may charge up to $0.02 per minute to recover those discretionary payments.[489] Similar to the requirements for our legally-mandated rate component, should providers decide to recover this discretionary amount from their interstate or international calling customers, they must clearly label the rate component on their bill and indicate that this rate component is required by the correctional facility per contract. They must also show this rate component charge as an additional (up to $0.02, as applicable) per minute rate component on top of the applicable provider-related per-minute rate component, and then compute the total amount attributable to the $0.02 rate component charged to the end user for that call, determined by multiplying $0.02 by the number of interstate and international minutes reflected on that bill.[490]

170. Finally, NCIC asks us to clarify that our $0.02 allowance "does not prohibit the payment of additional site commissions should the inmate calling services provider and correctional facility so negotiate."[491] We confirm that the $0.02 figure does not prevent or prohibit the payment of additional site commissions amounts to correctional facilities should the calling services provider and the facility enter into a contract resulting in the provider making per-minute payments to the facility higher than $0.02. All we do here is limit the providers' ability to recover these commissions to $0.02.[492] Our recognition here that existing site commission payment obligations may contain legitimate facility-related costs is not an invitation for correctional facilities not currently incorporating these discretionary payments into their

[488] Tex. Gov't Code Ann. § 495.027 (West 2021).

[489] Of course, should a provider's total contractually-prescribed site commission payment obligation result in a lower per-minute rate than $0.02 per minute of use, that provider's contractually-prescribed facility rate component would be limited to the actual amount of its per-minute site commission payment up to a maximum of $0.02. An illustration may prove helpful. If the provider charges $0.12 per minute for a call from a larger jail and the correctional facility imposes a 10% site commission payment obligation on all gross revenue, the provider would be required to pay the correctional facility $0.012 (an amount lower than $0.02). In such a case the provider is *only* able to charge a contractually-prescribed facility rate component of $0.012 rather than the full $0.02 amount. For this reason, providers must calculate any contractually-prescribed facility rate component to three decimal points for all intermediate calculations occurring before the total amount of such charges related to interstate and international calling are determined.

[490] To the extent providers believe they are unable to recover their costs through the interstate and international rate components we adopt today, they may seek waivers through the waiver process we also adopt today.

[491] NCIC Comments at 4.

[492] Consequently, we reject NCIC's assertion that the $0.02 allowance could raise Tenth Amendment concerns "by infringing on a state's right to require or permit site commissions." NCIC Comments at 5. With respect to state prescribed statutory or legal obligations, we allow recovery for such mandatory site commission payments as described herein, leaving states free to require them as they wish. As the Public Interest Parties correctly highlight, our actions do not "affect a state's ability to require or permit site commissions." Public Interest Parties Reply at 14.

bidding and contracting process to do so in the future. Indeed, in the Further Notice, we seek comment on whether providers should be prohibited from entering into any correctional facility contract that requires the payment of site commission payments with respect to interstate and international inmate calling services pursuant to our authority under section 201(b) of the Act.[493]

5. Waiver Process for Outliers

171. We readopt and modify the waiver process applicable to calling service providers and codify this process in our inmate calling services rules.[494] The *2020 ICS Notice* proposed to adopt a modified waiver process to better enable the Commission to understand why circumstances associated with a provider's particular facility or contract differ from those at other similar facilities it serves, and from other facilities within the same contract, if applicable.[495] The record, while not robust on this issue, generally supports our proposed waiver process modifications. For instance, GTL agrees with the Commission's proposal to apply the waiver process on a facility-by-facility basis rather than at the holding company level as required under the present rules.[496] Significantly, no commenter opposes the proposed waiver process modifications.[497]

172. A waiver process provides an important safety valve for providers that may face unusually high costs in providing interstate or international inmate calling services at a particular facility or under a particular contract that are otherwise not recoverable through the per-minute charges for those services and through ancillary service fees associated with those services. Such a process helps us ensure that providers' rates for interstate and international inmate calling services and ancillary services are not unreasonably low within the meaning of section 201(b) of the Act and also is essential to our ability to ensure that providers are fairly compensated for each and every completed call, as section 276(b)(1)(A) of the Act requires.[498] Accordingly, we establish a modified waiver process requiring providers of inmate calling services that seek waivers of our interstate or international rate or ancillary fee caps to do so on a facility-by-facility or contract basis, consistent with our proposal in the *2020 ICS Notice*.[499] We similarly modify our waiver process to specifically permit providers to seek waivers of the international rate caps we adopt in this Report and Order.[500] The Commission has previously delegated authority to the Bureau to review and rule on petitions for waiver of its caps for inmate calling services,[501] and we reaffirm that delegation of authority today.

173. Throughout the course of this proceeding, various parties have argued that reductions in inmate calling services rates would threaten their financial viability, imperiling their ability to provide service,[502] and risking degraded or lower quality service.[503] We find that these claims are best handled on

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[493] 47 U.S.C. § 201; *infra* Part VI.B.3.

[494] *See 2013 ICS Order*, 28 FCC Rcd at 14153, para. 82. The Commission reaffirmed its waiver process for inmate calling services providers in the *2015 ICS Order*. *2015 ICS Order*, 30 FCC Rcd at 12871, para. 219; *see also* 47 CFR § 1.3. These portions of the *2015 ICS Order* were left unaltered by the *GTL v. FCC* court's 2017 vacatur. *See GTL v. FCC*, 866 F.3d 397 *passim*.

[495] *2020 ICS Notice*, 35 FCC Rcd at 8524, para. 110.

[496] GTL Comments at 5 n.13.

[497] *See, e.g., id.* at 5 n.13, 34 n.171; Public Interest Parties Comments at 11-12.

[498] 47 U.S.C. §§ 201(b), 276(b)(1)(A).

[499] *2020 ICS Notice*, 35 FCC Rcd at 8523-24, paras. 108-11; *see also 2013 ICS Order*, 28 FCC Rcd at 14154, para. 84 (requiring providers to request waivers on a holding company basis).

[500] *2020 ICS Notice*, 35 FCC Rcd at 8532, para. 129; *see also* GTL Comments at 34 n.171.

[501] *See 2015 ICS Order*, 30 FCC Rcd at 12868, para. 212; *2013 ICS Order*, 28 FCC Rcd at 14154, para. 84.

[502] *See, e.g.*, GTL Comments at 13 (recognizing that providers "will require time to determine whether they can continue to provide [inmate calling services] under the new rate caps at a particular correctional facility"). To the

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a case-by-case basis through a waiver process that focuses on the costs the provider incurs in providing interstate and international inmate calling services, and any associated ancillary services, at an individual facility or under a specific contract. We find these levels of analysis to be the most appropriate because they permit the evaluation of detailed information about individualized circumstances that are best measured at those disaggregated levels of operations, unlike our prior waiver process which was based at the holding company level.[504] This approach also recognizes that in some instances the circumstances at a particular facility may prevent the provider from recovering its costs of providing interstate and international inmate calling services and associated ancillary services under our rate and ancillary service fee caps, while in other instances circumstances applicable to all facilities covered by a contract may prevent such cost recovery.

174. As with all waiver requests, the petitioner bears the burden of proof to show that good cause exists to support the request.[505] Any inmate calling services provider filing a petition for waiver must clearly demonstrate that good cause exists for waiving our rate or fee caps at a given facility or group of facilities, or under a particular contract, and that strict compliance with our rate or fee caps would be inconsistent with the public interest.[506] We do not expect the Bureau to grant waiver requests routinely. Rather, we expect the Bureau to subject any waiver requests to a rigorous review.[507] Relief would be granted only in those circumstances in which the petitioner can demonstrate that adhering to our

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extent any provider desires to cease serving a facility or facilities because it determines that it is no longer an economically attractive business operation, correctional facilities and incarcerated people need not fear an abrupt disruption or cessation of service, as some providers suggest could occur. If an inmate calling services provider seeks to discontinue offering service at any facility, it would first need to obtain authority from this Commission pursuant to section 214 of the Act, a provision which serves to ensure that customers of any telecommunications services provider have alternative service options available to them prior to the carrier discontinuing its service at any facility. 47 U.S.C. § 214; *see also* 47 CFR § 63.71; *Comments Invited on Section 214 Application(s) to Discontinue Domestic Non-Dominant Carrier Telecommunications and/or Interconnected VoIP Services*, WC Docket No. 20-52 et al., Public Notice, 35 FCC Rcd 12045 (WCB 2020) (citing 47 CFR § 63.71); Application of Legacy Long Distance International, Inc., WC Docket No. 20-52 (filed Feb. 18, 2020), https://ecfsapi.fcc.gov/file/1021706369350/FCC%20Legacy%20Discontinuance%20Application%20IXC%20and%20OSP%202020%20as%20Filed.pdf (seeking authorization to discontinue interexchange services in all 50 states, and including customer notices that explain how to obtain a new service provider). Moreover, based on the contractual arrangements between the relevant correctional facility and provider, the inmate calling services contract would likely be transferred to another provider to ensure continuity of service for the incarcerated people residing in the facility in question, a transfer which also would require prior approval from the Commission pursuant to section 214 of the Act. *See, e.g.*, *Section 214 Applications Granted*, WC Docket No. 20-207 et al., Public Notice, 35 FCC Rcd 13089 (WCB IB 2020) (granting application for the transfer of the jail contracts of Legacy Long Distance International, Inc. d/b/a Legacy Inmate Communications to Network Communications International Corp. d/b/a NCIC Inmate Communications, an existing inmate calling services provider, thereby ensuring the continuity of service to the correctional facility customers); *see* 47 U.S.C. § 214; 47 CFR §§ 63.03-63.04.

[503] *See, e.g.*, Securus Comments at 43.

[504] *See* Securus Comments, WC Docket No. 12-375, at iii, 40-41 (filed Jan. 12, 2015) (asserting that requiring waiver petitions to be evaluated at the holding company level would be far too onerous and suggesting that the Commission allow providers to seek waivers on a site-by-site basis).

[505] 47 CFR § 1.3 ("Any provision of the rules may be waived by the Commission . . . on petition if good cause therefor is shown.").

[506] *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (recognizing that the Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest).

[507] *See, e.g.*, *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, 17840, para. 540 (2011) (*USF/ICC Transformation Order*), *pets. for review denied sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

rate or fee caps would prevent it from recovering its costs of providing interstate inmate calling services at a particular facility or pursuant to a particular contract. Moreover, we agree with commenters that suggest that the interim rate reform adopted in this Report and Order should minimize the need for providers to avail themselves of the Commission's waiver process.[508]

175. Petitions for waiver must include a specific explanation of why the waiver standard is met in the particular case. Conclusory assertions that reductions in interstate or international rates, or associated ancillary service fees, will harm the provider or make it difficult for the provider to expand its service offerings will not be sufficient. We agree with commenters that providers requesting a waiver of our inmate calling services rules should provide a detailed explanation of their claims, as well as a comparative analysis of the reasons the provider cannot recover its costs when similar facilities or contracts served by the provider do.[509] In addition, waiver petitions must include all required financial data and other information needed to verify the carrier's assertions. Failure to provide the information listed below will be grounds for dismissal without prejudice. Furthermore, the petitioner must provide any additional information requested by Commission staff needed to evaluate the waiver request during the course of its review.[510] This additional information may include information regarding facilities or contracts of the provider that have characteristics similar to those for which waiver is sought, and the provider's interstate and international rates, and associated ancillary service charges, at or below our caps. Petitions for waiver must include, at a minimum, the following information:

- The provider's total company costs, including the nonrecurring costs of the assets it uses to provide inmate calling services, and its recurring operating expenses for these services at the correctional facility or under the contract;
- The methods the provider used to identify its direct costs of providing interstate and international inmate calling services, to allocate its indirect costs between its inmate calling services and other operations, and to assign its direct costs to and allocate its indirect costs among its inmate calling services contracts and correctional facilities;
- The provider's demand for interstate and international inmate calling services at the correctional facility or at each correctional facility covered by the contract;
- The revenue or other compensation the provider receives from the provision of interstate and international inmate calling services, including the allowable portion of any permissible ancillary services fees attributable to interstate and international inmate calling services, at the correctional facility or at each correctional facility covered by the contract;
- A complete and unredacted copy of the contract for the correctional facility or correctional facilities, and any amendments to such contract;
- Copies of the initial request for proposals and any amendments thereto, the provider's bid in response to that request, and responses to any amendments (or a statement that the provider no longer has access to those documents because they were executed prior to the effective date of the waiver rules adopted in this Report and Order);
- A written explanation of how and why the circumstances associated with that correctional

[508] GTL Comments at 5 n.13; *see also* Public Interest Parties Comments at 12-13 (arguing "that there should be no need for the Commission to routinely grant [inmate calling services] rate cap waivers because the FNPRM already addresses outliers through its mean plus one standard deviation approach, and because the record shows that the vast majority of [inmate calling services] rates will remain below the caps proposed").

[509] Free Press Comments at 6.

[510] This requirement is consistent with prior Commission inmate calling services waiver requirements. *2013 ICS Order*, 28 FCC Rcd at 14154, para. 84; *2015 ICS Order*, 30 FCC Rcd at 12868, para. 212.

facility or contract differ from the circumstances at similar correctional facilities the provider serves, and from other correctional facilities covered by the same contract, if applicable; and

- An attestation from a company officer with knowledge of the underlying information that all of the information the provider submits in support of its waiver request is complete and correct.

176. We decline to adopt Free Press's request that a provider's waiver request should terminate upon a showing either that facility costs have declined or that its revenue has increased, and that we should "require periodic updates on cost and revenue data to make these determinations."[511] Requiring a provider to provide updated and detailed cost and revenue data and analyses on an ongoing basis, beyond its initial detailed cost and data submissions, would be unnecessarily burdensome. Any waiver request filed with the Commission will be rigorously scrutinized and, if granted, time limited as appropriate, based on the circumstances of each particular request. Additionally, we view our waiver process as sufficiently narrow and rigorous to filter spurious waiver claims, and thus sufficiently addresses those commenters' requests that any potential grant of a waiver of our inmate calling services rules be as narrowly tailored as possible.[512]

177. Consistent with our past waiver process for inmate calling services, we delegate to the Bureau the authority to approve or deny all or part of any petition for waiver of our inmate calling services rules.[513] Such petitions will be placed on public notice, and interested parties will be provided an opportunity for comments and reply comments. The Bureau will endeavor to complete its review of any such petitions within 90 days of the provider's submission of all information necessary to justify such a waiver, including any information requested by the Bureau subsequent to receiving the waiver request.

D. Interim International Rate Caps

178. Today we adopt, for the first time, interim rate caps on international inmate calling services calls, as proposed in the *2020 ICS Notice*. In that *Notice*, the Commission proposed to "adopt a rate cap formula that permits a provider to charge an international inmate calling services rate up to the sum of the provider's per-minute interstate rate cap for that correctional facility *plus* the amount that the provider must pay its underlying international service provider for that call on a per-minute basis."[514] A diverse group of industry stakeholders strongly support the Commission's proposal to cap international calling rates.[515]

179. The record before us is replete with evidence that Commission action to address international inmate calling services rates is long overdue.[516] Although international calling minutes from

[511] Free Press Comments at 6.

[512] *Id.*; Leadership Conference Reply at 3.

[513] *See 2013 ICS Order*, 28 FCC Rcd at 14154, para. 84; *2015 ICS Order*, 30 FCC Rcd at 12868, para. 212.

[514] *2020 ICS Notice*, 35 FCC Rcd at 8509, para. 68 (emphasis in original).

[515] MediaJustice Comments at 2; Prisoners' Legal Services Comments at 6; Verizon Comments at 2; Episcopal Church Reply at 2; Leadership Conference Reply at 1-2. *See generally* Public Interest Parties Comments at 10 (supporting the capping of international rates at interstate levels); Securus Comments at 45-46 (requesting the amount added to the interstate rate be based on an average amount paid to the underlying carrier rather than what the underlying carrier charges on a call-by-call basis); GTL Reply at 16 n.72 (supporting Securus's solution).

[516] *See, e.g.*, Wright Petitioners, D.C. Prisoners' Legal Services Project, and Citizens United for Rehabilitation of Errants Reply, WC Docket No. 12-375, at 16 (filed Feb. 8, 2016); Letter from Karina Wilkinson & Alix Nguefack, New Jersey Advocates for Immigrant Detainees, & Rebecca Hufstader and Alina Das, New York University School of Law Immigrant Rights Clinic, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3-4 (filed June 30, 2015); Human Rights Defense Center Reply, WC Docket No. 12-375, at 11-12 (filed Feb. 8, 2016) (requesting

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correctional facilities represent only a fraction of all calling minutes from such facilities, for those incarcerated people who rely on international calling to stay connected with their loved ones abroad, current international calling rates present a heavy financial burden.[517] The *2020 ICS Notice* recognized that international rates are "exceedingly high in some correctional facilities, some as high as $45 for a 15-minute call."[518] Record evidence provides additional examples of extremely high international calling rates.[519]

180. Providers and public interest advocates alike broadly support Commission adoption of international rate caps.[520] Notably, the record explains that providers have entered into contracts that limit international rates in certain states. In 2016, New Jersey, for example, prohibited state correctional authorities from contracting for international rates higher than $0.25 per minute.[521] And in 2018, Illinois negotiated a contract with Securus capping international calls at $0.23 per minute.[522] We applaud these state efforts to address excessive international calling rates through the states' contracting authority, which complements our action today setting long-overdue rate caps for international calling services.

181. *Calculating International Rate Caps*. In the *2020 ICS Notice*, the Commission proposed to adopt a rate cap formula for international inmate calling services calls that would allow a provider to "charge a rate up to the sum of the inmate calling services provider's per-minute interstate rate cap for that correctional facility plus the amount that the provider must pay its underlying international service provider for that call on a per-minute basis (without a markup)."[523] Although some commenters support the proposed methodology for calculating the international rate caps,[524] we acknowledge Securus's argument regarding the administrative difficulty of practically implementing the Commission's proposal

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that the Commission implement rate caps that are just and reasonable after it "has reviewed sufficient cost data for international calls"); GTL Comments at 34; Securus Comments at iv.

[517] *2020 ICS Notice*, 35 FCC Rcd at 8531-32, paras. 126-27.

[518] *Id.* n.306 (noting some per-minute international rates ranging from $0.50 per minute to $1.50 per minute); *see, e.g.*, Los Angeles County Sheriff's Department Comments, WC Docket No. 12-375, at 4-5 (filed Jan. 19, 2016) (Los Angeles County Sheriff's Department Jan. 19, 2016, Comments) (reporting that while a 15-minute phone call to Mexico costs $8.00, a 15-minute call to Canada costs $5.00, and that the rates charged for calls to certain European and Asian countries can total $19.25 for 15 minutes); Margaret Bick Express Comments, WC Docket No. 12-375, at 1 (filed Feb. 1, 2016) (explaining that a 15-minute call from California to Canada costs $0.75 a minute, for a total of $11.25); *see also* GTL Supplement to Annual Report, WC Docket No. 12-375, Attach. (filed Dec. 23, 2020) (Tab I. International ICS Rates, reporting certain international rates on the higher per-minute range of $1.89 per minute ($28.35 per 15-minute call) up to as high as $4.50 per minute ($67.50 per 15-minute call)).

[519] *See, e.g.*, Prisoners' Legal Services Comments at 6 (reporting that rates for international calls in Massachusetts "vary from 21 cents per minute up to nearly 54 cents per minute, with most jails providing calls for 50 cents per minute").

[520] *See, e.g.*, GTL Comments at 34; Securus Comments at 45; Verizon Comments at 2; Public Interest Parties Comments at 10; MediaJustice Comments at 2; Prisoners' Legal Services Comments at 6-7.

[521] Prisoners' Legal Services Comments at 6 (citing the session law that has been codified at N.J. Stat. Ann. § 30:4-8.12 (West 2021)). N.J. Stat. Ann. § 30:4-8.12 also provides that international rates remain subject to the Commission's rules and regulations. N.J. Stat. Ann. § 30:4-8.12 (West 2021).

[522] Worth Rises Comments at 12.

[523] *2020 ICS Notice*, 35 FCC Rcd at 8530, para. 124.

[524] MediaJustice Comments at 2; Prisoners' Legal Services Comments at 6; Verizon Comments at 2; Episcopal Church Reply at 2; Leadership Conference Reply at 1-2.

for international rate caps.[525]

182. According to Securus, the rate structures used by underlying international providers outside the United States can vary based on the destination.[526] While the average cost that Securus pays for international calls is around $0.09 a minute, in some countries the international termination rates are significantly higher than $0.09.[527] To handle the fluctuating costs of international calls, Securus, like many telecommunications service providers, has implemented a "least cost routing system" for completing its inmate calling services customers' international calls that relies on continually updated "rate decks" containing thousands of entries for international rates.[528] When an international call is made, Securus will steer the call through the route having the lowest rate at that time.[529] When rates change or the route is no longer available, Securus must find an alternative route with the next lowest rate to terminate the calls.[530] Securus states that this constant flux of different underlying international carriers charging Securus different wholesale rates makes it impractical for Securus—and, likely, other providers—to charge customers "based on the actual cost of terminating each individual call."[531]

183. Securus, therefore, proposes a methodology to account for this constant variation in international rates to the same overseas destination. Under Securus's proposal, the per-minute international rate cap applicable to each "international destination" would be based on the Commission's applicable total per-minute interstate rate cap for that facility, plus the average per-minute amount paid by the provider to its underlying wholesale international carriers to terminate international calls to the same "international destination" over the preceding calendar quarter.[532] Under this proposal, providers would be required to determine this average per-minute amount paid for calls to each international destination for each calendar quarter, and then adjust their maximum international per-minute rate caps based on such determination within one month of the end of each calendar quarter.[533] The record supports Securus's proposal as being more administratively efficient than the Commission's proposal.[534]

184. Securus presents a convincing argument that compliance with international rate caps on a call-by-call basis, where the rates charged by underlying international carriers are constantly fluctuating, would be "impractical."[535] Moreover, this methodology takes into account not only the highest but also the lowest wholesale rate for international calls to the same destination over a reasonable period of time,

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[525] Securus Comments at 46 (explaining that "[i]nternational caps that are tied to the rates charged by underlying providers for each individual call would be very difficult for Securus (and likely other [inmate calling services] providers) to implement on a real-time, call-by-call basis").

[526] *Id.*

[527] *Id.*; *see also* GTL Comments at 35 (noting that international mobile termination rates are "substantially higher than termination rates on fixed-line networks" (citation omitted)).

[528] Securus Comments at 46-47.

[529] *Id.* at 46.

[530] *Id.* at 46-47.

[531] *Id.* at 47.

[532] *Id.*; *see also id.* at 46 (observing that "rate structures used by providers outside of the United States are dramatically different depending on the destination country, or even between regions within a destination country"). We define "international destination" as meaning the rate zone in which an international call terminates. For countries that have a single rate zone, "international destination" means the country in which an international call terminates.

[533] Securus Comments at 47.

[534] *See* GTL Reply at 16 n.72. GTL initially supported the Commission's original proposal, but, in its reply comments, it supported Securus's proposal as being more efficient. *Id.*

[535] Securus Comments at 47.

benefiting incarcerated people by having a consistent, predictable international calling rate for every three-month period to the country or countries they need to call. No party has objected to this proposal. Accordingly, we adopt Securus's approach for interim international rate caps.[536] This methodology will enable providers to recover the higher costs of international calling.[537] And incarcerated people will enjoy reasonable and more affordable international calling rates, allowing them to better communicate with family and friends abroad.

185. *Alternative Proposals*. On the record before us, we decline the Public Interest Parties' request that we cap international inmate calling services rates at a level no higher than our applicable interstate rate caps.[538] The Public Interest Parties note that some providers reported no international costs but did report international minutes and revenue from the calls, which "suggests that international costs are already included in their total costs, and thus accounted for in the interstate rates."[539] According to the Public Interest Parties, the Commission will double count those costs if it allows providers to recover the costs of international calls separately.[540] While some small degree of double counting may have occurred through failure to separately report international costs in response to the Second Mandatory Data Collection, the record indicates that some providers did include separate costs for international calls in their responses.[541] Regardless, the method we are adopting recognizes that international calling does cost more than domestic calling and that providers are entitled to recover these extra costs through the method we adopt. We will continue to monitor international calling rates in providers' annual reports and collect more uniform data on international costs at the same time we undertake our data collection for interstate costs. Should those data reflect double counting, we will adjust our permanent international rate caps accordingly.[542] We also decline the proposal of the Human Rights Defense Center, which asserts that "$.05 per minute is more than adequate compensation for companies that provide all Inmate Calling Services (ICS) services, locally, interstate, intrastate and internationally."[543] The Human Rights Defense center provides insufficient support and basis for this proposal, in light of our obligations under section 276 of the Act.

E. Consistency with Section 276 of the Act

186. Section 276(b)(1)(A) of the Act requires the Commission to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call."[544] We conclude, consistent with the Commission's proposal in the *2020 ICS Notice*,[545] that the interim rate

[536] Because the interstate rate caps adopted today are interim rate caps pending our collection of new, more uniform, cost data, and because our international rate caps include our applicable interim interstate rate cap component for each facility, these international rate caps are similarly interim in nature.

[537] In the unlikely scenario where an inmate calling services provider is unable to fully recover its international calling costs, such provider may avail itself of the waiver process we adopt in this Report and Order. *See* Part III.C.5.

[538] Public Interest Parties Comments at 10.

[539] *Id.*

[540] *Id.*

[541] *E.g.*, Letter from Stephanie A. Joyce, Counsel, Securus, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach., Description and Justification for Securus's Mandatory Data Collection Report at 3 (filed Jul. 22, 2019) (Securus's Mandatory Data Collection Description and Justification) (noting that Securus provided international cost data).

[542] *See generally infra* Part III.H.3 (instituting the Mandatory Data Collection).

[543] Human Rights Defense Center Comments at 1.

[544] 47 U.S.C. § 276.

[545] *2020 ICS Notice*, 35 FCC Rcd at 8525, para. 112.

caps we adopt in this Report and Order fully satisfy this mandate. In the vast majority of, if not all, cases, these rate caps will allow providers to generate sufficient revenue from each interstate and international call—including any ancillary service fees attributable to that call—(1) to recover the direct costs of that call; and (2) to make a reasonable contribution to the provider's indirect costs related to inmate calling services.[546] To the extent there are legitimate but rare anomalous cases in which a provider cannot recoup such costs under the new rate caps, the provider may seek a waiver of those caps, to the extent necessary to ensure that it is fairly compensated, as required by the Act.

187. As the Commission observed in the *2020 ICS Notice*, this approach recognizes that calling services contracts often apply to multiple facilities and that providers do not expect each call to make the same contribution toward indirect costs.[547] The record confirms that "because the industry norm is to bid for one contract for multiple facilities and then offer a single interstate rate across facilities irrespective of cost differentials that may exist among facilities under the contract, it would be impossible to reach a methodology that would allow a direct, one-to-one recovery of costs."[548] Indeed, providers acknowledge that they do not presently keep the type of accounting records that would allow them to measure the costs of individual calls.[549] And, although the Mandatory Data Collection that we adopt in this Report and Order will result in far more granular cost data than currently are available, the resulting data will necessarily rely on allocations of indirect costs among contracts and facilities and thus will fall far short of allowing a provider to directly assign all its inmate calling services costs to individual calls.

188. We find that the interim rate caps we adopt today are consistent with both section 276 of the Act and the D.C Circuit's decision in *GTL v. FCC*. In that decision, the court rejected the Commission's "averaging calculus" in the *2015 ICS Order*, which set tiered rate caps using industry-wide average costs derived from cost data submitted by providers.[550] The court explained that the Commission erred in setting rate caps using industry-average costs because calls with above-average costs would be "unprofitable," in contravention of the "mandate of § 276 that 'each and every' inter- and intrastate call be fairly compensated."[551] The court found the Commission's reliance on industry-average costs unreasonable because, even disregarding site commissions, the proposed caps were "below average costs documented by numerous [inmate calling services] providers and would deny cost recovery for a substantial percentage of all inmate calls."[552]

189. GTL argues that our new interim rate caps fail to address the court's criticism of the

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[546] *See* Public Interest Parties Comments at 11 (advocating that this approach with adjustments provides fair compensation). *But see* GTL Comments at 32 ("Setting interstate rate caps 'that generate sufficient revenue for such calls (including any ancillary fees attributable to those calls) that (1) allow the provider to recover from those calls the direct costs of that call and (2) reasonably contribute to the provider's indirect costs related to inmate calling services' does not satisfy the demands of Section 276.").

[547] *2020 ICS Notice*, 35 FCC Rcd at 8525, para. 112.

[548] Public Interest Parties Comments at 11. No parties challenged this conclusion or commented otherwise.

[549] *See, e.g.*, GTL Sept. 14, 2020, Letter at 32 (asserting that GTL cannot attribute its inmate calling services costs to a specific correctional facility or contract); GTL Amended Description and Justification at 8-9 (same assertion); {[ )]}; Description and Justification for Talton Communication, Inc.'s Mandatory Data Collection Report, WC Docket No. 12-375, at 1 (filed Mar. 1, 2019) (noting that its direct costs of providing inmate calling services are available in an aggregate form and are not separately reported by facility); CenturyLink Description and Justification, WC Docket No. 12-375, at 5 (filed Mar. 1, 2019) (indicating that cost data are reported at the correctional system level rather than at the individual correctional facility level).

[550] *GTL v. FCC*, 866 F.3d at 414.

[551] *Id.* (quoting *American Public Communications*, 215 F.3d at 54, 57-58).

[552] *GTL v. FCC*, 866 F.3d at 414.

Commission's prior rate caps, because they "will not, in *all* cases, cover the costs of providing service."[553] This argument ignores an important distinction between the rate cap methodology that was before the court in *GTL v. FCC* and the methodology we use in this Report and Order. Instead of setting rate caps at industry-wide average costs, our methodology begins by looking at industry-wide average costs but does not stop there. Instead, we adjust those mean costs upward by one standard deviation and use the results to establish zones of reasonableness from which we select separate provider cost components for prisons and larger jails. We then add an additional amount to account for the portion of site commission payments that we conservatively estimate is related specifically to inmate calling services.[554] Our approach therefore incorporates assumptions and actions which lean toward over recovery of costs. We estimate that revenues from the capped per minute charges for individual interstate and international calls—along with the revenues from related ancillary service fees—will enable all providers to recover their actual costs of providing interstate and international inmate calling services, but provide a process for unusual cases where we might be mistaken. Thus, contrary to GTL's assertion,[555] our interim rate caps, coupled with our new waiver process, "account for the real differences in costs among [inmate calling services] providers and ensure[] providers with higher costs receive fair compensation" in a manner consistent with section 276(b)(1)(A).[556]

190. "Fair compensation" under section 276(b)(1)(A) does not mean that each and every completed call must make the same contribution to a provider's indirect costs. Nor does it mean a provider is entitled to recover the total "cost" it claims it incurs in connection with each and every separate inmate calling services call.[557] Instead, compensation is fair if the price for each service or group of services "recovers at least its incremental costs, and no one service [e.g., interstate calling service] recovers more than its stand-alone cost."[558] The record indicates that, subject to one anomalous possible

[553] GTL Comments at 9, 32 (emphasis added); *see also, e.g.*, Pay Tel Comments at 3 ("[T]he *Further Notice* now proposes new interstate rate caps based again on industry average data—this time the 2018 data each [inmate calling services] provider was required to provide to the FCC—without taking into account any other data or evidence in the substantial record in this proceeding . . . .").

[554] *See* Public Interest Parties Comments at 11. As detailed in Part III.C.4, we adopt a modified version of the site commission proposal in the *2020 Further Notice* based on record evidence that $0.02 per minute for every facility may not permit recovery of all legitimate facility costs related to inmate calling services and may not account for site commission payments required under codified law. We permit full recovery of site commission payments required under codified law and up to $0.02 per minute for contractually-prescribed site commission payments. At the same time, we also explain above that full recovery of site commissions is not required under *GTL v. FCC* or section 276. We therefore disagree with commenters asserting that section 276 requires full recovery of site commission payments in order to comply with section 276. *See, e.g.*, Pay Tel Comments at i, 8-9; Securus Comments at 49. Our interim approach permits recovery of the portion of site commission payments that we estimate are directly related to the provision of inmate calling services. Nothing more is required.

[555] *See* GTL Comments at 32.

[556] *Id.*

[557] *See id.* at 9, 32; UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 6-7 (illustrating through legislative history that Congress used the "each and every call" language to ensure that payphone providers would be compensated for all categories of calls, such as "dial around calls," but did not intend that language "to ensure that any single call taken on its own was fully compensatory").

[558] *2002 Pay Telephone Order*, 17 FCC Rcd at 3255-56, para. 18. *GTL v. FCC* did not disturb this long-standing Commission precedent. *GTL v. FCC*, 866 F.3d at 412-14. Economists generally agree that the price for each product (or group of products) is compensatory if it at least recovers its incremental costs but is an inefficiently high price if it recovers more than its standalone costs. *See generally Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, 15847-48, 14854, paras. 682, 698 (1996) (setting prices that recover incremental costs and explaining

(continued….)

outlier contract, the rate cap methodology we adopt today will allow every provider of calling services for incarcerated people to charge a price that recovers its direct costs (i.e., costs that are directly attributable to producing all of the inmate calls under a given contract) and contributes to recovery of its indirect costs.[559] Indeed, we demonstrate that virtually all contracts, except those which reflect the issues we have discussed regarding GTL, impacted by the rate caps this Report and Order imposes are commercially viable under conservative assumptions. That is, we expect they should be able to cover the contracts' direct charges and make a commercially sound contribution to costs shared across the contracts sufficient to ensure each provider's viability.[560]

191. As the Commission recognized in the *2002 Pay Telephone Order*, the "lion's share of payphone costs are those that are 'shared' or 'common' to all services," and there are "no logical or economic rules that assign these common costs to 'each and every call.'"[561] As a result, "a wide range of compensation amounts may be considered 'fair.'"[562] Here, contrary to the assertions of certain providers,[563] we adopt conservative interim rate caps that fall squarely within the zones of reasonableness,[564] as well as an allowance for site commissions reflected by our new facility-related rate component that is supported by analysis that reflects the variations in correctional facility costs, thus providing for fair compensation under the statute.

192. Providers fail to acknowledge that a wide range of compensation amounts may be considered fair, arguing generally that the Commission must adopt rate caps that enable them to recover their total costs "for each and every completed . . . interstate call."[565] In effect, providers argue that a rate-setting methodology that does "not, in all cases, cover the costs of providing service" fails to satisfy section 276.[566] We disagree. First, GTL's reliance on *Illinois Public Telecommunications Assoc. v. FCC*

(Continued from previous page)
that prices should not exceed standalone costs). 47 CFR § 51.505 (b)-(c); Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 Am. Econ. Rev. 966-77 (1975), https://www.jstor.org/stable/1806633. Our rate caps are consistent with these principles.

[559] The one exception is an apparent anomalous contract for which that contract's indirect costs were reported by{[ ]} *after* the release of the *2020 ICS Notice*. The per-minute cost we calculate for this contract is the single highest per-minute cost of all jail contracts and more than double the per-minute cost for the second highest jail contract. To the extent this contract possesses such unusual characteristics that the provider's costs are indeed legitimately this high, this is precisely the type of contract the waiver process we adopt today is meant to address.

[560] Appx. E, *infra* Part F (showing that under the interim caps, providers will recover most of their reported costs).

[561] *2002 Pay Telephone Order*, 17 FCC Rcd at 3255-56, paras. 16, 18.

[562] *Id.* at 3255, para. 16 (citing *1999 Pay Telephone Order*, 14 FCC Rcd at 2570, para. 56).

[563] *See* Pay Tel Comments at 4, 8 (asserting problems with the Commission's proposed rate cap methodology that "reflect a false assumption that location costs are far more homogenous than they actually are"); GTL Reply at 8-9.

[564] *See Verizon v. FCC*, 535 U.S. 467, 487-88 (2002) (noting that historically, "calculating a rate base and then allowing a fair rate of return on it was a sensible way to identify a range of rates that would be just and reasonable for both investors and ratepayers").

[565] *See* Pay Tel Comments at 10 ("Section 276 requires the Commission to set [inmate calling services] rates at a level sufficient to fairly compensate [inmate calling services] providers for the costs incurred for each and every call."); GTL Comments at 32 ("The statutory language is clear that providers must be fairly compensated 'for each and every' call."); Securus Comments at 11 (arguing that "to the extent calls with above-average costs in each tier are unprofitable the proposed caps do not fulfill the mandate of § 276 that 'each and every' inter- and intrastate call be fairly compensated"); Pay Tel Wood Report at 3 (explaining that "for all locations whose costs exceed the average, the [inmate calling services] provider would not be able to charge a rate sufficient to recover its costs to serve that location"); Securus Furchtgott-Roth Report at 15 ("Actual costs for facilities including site commissions are likely substantially higher than presented in the [*2020 ICS Notice*]. Thus, the approach presented in the [*2020 ICS Notice*] fails to meet the 'each and every' standard of Section 276.").

[566] *See* GTL Comments at 32; Securus Comments 11.

for support is misplaced because totally different circumstances—resulting in "no compensation for coinless calls made from inmate phones"—were before the court in that case.[567] The *Illinois Public Telecommunications* court's rejection of a "no compensation" regime where providers received zero compensation for calls simply does not create a mandate that we adopt any particular compensation methodology, much less the methodology the providers urge.

193. Second, our rate cap methodology here differs materially from the methodology vacated in *GTL v. FCC*.[568] There, the court found that the record "include[d] two economic analyses, both concluding that the [*2015 ICS*] *Order's* rate caps are below cost for a substantial number of [inmate calling services] calls even after excluding site commissions" and that "[t]he [2015] *Order* does not challenge these studies or their conclusions."[569] As a result, the court held that "the use of industry-average cost data *as proposed in the Order*" could not be upheld because "it lacks justification in the record and is not supported by reasoned decisionmaking."[570] Our methodology in this Report and Order, by contrast: (1) is designed to ensure that the costs of the vast majority of, if not all, calls are recovered; (2) includes a site commission allowance; (3) is based on a rigorous analysis of data submitted into the record by providers responding to a Commission data collection; and (4) as a backstop, provides the opportunity for providers to obtain a waiver if they can show that one is needed to ensure that they receive fair compensation, consistent with the statute.

194. But for the extraordinary case, providers will recover their costs under the new interim rate caps we adopt. Providers that continue to claim they will be unable to recover their costs of interstate or international inmate calling services under the interim rate caps we adopt today will be able to seek a waiver of those caps in accordance with the procedures set forth in this Report and Order. Any such waiver requests will be analyzed and resolved based on more comprehensive, current, and disaggregated cost data regarding that provider's cost of providing inmate calling services at the particular facility or facilities at issue.[571] The combination of our carefully considered interim rate caps and our revised waiver process afford all providers the opportunity to recover fair compensation for each and every completed interstate and international inmate calling services call consistent with section 276(b)(1)(A).

F. Cost-Benefit Analysis of Revised Interstate Rate Caps

195. Although our actions in this Report and Order are not dependent on our analysis of the relative costs and benefits of the revised interim interstate rate caps, we find that the benefits of our actions far exceed the costs. The benefits of lowering inmate calling services rates sweep broadly, affecting incarcerated people, their families and loved ones, and society at large.[572] Although important and substantial, these benefits do not lend themselves to ready quantification. As one commenter aptly

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[567] *Ill. Public Telecom. Assoc. v. FCC*, 117 F.3d 555, 566 (D.C. Cir. 1997); GTL Comments at 32; UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 7 n.2 (explaining that the court in *Illinois Public Telecommunications* "was addressing the fact that the Commission had eliminated *a whole category of calls*" which is "precisely the issue" Congress was trying to address, namely the "exclusion of a category of calls from compensation, not the rate for each call") (emphasis in original).

[568] *See GTL v. FCC*, 866 F.3d at 402.

[569] *Id.* at 414.

[570] *Id.* at 402.

[571] *See* Pay Tel Comments at 7. We reject Securus's suggestion that, for purposes of assessing compliance with section 276, we should calculate the return component of a provider's costs using the price its current owners paid to purchase the provider. *See* Securus Furchtgott-Roth Report at 16-18. Instead, we conclude that we should calculate that component for purposes of assessing compliance with section 276 using the same rate base that we use in assessing compliance with section 201(b)—the original cost of the property used to provide inmate calling services at the particular facility or facilities. *See supra* Part III.C.3.

[572] Verizon Comments at 3 (explaining that maintaining connections "yields important benefits to us all").

explains, increased communication and ties to the outside world are important for "maintaining inmate mental health."[573] The formerly incarcerated can face myriad obstacles on reentry, including "limited occupational and educational experience and training to prepare them for employment, drug and alcohol addictions, mental and physical health problems, strained family relations, and limited opportunities due to the sigma of a criminal record."[574] Lower telephone rates will likely lead to increased communication by incarcerated people which, in turn, can help mitigate some of these issues by, for example, allowing incarcerated people to maintain family relationships and make plans for post-release housing or employment.[575]

196. Lower rates, and the resulting increase in calls, can also lead to improvements in the health and well-being of the families of incarcerated people. In particular, children of incarcerated parents are much more likely to suffer from behavioral problems, poor educational attainment, physical health problems, substance abuse, and adult incarceration.[576] Studies show that contact with incarcerated parents can help mitigate these harmful effects.[577] One study, for example, demonstrated that a child's chances of dropping out of school or being suspended decreased if child had increased contract with an incarcerated parent.[578] As Verizon explains, "[p]reserving family ties allows incarcerated people to parent their children and connect with their spouses, helping families stay intact. Supporting strong families, in turn, makes our communities safer."[579] We agree.

197. Our actions will benefit incarcerated people, their families, and society in ways that cannot easily be reduced to monetary values but that standing alone support our actions. That being said, an analysis of the quantifiable benefits of our actions today shows that they far exceed the costs. In the *2020 ICS Notice*, the Commission estimated that implementing the proposed changes would cost $6 million.[580] These estimated implementation costs included one-time administrative, contract-revision, and billing-system costs.[581] We now find that $6 million is a reasonable estimate for the costs of implementing the changes we adopt today. These costs are only a relatively small fraction of the $32 million in quantifiable benefits that we now estimate our actions will bring and pale in comparison to the qualitative benefits today's changes will confer on incarcerated people, their communities, and society as

[573] *See, e.g.*, Public Interest Parties Brattle Report at 2 (citing Kelle Barrick et al., *Reentering Women: The Impact of Social Ties on Long-Term Recidivism*, 94 Prison Journal 279 (2014)).

[574] *Reentering Women: The Impact of Social Ties on Long-Term Recidivism*, *supra* note 573, at 281.

[575] *See, e.g.*, Prisoners' Legal Services Massachusetts Background Sheet at 1; Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Apr. 16, 2021) (identifying the importance of "improving the odds of finding adequate housing and employment post release").

[576] *See, e.g.*, Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 Nat'l Inst. Just. J. 10-16 (2017), https://www.ojp.gov/pdffiles1/nij/250349.pdf; Kristin Turney & Rebecca Goodsell, *Parental Incarceration and Children's Wellbeing*, 28 Future Children 147-68 (2018), https://www.jstor.org/stable/26641551?mag=what-should-we-do-about-our-aging-prison-population&seq=1.

[577] *See, e.g.*, Julie Poehlmann et al., *Children's Contact with Their Incarcerated Parents*, 65 Am. Psych. 575 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4229080/.

[578] Ashton D. Trice & JoAnne Brewster, *The Effects of Maternal Incarceration on Adolescent Children*, 19 J. Police Crim. Psych. 27-25 (2004), https://link-springer-com.fcc.idm.oclc.org/article/10.1007/BF02802572.

[579] Verizon Comments at 3.

[580] *2020 ICS Notice*, 35 FCC Rcd at 8528, para. 119.

[581] *Id.* These costs included costs associated with changing the rate for debit/prepaid calls at jails with average daily populations less than 1,000.

a whole.[582] Our estimate of $32 million in benefits is the sum of: (1) a gain of $9 million from inmate calling services users making more calls at lower rates (which is an increase of $2 million as compared with the Commission's previous estimate of $7 million);[583] and (2) $23 million in benefits to society due to reduced recidivism, crime, and foster-child care costs that improved access to communications will bring.[584]

198. *Expected Quantitative Benefits of Expanded Call Volumes.* In the *2020 ICS Notice*, the Commission calculated benefits based on a forecast of the increase in the number of calls that would occur if the Commission adopted the proposed rate caps. The Commission used estimates of current call minutes at prices above the proposed rate caps, the price decline on those call minutes implied by the proposed rate caps, and the responsiveness of demand to the changes in price.[585] Using 2018 call volume data, the Commission estimated that approximately 592 million interstate prepaid and debit minutes and 3.3 million interstate collect minutes originated from prisons at rates above the proposed caps.[586] Those data also showed that approximately 453 million interstate prepaid and debit minutes and 2 million interstate collect minutes were made from jails at rates above the proposed caps.[587] In computing benefits, the Commission relied on a lower-end interstate calling estimate of demand price elasticity of 0.2,[588] and estimated annual benefits of approximately $1 million, or a present value over ten years of approximately

[582] In the *2020 ICS Notice*, the Commission estimated benefits of $30 million, including a benefit of $7 million due to expanded call volumes plus at least $23 million for reduced recidivism, which would reduce prison operating costs, foster care costs, and crime. *Id.* at 8526, para. 116.

[583] *Id.* GTL suggests that it "*may not* be the case" that revised interstate rate caps will result in increased call volume. GTL Comments at 33 (emphasis added). GTL posits that this is because interstate calls are "only a small part of all" inmate calling services calling and that "incarcerated individuals are not entitled to unfettered access to telephonic communications." GTL Comments at 33. We find GTL's arguments to be speculative and unsupported. We therefore reject these arguments in favor of the more data-driven approach we take here.

[584] As the Commission has explained, rate reform will promote increased communication between incarcerated persons and their loved ones. *See* Report and Order, *supra* Part I (highlighting the benefits of increased communication). This additional communication will help preserve essential family ties, allowing children to stay in touch with an incarcerated parent, which, in turn, will make communities safer. *See, e.g.*, Verizon Comments at 3. Being able to maintain communication also will help incarcerated persons plan for successful integration back into their communities upon release by providing a vital avenue to explore housing and employment opportunities. Prisoners' Legal Services Massachusetts Background Sheet at 1.

[585] *2020 ICS Notice*, 35 FCC Rcd at 8526-28, paras. 116-18.

[586] *Id.* at 8526, para. 117.

[587] To determine these numbers, the Commission used rate information from the 2019 Annual Reports and call volume data (interstate minutes) from the Second Mandatory Data Collection responses. We consider each of the following call types: interstate debit and prepaid calls for prisons and larger jails only; and interstate collect calls for prisons, larger jails, and jails with average daily populations less than 1,000. For each of these call types, we adjusted the reports for minutes downward by dropping the minutes recorded in nine states—Alaska, Delaware, Hawaii, Maryland, New Mexico, Texas, Vermont, Washington, and West Virginia. We did this because each of these states has important contracts with rates below the caps we are adopting, and the rates under those contracts will only be affected by our actions if they are required to reduce their site commissions. This adjustment means our benefit estimates are likely substantially understated.

[588] *2020 ICS Notice*, 35 FCC Rcd at 8526-28, para. 118 & n.280. Following common convention, we express own-price elasticities as positive numbers. An elasticity of 0.2 means that for each percentage point drop in rates, interstate inmate calling services demand would increase by 0.2%. Our analysis is based on pre-COVID-19 data and makes no adjustments for the COVID-19 pandemic. However, if post-COVID-19, there is an increased reliance on telecommunications, and acceptance by correctional authorities of such use, our estimates would be understated.

$7 million.[589]

199. Our estimation methodology remains essentially the same as in the *2020 ICS Notice*, with two exceptions. First, leaving intact the $0.21 per minute rate for interstate debit and prepaid calls from jails with average daily populations less than 1,000 excludes some call volume from the lower cap, lowering impacted call volumes.[590] Second, our estimate of inmate calling services price elasticity has been revised upward to 0.3. With these changes, we estimate an annual welfare gain of $1.3 million, or a present value of $9 million from reduced inmate calling services rates.[591]

200. *Inmate Calling Service Demand Elasticity*. When prices fall, quantity demanded increases. Demand elasticity is a measure of the sensitivity of quantity changes to changes in prices.[592] In

[589] The present value of a 10-year annuity of $1 million at a 7% discount rate is approximately $7 million. *See* OMB, Circular A-4, Regulatory Analysis, 33-34 (Sept. 17, 2003), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf. The Office of Management and Budget recommends using discount rates of 7% and 3%. Erring on the side of understatement, we use the 7% rate.

[590] Prior to our actions today, the interim interstate rate caps for all interstate calls were $0.21 per minute for debit and prepaid calls and $0.25 per minute for collect calls. The new interim provider-related rate caps we adopt today plus an allowance of $0.02 for contractually-prescribed facility rate components adopted in this Report and Order result in the following five price declines from these rates (assuming all calls include the $0.02 allowance and no legally-mandated site commission payment results in an allowance higher than $0.02 per minute, both of which will not be the case given that some facilities charge no site commissions and thus no facility cost allowance is permitted and some legally-mandated site commission payments may exceed $0.02 per minute: for prison debit and prepaid calls, 33% (= ($0.21 - $0.14) / $0.21); for prison collect calls, 44% (= ($0.25 - $0.14) / $0.25); for jail debit and prepaid calls, for jails with an average daily population of 1,000 or more, 24% (= ($0.21 - $0.16) / $0.21), with no change for jails with average daily populations less than 1,000; and for jail collect calls, for jails with an average daily population of 1,000 or more, 36% (= ($0.25 - $0.16) / $0.25), and for jails with average daily populations less than 1,000, 16% (= ($0.25 - $0.21) / $0.25). We cut these price changes in half to allow for contracts with rates below the current caps. (This is equivalent to assuming prices are evenly distributed around the midpoint between current caps and our new caps.)

[591] We calculate the increase in surplus due to lower call prices separately for: debit and prepaid calls from prisons; collect calls from prisons; debit and prepaid calls from jails with an average daily population of 1,000 or more; collect calls from jails with an average daily population of 1,000 or more; and collect calls from jails having an average daily population less than 1,000. The calculated surpluses equal one half of the product of three items: minutes for each of the five call types; the demand elasticity estimate (0.3); and, respectively for each of the five call types, half the price decline from the earlier cap to the new interim cap. This is the area of the surplus triangle generated by an assumed price fall of one half the difference between our current caps and the new interim caps if demand and supply are linear and the final price represents costs. If the final price is still above costs, as is likely given our conservative assumptions, the surplus gain would be greater. Nonlinearities of both demand and supply have ambiguous impacts, so linearity is a good approximation in the absence of further information. We obtain an increase in surplus of $1.7 million, and then calculate the present value of a 10-year annuity of $1.7 million at a 7% discount rate to be approximately $12 million. *See supra* note 589.

[592] For small changes, demand elasticity is the ratio of the percentage change in quantity to the percentage change in price, holding other things constant. However, for larger changes, again holding other things constant, demand elasticity is better estimated by the ratio of (1) the percentage change between the original quantity and the quantity midway between the original quantity and final quantity to (2) the percentage change between the original price and the price midway between the original price and the final price. This is because, due to the simple mathematics of percentage changes, for a large change in quantity or price, the elasticity of demand as measured by the simpler ratio can be materially different than the measure that would obtain if the change was reversed: a change from 1 to 0.80 is a 20% decline, but a rise from a 0.80 price to 1.00 is a 25% rise. University of Minnesota, Principles of Economics, § 5.1 The Price Elasticity of Demand, https://open.lib.umn.edu/principleseconomics/chapter/5-1-the-price-elasticity-of-demand/ (last visited Apr. 22, 2021) ("This measure of elasticity, which is based on percentage changes relative to the average value of each variable between two points, is called arc elasticity. The arc elasticity method has the advantage that it yields the same elasticity whether we go from point A to point B or from point B to point A." (emphasis omitted)).

the *2020 ICS Notice*, the Commission relied on demand elasticity estimated for voice telecommunications generally and chose a conservative estimate from these of 0.2.[593] However, the record provides four pieces of direct evidence of the demand elasticity for inmate calling services, two of which are quite recent. These estimates, two of approximately 0.4 and two of approximately 0.3, lead us to conservatively conclude inmate calling services have a demand elasticity of at least 0.3.[594]

201. First, a 57.5% drop in calling rates in New York state in 2007 resulted in an increase in call volumes of 36%, suggesting a demand elasticity of 0.38.[595] Second, 2018 data from the New York City contract suggests a demand elasticity of 0.38.[596] Third, in 2019, in San Francisco, when calls became free, call volumes rose 81%, suggesting an elasticity of 0.29.[597] Fourth, Securus's consultant FTI estimates price and quantity movements from the rate reduction seen in 2014 due to the Commission's earlier action. FTI's estimates suggest a demand elasticity of 0.31.[598] In both the New York City and San

[593] *2020 ICS Notice*, 35 FCC Rcd at 8527-28, para. 118 & n.280.

[594] For the first three of our estimates we do not have sufficient data to ensure we are holding all other things constant, and for the fourth, from Securus's consultant FTI, we cannot verify FTI's approach. Thus, all these estimates should be viewed as approximate. To avoid overstating benefits, we use the lower bound of these estimates rounded to the first decimal place.

[595] Martha Wright et al. Comments, WC Docket No. 12-375, Exh. C at 14 (filed Mar. 25, 2013). The 0.38 elasticity calculation is as follows. We normalize or change the units in which quantity and price are denominated, so the initial quantity is 100 and the initial price is $100. Using the quantity increase of 36% and price decline of 57.5%, we can determine the new quantity and price in these new normalized units. Normalization works because the arc elasticity calculation depends on the change between quantities and prices and therefore yields the same measure regardless of the units used to measure quantity and price. A quantity increase of 36% implies a new quantity of 136 (= 100 * (1 + 36%)). A price decrease of 57.5% implies a new price of 42.5 (= 100 * (1 – 57.5%)). The quantity change using the midpoint formula is 30.5% (= (136 – 100) / ((100 + 136) / 2)). The price change using the midpoint formula is 80.7% (= (100 – 42.5) / ((100 + 42.5) / 2)). Thus, the elasticity is 0.38 (= 30.5% / 80.7%).

[596] Worth Rises Comments at 11 ("[T]he city . . . renegotiated the price of its calls with Securus from $0.50 for the first minute and $0.05 for every additional minute to $0.03 per minute across the board. The legislation went into effect in May 2019, saved families nearly $10 million annually, and increased call times by almost 40% overnight."). We estimate the elasticity based on the price of a 15-minute phone call, the price of which dropped from $1.20 = ($0.50 + (14 * $0.05)) to $0.45 = (15 * $0.03). Normalizing the initial quantity to 100 implies a new quantity of approximately 140 (= 100 * (1 + 40%)). The quantity change in the midpoint formula is 33.3% (= (140 – 100) / ((100 + 140) / 2)); the price change in the midpoint formula is 90.9% (= ($1.20 - $0.45) / (($1.20 + $0.45) / 2)); therefore, the elasticity is 0.37 (= 33.3% / 90.9%).

[597] *Id.* ("In 2019, San Francisco became the second city to make jail calls free to incarcerated people . . . ."); Financial Justice Project Comments at 1 ("Compared to this time last year, incarcerated people are spending 81 percent more time in communication with their families."). The elasticity of 0.29 is derived as follows: Normalizing the initial San Francisco quantity to 100 and price to $100 implies the new quantity is 181, and the new price is zero. Thus, the quantity change in the midpoint formula is 57.7% (= (181 – 100) / ((100 + 181) / 2)); the price change in the midpoint formula is 200% (= (100 - 0) / ((100 + 0) / 2)); and the elasticity is 0.29 (= 57.7% / 200%).

[598] FTI initially used regression analysis to estimate an elasticity of 1.25 for interstate calling for large facilities. Securus Comments Attach., FTI Consulting, Inc., Report on Price Elasticity of Demand for Interstate Inmate Calling Services on Behalf of Securus Technologies, Inc., WC Docket No. 12-375, at 16 (filed Jan. 12, 2015) ("The actual cross-section price elasticity of demand in 2013 was . . . −1.25 for large facilities . . . ."). However, FTI was concerned the regression model did not account for a range of factors, the two most important of which were substitution from intrastate/local inmate calling services to interstate inmate calling services, said to increase call volumes by 28.3%, and unexplained Securus initiatives, said to increase call volumes by 14.9%. After making adjustments to control for the impact of these factors, FTI estimates that a 38.2% fall in interstate prices increased demand by 15.5%. *Id.* at 21 ("Specifically, the analysis we performed shows that the FCC's interim rate caps result in an increase in interstate minutes of only 15.5% while reducing interstate rates by 38.2%."),. From these measures the elasticity calculation is as follows. Normalizing the initial quantity and price to 100 implies the price fell to 61.8 (= 100 * (1 - 38.2%)) and the quantity rose to 115.5 (= (100 * (1 + 15.5%))). The midpoint formulas are 47.2%

(continued….)

Francisco cases, our elasticity estimate is derived from a price decrease in which the initial price was closer to our current caps than will be the case for most of the contracts we discuss. Economic theory suggests that the demand elasticity for contracts with prices above our caps will be greater than the New York City or San Francisco estimates.[599]

202. We also expect lower rates for calling services to yield additional benefits by reducing recidivism and crime and the need for child foster care. Several commenters point to the link between affordable inmate calling, improved mental health, and lower recidivism. According to the Episcopal Church and the United States Conference of Catholic Bishops, "studies have shown that phone communication between families and their loved ones in prison and its associated mental health benefits make incarcerated people less likely to recidivate."[600] Citing the California Department of Corrections, GTL also emphasizes the recidivism-reducing effect that affordable inmate calling services can have by helping incarcerated people prepare for life after confinement.[601] In the *2020 ICS Notice*, the Commission estimated that the benefits from reduced recidivism would exceed $23 million over ten years.[602] That estimate and the underlying reasoning continue to apply here. Although we cannot pinpoint how much increased telephone contact would reduce recidivism among incarcerated people, we estimate that even if our reforms resulted in only 100 fewer people being incarcerated due to recidivism, that would yield savings of approximately $3.3 million per year, or more than $23 million over 10 years in present value terms.[603] Other savings would also be realized through reduced crime,[604] and fewer children being placed

(Continued from previous page)
(= (100 - 61.8) / ((100 + 61.8) / 2)) for price; and 14.4% (= (100 -115.5) / ((100 + 115.5) / 2)) for quantity. Thus, the elasticity is 0.31 (= 14.4% / 47.2%).

[599] In general, demand elasticity changes at different points along the good's demand curve, generally rising with price. (This is most easily seen for a linear demand curve. For small changes, demand elasticity is defined as the product of the demand curve's slope and the ratio of price to quantity. When demand is linear, its slope is constant, thus any change in elasticity is determined by how the ratio of price to quantity changes, and this ratio always rises with price, since a rising price implies a falling quantity. For realistic nonlinear curves, for which quantity demanded is finite at a zero price and for which a price exists at which quantity demanded is zero, this relationship will hold at low and high prices; as price approaches zero, elasticity also approaches zero, while as price approaches the point at which quantity demanded is zero, elasticity becomes large.) Both the New York City and San Francisco cases considered price changes that happened along a portion of the demand curve where price was less than our rate caps. Therefore, these estimates were taken over a portion of the demand curve where elasticity was likely smaller than it is for the contracts with current rates above our caps. In addition, economic theory predicts that a good has higher elasticity if it accounts for more of a consumer's overall budget. Every estimate for inmate calling elasticity that the Commission has seen has been below 1. This implies that incarcerated people residing in facilities with higher calling rates end up spending more on calling services overall—even after accounting for differences in minutes purchased—than incarcerated people in facilities with lower calling rates. It follows that because incarcerated people in facilities with prices above our caps spend more on inmate calling than incarcerated people in New York City and San Francisco did, these incarcerated people will have a higher demand elasticity than incarcerated people in New York City and San Francisco. For further explanation on what affects demand elasticity, see University of Minnesota, Principles of Economics, § 5.1 The Price Elasticity of Demand, https://open.lib.umn.edu/principleseconomics/chapter/5-1-the-price-elasticity-of-demand/ (last visited Apr. 22, 2021).

[600] Episcopal Church et al. Reply at 2.

[601] GTL Comments at 2 nn.3-4.

[602] *2020 ICS Notice*, 35 FCC Rcd at 8527-28, para. 118.

[603] *Id.* at 8526-28, para. 118 & nn.283-84.

[604] Council of Economic Advisors, Returns on Investments in Recidivism-Reducing Programs, at 3 (May 2018), https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/05/Returns-on-Investments-in-Recidivism-Reducing-Programs.pdf.

in foster homes.[605] The potential scale of fiscal saving—in addition to the immense social benefits—is suggested by the fact that, on average, state and local governments incur administrative and maintenance costs of $25,782 per foster placement.[606]

203. *Costs of Reducing Rates for Interstate Inmate Calling Services Calls*. We find most credible the cost estimate used in the *2020 ICS Notice*, where the Commission estimated that the costs of reducing rates for interstate inmate calling services calls would amount to approximately $6 million.[607] Approximately 3,000 calling services contracts will need to be revised based on the rules we adopt today, and a smaller number of administrative documents may need to be filed to incorporate lower interstate and international rates.[608] We estimate that these changes would require approximately 25 hours of work per contract. We use a $70 per hour labor cost to implement billing system changes, adjust contracts, and to make any necessary website changes.[609] The estimated cost of these actions is $5,139,750 (= 2,937 (number of contracts) * 25 (hours of work per contract) * $70 per hour), which we round up to $6 million to be conservative.

204. GTL argues that the Commission's estimate that it would take 25 hours of work per contract to revise calling services contracts is unrealistically low.[610] According to GTL, its recent experience renegotiating contracts and implementing new rates in 2013 and 2015 indicates that the costs of such renegotiations are much higher than what the Commission estimated.[611] GTL, however, did not provide any specific data about the costs it incurred and did not explain the methodology it used to arrive at its cost estimates. Accordingly, we cannot reasonably assess the merits of GTL's objection, much less rely on its filings to provide a different estimate. As a result, we find that the Commission's earlier estimate that our reforms would cost providers approximately $6 million continues to provide the best information for us to use in conducting our cost-benefit analysis.

205. *Anticipated Effect on Inmate Calling Services Investment.* Our new rate caps will give inmate calling services providers the opportunity for full cost recovery and a normal profit. This full cost recovery includes operating costs, common costs, a return on capital investment, and capital replacement. By adopting the new interim rate caps, the Commission seeks to lower the price of interstate and international inmate calling services closer to the costs companies incur in providing the services. GTL argues that we risk discouraging investment by ignoring components of providers' total costs, particularly

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[605] U.S. Government Accountability Office, Child Welfare: More Information and Collaboration Could Promote Ties Between Foster Care Children and Their Incarcerated Parents, at 11 (Sept. 2011), https://www.gao.gov/assets/590/585386.pdf.

[606] Nicholas Zill, *Better Prospects, Lower Costs: The Case for Increasing Foster Care Adoption*, at 3 (May 2011), https://web.archive.org/web/20151005185803/https:/www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf.

[607] *2020 ICS Notice*, 35 FCC Rcd at 8528, para. 119. We continue to assume smaller jails incur costs for all calls.

[608] *Id.*

[609] We use an hourly wage of $46 for this work. We examined several potential wage costs. For example, in 2020, the median hourly wage for computer programmers was $45.98, and for accountants and auditors, it was $39.26. We chose the higher of these because of the specialized technical nature of the work. *See* Bureau of Labor Statistics, U.S. Department of Labor, Occupational Employment and Wage Statistics, https://www.bls.gov/oes/. This rate does not include non-wage compensation. To capture this, we mark up wage compensation by 46%. In March 2020, hourly wages for the civilian workforce averaged $25.91, and hourly benefits averaged $11.82, yielding a 46% markup on wages. *See* U.S. Department of Labor, Bureau of Labor Statistics, Employer Costs for Employee Compensation News Release (June 18, 2020), https://www.bls.gov/news.release/archives/ecec_06182020.htm. Using this 46% markup on the $46 hourly wage, we obtain an hourly rate of $67.16 (= $46 x 1.46), which we round up to $70.

[610] GTL Comments at 33.

[611] *Id.* at 34.

capital costs, and setting inmate calling services rates too low.[612] Securus claims that "the proposed caps would not allow Securus to recover its costs at many jail facilities," and that the Commission has not accounted for "the potential negative outcomes of degraded or lower quality service at some facilities if providers are not able to fully recover all of their costs."[613] We disagree with both providers. The rate caps adopted in this Report and Order will allow every provider of calling services for incarcerated people to charge a price that recovers its direct costs—namely the costs directly attributable to producing all of the calls under a given contract—and that contributes to the recovery of the provider's indirect costs. With rates set to exceed estimated per-minute costs, including an allowance for the cost of capital, a provider should generate sufficient revenue to more than cover its total operating costs, thereby avoiding any disincentive to invest. As a fail-safe, however, our Report and Order also allows providers unable to recover their costs under the interim rate caps adopted herein to seek waivers of those caps.

206. Under our new policy, lower rates will enable more frequent inmate calling at lower prices. Incarcerated people and their families will enjoy added consumer surplus, measured by the difference between the lower price and their willingness to pay for the increased call volume. Some of the producer surplus, measured by the difference between the lower price and service providers' marginal costs, will be transferred from providers to incarcerated people and their loved ones, thereby reducing provider profits. As discussed above, surplus gains may come from other sources besides provider profits. Any addition to consumer surplus that did not exist previously as provider profit is a net economic gain. Neither gain will come at the expense of provider investment. And, as noted above, lower calling rates will facilitate increased communication between incarcerated people and their loved ones, which will benefit all incarcerated persons and their families by fostering essential family ties and also allowing incarcerated people to plan for successful reentry upon release.[614]

G. Disability Access

207. The Commission is committed to using all of its authority to ensure that incarcerated people have access to functionally equivalent telecommunication services to communicate with their families, loved ones and other critical support systems. We specifically "acknowledge the injustice facing the scores of incarcerated people with disabilities who lack access to functionally equivalent communications."[615] In the *2020 ICS Notice*, the Commission asked for comment on the needs of incarcerated people with communication disabilities.[616] The response was voluminous.[617] Commenters' concerns generally fall into two categories. First, commenters allege that some providers are not following the Commission's rules for the provision of telecommunications relay services (TRS), and complain about egregiously high rates and the lack of necessary equipment at correctional facilities.[618] We remind providers that they are obligated to comply with our existing inmate calling services and

[612] GTL Godek Report at 2, 14; GTL Godek Reply Report at 5. FTI notes that "[t]he capital return is an important and sizable cost [inmate calling services] providers must recover through the prices of their services to ensure sufficient profitability to encourage investments in their business." Securus FTI Report at 8.

[613] Securus Comments at 10, 43.

[614] *See, e.g.*, *supra* paras. 195-97.

[615] Letter from Blake E. Reid, Counsel to Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Mar. 24, 2021) (Accessibility Coalition Mar. 24, 2021, *Ex Parte*).

[616] *2020 ICS Notice*, 35 FCC Rcd at 8534, para. 136. As we did in the *2015 ICS Order*, we use "disabilities" to include individuals who are deaf or hard of hearing, as well as those who are deafblind or have speech disabilities who also have policy concerns that are similar to those incarcerated people who are deaf or hard of hearing. *2015 ICS Order*, 30 FCC Rcd at 12874-75, para. 226.

[617] The Commission received 17 substantive responses in the comment cycle, and 68 express comments.

[618] *See, e.g.*, HEARD et al. Comments at 16-18 (Accessibility Coalition Comments).

related rules, including rules requiring that incarcerated people be provided access to certain forms of TRS, rate caps for calls using a text telephone (TTY) device, rules prohibiting charges for TRS-to-voice or voice-to-TTY calls, and rules requiring annual reporting of the number of TTY-based calls and any complaints.[619] In addition, like other communications service providers, inmate calling services providers must ensure that the services and equipment provided for use by incarcerated people are accessible and usable by incarcerated people with disabilities (subject to achievability),[620] including when legacy telephone services are discontinued and replaced with advanced services such as Voice over Internet Protocol (VoIP).[621]

208. Second, several commenters argue that TTY is an outdated mode of communication for individuals with disabilities.[622] We agree that given the changes in telecommunications technologies in the past decades, TTYs have become little used because of the widespread transition to Internet Protocol-based services.[623] We also understand that TTYs may not be suitable for individuals who, for example, use American Sign Language as their primary mode of communication.[624] To fill the void and to better serve incarcerated people with disabilities, commenters advocate that the Commission require providers to offer other types of functionally equivalent telecommunication services.[625] We intend to address these concerns in the near future in a manner that best meets the needs of incarcerated persons who are deaf, hard of hearing, deafblind or have a speech disability, consistent with our jurisdiction and legal authority. Accordingly, we seek detailed comment to further explore this issue in the accompanying Further Notice.[626]

209. Public interest groups also urge the Commission to coordinate with the Department of Justice (DOJ).[627] Through the Federal Bureau of Prisons, DOJ administers federal correctional facilities. In addition, DOJ has authority to adopt disability access regulations applicable to federal, state, and local government entities, including correctional authorities, under section 504 of the Rehabilitation Act of 1973 and Title II of the ADA.[628] We agree that such coordination would be beneficial in assisting the

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[619] *See* 47 U.S.C. §§ 225, 276; 47 CFR §§ 64.603, 64.1330(b), 64.6040, 64.6060; *2015 ICS Order*, 30 FCC Rcd at 12874-75, para. 226.

[620] *See* 47 U.S.C. §§ 255, 617; 47 CFR pts. 6, 7, 14.

[621] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128, 1185-86, para. 153 (2017).

[622] *See, e.g.*, HEARD et al. Comments at v, 9-12 (explaining that TTYs "in many cases no longer even work as a result of the years-long Internet Protocol (IP) transition" and overall use has dropped by over 80% in the past 11 years); HEARD et al. Reply at 3 (explaining that "TTYs are not operational and no longer provide functional equivalence"); Convo Reply at 1 (describing difficulties incarcerated individuals may have when they request videophones and VRS); *see also 2015 ICS Order*, 30 FCC Rcd at 12876, para. 229.

[623] *See, e.g.*, Accessibility Coalition Comments at v (explaining that TTYs "in many cases no longer even work as a result of the years-long Internet Protocol (IP) transition"); Accessibility Coalition Reply at 3 (explaining that "TTYs are not operational and no longer provide functional equivalence"); Convo Communications, LLC, Reply at 1 (Convo Reply) (describing difficulties incarcerated people may have when they request videophones and VRS).

[624] *E.g.*, Leadership Conference Reply at 2; *see* Richard Ray Reply at 4-5.

[625] *See, e.g.*, Accessibility Coalition Comments at 3; Convo Reply at 1.

[626] *Infra* Part VI.A.

[627] Accessibility Coalition Comments at 19; Accessibility Coalition Mar. 24, 2021, *Ex Parte* at 2; Richard Ray Reply at 1; ZP Better Together, LLC, Reply at 4 (ZP Reply). The Federal Bureau of Prisons is part of DOJ.

[628] *See* 29 U.S.C. § 794; 42 U.S.C. § 12131 *et seq.*; 28 CFR pt. 41 (regulations implementing the Rehabilitation Act of 1973); 28 CFR pt. 35 (regulations implementing Title II of the ADA).

Commission with addressing issues such as those raised in the record and in the Further Notice.[629] We therefore direct CGB to make all efforts to coordinate with DOJ to ensure that incarcerated people with communications disabilities have access to communications "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."[630]

H. Other Issues

1. Ancillary Fee Cap for Single-Call Services and Third-Party Transaction Fees

210. We revise our rules for single-call services and third-party financial transaction fees to establish a uniform cap for both types of ancillary service fees for or in connection with interstate or international use of inmate calling services. Providers may no longer simply pass through third-party financial transaction fees, including those related to single-call services, to calling services consumers.[631] The Commission sought comment in the *2020 ICS Notice* on whether its ancillary services fee caps, generally, should be lowered or otherwise modified.[632] It also sought comment on what limits, if any, should be placed on third-party transaction fees that providers may pass on to consumers, including those related to single-call services.[633] Record evidence provided by the Prison Policy Initiative explains that Western Union, one of the most prominent third-party money transfer services used in this context,[634] charges $6.95 to send money to GTL, the largest inmate calling services provider.[635] We therefore modify our rules to limit the charges a provider may pass on to incarcerated people or their friends and family for third-party financial transaction fees associated with single-call services[636] or for third-party money transfer service fees to $6.95 per transaction on an interim basis.[637] These modifications are

[629] *See infra* Part VI.A.

[630] 47 U.S.C. § 225.

[631] *See* 47 CFR § 64.6020(b)(2), (b)(5) (permitting a pass-through to consumers of the exact fees, with no markup that result from these transactions prior to today's action).

[632] *2020 ICS Notice*, 35 FCC Rcd at 8532, para. 131.

[633] *2020 ICS Order on Remand*, 35 FCC Rcd at 8488, para. 9; *2020 ICS Notice*, 35 FCC Rcd at 8532, para. 131. Single-call services are collect calls by incarcerated people that "are billed through third-party billing entities on a call-by-call basis to parties whose carriers do not bill collect calls." *2015 ICS Order*, 30 FCC Rcd at 12854, para. 82; *see also 2020 ICS Order on Remand*, 35 FCC Rcd at 8532, para. 12. Specifically, the Commission defined single-call services as "billing arrangements whereby an Inmate's collect calls are billed through a third party on a per-call basis, where the called party does not have an account with the Provider of Inmate Calling Services or does not want to establish an account." *2015 ICS Order*, 30 FCC Rcd at 12920, Appx. A, 47 CFR § 64.6000(a)(2).

[634] *See, e.g.*, *2015 ICS Order*, 30 FCC Rcd at 12850, para. 171 (identifying Western Union and MoneyGram as third-party money transfer service providers); Wright Petitioners et al. Comments, WC Docket No. 12-375, at 17 (filed Mar. 20, 2020) (Wright Petitioners Mar. 20, 2020, Comments) (explaining that "many [inmate calling services] customers do not have bank accounts, they often use money transmitters *such as Western Union or Money Gram* to remit funds to prepay an [inmate calling services] account" (emphasis added)).

[635] Letter from Andrea Fenster, Staff Attorney, Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Feb. 21, 2021) (Prison Policy Initiative Feb. 21, 2021, *Ex Parte*) (highlighting "inexplicably high third-party financial transaction fees" charged by GTL despite the fact that "Western Union charges consumers $6.95 to send payments to GTL"); Public Interest Parties July 29, 2020, *Ex Parte* Attach. at 8 (highlighting that Western Union charges $6.95 to send a $25 payment to GTL).

[636] 47 CFR § 64.6020(b)(2).

[637] 47 CFR § 64.6020(b)(5).

warranted to close loopholes in our rules.[638]

211. In adopting the $6.95 interim cap for single-call services and third-party transactions fees, we decline to adopt at this time NCIC's proposal to cap single-call services at the $3.00 cap for automated payment fees or the $5.95 cap for live agent fees, as applicable, pending further input on this proposal, which we seek in today's Further Notice.[639] We do not have sufficient evidence to adopt this proposal at this time, especially considering the data provided by the Prison Policy Initiative, which supports a higher rate ($6.95) than the highest rate NCIC's proposal would allow ($5.95). We encourage all interested parties to comment further on the NCIC proposal. At this time, however, we conclude that the number provided by the Prison Policy Initiative is a reasonable interim step that reduces excessively high third-party costs embedded in fees for single-call services and third-party transactions.[640]

212. *Single-Call Services*. In the *2015 ICS Order*, the Commission first adopted rules for single-call and related services, one of five permissible ancillary service charges that providers were allowed to assess on their customers in connection with inmate calling services.[641] The Commission found that providers were using single-call services "in a manner to inflate charges,"[642] and limited fees for single-call and related services to the exact transaction fee charged by the third-party that bills for the call, "with no markup, plus the adopted, per-minute rate."[643] Because the D.C. Circuit stayed the rule on March 7, 2016, it never became effective;[644] and the Commission reinstated it in the *2020 ICS Order on Remand* without revision.[645]

213. In reinstating the single-call services rule, the Commission noted evidence in the record suggesting that certain providers may have entered into revenue-sharing arrangements with third parties in connection with single-call services that indirectly result in mark-up of fees charged by third-party processing companies and thus serve to circumvent the Commission's cap on pass-through fees for single-call services.[646] This evidence included, for example, a then recent report prepared by the Prison Policy Initiative detailing the way some providers use these revenue-sharing arrangements with third parties, like Western Union and MoneyGram, to circumvent the caps on the fees they may charge for

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[638] *2015 ICS Order*, 30 FCC Rcd at 12769, para. 9 (citing "a disturbing trend in which ancillary service charges increased exponentially and unfairly, to the detriment of incarcerated [people] and their families and in contravention of the statute," the Commission limited the types and amounts of ancillary service charges that a provider may pass on to incarcerated people and their friends and family); *see also* Prison Policy Initiative Comments, WC Docket No. 12-375, at 1 (filed Jan. 19, 2016) (Prison Policy Initiative Jan. 19, 2016, Comments) (explaining how third parties charge consumers high fees to send money and then share profits with inmate calling services providers); Letter from Tim McAteer, President, Inmate Calling Solutions, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. 1 at 3-4 (filed Oct. 15, 2015) (arguing that "the loophole of allowing third-party financial transaction fees as a pass-through cost with no further restrictions or rate caps" allows providers to "outsource payment services to third parties who are not restricted to such caps, thereby allowing [inmate calling services] providers to charge fees above the caps").

[639] NCIC Comments at 3; Letter from Lee G. Petro, Counsel to NCIC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed July 28, 2020) (NCIC July 28, 2020, *Ex Parte*).

[640] Prison Policy Initiative Feb. 21, 2021, *Ex Parte* at 1.

[641] *2015 ICS Order*, 30 FCC Rcd at 12769, para. 9.

[642] *Id.* at 12854, para. 182.

[643] 47 CFR § 64.6020(b)(2); *2015 ICS Order*, 30 FCC Rcd at 12857, para. 186. The "third-party transaction" referred to in section 64.6020(b)(2) for single-call services is the same type of "third-party financial transaction" referred to in section 64.6020(b)(5). *See 2015 ICS Order*, 30 FCC Rcd at 12846, para. 163 tbl. 4.

[644] *2020 ICS Order on Remand*, 35 FCC Rcd at 8490, para. 12.

[645] *Id.* at 8495, para. 27 n.86, 8497, para. 34 n.101.

[646] *Id.* at 8502, para. 50; *see also* NCIC July 28, 2020, *Ex Parte* at 1-2 & Exh. A.

single-call services.[647] The third-party financial provider charges the inmate calling services provider as much as $12 to send it a payment in connection with a single-call service or to fund an account. The inmate calling services provider then passes this fee on to the family of the incarcerated person who placed the call, and the two companies split the $12 fee, each getting $6. Some providers freely admit that they engage in these revenue-sharing schemes.[648] Other providers have asked the Commission to address this practice and preclude it.[649]

214. These "egregiously-high third-party transaction fees" are unconnected to legitimate costs of inmate calling services.[650] We, therefore, revise the single-call service rule and limit the third-party transaction fees providers may pass on with respect to single-call services to $6.95 per transaction. There is support in this record for this proposal.[651] The Commission has previously found single-call services to be among "the most expensive ways to make a phone call."[652] And record evidence suggests some providers still may steer families of incarcerated people to these more expensive calls.[653] Revising the rule applicable to single-call services in this way will ensure that consumers of inmate calling services, who may be unaware of, or confused by, other available calling options, are protected from unjust and unreasonable charges and practices when seeking to remain in contact with incarcerated friends or family, particularly when they are initially incarcerated and this immediate single-call method of communication is even more critical.[654]

215. *Third-Party Financial Transaction Fees*. For the same reasons we limit the third-party transaction fee associated with single-call services, we revise the rule pertaining to third-party financial transaction fees in connection with funding accounts directly with the inmate calling services provider that may be set up on behalf of incarcerated people by their friends and family or by the incarcerated people themselves.[655] The same revenue-sharing practices that lead us to revise the single-call services rule are implicated in connection with the third-party financial transaction fees rule.[656]

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[647] Public Interest Parties July 29, 2020, *Ex Parte* Attach. at 8.

[648] *E.g., id.* (explaining that Amtel has "admitted . . . that it receives a portion of Western Union's fees" which Western Union calls "'revenue share'" and "'referral fee'").

[649] *See, e.g.*, NCIC July 28, 2020, *Ex Parte* at 1-2 & Exh. A.

[650] *Id.* at 1.

[651] Prison Policy Initiative Feb. 21, 2021, *Ex Parte* at 2; Public Interest Parties July 29, 2020, *Ex Parte* Attach. at 8.

[652] *2015 ICS Order*, 30 FCC Rcd at 12855, para. 183; *see also* NCIC Comments at 2.

[653] *See* Public Interest Parties July 29, 2020, *Ex Parte* at 3 & Attach. at 9. The Commission previously noted "concerns that providers may be using consumer disclosures as an opportunity to funnel end users into more expensive service options, such as those that may require consumers to pay fees to third parties." *2015 ICS Notice*, 30 FCC Rcd at 12896, para. 279 n.974.

[654] *See 2015 ICS Order*, 30 FCC Rcd at 12854-55, para. 182; NCIC Comments at 2-3.

[655] Although the *2020 ICS Notice* referred to "third-party transaction fees," the third-party financial transaction fee described in section 64.6020(b)(5) is the same as the third-party transaction fee referred to in the rule pertaining to single-call services. *See 2015 ICS Order*, 30 FCC Rcd at 12846, para. 163 tbl. 4; *see also 2015 ICS Order*, 30 FCC Rcd at 12857, para. 187 ("Accordingly, for single-call and related services, the Commission will allow [inmate calling services] providers to charge end users for each single call in a manner consistent with our approach to third-party financial transaction fees—i.e., [inmate calling services] providers may charge the amount of the third-party financial transaction (with no markup) added to a per-minute rate no higher than the applicable rate cap.").

[656] *2020 ICS Notice*, 35 FCC Rcd at 8516, para. 91; *2015 ICS Notice*, 30 FCC Rcd at 12915, para. 326; Pay Tel Comments, WC Docket No. 12-375, at 16 (filed Jan. 19, 2016) (Pay Tel Jan. 19, 2016, Comments); CenturyLink Public Communications, Inc., Comments, WC Docket No. 12-375, at 12-13 (filed Jan. 19, 2016) (CenturyLink Jan. 19, 2016, Comments); Prison Policy Initiative Jan. 19, 2016, Comments at 2-4; Human Rights Defense Center

(continued….)

216. The Commission sought comment in the *2015 ICS Notice* on a variety of issues relating to revenue-sharing, including how the Commission can "ensure that these revenue sharing arrangements are not used to circumvent our rules prohibiting markups on third-party fees."[657] In the *2020 ICS Notice*, the Commission sought further comment on the use of revenue-sharing arrangements and whether the Commission should clarify the third-party financial transaction fee rule.[658] CenturyLink previously contended that the rule governing third-party financial transaction fees already implicitly prohibits providers from recovering higher fees from consumers as a result of revenue-sharing agreements.[659] In the *2020 ICS Notice*, the Commission stated that "[m]arking up third-party fees, whether directly or indirectly, is prohibited."[660]

217. Yet the record in this proceeding continues to suggest that the same types of revenue-sharing agreements that lead to indirect markups of third-party transaction fees for single-call services similarly lead to mark-ups of third-party financial transaction fees.[661] Such practices serve to circumvent, either directly or indirectly, the limits placed by the Commission on ancillary service charges and lead to unjust and unreasonable charges. We thus revise our rule relating to third-party financial transaction fees, and limit the fees that a provider can pass through to a calling services consumer to $6.95. We clarify that we do not prohibit providers from entering into revenue-sharing agreements with third parties,[662] despite at least one commenter proposal to do just that.[663] But providers may not pass on fees exceeding $6.95 per transaction—whether or not they are associated with such agreements—to incarcerated people and their families.

2. Effect on State Regulation

218. As the Commission explained in the *2020 ICS Order on Remand*, where the Commission has jurisdiction under section 201(b) of the Act to regulate rates, charges, and practices of interstate communications services, "the impossibility exception extends that authority to the intrastate portion of jurisdictionally mixed services 'where it is impossible or impractical to separate the service's intrastate from interstate components' and state regulation of the intrastate component would interfere with valid

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Comments, WC Docket No. 12-375, at 10 (filed Jan. 19, 2016) (Human Rights Defense Center Jan. 19, 2016, Comments) (agreeing with the comment submitted by the Prison Policy Initiative).

[657] *2015 ICS Notice*, 30 FCC Rcd at 12915, para. 326.

[658] *See 2020 ICS Notice*, 35 FCC Rcd at 8517, para. 91 ("We seek comment on any additional modifications to the language in our *current* ancillary services rules that may be necessary to clarify what providers are permitted and not permitted to do with respect to ancillary services charges.") (emphasis added).

[659] CenturyLink Jan. 19, 2016, Comments at 12-13 ("Simply put, if an arrangement between an [inmate calling services] provider and a third party results in a higher cost to an end-user than would otherwise be charged by that third party directly (a 'base' cost), a markup has occurred. In other words, there is a markup regardless of whether it is the result of an explicit fee on top of the base cost, or whether a revenue-sharing agreement drives the cost above this base cost.").

[660] *2020 ICS Notice*, 35 FCC Rcd at 8516, para. 91.

[661] *See* Pay Tel Jan. 19, 2016, Comments at 16; CenturyLink Jan. 19, 2016, Comments at 12-13; Prison Policy Initiative Jan. 19. 2016, Comments at 2-4; Human Rights Defense Center Jan. 19, 2016, Comments at 10; Public Interest Parties Comments at 13-15.

[662] *See* GTL Reply at 35-37.

[663] *See* Public Interest Parties Comments at 14-15 ("With respect to third-party transaction fees charged to customers by [inmate calling services] providers, the Commission should require proof (by way of copies of contracts with third-party vendors, as many states now demand) that there is no revenue-sharing arrangement between the provider and the vendor.").

federal rules applicable to the interstate component."[664] Consistent with that explanation and prior cases, we exercise our authority under the Supremacy Clause of the U.S. Constitution to preempt state regulation of jurisdictionally mixed services but only to the extent that such regulation conflicts with federal law.[665] Thus, state laws imposed on inmate calling services providers that do not conflict with those laws or rules adopted by the Commission are permissible. The interim reforms we adopt in this Report and Order apply to interstate and international inmate calling services rates and certain ancillary services charges imposed for or in connection with interstate or international inmate calling services.[666] To the extent that a call has interstate as well as intrastate components, the federal requirements will operate as ceilings limiting potential state action.[667] To the extent a state allows or requires providers to impose or charge per-minute rates or fees for the affected ancillary services higher than the caps imposed by our rules, that state law or requirement is preempted except where a call or ancillary service fee is purely intrastate in nature, as the Commission did in the *2020 ICS Notice*.[668] To the extent that state law allows or requires providers to impose rates or fees lower than those in our rules, that state law or requirement is specifically not preempted by our actions here.[669]

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[664] *2020 ICS Order on Remand*, 35 FCC Rcd at 8496, para. 31 (citing *Vonage Order*, 19 FCC Rcd at 22413, para. 17).

[665] *See* U.S. Const. art. VI; *see also e.g.*, *Vonage Order*, 19 FCC Rcd at 22418, para. 23 n.86; *Qwest Corp. v Minnesota Pub. Utils. Comm'n*, 380 F.3d 367, 372 (8th Cir. 2004) (explaining that "[t]he FCC has authority to preempt state regulation of telecommunications where it is not possible to separate the interstate and intrastate aspects of a communications service, and where the Commission concludes that federal regulation is necessary to further a valid federal regulatory objective"); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1622-23, paras. 17-22 (using preemption under the Supremacy Clause for a Georgia voice mail regulation of a jurisdictionally mixed service).

[666] *See supra* Parts III.C-D, H.1, 3.

[667] *See 2015 ICS Order*, 30 FCC Rcd at 12864, para. 205; *USF/ICC Transformation Order*, 26 FCC Rcd at 17935, para. 801; *see also* Letter from Andrew D. Lipman, Morgan, Lewis & Bockius, LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed July 23, 2015).

[668] In connection with ancillary service charges, we remind providers that "[t]o the extent a state allows or requires an inmate calling services provider to impose fees for ancillary services other than those permitted by our rules, or to charge fees higher than the caps imposed by our rules, that state law or requirement is preempted except where such ancillary services are provided only in connection with intrastate inmate calling services." *2020 ICS Order on Remand*, 35 FCC Rcd at 8501, para. 47. Should a state allow or require providers to impose fees for ancillary service charges lower than those in the Commission's rules, that state law or requirement is not preempted. *Id.*

[669] For example, we are aware that certain states have begun efforts to examine inmate calling services rates and charges subject to their jurisdiction. *See, e.g.*, An Act Concerning the Fee Charged for a Phone Call by an Inmate in a Correctional Facility; And for Other Purposes, 2021 Arkansas Laws Act 702 (S.B. 550) (Apr. 13, 2021) (capping the cost per minute for inmate calling services calls and limiting the types of permitted ancillary services that providers may charge); S.B. 387, 81st (2021) Sess. (Nev. 2021) (directing the Public Utilities Commission of Nevada to regulate suppliers of inmate calling services and adopt rate caps and certain limitations on charges for inmate calling services); H.B. 1201, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021) (requiring the Public Utilities Commission to establish maximum per-minute rates for telephone calls made to or from correctional facilities; S.B. 303, 67th Reg. Sess. (Mont. 2021) (decreasing the cap on intrastate fees to $0.05 per minute from the current $0.10 per minute); H.B. 219, 2021 Gen. Sess. (Utah 2021) (imposing limits on the rate an incarcerated person may be charged for telephone use which must be lesser of the corresponding rate set by the FCC and the rate established by the Utah Department of Corrections); S.B. 1776, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (prohibiting the Department of Corrections from entering a contract or agreement for inmate telephone services that allows the department to receive excess revenue); H.B. 1484, Ind. Gen. Ass., 2021 Sess. (Ind. 2021) (requiring intrastate inmate calling services rates to adhere to the caps for comparable interstate rates set by the FCC). We applaud these state initiatives, which appear consistent with our own efforts in this proceeding. The fact that we are also examining inmate calling services rates and charges involving jurisdictionally mixed services in no way precludes the states from also adopting rules governing such services so long as the states' rules are not inconsistent with or conflict with

(continued….)

3. Additional Data Collection

219. We adopt a new data collection obligation to collect, in a more consistent and directed manner, the data and information necessary to respond to the various criticisms in the record about the imperfections and inconsistencies in the data from the Second Mandatory Data Collection. The *2020 ICS Notice* sought comment on whether and how the Commission should proceed with respect to any new data collection.[670] We agree with commenters that a new collection must state more precisely what data we seek and how a provider should approximate or derive the type of data we request if it does not keep its records in such a manner. This is an essential prerequisite to adopting permanent interstate rate caps for both provider-related and facility-related costs.[671] Accordingly, we delegate authority to WCB and the Office of Economics and Analytics (OEA) to implement a Mandatory Data Collection, including determining and describing the types of information required related to providers' operations, costs, demand, and revenues, consistent with the directives in this section. In addition, we delegate authority to CGB to undertake, if necessary, a separate data collection related to inmate calling services providers' costs and other key aspects of their provision of TRS and other assistive technologies, in conjunction with the disability access issues we explore in the accompanying Further Notice.[672]

220. *Background*. The Commission has conducted two mandatory data collections related to inmate calling services in the past eight years—the 2013 First Mandatory Data Collection[673] and the 2015 Second Mandatory Data Collection.[674] To allow for consistent data reporting, the Commission directed WCB in both collections to develop a template for providers to use when submitting their data and to furnish providers with further instructions to implement the collection.[675] The Commission also directed WCB to review the providers' submissions and delegated to WCB the authority to require providers to

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federal law or policy. Order Instituting Rulemaking, California Public Utilities Commission, Rulemaking 20-10-002 (2020), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M348/K902/348902674.PDF (an on-going rulemaking by the California Public Utilities Commission which is considering ways to ensure incarcerated people and their families have access to intrastate telecommunication service at just and reasonable rates); Motion of the Prison Policy Initiative, Inc., to Compel GTL to Respond to Data Requests, California Public Utilities Commission, Rulemaking 20-10-002, at 2-5 (filed Mar. 18, 2021), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M372/K332/372332177.PDF (seeking, among other things, documents that GTL declined to provide concerning its payment processing costs, and rebutting GTL's concern about the mixed jurisdiction of some ancillary services); Response of GTL (U 5680 C) to the Motion of the Prison Policy Initiative, Inc., to Compel, California Public Utilities Commission, Rulemaking 20-10-002, at 1-2, 5 (filed Mar. 29, 2021), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M374/K627/374627002.PDF (challenging the request for information about payment processing costs as beyond the California Commission's jurisdiction, and contrary to a confidentiality agreement GTL signed with Prison Policy Initiative, Inc.).

[670] *2020 ICS Notice*, 35 FCC Rcd at 8532-33, paras. 132-33.

[671] *See, e.g.*, Pay Tel Wood Reply Report at 7-11.

[672] *Infra* Part VI.A.

[673] *2013 ICS Order*, 28 FCC Rcd at 14172, paras. 124-26 (requiring providers to submit detailed cost information that subsequently formed the basis for the rate-cap calculations in the *2015 ICS Order*). The 2013 collection required providers to report actual and forecasted costs, separately for jails and prisons and at a holding company level; specific categories of costs, including telecom costs, equipment costs, security costs, and other specified costs; and information on site commissions, minutes of use, number of calls, number of facilities, and information on charges for ancillary services. *2013 ICS Order*, 28 FCC Rcd at 14172-73, paras. 124-26.

[674] *2015 ICS Order*, 30 FCC Rcd at 12862, paras. 197-98 (requiring providers to report, among other information, the location of each facility they served, the classification of each facility (i.e., jail or prison), average daily population of the facility, number of calls by method of payment, minutes of use by method of payment, revenue, and site commissions at a facility level, as well as total inmate calling services costs, direct costs, revenues, and site commissions at the company level). These data form the basis for the interim rates caps we adopt herein.

[675] *Id.* at 12863, para. 200; *2013 ICS Order*, 28 FCC Rcd at 14173, para. 26.

submit additional data as necessary to perform its review.[676]

221. In response to the *2020 ICS Notice* seeking comment on whether the Commission should collect additional data and, if so, what data it should collect,[677] several parties support additional data collection.[678] GTL, however, suggests that the Commission should avoid the burden of an additional data collection, asserting that there is no reason to believe that providers will report their costs differently than they have in the past.[679] GTL argues that the Commission should allow the market to adjust to any rules adopted as a result of the *2020 ICS Notice* before imposing additional reporting requirements.[680] GTL also suggests that relying on the Annual Reports that inmate calling services providers file pursuant to section 64.6000 of the Commission's rules would provide a less burdensome way of obtaining data and a better measure of rates in the marketplace.[681]

222. *Mandatory Data Collection.* We conclude that a Mandatory Data Collection is essential to enable us to adopt permanent interstate and international rate caps that more accurately reflect providers' costs than the interim rate caps we adopt in this Report and Order. Such a data collection is also needed to enable us to evaluate and, if warranted, revise the current ancillary service charge caps. Because of the adverse impact that unreasonably high rates and ancillary services charges have on incarcerated people and those family and loved ones they call, we believe that the benefits of conducting a third collection far outweigh any burden on providers. Moreover, providers have long been on notice of the types of cost information we intend to collect and will have ample time to consider how best to prepare to respond. We delegate to WCB and OEA authority to implement this new data collection. We direct them to develop a template and instructions for the collection to collect the information we need to protect consumers against unjust and unreasonable rates and ancillary services charges for interstate and international inmate calling services, and to aid our continuing review of this unique inmate calling services marketplace[682] that one provider quite aptly describes as "nuanced and multilayered."[683]

223. Contrary to GTL's assertion,[684] an additional data collection is warranted, particularly

[676] *2015 ICS Order*, 30 FCC Rcd at 12863, para. 200; *2013 ICS Order*, 28 FCC Rcd at 14173, para. 26. For example, staff analysis of responses to the Second Mandatory Data Collection revealed numerous deficiencies and areas requiring clarification. WCB and OEA conducted multiple follow-up discussions with providers to supplement and clarify their responses resulting in direction to several providers to amend their submissions and respond to questions from staff. *See, e.g.*, Pay Tel Amended and Supplemental Second Mandatory Data Collection Response (amending Pay Tel's Second Mandatory Data Collection response and noting questions raised by Commission staff).

[677] *2020 ICS Notice*, 35 FCC Rcd at 8532-33, para. 132. The Commission also sought comment on, among other things, whether providers should be required to update their responses to an additional data collection on a periodic basis. *Id.*, 35 FCC Rcd at 8532, para. 132. We discuss this issue below. *See infra* Part VI.E.

[678] *See* Free Press Comments at 2-3 (welcoming efforts to challenge and scrutinize the current data through additional data collections); MediaJustice Comments at 2; Securus Comments at 15; Public Interest Parties Reply at 2-3 (supporting a future data collection to remedy the deficiencies revealed in the Second Mandatory Data Collection).

[679] *E.g.*, GTL Comments at 36; GTL Reply at 21. GTL points out that providers are not subject to the Part 32 accounting rules. GTL Reply at 21.

[680] GTL Comments at 36.

[681] GTL Reply at 22; *see* 47 CFR § 64.6060 (requiring each inmate calling services provider to file an Annual Report setting forth the provider's current inmate calling services rates and ancillary service charges, among other information).

[682] *2015 ICS Order*, 30 FCC Rcd 12862, paras. 197-98.

[683] Securus Comments at 3.

[684] GTL Reply at 21-22 (arguing that an additional data collection is unnecessary because "[t]here is no reason to believe . . . that [inmate calling services] providers will report their costs any differently than they did previously").

considering the deficiencies of its own and other providers' responses to the Second Mandatory Data Collection. We are not persuaded by GTL's concern about the timing of an additional collection,[685] as the potential benefits from expediting further reform far outweigh any burdens the collection may place on providers. Our cost-benefit analysis shows substantial benefits are gained from lowering interstate and international inmate calling services rates towards costs. If, as appears likely, the interim price caps put in place today are still significantly above costs, then bringing rates down to costs will bring substantial further benefits. Finally, while the Annual Reports contain useful and relevant marketplace information on providers' rates and charges, we disagree with the contention that the Annual Reports provide sufficient data to establish just and reasonable interstate inmate calling services rates.[686] As the Public Interest Parties explain, the Annual Reports only include information on rates and charges and not the type of cost data required to set cost-based rates.[687]

224. *Details of Data Collection.* In the *2020 ICS Notice*, the Commission sought comment on whether we should consider other types of data that would more fully capture industry costs beyond the detailed and comprehensive data it had already collected.[688] Securus asserts that the Commission should require providers to follow a standard cost-causation modeling methodology to attribute costs to specific products, and, where that is not feasible, properly allocate costs across the products in a cost-causative manner, to the extent possible.[689] The Public Interest Parties contend that, among other things, the Commission should collect granular data with detailed components of direct and indirect costs, operations, and revenues, in addition to collecting costs at the facility level.[690] In addition, they assert that the Commission should standardize a methodology for allocating indirect costs.[691] The Public Interest Parties maintain that future data collections should require the submission of the costs of ancillary services and should be audited by an independent third party prior to submission to the Commission.[692] They also assert that the Commission should collect data on marketplace trends, such as bulk purchasing at fixed monthly rates.[693]

225. Securus asks that we provide more specific instructions on how to measure direct and indirect costs and contends that each company should be required to provide detailed work papers showing how it complied with the Commission's instructions.[694] Pay Tel supports modifications to forms, instructions, and guidance governing future data collections as necessary "to avoid the same or similar dataset issues currently presented."[695] Pay Tel asserts that detailed instructions would guide

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[685] GTL Comments at 36.

[686] *Id.* at 22.

[687] *See, e.g.*, Public Interest Parties Comments at 15-16.

[688] *2020 ICS Notice*, 35 FCC Rcd at 8512-13, para. 80.

[689] Securus Comments at 15. Securus contends that cost drivers should be incorporated into the cost attribution analysis, such as time-tracking by software developers, IT support tickets, and physical inventory of computing hardware. *Id.*

[690] Public Interest Parties Comments at 16.

[691] *Id.*

[692] *Id.*

[693] Public Interest Parties Comments at 17. The Public Interest Parties further argue that the Commission should require certification of the submitted cost data by the Chief Executive Officer, Chief Financial Officer, or other senior executive of the provider, as required for the Annual Reports. *Id.* In addition, they assert that the Commission should take enforcement action against any parties violating the Commission's rules well in advance of any future data collection. *Id.*

[694] Securus Comments at 15.

[695] Pay Tel Reply at 17.

providers when completing the data collection form, including by clearly and expressly defining terms that are crucial to the collection process. Pay Tel claims that many of the issues with the current dataset appear to have arisen due to differing provider interpretations of instructions and terms, and that the Commission should minimize the potential for such differing interpretations as much as possible.[696]

226. We direct WCB and OEA to consider all of the foregoing suggestions in designing the Mandatory Data Collection including considering whether to collect data for multiple years. They should also incorporate lessons learned from the two prior data collections to ensure that we collect, to the extent possible, uniform cost, demand, and revenue data from each provider.

227. To ensure that we have sufficient information to meaningfully evaluate each provider's operations, cost data, and methodology, we direct WCB and OEA to collect, at a minimum, information designed to enable us to:

- Quantify the relative financial importance of the different products and services in each provider's business portfolio, including revenues from products supplied by any corporate affiliates, and ensure that the provider's inmate calling services are not being used to subsidize the provider's, or any corporate affiliate's, other products or services;
- Quantify the relative financial importance of services, including revenues from each transmission service and ancillary service, included within the provider's inmate calling services operations;
- Measure the demand for the provider's inmate calling services (e.g., in terms of paid and unpaid total minutes of use or completed calls);
- Calculate the provider's gross investment (gross book value of an asset, i.e., prior to subtracting accumulated depreciation or amortization), accumulated depreciation or amortization, deferred state and federal income taxes, and net investment (net book value of an asset, i.e., after subtracting accumulated depreciation or amortization), in tangible assets, identifiable intangible assets, and goodwill;
- Calculate the provider's capital costs and operating expenses, disaggregated among appropriate categories;
- Ensure that the provider has directly assigned to its inmate calling services operations, and to its other operations, the investments and expenses that are directly attributable to those operations;
- Ensure that the provider has allocated to its inmate calling services operations, and to its other operations, common investments and expenses (i.e., investment and expenses that are not directly assignable to inmate calling services or to any single non-inmate calling services line of business);
- Ensure that the provider has directly assigned to specific contracts or facilities investments and expenses directly attributable to inmate calling services to the extent feasible;
- Ensure that the provider has allocated any remaining unassigned inmate calling services and common investment and expenses to specific contracts or facilities using reasonable, cost-causative methods; and
- Ensure that the provider has directly assigned any site commission payments to, or allocated any such payments between its inmate calling services and its other operations

[696] *Id.* at 17-18.

using reasonable, cost-causative methods.[697]

228. We also delegate to WCB and OEA the authority to require providers to submit any additional information that they deem necessary to help the Commission formulate permanent rate caps or to revise our rules governing ancillary service charges. WCB and OEA shall have the authority to require each provider to fully explain and justify each step of its costing process and, where they deem it appropriate, to specify the methodology the provider shall use in any or all of those steps. WCB and OEA also shall have the authority to require any provider to clarify and supplement its response to this data collection where appropriate to enable the Commission to make a full and meaningful evaluation of the company's cost, demand, and revenue data and costing methodology. Each provider shall keep all records necessary to implement this collection, and all providers shall make such records available to the Commission upon request.

229. *Timeframes for Data Collection*. We direct the template and instructions for the data collection to be completed for submission to the Office of Management and Budget (OMB) not later than 90 days after this Report and Order becomes effective. We also direct WCB to require providers to respond within 120 days after WCB announces in a Public Notice that OMB has approved the new data collection, such announcement to occur no later than seven business days after receipt of OMB's approval. WCB may, however, grant an extension of the 120-day response deadline for good cause.

230. *Potential CGB Data Collection.* We separately delegate authority to CGB to undertake a separate data collection related to inmate calling services providers' costs and other key aspects of their provision of TRS and other assistive technologies should CGB determine such a data collection is necessary to assist the Commission's consideration of the record obtained with respect to assistive technologies for incarcerated people pursuant to our accompanying Further Notice.[698] To the extent CGB undertakes such data collection, we delegate to it the authority to require providers to submit any additional information that it deems necessary to assist the Commission's consideration of reforms in this area. CGB shall also have the authority to require any provider to clarify and supplement its response to such data collection where appropriate.

4. Effective Dates

231. Our actions in this Report and Order, including our new interim interstate and international rate caps, will take effect 90 days after notice of them is published in the Federal Register, except that the delegations of authority in Part III.H.3 shall take effect upon such publication, and the rules and requirements that require approval from OMB under the Paperwork Reduction Act shall be effective on the date specified in a notice published in the Federal Register announcing OMB approval. This 90-day timeframe is the same transition timeframe the Commission proposed in the *2020 ICS Notice*, and this period matches the timeframe the Commission adopted when providers first became subject to the current interim caps.[699] We received varying proposals for effective dates in response our proposed 90-day timeframe. Certain commenters argue for an effective date of 30 days after publication in the Federal Register, on the basis that providers have been on notice of the pending changes for some time and that any further delay will only add to the costs that incarcerated people and their families will bear.[700] Other commenters propose an effective date beyond 90 days or advocate for a staggered approach that would allow more transition time for jails, arguing that this additional time is necessary to

[697] *See* GTL Letter, 35 FCC Rcd at 7031-34; Securus Comments at 15; Securus Cost Study.

[698] *Infra* Part VI.A.

[699] *2020 ICS Notice*, 35 FCC Rcd at 8511, para. 77; *see also 2013 ICS Order*, 28 FCC Rcd at 14147, paras. 72-73; *2015 ICS Order*, 30 FCC Rcd at 12884, para. 251 ("The record does not indicate that providers experienced difficulties implementing the rate caps within 90 days after the *2013* [*ICS*] *Order*'s publication in the Federal Register.").

[700] Free Press Comments at 5; Public Interest Parties Comments at 18-20.

make billing system changes, or to renegotiate contracts among private parties.[701]

232. We conclude that a 90-day timeframe for implementing the new interim rate caps and other changes that do not require OMB approval strikes a reasonable balance between the competing interests. On the one hand, a rapid timeframe would help alleviate the burden of unreasonably high interstate and international rates on incarcerated people and those they call,[702] a burden that the ongoing COVID-19 global pandemic has exacerbated.[703] On the other hand, the record shows that providers and correctional officials will need more than 30 days to execute any contractual amendments necessary to implement the new interstate and international rate caps and otherwise adapt to those caps.[704] Parties seeking a longer transition period rely primarily on the difficulties jails with average daily populations less than 1,000 may encounter in implementing relatively sweeping changes to the rate cap structure.[705] The only rate cap change applicable to those jails, however, will be to reduce the per-minute charges for interstate collect calls from $0.25 per minute to $0.21 per minute. Further, as the Commission recognized in the *2020 ICS Notice*, 90 days after publication in the Federal Register appears to have been sufficient for implementation of the rate cap changes adopted in the *2013 ICS Order*.[706] In view of the foregoing considerations, we find that a 90-day transition period after publication in the Federal Register appropriately balances the need for expedited reform with the difficulties of adapting to our new rules.

233. We find good cause for having our delegations of authority to WCB, OEA, and CGB take effect immediately upon publication of notice of them in the Federal Register. Making the delegations effective at that time will enable WCB and OEA to move as expeditiously as practicable toward finalizing the Mandatory Data collection and thereby reduce the time it will take us to set permanent rate caps for interstate and international inmate calling services and, if appropriate, revise the current ancillary service fee caps. Similarly, making the delegation to CGB effective upon publication in the Federal Register will enable CGB to move forward with any data collection as soon as practicable once it receives comments on the Further Notice. Given the importance of these areas to incarcerated people, including those with communication disabilities, any unnecessary delay in these initiatives would be inconsistent with the public interest.

5. Rule Revisions

234. We make two non-substantive changes to our inmate calling services rules. First, we amend section 64.6000(g) of our rules to fix a typographical error. Currently, this section erroneously uses the word "though" instead of "through" in defining "Debit Calling"[707] whereas a parallel definition

[701] *See* California State Sheriffs' Association Comments at 2; GTL Comments at 4, 16-17 (advocating for a 90-day timeframe for prisons and a six-month timeframe for jails); National Sheriffs' Association Reply at 3-4 (seeking a one-year transition for jails).

[702] Free Press Comments at 5 (citing an example of an inmate calling services provider voluntarily lowering its rates in less than 90 days' time); *see also* Public Interest Parties Reply at 19-20.

[703] *See* Public Interest Parties Comments at 2-3 (recognizing that restrictions on in-person visitations as a result of the pandemic have only increased the difficulty for incarcerated people to communicate with friends, family, and loved ones); *see also* Verizon Comments at 2-3. *But see* Federal Bureau of Prisons, BOP Modified Operations (updated Nov. 25, 2020), https://www.bop.gov/coronavirus/covid19_status.jsp (reinstating in-person visits subject to conditions and limitations due to the COVID-19 pandemic).

[704] GTL Comments at 12 (noting that the COVID-19 pandemic may delay county board meetings); National Sheriff's Association Reply at 7 (quoting GTL Comments at 12).

[705] GTL Comments at 13, 14 n.52; National Sheriffs' Association Reply at 3-4; *2015 ICS Order*, 30 FCC Rcd at 12886-87, para. 256.

[706] *2020 ICS Notice*, 35 FCC Rcd at 8511, para. 77 & n.195.

[707] 47 CFR § 64.6000(g).

for "Prepaid Calling" correctly uses "through."[708] We therefore change "though" to "through" in section 64.6000(g). Second, we remove the last sentence of section 64.6000(c) of our rules. That sentence references section 64.6010, which previously was removed and reserved for future use.[709]

235. We find good cause to make these revisions without notice and comment. The Administrative Procedure Act permits agencies to issue rule changes without notice and comment "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[710] We find good cause here because the rule changes are editorial and non-substantive.[711] The rule changes correct a typographical error and conform our rules to previous rule amendments. The Commission need not seek comment on rule changes to "ensure consistency in terminology and cross references across various rules or to correct inadvertent failures to make conforming changes when prior rule amendments occurred."[712]

IV. ORDER ON RECONSIDERATION

236. We deny the GTL Petition[713] in full on the merits and, independently, dismiss that petition as procedurally defective, insofar as it relies on arguments the Commission already considered and rejected in the underlying order.[714] GTL seeks reconsideration of a single sentence from the *2020 ICS Order on Remand* reiterating that "the jurisdictional nature of a call depends on the physical location of the endpoints of the call and not on whether the area code or NXX prefix of the telephone number . . . associated with the account, are associated with a particular state."[715] GTL claims that this sentence (1) ignores telecommunications carriers' historical reliance on NPA-NXX codes to classify calls as interstate or intrastate; (2) unfairly singles out providers of calling services for incarcerated people; (3) presents implementation issues; (4) potentially compromises state programs funded by assessments on intrastate revenues; and (5) promulgates a new rule without notice and an opportunity to comment.[716] We find each of these claims to be without merit and affirm the Commission's continued use of the traditional end-to-end jurisdictional analysis relied upon in the *2020 ICS Order on Remand*.

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[708] 47 CFR § 64.6000(p).

[709] *2020 ICS Order on Remand*, 35 FCC Rcd at 8508, 8539, para. 63, Appx. A.

[710] *See* 5 U.S.C. § 553(b)(3)(B).

[711] *See, e.g.*, *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, GN Docket No. 16-142, Second Report and Order and Order on Reconsideration, 35 FCC Rcd 6793, 6824, para. 62 (2020) (concluding that notice and comment are not required for "editorial and non-substantive" rule changes).

[712] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Order, 33 FCC Rcd 5660, 5688-89, para. 63 (2018) (finding notice and comment unnecessary for non-substantive changes to the Commission's rules).

[713] Petition for Reconsideration of GTL, WC Docket No. 12-375 (filed Nov. 23, 2020) (GTL Petition).

[714] 47 CFR § 1.429(l)(3) (stating that a petition for reconsideration that relies "on arguments that have been fully considered and rejected by the Commission within the same proceeding" "plainly do not warrant consideration by the Commission"). The Commission considered and rejected GTL's arguments regarding so-called Commission "precedent" purporting to establish a general policy of reliance on NPA-NXX as a proxy for jurisdiction and whether the Commission's statement required prior notice and an opportunity to comment. *2020 ICS Order on Remand*, 35 FCC Rcd at 8504-06, paras. 54-58.

[715] *2020 ICS Order on Remand*, 35 FCC Rcd at 8503, para. 53 (citation omitted); GTL Petition at 3.

[716] *See, e.g.*, GTL Petition at ii-iii, 4. The "NPA-NXX" code "correspond[s] to the area code and first three digits of a telephone number." *Federal-State Joint Board on Universal Services et al.*, CC Docket No. 96-45 et al., Further Notice of Proposed Rulemaking, 12 FCC Rcd 18514, 18538, para. 51 n.105 (1997).

A. Background

237. Last year, the Commission responded to the D.C. Circuit's directive that it consider whether ancillary service charges can be segregated into interstate and intrastate components to exclude the intrastate components from the reach of the Commission's rules.[717] The Bureau issued the *Ancillary Services Refresh Public Notice* seeking to refresh the record in light of the D.C. Circuit's remand.[718] Based on the record developed in response to that public notice, the Commission found that "ancillary service charges generally cannot be practically segregated between the interstate and intrastate jurisdiction except in the limited number of cases where, at the time a charge is imposed and the consumer accepts the charge, the call to which the service is ancillary is a clearly intrastate-only call."[719] Thus, the Commission concluded that providers are generally prohibited from imposing ancillary service charges, other than those explicitly permitted by the Commission's rules, and are also generally prohibited from imposing ancillary service charges in excess of the permitted ancillary service fee caps in the Commission's rules.[720]

238. In the *2020 ICS Order on Remand*, the Commission addressed record debate about the jurisdictional classification methodology for certain inmate calling services calls and the ancillary services provided in connection with those calls by reminding providers that "the jurisdictional nature of a call depends on the physical locations of the endpoints of the call," rather than on the area codes or NXX prefixes of the telephone numbers used to make and receive the call.[721] GTL and Securus objected to this approach, asserting that relying on a call's endpoints was inconsistent with prior Commission decisions and with providers' practice of using NPA-NXX codes as proxies for jurisdiction.[722] GTL and Securus also claimed that the Commission's "clarification" regarding how carriers are to determine the jurisdictional nature of a call required prior notice and an opportunity to comment.[723] In addition, NCIC questioned "the FCC's determination that [inmate calling services] providers will be able to determine the location of the terminating point of an [inmate calling services] wireless call—and thus determine whether the call is intrastate or interstate in nature."[724]

239. In response to these objections, the Commission explained that although it has allowed the use of proxies to determine the jurisdictional nature of certain calls, it has done so only in specific contexts "typically related to carrier-to-carrier matters or payment of fees owed" and that it "never

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[717] *2020 ICS Order on Remand*, 35 FCC Rcd at 8486, para. 2.

[718] *See Ancillary Services Refresh Public Notice*, 35 FCC Rcd at 189-92.

[719] *2020 ICS Order on Remand*, 35 FCC Rcd at 8495, para. 28.

[720] *Id.*; 47 CFR §§ 64.6000(u), 64.6020.

[721] *2020 ICS Order on Remand*, 35 FCC Rcd at 8503, para. 53.

[722] GTL and Securus raised these objections in *ex parte* filings during the public circulation period of the *2020 ICS Order on Remand* but before the Commission adopted that *Order* on August 6, 2020. Letter from Chérie R. Kiser, Counsel for GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3-4 & nn.11-14, 16 (filed July 30, 2020) (GTL July 30, 2020, *Ex Parte*) (citing various state and federal authorities); Letter from Dennis J. Reinhold, Senior Vice President and General Counsel, Securus, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 n.3 (filed July 30, 2020) (Securus July 30, 2020, *Ex Parte*) (citing various Commission actions relating to jurisdictional proxies for intercarrier compensation and revenue reporting purposes); *see* FCC, *Reforming Rates and Charges for Inmate Calling Services* (Jul. 16, 2020), https://www.fcc.gov/document/reforming-rates-and-charges-inmate-calling-services (releasing the draft text of the *2020 ICS Order on Remand*, thereby commencing the public circulation period); *see also 2020 ICS Order on Remand*, 35 FCC Rcd at 8504, 8506, paras. 54, 58.

[723] *See* GTL July 30, 2020, *Ex Parte* at 2 (suggesting that the Commission's clarification was a new requirement); Securus July 30, 2020, *Ex Parte* at 3 (explaining that "[t]he Commission should follow the process for a new rulemaking to address this significant policy change").

[724] NCIC July 28, 2020, *Ex Parte* at 2-3.

adopted a general policy allowing the broad use of such proxies."[725] The Commission distinguished the so-called "precedent" cited by GTL and Securus, explaining that none of those decisions established actual Commission policy or practice regarding the use of jurisdictional proxies and that the examples provided "relate specifically to carrier-to-carrier arrangements involving intercarrier compensation or applicable federal fees due between carriers and the Commission, not to using a proxy for charging a customer a higher or different rate than it would otherwise be subject to based on whether the customer's call is interstate or intrastate."[726] The Commission, therefore, rejected GTL's and Securus's argument that application of the end-to-end analysis required prior notice and an opportunity to comment, explaining that it was merely clarifying "the long-established standard that inmate calling services providers must apply in classifying calls for purposes of charging customers the appropriate rates and charges."[727] The Commission further explained that the Bureau's public notice seeking to refresh the record on ancillary service charges in light of the D.C. Circuit's remand provided "notice of, and a full opportunity to comment on, the jurisdictional status of inmate calling services calls" because the public notice sought comment on how to proceed if ancillary services were "jurisdictionally mixed" and defined jurisdictionally mixed services as those that are "capable of communications both between intrastate end points and between interstate end points."[728]

240. In November 2020, GTL filed a petition seeking reconsideration of the application of the end-to-end jurisdictional analysis in the *2020 ICS Order on Remand*.[729] The Bureau released a Public Notice announcing the filing of GTL's Petition and establishing deadlines for oppositions and replies to the Petition.[730] The Bureau received comments from Pay Tel Communications[731] and replies from NCIC and GTL.[732]

B. Discussion

241. *Standard of Review*. Any interested party may file a petition for reconsideration of a final action in a rulemaking proceeding.[733] Reconsideration "may be appropriate when the petitioner demonstrates that the original order contains a material error or omission, or raises additional facts that were not known or did not exist until after the petitioner's last opportunity to present such matters."[734] Petitions for reconsideration that do not warrant consideration by the Commission include those that: "[f]ail to identify any material error, omission, or reason warranting reconsideration; [r]ely on facts or

[725] *2020 ICS Order on Remand*, 35 FCC Rcd at 8505, para. 54.

[726] *Id.* at 8505-06, paras. 54-55.

[727] *Id.* at 8506, para. 58.

[728] *Id.* (internal quotation marks and citation omitted); *Ancillary Services Refresh Public Notice*, 35 FCC Rcd at 190. The *Ancillary Services Refresh Public Notice* was published in the Federal Register on February 19, 2020. FCC, Wireline Competition Bureau Seeks to Refresh the Record on Ancillary Service Charges Related to Inmate Calling Services, 85 Fed. Reg. 9444 (Feb. 19, 2020).

[729] *See generally* GTL Petition.

[730] *Petition for Reconsideration of the 2020 Inmate Calling Services Report and Order on Remand*, WC Docket No. 12-375, Public Notice, 35 FCC Rcd 14088, 14088-89 (WCB 2020).

[731] Pay Tel Comments in Response to GTL's Petition for Reconsideration, WC Docket No. 12-375 (filed Jan. 11, 2021) (Pay Tel Reconsideration Comments).

[732] NCIC Reply in Response to GTL's Petition for Reconsideration, WC Docket No. 12-375 (filed Jan. 21, 2021) (NCIC Reconsideration Reply); GTL Reply in Response to GTL's Petition for Reconsideration, WC Docket No. 12-375 (filed Jan. 21, 2021) (GTL Reconsideration Reply).

[733] 47 CFR § 1.429(a).

[734] *Universal Service Contribution Methodology et al.*, WC Docket No. 06-122 et al., Order on Reconsideration, 27 FCC Rcd 898, 901, para. 8 (2012); *see* 47 CFR § 1.429(b).

arguments which have not been previously presented to the Commission . . . ; [r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding;" or "[r]elate to matters outside the scope of the order for which reconsideration is sought."[735] The Commission may consider facts or arguments not previously presented if: (1) they "relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission;"[736] (2) they were "unknown to petitioner until after [their] last opportunity to present them to the Commission, and [the petitioner] could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity;"[737] or (3) "[t]he Commission determines that consideration of the facts or arguments relied on is required in the public interest."[738]

1. GTL's Substantive Arguments Against the End-to-End Analysis Do Not Warrant Reconsideration

242. GTL's Petition provides no new substantive facts or arguments that justify reconsideration of the Commission's application of the end-to-end jurisdictional analysis to calling services for incarcerated people. Although GTL cites various documents it claims establish a general Commission policy on the use of jurisdictional proxies for classifying interstate and intrastate calls, none of the cited documents establish such a policy, especially in the provision of inmate calling services.[739] We are also unpersuaded by GTL's arguments regarding the possible discriminatory treatment of providers of these calling services, its reliance on third parties to make jurisdictional determinations, or its unsubstantiated claims about the effects our jurisdictional analysis may have on state programs.[740]

243. GTL first argues that the end-to-end analysis ignores what it claims is the industry custom and practice of using NPA-NXX codes to determine whether a call is interstate or intrastate.[741] GTL asserts that the "Commission's prior statements have recognized that using NPA-NXX *is* an appropriate industry standard for determining whether a call is interstate or intrastate."[742] In this regard, GTL emphasizes the 2003 *Starpower Damages Order*.[743] For its part, NCIC argues that the Commission's "precedent" has been "correctly cited by GTL," and that the Commission should "continue to follow that precedent" in the context of calling services for incarcerated people.[744]

244. We disagree. We reaffirm the Commission's prior conclusion that not one of the decisions cited in GTL's Petition adopted a general policy allowing broad use of jurisdictional proxies, such as NPA-NXX codes.[745] Those decisions primarily concern the use of jurisdictional proxies to determine the appropriate rating between and among various types of service providers routing calls originating from one NPA-NXX code to a terminating NPA-NXX code and vice versa. None of them allow for the use of jurisdictional proxies in the context of inmate calling services for which consumers may be charged different rates based on whether a call is classified as interstate or intrastate. Instead, the

[735] 47 CFR § 1.429(l)(1)-(3), (5).

[736] 47 CFR § 1.429(b)(1).

[737] 47 CFR § 1.429(b)(2).

[738] 47 CFR § 1.429(b)(3).

[739] *E.g.*, GTL Petition at 4-6.

[740] *E.g.*, *id.* at 6, 10, 12.

[741] *Id.* at 4.

[742] *Id.* (emphasis in original).

[743] *See* GTL Petition at 5; *Starpower Communications, LLC v. Verizon South Inc.*, File No. EB-00-MD-19, Memorandum Opinion and Order, 18 FCC Rcd 23625 (2003) (*Starpower Damages Order* or *Starpower*).

[744] NCIC Reconsideration Reply at 2.

[745] *2020 ICS Order on Remand*, 35 FCC Rcd at 8504, paras. 54.

decisions GTL cites merely reflect that the Commission "has allowed carriers to use proxies for determining the jurisdictional nature of calls in specific contexts, typically related to carrier-to-carrier matters or payment of fees owed."[746]

245. At bottom, GTL requests that we engraft into our inmate calling services rules a jurisdictional proxy—relying on NPA-NXX codes for all telephone calls from incarcerated people to a called party regardless of the called parties' service provider of choice—that the Commission has never suggested might be used in determining the jurisdictional classification of an inmate calling services call. We thus are not persuaded that GTL's approach reflects a reasonable interpretation of our existing rules.

246. GTL seizes on certain language in the *Starpower Damages Order* that, GTL claims, establishes a "historical" or "consistent" use of NPA-NXX codes.[747] Contrary to GTL's assertions, however, the *Starpower* decision did not announce a general policy permitting the use of jurisdictional proxies. Rather, *Starpower* was narrowly concerned with an intercarrier compensation dispute, the resolution of which hinged on the treatment of traffic under a Verizon tariff. In the liability phase of the proceeding, Starpower obtained an order from the Commission obligating Verizon to pay reciprocal compensation under an interconnection agreement "for whatever calls Verizon South bills to its own customers as local calls under the Tariff, regardless of whether a call is jurisdictionally interstate."[748] In the damages phase, Verizon argued that, under its tariff definition, the physical location of the called parties, and not the telephone numbers, determined whether service was "local."[749] But the Commission concluded that Verizon rated and billed ISP-bound traffic under its tariff by looking to the telephone numbers of the parties to a call and not the parties' physical locations.[750] The Commission held that since Verizon treated ISP-bound calls as "local under the Tariff," Verizon was obligated to pay reciprocal compensation under the interconnection agreement.[751] Thus, although *Starpower* contains passing references to the use of NPA-NXX to determine the jurisdictional nature of certain traffic, the decision ultimately turned on the Commission's interpretation of Verizon's tariff and Verizon's own practices in applying that tariff. Accordingly, *Starpower* does not establish any Commission or industry-wide policy on the use of jurisdictional proxies.[752]

247. In any event, it is simply not reasonable or reliable now, nor has it been for many years, to assume that a called party is physically located in the geographic area (rate center) of the switch to which the party's NPA-NXX code is native. Before Congress adopted the 1996 Act, when incumbent LECs controlled 99% of the local voice marketplace,[753] one could reasonably assume that a called party was physically located in the geographic area associated with a particular NPA-NXX, as NPA-NXX codes were associated only with a particular incumbent's rate center. Since that time, however, number

[746] *Id.* at 8504-05, paras. 54-55.

[747] *See* GTL Petition at 5.

[748] *Starpower Damages Order*, 18 FCC Rcd at 23627, para. 5 (citing *Starpower Communications, LLC v. Verizon South Inc.*, File No. EB-00-MD-19, Memorandum Opinion and Order, 17 FCC Rcd 6873, 6892-94, paras. 44-46, 49 (2002)).

[749] *Id.* at 23630-31, para. 12.

[750] *Id.* at 23631, para. 13.

[751] *Id.*

[752] The fact that *Starpower* involved Internet service provider-bound traffic—i.e., traffic to another type of service provider, which at the time was a separate unsettled jurisdictional issue, rather than an end user telephone subscriber—alone, makes this case entirely inapposite.

[753] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, 11 FCC Rcd 14171, 14174-75, para. 6 (1996).

porting[754] between and among competing wireline LECs,[755] wireless carriers,[756] and fixed and nomadic VoIP providers[757] has rendered NPA-NXX codes an all-too-frequently unreliable means to determine whether a called party is physically located within a particular state when it receives and answers a given call.[758]

248. Today, consumers increasingly rely on nomadic VoIP and mobile voice services for

[754] In the 1996 Act, Congress included the requirement that each LEC "provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2); 47 U.S.C. § 153(30) (Supp. II 1997) (defining "number portability" as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another"). This definition now appears in section 3(37) of the Act. 47 U.S.C. § 153(37); *see also* 47 CFR § 52.21(m). The number portability rules subsequently adopted by the Commission, as modified over time, limit number porting between wireline incumbents and wireline competitors to ports within the same rate center. *E.g.*, *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8447, para. 181 (1996) (*First Number Portability Order*) (declining, at the time, to require location portability).

[755] With respect to wireline-to-wireless porting, the Commission requires wireline carriers to port to requesting wireless carriers "where the requesting wireless carrier's 'coverage area' overlaps the geographic location in which the customer's wireline number is provisioned, provided that the porting-in carrier maintains the number's [NPA-NXX] original rate center designation following the port." *See Telephone Number Portability*; *CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697, 23706, para. 22 (2003) . In other words, when the wireline number is ported to the wireless carrier's customer, the original rate center designation is maintained for routing and rating purposes by other service providers.

[756] A wireless carrier may only port a number to a wireline carrier if the number is associated with the rate center of the wireline carrier where the customer is located. *See id.* at 23706, para. 22.

[757] Nomadic VoIP "is usually a VoIP phone installed in a portable computer which can be taken with the subscriber" so that "[c]alls can be made from anywhere in the world." *IP-Enabled Services et al.*, WC Docket No. 04-36 et al., Order and Public Notice Seeking Comment, 22 FCC Rcd 18319, 18322, para. 6 n.19 (CGB 2007). By comparison, fixed VoIP is not movable. "The [fixed] service is provided by a cable company, for example, where the telephone does not leave the residence." APCO International, *NG9-1-1 VoIP and SIP Trunking*, https://www.apcointl.org/resources/ng911/voip-and-sip-trunking/ (last visited Apr. 4, 2021).

[758] The Commission began its work implementing the 1996 Act's number portability requirement with its 1996 *First Number Portability Order*, in which it adopted an initial set of rules governing wireline-to-wireline, wireless-to-wireless, and wireline-to-wireless number portability obligations. *First Number Portability Order*, 11 FCC Rcd at 8355, 8357, 8393, paras. 3-4, 8, 77; *see also Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236, 7273, paras. 60-61 (1997) (clarifying that licensed commercial mobile radio service (CMRS) providers, such as cell phone companies, must be allowed to make a request for deployment of number portability); 47 CFR § 52.23(b)(2)(i) (1997). It required that LECs in the 100 largest Metropolitan Statistical Areas (MSAs) begin implementing a long-term number portability methodology on a phased deployment schedule, and that CMRS providers be able to port numbers by the wireline carriers' deadline to complete number portability implementation and to support network-wide roaming thereafter. *First Number Portability Order*, 11 FCC Rcd at 8355, 8393, 8439-40, paras. 3-4, 77, 165-66. The Commission also established LEC number portability implementation obligations outside of the 100 largest MSAs. *First Number Portability Order*, 11 FCC Rcd at 8395, para. 82. Subsequently, in 2007, the Commission extended local number portability obligations to interconnected VoIP providers, both fixed and nomadic. *See Telephone Number Requirements for IP-Enabled Services Providers et al.*, WC Docket No. 07-243 et al., Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, 19532, para. 1 (2007). In 2015, the Commission opened direct access to numbering resources to interconnected VoIP providers. *See generally Numbering Policies for Modern Communications et al.*, WC Docket No. 13-97 et al., Report and Order, 30 FCC Rcd 6839, 6840, para. 2 (2015) (*VoIP Direct Access to Numbers Order*).

telephone service.[759] Nomadic interconnected VoIP services are provided as over-the-top applications and are not associated with any specific geographic location.[760] Subscribers to these services can readily move to other rate centers throughout the country while retaining their telephone numbers.[761] And nearly half of all assigned telephone numbers are associated with wireless phones,[762] unsurprising given that the majority of households in the United States no longer subscribe to a landline service.[763] The *combination* of the Commission's number portability orders and the significant technological changes to the communications marketplace means that NPA-NXX codes reflected in telephone numbers, are often subject to movement across state lines, on a permanent, nomadic, or mobile basis, making them unreliable as a geographic indicator of endpoints for a given call.[764]

249. GTL next complains that our confirmation of the end-to-end analysis inappropriately "singles out [inmate calling services] providers," and that the Commission "cannot target particular classes of telecommunications service providers in its rulemaking when the legal basis for it (and the criticisms that undergird it) are of universal applicability."[765] This complaint is completely without merit. The Commission has not singled out inmate calling services providers for disparate treatment. The end-to-end analysis is, and remains, the generally-applicable, default, standard for all telecommunications carriers—not just inmate calling services providers—for determining the jurisdictional classification of a telephone call. In addition, inmate calling services providers *are* unlike other telecommunications

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[759] *See, e.g.*, *Communications Marketplace Report* et al., GN Docket No. 18-231 et al., Report, 33 FCC Rcd 12558, 12668-69, paras. 205-07 (2018).

[760] *VoIP Direct Access to Numbers Order*, 30 FCC Rcd at 6848-49, para. 21. "In this way, nomadic interconnected VoIP service is similar to mobile service, but distinct from fixed telephony service." *Id.* n.67. "Over-the-top" VoIP providers are VoIP providers that are not facilities-based; *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5712, para. 92 n.266 (2007). The consumer of an over-the-top VoIP service "uses an independent data service over a broadband connection." *Communications Marketplace Report*, GN Docket No. 20-60, 2020 Communications Marketplace Report, FCC 20-188, 2020 WL 8025117, at *54, para. 149 (2020) (*2020 Communications Marketplace Report*). The Commission's December 2019 FCC Form 477 data reflected 12.9 million over-the-top VoIP subscriptions in the United States at that time. *2020 Communications Marketplace Report* at *54, para. 149.

[761] *See generally* Number Portability Administration Center, *How LNP Works*, https://numberportability.com/about-us/how-lnp-works/ (last visited Apr. 4, 2021).

[762] FCC, Numbering Resource Utilization in the United States: Status as of December 31, 2018 at 9 tbl. 1 (IAD OEA 2020), https://docs.fcc.gov/public/attachments/DOC-367592A1.pdf (calculated by dividing Mobile Wireless Assigned numbers by All Reporting Carriers' Assigned numbers).

[763] *2020 Communications Marketplace Report* at *53, para. 148; Stephen J. Blumberg & Julian V. Luke, National Center for Health Statistics, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2019, at 5-6, tbls. 1-2 (2020), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless202009-508.pdf; *see also* Stephen J. Blumberg & Julian V. Luke, National Center for Health Statistics, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2014, at 5 tbl. 1 (2015), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201506.pdf (showing 54% of households were wireless-only).

[764] As the foregoing analysis suggests, *only* where the calling party (here, the incarcerated person) and the called party each have wireline telephone numbers, can an inmate calling services provider reasonably and reliably determine the jurisdictional nature of a call between those parties based on the NPA-NXX codes of the originating and terminating telephone numbers. That is the case because our rules require the NPA-NXX of a wireline telephone subscriber to necessarily physically remain within the particular rate center from which each wireline telephone number originated. Unlike for wireless voice service and nomadic VoIP service, our number porting rules do not permit telephone numbers of wireline subscribers to port across rate center boundaries. 47 CFR §§ 52.21(m), 52.23(b), (h), 52.31, 52.34.

[765] GTL Petition at 7.

carriers. Calling service providers have a captive consumer base at each correctional facility they serve for which they rarely, if ever, offer all-distance calling plans with uniform rates and charges for intrastate and interstate calls as do most, if not all, other telecommunications services providers. Indeed, inmate calling services providers typically have a myriad of different rates and charges applicable to different jurisdictional call types (i.e., intraLATA intrastate, interLATA intrastate, intraLATA interstate, and interLATA interstate).[766] Calling service providers continue to charge incarcerated people (or their families) different rates and charges purportedly based on differences in costs to serve these different call types, even though those rates are based on fictional determinations that have nothing to do with actual geographic endpoints, except in the case of wireline-to-wireline calls.

250. As explained above, the generally acceptable method of determining the jurisdictional nature of any given call is by an end-to-end analysis. Thus, contrary to the providers' claims, jurisdictional proxies are the exception, not the rule. It is only "[w]here the Commission has found it difficult to apply an end-to-end approach for jurisdictional purposes, [that] it has proposed or adopted proxy or allocation mechanisms to approximate the end-to-end result."[767] In the *Vonage Order*, for example, the Commission expressly declined to adopt the use of proxies for determining whether a call was jurisdictionally intrastate or interstate or to address the conflict between federal and state regulatory regimes. Indeed, GTL itself recognized the general applicability of the end-to-end analysis in its comments on the *Ancillary Services Refresh Public Notice*, explaining that "[t]he *jurisdictional nature of calls themselves is easily classified* as either interstate or intrastate *based on the call's points of origination and termination*. This accords with *the Commission's traditional end-to-end analysis for determining jurisdictional boundaries* 'beginning with the end point at the inception of a communication to the end point at its completion.'"[768] GTL fails to explain how the application of the Commission's long-established approach for determining the appropriate jurisdiction of a call unfairly singles out providers of calling services for incarcerated people given that, by GTL's own admission, it is "traditional" analysis the Commission generally applies to all telecommunications providers.[769]

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[766] *See, e.g.*, GTL, Oklahoma Interexchange Telecommunications Tariff No. 1, 1st Rev. Page 10 (Mar.18, 2016), 4th Rev. Page 28 (June 20, 2016), §§ 1, 4.3, https://www.gtl.net/documents/global-tel-link/GTL-Oklahoma-Tariff-(6-20-16).pdf (defining an interstate call as originating in one state and terminating in another state, and setting different rate categories for local, intraLATA, and interLATA service); Pay Tel, Florida Inmate Telecommunications Services Tariff No. 2, Original Page 33, §§ 4.1.4-4.1.6 (Feb. 1, 2013), https://www.paytel.com/pdf/tariff-fl.pdf (providing different rate categories for local, "Intra-State/IntraLATA" and "Intra-State/InterLATA" collect calls); Securus, Rate Schedule Applying to Intrastate Services Between Points in the State of Arkansas, Page 4 (May 7, 2020), https://securustechnologies.tech/wp-content/uploads/2020/05/AR-Securus-Price-List-5-7-20-Current.pdf (providing different rate categories for local, intraLATA and interLATA basic collect calls). And while providers have not explained in detail what their resale arrangements with underlying telecommunications carriers entail, it is our understanding that providers typically pay a flat rate for all minutes of use (except for international calling) regardless of the jurisdictional nature of the call.

[767] *Vonage Order*, 19 FCC Rcd at 22421, para. 26 n.98. *See generally id.* at 22419-23, paras. 25-29. The Commission subsequently adopted permissible proxies for determining what portion of such jurisdictionally indeterminate VoIP services to attribute to the interstate jurisdiction for Universal Service Fund (USF) payment purposes, but such proxies did not pertain to classifying the underlying calls as either interstate or intrastate for purposes of billing consumers different rates for telephone calls. *Universal Service Contribution Methodology et al.*, WC Docket No. 06-122 et al., Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7544, para. 52 (2006) (allowing interconnected VoIP providers to use an interim safe harbor, actual interstate revenues, or traffic studies to report and contribute to the USF based on their interstate and international end-user revenues).

[768] GTL Comments, WC Docket No. 12-375, at 4 (filed Mar. 20, 2020) (GTL Mar. 20, 2020, Comments) (emphasis added) (citation omitted).

[769] *See Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3320-21, para. 21 & n.76 (2004) (referring to the Commission's traditional use of its "end-to-end analysis," and citing *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000) (*Bell Atlantic v. FCC*) ("The end-to-end analysis . . .

(continued….)

251. Because an NPA-NXX code frequently fails to provide any indication of the actual physical location of a called party (unless it is known that the called party is a wireline telephone subscriber), it generally cannot be relied upon to determine the jurisdictional nature of a call.[770] As the Commission stated in the *2020 ICS Order on Remand*, to do so would undercut interstate callers' federal protection from unjust and unreasonable interstate charges and practices.[771]

252. GTL also alleges, through reliance on decades-old discussions of rating based on NPA-NXX and industry guides,[772] that there are technical barriers that prevent providers of calling services for incarcerated people from applying the traditional end-to-end analysis.[773] These allegations arise from the fact that providers rely on third parties to classify the jurisdiction of calls. As GTL explains it, calls from correctional facilities, whether to wireline, wireless, or VoIP numbers, "are handed off to unaffiliated third party telecommunications service providers that route them across the public switched telephone network to their appropriate termination point, based on the called number's entry in the Local Exchange Routing Guide."[774] GTL concludes that "[g]iven indicia that classification determinations have, for decades, been under the control of entities over which many providers exercise no authority, critical logistical and financial questions present themselves, such as the costs attendant upon [inmate calling services] providers should they be required to design, deploy, and implement an alternative call classification system."[775]

253. We find these arguments unpersuasive. The Commission's rules specify that providers of inmate calling services are currently prohibited from charging more than $0.21 per minute for interstate Debit Calling, Prepaid Calling, or Prepaid Collect Calling and prior to today's accompanying Report and Order more than $0.25 per minute for interstate Collect Calling.[776] Our interpretation of the term

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is one that [the Commission] has traditionally used to determine whether a call is within its interstate jurisdiction." (emphasis omitted)).

[770] *2020 ICS Order on Remand*, 35 FCC Rcd at 8503, para. 53 n.143; *see also Vonage Order*, 19 FCC Rcd at 22418-24, paras. 23-32.

[771] *2020 ICS Order on Remand*, 35 FCC Rcd at 8503-04, para. 53; *see also* 47 U.S.C. § 201(b).

[772] *See* GTL Petition at 10 & nn.41-43; GTL Reply at 25-31.

[773] GTL Petition at 8-12; GTL Reconsideration Reply at 2-3 (arguing that inmate calling services providers "lack the technological capacity and administrative infrastructure" to implement the end-to-end analysis).

[774] GTL Petition at 10. The Local Exchange Routing Guide (LERG) is "an industry guide generally used by carriers in their network planning and engineering and numbering administration. It contains information regarding all North American central offices and end offices." *Implementation of the National Suicide Hotline Improvement Act of 2018*, WC Docket No. 18-336, Notice of Proposed Rulemaking, 34 FCC Rcd 12562, 12576, para. 34 n.131 (2019). GTL adds that "[inmate calling services] providers assess charges on inmate calls by purchasing access to third-party databases that classify them as intrastate, interstate, or international" and that these databases do not provide the "actual geographical location associated with a particular device or service." GTL Petition at 10; *see also* GTL Reply at 23-35 (explaining certain technical limitations faced by inmate calling services providers in determining the physical location of every call). Relatedly, Securus explains that these third parties use "telephone numbers or, since the advent of local number portability, the Local Routing Number . . . as a proxy for . . . jurisdiction," and lack "the information needed to apply the end-to-end analysis." Securus Comments at 37. The Local Routing Number is a "telephone number assigned in the local number portability database for the purposes of routing a call to a telephone number that has been ported. When a call is made to a number that has been ported, the routing path for the call is established based on the L[ocal] R[outing] N[umber] rather than on the dialed number." *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, 17899-900, para. 724 n.1254 (2011) (citing Travis Russell, Signaling System #7 640 (5th ed. 2006)).

[775] GTL Petition at 11.

[776] 47 CFR § 64.6030. The current rule language tracks the language adopted in 2013 but adds the term "interstate." *2013 ICS Order*, 28 FCC Rcd at 14196, Appx. A (adopting the rule without the word "interstate," which states: "No
(continued….)

"interstate" in our rule accords not only with the use of that terminology in the Communications Act,[777] but also the Commission's traditional approach to defining jurisdiction.[778] It is the *provider's* responsibility to "appropriately comply[] with this most basic regulatory obligation of telecommunications service providers with respect to their customers—determining the proper jurisdiction of a call when charging its customers the correct and lawful rates for those calls using the end-to-end analysis."[779] Providers did not express any concerns about their ability to determine the jurisdiction of any given call when the Commission's adopted "interim rate caps . . . for *interstate* [inmate calling services]" in 2013.[780] Nor did they express such concerns in the following years, as those interim rate caps continued to apply. Indeed, despite GTL's claims here, it and other providers use the Commission's historical approach when defining the terms "interstate" and "intrastate" in at least some of their tariffs and price lists.[781] It is unclear why GTL, or any provider, would base its rates on the geographic locations of the parties to a call if the service provider could not, in fact, determine where the parties are located at the time of the call. The record also provides no indication that the third parties upon which GTL and others claim they rely for determining the jurisdiction of their calls could not accurately determine whether a consumer is making calls between NPA-NXX codes assigned to wireline, wireless, or nomadic VoIP numbers to determine whether those calls are subject to the Commission's interstate rate caps without relying on another methodology to determine the actual endpoints of the call.

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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."). The term "interstate" was added to section 64.6030 of the Commission's rules as a non-substantive change to reflect a D.C. Circuit decision that the Commission's regulation of inmate calling services rates could extend no further than the extent of its authority over interstate (and international) calls. *2020 ICS Order on Remand*, 35 FCC Rcd at 8508-09, paras. 63-64. The fact that the addition of "interstate" was a non-substantive change to reflect a court decision limiting the Commission's inmate calling services rate regulations to the limit of the Commission's authority further reinforces the reasonableness of interpreting "interstate" consistent with the Commission's historical jurisdictional approach.

[777] *See supra* para. 242; *infra* note 805 (discussing 47 U.S.C. § 153(28)).

[778] *See supra* para. 250.

[779] *2020 ICS Order on Remand*, 35 FCC Rcd at 8506, para. 57.

[780] *2013 ICS Order*, 28 FCC Rcd at 14147, para. 73 (emphasis added).

[781] *See, e.g.*, GTL, Oklahoma Interexchange Telecommunications Tariff No. 1, 1st Rev. Page 10, § 1 (Mar. 18, 2016), https://www.gtl.net/documents/global-tel-link/GTL-Oklahoma-Tariff-(6-20-16).pdf (defining an interstate call to mean a call "originated in one state and terminated within the bounds of another state," and defining an intrastate call to be a call which "originated and terminated within the boundaries of the State of Oklahoma, regardless of whether such call is routed across state boundaries prior to reaching its termination point"); GTL, California Price List No. 1, Preliminary Statement, Original Sheet 4 (Oct. 13, 2009), https://www.gtl.net/documents/global-tel-link/GTL-California-Price-List-(10-26-17).pdf (explaining that the price list provides rates for "intrastate resale common carrier communications . . . between locations within the State of California"); Pay Tel, Florida Inmate Telecommunications Services Tariff No. 2, Original Page 21, § 3.1 (Feb. 1, 2013), https://www.paytel.com/pdf/tariff-fl.pdf (providing that service under the tariff is "intrastate voice telecommunications service between points in the State of Florida"); Securus, PSC MD Intrastate Institutional Telecommunications Services Tariff No. 1, Original Page 1 (Mar. 11, 2020), https://securustechnologies.tech/wp-content/uploads/2020/04/MD-STI-Tariff-LLC-Name-Chg_031120-Current.pdf (describing the tariff as being applicable to services "[b]etween [p]oints within the State of Maryland"); *see also* Securus, *Rates*, https://securustech.net/rates/index.html (last visited Apr. 3, 2021) ("In-state (Intrastate) calls are calls within the same state."); Pay Tel, Pa. PUC Reseller Interexchange Toll Carrier IXC Tariff No. 1, Original Page 23 (Apr. 22, 2010), https://www.paytel.com/pdf/tariff-pa.pdf ("Service provided under this tariff is intrastate voice telecommunications service between points in the State of Pennsylvania."); Pay Tel, Interstate & International Inmate Telecommunications Services Rates, Terms & Conditions, Original Page 19 (Jan. 4, 2021), https://www.paytel.com/pdf/tariff-all.pdf (describing "interstate voice telecommunications service between states in the United States and international locations"); Securus, *FCC Fact Sheet*, https://securustech.net/fcc-fact-sheet/index.html (last visited Apr. 3, 2021) ("'[I]nterstate' rates for incarcerated individual calling services . . . appl[y] to calls originating in one state and terminating in another state.").

254. Further, many of the guides and brochures to which GTL cites in this regard relate predominantly to call *routing* rather than rating. For example, GTL cites to the iconectiv brochure "Route It Right Every Time with LERG OnLine."[782] That brochure contains precisely two references to rating, neither of which relate to the billing of end-user customers.[783] GTL also points to an iconectiv Catalog of Products and Services, but that document is similarly unhelpful for GTL.[784] Finally, the iconectiv catalog to which GTL cites notes that the Telecom Routing Administration's products "are a mainstay in supporting the various offerings of service providers . . . and, bottom line, in ensuring calls placed by their customers and through their network complete without any problems."[785] In other words, the Telecom Routing Administration provides data that supports the *routing* of calls. Nowhere in that catalog does it state that providers should rely solely on NPA-NXX for rating calls to end users.[786] But even if it did, that would have no bearing on inmate calling services providers' obligations to charge incarcerated people and those whom they call lawful rates.

255. To the extent that the technical issues raised by GTL make it impracticable or impossible to determine whether a call is interstate or intrastate based on the geographical endpoints of the call, we do not require providers of calling services for incarcerated people to redesign or deploy other call classification systems.[787] Instead, we reaffirm that providers must charge a rate at or below the applicable interstate cap for that call.[788] As the Commission explained in the *2020 ICS Order on Remand*, "where the Commission has jurisdiction under section 201(b) of the Act to regulate rates, charges, and practices of interstate communications services, the impossibility exception extends that authority to the intrastate portion of jurisdictionally mixed services 'where it is impossible or impractical to separate the service's intrastate from interstate components' and state regulation of the intrastate component would interfere with valid federal rules applicable to the interstate component."[789] There is no dispute that the Commission has jurisdiction over providers' interstate rates, and GTL does not dispute the Commission's authority to regulate jurisdictionally indeterminate services.[790] Accordingly, to the extent that GTL and other providers find it impossible or impracticable to determine the actual endpoints, hence the actual jurisdictional nature of a call, they must treat that call as jurisdictionally indeterminate and must charge a rate at or below the applicable interstate cap.

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[782] GTL Reply at 30 n.144.

[783] iconectiv, Product Brochure, *Route It Right Every Time with LERG OnLine* at 3 (July 2019), https://iconectiv.com/sites/default/files/2019-11/TruOps_TRA_LERGOnLineBrochure.pdf.

[784] GTL Reply at 30 n.140.

[785] iconectiv, Catalog of Products and Services, *TruOps Telecom Routing Administration* at 4 (Oct. 2020), https://trainfo.iconectiv.com/sites/microsites/files/2020-10/tra_catalog_Final_10.20.2020.pdf (TRA Catalog).

[786] We also disagree with GTL's characterization of the Local Exchange Routing Guide as requiring the use of NPA-NXXs for determining the jurisdictional nature of a call. GTL Petition at 11; GTL Reconsideration Reply at 2. Once again, GTL conflates the relationship of an NPA-NXX code to that code's original rate center designation, reflected in the Local Exchange Routing Guide for *routing* purposes, with using the same rate center information to determine whether the terminating call to that NPA-NXX code is jurisdictionally intrastate or interstate. The original rate center designation of an NPA-NXX number has no bearing on where calls to that number actually terminate when the called party is a customer of a wireless or nomadic VoIP provider, at a minimum.

[787] GTL Petition at 11.

[788] Report and Order, *supra* Parts III.C.3, III.H.2; *see also 2020 ICS Order on Remand*, 35 FCC Rcd at 8503-04, para. 53.

[789] *2020 ICS Order on Remand*, 35 FCC Rcd at 8496, para. 31 (citing *Vonage Order*, 19 FCC Rcd at 22413, para. 17).

[790] GTL Petition at 3 ("GTL does not dispute the Commission's authority to regulate jurisdictionally mixed services according to the well-established 'impossibility doctrine' . . . .").

256. We reject GTL's argument that application of the end-to-end analysis violates the jurisdictional limitation in section 221(b) of the Act.[791] That section has been narrowly interpreted to "enable state commissions to regulate local exchange service in metropolitan areas . . . which extend across state boundaries."[792] Section 221(b), which refers to "telephone exchange service"[793] says nothing about payphone service, which is separately defined in section 276 of the Act.[794] Indeed, the statute recognizes and treats payphone service separately from exchange service in section 276(a), which prevents Bell operating company-owned payphones from receiving subsidies "from . . . telephone exchange service operations."[795] The Commission has previously recognized this distinction, explaining that although states traditionally regulated payphones, including by setting local rates, that role was "in the context of LECs providing local payphone service as part of their regulated service."[796] By disallowing LEC payphones from receiving subsidies from their basic exchange service, the Commission emphasized that section 276 "greatly changes the way in which states set local coin rates."[797] In sum, the Act treats the exchange service in section 221(b) separate from payphone service in section 276 and the courts have narrowly interpreted section 221(b) to apply only to a state's ability to regulate local exchange service. We are therefore unpersuaded by GTL's argument that the Commission violated section 221(b) or acted in a manner precluded by the implementation of that provision by reiterating that providers of calling services for incarcerated people must charge their end users for interstate and intrastate calls based on the physical endpoints of the call.

257. We are also unpersuaded by GTL's claim that our jurisdictional analysis might have some "potential impact" on state communications programs that depend on assessments of intrastate revenues or that we are somehow limiting the ability of state commissions to use NPA-NXX as a

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[791] *Id.*at 13; 47 U.S.C. § 221(b) (providing that the Commission does not, in general, have jurisdiction over the "charges, classifications, practices, services, facilities, or regulations for or in connection with . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority").

[792] *N.C. Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir. 1977) (*North Carolina II*); *see also N.C. Utils. Comm'n v. FCC*, 537 F.2d 787, 795 (4th Cir. 1976) (*North Carolina I*) (explaining that section 221(b) of the Act means that "a local carrier that serves a single multi-state exchange area is assured whatever degree of freedom from federal regulation section 2(b) provides for uni-state carriers and intrastate telephone business generally"); *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982) (adopting the interpretation of section 221(b) of the Act from *North Carolina I* and *North Carolina II*, and explaining that "[t]he Fourth Circuit found on the basis of the legislative history that this provision was merely intended to preserve state regulation of local exchanges that happened to overlap state lines"); *Application of Access Charges to the Origination and Termination of Interstate, IntraLATA Services and Corridor Services*, Memorandum Opinion and Order, 1985 FCC LEXIS 3510, at *8 (1985) (explaining that if interstate, intraLATA service "is *exchange service* subject to state regulation," it is exempt from the Commission's jurisdiction under section 221(b) of the Act (emphasis added)).

[793] "Telephone exchange service" is broadly defined as "service within a telephone exchange" or "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(54).

[794] 47 U.S.C. § 276(d) (defining payphone service as "the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services").

[795] *Id.* § 276(a)(1).

[796] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 et al.*, CC Docket No. 96-128 et al., Report and Order, 11 FCC Rcd 20541, 20571, para. 58 (1996) (*First Payphone Order*).

[797] *Id.*

jurisdictional proxy.[798] GTL provides no evidence that applying an end-to-end analysis for purposes of complying with the federal interstate rate cap for inmate calling services charges would either interfere with state authority to use NPA-NXX as a proxy for determining which calls are within their jurisdiction or would somehow result in the "reclassification of all telecommunications traffic that relies on NPA-NXX . . . as interstate."[799]

2. GTL's Procedural Arguments Do Not Warrant Reconsideration

258. We reject GTL's claim that the Commission needed to provide additional notice and an additional opportunity for comment before it clarified in the *2020 ICS Order on Remand* that providers must use the geographical endpoints of a call rather than the area code or NXX prefix of the call's recipient to determine whether the call is interstate or intrastate.[800] GTL mischaracterizes the Commission's clarification as a "new and unprecedented [r]ule" and a "serious departure from prior practice."[801] To the contrary, after identifying confusion and debate in the record,[802] the Commission "remind[ed]" and "clarifie[d]" for providers the end-to-end analysis it "has traditionally used to determine whether a call is within its interstate jurisdiction" to ensure that providers of calling services for incarcerated people do not "circumvent or frustrate [the Commission's] ancillary service charge rules."[803] Providers of calling services for incarcerated people have been on notice since the Commission adopted interstate rate caps in 2013 that they could not charge more than the capped amounts for interstate calls.[804] By interpreting the rate cap rule as requiring that inmate calling services calls be classified based on their endpoints, the Commission applied the ordinary meaning of the term "interstate" as that term is defined in the Communications Act.[805] There has been no new legislative rule that would have required notice and

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[798] GTL Petition at 15-16; GTL Reconsideration Reply at 4; *see also* Securus Comments at 38-39 (arguing that the end-to-end analysis "will directly impact state and local authorities, particularly those which rely upon the collection of commissions from consumer pricing structures," and will result in lower tax revenues for state legislatures and public utility commissions).

[799] GTL Petition at 15.

[800] *See generally* GTL Petition. We reject this claim on procedural grounds insofar as the Commission considered and responded to these arguments in the *2020 ICS Order on Remand*, 35 FCC Rcd at 8502-04, paras. 52-54. We also reject it on substantive grounds as discussed herein.

[801] GTL Petition at iii, 3.

[802] *2020 ICS Order on Remand*, 35 FCC Rcd at 8502-03, para. 52; *see also* GTL Mar. 20, 2020, Comments at 4 (arguing that the "jurisdictional nature of calls themselves is easily classified as either interstate or intrastate based on the call's points of origin and termination"); Pay Tel Comments, WC Docket No. 12-375, at 17 (filed Mar. 20, 2020) (explaining that the ancillary service charge rules constitute "reasonable regulation of charges tied to jurisdictionally mixed services that are incapable of segregation").

[803] *See, e.g.*, *Bell Atlantic v. FCC*, 206 F.3d at 3 (emphasis omitted); *Ancillary Services Refresh Public Notice*, 35 FCC Rcd at 190.

[804] *2013 ICS Order*, 28 FCC Rcd at 14147, para. 73 ("We adopt interim rate caps to place an upper limit on rates providers may charge for *interstate* [inmate calling services]." (emphasis added)).

[805] The Communications Act defines "interstate communication" or "interstate transmission" as:

> [C]ommunication or transmission (A) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (B) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than second 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

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an opportunity to comment. The Commission's reminder clearly served the purpose of an interpretive rule.[806]

259. In essence, GTL contends that "interstate" as used in the Commission's inmate calling services rules had a different meaning than "interstate" as used in the Communications Act and therefore that it could classify as intrastate a call that originates in one state and terminates in another state based solely on NPA-NXX codes.[807] GTL's claim is unavailing and has no bearing on the question of whether the Commission was required to provide additional notice and an additional opportunity to comment prior to clarifying that "interstate" as used in the inmate calling services rules continues to have the same meaning as "interstate" as used in the Communications Act and historical Commission usage of the term.

260. In any event, the *Ancillary Services Refresh Public Notice* fully apprised all interested parties that the Commission would be considering how it should proceed in the event an ancillary service could not "be segregated between interstate and intrastate calls."[808] That public notice also invited comment on what additional steps the Commission should take to ensure that providers of interstate inmate calling services do not circumvent or frustrate the Commission's ancillary service charge rules.[809] GTL claims that the *Ancillary Services Refresh Public Notice* was insufficient to inform stakeholders that the Commission might reexamine "the methodology used to determine whether a call or charge is interstate or intrastate."[810] But the *Public Notice* made clear that the Commission would be considering when an ancillary service is interstate, which necessarily involves a determination whether the calls in connection with that service are interstate.[811] And, when the record revealed that certain providers were using NPA-NXX codes, rather than endpoints, to classify calls as interstate or intrastate, the Commission properly clarified, consistent with the text of the Act and long-standing precedent, that using the geographic endpoints was the proper method to determine call jurisdiction.[812] Thus, the Commission's clarification that providers must use an end-to-end analysis in classifying calls as interstate or intrastate was, at the very least, a logical outgrowth of the *Ancillary Services Refresh Public Notice*. Indeed, absent such clarification, the Commission could not have responded fully to the D.C. Circuit's directive to ascertain on remand whether ancillary service charges could be segregated between interstate and

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47 U.S.C. § 153(28).

[806] The Administrative Procedure Act (APA) exempts interpretive rules from the procedural requirements of notice and comment rulemaking. 5 U.S.C. § 553(b)(A). An interpretive rule is a clarification or explanation of existing laws or regulations rather than a substantive modification in or adoption of new regulations. *See, e.g., Continental Oil Co. v. Burns*, 317 F. Supp. 194, 197-98 (D. Del. 1970) (finding that the rule at issue was interpretive and therefore not subject to the APA's notice and opportunity for comment provisions, and explaining that "[e]xpressing an agency's view of the definition of a term used in a statute or regulation is uniformly held to be interpretative"); *see also PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2052 (2019) (explaining that a legislative rule "is issued by an agency pursuant to statutory authority and has the force and effect of law" while an interpretive rule "simply advises the public of the agency's construction of the statutes and rules it administers and lacks the force and effect of law" (internal quotation marks and alterations omitted)).

[807] GTL Petition at 4 (arguing that the "governing test for determining how the Commission's rules apply . . . is the call classification methodology utilizing NPA-NXX and related network information that has long been the industry standard").

[808] *Ancillary Services Refresh Public Notice*, 35 FCC Rcd at 190.

[809] *Id.* at 191.

[810] GTL Petition at 17.

[811] For this reason, we also reject Pay Tel's assertion that the *Ancillary Services Refresh Public Notice* did not contemplate an evaluation of the jurisdictional classification of inmate calling services calls. Pay Tel Reconsideration Comments at 2.

[812] *2020 ICS Order on Remand*, 35 FCC Rcd at 8502-04, paras. 52-53.

intrastate components.

261. For the reasons stated herein, we deny GTL's petition on the merits and dismiss it as procedurally defective.

V. SEVERABILITY

262. All of the rules and policies that are adopted in this Third Report and Order and Order on Reconsideration are designed to ensure that rates for inmate calling services are just and reasonable while also fulfilling our obligations under sections 201(b) and 276 of the Act.[813] Each of the separate reforms we undertake here serves a particular function toward these goals. Therefore, it is our intent that each of the rules and policies adopted herein shall be severable. If any of the rules or policies is declared invalid or unenforceable for any reason, the remaining rules shall remain in full force and effect.

VI. FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING

263. In this Fifth Further Notice, we seek further evidence and comments from stakeholders to consider additional reforms to inmate calling services rates, services, and practices within our jurisdiction, including permanent rate caps. To that end, we seek comment on the provision of functionally equivalent communications services to incarcerated people with hearing and speech disabilities, the methodology for establishing permanent rate caps, further reforms to the treatment of site commission payments, including at jails with average daily populations less than 1,000, and revisions to our ancillary service charge rules, among other matters.

A. Disability Access

264. While there are barriers to telecommunications access for incarcerated people, the obstacles are much larger for those who are deaf, hard of hearing, or deafblind or who have a speech disability.[814] Because functionally equivalent means of communication with the outside world are often unavailable to incarcerated people with communication disabilities, they are effectively trapped in a "prison within a prison."[815] The ability to make telephone calls is not just important to maintain familial and intimate relationships necessary for successful rehabilitation, but also crucial to allow for communication with legal representatives and medical professionals.[816]

1. Background

265. The Commission first sought comment in 2012 on access to inmate calling services for

[813] 47 U.S.C. §§ 201(b), 276.

[814] We refer to this class of people generally as incarcerated people with communication disabilities. *Cf. 2015 ICS Order*, 30 FCC Rcd 12874-75, para. 226. *See also* UCC Apr. 26, 2021, *Ex Parte* at 1 (emphasizing the "very long wait that incarcerated people with disabilities have faced awaiting Commission action").

[815] Accessibility Coalition Comments at 2 (citing Sara Novic, *Deaf Prisoners Are Trapped in Frightening Isolation*, CNN (June 21, 2018), https://www.cnn.com/2018/06/21/opinions/aclu-georgia-deaf-abuse-lawsuit-novic). Accessibility Coalition also cites Talila A. Lewis, *In Georgia, Imprisoned Deaf and Disabled People Don't Stand a Chance*, ACLU (June 20, 2018), https://www.aclu.org/blog/disability-rights/disability-rights-and-criminal-legal-system/georgia-imprisoned-deaf-and ("'At every stage—arrest, interrogation, trial, sentencing, prison, and parole—deaf people are more susceptible to going to prison more often, staying longer, suffering more, and returning to prison faster. Deaf people with other marginalized identities—including those who are LGBTQ and come from communities of color—fare even worse.'").

[816] *See 2013 ICS Order*, 28 FCC Rcd at 14109, para. 2 (citing research showing that family contact is associated with lower recidivism rates); ZP Reply at 5 (citing research showing that telecommunications can be a critical link between incarcerated people and can lower post-release recidivism rates); Accessibility Coalition Comments at 5-6 (suggesting that the inability of incarnated individuals with communication disabilities to contact legal representatives is a violation of their constitutional right to access to the courts).

incarcerated people with communication disabilities.[817] In 2015, the Commission affirmed the obligation of inmate calling services providers, as common carriers, to provide incarcerated people access to "mandatory" forms of TRS—TTY-based TRS and speech-to-speech relay service (STS).[818] The Commission also amended its rules to prohibit inmate calling services providers from levying or collecting any charge for TRS calls. For TTY-to-TTY calls, which require substantially longer time than voice calls, the Commission limited permissible charges to 25% of the applicable per-minute voice rate.[819]

266. The Commission recognized in the *2015 ICS Order* that other, more advanced forms of TRS, many of which use the Internet, had been developed and recognized as eligible for TRS Fund support.[820] For example, video relay service (VRS) makes use of video communications technology to allow individuals whose primary language is American Sign Language (ASL) to communicate in ASL.[821] Internet Protocol Captioned Telephone Service (IP CTS) and its non-Internet counterpart, Captioned Telephone Service (CTS), allow a person who is hard of hearing to participate in direct voice communications while receiving captions of the other party's voice—thereby eliminating much of the delay inherent in more traditional forms of TRS.[822] And IP Relay enhances traditional text-based relay by

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[817] *See 2012 ICS Notice*, 27 FCC Rcd at 16644, para. 42.

[818] *2015 ICS Order*, 30 FCC Rcd at 12875, para. 227. TRS are "telephone transmission services that provide the ability for an individual who is deaf, hard of hearing, or deaf-blind or has a speech disability to engage in communication by wire or radio . . . in a manner that is functionally equivalent to the ability of a hearing person who does not have a speech disability to communicate using voice communication services." 47 U.S.C. § 225(a)(3); 47 CFR § 64.601(a)(42). TTY-based TRS allows an individual with a communication disability to communicate by telephone with another party, such as a hearing individual, by using a text telephone (TTY) device to send text to a communications assistant (CA) over a circuit-switched telephone network. To connect a hearing individual as the other party to the call, the CA establishes a separate voice service link with the hearing party and converts the TTY user's text to speech. The CA listens to the hearing party's voice response and converts that speech to text for the TTY user. *Telecommunications Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5142, para. 2 (2000) (*2000 TRS Order*). A TTY is "[a] machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system." 47 CFR § 64.601(a)(43); *see also* Gallaudet University Technology Access Program (Gallaudet TAP), TTY Basic (June 30, 1998), https://tap.gallaudet.edu/Text/TTYBasics.html. STS "allows individuals with speech disabilities to communicate with voice telephone users through the use of specially trained CAs who understand the speech patterns of persons with speech disabilities and can repeat the words spoken by that person." 47 CFR § 64.601(a)(40); *see also 2020 TRS Order*, 15 FCC Rcd at 5148-51, paras. 14-20 (describing STS and adopting regulations for providing it).

[819] *2015 ICS Order*, 30 FCC Rcd at 12879-80, paras. 237-38.

[820] *Id.* at 12876, para. 229.

[821] VRS is a form of TRS that "allows people with hearing and speech disabilities who use sign language to communicate with voice telephone users through video equipment. The video link allows the [communication assistant] to view and interpret the party's signed conversation and relay the conversation back and forth with a voice caller." 47 CFR § 64.601(a)(50); *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Disabilities*, CG Docket No. 03-123, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5442, 5447, para. 11 (2006) (*2006 VRS Declaratory Ruling*) (describing VRS); *see also 2000 TRS Order*, 15 FCC Rcd at 5154, para. 26 (concluding that VRS is necessary to provide many people with TRS that is functionally equivalent to voice communications).

[822] IP CTS is a form of TRS "that permits an individual who can speak but who has difficulty hearing over the telephone to use a telephone and an Internet Protocol-enabled device via the Internet to simultaneously listen to the other party and read captions of what the other party is saying." 47 CFR § 64.601(a)(22); *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*; *Internet-based Captioned Telephone Service*, CG Docket Nos. 03-123 and 13-24, Declaratory Ruling, 22 FCC Rcd 379, 379, para. 1 (2007) (*2007 IP CTS Declaratory Ruling*) (approving IP CTS as a type of TRS eligible for compensation from the TRS Fund). The term "CTS" refers to a telephone captioning service, offered in state TRS programs, that functions similarly to IP CTS but without using the Internet for the delivery of captions.

(continued….)

making use of the faster transmission speeds offered by the Internet.[823] Today, among people with communication disabilities, there is far more demand for these forms of TRS than for TTY-based TRS and STS.[824]

267. The Commission also "agree[d] with commenters that limiting all inmates with communication disabilities to one form of TRS, particularly what many view as an outdated form of TRS that relies on TTY usage, may result in communication that is not functionally equivalent to the ability of a hearing individual to communicate by telephone."[825] However, noting that the newer forms of TRS (other than STS) are not "mandatory" for common carriers to provide, the Commission declined to require calling service providers to make them available. Instead, it "strongly encourage[d] correctional facilities to work with [inmate calling services] providers to offer these other forms of TRS,"[826] and to "comply with obligations that may exist under other federal laws, including Title II of the ADA**,** which require the provision of services to inmates with disabilities that are as effective as those provided to other inmates."[827] The Commission stated it would "monitor the implementation and access to TRS in correctional institutions and may take additional action if inmates with communications disabilities

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See Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Speech and Hearing Disabilities, CC Docket No. 98-67, Declaratory Ruling, 18 FCC Rcd 16121 (2003).

[823] IP Relay is a form of TRS that "permits an individual with a hearing or a speech disability to communicate in text using an Internet Protocol-enabled device via the [I]nternet." 47 CFR § 64.601(a)(23); *see also Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*; *Petition for Clarification of WorldCom, Inc.*, CC Docket No. 98-67, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779, 7781-82, paras. 8-9 (2002) (describing how IP Relay works and the benefits of using this service). For deafblind consumers, IP Relay service is often the sole or primary means of communicating via telephone. *See Telecommunications Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*; *Structure and Practices of the Video Relay Service Program*, CG Docket Nos. 03-123 and 10-51, Order, 31 FCC Rcd 7246, 7250-52, paras. 14, 18-19 (CGB 2016).

[824] In its annual TRS usage projections for TRS Fund Year 2020-21, the TRS Fund administrator projected that interstate usage of TTY-based TRS from July 2020 through April 2021 would total 1,361,038 minutes, and interstate usage of STS for the same period would be 141,313 minutes. *See* Rolka Loube, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, CG Docket Nos. 03-123 and 10-51, Exh. 2 (filed May 1, 2020) (2020 TRS Fund Report), https://ecfsapi.fcc.gov/file/105013048227177/2020%20Annual%20TRS%20Fund%20Report.pdf. Taking account of likely intrastate usage, total usage of TTY-based TRS in this period will not exceed 6 million minutes, and total usage of STS will not exceed 500,000 minutes. *See* 2020 TRS Fund Report, Exh. 1-1 (showing total conversation minutes of 4,417,105 for intrastate TTY-based TRS and 264,912 for intrastate STS). Although these statistics are for calendar year 2019, an earlier period, TTY-based TRS usage has been declining over time, and STS usage has not increased significantly in recent years. Therefore, the corresponding intrastate usage statistics for TRS Fund Year 2020-21 are likely to be lower (in the case of TTY-based TRS) or not substantially higher (in the case of STS) than these totals. By contrast, projected usage of VRS for the same period is 140,575,160 minutes (about 23 times the usage of TTY-based TRS) and projected usage of IP CTS is 542,340,606 minutes (about 90 times the usage of TTY-based TRS). *Id*. Exh. 2; *see also Misuse of Internet Protocol (IP) Captioned Telephone Services*; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Dockets No. 13-24, 03-123, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 33 FCC Rcd 5800, 5801, para. 1 (2018) (*2018 IP CTS Order* or *2018 IP CTS Notice*) (noting that IP CTS represents almost 80% of the total minutes compensated by the Commission's Interstate TRS Fund).

[825] *2015 ICS Order*, 30 FCC Rcd at 12876, para. 229; *see also id*. at 12877, para. 230 ("Access to more advanced forms of TRS, including VRS, IP Relay, CTS, and IP CTS**,** may be necessary to ensure equally effective telephone services for these inmates.").

[826] *Id*. at 12876, para. 229.

[827] *Id*. at 12877, para. 230.

continue to lack access to functionally equivalent service."[828]

268. In the *2015 ICS Notice*, the Commission sought comment on the accessibility implications of the increasing availability to incarcerated people of video calling and video visitation services.[829] Recognizing that video calling could enable incarcerated sign language users to access and use VRS, as well as communicate directly with other sign language users, the Commission sought comment on the bandwidths and broadband speeds currently used for video visitation, the interoperability of video visitation systems with VRS, the prevalence of VRS access in correctional institutions, and the steps that should be taken to ensure that charges for video calling services offered to deaf incarceratd people are just and reasonable.[830] In the *2020 ICS Notice*, the Commission sought comment more broadly on the needs of incarcerated people with communication disabilities, including whether they have adequate access to TRS, whether additional forms of TRS should be made available by inmate calling services providers, and what the Commission can do to facilitate such access.[831] In response to the *2015 ICS Notice* and *2020 ICS Notice*, the Commission has received information describing the lack of functionally equivalent access to telecommunications services for incarcerated people with communication disabilities.[832] As a result of these limitations, the Accessibility Coalition asserts, many incarcerated people with communication disabilities have been unable to stay in contact with their loved ones.[833]

2. Making Modern Forms of TRS Available

269. In light of the comments filed in response to the *2020 ICS Notice*, as well as other evidence, we propose to amend the Commission's rules to require that inmate calling services providers provide access, wherever feasible, to all forms of TRS that are eligible for TRS Fund support—including (in addition to TTY-based TRS and STS) CTS (a non-Internet-based telephone captioning service) and

[828] *Id.*

[829] *2015 ICS Notice*, 30 FCC Rcd at 12907, para. 307.

[830] *Id.* at 12907-08, para. 307.

[831] *2020 ICS Notice*, 35 FCC Rcd at 8534, para. 136.

[832] *See, e.g.*, Comments of HEARD, WC Docket No 12-375 (filed Jan. 19, 2016); Comments of Barry C. Taylor, WC Docket No 12-375 (filed Jan. 19, 2016) (filed on behalf of Equip for Equality) (Equip for Equality Jan. 19, 2016, Comments); Comments of Mark McWilliams, WC Docket No. 12-375 (filed Dec. 18, 2015) (filed on behalf of Michigan Protection & Advocacy Service, Inc.); Comments of Diane Smith Howard, WC Docket No. 12-375 (filed Dec. 18, 2015) (filed on behalf of the National Disability Rights Network and the National Association of the Deaf) (NDRN/NAD Dec. 18, 2015, Comments); Accessibility Coalition Comments; Sorenson Communications, LLC, and CaptionCall, LLC, Comments (Sorenson Comments); GTL Comments; Accessibility Coalition Reply; Arizona Commission for the Deaf and Hard of Hearing Reply (ACDHH Reply); GlobalVRS Reply; ClearCaptions, LLC, Reply (ClearCaptions Reply); Convo Reply; Hamilton Reply; MEZMO Corp. dba InnoCaption Reply; Richard Ray Reply; ZP Reply. The Commission has also received several individual comments urging it to require more access to communications in correctional facilities and sharing personal experiences with disability access to telecommunications in correctional facilities. *See, e.g.*, Comments of Jennifer Jacobs, WC Docket No. 12-375 (filed Jan. 19, 2016) (asking for VRS in all correctional facilities); Comments of J. Marchak, WC Docket No 12-375 (filed Jan. 19, 2016) (a deaf fiancé of a deaf incarcerated person explaining financial and emotional hardship with having only 2 or 3 minutes of actual conversation in a 15-minute call using a TTY); Comments of Nia Ocansey, WC Docket No. 12-375, at 1 (filed Nov. 23, 2020) (stating that deaf incarcerated people often "can't even communicate with other [incarcerated people] so are automatically, in a sense, subjected to de facto solitary confinement, a cruel and unusual punishment").

[833] Accessibility Coalition Comments at 2-3; *see also* Convo Reply at 1.

the three forms of Internet-based TRS: VRS, IP CTS, and IP Relay.[834]

270. As the Commission has recognized, "functional equivalence" is an evolving standard for the level of communications access that TRS must provide.[835] The current record confirms the Commission's initial assessment in the *2015 ICS Order*[836] that TTY-based TRS and STS may be insufficient by themselves to ensure functionally equivalent communication for people with communication disabilities. As explained above, among the general population of people with communication disabilities, TTY-based TRS and STS are currently the *least* frequently used forms of relay service.[837] TTY-based TRS is little used today because it is based on an obsolete technology, which is very slow and cumbersome compared with current Internet technology.[838] Further, given the availability of VRS, limiting sign-language users to TTY-based TRS unnecessarily precludes them from communicating in their primary language.[839] Similarly, for individuals who are hard of hearing, captioned telephone services such as CTS and IP CTS frequently provide far more efficient and effective means of communication than TTY-based TRS. Further, current transitions to modern IP-based networks have adversely affected the quality and utility of TTY-based communication.[840]

271. Although the Commission has not mandated the provision of the more advanced forms of TRS by state TRS programs or common carriers,[841] their "non-mandatory" status does not reflect a lower level of need for these forms of TRS.[842] As noted above, among the general population of people with

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[834] In proposing that inmate calling services providers offer access to all forms of TRS, we do not contemplate that providers would necessarily provide TRS directly. They would only need to ensure that incarcerated people with hearing and speech disabilities can be connected to an existing, authorized provider of the appropriate form of TRS.

[835] "Functional equivalence is, by nature, a continuing goal that requires periodic reassessment. The ever-increasing availability of new services and the development of new technologies continually challenge us to determine what specific services and performance standards are necessary to ensure that TRS is functionally equivalent to voice telephone service." *2000 TRS Order*, 15 FCC Rcd at 5143, para. 4.

[836] *2015 ICS Order*, 30 FCC Rcd at 12876-77, paras. 229-30.

[837] *Supra* note 824.

[838] *See Transition from TTY to Real-Time Text Technology*; *Petition for Rulemaking to Update the Commission's Rules for Access to Support the Transition from TTY to Real-Time Text Technology*; *Petition for Waiver of Rules Requiring Support for TTY Technology*, CG Docket No. 16-145, GN Docket No. 15-178, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 13568, 13574-75, para. 8 (2016) (*2016 RTT Order*); *see also* Richard Ray Reply at 5, 9 (explaining that most TTYs are limited to transmitting text over telephone lines at a rate of 30-60 words per minute, while people generally speak at a rate of between 180 and 240 words per minute and that TRS calls using TTY may take even longer than direct TTY calls because communication assistants wait until the TTY user types two or three sentences at a time before relaying); NDRN/NAD Dec. 18, 2015, Comments at 3-4 (stating that "the conversation between the VRS user and the CA flows much more quickly than with a text-based TRS call," and citing https://www.fcc.gov/consumers/guides/video-relay-services); Sorenson Comments at 4 (describing how "[o]n an IP CTS call, both parties to the call speak freely").

[839] NDRN/NAD Dec. 18, 2015, Comments at 3 (For people who are deaf or hard of hearing and for whom ASL is the primary language, "[v]ideophones, not TTYs, are the functional equivalent of telephones."); ACDHH Reply at 1.

[840] *2016 RTT Order*, 31 FCC Rcd at 13570, para. 3. In the *2016 RTT Order*, the Commission recognized the limitations of TTY technology in an IP environment, and adopted rules to facilitate a transition from TTY technology to real-time text (RTT) as a reliable and interoperable universal text solution over wireless IP-enabled networks for people who are deaf, hard of hearing, deafblind, or have a speech disability. *Id*. at 13574, para. 8 (describing the significant challenges with using TTY technology on IP-based networks, including susceptibility to packet loss, compression techniques that distort TTY tones, and echo or other noises that result from the transmission of the Baudot character string used by TTYs).

[841] *See 2015 ICS Order*, 30 FCC Rcd at 12876, para. 229.

[842] These forms of TRS are "non-mandatory" only in the limited sense that the Commission does not require that they be included in the offerings of Commission-certified state TRS programs (and, in the event that a state does not

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communication disabilities, there is far more demand for "non-mandatory" than "mandatory" relay services. Further, the comments submitted in response to the *2015 ICS Notice* and *2020 ICS Notice* persuade us that access to commonly used, widely available relay services such as VRS and IP CTS is equally or more important for incarcerated people with communication disabilities than it is for the general population.[843] Further, incarcerated people—unlike the general population—have no ability to connect to a suitable form of TRS on their own. Therefore, to fulfill the statutory TRS mandate with respect to this subset of people with communication disabilities, it appears to be incumbent on the Commission to take additional steps in this proceeding to ensure that they can access those relay services needed for functionally equivalent communication, regardless of the "mandatory" or "non-mandatory" status of such services as provided in other contexts. We seek comment on this analysis.

272. *Legal Authority*. As a threshold matter, we seek comment on the extent of our statutory authority to require inmate calling services providers to provide access to TRS. Section 225 of the Act directs the Commission to "ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to [individuals with communications disabilities] in the United States,"[844] and incarcerated people are not excluded from this mandate.[845] To

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have a certified TRS program, does not require common carriers in that state to make their own arrangements to provide such relay services). *See generally* 47 U.S.C. § 225(c); 47 CFR § 64.603 (requiring common carriers to provide TRS, including STS, either directly or through a state TRS program); *2000 TRS Order*, 15 FCC Rcd at 5143, 5149, paras. 3, 15 (explaining that "the law gives states a strong role by considering carriers to be in compliance with this obligation if they operate in a state that has a relay program certified as compliant by this Commission," and requiring common carriers to provide STS); *2007 IP CTS Declaratory Ruling*, 22 FCC Rcd at 381, para. 4 n.14 ("The Commission made STS a mandatory service so that all states with a certified state TRS program must offer this service."). Instead, Internet-based TRS are made available by TRS providers operating on a nationwide basis and certified by the Commission. However, *support* for *all* forms of TRS is mandatory for all carriers and VoIP service providers, which must support the provision of these services through mandatory contributions to the TRS Fund. 47 CFR § 64.604(c)(5)(ii), (iii)(A)-(C).

[843] *See* Accessibility Coalition Comments at 7-12 (asserting that incarcerated people with communication disabilities often have access only to TTYs that do not work reliably because their correctional facilities have IP-enabled networks and not analog networks, and that TTY and TTY-based relay are especially ineffective for many incarcerated people with communication disabilities whose primary language is not English); *id*. at 13 (asserting that VRS and IP CTS can "dramatically improve the accessibility of phone calls" for incarcerated people with communication disabilities, explaining that VRS allows for a quicker and more natural conversation for ASL and that IP CTS and other modern texting services can "facilitate multimodal communications for those who do not sign but can read or voice for themselves"); Equip for Equality Jan. 19, 2016, Comments at 1 (highlighting the importance of incarcerated ASL users communicating in their primary language, especially for those with "a lower level of education"); Sorenson Comments at 2, 4 ("TTY has been largely supplanted by better forms of TRS that are easier to use and are much more functionally equivalent to hearing use of a telephone." Sorenson remarks that IP CTS and VRS allow both parties to the call to sign or speak freely and to perceive nuances that otherwise would have been missed on TTY-based TRS calls.); ACDHH Reply at 1 (commenting that IP CTS is a more common form of TRS used by hard of hearing individuals, and that many deaf and hard of hearing incarcerated people may not be familiar with "antiquated" technologies such as TTYs, having never used them before); GlobalVRS Reply at 2-3 (arguing that limiting deaf incarcerated people whose primary language is ASL to TTY services leads to further isolation from family and friends); Richard Ray Reply at 11 ("[I]nmates who are deaf, deafblind, and hard-of-hearing who sign, require VRS to be able to contact their hearing associates outside of the correctional center in a manner comparable to hearing inmates contacting hearing associates over a standard telephone."); ZP Reply at 3 (stating that providing video communication services, including VRS, has "had a tremendously positive impact on [incarcerated people], their families, and ultimately the community" and that "[a] federal mandate for all such persons to have access to video communication, including VRS, would ensure that the significant benefits of modern telephone communications reach all people with disabilities who are incarcerated"). As explained above, *supra* note 824, in the general population, VRS is projected to be used approximately 23 times as much, and IP CTS is projected to be used 90 times as much, as TTY-based TRS.

[844] 47 U.S.C. § 225(b)(1).

this end, section 225 expressly provides the Commission with authority over common carriers providing intrastate as well as interstate communications services, including the authority to require carriers to provide access to TRS "to the extent possible."[846] Does section 225 authorize the Commission to require that inmate calling services providers provide access to appropriate forms of TRS, as well as to regulate the manner in which such access is provided?

273. As alternative sources of authority, section 255 of the Act requires providers of telecommunications services to ensure that their services are "accessible to and usable by individuals with disabilities 'if readily achievable.'"[847] Similarly, section 716 of the Act requires providers of advanced communications services (including VoIP services) to ensure that such services are accessible to and usable by individuals with disabilities "unless [these requirements] are not achievable," prohibits such providers from installing "network features, functions, or capabilities that impede accessibility or usability," and authorizes the Commission to adopt implementing regulations.[848] We seek comment on the extent to which, independently of section 225, these provisions authorize the Commission to require inmate calling services providers to provide access to appropriate forms of TRS.

274. As noted earlier in the accompanying Report and Order, correctional authorities "exercise near total control over how incarcerated people are able to communicate with the outside world."[849] In general, the Communications Act does not provide us with authority to regulate the actions of correctional authorities (except to the extent that they also act as communications service providers or other entities subject to our authority). As a practical matter, therefore, our ability to compel an inmate calling services provider to make additional forms of TRS available in a particular facility may depend, for example, on whether the correctional institution agrees—or is required by other applicable law—to make suitable communications devices and network access available to incarcerated people with disabilities, or to permit a service provider to do so. We seek comment on the extent to which Title II of the Americans with Disabilities Act (ADA) or other federal or state laws require such access.[850] We also stress that, although the obligations of inmate calling service providers under any rules we adopt may be limited to

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[845] *See id.* (identifying an underlying goal of section 225 is to carry out the purpose of 47 U.S.C. § 151 "to make available to *all* individuals in the United States a rapid, efficient nationwide communication service" (emphasis added)).

[846] 47 U.S.C. § 225(b)(1)-(2). Section 225 also expressly requires common carriers to "provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers." *Id.* § 225(c).

[847] *Id.* § 255(c).

[848] 47 U.S.C. § 617(b)(1), (d)-(e).

[849] Report and Order, *supra* Part III.A.

[850] *See, e.g.*, 42 U.S.C. § 12131 *et seq.* (ADA Title II, prohibiting disability discrimination in all services, programs, and activities provided to the public by state and local governments); 29 U.S.C. § 794 (Rehabilitation Act of 1973, prohibiting disability discrimination in programs that, for example, receive federal funds); *Zemedagegehu v. Arlington County Sheriff Elizabeth F. Arthur et al.*, No. 1:15cv57 (JCC/MSN), 2015 WL 1930539 at *1-2, *16 (E.D. Va. Apr. 28, 2015) (denying a motion to dismiss an ADA Title II complaint against a correctional facility for, among other things, providing a TTY, but not a videophone). The *Zemedagegehu* case ultimately led to a settlement agreement between the correctional facility and the U.S. Department of Justice. Department of Justice, *Settlement Agreement between the United States of America and Elizabeth F. Arthur, in Her Official Capacity as the Arlington County Sheriff*, DJ # 204-79-325 (Nov. 17, 2016), https://www.ada.gov/arlington_co_sheriff_sa.html; *see also* NDRN/NAD Dec. 18, 2015, Comments at 5. Access to telecommunications for incarcerated people with disabilities may also involve issues of constitutional rights. *See, e.g.*, *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 218 (4th Cir. 2017) (reversing the district court's grant of summary judgment in favor of the correctional facility regarding the plaintiff's claim that being given access to a TTY, rather than a videophone as requested, violated his First Amendment rights).

measures that are "feasible" in the circumstances of a particular correctional facility, we do not propose to preempt other requirements under state or federal law, whether applicable to service providers or correctional authorities, which may expand the scope of access to TRS that would otherwise be deemed "possible" under section 225.

275. *Benefits and Costs*. To supplement the current record, we seek further comment on the benefits and costs of requiring that providers of inmate calling services provide access to all authorized forms of TRS. First, to establish a baseline, we seek additional, specific information on the extent to which VRS, IP Relay, IP CTS, and CTS are currently being made available in correctional facilities. According to comments on the *2020 ICS Notice*, VRS and IP CTS already have been made available in some correctional facilities.[851] ZP Better Together, LLC, a certified VRS provider, notes that a number of state facilities that allow video visitations also have added VRS and point-to-point video communications for those with accessibility needs.[852] Where available, how are Internet-based relay services and CTS provided? Do correctional facilities make arrangements directly with TRS Fund-supported TRS providers to provide these services, or are they accessed through an inmate calling services provider? What kinds of devices are used to access these forms of TRS, and how and by which entities are they provided? Similarly, how is broadband Internet access provided to the facility—by arrangement with an inmate calling services provider or some other entity? Where access to additional forms of TRS has been made available, what operational or other challenges were encountered, and how were they addressed?

276. Second, we seek additional comment on the benefits of making VRS, IP CTS, IP Relay, and CTS available in correctional facilities where they are *not* currently available. As noted above, the record to date strongly suggests that TTY-based TRS and STS, by themselves, are insufficient to ensure that incarcerated people with communications disabilities have access to functionally equivalent communications. We seek additional, specific information on how and to what extent each of the other TRS-Fund supported relay services would enhance communications for incarcerated people with communications disabilities. Where available, what specific benefits do these services offer that TTY-based TRS and STS cannot? What communications limitations of TTY-based TRS and STS would be remedied by providing modern relay services? For example, how would access to additional forms of TRS improve communications access for incarcerated people who are deafblind? Should each of these relay services—VRS, IP CTS, IP Relay, and CTS—be available, or would a combination of some of them collectively provide adequate access to telecommunications for incarcerated people with communication disabilities? Would the provision of modern relay services also benefit the people that incarcerated people with communication disabilities want to call?

277. As part of our assessment of the potential benefits of making other forms of TRS available, we also seek comment on the extent to which, as a practical matter, TTY-based TRS is actually available and usable in correctional facilities. To what extent is access to TTY-based TRS subject to more restrictions (e.g., physical access, limited hours, dependence on correctional staff) than telephone access? For example, to what extent are TTY devices incorporated into the telephones used by the general incarcerated population, or are TTY devices available only upon request? We also seek comment on the extent to which the TTYs available at correctional facilities are actually functional and capable of making calls. Are TTYs adequately maintained?[853] Further, in light of the incompatibilities between TTYs and IP networks, we seek comment on the extent to which correctional facilities have upgraded to IP-enabled voice service. For those that have upgraded, how do correctional facilities ensure that incarcerated people with communication disabilities are able to use TTYs successfully? Do incarcerated

[851] ZP Reply at 1-2 (stating that ZP, a certified VRS provider, currently provides VRS in correctional facilities across the country); Hamilton Reply at 3 (explaining how Hamilton, a certified IP CTS provider, works with correctional facilities and calling service providers to have IP CTS available).

[852] ZP Reply at 2.

[853] *See* Accessibility Coalition Comments at 15 n.63, 19-20.

people with disabilities wishing to use TTY-based TRS encounter difficulties navigating inmate calling services (e.g., accessing the system to complete steps require to make an outgoing call)? What kinds of difficulties are encountered by individuals eligible to use STS? To what extent could such difficulties in using TTY-based TRS and STS be overcome by providing access to other forms of TRS?

278. Third, what security or other issues do inmate calling services providers and correctional facilities face that could be affected by the provision of VRS, IP CTS, IP Relay, and CTS, and how could such issues be effectively addressed? The Commission has recognized that security is a significant concern for inmate calling services generally.[854] However, service providers and correctional facilities have developed methods for effectively monitoring, recording, and administering inmate calls, and some commenters have stated that these solutions are applicable or adaptable to the TRS context.[855] Is there evidence that security issues are more challenging for TRS than for inmate calling services in general, and if so, why? What specific security issues are raised by incarcerated people's access to TRS? Are there specific concerns with respect to VRS, given its use of video? How have security concerns been addressed with respect to TTY-based TRS and STS, and in facilities where VRS is currently available? What measures are available to address such security concerns with respect to other forms of TRS?

279. Fourth, what additional costs would be incurred—and by which entities—in providing access to VRS, IP CTS, IP Relay, and CTS, respectively, for incarcerated people? For example, would inmate calling services providers or other entities incur costs associated with upgrading or modifying existing technology configurations, operations or associated network infrastructure?[856] To what extent would additional broadband services be needed for transmission and completion of TRS calls, what costs would be involved, and which entity would incur such costs—the correctional institution or the inmate calling services provider? To what extent would additional costs be incurred by TRS providers to provide relay services in correctional facilities? Would it be necessary to provide training to correctional facilities personnel regarding modern TRS, and which entity would incur such costs? To what extent would additional costs be incurred, and by which entity, in ensuring that the provision of VRS, IP CTS, IP Relay, and CTS is secure? We seek detailed estimates of the costs described above and how they would be incurred—including discussion of the actual costs incurred in those instances where access to some of these forms of TRS is already being provided.

280. We also seek comment on how the various costs attributable to the provision of TRS access should be recovered. Which, if any, of the additional costs that may be incurred by TRS providers should be treated as eligible for TRS Fund support? To the extent that costs are incurred by inmate calling services providers, to what extent should they be recoverable in generally applicable inmate

[854] *See, e.g.*, *2013 ICS Order*, 28 FCC Rcd at 14138, para. 58 (recognizing that inmate calling services systems include important security features); *2015 ICS Order*, 30 FCC Rcd at 12775, para. 21 (noting the need to balance the Communication Act requirements, the unique security needs of inmate calling service, and the requirement that calling service providers receive fair compensation); *see also* Securus Comments at 3-4 ("ICS is an inherently different service to provide than traditional consumer outbound calling services due to the extensive user verification and facility-specific security requirements of correctional facilities (e.g., costs associated with the logging, monitoring and retention of calls), facility-specific infrastructure installation requirements, a vast variety of facility sizes and unique requirements . . . .").

[855] *See, e.g.*, ZP Reply at 2-3 (highlighting the capability of inmate calling services providers to administer, monitor, and record VRS and point-to-point calls); ClearCaptions Reply at 3 (discussing potential concerns with IP CTS equipment and software used for calls in incarceration facilities); Richard Ray Reply at 13-14 (suggesting monitoring and recording solutions for video-based communications in the incarceration context, and methods to keep the Internet connection needed for video-based communication secure).

[856] *See, e.g.*, NDRN/NAD Dec. 18, 2015, Comments at 6 (cautioning that video visitation devices "are typically not compatible with VRS or videophones").

calling services charges that are subject to Commission regulation?[857]

281. *Feasibility, TRS Equipment, and Internet Access*. As noted above, our proposed expansion of inmate calling services providers' obligations to provide access to TRS is necessarily conditional on the extent to which associated communications capabilities, such as Internet access and suitable user devices, can be made available in a particular correctional facility. We cannot compel providers to provide access to all forms of TRS in those facilities where it is not feasible to do so.[858] We seek comment on how to determine feasibility in this context and how potential limitations on the availability of Internet service and user devices could be addressed and overcome. In order to access relay services, certain hardware is necessary.[859] To access TTY-based relay, a TTY is necessary. For CTS, a telephone with a display suitable for captioning, and compatible with the applicable state-program captioning service, is required. For Internet-based forms of TRS, broadband Internet access is required, as well as appropriate devices. Various devices may be used for IP CTS, such as a caption-displaying telephone compatible with an IP CTS provider's service, a personal computer, a laptop, a tablet, or a smartphone. IP Relay, similarly, may be accessed using a personal computer, a laptop, a tablet, or a smartphone. Finally, VRS requires a device with a screen and a video camera, such as a standalone videophone, a personal computer, a laptop, a tablet, or a smartphone. Internet-based services (IP Relay, IP CTS, and VRS) also require certain software that is available from TRS providers. With respect to VRS, the Commission requires that any user devices and associated software distributed by a VRS provider must be interoperable and usable with all VRS providers' services.[860]

282. As a threshold matter, we seek comment on the extent to which broadband Internet access, as well as the various user devices described above, are currently made available in correctional facilities for use by incarcerated people. To what extent are broadband Internet access services currently available for use by incarcerated people, and could such services be used to support access to Internet-based TRS? For example, the record indicates that remote video visitation, where available, is often provided by an inmate calling service provider.[861] Where an inmate calling service provider or affiliated company is providing video visitation using broadband Internet access, is it feasible for the provider to

[857] As discussed below, the Communications Act restricts the extent to which parties to a TRS call may be charged for TRS access.

[858] *See generally* 47 U.S.C. § 225(b)(1) (requiring the Commission to ensure that TRS is available "to the extent possible").

[859] We note that people who are deafblind may need devices that have refreshable Braille output or text enlarging capabilities.

[860] 47 CFR § 64.621 (requiring that VRS providers enable users to make and receive calls through any VRS provider, to choose a different default service provider without changing the access technology used to place calls, and to make point-to-point calls to any other VRS user, even if the calling and called parties are registered with different providers).

[861] *See* Prison Policy Initiative, *Screening Out Family Time: The For-Profit Video Visitation Industry in Prisons and Jails* (Jan. 2015), https://www.prisonpolicy.org/visitation/report.html (providing data showing that video visitation services are often provided by inmate calling services providers and bundled with telephone services in contracts with correctional institutions), *cited in* Comments of CuWAV, LLC, WC Docket No. 12-375, at 1 (filed Dec. 16, 2015); Prison Policy Initiative Jan. 19, 2016, Comments at 2 ("Most video visitation providers are the same companies that have long been providing phone services to prisons and jails: ICSolutions, Renovo (which is owned by GTL), Securus, and Telmate." (emphasis omitted)); *see also* Comments of Brian Dolinar, WC Docket No. 12-375, at 2 (filed Jan. 19, 2016) (filed on behalf of Illinois Campaign for Prison Phone Justice) (At certain facilities in Illinois, video visitation is provided by an inmate calling services provider and bundled with inmate calling services.); Los Angeles County Sheriff's Department Jan. 19, 2016, Comments at 2-3 (stating that its contracted video visitation provider was acquired by an inmate calling services provider); Comments of Wright Petitioners et al., WC Docket No. 12-375, at 3 (filed Jan. 19, 2016) (stating that "the pace of consolidation within the prison-industrial complex has accelerated in recent years, resulting in attempts by [inmate calling services] providers to serve all aspects of the correctional authorities' needs at the facility," including video visitation).

also use such broadband service to provide access to VRS or other forms of Internet-based TRS? To what extent are off-the-shelf user devices suitable for Internet access, such as personal computers, laptops, tablets, smartphones, or specialized videophones, available to incarcerated people? For VRS, to what extent are video-capable versions of such devices available?[862] To what extent do correctional facilities place restrictions on people with disabilities' access to the Internet and Internet-capable devices (e.g., physical access, limited hours, dependence on correctional staff) that are not imposed on the use of telephones by hearing people? We also seek comment on any security issues specific to certain types of equipment that may be used to access TRS. Are such security issues more easily or effectively addressed with certain kinds of video-capable user devices than with others?

283. To what extent is the provision of broadband Internet access or TRS-compatible user devices (other than TTYs) by a correctional facility required by the ADA or other laws?[863] To the extent that such access services and devices are *not* otherwise available, should the Commission require inmate calling services providers to provide Internet access service or user devices? We also note that TRS providers frequently distribute suitable user devices to TRS users, although our rules do not permit recovery of device-related costs from the TRS Fund.[864] Should we make TRS Fund support available for the provision of these items by a certified TRS provider to an incarcerated person, as an exception to the cost-recovery prohibition? We seek comment on the merits, costs, and benefits of these alternatives, and whether we have statutory authority to adopt each of them.

284. To what extent do these feasibility issues implicate the agreements between calling service providers and correctional facilities, and how should the Commission treat such contractual issues in defining providers' obligations? For example, an inmate calling services provider may claim that access to a particular form of TRS is infeasible at a particular facility because the correctional authority has withheld permission for incarcerated people to use of that form of TRS—or has withheld permission for the inmate calling services provider or TRS provider to provide Internet access or suitable user devices. How should the Commission evaluate such possible defenses? For example, should we require the inmate calling services provider to provide written evidence that the necessary permissions were withheld? Should we require providers to make a good faith effort to secure necessary permissions, and

[862] *Cf.* NDRN/NAD Dec. 18, 2015, Comments at 6 (cautioning that video visitation devices "are typically not compatible with VRS or videophones").

[863] Federal prisons and other facilities receiving federal funds are subject to section 504 of the Rehabilitation Act of 1973, *e.g.*, 29 U.S.C. § 794(a), and implementing regulations. *E.g.*, 28 CFR pt. 41. State and local correctional facilities are subject to Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, and implementing regulations adopted by the Department of Justice. *2015 ICS Order*, 30 FCC Rcd at 12874, para. 225 n.807; *e.g.*, 28 CFR § 35.152 (rules specifically applicable to correctional facilities). For example, public entities must "furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." 28 CFR § 35.160(b)(1). Such "auxiliary aids and services" include "qualified interpreters on-site or through video remote interpreting (VRI) services; . . . real-time computer-aided transcription services; . . . telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing." 28 CFR § 35.104. We invite parties to comment on the extent to which this or other applicable ADA regulations mandate the availability to incarcerated people of appropriate equipment for accessing TRS.

[864] *See, e.g.*, *2006 VRS Declaratory Ruling*, 21 FCC Rcd at 5447, 5457-58, paras. 15, 38; *Structure and Practices of the Video Relay Service Program*; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 10-51 and 03-123, Report and Order and Order, 32 FCC Rcd 5891, 5897, para. 12 (2017).

how should a sufficient effort be defined? Should we require the provider to show that it assured the correctional authority of its willingness to abide by reasonable use limitations and security restrictions? If there is sufficient evidence of infeasibility of access to some form of TRS due to the policy of the correctional authority, are there any steps that the Commission could take to encourage the facility to alter its practice? We invite commenters to discuss the Commission's legal authority for any measures advocated in this regard.

3. Application of Existing TRS Rules

285. We seek comment on whether any modifications of our existing TRS rules may be appropriate in conjunction with expanded TRS access for incarcerated people. In general, the rules governing Internet-based forms of TRS are more complex than those applicable to TTY-based TRS. For example, to prevent waste, fraud, and abuse and allow the collection of data on TRS usage, our rules require that people using VRS, IP Relay, or IP CTS be registered with a TRS provider and that such providers submit information on users registered for VRS and IP CTS to a central User Registration Database (User Database).[865] VRS providers, however, may register videophones maintained by businesses, organizations, government agencies, or other entities and designated for use in private or restricted areas as "enterprise videophones."[866] In lieu of individual registration, should we also permit such enterprise device registration for equipment used by incarcerated people to access IP Relay and IP CTS? Should the information and documents collected by TRS providers for purposes of such enterprise or individual user registration be the same, or different from, the information and documents currently required by our rules?[867] Are additional safeguards necessary for the provision of certain relay services in the inmate calling services context, to prevent waste, fraud, and abuse?[868] What steps should be taken to ensure that compliance with user registration rules or other TRS rules do not create a significant delay for telecommunication access for incarcerated people with disabilities?

286. Should incarcerated people be able to select the TRS provider they wish to use, or should the TRS provider be selected by the inmate calling services provider serving a facility (or by the facility itself)? Should a TRS provider be required to identify inmate calling services calls in their claims for TRS Fund compensation, or to submit additional or different information to the TRS Fund administrator regarding TRS calls involving incarcerated people?[869] To assist the Commission in evaluating the level of service incarcerated people are receiving, and the effectiveness and efficiency of such service, should we require TRS providers to report annually on the provision of TRS to incarcerated people? What kinds of

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[865] 47 CFR § 64.611.

[866] *Id.* § 64.601(a)(16) (defining "enterprise videophone"); *id.* § 64.611(a)(6) (providing for registration of enterprise videophones). The VRS provider must "obtain a written certification from the individual responsible for the videophone, attesting that the individual understands the functions of the videophone[,] that the cost of VRS calls made on the videophone is financed by the federally regulated Interstate TRS Fund," and that the institution "will make reasonable efforts to ensure that only persons with a hearing or speech disability are permitted to use the phone for VRS." *Id.* § 64.611(a)(6)(ii)(A). In addition, the VRS provider must collect and submit to the User Database the following information: (1) the VRS provider's name; (2) the telephone number assigned to the videophone; (3) the name and physical address of the institution (and the Registered Location of the phone, if different from the physical address); (4) the type of location where the videophone is placed within the institution; (5) the date of initiation of service to the videophone; (6) the name of the individual responsible for the videophone, confirmation that the provider has obtained the certification described above, and the date the certification was obtained; and (7) whether the device is assigned to a hearing individual who knows sign language. *Id.* § 64.611(a)(6)(iii).

[867] *See, e.g.*, 47 CFR § 64.611(a)(3)-(4), (6) (listing the registration information to be collected by VRS providers).

[868] *See 2018 IP CTS Notice*, 33 FCC Rcd at 5854-57, paras. 117-22 (proposing to require that, when registering users for IP CTS, a TRS provider should obtain a certification of eligibility from a third-party professional).

[869] *See* 47 CFR § 64.604(c)(5)(D) (specifying information that TRS providers must submit to the TRS Fund administrator with requests for TRS Fund compensation).

information should be included in such reports—e.g., identification of the correctional facilities served, the number and type of devices provided at each facility, and the number of minutes handled per facility?

287. Are any changes in the Commission's TRS confidentiality rules necessary to address the security concerns of correctional facilities? For example, section 64.604(a) states:

> Except as authorized by section 705 of the Communications Act, 47 U.S.C. 605, CAs [(communications assistants)] are prohibited from disclosing the content of any relayed conversation regardless of content, and with a limited exception for STS CAs, from keeping records of the content of any conversation beyond the duration of a call, even if to do so would be inconsistent with state or local law.[870]

This rule, which the Commission has recognized as fundamental to ensuring that TRS is "functionally equivalent" to voice communications and maintaining the trust of TRS users in the TRS program,[871] applies to TRS providers and their CAs but does not expressly impose obligations on other parties, such as an inmate calling services provider that does not employ CAs and is only providing a communications link to an authorized TRS provider. We tentatively conclude that the existing rule does not prohibit an inmate calling services provider or correctional facility from monitoring the transmissions sent and received between an incarcerated person and the TRS provider's CA, in the same way as they monitor other inmate calls, provided that the TRS provider and CA are not directly facilitating such monitoring. We seek comment on this tentative conclusion. We also seek comment on whether such monitoring that does not require affirmative steps by the TRS provider or CA is sufficient to ensure that a facility's security needs are protected as effectively as for other inmate calls.[872] To the extent that monitoring permitted by the current rule is insufficient to protect institutional security, we seek comment on whether there are ways to narrowly address such security needs in order to avoid eroding the legitimate privacy interests of TRS users.

288. We seek comment on whether any other modifications to our TRS rules are necessary to address the special circumstances that characterize inmate calling services. For example, what, if any, changes are needed in the TRS rules governing the types of calls TRS providers must handle (47 CFR § 64.604(a)(3)), the TRS Numbering Directory (47 CFR §§ 64.613, 64.615(a)(1)-(2)), change of default TRS provider (47 CFR § 64.630-64.636), and TRS customer proprietary network information (47 CFR § 64.5101-64.5111)? In the inmate calling services context, should any of the rules under part 64, subpart F, that currently apply to TRS providers be applicable to inmate calling services providers as well—and if so, which rules?

4. Charges for TRS Calls

289. *Prohibition of Provider Charges for TTY-Based TRS Calls*. In 2015, the Commission amended its rules to state that "No [inmate calling services] Provider shall levy or collect any charge or fee for TRS-to-voice or voice-to-TTY calls."[873] Notwithstanding this rule, some commenters allege that

[870] *Id.* § 64.604(a)(2)(i).

[871] *See* 47 U.S.C. § 225(d)(1)(F) (requiring the Commission to adopt a rule "prohibit[ing] relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call"); *2000 TRS Order*, 15 FCC Rcd at 5163-64, paras. 53-54 (recognizing that confidentiality is essential to relay service).

[872] We note that, by monitoring transmissions to and from the incarcerated user's device, without involving the TRS provider, the inmate calling services provider or facility would have access to the entire content of the incarcerated person's conversation with the other party to the call. That is, the inmate calling services provider or facility could monitor the incarcerated person's communication directly, and could monitor the speech of the other party as conveyed in text or ASL video by the TRS CA.

[873] 47 CFR § 64.6040(b); *2015 ICS Order*, 30 FCC Rcd at 12923, Appx. A (adoption of the rule section).

some calling service providers are imposing fees on the receiving end of TTY-based TRS calls placed by incarcerated people.[874] In addition, at least one commenter suggests that incarcerated people with disabilities may be subject to charges for using or accessing the TTY or telephone devices needed to make TRS calls.[875] To prevent circumvention of the rule, advocates and VRS providers have requested that the Commission clarify that it does not allow either party to be charged for a TRS call, or for access to equipment when used to place or receive a TRS call.[876] We seek additional comment and information on whether, and to what extent, such practices have continued after section 64.6040(b) of the rules became effective, and by which entities—inmate calling services providers or correctional institutions—such charges are being imposed.

290. We note that, by its terms, section 64.6040(b) prohibits *any* charge for TRS calling, regardless of the person on whom such a charge might be assessed, or whether such a charge is formally applied to the service itself or to a device used to access the service.[877] Nonetheless, to more effectively deter the charging practices described above, we propose to amend the rule to expressly prohibit inmate calling services providers from levying or collecting any charge on *any* party to a TRS call subject to this rule, regardless of whether the party is the caller or the recipient and whether the party is an incarcerated person or is communicating with such individual, and regardless of whether the charge is formally assessed on the service itself or on the use of a device needed to make the call. We seek comment on this proposal, including its costs and benefits. We also seek comment on our legal authority in this regard, including section 225 of the Act, which the Commission relied upon in the *2013 ICS Order*,[878] as well as the interplay with section 276 of the Act.[879]

291. *Provider Charges for Other Forms of TRS*. In light of our proposal above to expand the kinds of relay services that incarcerated people are able to access, we also propose to amend section 64.6040 to prohibit inmate calling service providers from charging for other forms of TRS to which an inmate calling services provider provides access. We seek comment on the costs, benefits, and statutory authority for this proposal.

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[874] Accessibility Coalition Comments at 17-18.

[875] Letter from Blake E. Reid, Counsel to Telecommunications for the Deaf and Hard of Hearing (TDI), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, CG Docket Nos. 10-51, and 03-123, at 2-3 (filed Feb. 4, 2021) (citing a memorandum by an inmate calling service provider arguing that incarcerated deaf and hard of hearing individuals can be charged to access VRS equipment to make calls, as well as the provider's webpage encouraging this practice).

[876] Accessibility Coalition Comments at 17-18; ZP Reply at 7.

[877] Prior to the adoption of section 64.6040, other provisions of our rules might have been read to suggest that inmate calling services providers were free to charge the called party for TRS calls. Specifically, in the payphone provisions of our rules, adopted more than 20 years ago, section 64.1330(b) states that "[e]ach state must ensure that access to dialtone, emergency calls, and telecommunications relay service calls for the hearing disabled is available from all payphones at no charge to the *caller*." 47 CFR § 64.1330(b) (emphasis added); *First Payphone Order*, 11 FCC Rcd at 20721, Appx. D (adopting the rule section). Similarly, section 64.1300(c) states that "[t]he [payphone] compensation obligation set forth herein shall not apply to . . . *calls by hearing disabled persons* to a telecommunications relay service." 47 CFR § 64.1300(c) (emphasis added). However, we see no basis for inferring that the Commission, in adopting section 64.6040, intended an unstated qualification that similarly limits its application to the assessment of charges on the initiator of a call. In any event, our proposed amendment would put to rest any conceivable doubt that inmate calling services providers are prohibited from charging other parties to a TRS call.

[878] *2013 ICS Order*, 28 FCC Rcd at 14159-60, para. 95.

[879] *See, e.g.*, *2015 ICS Order*, 30 FCC Rcd at 12879, para. 236 (observing that "[t]he *2013* [*ICS*] *Order*, . . . did not address the relevance of section 276 to [inmate calling services] provider charges for TRS calls" and going on to consider the role of section 276).

292. To the extent that incarcerated people currently have access to forms of TRS not currently covered by the ban on TRS charges, we seek comment on the extent to which callers or called parties are currently being charged for such TRS calls, and whether such charges are assessed by the inmate calling services provider, the correctional facility, the TRS provider, or another entity. Are the same charges assessed for all types of TRS calls allowed at a given correctional facility, or only some? If certain charges are only being assessed for some types of TRS, which types are being assessed? If charges are imposed on either party for relay calls, what justification, if any, is proffered for imposing such charges? Are incarcerated people with communication disabilities being charged to access equipment needed to make relay calls? If so, how are they being charged (e.g., per use, or per minute), and how much are they being charged? Are there any comparable charges for the use of telephones in correctional facilities? Which entities impose charges for the use of relay equipment in correctional facilities, and what justification, if any, is proffered for such charges? Where charges are *not* imposed for calls involving such additional forms of TRS, how are costs attributable to such calls currently being recovered, and how should they be recovered?

293. To the extent that the Commission has discretion to permit calling service providers to assess charges for non-TTY TRS, to what extent should such charges be allowed? Should the Commission allow charges for some forms of TRS and not others? For example, while VRS cannot be used for video communication unless the user knows sign language, CTS and IP CTS have no similar inherent barriers to use—and consequently are more susceptible to abuse by ineligible users.[880] Could requiring free provision of CTS and IP CTS create an undesirable incentive for ineligible incarcerated people to place calls using such relay services, simply to avoid the applicable charges for using non-TRS inmate calling services? Are correctional facilities able to effectively mitigate such risks? Should any allowed charges be calibrated, like TTY-to-TTY calls, to take into account that VRS, IP Relay, IP CTS, or CTS calls, like TTY-to-TTY calls, are of longer duration than "functionally equivalent" calls using "voice communications services"? On this point, we invite commenters to submit evidence regarding the relative duration of various kinds of TRS calls and voice calls.

294. *Correctional Institution Charges*. Regarding charges for the use of relay services (whether TTY-based or modern) or related user devices or access services that are imposed directly by a correctional facility, rather than by an inmate calling services provider, we seek comment on whether we have authority to regulate or prohibit such charges, either directly or indirectly, the source of any such authority, and how any such rules should be structured. We also seek comment on the legality of such charges under other laws, including other titles of the ADA.

5. Direct Video Communication by Incarcerated People with Communication Disabilities

295. *Availability of Direct Communication*. Many incarcerated people with communication disabilities have family and loved ones who also have communication disabilities.[881] Communication with these people requires direct communication without TRS. This is a particular concern for incarcerated persons who are deaf and whose primary language is ASL. For these individuals, direct communication in their primary language requires direct video communication. To facilitate direct communication among ASL users, the Commission has long required VRS providers to handle point-to-point calls between a registered VRS user and another ASL user with an assigned VRS telephone

[880] *See generally 2018 IP CTS Order*, 32 FCC Rcd at 5805, para. 9.

[881] *See, e.g., Structure and Practices of the Video Relay Service Program et al.*, CG Docket Nos. 10-51 and 03-123, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618, 8683, para. 164 (2013) (noting that "upwards of 80-90 percent of all calls made by ASL users on the VRS network are point-to-point" calls between two or more persons with disabilities eligible for VRS).

number.[882] Further, the record indicates that the number of correctional facilities that allow some form of direct video communication by incarcerated people has grown in recent years.[883]

296. Because of the key role of video communications for ASL users, because VRS providers are already set up to provide direct video service in conjunction with VRS, and because the equipment and Internet connection needed for VRS is also sufficient for direct video, we propose to require that, wherever inmate calling services providers provide access to VRS, they also provide access to direct video service, through a VRS provider or by another effective method. We seek comment on this proposal, including its costs and benefits and relevant sources of statutory authority. We invite commenters to provide additional information on specific benefits that direct video communication provides, beyond those offered by VRS. In terms of benefits, costs, and feasibility, what are the differences between video visitations, which some facilities currently allow, and direct video communications using VRS provider networks?[884] Is one form of direct video communication generally more available than the other? What are the security concerns, and related costs, with providing direct video communication in ASL using broadband Internet in correctional facilities? How can such concerns be effectively addressed to increase the availability of direct video communication to incarcerated people with disabilities?

297. With respect to direct *text-based* communication for incarcerated people with disabilities, the record is insufficient for us to formulate a proposed rule. What kinds of direct text-based communication services—such as SMS messaging and real-time text—are currently available to incarcerated people with disabilities, and to what extent? Do direct text communications raise security concerns, and if so, how can they be addressed to enable increased availability of text communication to incarcerated people with communication disabilities?

298. *Charges for Direct Communication*. Our current rules limit the rates charged by inmate calling services providers for TTY-to-TTY calls to no more than 25% of the rates they charge for traditional inmate calling services.[885] We invite comment on whether and how to expand the scope of this rule to include charges for other types of direct communications.

299. First, we seek additional information on current charging practices for other types of direct communications by incarcerated people with communication disabilities. With respect to direct video communication that is currently available in correctional facilities, are incarcerated people being charged for such calls, and if so, how much? Are different charges currently applied to point-to-point videophone calls by sign-language-using individuals with communication disabilities than for video visitation by other incarcerated people? How do charges for direct video communication and video visitation compare with charges for voice telephone calls? Regarding direct text services for incarcerated people with communication disabilities, are there charges for such services? If so, what are the rates? Are there differences in how much incarcerated people with communication disabilities are charged to engage in direct text communication and how much other incarcerated people are charged for similar

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[882] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*; *E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, CC Docket No. 98-67, WC Docket No. 05-196, Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791, 820-22, paras. 65-68 (2008) (requiring VRS providers to facilitate direct video calling between VRS users); *see also Structure and Practices of the Video Relay Service Program*; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 10-51 and 03-123, Report and Order, Notice of Inquiry, Further Notice of Proposed Rulemaking, and Order, 32 FCC Rcd 2436, 2452-55, paras. 38-45 (2017) (amending rules to provide for issuance of VRS telephone numbers to hearing ASL users for direct video calling with VRS users).

[883] *See* Richard Ray Reply at 15.

[884] *See* GTL Comments at 2 ("Video visitation" is one of the GTL's "diverse suite of offerings.").

[885] 47 CFR § 64.6040; *2015 ICS Order*, 30 FCC Rcd at 12880, para. 238.

services?

300. We invite comment on whether the Commission should impose limits on the charges that may be assessed for direct video communications by ASL users, as well as the costs and benefits and our statutory authority for regulating such charges. Are such limits justified by fairness and nondiscrimination considerations, such as those underlying the TTY-pricing rule?[886] For example, should we require that an inmate calling services provider's charges for direct video communication by an incarcerated ASL user should be no greater than the provider's charges for a voice call of equivalent duration? Are similar limits needed and appropriate for direct text communication by people with communication disabilities?

6. Accessibility-Related Reporting

301. As a part of the Commission's Annual Reporting and Certification Requirement, inmate calling services providers are required to submit certain information related to accessibility: (1) "[t]he number of TTY-based Inmate Calling Services calls provided per facility during the reporting period"; (2) "[t]he number of dropped calls the . . . provider experienced with TTY-based calls"; and (3) "[t]he number of complaints that the . . . provider received related to[,] e.g., dropped calls, [or] poor call quality[,] and the number of incidents of each by TTY and TRS users."[887] In the *2015 ICS Order*, the Commission concluded that tracking TTY-based calls would not be overly burdensome because: (1) TTY-based TRS calls make up only a small portion of inmate calling services calls; and (2) the need for specialized equipment or calling a designated TRS number (such as 711), or both, makes tracking easier.[888] The Commission also found the burdens of reporting TTY-based calls to be far outweighed by the benefits of greater transparency and heightened accountability on the part of inmate calling services providers.[889] In the same order, the Commission established a safe harbor, allowing inmate calling services providers to avoid TRS-related reporting obligations if: (1) the provider operates in a facility that allows additional forms of TRS beyond those already mandated by the Commission, or (2) the provider has not received any complaints related to TRS calls.[890] Although the TRS-related reporting may not be required under this safe harbor, the provider would need to provide a certification from an officer of the company stating which prong(s) of the safe harbor the provider has met.[891] This safe harbor was adopted to help encourage correctional facilities to adopt more modern forms of TRS.[892] Accessibility Coalition requests that the Commission expand the reporting requirement to foster accountability on the part of inmate calling services providers, and to eliminate the safe harbor.[893] Generally, GTL is opposed to

[886] *See 2015 ICS Order*, 30 FCC Rcd at 12880, para. 237-38.

[887] 47 CFR § 64.6060. Inmate calling services providers must submit annual reporting and certifications forms to the Commission by April 1 of each year. Required information to submit include international, interstate, and intrastate inmate calling services rates and ancillary service charges. *Id.*

[888] *2015 ICS Order*, 30 FCC Rcd at 12882, para. 245.

[889] *2015 ICS Order*, 30 FCC Rcd at 12882-83, para. 245.

[890] *Id.* at 12883, para. 246.

[891] *Id.*

[892] *Id.*

[893] Accessibility Coalition Comments at 18; Accessibility Coalition Reply at 4-5. Specifically, they ask to include the functionality and status of accessible equipment in correctional facilities in the reporting requirements. At this time, we do not propose a rule on reporting of accessible equipment by inmate calling services providers, pending further information and analysis regarding the current availability of such equipment and the role of inmate calling services providers in providing such equipment.

additional data collection on the basis it would create an administrative burden.[894]

302. Given our proposal to expand the types of TRS that inmate calling services providers are required to provide, we seek comment on whether to expand the inmate calling services providers' reporting requirements to include all other accessibility-related calls. What are the benefits or burdens, including on small entities, of imposing these additional requirements? Has our safe harbor, in fact, driven more correctional facilities to adopt forms of TRS other than TTY-based TRS and STS? If the reporting requirements are expanded to include other types of TRS, should the safe harbor be modified so that inmate calling services providers can avoid TRS-related reporting obligations only if they have not received complaints related to TRS calls? Alternatively, should the Commission eliminate the safe harbor and require all inmate calling services providers to report the required information?

B. Permanently Capping Provider and Facility-Related Rate Components

1. Overall Methodology

303. We seek comment on what methodology we should use to permanently cap provider-related rate components for interstate and international inmate calling services. In the Report and Order we adopt today, we use data from the Second Mandatory Data Collection to establish zones of reasonableness from which we select separate interim provider-related rate caps for prisons and larger jails. Although those data are more than sufficient to support the interim rate caps, we recognize that more disaggregated, consistent and uniformly-reported data will be needed for us to set permanent rate caps for interstate and international inmate calling services that more accurately reflect the cost of providing inmate calling services, including to jails with average daily populations less than 1,000. Accordingly, we establish another Mandatory Data Collection to enable us to obtain those data.

304. We seek comment on how we should use the data from the Mandatory Data Collection in establishing permanent provider-related rate caps for interstate and international inmate calling services. Should we use those data to calculate industry-wide mean contract costs per paid minute of use, and the associated standard deviation, in the provision of calling services to incarcerated persons? Should we, instead, analyze costs at the facility level, which seems necessary to capture potential differences in costs associated with smaller facilities? If so, how would we do that if providers keep their costs only on a contract basis? Does that fact suggest that, for any particular contract, so long as the permanent rate caps enabled the provider to recover the contract costs for interstate and international services without regard to the different facilities comprising the contract, the caps would be consistent with the fair compensation provision of section 276 of the Act? Or should we use an alternative methodology and, if so, what methodology should we use?

305. We also seek comment on whether we should employ a zone of reasonableness approach in establishing permanent rate caps. If so, should we establish separate zones of reasonableness for prisons, larger jails, and jails with average daily populations less than 1,000? Or should we use different groupings of facilities? Precisely how should we establish the upper and lower bounds of the zones of reasonableness for each group of facilities? Should we follow the approach set forth in the Appendices to the Report and Order in developing the database that we use to set any upper and lower bounds? If not, what alternative approach should we take? What other steps, if any, should we take to make sure that any upper and lower bounds reflect the costs of providing interstate and international inmate calling services? And what criteria should we use in picking interstate rate caps from within those zones? How should we determine permanent rate caps if we do not use a zone of reasonableness approach? Should we set the caps at our best estimates of industry-wide mean costs per paid minute of use plus one standard deviation or should we use another methodology? And, if so, what methodology should we use?

[894] *See* GTL Comments at ii (asking the Commission to "avoid burdening [inmate calling services] providers with additional data collections when the Commission already receives annual data from [inmate calling services] providers").

306. Our rules preclude providers from imposing on consumers of interstate inmate calling services any charges other than per-minute usage charges and the permissible ancillary services fees.[895] We invite comment on whether we should consider alternative rate structures, such as one under which an incarcerated person would have a specified—or unlimited—number of monthly minutes of use for a predetermined monthly charge.[896] Should providers be permitted to offer different options of rate structures as long as one of their options would ensure that all consumers of inmate calling services have the ability to choose a plan subject to the Commission's prescribed rate caps?[897] Would such an optional rate structure benefit incarcerated persons and their families?[898] Or would a different alternative rate structure be preferable?[899] What incremental costs, if any, would providers incur to develop an alternative rate structure and implement it on an ongoing basis? We ask interested parties to address the relative merits of different rate structures and their impact on calling services consumers and providers.

2. Provision of Service to Jails with Average Daily Populations Below 1,000

307. In the *2020 ICS Notice*, the Commission sought comment on its proposal to adopt a single interstate rate cap for prisons and a single interstate rate cap for jails.[900] The Commission asked, however, whether there are differences in providers' costs to serve different types of facilities, and, if so, how it should take those differences into account in setting interstate rate caps for different types of facilities.[901] We now seek to expand the record on these matters.

308. The available data do not make clear how, if at all, jail size affects the costs providers incur in providing inmate calling services. Securus asserts that jail size is a "critical cost factor" in providing calling services to incarcerated people,[902] identifying jails with an average daily population of less than 1,000 as being the most costly to serve.[903] The National Sheriffs' Association, for example, contends that there are a number of factors that result in facilities having higher costs in jails with fewer incarcerated people, noting that jails are typically operated by local jurisdictions that are under the authority of the county government or an elected sheriff, and that jails lack the economies of scope and scale of federal or state prisons.[904] The National Sheriffs' Association 2015 survey shows, in general, that jails with larger average daily populations have lower per-minute costs than jails with average daily populations less than 1,000,[905] but even if this is the case, would the fact that the jails themselves may have higher costs make providers' costs to provide service at jails with fewer incarcerated people any

[895] 47 CFR §§ 64.6020, 64.6030, 64.6080, 64.6090.

[896] Instead of the more traditional per-minute rate approach, some cities and providers are moving towards alternative rate structures including free calling plans for incarcerated people and their families. Worth Rises Comments at 11. These cities sometimes even preclude providers from bidding on a per-minute basis and instead require them to bid on the entire contract or a per phone line lease. *Id*.

[897] *E.g.*, Securus Comments at 47-48 (asking that the Commission to permit providers to offer alternative calling plans including plans allowing the purchase of blocks of minutes in advance or unlimited calling minutes to reflect the developments in the inmate calling services marketplace).

[898] For example, incarcerated people and their families enjoy free telephone calling in New York City and San Francisco for calls made from jails. Worth Rises Comments at 11.

[899] Financial Justice Project Comments at 1 (noting a sharp increase in call volumes since introducing a free call plan for county jails).

[900] *2020 ICS Notice*, 35 FCC Rcd at 8511, para. 75.

[901] *Id*.

[902] Securus Comments at 10.

[903] *See* National Sheriffs' Association Reply at 2; Pay Tel Reply at 13-15; *see also* Pay Tel Wood Report at 24.

[904] National Sheriffs' Association Comments at 8.

[905] *Id.* at 7-8.

higher? Pay Tel's outside consultant argues that "some locations, particularly small jails, have characteristics that make them more costly for an [inmate calling services] provider to serve, and that the higher level of costs precludes any ability to pay site commissions."[906] Is this the case for other providers as well? High turnover rates may play a role, as Pay Tel explains, because "the cost of establishing service or 'selling' to a new customer is greater than the cost of continuing to service or maintain an existing customer."[907] But to the extent providers are able to recover the cost of account set up and funding through ancillary service fees, how does setting up new accounts for newly incarcerated people differ in any material way from funding existing accounts?

309. We seek comment on the particular factors that result in higher costs of serving jails having average daily populations below 1,000 and ask commenters to address how we should take those factors into account in setting permanent interstate rate caps using data from the upcoming Mandatory Data Collection. Are there characteristics that are consistent across all jails with average daily populations less than 1,000 and that contribute to making those facilities more costly to serve on a per-minute basis? What factors affect providers' costs of serving these jails? Are the characteristics that make it more costly to serve these jails related to size, geography, state or local law, or other factors? Does the length of the average incarcerated person's stay influence providers' costs of serving jails having average daily populations below 1,000 and, if so, how? What one-time costs, if any, do providers incur when first offering service to a newly incarcerated person that differ from the costs of the services permitted under our ancillary services rules? What is the effect of turnover of incarcerated people in jails with average daily populations less than 1,000 on a provider's cost to serve that jail? Finally, are there other cost categories, such as account setup, customer service, or refund processing, that the Commission should consider in determining appropriate rate caps for jails having average daily populations below 1,000? Commenters are asked to share any additional information that may be relevant for the Commission to consider in establishing new permanent rate caps for jails with average daily populations less than 1,000 vis-a-vis larger jails.

310. We also seek comment on how our methodology for setting permanent interstate rate caps can quantify the factors that make jails with average daily populations less than 1,000 more costly to serve than prisons and larger jails. What steps should we take to distinguish the direct costs of serving these jails from the direct costs of serving prisons and larger jails? How can we ensure that jails with average daily populations less than 1,000 are allocated an appropriate proportion of providers' common costs? Should we use a combination of allocation methods to apportion those costs among facilities and, if so, what allocation methods should we use?

3. Correctional Facility Costs

311. In the Report and Order we adopt today, we reform, on an interim basis, the current treatment of site commission payments related to inmate calling services for prisons and larger jails based on the record before us.[908] We permit recovery of payments or portions of site commission payments mandated by federal, state or local law or regulation (legally-mandated) and those resulting from contractual obligations imposed by correctional facilities or agencies (contractually-prescribed). For legally-mandated site commission payments, we permit providers to pass through these payments to consumers, without any markup, up to a maximum total interstate rate of $0.21. For contractually-prescribed payments, we adopt a new interim rate component of up to $0.02 for both prisons and larger jails.[909] We refrain from including jails with average daily populations less than 1,000 from today's interim rate cap reforms because we find the record information insufficient to reasonably consider such

[906] Pay Tel Wood Report at 24.

[907] Pay Tel July 3, 2013, *Ex Parte* at 2.

[908] We use the term "larger jails" to refer to facilities with an average daily population greater than or equal to 1,000.

[909] *Supra* Part III.C.4.

reforms, including for discretionary site commission payments, at this time. We seek comment to supplement the record to account for this fact, specifically with respect to facility costs reflected in site commission payments. We seek broad comment on potential site commission reforms with respect to all correctional facilities. We also seek more targeted data and detailed information that would better enable us to undertake further reforms in how providers recover site commission payments going forward, especially for jails with average daily populations less than 1,000,[910] if permitted at all, that are legitimately related to, and necessary for, the provision of inmate calling services.[911]

312. In *GTL v. FCC*, the court left it to the Commission to determine "*which portions* of site commissions *might be directly related to the provision of ICS and therefore legitimate*, and which are not."[912] As the Commission explained in the *2020 ICS Notice*, site commissions have two components: compensating facilities for the costs they incur in providing inmate calling services and compensating the facilities for the transfer of market power over inmate calling services from the facility to the providers.[913] Prior to the *2016 ICS Reconsideration Order*, the Commission viewed these payments solely as an apportionment of profits between providers and correctional facility owners even though it recognized some portion of site commission payments may be attributable to legitimate facility costs.[914] In the *2016 Reconsideration Order*, the Commission recognized that "some facilities likely incur costs that are directly related to the provision of [inmate calling services]," and determined that "it is reasonable for those facilities to expect [inmate calling services] providers to compensate them for those costs . . . [a]s a legitimate cost of [inmate calling services] . . . ."[915] But, as the Public Interest Parties' expert explains, it is "difficult to disentangle which part of the site commission payment goes towards reasonable costs and which portion is due to the transfer of market power."[916] Even the National Sheriffs' Association acknowledges that some portion of commission payments are "locational rents," while other parts may be attributable to other factors.[917] How and where should the Commission draw the line between legitimate and illegitimate portions of site commissions? We seek comment on the specific costs that we should consider to be legitimate for recovery through site commission allowances as the Commission moves from the interim steps we take today to a more permanent policy. Specifically, what costs are directly related to, and necessary for, the provision of inmate calling services?[918] What costs are too attenuated or indirect to be directly related to the provision of inmate calling services? Commenters should be as specific as possible in describing specific costs or cost categories. If commenters identify categories of costs that they believe are directly related to the provision of inmate calling services, those commenters should identify with specificity what those costs cover and why they would not be incurred but for the fact that inmate calling services are provided at that facility.

313. *Methodology to Estimate Costs*. We also seek comment on other methodologies to estimate correctional facility costs directly related to the provision of inmate calling services and whether and how the Commission should consider accounting for legitimate facility costs related to inmate calling

[910] Although in some places we use the term "smaller jails" to refer to facilities with an average daily population less than 1,000, that usage is not meant to imply that such jails are small in any absolute sense

[911] *See, e.g.*, Worth Rises Mar. 24, 2021, *Ex Parte* at 3.

[912] *GTL v. FCC*, 866 F.3d at 414 (emphasis added).

[913] *2020 ICS Notice*, 35 FCC Rcd at 8520, para. 100.

[914] *See, e.g.*, *2016 ICS Reconsideration Order*, 31 FCC Rcd at 9307, para. 12.

[915] *Id*.

[916] Public Interest Parties Brattle Reply Report at 14.

[917] National Sheriffs' Association Comments at 6.

[918] UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 5 (explaining that "[a]s long as the FCC carefully reviews costs that are proposed to be included and determines which of those costs are 'directly related to communications service provision, it will have fulfilled its obligations under *GTL*").

in the future. Should we continue to permit recovery through an additive per-minute rate component like the interim $0.02 rate component we adopt today for larger jails and prisons? Should we consider some other method of recovery such as a flat fee per billing period or on a per call basis? We seek comment, generally, on any other factors that we should consider in determining legitimate facility-related costs to enable inmate calling services and whether those costs are reflected in site commission payments or recovered by facilities in some other way, and whether it is appropriate to even permit providers to recover those costs from end-users of inmate calling services. If they are recovered through other means, how best can the Commission account for that fact so as to ensure there is no double recovery at the expense of incarcerated people and their families?

314. Given the difficulties and complexities evidenced in accounting for and isolating what portion of site commission payments may be related to legitimate facility costs for enabling inmate calling, should we simply consider prohibiting providers from entering into any contract requiring the payment of contractually-prescribed site commissions for interstate and international calling services? Would such a prohibition be the best way to ensure incarcerated people and their families do not bear a financial burden that is unrelated to costs necessary to provide their calling services? We believe section 201(b) of the Act provides sufficient authority for us to prohibit such payments. Do commenters agree? What other legal authority do we have to make this determination? Would restricting such payments ensure that providers recover fair compensation pursuant to section 276 of the Act? Would prohibiting such payments eliminate the incentive for facilities to select providers that pay the highest site commissions, even if those providers do not offer the best service or lowest rates?[919] Would prohibiting such payments encourage facilities to allow multiple providers of inmate calling services to serve a given facility, instead of awarding monopoly franchises? Does permitting providers to recover any portion of site commission payments through interstate and international rates decrease incentives of providers to negotiate with facilities to lower or eliminate such payments altogether? We seek comment on whether contractually-prescribed site commissions are commonly paid on intrastate calls. If so, will the ability to charge site commissions on intrastate calls render ineffective any Commission efforts to encourage correctional facilities to prioritize the selection of providers with the best service or lowest rates, rather than those which pay the highest site commission?

315. We seek comment on legally-mandated site commission payments. As Judge Pillard explained in her dissent in *GTL v. FCC* and as the United Church of Christ and Public Knowledge emphasize, "the fact that a state may demand them does not make site commissions a legitimate cost of providing calling services."[920] Do commenters agree? Why or why not? If there is a legal requirement to pay site commissions in a state on what basis could we say that this legal requirement is not recoverable through interstate inmate calling services rates? Should we preempt state or local laws that impose these payments on interstate and international calling services because they interfere with federal policy and our statutory duty to consumers of inmate calling service that their interstate rates be just and reasonable? What effect would such a prohibition have on inmate calling services? How do these various possible approaches comport with sections 201(b) and 276 of the Act, and cases interpreting those provisions, including *GTL v. FCC*? Would preventing providers from paying site commissions (or certain types of site commissions) comport with principles of federalism? Should the Commission consider continuing to allow the payment of site commissions but prohibit the recovery of any portion of site commissions in interstate and international rates?

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[919] *See, e.g.*, GTL Godek Report at 21 (explaining that "site commissions . . . are determined through the various competitive processes used in the award of [inmate calling services] contracts"); *GTL v. FCC*, 866 F.3d at 404 ("In awarding contracts to providers, correctional facilities usually give considerable weight to which provider offers the highest site commission . . . ."); *see also James v .GTL*, 2018 WL 3727371, *2 (D.N.J. 2018) ("Indeed, GTL's [Chief Financial Officer,] Stephen Yow, agreed that site commissions were probably the most important feature of [inmate calling] service[s] agreements.") (citations omitted).

[920] *GTL v. FCC*, 866 F.3d at 424 (Pillard, J. dissenting); UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 4.

316. *Facility Costs for Jails with Average Daily Populations Less Than 1,000*. Several commenters responding to the *2020 ICS Notice* argue that a $0.02 rate component is inadequate for smaller jails to recover their costs related to inmate calling services. They point to the National Sheriffs' Association 2015 cost survey to support the claim that "the per minute cost incurred by the vast majority of Sheriffs and jails for security and administrative duties associated with [inmate calling services] greatly exceeds $0.02 per minute."[921] Pay Tel contends that a uniform $0.02 allowance for all size facilities is at odds with the Commission's tiered treatment of site commissions in the *2016 Reconsideration Order*, which adopted higher allowances for smaller facilities, based on a finding that those facilities incur higher per-minute costs than larger facilities.[922] Here, commenters suggest that legitimate facility costs related to inmate calling services may indeed be higher for smaller facilities.[923] Unfortunately, they did not provide sufficient evidence to enable us to quantify any such costs.

317. We seek that comment now. While the National Sheriffs' Association points us to its 2015 survey for evidence that correctional facility costs for smaller facilities are higher, the survey data for jails with fewer incarcerated people varied far too widely to comfortably estimate any values that would withstand scrutiny today. This is particularly the case when even the National Sheriffs' Association itself explains that "each individual jail facility has its own per minute cost because of differences in officer, supervisor and other employee hours spent on various duties; the compensation rates for officer, supervisors and other employees; and differences in minutes of use,"[924] and states that in some cases, jails with similar average daily populations have "significantly different cost per minute."[925] We understand there are many potential variables that impact facilities' cost of enabling inmate calling services inmate calling services in addition to size.[926] We seek detailed comment on those variables, including jail funding sources that may come from state or local government budgets to offset these costs.

318. We seek comment on what costs, if any, jails with average daily populations less than 1,000 incur related to the provision of inmate calling services that prisons and larger jails may not incur. If costs are indeed higher, either in an absolute sense or on a per unit basis, at jails with average daily populations less than 1,000, what are the characteristics that make those facilities more costly to serve? Are these characteristics related to geography, state or local law, or other factors, and if so, how should we account for that in our facility-rate component analysis? Are there particular factors or characteristics that are consistent across all jails with average daily populations less than 1,000? We encourage commenters, especially correctional facilities and agencies, to provide detailed descriptions and analyses of the cost drivers for jails with average daily populations less than 1,000.

319. We also seek comment on the effect of turnover of incarcerated people in jails with average daily populations less than 1,000. The National Sheriffs' Association explains that jails "contain people who have been arrested and not convicted and, as a result they experience a much greater number of admissions and higher turnover."[927] Pay Tel's outside consultant points to data previously submitted

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[921] National Sheriffs' Association Comments at 7; National Sheriffs' Association Reply at 2-3; *see also* NCIC Reply at 1.

[922] Pay Tel Comments at 12; National Sheriffs' Association Comments at 9 (jails with larger average daily populations have lower per-minute costs); *see also 2016 ICS Reconsideration Order*, 31 FCC Rcd at 9315, para. 27.

[923] Securus Cost Study at 17; *see also* Securus Comments at 33 (asserting that "commissions in large part are impacted by facility size and differ between county jail facilities and prisons").

[924] National Sheriffs' Association Comments at 9.

[925] *Id.*

[926] California State Sheriffs' Association Comments at 1-2.

[927] National Sheriffs' Association Reply at 2; *see also* National Sheriffs' Association Comments at 9 (explaining that "smaller jails have a much higher weekly turnover rate than larger jails").

by Pay Tel estimating that average weekly turnover is 62.2% for jails compared with 1.01% for prisons.[928] According to Pay Tel, this turnover impacts both provider and facility costs.[929] While these turnover costs might lead to increased costs for the provider due to, for example, larger numbers of account setups and larger quantities of called numbers to be vetted,[930] do they similarly increase costs for the facility? If so, how and by how much, and how is that related specifically to inmate calling services? The National Sheriffs' Association explains that the relatively shorter stays in jails with fewer incarcerated people leaves correctional facilities less time to recover their costs from incarcerated people, which, in turn leads to higher "per inmate cost" in these jails."[931] We seek detailed comment and analysis on the relationship between turnover and correctional facilities' costs, but more specifically, between turnover and inmate calling service costs. For example, if an intake process requires certain tasks associated with newly incarcerated people, including explaining the availability of inmate calling services, we see no reason why any portion of the costs of that intake process should be included as a legitimate facility cost related to inmate calling. This is because intake procedures are not specific to the provision of inmate calling services. Facilities incur costs related to these procedures regardless of whether the correctional facility staff explain the availability of inmate calling services. We also seek data regarding turnover rates and legitimate facility costs unique to jails with average daily populations less than 1,000, if any. We also seek specific information and comment on how we avoid duplication in cost recovery for inmate calling services-related costs that both facilities and providers say they incur for the same functions. Commenters should be specific in identifying cost categories and providing supporting data for each category.

320. Pay Tel, which "serves many small facilities," indicates that it has experienced increases in site commissions over the last four years, but there is no indication that these increases are attributable to legitimate facility costs related to inmate calling services.[932] What accounts for these increases and why should incarcerated people and their families bear the burdens of these costs when other services are provided to incarcerated people for which they need not pay any fee or rate? Is there any evidence such increases have any relationship to inmate calling services at all except that they are being extracted from an inmate calling services provider? Do these increases reflect other market dynamics, such as providers offering increasingly larger site commissions? Have other providers that serve smaller facilities observed a similar trend? Is this increase attributable to smaller facilities undertaking a greater share of administrative and security tasks that calling providers would ordinarily perform for larger facilities?[933] Are these increases observed at all jails with average daily populations less than 1,000 or only at the jails with the fewest people? Conversely, have other providers experienced a decrease in site commissions at smaller facilities in recent years? If so, what has caused this decrease? We encourage commenters to submit current data and detailed analyses of these increases or decreases and to what they are attributable to enable the Commission to better understand cost causation at these smaller facilities. We also seek comment on whether providers have sought to pay lower site commissions in connection with inmate calling services and whether such attempts have been rebuffed or successful.

321. Some commenters advocate for a tiered jail structure based on average daily population, with the jails with the fewest incarcerated people receiving the largest per-minute facility-related cost

[928] Pay Tel Wood Reply Report at 13.

[929] *Id.*

[930] *Id.* (explaining that these tasks "increase the costs to an [inmate calling services] provider to serve the facility because it is a jail rather than a prison with the same [average daily population]").

[931] National Sheriffs' Association Comments at 9.

[932] Pay Tel Comments at 13.

[933] *See* Pay Tel Reply at 9 (explaining that small and mid-sized facilities perform certain administrative and security tasks that calling service providers generally perform).

recovery.[934] We seek comment on whether we should adopt separate tiers that distinguish between jails with average daily populations of less than 350 and somewhat larger jails (e.g., those with average daily populations of 350 to 999). If so, what tiers should we adopt? The Commission previously adopted site commission allowances for tiers that reflected three categories of incarcerated people (i.e., jails with average daily populations below 350; medium-sized jails with average daily populations of 350 to 999; and larger jails). Should we adopt these same tiers or different sizes or number of tiers? If so why? Or would a single tier covering all jails with average daily populations below 1,000 be more appropriate? Alternatively, should we conclude, as certain commenters suggest, that a uniform facility-related allowance is the most appropriate if any such allowance is permitted? Commenters arguing that we should adopt different site commission rate components based on jail size should provide data and supporting analysis for any proposals submitted.[935]

322. *Facility Costs for Prisons and Larger Jails*. We also seek comment on whether we should further reduce or eliminate the $0.02 rate component allowance for contractually-prescribed site commissions for prisons, larger jails, or both. We seek comment on the same questions we pose for jails with average daily populations less than 1,000 regarding what factors impact a facility's legitimate costs to enable inmate calling services. Should we consider different tier sizes for larger jails? For example, the National Sheriffs' Association proposes categorizing the largest jails as those with average daily populations exceeding 2,500.[936] What would be the basis for different sized tiers for prisons and larger jails? Are there material differences in unit costs that facilities reasonably incur as sizes increase? As explained above in connection with jails with average daily populations less than 1,000, there is record evidence suggesting that small facilities incur higher costs due to turnover of the incarcerated population.[937] Are larger jails and prisons similarly affected by turnover rates? If not, what effect, if any, does turnover have at larger facilities? As we do for jails with average daily populations less than 1,000, we ask commenters to provide data on turnover rates for prisons and larger jails.

323. *Security and Surveillance*. Several commenters argue that facilities' security and surveillance costs should not be recovered through inmate calling services rates as these tasks are "not related to the provision of communication service and provide no benefit to consumers."[938] Others argue that these costs should be recovered through providers' calling rates because correctional facilities incur them to provide incarcerated people with access to inmate calling services.[939] In the survey data the

[934] Pay Tel Comments at 12; Pay Tel Reply at 11-12; National Sheriffs' Association Comments at 9; National Sheriffs' Association Reply at 1.

[935] Pay Tel and the National Sheriffs' Association ask us to consider the data that are already in the record. Pay Tel Comments at 11-13; Pay Tel Reply at 7; *see* National Sheriffs' Association Comments at 7-8. But Pay Tel's representation that it has seen upticks in site commission costs at some of the smaller facilities it serves suggests that the landscape has changed since those data became part of the record in this proceeding. Pay Tel Comments at 13. We therefore request renewed data and analysis regarding reasonable inmate calling services costs at facilities with average daily populations between 0 and 999.

[936] National Sheriffs' Association Comments at 8.

[937] *See, e.g.*, Pay Tel Wood Reply Report at 13.

[938] Worth Rises Comments at 8; MediaJustice Comments 2 ("The Commission should not incorporate the cost of security and surveillance in rates."); Public Interest Parties Reply at 9 ("Constant observation of incarcerated people is a core function of jail and prison facilities, not a function specific only to [inmate calling services]."); UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 3 (arguing that simply because a facility "contracts for security and monitoring services with the same provider that it chooses for the provision of the underlying communications service . . . does not mean that it has become a communications provider entitled to pass on those costs to telephone consumers); UCC Apr. 26, 2021, *Ex Parte* at 1 (explaining that "security services are not regulated telecommunications services").

[939] GTL Comments at 28; National Sheriffs' Association Comments at 3 (listing various security and administrative functions).

National Sheriffs' Association provided, facilities reported often hundreds of hours a week on security and related administrative functions associated with inmate calling.[940] How can we ensure that these functions are not normal security functions a facility already incurs?[941] How can we determine to what extent some of these security-related costs are for services that should more appropriately be deemed to be general security services that are added on to inmate calling services but not actually necessary to the provision of the calling service itself? In other words, we seek to determine if inmate calling service providers are providing two different services to facilities when it comes to these so-called security and surveillance costs: (1) a communication service that enables incarcerated people to make telephone calls; and (2) a separate security service that aids the facility's general security efforts but would more appropriately be paid for directly by the facility rather than by the users of the communications service who receive no benefit from these security features that are unnecessary to enable them to use the calling service.[942] We also note that the functions described by the National Sheriffs' Association appear to duplicate many of the same security functions for which providers reported costs.[943] What types of security and surveillance functions, if any, are appropriately and directly related to inmate calling? What functions should be disallowed as too attenuated to claim as legitimate costs? What methodology would permit the Commission to verify or otherwise isolate telephone calling-related security and surveillance costs from general security and surveillance costs in correctional facilities? Worth Rises cautions that isolating and thus being able to quantify calling-related security and surveillance costs is an important step in determining how, if at all, such costs should be recovered through rates.[944] We seek comment on how to isolate and quantify these from general security and surveillance costs.

324. *Obtaining Correctional Facility Cost Data*. Several commenters discuss the difficulty in determining facilities' actual costs related to the provision of inmate calling services from examining providers' reported costs.[945] For example, GTL asserts that, correctional facilities "are in the best position to provide information regarding their costs related to [inmate calling services]," which fall into several generic categories, namely "administrative security, monitoring investigative, maintenance, and staffing."[946] The National Sheriffs' Association again points to its 2015 survey as the most recent data available about correctional facility costs as reported by correctional officials.[947] Are the data from the National Sheriffs' Association survey accurate today regarding the functions and related costs that jails

[940] National Sheriffs' Association Jan. 12, 2015, Comments, Exh. A.

[941] *See* Worth Rises Mar. 24, 2021, *Ex Parte* at 2 (arguing that security and surveillance services "are a cost of operating prisons and jails, not providing communication service—no different than the security and surveillance of mail or visit rooms," and further explaining that the "presence or absence of security and surveillance services does not actually prevent or enable communication"); UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 3 (explaining that "[t]he very services considered in the [*2016 ICS Reconsideration Order*]—monitoring costs, blocking and unblocking numbers and enrolling [incarcerated people] in voice biometrics services—are security costs that are part of carceral functions, not communications functions").

[942] Worth Rises Mar. 24, 2021, *Ex Parte* at 1-3.

[943] *Compare* National Sheriffs' Association Jan. 12, 2015, Comments at 2-3 (asserting that costs for security and administrative duties performed by facility staff should be recovered through rates consumers pay for inmate calling services) *with* Prisoners' Legal Services Comments Attach. 1, at 13 n.15 (explaining that the costs of certain security features that Securus provides in Essex County, Massachusetts—Automated Information Services, Investigator Pro, Threads, and "Guarded Exchange" call monitoring—are subtracted from the 50% site commission).

[944] *Cf.* Worth Rises Comments at 9 (suggesting that isolating security and surveillance costs would facilitate greater visibility into provider rate structures and bids).

[945] Securus Comments at 31-32 (claiming it "has not analyzed the costs that correctional facilities incur directly related to [inmate calling services]").

[946] GTL Comments at 28.

[947] National Sheriffs' Association Jan. 12, 2015, Comments at 4; National Sheriffs' Association Comments at 7.

legitimately incur in connection with inmate calling services? We invite the National Sheriffs' Association and others to provide updated data and analysis in this regard. We also seek comment more broadly on how we can obtain reliable data on correctional facility costs. Are there specific questions we could ask of providers or other stakeholders that would elicit data appropriate to establish a permanent allowance for recovering legitimate facility-related costs that are included in site commission payments? Should we condition any rate element for correctional facility costs on the provision of reliable correctional facility cost data provided to us by the facilities themselves?[948] Or should we specify a default rate cap, similar to the $0.02 per minute that we adopt on an interim basis in the accompanying Report and Order, and disallow recovery of any amount above that default rate cap absent the provision of reliable facility cost data that supports a higher rate cap?

C. Revising Ancillary Service Charges Rules

325. We seek comment on our current rules for permitted ancillary service charges, and whether we should revisit the rules and the level of charges. Ancillary service charges are fees that providers of calling services for incarcerated people assess on calling services consumers[949] that are not included in the per-minute rates assessed for individual calls.[950] Currently, the Commission allows five types of ancillary service charges in connection with interstate or international inmate calling services:

(1) Fees for Single-Call and Related Services;

(2) Automated Payment Fees;

(3) Third-Party Financial Transaction Fees;

(4) Live Agent Fees; and

(5) Paper Bill/Statement Fees.[951]

326. The Commission has explained that these charges are unchecked by market forces because incarcerated people and their families must either incur them when making a call or forego contact with their loved ones.[952] Ancillary charges have in the past drawn Commission scrutiny and reform because they were excessive and not cost justified.[953] The record reflects concerns that consumers may still be overpaying ancillary service charges in various ways.[954] We seek comment on these concerns. Certain providers argue that we need not consider making any changes our ancillary service charge cap rules.[955] Do commenters agree? Why or why not?

327. The record suggests that some providers of inmate calling services may impose "duplicate transaction costs" on the same payments, such as charging both an automated payment fee and a third party financial transaction fee also covering credit/debit card processing fees, for example, when a consumer makes an automated payment to fund its account with the services provider.[956] There appears

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[948] *See, e.g.*, UCC and Public Knowledge Mar. 28, 2021, *Ex Parte* at 4 (arguing that facilities seeking to recover their costs through inmate calling services rates should provide data to the Commission).

[949] *See* 47 CFR § 64.6000(e) (defining "Consumer" as "the party paying a Provider of Inmate Calling Services").

[950] *See id.* § 64.6000(a).

[951] *Id.*

[952] *2015 ICS Order*, 30 FCC Rcd at 12838, para. 144.

[953] *Id.* at 12845, para. 161.

[954] Public Interest Parties Comments at 12; NASUCA Comments at 3-4.

[955] *See, e.g.*, GTL Reply at 4, 35; Pay Tel Reply at i, 16-17; Securus Comments at 42-43.

[956] NASUCA Comments at 3; Public Interest Parties Comments at 14 (noting that GTL's "combined fee" practice was under investigation by the Iowa Utilities Board); Letter from Andrea Fenster, Staff Attorney, Prison Policy Initiative, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Mar. 23, 2021) (Prison Policy

(continued….)

to be some confusion among industry stakeholders regarding the relationship between the automated payment fee and third-party transaction fees as they relate to credit card processing fees.[957] In connection with automated payment fees, the Commission has suggested that credit card processing fees that providers incur are already included in the automated payment fee, which is capped at $3.00.[958] At the same time, the Commission referred to "credit card processing fees" in its discussion of third-party financial transaction fees in the *2015 ICS Order*.[959] We seek comment on whether the credit card processing fees encompassed in the automated payment fee are the same credit card processing fees referred to in the third-party financial transaction fee. If they are the same, then permitting providers to charge both an automated payment fee and a third-party financial transaction fee when consumers use a credit or debit card to make an automated payment would, indeed, seem to allow for double recovery. And if credit or debit card companies or other third parties are also charging the consumer a fee for using a credit or debit card to fund their account,[960] permitting the services provider to double recover would mean the consumer might potentially be paying for the same processing fees *three* times. Do commenters agree? Alternatively, is the credit card processing embedded in the automated payment fee related to providers' costs of allowing credit card and debit card payments in the facilities they serve separate and apart from any fees providers might incur from the third-party financial institution for enabling such payments?[961] While we believe third-party financial fees associated with using a credit or debit card to make an automated payment are already included in the automated payment fee, do commenters agree? If so, are the "credit card processing fees" charged by third parties, such as Western Union, Money Gram, or credit card companies, fees associated with transferring *cash* to an incarcerated person's calling account? If so, are those fees passed on to the services provider, or the consumer requesting the cash transfer, or both?[962] If a third-party transaction fee can only be passed on by the provider to the consumer when a third party is directly involved in the transaction with the provider (as opposed to indirectly when the consumer uses its credit or debit card to fund an account or pay a bill using an automated method), when would it be the case that a third-party financial transaction fee is incurred by the provider that could

(Continued from previous page)
Initiative Mar. 23, 2021 *Ex Parte*) (providing copies of five informal complaints alleging that certain inmate calling services providers charge an automated payment fee and also pass through credit or debit card processing costs on the same transaction).

[957] *See* Letter from David Springe, Executive Director, National Association of State Utility Consumer Advocates, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Apr. 2, 2021) (NASUCA Apr. 2, 2021 *Ex Parte*) (asking whether an inmate calling services provider can "add a payment card processing fee in addition to the $3.00 automated payment fee in cases where the consumer deals directly with the [inmate calling services] provider to make the deposit and does not go to a third-party money transfer service such as Western Union or MoneyGram"). *See generally* Prison Policy Initiative Mar. 23, 2021 *Ex Parte*.

[958] 47 CFR § 64.6000(a)(1) (defining "Automated Payment Fees" as credit card payment, debit card payment, and bill processing fees, including fees for payments made by interactive voice response (IVR), web, or kiosk); *see also 2015 ICS Order*, 30 FCC Rcd at 12848, para. 169 (rejecting arguments that credit card processing costs more than $3.00).

[959] *See 2015 ICS Order*, 30 FCC Rcd at 12770, 12846, 12849, paras. 9, 163, 170 n.612.

[960] *See, e.g.*, Prison Policy Initiative Jan. 19, 2016 Comments at 1-2 (suggesting that third-party fees are charged to consumers as opposed to the inmate calling services provider).

[961] *See 2015 ICS Order*, 30 FCC Rcd at 12847, para. 167 (explaining that the charge for the automated payment fee "ensures that [inmate calling services] providers can recoup the costs of offering these services"); CPC Informal Complaint Response at 2 (filed Apr. 21, 2021) (explaining "CPC incurs costs associated with the kiosks used to deposit funds by the consumer" and that "the automated payment fee of $3.00 is to offset these costs which include the maintenance, technology support, software updates, and a call center to handle complaint and refunds"); GTL Apr. 23, 2021, *Ex Parte* Attach. at 2-5 (emphasizing the automated payment fee and the third-party financial transaction fee are separate fees and that the Commission has treated them as such).

[962] *See, e.g.*, 47 CFR § 64.6000(a)(5) (referring specifically to charges by third parties).

appropriately be passed on to the consumer? We seek comment on how we should amend our rules to clarify when providers may pass through separate third-party financial transaction fees and when they may not.[963]

328. Alternatively, we seek comment on whether our rules clearly prohibit services providers from charging an automated payment fee and a third-party financial transaction fee for the same transaction in spite of some providers' apparent confusion.[964] The Prison Policy Initiative argues that "the Commission's record overwhelmingly indicates that carriers should not be allowed to double-dip by charging an automated payment fee and passing through third-party fees on the same transaction."[965] Do commenters agree? As discussed above, if the credit card processing costs associated with the automated payment fee are different than the credit card processing costs inherent in the fee associated with the third-party financial transaction fee, how are providers double dipping? CPC argues that there is no double dipping associated with charging an automated payment fee and a third-party financial transaction fee for the same transaction.[966] And GTL asserts that "[t]he rationale for and purpose of Automated Payment Fees and Third-Party Financial Transaction Fees are therefore distinct; the former cannot substitute for or subsume the latter."[967] Do commenters agree with this assertion? Why or why not? Can commenters point us to specific evidence of other forms of double dipping in the record? Are there other costs embedded in the automated payment and third-party transaction fees that could lead to double recovery? If there is no overlap between the costs recovered in the automated payment fee and the third-party financial transaction fee, on what basis would we say that providers cannot charge both for the same transaction provided that the charges are at or below the applicable caps?

329. Similar to our inquiry above, should we specifically prohibit providers from charging a live agent fee and a third-party financial transaction fee in the same transaction, if no third party is directly involved when the consumer provides the agent with its credit or debit card information? The Prison Policy Initiative alleges that at least one provider may be charging "an automated-payment or live-agent fee *and* passing through its credit- or debit-card processing costs."[968] They point to tariff language that appears to couple live agent fees with third-party transaction fees.[969] In the *2015 ICS Order*, the Commission explained that "interaction with a live operator to complete [inmate calling services] transactions may add to the costs of providing ICS" recognizing that providers incur costs associated with use of a live operator.[970] But it is unclear from the current record whether third-party costs are involved with all or even some such live agent transactions, or whether such costs are already included in the live agent fee. For example, if the provider uses its own live agents,[971] do such agents ever engage in three-way calls with third parties, such as Western Union or MoneyGram to transfer money to effectuate the transaction? If so, would it be the provider or the consumer that would incur the third-party transaction fee imposed by Western Union or MoneyGram for transferring the money? Even if there were third

[963] NASUCA Apr. 2, 2021 *Ex Parte* at 2.

[964] *See, e.g.*, CPC Informal Complaint Response at 1-2 (alleging that there is no prohibition on charging an automated payment fee and a third-party financial transaction fee in the same transaction provided that the fee caps for each are met).

[965] Prison Policy Initiative Mar. 23, 2021 *Ex Parte* at 2.

[966] *See* CPC Informal Complaint Response at 2.

[967] GTL Apr. 23, 2021, *Ex Parte* Attach. at 4.

[968] Prison Policy Initiative Mar. 23, 2021 *Ex Parte* Attach. 4 at 2 (emphasis in original).

[969] *Id.* Attach. 4, Exh. 1.

[970] *2015 ICS Order*, 30 FCC Rcd at 12848, para. 168.

[971] Prison Policy Initiative Mar. 23, 2021 *Ex Parte* Attach. 4 at 2 (explaining that the "Commission's explanation of the live-agent fee expresses an intent to allow a fee up to $5.95 to cover all expenses related to processing transactions through a carrier's customer service agents").

parties involved, the Commission has been clear that the fee for use of a live agent applies "regardless of the number of tasks completed in the call."[972] Does this suggest that there should be no other fees passed through to the consumer in connection with the use of a live operator? Why or why not?

330. Finally, we seek comment on how we can ensure that third parties are involved when third-party financial transaction fees are charged. The Commission has explained that the third-party financial transaction fees necessarily must involve third parties.[973] The Prison Policy Initiative suggests that certain fees characterized as third-party financial transaction fees may not actually involve third parties.[974] In the case of GTL, for example, the Prison Policy Initiative explains that "the customer makes a payment via GTL's website, thus making only two parties to the transaction."[975] The Prison Policy Initiative acknowledges that "other entities may participate behind the scenes (such as the customer's card issuer and GTL's acquiring bank), but these entities are not directly third parties to the transaction; they are merely agents of the payor and payee."[976] Do commenters agree that our third-party financial transaction fee rule contemplates direct involvement in the particular transaction by the third party before the provider can pass through any fee it is assessed in conjunction with that transaction? Why or why not? Should we amend our rules to require calling service providers to specify the third party involved in the transaction whose fees are being passed through to the consumer? Why or why not?

331. The record also reveals that "15 states now explicitly exclude any automated payment (or deposit) fees from being charged to end users because the costs of automated payments are already factored into the [inmate calling services] provider's direct or indirect costs of providing service."[977] What is the basis for these states' decisions to exclude these types of fees? Do providers already include these costs in the cost of providing inmate calling services? To the extent providers claim that it costs more to serve smaller facilities because higher turnover rates result in opening proportionately more new accounts, does this confirm that providers consider the processing of automated payments (necessary to establish a new account) as a cost included in their general inmate calling services accounts? We seek comment on whether we should similarly prohibit providers from charging automated payment fees. Should we instead reduce such fees to account for the third-party charges embedded in those fees? If so, what would be the appropriate cap?

332. In the Report and Order, we adopt an interim cap of $6.95 for fees related to single-call services and third-party financial transaction fees based on data provided by the Prison Policy Initiative and acknowledged by other public interest advocates that providers were circumventing the "pass through without markup" rule previously in place.[978] NCIC has proposed that we cap the third-party financial transaction fee associated with single-call services at the $3.00 cap for automated payment fees or the $5.95 cap for live agent fees, as applicable.[979] As we explain in the Report and Order, however, the record does not contain sufficient evidence to adopt NCIC's proposal at this time. We seek comment on that proposal here. Why would it be reasonable to tie fees for single-call services and third-party

[972] *2015 ICS Order*, 30 FCC Rcd at 12848, para. 168.

[973] *See, e.g., 2015 ICS Order*, 30 FCC Rcd at 12850, para. 171 ("Therefore, as discussed in more detail below, we require that [inmate calling services] providers pass through to their end users, with no additional markup, the money transfer or third-party financial transaction fees they are *charged by such third parties*." (emphasis added)); 47 CFR § 64.6000(a)(5).

[974] Prison Policy Initiative Mar. 23, 2021 *Ex Parte* Attach. 1 at 2-3.

[975] *Id.*

[976] *Id.* Attach. 1 at 3-4.

[977] Public Interest Parties Comments at 13.

[978] *See supra* Part III.H.1.

[979] NCIC Comments at 3; NCIC July 28, 2020, *Ex Parte* at 1-2.

transaction fees to the caps for automated payment or live agent fees? What is the relationship between these fees? Should we consider adopting two separate caps on Third-Party Financial Transaction Fees, one for money transfer companies like Western Union and a separate one for credit card companies? Given the evidence provided by the Prison Policy Initiative suggesting that one of the more prevalent money transmitter services charges more than NCIC's proposed caps, on what basis would we adopt NCIC's lower caps? In the absence of a revenue-sharing agreement, do these third parties legitimately charge more than NCIC's proposed caps, and if so, do providers—due to the volume of business conducted with these money transfer companies—have an ability to negotiate lower fees?

333. Relatedly, we remain concerned about the adverse effect of revenue-sharing arrangements between calling service providers and third-party financial institutions. In the *2020 ICS Order on Remand*, the Commission cited evidence that inmate calling services providers have "entered into revenue-sharing arrangements with third-party processing companies such as Western Union and MoneyGram where a third-party processing company shares its revenues generated from processing transactions for an inmate calling services provider[s]' customers."[980] While the Commission sought additional evidence that providers were using revenue-sharing or other arrangements to indirectly mark up ancillary service charge fees, we received relatively little responsive comment. We therefore seek renewed comment on how revenue sharing arrangements work in the context of ancillary service charges, including concrete evidence of these arrangements. There is evidence in the record that revenue sharing can run from the third-party to the calling services provider whereby the third-party provider charges the consumer a fee, which the third-party then shares with the providers.[981] The record also suggests that providers may charge the incarcerated person inflated fees and then split the resulting revenue with third parties.[982] Is one scenario more prevalent than the other? How do commenters suggest that we detect these types of practices? Will our adoption of a specific monetary cap—instead of permitting the pass-through of any third-party financial transaction fee—mitigate this issue, or could it still occur even under our adopted caps? Should we adopt a rule disallowing the revenue-sharing arrangements with respect to interstate or international inmate calls or accounts altogether? If so, how should we ensure compliance with such a rule?

334. Certain parties point out that the Commission's present ancillary services charge caps are based on cost data that are over six years old and assert that all ancillary service charge caps should be immediately reduced by 10%.[983] These commenters argue that the caps should also be adjusted in the future based on more current cost data.[984] We seek comment on these proposals. We note that the Mandatory Data Collection that we authorize in the accompanying Report and Order will collect cost data on our permissible ancillary service charges. Should we adjust our ancillary service charge caps based on the new data collection we will receive from the upcoming Mandatory Data Collection? What factors should we consider in evaluating that cost data for ancillary service charges in connection with interstate and international inmate calling services?

335. We ask commenters to address specific factors that we should consider in evaluating the cost data to ensure we address and account for anomalies that may distort our analysis. We encourage participation, and seek input, from our state public utility commission or similar state regulatory agency colleagues having jurisdiction over inmate calling services based on their expertise setting appropriate

[980] *2020 ICS Order on Remand*, 35 FCC Rcd at 8516, para. 91.

[981] *See, e.g.*, Prison Policy Initiative Jan. 19, 2016, Comments at 1-2 (suggesting that third-party fees are charged by the financial institution to the consumer and then split with the inmate calling services provider).

[982] *See, e.g.*, *2015 ICS Order*, 30 FCC Rcd at 12850, para. 171.

[983] Public Interest Parties Comments at 12. *But see, e.g.*, GTL Reply at 22 (asserting "the Commission can utilize the data it currently receives to ensure [inmate calling services] providers' . . . ancillary service charges are just and reasonable").

[984] *See, e.g.*, Public Interest Parties Reply at 16.

ancillary service charge caps.

336. Should we consider revising our ancillary service charge caps on a standard periodic basis? If so, how frequently should we revise those caps and what process should the Commission follow? Commenters should provide the reasoning and justification for their responses. For example, how should we balance related benefits and burdens to all relevant stakeholders and serve the public interest in determining how frequently to update ancillary service charge caps to enable the Commission to continually maintain interstate and international rates and charges that are just and reasonable and provide fair compensation to providers? How frequently should we require providers to file updated ancillary charges cost data to make this possible?

337. We also seek comment generally on any other matters related to ancillary services that we should consider in reforming our ancillary service charges rules. For example, record evidence suggests that certain providers fail to close accounts and issue refunds to families of incarcerated people when they are released.[985] It appears that some state authorities, such as the Alabama Public Service Commission, have addressed this problem.[986] We are concerned that any unused funds are not refunded to the account holder and invite comment on this issue. Should we adopt a rule requiring automatic refunds after a certain period of inactivity? If so, what timeframe would be appropriate? Should the timeframe vary based on the size and type of facility? If we require these refunds, how should such refunds be made? Is this issue sufficiently related to setting up an account and making automatic payments that we can include this in our existing ancillary services charges rules, or should we adopt a separate rule to address this issue? We also seek comment on the issue of dropped calls as it relates to ancillary service charges. Should we amend our rules to prevent providers from assessing the same ancillary service charge in cases where calls are dropped after a call is successfully connected? For example, should providers be permitted to charge a fee for single-call services if a consumer makes a call that is dropped and then must make another call to finish the conversation? Why or why not? If not, how should we amend our ancillary service charge rules to prevent this? Are there other issues regarding dropped calls in the ancillary services context that we should be aware of? More broadly, are there other practices in which providers engage that we should also consider addressing in the context of our ancillary services rules? If so, we ask commenters to describe such practices in detail and discuss how best we should address them.

D. Refining International Rate Methodology to Prevent Double Counting

338. In the Report and Order, we adopt interim rate caps for international inmate calling services based on a formula that permits a provider to charge a rate up to the sum of the provider's per-minute interstate rate cap for a particular correctional facility plus the amount that the provider must pay its underlying international service provider for that call on a per-minute basis. The interim rate caps for international calls will benefit incarcerated people by lowering the rates for most of their international calls, while allowing providers to recover their costs for those calls. Nonetheless, we are concerned that our new interim rate caps for international calls may be based on an overestimation of the costs providers actually incur in providing international inmate calling services.

339. In particular, we are concerned by the Public Interest Parties' assertion that the interim rate caps for international calls that we set today may be double counting providers' costs for international calls because such costs are already included in their overall inmate calling services costs that we use to set interim interstate rate caps. As the Public Interest Parties explain, "some [inmate calling services] providers reported zero international costs but positive international minutes and revenues [which] suggests that international costs are already included in their total costs, and thus accounted for in the

[985] NASUCA Comments at 3.

[986] *Id.*

interstate rates."[987]

340. We seek comment on this assertion. Do the data reflect such double counting? Is some degree of double counting a natural consequence of the way providers reported their costs associated with international calls as part of their total costs associated with inmate calling services?[988] We anticipate that in the upcoming Mandatory Data Collection, WCB and OEA will require calling service providers to report separately the amounts they pay international service providers for international calls. Will this eliminate the double counting of international inmate calling services costs, to the extent it exists? If not, how should we address this issue if providers do not ordinarily track international call costs separately? What allocation method should providers use to reliably separate their international costs from their interstate costs? We further ask what types of costs should legitimately be considered as additional costs associated with international calls. Do those additional costs include only the charges imposed by international carriers?

341. We also ask commenters to consider other ways in which we could reform international rates on a permanent basis to ensure they are just and reasonable. For example, there is evidence in the record that in addition to varying by country/rate zone, international rates also vary depending on whether the call terminates on a mobile or fixed line network.[989] Should we address this type of rate variation in setting permanent rate caps for international calls, and if so, how? Are there any other issues we should take into account in setting permanent rate caps for international inmate calling services?

E. Recurring Mandatory Data Collection

342. We seek comment on whether we should conduct cost data collections on a more routine, periodic basis than we have since the First and Second Mandatory Data Collections in 2012 and 2019. In the *2020 ICS Notice*, the Commission sought comment on whether, in the event that it adopted a new data collection, it should require providers to update their responses to that collection periodically.[990] The Commission invited comment on the relative benefits and burdens of a periodic data collection versus another one-time data collection. The Commission also asked how frequently it should collect the relevant data, inquiring whether a biennial or triennial collection covering multiple years would balance the benefits and burdens better than an annual collection.[991]

343. In the Report and Order, we institute a Third Mandatory Data Collection. GTL asserts that data filed in the Annual Reports is sufficient to evaluate calling service providers' rates, but we disagree.[992] Instead, we agree with the Public Interest Parties who explain that the Annual Reports only include information on rates and charges and not the type of cost data required to establish and ensure continued cost-based rates.[993] We seek comment on whether the Third Mandatory Data Collection should be required to be updated within a specific future timeframe to enable us to evaluate the reasonableness of providers' interstate and international rates on a regular basis. The Public Interest Parties assert that, to further refine rate caps in the future, the Commission should institute a "routine, periodic data collection with clear, structured questions, commit to reviewing that data through scheduled ratemaking

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[987] Public Interest Parties Comments at 10 (asking the Commission not to double-count the costs associated with international calls that are already accounted for in the Commission's interstate rate caps).

[988] Despite Public Interest Parties' concerns, the record indicates that some providers separately reported international calling costs in their responses. *E.g.*, Securus's Mandatory Data Collection Description and Justification at 3 (noting that Securus provided international cost data).

[989] *See* GTL Comments at 34-35.

[990] *2020 ICS Notice*, 35 FCC Rcd at 8532-33, para. 132.

[991] *Id.*

[992] GTL Reply at 22.

[993] *See, e.g.*, Public Interest Parties Comments at 15-16.

proceedings, and adjust [inmate calling services] rates accordingly."[994] The Public Interest Parties contend that we should first establish an annual data collection to ensure it has sufficient and updated information to reevaluate rate caps, and then establish a triennial rate review process to evaluate the prior two years' cost data to determine whether interstate rates for inmate calling services and ancillary service charge caps should be lowered. According to the Public Interest Parties, a three-year review cycle would strike the appropriate balance between the need for the Commission to fulfill its statutory mandate and the administrative burdens to providers.[995] Free Press supports conducting routine future data collections and implementing a biennial or triennial review process to evaluate rates based on those data collections.[996] Free Press asserts that a periodic collection will provide the Commission with the opportunity to conduct trend analysis on costs, revenues, and prices charged over time, and that it may give providers an incentive to collect more uniform and consistent data over time.[997] We seek comment on these proposals or alternative proposals that similarly enable us to monitor costs and revenue for the purpose of continuing to lower our rate caps.

344. We recognize that the periodic collection and assessment of cost data could yield valuable information but are conscious of potential burdens on providers. If we were to adopt a periodic collection, how could we best structure the collection in order to maximize its benefits, while at the same time reducing administrative burdens on providers? Would a triennial review, as described by the Public Interest Parties, be the ideal structure? What are the relative benefits and burdens of conducting a triennial review versus a biennial review, or some other type of review?

345. We invite comment on how providers should maintain their records in the event we require a periodic collection, such as a triennial review? Should we impose specific recordkeeping requirements on providers of inmate calling services? What would be the type of recordkeeping requirements necessary for a biennial or triennial review, as opposed to a one-time collection? Is there a relatively small but precisely defined set of investment and expense accounts that we could establish relative to providers' inmate calling service assets and labor activities or categories of assets and labor activities to facilitate consistent data reporting among all providers? If so, what specific accounts should be included in the prescribed set of accounts?[998] Should a portion of revenues from ancillary services be netted out of the inmate calling service costs to the extent that costs are incurred for assets or labor shared among inmate calling services and ancillary services if the full amount of these shared costs is reported as inmate calling service costs? If so, how should it be calculated? We believe our authority under sections 201 and 220 of the Act permits us to impose certain record keeping obligations on providers for the purpose of ensuring just and reasonable rates.[999] Do commenters agree? What other authority does the Commission have to adopt such requirements should they be necessary? How can we ensure that providers comply with any recordkeeping requirements? Are there other requirements associated with a periodic collection, as opposed to a one-time data collection, that we should consider?

346. Alternatively, should we require providers to comply with an annual or biennial certification obligation attesting to the fact that no substantial change in costs have occurred that would

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[994] Public Interest Parties Comments at 15; *see also* Leadership Conference Comments at 3 (supporting a regular data collection).

[995] Public Interest Parties Comments at 15.

[996] Free Press Comments at 2, 6-8.

[997] *Id.* at 7-8.

[998] Securus considers its cost study "to be a comprehensive view" of its cost structures and encourages "the Commission to consider similar data collection from other providers"). Securus Comments at 2-3; Securus Cost Study. Should we use this cost study as a model for future mandatory data collections, especially in regard to the cost categories and methodologies set forth therein? Why or why not?

[999] 47 U.S.C. §§ 201, 220.

warrant a change in rates? Would such a certification in conjunction with providers' annual reporting obligation on rates provide us sufficient basis to avoid a periodic data collection on a more routine basis? We seek comment on this alternative and any others that stakeholders may propose.

F. Revisions to the Commission's Definition of "Jail"

347. We propose to amend section 64.6000(m) of our rules to clarify the definition of "Jail" in several ways. These amendments would apply equally to the definition of "Prison" because our rules explain that "Prisons" include "*facilities that would otherwise fall under the definition of a Jail* but in which the majority of inmates are post-conviction or are committed to confinement for sentences of longer than one year."[1000] First, we propose to modify the definition of "Jail" in section 64.6000(m) of our rules to include facilities operated by the Federal Bureau of Prisons (BOP) and Immigration and Customs Enforcement (ICE), whether directly or by contract with third parties.[1001] Second, we propose to add "juvenile detention facilities" and "secure mental health facilities" to that definition. We seek comment on these proposals, which are consistent with the *2015 ICS Order* and are meant to prevent potential confusion as to the application of our rules.

348. In the *2015 ICS Order*, the Commission explained that the rate caps adopted in that order were meant to apply to "jails, prisons and immigration detention facilities, secure mental health facilities and juvenile detention facilities."[1002] The Commission further explained that the general term "Jail" was meant to include facilities operated by local, state, or federal law enforcement agencies and "city, county or regional facilities that have contracted with a private company to manage day-to-day operations; privately-owned and operated facilities primarily engaged in housing city, county or regional inmates; and facilities used to detain individuals pursuant to a contract with U.S. Immigration and Customers Enforcement (ICE) and facilities operated by ICE."[1003] But the codified rule only includes "facilities used to detain individuals *pursuant to a contract*" with ICE, and does not explicitly include facilities operated directly by ICE.[1004] Similarly, while the BOP is a "federal law enforcement agency" such that BOP facilities fall within the purview of our rules, the codified rule does not explicitly distinguish between facilities operated by the BOP and those operated under a contract with the BOP. We therefore propose to explicitly list ICE and BOP facilities, whether operated directly by the relevant law enforcement agency or by contract, in the definition of "Jail." We find these proposed changes to 64.6000(m) of our rules to be clarifying in nature given the Commission's stated intent in 2015 to include all facilities directly operated by law enforcement agencies and those operated pursuant to a contract with a third party. We seek comment on this analysis. We also seek comment on whether there are other types of correctional facilities that should be explicitly added to our codified definitions of "Jail" or "Prison."

349. We also propose to list "juvenile detention facilities" and "secure mental health facilities" within the definition of "Jail" in section 64.6000(m). In the *2015 ICS Order*, the Commission concluded that providing inmate calling services in these facilities was "more akin to providing service to jail facilities" and instructed that "[t]o the extent that juvenile detention facilities and secure mental health facilities operate outside of jail or prison institutions" they would be subject to the rate caps applicable to jails.[1005] However, the codified definition of "Jail" does not include the phrases "juvenile detention

[1000] 47 CFR § 64.6000(r) (emphasis added).

[1001] *Id.* § 64.6000(m).

[1002] *2015 ICS Order*, 30 FCC Rcd at 12775, para. 20.

[1003] *Id.* at 12783, para. 39.

[1004] *Id.*

[1005] *Id.* at 12785, para. 43.

facilities" or "secure mental health facilities."[1006] We therefore propose to add these terms to the definition of "Jail" in section 64.6000(m) and seek comment on this proposal.

G. Characteristics of the Bidding Market

350. We have already determined that inmate calling services providers have market power at the facility level once they win a contract.[1007] However, some providers claim that they win contracts through a competitive bidding process, and thus, that the market or markets to supply inmate calling services are competitive.[1008] To assess this claim, and its relevance to permanent rate caps, we seek comment on the characteristics of the bidding market. We propose to define every contract or request for proposal as a market in which calling service providers participate based on our understanding that providers generally make contract-by-contract decisions about whether or not to bid on a particular request for proposal, and they do not bid on all open requests for proposals.[1009] We seek comment on these proposed bidding market boundaries or whether there are other boundaries we should consider.

351. We also seek comment on the extent of competition in these bidding markets. What share of providers' contracts are won through a competitive bidding process? Does this vary across providers? Does the number of bidders vary from request for proposal to request for proposal, and if so, what determines bidders' decisions to compete? Do the number of bidders vary depending on the type and size of facility? Do large providers have a competitive advantage in bidding for certain contracts, such as contracts for state prisons, or large or multiple facility contracts? Are there providers who cannot compete for such contracts at all? Are some providers unable to bid beyond certain geographies because of logistical difficulties or difficulties associated with meeting different governmental requirements? Are some providers uninterested in certain requests for proposals (e.g., those for the jails with the fewest people)? What are the implications of these answers for competition for different requests for proposals? Should we consider prisons, larger jails, and contracts for multiple facilities to be in separate market segments? Are there other potential market segments we should consider? It is common, in measuring market power in bidding markets, to analyze bids across many requests for proposals to determine the impact of the number and identity of bidders on contract prices.[1010] Should the Commission collect data to enable such analysis?

352. We seek to understand how correctional authorities select a winning bid. To what extent do correctional authorities evaluate inmate calling service bids based on costs (both to incarcerated people and to the facility), quality of service, or other factors? What is the relevance of site commissions? Do calling service providers compete on the basis of site commissions? If so, how? Are providers aware of

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[1006] As relevant to juvenile facilities, the National Center for Youth Law explains that it is "unclear which rate cap will apply to juvenile facilities, many of which are not described by the proposed definitions of 'jail' or 'prison.'" National Center for Youth Law Apr. 21, 2021, *Ex Parte* at 1.

[1007] *Supra* Part III.C.4; *2013 ICS Order*, 28 FCC Rcd at 14129-30, para. 39-41 (discussing how competition among inmate calling services providers may actually increase rates); *see also United States v. Microsoft*, 253 F.3d at 58 (finding that a firm's ability to set prices "without considering rival's prices" is "something a firm without a monopoly would have been unable to do").

[1008] *See* GTL Godek Report at 10; Securus Furchtgott-Roth Report at 10-12. *But cf.* U.S. Department of Justice, Horizontal Merger Guidelines § 6.2 (Aug. 19, 2010) (Horizontal Merger Guidelines), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf; Paul Klemperer, *Bidding Markets*, 2005, 3 J. Competition L. & Econ. 1, 1 (2007) (Klemperer), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=776524 ("The existence of a 'bidding market' is commonly cited as a reason to tolerate the creation or maintenance of highly concentrated markets. We discuss three erroneous arguments to that effect . . . .").

[1009] *See 2020 ICS Notice*, 35 FCC Rcd at 8525-26, para. 115.

[1010] In the context of a merger, the U.S. Department of Justice and Federal Trade Commission recommend examining "the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business." Horizontal Merger Guidelines § 6.2; *see also* Klemperer at 10-12.

site commissions offered by other providers in the bidding process? If not, how do they determine the level of the site commission to offer to ensure that they remain competitive? Assuming no site commission is legally-mandated, can a provider win a bid if it offers no site commission to the facility? We have observed differences in criteria for awarding contracts among various requests for proposals that we have reviewed. Is this seeming heterogeneity in the criteria used by authorities when selecting a winning bid typical? If so, is this heterogeneity more pronounced in some jurisdictions or jail types than in others?

353. We understand that once a local correctional authority awards the contract to a particular provider, it is locked into a multi-year contract, typically with options to renew that avoid the need for further competitive bidding to serve the facility after the expiration of the initial term.[1011] Is there a typical contract length, and if so, does this vary across prisons and jails or by contract size? Are there typical timeframes for options to renew? Does exercising options to renew lead to contract amendments that also avoid competitive bidding to effectuate contractual changes?[1012] Is contract length ever a dimension along which provider's bids are compared, in addition to criteria pre-specified in the request for proposal? Do correctional authorities give more weight to some criteria than others, and if so, which ones? How easy or difficult is it to modify the terms of the contract or terminate it during the contract term if the correctional authority is dissatisfied with the provider's rates, site commissions, terms, or quality of service? How common is it for a contract to be extended by correctional authorities, and does this occurrence vary as between prisons or jails or by contract size?

354. The Commission has found that the inmate calling services industry is highly concentrated, and that GTL possesses the largest market share, controlling {[ ]} of the market as measured by paid minutes.[1013] Another provider, Securus, controls {[ ]} of the market, which means these two firms collectively control {[ ]} of the market.[1014] The record also shows high industry concentration as measured by the Herfindahl-Hirschman Index (HHI).[1015] We seek comment on these findings. Are these shares still accurate? Does a large industry share, together with entry barriers and other market characteristics, give the two largest inmate calling services providers a degree of market power in bidding for certain or all requests for proposals?

355. We seek comment on barriers to entering the inmate calling services markets, both generally and in terms of bidding on a particular request for proposal. What impediments do potential providers face when considering entering the inmate calling services market? We also seek comment on actual entry into the market in the past. How many firms have entered or exited the inmate calling services market in the past twenty years? What barriers does a provider face once it enters the market? What services, other than inmate calling services, must be offered, at a minimum, by a provider in order to successfully participate in the bidding market given record evidence of service bundling required by

[1011] Prisoners' Legal Services Comments at 5 (describing contracts with Securus that were renewed for seven additional years to 2028 with no competitive bids).

[1012] *Id.* at 4 (describing a change in a contract at renewal in 2019 from a 76.2% site commission to a flat yearly payment of $2.5 million).

[1013] *See 2020 ICS Notice*, 35 FCC Rcd at 8518, para. 94 n.226.

[1014] *See id.* Concentration remains high when measured by revenues or average daily population.

[1015] *See* Public Interest Parties Brattle Report at 10-11; *see also* U.S. Department of Justice, *Herfindahl-Hirschman Index* (July 21, 2018), https://www.justice.gov/atr/herfindahl-hirschman-index; Horizontal Merger Guidelines § 5.3. *But see* GTL Apr. 26, 2021, *Ex Parte* Godek Report at 7 (contending that "[t]he fact that the service at issue [inmate calling services] is currently supplied by a concentrated group of providers, when viewed under the static paradigm of [DOJ's Horizontal Merger Guidelines], does not justify regulation").

many facilities when issuing request for proposals?[1016]

356. We also understand that providers frequently provide multiple nonregulated services at the facilities where they provide inmate calling services, including commissary services, access to email and the Internet, video services, video visitation and calling, and access to tablets. Do correctional authorities sometimes or typically require that the same company bundle some or all of these services? If so, are there any exceptions to this (i.e., do correctional authorities enter into separate contracts for certain services with different providers), and how common is this? What other services outside of telephone communications do providers competitively bid on at the same facility? Are providers more likely to win bids if they offer other services at the same facility? Have calling service providers used their market power, to the extent they have such power, in the communications services market to affect bidding for other services? We ask whether the Commission should consider any additional aspects of the bidding market and invite parties to submit alternative evidence in the record.

357. If we do find that some providers possess market power in the bidding market, should we act to make it easier for small providers to compete? Would doing so better ensure just and reasonable rates? For example, should the Commission prohibit dominant providers from including certain terms and conditions in their contracts with correctional authorities? In many instances, won contracts are not publicly available. Would requiring the contracts to be made publicly available make bidding more competitive? We seek comment on potential ways to even the playing field among large and small providers in the bidding market, and on whether doing so would lower interstate rates paid by incarcerated people and their families. We also seek comment on whether such regulations would result in supporting providers that are currently not as successful in winning contracts with correctional facilities in spite of continuing to bid for contracts.

358. We also seek comment on the optimal regulatory regime for inmate calling services. If we find that certain providers possess market power in the bidding market, should we classify those providers as dominant carriers? In the past, the Commission imposed rate-of-return regulation on providers with market power. Would this type of regulation be appropriate in the event that market power in the bidding market is found to exist? If not, what type of regulatory regime would promote regulatory certainty and permit us to ensure that inmate calling services rates and charges are just and reasonable? What other type of regulatory framework would be appropriate to achieve our objectives if we determine that some or all inmate calling service providers should be considered dominant carriers? What are the relative costs and benefits of the alternative approaches? Finally, we welcome comments by all stakeholders on appropriate alternative frameworks and ideas that will promote increased transparency and just and reasonable inmate calling services rates and charges for incarcerated people.

VII. PROCEDURAL MATTERS

359. *Filing of Comments and Replies*. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 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. *See* FCC, Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (May 1, 1998).[1017]

360. Electronic Filers: Comments may be filed electronically using the Internet by accessing

[1016] Prison Policy Initiative Mar. 23, 2021, *Ex Parte* at 1-2 (providing evidence of the "prevalence of bundling" which "shows that inmate communications services . . . carriers are increasingly expected to provide regulated and unregulated services under a single contract").

[1017] The Protective Order issued in this proceeding permits parties to designate certain material as confidential. *Rates for Inmate Calling Services*, WC Docket No. 12-375, Order, 28 FCC Rcd 16954 (WCB 2013); *see also Rates for Inmate Calling Services*, WC Docket No. 12-375, Order, DA 20-1006 (WCB rel. Sept. 1, 2020) (clarifying non-confidential treatment for certain information). Filings which contain confidential information should be appropriately redacted, and filed pursuant to the procedure described therein.

the ECFS: https://www.fcc.gov/ecfs/.

361. 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.

362. Filings can be sent 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.

363. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.

364. Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.[1018]

365. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules. We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to use a table of contents, regardless of the length of their submission. We also strongly encourage parties to track the organization set forth in the Fifth Further Notice of Proposed Rulemaking in order to facilitate our internal review process.

366. *People with Disabilities*. We ask that requests for accommodations be made as soon as possible in order to allow the agency to satisfy such requests whenever possible. Send an email to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530.

367. *Ex Parte Presentations.* This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[1019] 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).

368. 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 the 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 section 1.1206(b) of the Commission's rules.[1020] Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

369. *Congressional Review Act*. [[The Commission will submit this draft *Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking* to the Administrator

[1018] *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (OS 2020).

[1019] 47 CFR § 1.1200 *et seq*.

[1020] 47 CFR § 1.1206(b).

of the Office of Information and Regulatory Affairs, Office of Management and Budget, for concurrence as to whether this rule is "major" or "non-major" under the Congressional Review Act, 5 U.S.C. § 804(2).]] The Commission will send a copy of this Third Report and Order and Order on Reconsideration to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

370. *Supplemental Final Regulatory Flexibility Act Analysis*. As required by the Regulatory Flexibility Act of 1980 (RFA), as amended, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (FRFA) relating to the Third Report and Order and Order on Reconsideration.[1021] The FRFA is set forth in Appendix C.

371. *Initial Regulatory Flexibility Act Analysis*. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1022] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the Fifth Further Notice of Proposed Rulemaking. The IRFA is set forth in Appendix D. The Commission requests written public comments on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in the Fifth Further Notice of Proposed Rulemaking. The Commission will send a copy of the Fifth Further Notice of Proposed Rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[1023] In addition, the Fifth Further Notice of Proposed Rulemaking and the IRFA (or summaries thereof) will be published in the Federal Register.[1024]

372. *Paperwork Reduction Act Analyses*. *Final Paperwork Reduction Act Analysis*. The Third 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 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 this 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(4), we previously sought comment on how the Commission will further reduce the information collection burden for small business concerns with fewer than 25 employees.[1025]

373. The Order on Reconsideration does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. Therefore, it does not contain any new or modified information collection burdens 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).

374. *Initial Paperwork Reduction Act Analysis*. The Fifth Further Notice of Proposed Rulemaking contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites OMB, the general public, and other Federal agencies to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business

[1021] *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

[1022] *See* 5 U.S.C. § 603.

[1023] *See* 5 U.S.C. § 603(a).

[1024] *Id.*

[1025] *2020 ICS Order on Remand*, 35 FCC Rcd at 8536-37, para. 146.

concerns with fewer than 25 employees.

VIII. ORDERING CLAUSES

375. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 617, this Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking ARE ADOPTED.

376. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 716, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 617, the Petition for Reconsideration, filed November 23, 2020, by Global Tel*Link Corp. IS DENIED IN FULL and DISMISSED IN PART as described herein.

377. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 716, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 617, this Third Report and Order SHALL BE EFFECTIVE ninety (90) days after publication in the Federal Register, except that the delegations of authority to the Wireline Competition Bureau, the Office of Economics and Analytics, and the Consumer and Governmental Affairs Bureau SHALL BE EFFECTIVE upon publication in the Federal Register. Sections 64.6110(b) and 64.6120 contain new or modified information collection requirements that require review by OMB under the PRA. The Commission directs the Wireline Competition Bureau to announce the effective date for those information collections in a document published in the Federal Register after the Commission receives OMB approval, and directs the Wireline Competition Bureau to cause sections 64.6110(b) and 64.6120 to be revised accordingly.

378. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on this Fifth Further Notice of Proposed Rulemaking on or before 30 days after publication of a summary of this Fifth Further Notice of Proposed Rulemaking in the Federal Register and reply comments on or before 60 days after publication of a summary of this Fifth Further Notice of Proposed Rulemaking in the Federal Register.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

For the reasons set forth above, the Federal Communications Commission amends Part 64, subpart FF of Title 47 of the Code of Federal Regulations as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

The authority citation for part 64 is amended to read as follows:

Authority: 47 U.S.C. §§ 151, 152, 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 255, 262, 276, 403(b)(2)(B), (c), 616, 620, 716, 1401-1473, unless otherwise noted; Pub. L. 115-141, Div. P, sec. 503, 132 Stat. 348, 1091.

1. Amend § 64.6000 by revising paragraphs (c) and (g) and adding new paragraphs (v), (w), and (x) to read as follows:

§ 64.6000 Definitions.

As used in this subpart:

* * * * *

(c) *Average Daily Population (ADP)* means the sum of all Inmates in a facility for each day of the preceding calendar year, divided by the number of days in the year.

* * * * *

(g) *Debit Calling* means a presubscription or comparable service which allows an Inmate, or someone acting on an Inmate's behalf, to fund an account set up through a Provider that can be used to pay for Inmate Calling Services calls originated by the Inmate;

* * * * *

(v) *Provider-Related Rate Component* means the interim per-minute rate specified in either § 64.6030(b) or § 64.6030(c) that Providers at Jails with Average Daily Populations of 1,000 or more Inmates and all Prisons may charge for interstate Collect Calling, Debit Calling, Prepaid Calling, or Prepaid Collect Calling.

(w) *Facility-Related Rate Component* means either the Legally-Mandated Facility Rate Component or the Contractually-Prescribed Facility Rate Component identified in § 64.6030(d).

(x) *International Destination* means the rate zone in which an international call terminates. For countries that have a single rate zone, *International Destination* means the county in which an international call terminates.

2. Amend § 64.6020(b) by revising paragraphs (2) and (5) to read as follows:

§ 64.6020 Ancillary Service Charge.

* * * * *

(b) * * *

(2) For Single-Call and Related Services— $6.95 per transaction, plus the adopted, per-minute rate;
* * *

(5) For Third-Party Financial Transaction Fees—$6.95 per transaction.

3. Amend § 64.6030 by revising it to read as follows:

§ 64.6030 Inmate Calling Services interim rate caps.

(a) For all Jails with Average Daily Populations of less than 1,000 Inmates, no Provider shall charge a rate for interstate Collect Calling, Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute.

(b) For all Jails with Average Daily Populations of Inmates of 1,000 or greater, no Provider shall charge a Provider-Related Rate Component for interstate Collect Calling, Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.14 per minute.

(c) For all Prisons, no Provider shall charge a Provider-Related Rate Component for interstate Collect Calling, Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.12 per minute.

(d) For all Jails with Average Daily Populations of Inmates of 1,000 or greater, and for all Prisons, Providers may recover the applicable Facility-Related Rate Component as follows:

(1) Providers subject to an obligation to pay Site Commissions by federal, state, or local law, regulation, statute, or other rule or law that operates independently of the contracting process between Correctional Institutions and Providers may recover the full amount of such payments through the Legally-Mandated Facility Rate Component subject to the limitation that the total rate (Provider-Related Rate Component plus Facility-Related Rate Component) does not exceed $0.21 per minute.

(2) Providers that pay Site Commissions pursuant to a contract with the Jail or Prison may recover up to $0.02 per minute through the Contractually-Prescribed Facility Rate Component except where the Provider's total Contractually-Prescribed Facility Rate Component results in a lower per-minute rate than $0.02 per minute of use. In that case, the Provider's Contractually-Prescribed Facility Rate Component is limited to the actual amount of its per-minute Site Commission payment up to a maximum of $0.02 per minute. Providers shall calculate their Contractually-Prescribed Facility Rate Component to three decimal places.

(e) No Provider shall charge, in any Prison or Jail it serves, a per-minute rate for an International Call in excess of the applicable interstate rate cap set forth in paragraphs (a), (b), (c), and (d) plus the average amount that the provider paid its underlying international service providers for calls to the International Destination of that call, on a per-minute basis. A Provider shall determine the average amount paid for calls to each International Destination for each calendar quarter and shall adjust its maximum rates based on such determination within one month of the end of each calendar quarter.

4. Amend § 64.6110 by making the current rule paragraph (a) and adding paragraph (b) as follows:

§ 64.6110 Consumer disclosure of Inmate Calling Services rates.

(a) Providers must clearly, accurately, and conspicuously disclose their interstate, intrastate, and international rates and Ancillary Service Charges to consumers on their Web sites or in another reasonable manner readily available to consumers.

(b) Providers must clearly label the Facility-Related Rate Component (either the Legally-Mandated Facility Rate Component or the Contractually-Prescribed Facility Rate Component) identified in § 64.6030(d) on Consumer bills for the recovery of permissible facility-related costs contained in Site Commission payments. To be clearly labeled, the Facility-Related Rate Component shall:

(1) Identify the Provider's obligation to pay a Site Commission as either imposed by federal, state, or local law, regulation, statute, or other rule or law that operates independently of the contracting process between Correctional Institutions and Providers or subject to a contract with the Correctional Facility;
(2) Where the Site Commission is imposed by federal, state, or local law, regulation, statute, or other rule or law that operates independently of the contracting process between Correctional Institutions and Providers, specify the relevant law, regulation, statute, or other rule of law.
(3) Identify the amount of the Site Commission payment, expressed as a per-minute or per-call charge, a percentage of revenue, or a flat fee; and
(4) Identify the amount charged to the Consumer for the call or calls on the bill.

(c) *Compliance Date*. Paragraph (b) of this section contains new or modified information collection requirements adopted in FCC 21-XXX. Compliance with these information collection requirements will not be required until after approval by the Office of Management and Budget. Providers will be required to comply with these information collection requirements immediately upon publication by the Commission of a document in the Federal Register announcing Office of Management and Budget approval and revising this paragraph accordingly.

5. Add § 64.6120 to read as follows:

§ 64.6120 Waiver process.

(a) A Provider may seek a waiver of the interim rate caps established in section 64.6030 and the Ancillary Service Charge fee caps on a Correctional Facility or contract basis if the interstate or international rate caps or Ancillary Service Charge fee caps prevent the Provider from recovering the costs of providing interstate or international Inmate Calling Services at a Correctional Facility or at the Correctional Facilities covered by a contract.

(b) At a minimum, a Provider seeking such a waiver is required to submit:

(1) The Provider's total company costs, including the nonrecurring costs of the assets it uses to provide Inmate Calling Services, and its recurring operating expenses for these services at the Correctional Facility or under the contract;

The methods the provider used to identify its direct costs of providing interstate and international Inmate Calling Services, to allocate its indirect costs between its Inmate Calling Services and other operations, and to assign its direct costs to and allocate its indirect costs among its Inmate Calling Services contracts and Correctional Facilities;

(2) The Provider's demand for interstate and international Inmate Calling Services at the Correctional Facility or at each Correctional Facility covered by the contract;

(3) The revenue or other compensation the Provider receives from the provision interstate and international Inmate Calling Services, including the allowable portion of any permissible Ancillary Service Charges attributable to interstate or international inmate calling services, at the Correctional Facility or at each Correctional Facility covered by the contract;

(4) A complete and unredacted copy of the contract for the Correctional Facility or Correctional Facilities, and any amendments to such contract;

(5) Copies of the initial request for proposals and any amendments thereto, the Provider's bid in response to that request, and responses to any amendments (or a statement that the Provider no longer has access to those documents because they were executed prior to the effective date of this rule);

(6) A written explanation of how and why the circumstances associated with that Correctional Facility or contract differ from the circumstances at similar Correctional Facilities the Provider serves, and from other Correctional Facilities covered by the same contract, if applicable; and

(7) An attestation from a company officer with knowledge of the underlying information that all of the information the provider submits in support of its waiver request is complete and correct.

(c) A Provider seeking a waiver pursuant to section 64.6120(a) must provide any additional information requested by the Commission during the course of its review.

(d) *Compliance Date*. Paragraphs (a), (b), and (c) of this section contain new or modified information collection requirements adopted in FCC 21-XXX. Compliance with these information collection requirements will not be required until after approval by the Office of Management and Budget. Providers will be required to comply with these information collection requirements immediately upon publication by the Commission of a document in the Federal Register announcing Office of Management and Budget approval and revising this paragraph accordingly.

APPENDIX B

Proposed Rules

For the reasons set forth above, the Federal Communications Commission proposes to amend Part 64, subpart FF of Title 47 of the Code of Federal Regulations as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is amended to read as follows:

Authority: 47 U.S.C. §§ 151, 152, 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 255, 262, 276, 403(b)(2)(B), (c), 616, 620, 716, 1401-1473, unless otherwise noted; Pub. L. 115-141, Div. P, sec. 503, 132 Stat. 348, 1091.

2. Amend § 64.6000 by revising paragraph (m) and adding new paragraphs (y), (z), and (aa) to read as follows:

§ 64.6000 Definitions.
* * * * *
(m) * * *

* * *

(3) Post-conviction and awaiting transfer to another facility. The term also includes city, county, or regional facilities that have contracted with a private company to manage day-to-day operations; privately-owned and operated facilities primarily engaged in housing city, county or regional Inmates; ~~and~~ facilities used to detain individuals operated directly by the Federal Bureau of Prisons or U.S. Immigration and Customs Enforcement, or pursuant to a contract with those agencies; juvenile detention centers; and secure mental health facilities; ~~pursuant to a contract with U.S Immigration and Customs Enforcement~~
* * * * *
(y) *Incarcerated person with a communication disability* means an incarcerated individual who is deaf, hard of hearing, or deafblind, or has a speech disability.

(z) *Telecommunications relay services (TRS)* and other TRS-related terms used in this subpart are defined in 47 CFR § 64.601.

(aa) *TRS Fund* means the Telecommunications Relay Services Fund described in 47 CFR § 64.604(c)(5)(iii).

3. Amend § 64.6040 by revising paragraph (b) and adding paragraphs (c) and (d) to read as follows:

§ 64.6040 Communications Access for Incarcerated People with Communication Disabilities.

* * * * *

(b) No Provider shall levy or collect any charge or fee on or from any party to a TRS call to or from an incarcerated person, including any charge for the use of a device or transmission service when used to access TRS from a correctional facility.

(c) A Provider shall provide access for incarcerated people with communication disabilities to any form of TRS that is eligible for TRS Fund support.

(d) A Provider shall provide access to direct video service for incarcerated people eligible to access video relay service (VRS).

4. Amend § 64.6060 by revising paragraphs (a)(5), and (6) to read as follows:

§ 64.6060 Annual reporting and certification requirement.

(a) * * *

(5) The number of calls provided per facility, and the number of dropped calls per facility, during the reporting period in each of the following categories:

(i) TTY-to-TTY Inmate Calling Services calls;

(ii) Direct video calls placed or received by ASL users;

(iii) TRS calls, broken down by each form of TRS that can be accessed from the facility; and

(6) The number of complaints that the reporting Provider received related to dropped calls and poor call quality, respectively, in each of the categories set forth in paragraph (a)(5).

* * * * *

APPENDIX C

Supplemental Final Regulatory Flexibility Analysis

A. Need for, and Objectives of, the 2021 Third Report and Order and Order on Reconsideration

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Second Further Notice of Proposed Rulemaking in the Commission's Inmate Calling Services proceeding.[2] The Commission sought written public comment on the proposals in that *Notice*, including comment on the IRFA.[3] The Commission did not receive comments directed toward the IRFA. Thereafter, the Commission issued a Final Regulatory Flexibility Analysis (FRFA) conforming to the RFA.[4] This Supplemental FRFA supplements that FRFA to reflect the actions taken in the Third Report and Order and Order on Reconsideration and conforms to the RFA.[5]

380. The Third Report and Order adopts lower per-minute interim interstate provider-related rate caps of $0.12 per minute for prisons and $0.14 per minute for larger jails, respectively, until the Commission completes its evaluation of a new mandatory data collection and adopts permanent rate caps. Next, it reforms the current treatment of site commission payments by adopting facility-related rate components to permit recovery only of the portions of such payments estimated, on the present record, to be directly related to inmate calling services and requires them to be separately listed on bills, if charged. Where site commission payments are mandated pursuant to federal, state, or local law, regulation, statute, or other rule or law that operates independently of the contracting process between correctional institutions and providers (the legally-mandated facility rate component), providers may pass these payments through to consumers, without any markup, as an additional component of the new interim interstate per-minute rate cap. Where site commission payments result from contractual obligations reflecting negotiations between providers and correctional facilities arising from the bidding and subsequent contracting process (the contractually-prescribed facility rate component), providers may recover up to $0.02 per minute to account for these costs at prisons and larger jails. To promote increased transparency, the Third Report and order requires providers to clearly label a legal-mandated or contractually-prescribed facility rate component, as applicable, in the rates and charges portion of a consumer's bill, including disclosing the source of such provider's obligation to pay that facility-related rate component. Next, the Third Report and Order eliminates the current interim instate collect calling rate cap, resulting in a single uniform interim interstate maximum rate cap of $0.21 per minute for calls from jails with average daily populations below 1,000. The Third Report and Order emphasizes that the sum of the provider-related and facility-related rate components for prisons and larger jails may not result in a higher permissible total rate cap for any interstate call from any size facility than the $0.21 that existed for interstate debit and prepaid calls before today and that continues to apply to all providers for all types of calls from jails with average daily populations below 1,000. The Third Report and Order also caps international inmate calling services rates for the first time, adopts a new mandatory data collection to obtain more uniform cost data based on consistent allocation methodologies to determine fair

[1] *See* 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-602, 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] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd at 13170 (2014) (*2014 ICS Notice*).

[3] *See id.* at 13235, Appx. para. 2.

[4] *Rates for Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763, 12944-49 (2015) (*2015 ICS Order* or *2015 ICS Notice*).

[5] *See* 5 U.S.C. § 604.

permanent cost-based rates for facilities of all sizes and reforms the ancillary service charge rules, capping third-party transaction fees related to calls that are billed on a per-call basis and related to transferring or processing financial transactions. Finally, the Third Report and Order reaffirms providers' current obligations regarding functionally equivalent access for incarcerated people with disabilities.

381. Regarding access to inmate calling services by people who are deaf, hard of hearing or deafblind, or have speech disabilities, the Third Report and Order reminds providers that they are obligated to comply with the existing inmate calling services and related rules, including rules requiring that incarcerated people be provided access to certain forms of telecommunications relay service (TRS), rate caps for calls using a text telephone (TTY) device, rules prohibiting charges for TRS-to-voice or voice-to-TTY calls, and rules requiring annual reporting of the number of TTY-based calls and any complaints.[6] In addition, inmate calling services providers must ensure that the services and equipment provided for use by incarcerated people are accessible and usable by incarcerated people with disabilities (subject to achievability),[7] including when legacy telephone services are discontinued and replaced with advanced services such as Voice over Internet Protocol (VoIP).[8]

382. Finally, the Order on Reconsideration denies a Petition for Reconsideration of the *2020 ICS Order on Remand* and reiterates that the jurisdictional nature of an inmate calling services telephone call depends on the physical location of the originating and terminating endpoints of the call.

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

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

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

384. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

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

385. 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.[9] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[10] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[11] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and

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[6] *See* 47 U.S.C. §§ 225, 276; 47 CFR §§ 64.603, 64.1330(b), 64.6040, 64.6060; *2015 ICS Order*, 30 FCC Rcd at 12874-75, para. 226.

[7] *See* 47 U.S.C. §§ 255, 617; 47 CFR pts. 6, 7, 14.

[8] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128, 1185-86, para. 153 (2017).

[9] 5 U.S.C. § 604(a)(3).

[10] 5 U.S.C. § 601(6).

[11] 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."

(3) satisfies any additional criteria established by the Small Business Administration (SBA).[12]

386. *Small Businesses*. Nationwide, there are a total of approximately 27.9 million small businesses, according to the SBA.[13]

387. *Wired Telecommunications Carriers*. The U.S. Census Bureau defines this industry as "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[14] 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.[15] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[16] Of this total, 3,083 operated with fewer than 1,000 employees.[17] Thus, under this size standard, the majority of firms in this industry can be considered small.

388. *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 NAICS Code category is Wired Telecommunications Carriers.[18] Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.[19] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated for the entire year.[20] Of that total, 3,083 operated with fewer than 1,000 employees.[21] Thus under this category and the associated size standard, the Commission estimates that the majority of local exchange carriers are small entities.

389. *Incumbent Local Exchange Carriers (incumbent LECs*). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services.

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[12] 15 U.S.C. § 632.

[13] *See* SBA, Office of Advocacy, "Frequently Asked Questions," available at http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf (last visited June 22, 2020).

[14] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* https://www.census.gov/naics/?input=517311&year=2017&details=517311.

[15] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[16] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[17] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[18] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* https://www.census.gov/naics/?input=517311&year=2017&details=517311.

[19] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[20] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[21] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

The closest applicable NAICS Code category is Wired Telecommunications Carriers.[22] Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.[23] U.S. Census Bureau data for 2012 indicate that 3,117 firms operated the entire year.[24] Of this total, 3,083 operated with fewer than 1,000 employees.[25] Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.[26] Of this total, an estimated 1,006 have 1,500 or fewer employees.[27] Thus, using the SBA's size standard the majority of incumbent LECs can be considered small entities.

390. 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."[28] 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.[29] 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.

391. *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 NAICS Code category is Wired Telecommunications Carriers[30] and under that size standard, such a business is small if it has 1,500 or fewer employees.[31] U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year.[32] Of that number, 3,083 operated with fewer than 1,000

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[22] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* https://www.census.gov/naics/?input=517311&year=2017&details=517311.

[23] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[24] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[25] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[26] *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*).

[27] *Id*.

[28] 5 U.S.C. § 601(3).

[29] *See* Letter from Jere W. Glover, Chief Counsel to 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(2). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 CFR § 121.102(b).

[30] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* https://www.census.gov/naics/?input=517311&year=2017&details=517311.

[31] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[32] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110,

(continued….)

employees.[33] Based on these data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. 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.[34] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees.[35] 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.[36] Also, 72 carriers have reported that they are Other Local Service Providers.[37] Of this total, 70 have 1,500 or fewer employees.[38] Consequently, based on internally researched FCC data, 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.[39]

392. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. The closest applicable NAICS Code category is Wired Telecommunications Carriers.[40] The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[41] U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year.[42] Of that number, 3,083 operated with fewer than 1,000 employees.[43] According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[44] Of this total,

(Continued from previous page)
https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[33] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[34] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.

[35] *Id*.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] 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." 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. 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.

[40] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* https://www.census.gov/naics/?input=517311&year=2017&details=517311.

[41] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[42] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[43] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[44] *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*). https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.

an estimated 317 have 1,500 or fewer employees.[45] Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

393. *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.[46] According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.[47] Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.[48] Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by the Commission's action.

394. *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.[49] According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.[50] Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.[51] Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by the Commission's action.

395. *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.[52] According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[53] Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.[54] Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the Commission's action.

396. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers, a group that includes inmate calling 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.[55] According to Commission data,[56] 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 1,5000 employees.[57] Consequently, the Commission estimates that

[45] *Id*.

[46] *See* 13 CFR § 121.101, NAICS Code 517911.

[47] *See* Trends in Telephone Service at Table 5.3.

[48] *See id.*

[49] *See* 13 CFR § 121.101, NAICS Code 517911.

[50] *See* Trends in Telephone Service at Table 5.3.

[51] *See id.*

[52] *See* 13 CFR § 121.101, NAICS Code 517110.

[53] *See* Trends in Telephone Service at Table 5.3.

[54] *See id.*

[55] *See* 13 CFR § 121.101, NAICS Code 517110

[56] *See* Trends in Telephone Service at Table 5.3.

[57] *See id.*

the majority of payphone service providers are small entities that may be affected by the Commission's action.

397. *TRS Providers.* TRS can be included within the broad economic category of All Other Telecommunications. Ten providers currently receive compensation from the TRS Fund for providing at least one form of TRS: ASL Services Holdings, LLC (GlobalVRS); Clarity Products, LLC (Clarity); ClearCaptions, LLC (ClearCaptions); Convo Communications, LLC (Convo); Hamilton Relay, Inc. (Hamilton); MachineGenius, Inc. (MachineGenius); MEZMO Corp. (InnoCaption); Sorenson Communications, Inc. (Sorenson); Sprint Corporation (Sprint); and ZP Better Together, LLC (ZP Better Together).

398. *All Other Telecommunications.* The "All Other Telecommunications" category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.[58] This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.[59] Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.[60] The SBA has developed a small business size standard for All Other Telecommunications, which consists of all such firms with annual receipts of $35 million or less.[61] For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.[62] Of those firms, a total of 1,400 had annual receipts less than $25 million and 15 firms had annual receipts of $25 million to $49, 999,999.[63] Thus, the Commission estimates that the majority of "All Other Telecommunications" firms potentially affected by our action can be considered small. Under this category and the associated small business size standard, a majority of the ten TRS providers can be considered small.

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

399. The Third Report and Order requires providers to examine site commission payments in order to recover only the portions of such payments estimated to be directly related to inmate calling services and to separately list these charges on consumers' bills. Providers must determine whether a site commission payment is either (1) mandated pursuant to federal, state, or local law, regulation, statute, or other rule or law that operates independently of the contracting process between correctional institutions and providers (the legally-mandated facility rate component), or (2) results from contractual obligations reflecting negotiations between providers and correctional facilities arising from the bidding and subsequent contracting process (the contractually-prescribed facility rate component). For legally-mandated site commission payments, providers may pass these payments through to consumers without any markup, as an additional component of the new interim interstate per-minute rate cap. For contractually-prescribed site commission payments, providers may recover an amount up to $0.02 per

[58] *See* U.S. Census Bureau, 2017 NAICS Definitions, NAICS Code "517919 All Other Telecommunications", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017.

[59] *Id.*

[60] *Id.*

[61] *See* 13 CFR § 121.201, NAICS code 517919.

[62] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012, NAICS code 517919, https://data.census.gov/cedsci/table?q=EC1251&hidePreview=true&table=EC1251SSSZ5&tid=ECNSIZE2012.EC1251SSSZ5&lastDisplayedRow=28#.

[63] *Id.*

minute to account for these costs. To promote increased transparency, the Third Report and order requires providers to clearly label a legal-mandated or contractually-prescribed facility rate component, as applicable, in the rates and charges portion of a consumer's bill, including disclosing the source of such provider's obligation to pay that facility-related rate component.

400. The Third Report and Order adopts a waiver process for providers if they can show that the applicable total rate per minute and ancillary service charge caps do not permit them to recover their costs of providing interstate and international calling services as well as minimum requirements for such a showing. It also adopts a new mandatory data collection to obtain more uniform cost data based on consistent prescribed allocation methodologies to determine fair permanent cost-based rates for facilities of all sizes.

401. The Order on Reconsideration confirms that providers must properly identify the physical location of the originating and terminating endpoints of the call in order to determine the jurisdictional nature of the call. To the extent those services are interstate, international, or jurisdictionally mixed, the provider must comply with interim interstate inmate calling services caps or limits adopted by the Commission.

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

402. 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."[64]

403. The Commission's rate caps differentiate between prisons, larger jails, and jails with average daily populations below 1,000 to account for differences in costs incurred by providers servicing these different facility types. The Commission adopts new interim interstate provider-related rate caps for prisons and larger jails and for collect calls from jails with average daily populations below 1,000. The Commission believes these actions properly recognize that, in comparison to prisons and larger jails, jails with average daily populations below 1,000 may be relatively high-cost facilities for providers to serve. The Commission also adopts rate caps for international calls originating from facilities of any size.

404. The Commission adopts new interim interstate facility-related rate components for prisons and larger jails to allow providers to recover portions of site commissions payments estimated to be directly related to the provision of inmate calling services and to separately list these charges on consumers' bills. Providers must determine whether a site commission payment is either (1) mandated pursuant to federal, state, or local law, regulation, statute, or other rule or law that operates independently of the contracting process between correctional institutions and providers (legally-mandated facility rate component), or (2) results from contractual obligations reflecting negotiations between providers and correctional facilities arising from the bidding and subsequent contracting process (the contractually-prescribed facility rate component). For legally-mandated site commission payments, providers may pass these payments through to consumers without any markup, as an additional component of the new interim interstate per-minute rate cap. For contractually-prescribed site commission payments, providers may recover an amount up to $0.02 per minute to account for these costs. To promote increased transparency, the Third Report and order requires providers to clearly label a legal-mandated or contractually-prescribed facility rate component, as applicable, in the rates and charges portion of a consumer's bill, including disclosing the source of such provider's obligation to pay that facility-related rate component.

[64] 5 U.S.C. § 603(c)(1)-(4).

405. The Commission recognizes that it cannot foreclose the possibility that in certain limited instances, the interim rate caps may not be sufficient for certain providers to recover their costs of providing interstate and international inmate calling services. To minimize the burden on providers, the Commission adopts a waiver process that allows providers to seek relief from its rules at the facility or contract level if they can demonstrate that they are unable to recover their legitimate inmate calling services-related costs at that facility or for that contract. The Commission will review submitted waivers and potentially raise each applicable rate cap to a level that enables the provider to recover the costs of providing inmate calling services at that facility. This waiver opportunity should benefit any inmate calling services providers that may be small businesses and that are unable to recover their interstate and international costs under the new interim rate caps.

G. Report to Congress

406. The Commission will send a copy of the Third Report and Order and Order on Reconsideration, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[65] In addition, the Commission will send a copy of the Third Report and Order and Order on Reconsideration, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Third Report and Order and Order on Reconsideration, and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.[66]

[65] 5 U.S.C. § 801(a)(1)(A).

[66] *See id.* § 604(b).

APPENDIX D

Initial Regulatory Flexibility Analysis

2. 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 small entities by the policies and rules proposed in this Fifth Further Notice of Proposed Rulemaking (Notice). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of this Further Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the Further Notice and the IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

407. In the Notice, the Commission seeks more detailed evidence and comments from industry stakeholders to consider further reforms to inmate calling services rates within its jurisdiction, including permanent interstate and international rate caps. The Commission seeks to ensure that functionally equivalent access is provided to people who are deaf, hard of hearing or deafblind, or have speech disabilities. The TTY-based telecommunications relay service (TRS) and speech-to-speech relay service (STS)—the only relay services for which inmate calling services providers currently are required to provide access under the Commission's rules—are insufficient to meet the range of needs of incarcerated people with communication disabilities using today's networks. The Commission seeks comment on requiring inmate calling services providers to make available newer forms of TRS, such as Captioned Telephone Service (CTS) (a non-Internet-based telephone captioning service), and the three forms of Internet-based TRS: video relay service (VRS), IP Captioned Telephone Service (IP CTS), and IP Relay (a text-based relay service using IP). The Commission seeks comment on whether to modify the existing TRS rules for application to the provision of such services at correctional facilities. The Commission seeks comment on whether to expand the scope of the rule prohibiting charges for TRS provided at correctional facilities. Further, the Commission seeks comment on whether to require inmate calling services providers to provide access to direct video communication for incarcerated people with communication disabilities. Finally, the Commission seeks comment on whether new TRS services provided to incarcerated people with communication disabilities should be included in the existing accessibility-related reports.

408. The Commission seeks comment on what methodology it should use to permanently cap provider-related rate components for interstate and international inmate calling services. It seeks comment on the provision of communications services to jails with average daily populations below 1,000 and on further reforms to the treatment of site commission payments in connection with interstate and international inmate calling services, including at jails with average daily populations below 1,000. Next, the Commission seeks comments on revisions to its ancillary service charge rules and refining its international rate methodology to prevent double counting of international call costs that are already included in the providers' overall inmate calling services cost. The Commission also seeks comment on the need to adopt an on-going periodic cost data collection to ensure interstate and international calling services rates are just and reasonable and on revisions to the Commission's definition of "jail" to clarify the term to include certain types of facilities. Finally, the Commission seeks comment on the

[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] *Id*.

characteristics of the bidding market in order for the Commission to assess some providers' claims that they win contracts through a competitive bidding process and thus the inmate calling services market is competitive.

B. Legal Basis

409. 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), 218, 220, 276, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b), 218, 220, 276, and 403.

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

410. 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 rule revisions, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[4] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.[5] 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.[6]

411. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.[7] First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.[8] These types of small businesses represent 99.9% of all businesses in the United States, which translates to 30.7 million businesses.[9]

412. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[10] The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations.[11] Nationwide, for tax year 2018, there

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[4] *See* 5 U.S.C. § 601(6).

[5] *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."

[6] *See* 15 U.S.C. § 632.

[7] *See* 5 U.S.C. § 601(3)-(6).

[8] *See* SBA, Office of Advocacy, "What's New With Small Business," https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/23172859/Whats-New-With-Small-Business-2019.pdf (June 2020).

[9] *Id*.

[10] 5 U.S.C. § 601(4).

[11] The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C § 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. S*ee* Annual Electronic Filing Requirement for Small Exempt Organizations—Form 990-N (e-Postcard), "Who must file,"https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard. We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

were approximately 571,709 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.[12]

413. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[13] U.S. Census Bureau data from the 2017 Census of Governments[14] indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.[15] Of this number there were 36,931 general purpose governments (county[16], municipal and town or township[17]) with populations of less than 50,000 and 12,040 special purpose governments - independent school districts[18] with enrollment populations of less than 50,000.[19] Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of "small governmental jurisdictions."[20]

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[12] *See* Exempt Organizations Business Master File Extract (EO BMF), "CSV Files by Region," https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for Region 1-Northeast Area (76,886), Region 2-Mid-Atlantic and Great Lakes Areas (221,121), and Region 3-Gulf Coast and Pacific Coast Areas (273,702) which includes the continental U.S., Alaska, and Hawaii. These data do not include information for Puerto Rico.

[13] 5 U.S.C. § 601(5).

[14] *See* 13 U.S.C. § 161. The Census of Governments survey is conducted every five (5) years compiling data for years ending with "2" and "7." *See generally* Census of Governments, https://www.census.gov/programs-surveys/cog/about.html.

[15] *See* U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02]. https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html. Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts); *see also* Table 2. CG1700ORG02 Table Notes_Local Governments by Type and State_2017.

[16] *See* U.S. Census Bureau, 2017 Census of Governments - Organization, Table 5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05]. https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

[17] *See* U.S. Census Bureau, 2017 Census of Governments - Organization, Table 6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06]. https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

[18] *See* U.S. Census Bureau, 2017 Census of Governments - Organization, Table 10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10]. https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html. There were 12,040 independent school districts with enrollment populations less than 50,000. *See generally* Table 4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes_Special Purpose Local Governments by State_Census Years 1942 to 2017.

[19] While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

[20] This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments - Organizations Tables 5, 6, and 10.

414. *Wired Telecommunications Carriers*. The U.S. Census Bureau defines this industry as "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[21] 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.[22] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[23] Of this total, 3,083 operated with fewer than 1,000 employees.[24] Thus, under this size standard, the majority of firms in this industry can be considered small.

415. *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 NAICS Code category is Wired Telecommunications Carriers.[25] Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.[26] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated for the entire year.[27] Of that total, 3,083 operated with fewer than 1,000 employees.[28] Thus under this category and the associated size standard, the Commission estimates that the majority of local exchange carriers are small entities.

416. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers.[29] Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.[30] U.S. Census

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[21] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* https://www.census.gov/naics/?input=517311&year=2017&details=517311.

[22] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[23] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[24] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[25] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* https://www.census.gov/naics/?input=517311&year=2017&details=517311.

[26] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[27] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[28] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[29] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* https://www.census.gov/naics/?input=517311&year=2017&details=517311.

[30] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

Bureau data for 2012 indicate that 3,117 firms operated the entire year.[31] Of this total, 3,083 operated with fewer than 1,000 employees.[32] Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.[33] Of this total, an estimated 1,006 have 1,500 or fewer employees.[34] Thus, using the SBA's size standard the majority of incumbent LECs can be considered small entities.

417. 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.[35] The SBA's Office of Advocacy contents that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[36]

418. 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 NAICS Code category is Wired Telecommunications Carriers[37] and under that size standard, such a business is small if it has 1,500 or fewer employees.[38] U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year.[39] Of that number, 3,083 operated with fewer than 1,000 employees.[40] Based on these data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either

[31] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[32] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[33] *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*).

[34] *Id.*

[35] 5 U.S.C. § 601(4).

[36] *See* Letter from Jere W. Glover, Chief Counsel to 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. § 601(4). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 CFR § 121.102(b).

[37] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* https://www.census.gov/naics/?input=517311&year=2017&details=517311.

[38] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[39] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[40] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

competitive local exchange services or competitive access provider services.[41] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees.[42] 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.[43] Also, 72 carriers have reported that they are Other Local Service Providers.[44] Of this total, 70 have 1,500 or fewer employees.[45] Consequently, based on internally researched FCC data, 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.[46]

419. *Interexchange Carriers (IXCs).).* Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. The closest applicable NAICS Code category is Wired Telecommunications Carriers.[47] The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[48] U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year.[49] Of that number, 3,083 operated with fewer than 1,000 employees.[50] According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[51] Of this total, an estimated 317 have 1,500 or fewer employees.[52] Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

420. *Local Resellers*. The SBA has developed a small business size standard for the category of Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses

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[41] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] 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." 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. 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.

[47] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* https://www.census.gov/naics/?input=517311&year=2017&details=517311.

[48] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[49] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[50] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[51] *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*). https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.

[52] *Id*.

and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry.[53] Under that size standard, such a business is small if it has 1,500 or fewer employees.[54] Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities.

421. *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.[55] According to Commission data, 881 carriers have reported that they are engaged in the provisions of toll resale services.[56] Of this total, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.[57] Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

422. *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 NAICS code is for Wired Telecommunications Carriers.[58] The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[59] According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[60] Of this total, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.[61] Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by our action.

423. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers, a group that includes inmate calling 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.[62] According to Commission data,[63] 535 carriers have reported that they are engaged in the provision of payphone services. Of this total, an estimated 531 have 1,500 or fewer employees and four have more than 1,500 employees.[64] Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

424. *TRS Providers.* TRS can be included within the broad economic categories of All Other

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[53] U.S. Census Bureau, *2012 NAICS Definition*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517911&search=2012+NAICS+Search&search=2012 (last visited June 17, 2020).

[54] 13 CFR § 121.201 (NAICS Code 517911).

[55] *See* 13 CFR § 121.201, NAICS Code 517911 (previously 517310).

[56] *See* Trends in Telephone Service at Table 5.3.

[57] *See id.*

[58] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[59] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[60] *See* Trends in Telephone Service at Table 5.3.

[61] *See id.*

[62] *See* 13 CFR § 121.201, NAICS code 517311 (previously 517110).

[63] *See* Trends in Telephone Service at Table 5.3.

[64] *See id.*

Telecommunications. Ten providers currently receive compensation from the TRS Fund for providing at least one form of TRS: ASL Services Holdings, LLC (GlobalVRS); Clarity Products, LLC (Clarity); ClearCaptions, LLC (ClearCaptions); Convo Communications, LLC (Convo); Hamilton Relay, Inc. (Hamilton); MachineGenius, Inc. (MachineGenius); MEZMO Corp. (InnoCaption); Sorenson Communications, Inc. (Sorenson); Sprint Corporation (Sprint); and ZP Better Together, LLC (ZP Better Together).

425. *All Other Telecommunications.* The "All Other Telecommunications" category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.[65] This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.[66] Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.[67] The SBA has developed a small business size standard for All Other Telecommunications, which consists of all such firms with annual receipts of $35 million or less.[68] For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.[69] Of those firms, a total of 1,400 had annual receipts less than $25 million and 15 firms had annual receipts of $25 million to $49, 999,999.[70] Thus, the Commission estimates that the majority of "All Other Telecommunications" firms potentially affected by our action can be considered small. TRS can be included within the broad economic census category of All Other Telecommunications. Under this category and the associated small business size standard, a majority of the ten TRS providers can be considered small.

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

426. *Compliance with Caps on Permanent Per-Minute Rate, and Ancillary Service Charges.* In the Further Notice, the Commission seeks comments on further reform of inmate calling services, including permanent rate caps on interstate and international telephone services and on revising ancillary service charges rules. To the extent that permanent rate caps are lower than the interim interstate and international rate caps or they apply to all types of facilities (including jails with average daily populations below 1,000), providers (including any smaller entities) must comply with the new rate caps. Likewise, providers of all sizes must comply with any new caps or limits on permissible ancillary service charges.

427. *Compliance with Requirements to Provide Access to Additional Telecommunications Relay Services*. In the Further Notice, the Commission seeks comment on requiring inmate calling services providers to provide access to several additional TRS and direct video communications services, and whether such services should be provided at no charge. If such rules are adopted, they would apply to inmate calling service providers of all sizes.

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[65] *See* U.S. Census Bureau, 2017 NAICS Definitions, NAICS Code "517919 All Other Telecommunications", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017.

[66] *Id.*

[67] *Id.*

[68] *See* 13 CFR § 121.201, NAICS code 517919.

[69] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012, NAICS code 517919, https://data.census.gov/cedsci/table?q=EC1251&hidePreview=true&table=EC1251SSSZ5&tid=ECNSIZE2012.EC1251SSSZ5&lastDisplayedRow=28#.

[70] *Id.*

428. *Recordkeeping, Reporting, and Certification*. The Further Notice seeks comments on adopting an on-going periodic cost data collection to ensure calling services rates are just and reasonable. It also seeks comments on revising the Commission's definition of "jail" to include certain types of facilities. To the extent the Commission imposes a new periodic cost data collection and clarifies the term "jail" to include certain types of facilities, providers of all sizes must maintain and report their cost data in accordance with the Commission's rules. Similarly, if the Commission imposes expanded data collection or other new rules specific to services provided to incarcerated people with communication disabilities, the data collection and other rules will be applicable to inmate calling services providers of all sizes. However, some providers may opt to not make the data filings based on the "safe harbor" applicable to entities, basically, that offer more than the mandatory TRS services or that have had no complaints, provided that the safe harbor is expanded and not eliminated entirely.

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

429. The RFA requires an agency to describe any significant 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.[71] We will consider all of these factors when we receive substantive comment from the public and potentially affected entities.

430. The Commission seeks comment on differences in costs between prisons, larger jails, and jails with average daily populations below 1,000 to account for differences in costs incurred by providers servicing these different facility types and sizes. To that end, the Commission seeks comment on provisioning of inmate calling services to small jails and different correctional facility costs involving different facility sizes. The Commission also seeks comment on employing separate zones of reasonableness in establishing permanent rate caps for prisons, larger jails, and jails with average daily populations below 1,000 to ensure that even small providers serving jails, which may be smaller, higher-cost facilities, and larger prisons, which often benefit from economies of scale, can recover their legitimate inmate calling services-related costs.

431. The Commission also seeks comment on whether it should revise its ancillary service charge caps on a standard periodic basis and if so, how frequently we should do so while balancing related benefits and burdens to all relevant stakeholders and serve the public interest and ensuring that the interstate and international rates are just and reasonable and provide fair compensation to providers.

432. The Commission asks whether its proposed periodic data collection would impose unreasonable burdens and costs. The Commission also seeks comment on how to structure the data collection in order to maximize its benefits, while at the same time reducing administrative burdens on providers by asking, for example, how frequently we should require the cost data collection to occur and whether we should allow a certification of no substantial change in lieu of a full data collection to alleviate burdens on providers.

433. Given the Commission's long-standing finding that every provider has a monopoly in the facilities it serves, the Commission seeks comment on whether calling services providers have market power in bidding for calling services contracts. The Commission also asks for comment on what kind of regulation would be appropriate in the event that market power in the bidding market is found to exist.

434. Regarding the provision of functionally equivalent access to people who are deaf, hard of hearing or deafblind, or have speech disabilities, the Commission does not expect that the implementation

[71] 5 U.S.C. § 603(c)(1)-(4).

of new forms of TRS or direct video communication would have much impact on small providers of inmate calling services. The TRS itself is provided by other entities. Small inmate calling services providers would need to provide access to that TRS, which may require special equipment (such as videophones) and appropriate billing and security features. The data obtained from providing these additional services may be additional data that would be required for annual accessibility-related reports. The Commission seeks comment on the impact of expanded reporting requirements on small entities, including the modification or elimination of the safe harbor for entities that, have had no TRS-related complaints.

435. The Commission will consider the economic impact on small entities, as identified in comments filed in response to the Further Notice and this IRFA, in reaching its final conclusions and promulgating rules in this proceeding.

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

436. None.

APPENDIX E

Analysis of Responses to the Second Mandatory Data Collection

A. Introduction

1. We determine the interim interstate provider-related rate caps by developing separate zones of reasonableness based on data submitted by inmate calling services providers in response to the Second Mandatory Data Collection.[1] The goal of our approach is to estimate the mean contract cost per paid minute while taking into account providers' costs of providing inmate calling services as reported in response to the Second Mandatory Data Collection as well as the limitations of those data and concerns raised by stakeholders.[2] We establish the bounds of the zones using a variety of standard data and economic methods. Our overall approach is described in this Introduction, with additional details and our results discussed in the remainder of this Appendix and the Appendices that follow.

2. We begin by collecting certain cost and revenue data related to inmate calling services from providers through the Commission's Second Mandatory Data Collection. Next, following a standard approach to data cleaning, we then review the responses to the Second Mandatory Data Collection to identify submissions with duplicative, missing, or anomalous data. We then fix or remove these observations as appropriate,[3] and create new variables that will be used in our analysis.[4] At the core of our initial analysis and creation of new variables is the selection of a suitable mechanism to allocate reported indirect costs.[5] Allocating indirect costs is critical to ensuring that our estimates capture the providers' actual costs associated with providing inmate calling services to the greatest possible extent. These steps result in a dataset that serves as the basis for the remainder of our analyses. Data cleaning and cost allocation play a critical role in ensuring appropriate evaluation of the data and lead to results that better reflect the realities of the inmate calling services market.

3. Using this dataset, we first estimate the upper bounds of the zones of reasonableness by calculating, for both prisons and larger jails, the mean per-minute contract costs plus one standard deviation.[6] Incorporating a standard deviation into each upper bound recognizes that providers' costs

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[1] In this Appendix, we frequently refer to inmate calling services providers by short names or acronyms. These providers are: ATN, Inc. (ATN); CenturyLink Public Communications, Inc. (CenturyLink); Correct Solutions, LLC (Correct); Combined Public Communications (CPC); Crown Correctional Telephone, Inc. (Crown); Global Tel*Link Corporation (GTL); ICSolutions, LLC (ICSolutions); Legacy Long Distance International, Inc. (Legacy); NCIC Inmate Communications (NCIC); Pay Tel Communications, Inc. (Pay Tel); Prodigy Solutions, Inc. (Prodigy); and Securus Technologies, LLC (Securus).

[2] Report and Order, *supra* Part III.C.3; *e.g.*, Pay Tel Comments at 4; Pay Tel Comments Attach., Expert Report of Don J. Wood at 7-11 (Pay Tel Wood Report) (flagging providers' differing understandings of how to report direct and indirect costs and the accuracy of reported direct costs); Securus Comments at 11-16 (asserting that providers did not report their costs using a consistent methodology); GTL Reply at 6 (remarking that providers use different reporting methodologies and that no uniform accounting is required). *But see* Wright Petitioners et al. Reply at 3 (Public Interest Parties Reply) (arguing that the data "provide more than sufficient evidence to support immediate rate reform").

[3] *See generally* Heiko Müller & Johann-Christoph Freytag, Problems, Methods, and Challenges in Comprehensive Data Cleansing (2003), http://www.dbis.informatik.hu-berlin.de/fileadmin/research/papers/techreports/2003-hub_ib_164-mueller.pdf.

[4] Created variables include, for example, facility size categories and rurality (based on geocoding). These new variables are based on information submitted in the Second Mandatory Data Collection and described in greater detail below.

[5] *See infra* Part E (explaining our conclusion that minutes of use are the best allocator considering the available information and limitations of the Second Mandatory Data Collection).

[6] *See* Report and Order, *supra* Part III.C.3.

vary but places a limit on how much costs may differ among providers.[7] We recognize, however, that per-minute costs may be affected by the particular characteristics of a facility or contract, such as size or location. With statistical modeling, we can identify how well various reported characteristics predict the per-minute costs of a contract.[8] The results of this analysis can inform which characteristics, if any, may influence our approach to setting interim rates.[9]

4. To estimate the lower bound of each zone of reasonableness, we compare results from standard statistical tests to identify outliers within the dataset.[10] An outlier is a value within the data that "lies an abnormal distance from other values."[11] After removing the outliers, we find there are still contracts that have reported per-minute costs that are significantly higher than other providers. To bring these contracts into alignment with comparable contracts, we employ a statistical method that replaces the cost information for the abnormally high-cost contracts with cost information from contracts that have similar characteristics.[12] We use these adjusted data to calculate the mean per-minute cost plus one standard deviation. From between the upper and lower bounds, we then select interim interstate provider-related rate caps for prisons and larger jails in accord with our analysis. We conclude our analysis by testing whether these interim rate caps will allow providers to recover the costs of providing calling services to incarcerated people. In the remainder of this Appendix, we describe the Second Mandatory Data Collection in greater detail, specific steps taken to clean the data, and initial data analysis to allocate indirect costs and explore the data. In addition, we select an appropriate cost allocator and assess the commercial viability of contracts under the new interim interstate provider-related rate caps.

5. *Collecting Inmate Calling Services Data*. Our efforts to reform inmate calling services rates begin with collecting the cost, revenue, and other data reported by providers. The Commission initiated the Second Mandatory Data Collection in order to obtain more comprehensive and detailed data about inmate calling services providers, with the goal of setting more accurate cost-based rates. This effort included seeking cost data at the level of the contract and seeking information on cost components such as credit card processing fees, payments to affiliates, and the direct costs for collect calls. Further, the Second Mandatory Data Collection was unprecedented in how it disaggregates minutes, calls, site commissions, and revenues.[13] These data, coupled with key attributes, such as average daily population (ADP), facility type (prison or jail), and facility locations, provide a detailed view of the inmate calling services industry.

6. Appropriate use of these data, however, requires awareness of the data's flaws.[14] Two

[7] Under a normal distribution, 68% of providers would fall within one standard deviation of the mean. *See* National Institute of Standards and Technology and SEMATECH, e-Handbook of Statistical Methods: 1.3.5.1. Measures of Scale (Oct. 30, 2013), https://www.itl.nist.gov/div898/handbook/index.htm (e-Handbook of Statistical Methods).

[8] *See* Appx. F, *infra* (describing sensitivity testing using a lasso analysis method).

[9] *See* Appx. F, *infra* (noting that our estimates indicate "the costs of providing inmate calling services are approximately 22% greater in jails than in prisons").

[10] *See* Appx. F, *infra*; *see generally* Victoria J. Hodge & Jim Austin, *A Survey of Outlier Detection Methodologies*, 22 A.I. Rev. 85-126 (2004) (providing an overview of commonly used outlier detection methods).

[11] *See* e-Handbook of Statistical Methods, *supra* note 7, at 7.1.6.

[12] *See* Appx. G, *infra* (describing use of a *k*-nearest neighbor matching algorithm).

[13] Unlike past collections, providers reported both paid and unpaid minutes, and reported breakdowns of minutes and calls by payment type (debit/prepaid and collect calls) and by regulatory jurisdiction. Providers also reported site commissions in fixed and variable components, and disaggregated revenues between inmate calling services revenues and ancillary service revenues. *See generally* Inmate Calling Services Mandatory Data Collection, WC Docket No. 12-375, General Instructions, https://docs.fcc.gov/public/attachments/DOC-343708A3.docx.

[14] *See* Report and Order, *supra* Part III.C.3 (explaining our reliance on the Second Mandatory Data Collection); *see also* Wright Petitioners, Prison Policy Initiative, and Public Knowledge Comments Appx. A, Coleman Bazelon et al., The Brattle Group, Brattle Report at 1 (Public Interest Parties Brattle Report).

difficulties stand out. First, different providers record and interpret costs differently. This makes it impossible to ensure an apples-to-apples comparison among providers.[15] Second, providers have strong incentives to overstate costs because higher costs will increase any rate caps the Commission bases upon those costs, resulting in higher prices.[16] In fact, these two difficulties may be the reason why the data do not support two widely believed stylized facts: that providers' prison costs per minute are generally lower than their jail costs per minute; and that providers' unit costs tend to rise as the size of a correctional institution falls.[17] Consequently, averaging reported costs, as allocated between prison and jail contracts, shows prisons to be more expensive to serve on a per-minute basis than jails.[18]

7. However, careful analysis can identify such biases, and correct for them (*see* Appendix G).[19] Separately, we find other aspects of the reported data are less likely to be distorted. Providers' reports of call minutes (i.e., minutes of use) and revenues are likely to be accurate down to the level of the contract. Call minutes are almost universally billed,[20] as are calls when the first minute is priced differently to the second, requiring auditable accounting. Revenue tracking, and thus reported revenues, are also likely to be reliable. Calling service providers have strong incentives to accurately track revenues. First, they must do so in order to make revenue-based site commissions payments, which occur in a large majority of contracts.[21] Second, tracking revenues at the contract level is necessary to determine whether a contract is profitable. Revenue reports are particularly valuable for the Commission's analysis because they provide an upper bound for contract costs that can be used to verify the accuracy of chosen cost allocation approaches. Accordingly, we find reported minutes of use and revenues to be reliable, and we use them in setting the interim interstate provider-related rate caps.

B. Fundamentals of the Second Mandatory Data Collection

8. *Description of Data Collection*. The Second Mandatory Data Collection was adopted with the goal of enabling the Commission to identify trends in the market and provide information necessary to adopt further reforms. Providers offering inmate calling services were required to submit five years of information, covering calendar years 2014 to 2018. Providers filed their responses to the

[15] *See* GTL Comments Attach., Paul E. Godek, Economists Incorporated, Report in Support of Comments of GTL Regarding the FCC's Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking at 11-14; Pay Tel Wood Report at 8-9 (stating that "[s]ome providers included site commissions in their reported direct cost, but others treated them as an indirect cost" and "the accuracy of each provider's reported estimate of direct costs is likely to vary"); Public Interest Parties Brattle Report at 7 (noting for direct and indirect costs "there are certain costs that should not be included [and] there may be potential overstatement of costs"); Securus Comments at 12.

[16] *See* Free Press Comments at 2; Public Interest Parties Brattle Report at 5; Public Interest Parties Comments at 4. *But see* Pay Tel Reply Attach., Reply Report of Don J. Wood at 8.

[17] Securus Comments Attach. D, FTI Consulting, Inc., Declaration of Robert O. Fisher, Brian F. Pitkin & Steven E. Turner, at 23-24 (Securus FTI Report).

[18] Securus Comments at 40; Appx. G, *infra*.

[19] A similar distortion can occur if different providers have different approaches to reporting their costs. One provider's costs could, through the averaging process, overstate the costs of contracts of a certain type and understate the costs of others. However, averaging over all providers would reduce such distortions to the extent they were not systematic. *See generally* Public Interest Parties Brattle Report at 16; Public Interest Parties Reply Appx. A, Coleman Bazelon et al., Brattle Group, Brattle Report at 16 (Public Interest Parties Brattle Reply Report).

[20] For roughly 72% of contracts (2,100 of 2,900), providers report paid minutes which account for 90% or more of their total reported minutes, according to staff analysis of the Second Mandatory Data Collection responses.

[21] For roughly 86% of contracts (2,488 of 2,900), providers report variable site commissions (both legally compelled and negotiated), according to staff analysis of the Second Mandatory Data Collection responses. *See, e.g.*, Revised Description and Justification for GTL's Mandatory Data Collection Report, WC Docket No. 12-375, at 15 (filed May 19, 2020) (Redacted for Public Inspection) (GTL Revised Description and Justification) (noting that "[t]he vast majority of GTL's site commission payment requirements are variable commissions").

data collection in March 2019. Commission staff then "undertook a comprehensive analysis of the . . . responses and conducted multiple follow-up discussions with . . . providers to supplement and clarify their responses."[22] In addition, staff relied on providers' April 1, 2020, annual reports to further inform the analysis and results set forth in the *2020 ICS Notice*.[23]

9. Information requested by the Commission in the Second Mandatory Data Collection included company and affiliate information, total costs and revenues, and facility level information. Filers were required to indicate the portion of total costs directly attributable to the provision of inmate calling services and allocate indirect costs, such as general overheads, between inmate calling services and other operations.[24] In total, 13 providers of inmate calling services submitted data to the Commission (*see* Table 1).[25] The collected data included information on numerous characteristics of the providers' contracts, such as:

- Whether the contract was for a prison or a jail;
- The average daily incarcerated population (average daily population) of all the facilities covered by the contract;
- The total number of calls made annually under the contract, broken out by paid and unpaid, with paid calls further broken out by debit, prepaid, and collect;
- Total call minutes; call minutes broken out by paid and unpaid; interstate, intrastate, and international; and prepaid, debit, and collect calls;
- Inmate calling services revenues, broken out by prepaid, debit, and collect;
- Automated payment revenues and paper bill or statement revenues, earned under the contract (live operator revenues were not collected);
- Site commissions paid to facility operators under the contract; and
- Each provider's inmate calling services costs in total, exclusive of site commissions.

10. *Description of Initial Data Cleaning.* In our review of the responses to the Second Mandatory Data Collection, we identify submissions with incomplete or invalid data, duplicative information, and contracts that are not comparable to others because of unique characteristics. We exclude these contracts where they cannot be used (e.g., where missing data would not allow us to make relevant calculations) or where the contracts do not have paid minutes, and so are unaffected by changes to the interstate rate caps.[26] As the Wright Petitioners, Prison Policy Initiative, and Public Knowledge (Public Interest Parties) recognize, "data cleaning to ensure comparability of costs" is important.[27] In response to commenters' emphasis on data consistency,[28] we further review the responses to the Second

[22] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking, 35 FCC Rcd 8485, 8493-94, para. 22 (2020) (*2020 ICS Order on Remand* or *August 2020 ICS Notice or 2020 ICS Notice*).

[23] *Id.* at 8493-94, para. 25.

[24] *See* Inmate Calling Services Mandatory Data Collection, WC Docket No. 12-375, General Instructions at 6, https://docs.fcc.gov/public/attachments/DOC-343708A3.docx (Second Mandatory Data Collection Instructions).

[25] The 13th provider, Talton, is excluded from Table 1 for the reasons discussed below.

[26] Public Interest Parties Brattle Report at 12-13 (discussing removal of outliers).

[27] *Id.* at 12.

[28] Commenters express concern with instances where provider responses to the Second Mandatory Data Collection report zero values. *See, e.g.*, Securus Comments Attach. B, Robert O. Fisher et al., FTI Consulting, Inc., Inmate Calling Services Cost Analysis for Securus at 17 (Securus Cost Study) (noting instances where providers "reported zero or near zero direct cost"); Securus Comments at 12 (stating that 90 contracts reported an average daily

(continued….)

Mandatory Data Collection and identify additional contracts that should be excluded from our analysis. Specifically, we remove an additional 35 contracts beyond the contracts removed from the results presented in the *2020 ICS Notice*. The contracts removed from the *2020 ICS Notice* analysis included three contracts "not comparable to the average correctional facility" and contracts reporting zero minutes.[29] In addition to removing these contracts, we remove contracts with negative or zero total revenue. Other than the adjustments noted below, we accepted the filers' data and related information "as provided" (i.e., without any modifications).

11. *Removing Contracts with Invalid or Incomplete Data*. For the calculations presented in this Appendix, we exclude a total of 467 contracts from the Second Mandatory Data Collection data. First, we remove 424 contracts where a provider reported either zero paid minutes or zero total minutes, 416 of which reported neither paid nor total minutes. Of the remaining eight contracts reporting either zero paid minutes or zero total minutes, two appear to be contracts for juvenile services and the provider may not charge for calls ({[ ]} in Texas and {[ ]} in Florida), and six report zero paid minutes, but report a range of total minutes from four to 97. As a practical matter, contracts which provide free inmate calling services will not be affected by the interim rate caps adopted in the Report and Order, and zero-minute contracts frustrate attempts to calculate per-minute rates or revenues. We find these reasons sufficient to exclude such contracts from our analysis. Second, we remove 10 contracts where a provider reported direct costs less than $0. By contrast, we did not delete contracts for which no direct costs were reported. Finally, we exclude 31 contracts where the total revenue net of site commissions is less than or equal to $0. We find that contracts which report negative direct costs and or negative revenues are implausible, and likewise indicative of some error in reporting.

12. *Excluding an Anomalous Contract*. We exclude a long-standing, so presumably viable, contract between GTL and the {[ ]}, because it has an unusual preponderance of free calls,[30] and at face value suggests GTL's per-minute costs on this contract for both paid and unpaid minutes are as low as {[ ]}.[31] Inclusion of this contract distorts the cost allocation procedure, raising the mean per-minute cost for prisons by approximately {[ ]} (from {[ ]} to {[ ]}), and increasing the standard deviation from $0.041 to $0.658. This occurs because we estimate the per-minute costs by dividing a contract's allocated cost by paid minutes. Because this contract bears so few paid minutes, we calculate a per-minute cost of {[ ]}.[32] This is implausible on

(Continued from previous page)
population of zero). We do not remove these contracts because we find it appropriate to classify them as smaller jail contracts based on the reported paid minutes of use. *See infra* para. 20.

[29] *See 2020 ICS Notice*, 35 FCC Rcd at 8556, Appx. E at paras. 3-4; *see also infra* paras. 11-14.

[30] In 2018, GTL provided {[ ]} free minutes, earning revenues on only {[ ]} minutes, or {[ ]} of all minutes on this contract. Thus, free minutes constitute {[ ]} of all minutes on this contract. In contrast, the share of paid minutes for all contracts excluding this one is 3.3%. Consistent with this {[ ]} share of free minutes, it appears that the state requires the provision of at least two free 10-minute calls to each incarcerated juvenile per week. Juvenile Justice Monitoring Unit, State of Maryland, Fourth Quarter Report and 2017 Annual Review, at 18, 22 ("two weekly phone calls to which youth are entitled"), 26 ("DJS policy limits youth in detention and committed placement centers to two ten minute phone calls a week."), 33, 38, 42, 50, 54, 58 (Mar. 2018), https://www.marylandattorneygeneral.gov/JJM%20Documents/17_Quarter4.pdf.

[31] This equals the quotient of GTL's total revenues under the contract and total minutes supplied. GTL also paid {[ ]} on the contract, which also is somewhat unusual. In 2018, only 31% of all prison contracts were commission-free.

[32] If per-minute costs were calculated using total minutes instead of paid minutes, the per-minute costs would be {[ ]}.

its face,[33] and becomes more implausible in light of the reported revenues associated with the contract. GTL only reports earning {[ ]} per paid minute on this contract, an amount that is less than {[ ]} the per-minute allocated cost. This is also substantially lower than the rate GTL earned per all minutes on its contract with the {[ ]}, or {[ ]} per minute.

13. *Eliminating Double Reporting and Excluding Federally Managed Facilities*. In discussions with calling service providers, we learned that several had included site commissions as part of their total inmate calling services costs and a subset of those had also reported site commissions as part of their direct inmate calling services costs. Because we are interested in the cost of providing the underlying telecommunications service, we do not include site commission payments in our measures of providers' costs. We also discovered a double reporting of site commission payments for {[ ]} contracts that both {[ ]} and {[ ]} reported serving. In their responses to the Second Mandatory Data Collection, it appears that {[ ]} reported its share of the site commission while {[ ]} reported the site commission for the entire contract. In these cases, we have removed the site commission payments reported by {[ ]} and consider {[ ]}'s reported payment to represent the site commissions for the entire contract.

14. We also excluded two contracts that are not comparable to the average correctional facility because they are managed by Immigration and Customs Enforcement (ICE) and the Federal Bureau of Prisons (BOP). This is because significant elements of inmate calling services in these federal institutions are managed by the incarceration authority and not the reporting provider.[34] The ICE contract was the only contract held by Talton, so dropping this contract eliminated Talton from our dataset thus resulting in our relying on data from 12 providers. Before dropping the BOP contract, we allocated a share of GTL's costs reported at the level of the firm (as opposed to the contract) to the BOP contract as described below. Excluding these contracts produces a dataset of 2,900 contracts, accounting for 2.2 million incarcerated people and 7.8 billion paid minutes.

15. Our dataset of 2,900 contracts gives an unprecedented view into providers' costs, revenues, and call minutes.[35] By excluding incomplete and anomalous contracts, we substantially improve the comparability of the information submitted by providers. However, providers may have overstated their costs or reported costs differently than other providers. We address these issues in Appendix G by excluding outliers and replacing the cost information for abnormally high costs with that of comparable contracts.

C. Initial Data Analysis

16. After cleaning the reported data, we make a number of basic analytical observations to aid our analysis. First, it is important to understand the different levels of granularity in reported costs. This leads us to conduct our analysis at the contract level. Next, we divide the reported data into several tiers, and examine prisons, larger jails, and jails with average daily populations less than 1,000 separately. We also conduct a geographic analysis to analyze the effects of rurality on reported costs. Finally, we observe that disparate treatment of ancillary services costs and revenues requires some attention in order

[33] By way of comparison, this is {[ ]} times higher than the next nearest allocated cost, {[ ]} times higher than the average allocated cost for prisons, and {[ ]} times higher than the {[ ]} per-minute costs we calculate for GTL's contract with the {[ ]}.

[34] *See* Description and Justification for Talton Communication, Inc.'s Mandatory Data Collection Report, WC Docket No. 12-375, at 1 (filed Mar. 1, 2019) (stating that Talton "does not bill or collect revenues nor do we incur the cost of service"); *see also* GTL, FCC Form 2301(a) – Inmate Calling Services Annual Report, WC Docket No. 12-375, Tab I.a Narrative (3), Row 102 (filed Apr. 1, 2020) (Confidential version) (GTL Annual Report) ({[ ]}.

[35] Today, CenturyLink's former inmate calling services operations are part of ICSolutions, but we kept those operations separate in our analysis.

to ensure we are comparing commensurate quantities. Taken together, these steps form a predicate around which may then offer further, deeper analysis of the resultant costs. We review these steps below.

17. *Granularity of Reported Costs.* In the Second Mandatory Data Collection, costs are effectively reported at two levels, that of the inmate calling services provider—total costs—and that of the contract. Contract costs are costs that the provider attributes to a specific contract, including any proportion of overheads the provider elects to allocate.[36] The difference between a provider's total costs and the sum of all costs reported at the contract level are unallocated costs, and these represent costs which have not been attributed to a particular contract. While providers generally reported at least some inmate calling services costs at the level of the contract, and more rarely at the level of the facility, each did this differently. Providers took different approaches in how they reported these costs. For example, bad debt is the only cost GTL reports at the level of the contract. Thus, for GTL, a range of other contract-specific costs are recorded at the level of the firm only. By contrast, another provider allocates some of its costs, most likely including overheads, to the contract according to the contract's share of phones installed. Still other providers allocate all of their overheads using a revenue allocator.

18. *Unit of Analysis*. Our analysis is conducted primarily at the contract level. This approach is consistent with our view that the contract is the basic unit of supply for inmate calling services. That is, providers bid on contracts, rather than facilities (though in many instances the contract is for a single facility). This approach is also consistent with how the data were submitted, reflecting the underlying reality that providers are focused on contracts as a whole and not elements of the contracts. The Commission requested information to be submitted for each correctional facility where a provider offers inmate calling services, and some key variables—for example, the quantity of calls and minutes of use—were reported by facility. However, even though over 90% of contracts were reported as representing a single facility, most filers do not maintain all of the data we requested by facility in the ordinary course of their business. As a result, in some instances, contracts were reported that covered multiple facilities without any breakout for those facilities.[37] In other cases, some facility-level data were not reported. Examples of the latter include average daily populations and credit card processing costs. In any event, because the Second Mandatory Data Collection instructions had required providers to cross-reference their contracts with the facilities they covered,[38] we were able to group facilities by contract, which facilitated our ability to conduct our analysis at the contract level.

19. *Separation into Tiers*. We separate contracts into three distinct categories for analysis: contracts for prisons, contracts for jails with an average daily population of less than 1,000, and contracts for jails with an average daily population of 1,000 or more (larger jails). Average daily population was not reported for three of the 129 prison contracts and 81 of the 2,771 jail contracts. The average paid minutes across these 81 jail contracts is 54,895 paid minutes. Since the average paid minutes for these contracts are lower than the average paid minutes reported for jails with average daily populations less than 1,000, we categorize these 81 jail contracts as contracts for jails with fewer incarcerated people for

[36] In this Appendix, unless otherwise specified, we use "overheads" to refer to costs incurred to provide a service, but which are also incurred to provide other services, and so cannot be directly attributed to any of those services. The canonical example is a Chief Executive Officer's salary. Another example is the cost of a provider's platform and associated software used to provide inmate calling services across all of the provider's contracts. That cost cannot be directly attributed to any particular contract. Instead, it is incurred whether or not one, several, or perhaps even most of the contracts are served.

[37] For example, contracts with the {[ ]} and {[ ]} were reported as single facilities, with average daily populations of {[ ]} and {[ ]}, respectively.

[38] *See* Second Mandatory Data Collection Instructions at 8 (stating that each entry should be submitted with a "Unique Identifier For Contract . . . for purpose[s] of referencing and identifying that particular contract").

the purposes of our analysis.[39]

20. Average daily population of 1,000 serves as a natural breakpoint in the data in two key respects. A natural break in a dataset is an approach to classifying data into ranges based on the similarity of the observations within a class, in this case facility size (i.e., average daily population).[40] First, in terms of cost differentials, jails with average daily populations less than 1,000 are more likely than larger jails to exhibit higher per-minute costs.[41] For instance, contracts for jails with fewer people exceed a cost threshold of $0.16 per minute at more than twice the rate of contracts for larger jails.[42] Second, as shown in Figure 1 below, visualizing the distribution of the average daily population data for jails shows a shift in the shape of the data around an average daily population of 1,000, with a much more substantial density of observations below 1,000 as compared to above.[43] This density is driven by large numbers of contracts with low average daily populations. Specifically, approximately 48% of all jail contracts report average daily populations of less than 100, and approximately 93% of all jail contracts report average daily populations of less than 1,000. We then look at the 95th percentile value because it is often used to identify the tail of a distribution (i.e., the values in the distribution that are farthest from the mean).[44] Across all 2,771 jail contracts, the 95th percentile of average daily population is 1,165. Put differently, 95% of the jail contracts have average daily populations of less than 1,165 and 5% of jail contracts report an average daily population of 1,165 or greater. Since average daily population is an annualized estimate based on one year of data,[45] we find it reasonable to round to the nearest order of magnitude and remain consistent with other analyses that use 1,000 or more as a category.[46] We include jails with average daily populations less than 1,000 in our total dataset of 2,900 contracts for purposes of analyzing the various possible allocation methodologies and to ensure our analysis is sufficiently comprehensive. But, because we do not adopt a new interstate interim rate cap for debit and prepaid calls from jails with average daily populations less than 1,000, we do not provide summary statistics or otherwise analyze such facilities in this Appendix.

[39] Average paid minutes for a smaller jail is 634,774, and average paid minutes for a larger jail is 9,274,594.

[40] *See* Axis Maps, The Basics of Data Classification, https://www.axismaps.com/guide/data-classification (last visited Mar. 25, 2021) (describing various classification methods, including natural breaks).

[41] *See* Report and Order, *supra* Part III.C.2 (discussing record evidence of the cost differences between large and smaller jails).

[42] Of the 2,589 smaller jail contracts, 132 contracts have an average per-minute cost above $0.16, and of the 182 larger jail contracts, four have an average per-minute cost above $0.16. Staff analysis of Second Mandatory Data Collection.

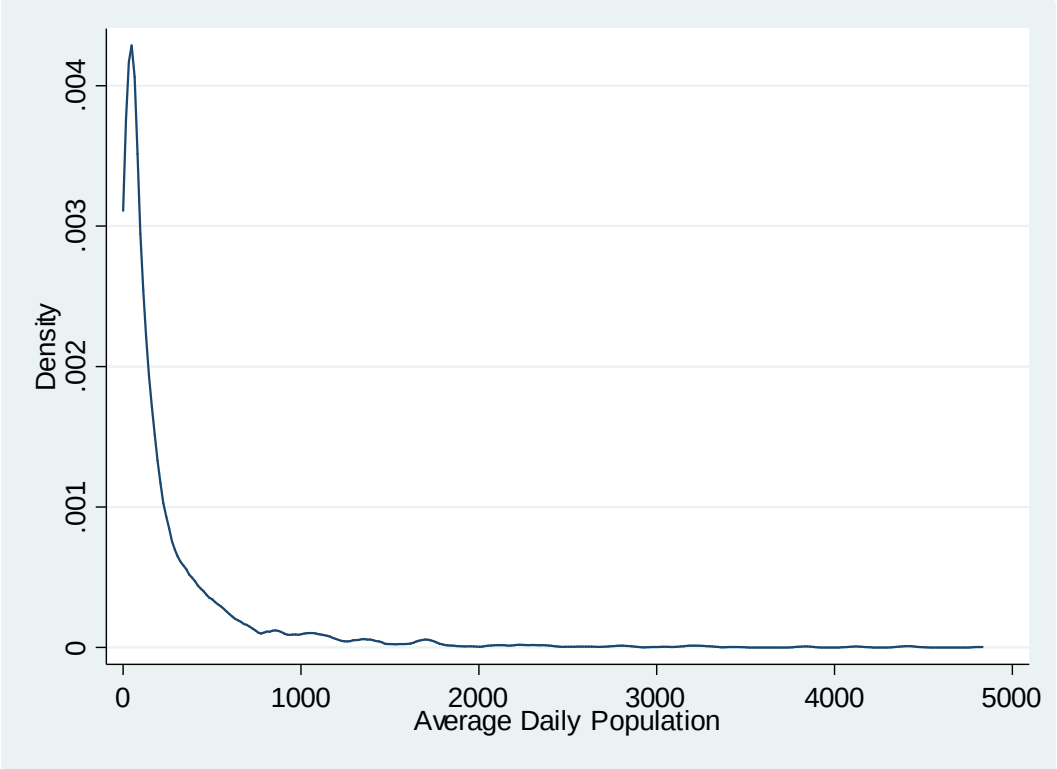
[43] Distribution of average daily population was visualized by plotting the results of a kernel density estimate.

[44] *See* e-Handbook of Statistical Methods, *supra* note 7, at 1.3.5.1 - Measures of Location.

[45] *See* Second Mandatory Data Collection Instructions at 2; *see also* National Sheriffs' Association Comments at 7 (stating that "[s]maller jails had higher weekly inmate-turnover rates and shorter lengths of stay than larger jails").

[46] *See, e.g.*, *Rates for Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763, 12786, para. 46 (2015); Securus Cost Study at 17 (showing lower per-minute total average costs for average daily populations of 1,000 or more compared to categories with lower average daily populations).

Figure 1 – Density of Average Daily Population for Jails[47]



21. *Geographic Analysis.* Rurality is an additional characteristic of correctional facilities that may affect the costs of provisioning inmate calling services. For example, jails and prisons in more rural areas of the country may be required to pay a higher rate for access to the public switched telephone network and these costs should be recoverable. Similarly, it is possible other costs, such as those for maintenance visits or installations, may be higher in rural areas. Detailed geographic information was not requested as part of the Second Mandatory Data Collection; however, the Commission did request that providers submit the street address for each facility reported. We geocoded these addresses to determine the Census Block in which each facility is located.[48] This allows us to test, for example, whether the costs of providing inmate calling services tend to be higher for facilities in blocks defined as rural by the U.S. Census Bureau.[49]

22. We applied three processes to ultimately geocode 3,784 or 88% of the 4,319 filed facilities. We first used ArcMap software version 10.8 to geocode 3,321 or 77% of the 4,319 filed

[47] For the purposes of this Figure, we visualize only jail contracts with average daily populations less than 5,000.

[48] Geocoding is a process of associating longitude and latitude coordinates to a facility's address to conduct geographic analyses. *See* ArcGIS Desktop, *What Is Geocoding?*, https://desktop.arcgis.com/en/arcmap/latest/manage-data/geocoding/what-is-geocoding.htm (last visited Apr. 14, 2021).

[49] "'Rural' encompasses all population, housing, and territory not included within an urban area." "Urban areas" are "Urbanized Areas (UAs) of 50,000 or more people"; and "Urban Clusters (UCs) of at least 2,500 and less than 50,000 people." U.S. Census Bureau, Urban and Rural (Dec. 7, 2020), https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural.html. "Census blocks provide the 'building blocks' for measuring population density and delineating each urban area." U.S. Census Bureau, 2010 Census Urban Area FAQs, https://www2.census.gov/geo/pdfs/reference/ua/2010ua_faqs.pdf (last visited Mar. 31, 2021).

facilities.[50] We then took a random sample of 170, or 17%, of the 998 addresses we were unable to geocode, and where possible, corrected them manually. We were able to geocode 164 of these 170 addresses. Finally, we developed a Python script to clean up the remaining addresses—which we then manually checked—and were able to geocode 299 additional facilities this way. In instances of contracts with multiple facilities, we were unable to geocode the relevant facilities where a filer only provided a single address.[51] In some instances a mailing address was reported.[52] If this was different from the facility's physical address and the address correction process did not detect this error, then the mailing address was used.

23. *Matching Ancillary Costs and Revenues*. The Second Mandatory Data Collection also collected data on the revenues generated from ancillary service charges, which are separate from inmate calling services revenues. Such charges have their own matching costs, which may be separately accounted for by providers.[53] For example, ancillary services revenues from passthrough fees can be matched to separately reported costs. Thus, because revenues and costs for passthrough fees are separately reported, they can be readily compared.

24. In other cases, the costs of ancillary services may not be separately reported, but instead may be included by providers as the costs of supplying inmate calling services. In such cases, we cannot be sure appropriate matching occurs. Because it is important to compare commensurate costs and revenues when assessing service profitability, we must take steps to control for these circumstances. For example, for some analyses we add the revenues for two ancillary services—automated payments, and paper billing and statements—to inmate calling services revenues in order to compare commensurate revenues to costs.[54] The revenues earned on these ancillary services do not have separate matching cost reports, although the costs of these services are ordinarily included in the providers' inmate calling costs. Indeed, total billing costs, including automated payments and paper billing costs, are typically considered as costs of the billed service.[55] Matching like to like therefore requires including revenues from these ancillary services in with inmate calling services revenues. Providers may also have reported some or all of their live agent services costs as inmate calling services costs, given no other category in which to include them. However, since this is less clear, we made no adjustment to account for live agent services revenues.

25. Lastly, accounting for the costs and revenues of shared services also poses difficulties which may lead us to understate inmate calling services' profitability. This possibility arises because providers may have allocated the costs of shared services to inmate calling services, but are unable to allocate the related revenues accordingly. As an example, consider a payment account that incarcerated persons must set up to purchase inmate calling services as well as commissary services, tablet access, and other services. Providers may have allocated some or all the costs of the payment system to inmate calling services. At the same time, if there are usage fees associated with the payment account, such as fees charged to set up the account or to deposit money, then the provider should not have reported these in

[50] We used the geocoding database ArcGIS StreetMap Premium North America (2020 Release 1).

[51] *See, e.g.*, GTL Revised Description and Justification at 11.

[52] *Id*.

[53] Providers should not have reported costs for lines of business such as video visitation services as part of inmate calling services costs, and thus we do not have to account for these services.

[54] In some instances, our analyses of the ability of providers to recover their costs at our new interim interstate rate caps do not account for these ancillary services fee revenues. In those cases, our results therefore overstate the percentage of contracts under which the provider would be unable to recover its reported costs under those rate caps.

[55] GTL Revised Description and Justification at 8 (GTL considers inmate calling services costs to include "costs associated with billing for all GTL services (including paper billing and single call fees among others)" and "credit card and other payment processing costs and call center/live operator support costs.").

their inmate calling services nor ancillary services fee revenues, notwithstanding that the revenues are in part generated due to demand for inmate calling services.[56]

26. Recognition of these nuances regarding the reported data and their limitations allows us to offer some basic observations about inmate calling providers and the overall industry.

D. Summary Statistics

27. After taking the aforementioned steps, we find it useful to summarize aspects of the data here. The final dataset used in our analyses contains information on 2,900 contracts that are reported by 12 providers. Table 1 shows, for each provider and the industry, the number of contracts by facility type and in total, the number of facilities covered under those contracts, and the aggregated average daily population of those facilities.

Table 1 – Inmate Calling Services Providers Ranked by Number of Contracts

Provider	Prison Contracts	Jail Contracts	Total Contracts	Facilities	ADP
{[					]}
{[					]}
{[					]}
{[					]}
{[					]}
{[					]}
{[					]}
{[					]}
{[					]}
{[					]}
{[					]}
{[					]}
Industry	**129**	**2,771**	**2,900**	**3,628**	**2,238,732**

28. Table 1 suggests that provision of inmate calling services is very concentrated, with two providers reporting servicing more than {[ ]} of all incarcerated people. Prison contract supply is more concentrated than that of jails, with only six of the 12 providers reporting prison contracts. Of the 129 prison contracts, {[ ]}, and 86% were held by the top three providers combined.[57] For jails, the largest provider, {[ ]} of the contracts, and the top three

[56] GTL Revised Description and Justification at 14 (noting that at certain facilities, automatic payment fees are assessed for services beyond inmate calling services because "GTL cannot distinguish between [automated payment fees] for automated payments to [inmate calling services] and [automated payment fees] for automated payments to other non-[inmate calling services] services").

[57] Other measures also show high concentration for prisons. The largest provider covers 45% of reported average daily population, and the top three cover 96%. The same numbers for total minutes are 51% and 96%, and for provider revenues including automated payment fees and paper bill fees are 55% and 95%.

providers combined held 59% of all jail contracts.[58]

29. Table 2 presents each provider and the number of contracts it serves, lists the average daily population and total quantity of paid minutes delivered under those contracts, and provides the overall per-minute costs and per-minute revenues reported by each provider.

Table 2 – Selected Statistics of Responding Providers

Provider	# of Contracts	ADP	ADP (% of Total)	Paid Minutes (millions)	Paid Minutes (% of Total)	Per-Paid Minute Cost ($)	Per-Paid Minute Revenue ($)
ATN	{[						]}
CenturyLink	{[						]}
Correct	{[						]}
CPC	{[						]}
Crown	{[						]}
GTL	{[						]}
ICSolutions	{[						]}
Legacy	{[						]}
NCIC	{[						]}
Pay Tel	{[						]}
Prodigy	{[						]}
Securus	{[						]}
Industry	**2,900**	**2,238,732**	**100.0**	**7,790**	**100.0**	**0.092**	**0.096**
Industry (Excluding GTL)	**{[**						**]}**

Notes: Average daily population was reported for only 2,816 out of 2,900 contracts. Per-paid-minute costs equal reported total costs, excluding site commissions, divided by paid minutes. Per-paid minute revenues equal all reported calling revenues, including for automated payment and paper billing services, divided by paid minutes.

30. Two noteworthy observations are offered by the foregoing table. First, because of the highly concentrated nature of supply, the data submitted by a few providers has a disproportionate effect on the total revenues and costs reported by the industry. For example, exclusion of GTL—see the last row—lowers the average cost per paid minute by nearly {[ ]}. Second, GTL uniquely reports making losses on inmate calling services (with a per-paid minute cost of {[ ]} compared to a per-paid minute revenue of {[}), and that loss is {[ ]}, being {[ ]} of its reported costs. However, GTL's revenues likely represent an upper bound for its economic costs, given GTL's long-standing operation in the industry. In that case, its per-minute costs would be no more than {[

[58] Other measures also show high concentration for jails. The largest provider covers 34% of reported average daily population, and the top three cover 74%. The same numbers for total minutes are 37% and 79%, and for provider revenues including automated payment fees and paper bill fees are 37% and 80%.

]}.

E. Determining the Appropriate Cost Allocator

31. *Introduction.* Traditionally, under cost-based regulation, regulators set rates for a regulated firm based on a cost-of-service study. A cost-of-service study measures a firm's total cost of providing regulated services using the firm's accounting data.[59] As part of this study, all of the firm's costs are directly assigned to or allocated among different jurisdictions and services. The results are referred to as fully distributed, or fully allocated, costs. Regulators typically establish a uniform system of accounts (USOA) and rules that specify how costs, are to be assigned or allocated, and these costs, direct assignments, and allocations are reflected in the cost-of-service study in accordance with these accounts and rules. For example, the Commission's USOA for rate-of-return incumbent local exchange carriers—a distinct set of carriers not at issue here—is set forth in Part 32 of the Commission's rules.[60] Part 32 requires rate-of-return incumbent local exchange carriers to disaggregate company-wide cost data into 80 different accounts, including 49 balance sheet accounts, eight revenue accounts, 15 expense accounts, and eight other income accounts.[61] The Commission's rules for separating regulated costs from nonregulated costs are set forth in Part 64 of the Commission's rules.[62] Under these rules, the company-wide costs booked to Part 32 accounts are directly assigned to either regulated or nonregulated activities as feasible. The remaining costs are grouped into homogenous cost categories and then allocated based on the hierarchy of (1) direct analysis; (2) indirect, cost-causative links to another cost category for which direct assignment or attribution based on direct analysis is possible; or (3) a general allocator that reflects the ratio of all expenses directly assigned or attributed to regulated and nonregulated activities.[63]

32. In contrast to the traditional approach to cost-based ratemaking for industries that have a long history of rate regulation, our overall approach here is a relatively simple one that reduces the reporting burden on the industry but limits the degree to which a precise accounting of costs can be reflected in new interim provider-related rate caps. The Commission did not create a uniform system of accounts or a detailed set of cost accounting requirements for inmate calling services. Nor did it specify any complex set of rules for assigning or allocating inmate calling services costs to rate-regulated inmate calling services, nonregulated inmate calling services and non-inmate calling services. The Commission also did not require providers to do a detailed cost-of-service study, although the FTI study of Securus's costs demonstrates the possibility of doing such a study in a credible way even without a detailed USOA or specific set of cost allocation rules.[64] Securus gave FTI access to a highly disaggregated and comprehensive set of accounting data. As a result, FTI was able to distinguish among many different types of costs, develop more than 90 different cost allocators, and use these allocators to assign and allocate those different types of costs to inmate calling services subject to our rate caps or to services not subject to our rate caps, including services provided to prisons and jails (e.g., advanced and investigative services), and other non-inmate calling services to estimate Securus's fully distributed cost of providing

[59] The cost of doing business includes operating expenses (e.g., operating, maintenance and repair, and administrative expenses), depreciation expense (the loss of value of the firm's assets over time due to wear and tear and obsolescence), cost of capital (the cost incurred to finance the firm's assets with debt and equity capital), and income and other tax expenses.

[60] 47 CFR pt. 32.

[61] *Id.*

[62] 47 CFR § 64.901.

[63] *Id.* The Commission's Part 36 rules set forth procedures for separating between intrastate and interstate jurisdictions the costs assigned or allocated to regulated activities under Part 64. 47 CFR pts. 36, 64. The Commission's Part 69 rules set forth procedures for assigning to or allocating among different categories of interstate access services the costs assigned or allocated to regulated interstate services under Part 36. 47 CFR pts. 36, 69.

[64] *See generally* Securus Cost Study.

inmate calling services.[65]

33. Providers in response to the Second Mandatory Data Collection aggregated various types of costs of supplying inmate calling services and reported a single number for each contract that reflects the aggregation of these costs. Any remaining costs not reported at the contract level were reported at the level of the firm.[66] Costs that are not directly attributable to a contract and costs reported at the level of the provider, rather than contract, create a challenge: we need to allocate the various types of overhead costs among all of a provider's contacts as part of developing a cost-based rate cap, but the aggregation of these costs limits us to a single allocation using a single one-size-fits-all allocator. The fact that some providers have categorized inmate calling services costs that almost certainly are attributable to a contract as overhead costs, rather than direct costs, and vice versa, further complicates the cost allocation problem. Different allocators for overhead costs produce materially different allocations and we must choose the one that allocates these costs the best.

34. To cap per-minute rates, we seek to identify commercially viable rates—rates which would cover the true direct costs of any contract and provide enough contribution to recover total costs across all contracts.[67] Given providers' accounting systems are designed to run their businesses, and that providers bid for contracts, for the purposes of analyzing various possible allocators we accept their reports of costs, overstatement and miscategorization issues aside, as being largely accurate. That leaves us with the need to identify rates which recover costs reported at the level of the contract ("reported direct costs") and make appropriate contributions to the difference between reported total costs and the sum of the providers' reported direct costs ("reported overheads"). One approach to this is to allocate reported overheads to contracts using a cost allocator, and to then determine a per-minute rate that would cover most contracts' fully allocated costs.

35. Our analysis leads us to choose total minutes as the cost allocator. We begin by explaining the cost allocation problem, then show that the best cost allocator of seven considered is call minutes. Lastly, we explain the record provides us with little support to cap prices on a basis other than a per-minute price cap, such as a per call or per-person per-period price cap.

36. *Compensatory Rates and Cost Allocation*. Putting aside the difficulties of interfirm comparisons, there is no clear rule for identifying a price for inmate calling services that covers costs directly attributable to a contract and makes a contribution to recovery of any remaining costs not directly attributable to inmate calling services supplied under the contract, such that total costs are recovered. Under broadly accepted economic principles, where a firm provides a service under multiple contracts, prices for the service provided under each contract are compensatory if three conditions are met: (1) the price at least covers the contract's direct costs for inmate calling services, meaning recovery of the costs attributable to supplying these services under the contract; (2) the price does not recover more than the cost of providing inmate calling services on a standalone basis under the contract (i.e., the costs that would be incurred if these services alone were supplied under the contract, and no other contract were supplied);[68] and (3) prices overall recover the firm's total costs, meaning recovery of the direct costs for inmate calling services under each contract and the reported costs that are not attributable to any one

[65] *See* Securus Cost Study at 3-4, 19-21.

[66] Costs directly attributable to the contract were not always allocated to the contract. For example, the only direct costs GTL reported at the contract level were those for bad debts, when many other costs would be contract specific. The reverse was also true. Costs that are not directly attributable to the contract level were sometimes reported as such. For example, CenturyLink allocated all of its costs down to the contract level.

[67] If a provider is unable to recover its costs for a specific contract, it may seek a waiver. Report and Order, *supra* Part III.C.5 (setting forth a waiver process for outliers).

[68] Thus, for example, any costs shared among all the contracts would be attributable to the one contract.

contract but were allocated to inmate calling services.[69] However, since many prices are consistent with these conditions, they fail to provide full guidance for price setting.

37. Cost allocation is a standard, if imperfect, procedure used by regulators to develop cost-based prices for different services or customer groups where not all of a regulated firm's costs are attributable to a single service or customer group.[70] Following a similar approach here, we identify a method to allocate providers' reported overheads to contracts, as these are the costs that providers did not attribute to contracts, and apply that method. The resulting cost allocation is then used to determine a cost-based price that would allow the provider to recover its contracts' reported direct costs while making a sufficient contribution to reported overheads such that total costs for all the contracts would be covered. We consider seven approaches to allocating overheads, the six cost allocators analyzed in the *2020 ICS* Notice—call minutes (i.e., minutes of use), number of calls, average daily population, revenues, contracts, and facilities—and, at the suggestion of commenters, direct costs.[71] To do this, we must identify the unit of sale for the service to be regulated and choose a cost allocator.

38. In developing these allocators, we allocate reported overheads to contracts, calculate the mean per-minute cost of a contract, the standard deviation relative to that mean, and then add the mean to the standard deviation following the approach in the *2020 ICS Notice*.[72] We calculate a per-minute cost of a contract for each possible allocator by allocating reported overheads among each provider's contracts in proportion to the contracts' shares of the provider's total minutes, calls, average daily population, etc., and then divide the total cost of each contract by its quantity of paid minutes. Paid minutes are used as the divisor because those are the minutes that providers rely on to recover their costs. We use total minutes to allocate reported overhead costs rather than paid minutes, because costs are incurred to build sufficient capacity to provide all minutes, regardless of whether the minutes generate revenue. These results are reported in Table 3.

Table 3 – Means, Standard Deviations, and Implied Rate Caps Using Various Cost Allocators

Cost Allocator	Total Contracts	Mean	Standard Deviation	Implied Rate Cap (Mean + Std. Dev.)
Minutes	2,900	$0.093	$0.056	$0.149
Number of Calls	2,900	$0.116	$0.092	$0.208
ADP	2,804	$0.789	$10.325	$11.114
Revenue	2,900	$0.164	$0.170	$0.333
Contracts	2,900	$18.499	$300.136	$318.636
Facilities	2,900	$16.485	$287.199	$303.685
Direct Costs	2,125	$0.228	$2.189	$2.417

39. *Choosing Minutes of Use as a Cost Allocator*. In determining the appropriate allocator,

[69] *See* 47 CFR § 51.505(b)-(c); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, 15847-48, 15854, paras. 682, 698 (1996); Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 Am. Econ. Rev. 966-77 (1975).

[70] Leonardo R. Giacchino & Jonathan A. Lesser, Principles of Utility Corporate Finance 144-46 (2011).

[71] Report and Order, *supra* Part III.C.3; Securus Comments at 15, 41; Pay Tel Wood Report at 21, 26.

[72] *2020 ICS Notice*, 35 FCC Rcd at 8558, Appx. E (cost allocation).

we recognize concerns that if we were to prefer the per-minute cost allocator due to low variance in the resulting per-minute costs, there would be an element of circular reasoning in our decision.[73] We select the cost per-minute allocator over the six other alternatives based on a range of reasons.[74] Three primary reasons are not subject to the circularity critique: data trustworthiness, availability of data, and consistency with reported revenues. Table 4 compares the seven cost allocators:

Table 4 – Cost Allocator Rate Cap, Implied Anomalous Contracts, and Total Contracts

Cost Allocator	Implied Rate Cap (Mean per-minute allocated cost + 1 standard deviation)	Contracts with per-minute allocated costs greater than implied rate cap		Contracts with per-minute provider revenues greater than their per-minute allocated costs		Total Contracts
		Number	Percent	Number	Percent	Number
Minutes	$0.149	196	6.8	2,532	87.3	2,900
Number of Calls	$0.208	245	8.4	2,358	81.3	2,900
ADP	$11.114	28	1.0	2,150	76.7	2,804
Revenue	$0.333	254	8.8	2,290	79	2,900
Contracts	$318.636	23	0.8	907	31.3	2,900
Facilities	$303.685	20	0.7	1,000	34.5	2,900
Direct Costs	$2.417	12	0.6	1,735	81.6	2,125

Notes: The implied rate cap for each allocator is the sum of the mean of contract costs and 1 standard deviation of the contract cost distribution, as set forth in Table 3. The number of contracts with per-minute allocated cost greater than implied rate cap is calculated for each cost allocator by counting the contracts with a cost allocation that exceeds the implied rate cap. The corresponding percent column represents this number as a share over the number of contracts for which a cost allocation could be calculated (contract totals are reported in the last column). Per-minute provider revenues equal contract revenues from calling rates, plus automated payment fees and paper billing fees, less commissions divided by paid minutes. The number of contracts with per-minute provider revenues greater than their per-minute allocated cost is calculated by counting the contracts with per-minute revenues that exceed the contract's allocated costs. The corresponding percent column represents this number as a share over the number of contracts for which a cost allocation could be calculated.

40. In Table 4, the second column reports the rate cap implied by each respective allocator. Only two of the potential allocators—minutes of use and number of calls produce results below the current cap of $0.021 per minute for prepaid and debit calls. In contrast, the implied rate caps for revenue, direct costs, average daily population, facilities, and contracts all suggest that interstate inmate calling services rates are presently unreasonably low. This disparity is one of the reasons we find that minutes of use and number of calls are the only plausible allocators among the available alternatives.

41. In table 4, the third and fourth columns (under the title "Contracts with per-minute allocated costs greater than implied rate cap) report the number and percentage of contracts that would not recover the costs allocated to them if prices were set to the implied rate cap. Lower numbers in these columns indicate that the cost allocator minimizes the number of contracts with allocated costs above the

[73] Securus FTI Report at 16-17; *see also* Pay Tel Wood Reply Report at 14-16.

[74] The primary aim of a cost allocator is to find a reasonable way of attributing costs, in this case to contracts, that either cannot be directly attributed, such as true overheads, or that, while conceptually could be attributed to a specific contract, cannot be attributed based on how the providers' accounts are kept. Such an allocator must be likely to reflect cost causation and result in rates that demand can bear. *See, e.g.*, David Heald, *Contrasting Approaches to the 'Problem' of Cross Subsidy*, 7 Management Accounting Research 53, 55-57, 68 (1996), http://davidheald.com/publications/contrast.pdf.

cap.

42. In Table 4, the fifth and sixth columns (under the title "Contracts with per-minute provider revenues greater than their per-minute allocated costs") provide a measure of the extent the cost allocator is consistent with prices currently set by providers. These two columns, respectively, report the number and percentage of contracts that earn revenues that are greater than the allocated per-minute costs. If the cost allocation is consistent with commercial cost recovery in an industry found to be in need of rate regulation and otherwise thought to be in solid shape financially, then revenues from the contracts recorded in these columns would recover direct costs and contribute to the recovery of overhead costs, as these contracts are commercially viable. Thus, a cost allocator that is compensatory if not overly so would have numbers close to the total contract number or 100% in these columns. The smaller the entries in these columns are, the less plausible the cost allocator is.

43. While no allocator is likely to pass these tests perfectly, the call minute cost allocator is the standout performer. The call minute cost allocator has the highest percentage, 87.3%, of contracts with revenues greater than their per-minute allocated cost (i.e., the greatest percentage of contracts that appear to recover direct costs and contribute to overhead cost recovery) consistent with actual commercial revenue recovery in a financially solid industry. Thus, it produces results most consistent with what is required to make a contract commercially viable.

44. The call minute cost allocator also has the lower implied rate cap error rate, 6.8%, of the two plausible cost allocators, the other two being the number of calls. Simultaneously, it produces the lowest implied rate cap, $0.149, among all allocators. Thus, it is least likely to overcompensate providers, and, among plausible allocators, most likely to allow cost recovery.

45. The only other allocator to come close to producing results consistent with what we learn from observed contract revenues, and not appearing to over-compensate providers, is the number of calls allocator. There, the percentage of contracts with observed per-minute revenues greater than per-minute allocated costs is 81.3%—a percentage that is lower than that for the call minute allocator. The number of calls allocator has the second lowest implied rate cap (behind the call minute cost allocator) at $0.208, with 8.4% of contracts with per-minute allocated costs that would exceed this rate cap. These values indicate that the call minute cost allocator is a superior choice to the number of calls allocator.

46. Use of an average daily population allocator requires dropping 96 contracts, and providers in many instances had difficulties accurately reporting this number.[75] While these facts alone are perhaps insufficient to eliminate average daily population as a cost allocator, they cast some doubt on its relative usefulness. Further, the average daily population allocator implies that only about three-fourths of all contracts recover their allocated cost at actual commercial rates, 10% points lower than the same number for the call minute allocator. The average daily population allocator also has an implied rate cap of $11.114. No credible contract in our data earns this much.[76] Further, if the allocator correctly assigns costs, then 28 or 1% of contacts earning $11.114 in revenues per minute implausibly would fail to

[75] *See, e.g.*, Securus Cost Study at 11.

[76] There is an {[ ]} contract {[ ]} with per-minute revenues of $12.20. That contract has an average daily population of zero and only one reported paid minute in 2018. If the data recorded for that contract are not in error, then the contract is too unusual to be a good comparator. The next highest is an {[ ]} contract for the {[ ]}. It has an average daily population of 64, paid minutes of 3,335 or 52 minutes per incarcerated person per year, and per-minute revenues of $8.99, followed by an {[} contract {[ ]}, which has an average daily population of 754, paid minutes of 1,272, or 1.7 minutes per incarcerated person per year, and per-minute revenues of $1.50. {[ ]} contract has the highest per-minute revenues of larger jails, at $1.35. Its average daily population is 1,128, with 130,781 paid minutes, for 116 minutes per incarcerated person per year. In contrast, the minutes per average daily incarcerated person for smaller jails is 3,671 and for all jails, 3,705. Thus, the {[ ]} contracts appear peculiar with minutes per incarcerated person per year that are several orders of magnitude less than the smaller jail ratio.

recover costs. Based primarily on the commercial cost recovery mistake rate and implausibly high implied rate cap, we conclude that average daily population is an unreasonable allocator.

47. Although a revenue cost allocation key may be used for certain accounting purposes, a revenue key is inappropriate for regulatory purposes because revenue is not a cost driver. While costs can be expected to increase with quantity sold, revenues do not always increase with quantity sold, and this can lead to perverse effects.[77] The exercise of market power can result in higher revenues than would be earned in a competitive market. In that circumstance, holding other things constant, a revenue allocator would allocate more costs to monopolized services than competitive ones.[78] In addition, the revenue allocator scores worse than the call minute cost allocator on all of our performance measures. Most significantly, it produces a rate cap that is more than twice the call minute rate cap, while simultaneously indicating a higher percentage of contracts would not cover their costs at that rate cap. Given these concerns, we eliminate revenue as a cost allocator.

48. The contracts cost allocator has the lowest percentage of contracts with per-minute provider revenues greater than their per-minute allocated cost, 31.3%, a percentage that is about one third of the call minute cost allocator percentage, and that is inconsistent with actual commercial rates. In addition, the contracts cost allocator implied rate cap of $318.63 is disconnected from reality, being an order of magnitude higher than the highest per-minute revenues earned on any contract. For both these reasons, we conclude that contracts are an unreasonable cost allocator.

49. The facility data are poor with many providers failing to report the number of facilities under their contracts. In addition, a facility allocator has nearly the same problems as the contract allocator. Given these concerns, we eliminate facilities as a cost allocator.

50. We eliminate direct costs as an allocator due to lack of availability of data and concerns about the trustworthiness of the data. Because direct costs were not reported for certain contracts, we have to drop 775, or more than a quarter, of our observations. This artificially increases the amount of indirect costs allocated to the remaining contracts. In addition, many providers took markedly different approaches to recording direct costs, meaning the direct cost allocator treats different providers very differently. For example, GTL only reports bad debt as direct costs,[79] essentially rendering any allocation based on direct costs meaningless for an additional {[ ]} of all contracts, which cover nearly {[ ]} of incarcerated people. Further, the direct cost allocator allocates overhead costs such that 81.6% of the contracts have provider per-minute revenues from actual commercial rates that are greater than their per-minute allocated cost, a share lower than that of the per-minute allocator.[80] It also produces an implied rate cap of $2.417, an implausibly high cap given only two contracts currently earn per-minute revenues greater than this. Such a rate cap would unnecessarily allow substantial margins for most contracts. We

[77] For example, in general quantity sold increases as price falls. Starting from a price where no sales are made, revenues also increase as prices fall. However, at some point as prices fall, revenues also begin to fall: the revenue gain from new sales made at the lower price is smaller than the revenue loss incurred due to the lower price as applied to all purchases that would have been made at the higher price. In that circumstance, holding other things constant, a revenue cost allocator would allocate less cost to a contract with a greater sales volume, contrary to cost causation. This also means a revenue allocator might reinforce monopoly prices.

[78] *Supra* note 73; Free Press Comments at 4 (stating that "[i]n rejecting the use of proportional revenue in lieu of costs, the Commission correctly concluded 'that using revenues to allocate costs is [] circular' and 'a revenue-based allocator tends to "lock in" the historical pricing decisions of providers rather than drive rates toward actual costs'"). We do not need to determine whether "[a]llocating costs based on revenue is a commonly-used accounting tool in business." GTL Comments at 21. What is relevant here is that it is inappropriate for the purpose of setting rates for the reasons we give.

[79] *2020 ICS Notice*, 35 FCC Rcd at 8519, para. 95.

[80] The relative shares rather than absolute number of contracts must be compared because to develop the direct cost allocator requires dropping 876 observations for which no direct costs were reported.

eliminate this allocator based on these concerns.

51. We conclude that a call minute cost allocator remains the most reasonable choice for setting per-minute inmate calling services rate caps.[81] A call minute cost allocator has the highest percentage of the contracts with provider per-minute revenues from actual commercial rates that are greater than their per-minute allocated cost, thus representing the allocator that most closely hews to commercial cost recovery as seen in supply. Consistent with this, its implied rate cap appears unlikely to significantly overcompensate providers on an interim basis, while ensuring commercial viability for most contracts.[82]

52. *Subcontracts*. Some providers subcontract some or all of their contracts to a second provider.[83] This raises the question of how to deal with overhead costs in the case of subcontractors. We take an approach that may double count some overhead costs, as we cannot identify what fraction of the subcontractors' overhead costs are captured in what they charge the prime contractor.

53. The reporting of costs for shared contracts varies by provider. Where the prime contractor only reported the cost of supplying the broadband connection on its contracts, while the subcontractor reported the costs of servicing the facilities (installation, maintenance, etc.), we aggregated their costs. Because the reported costs represent the provision of different services, we do not believe these contracts have costs that were double counted. Other providers operating as prime contractors reported all costs (including subcontractors' costs). Where the prime contractor's associated subcontractor did not file reports on the subcontracts, we used the costs as reported by the prime contractor. However, where the associated subcontractors reported their costs, we removed their direct costs to avoid counting them twice.

54. The subcontracting filers were also the main inmate calling services suppliers on other contracts, raising the question of how to avoid double counting the allocation we made for overhead costs for their subcontracts. Leaning toward overstating costs, a shared contract is allocated the overhead of both providers that report the contract. The two observations were then aggregated into one and placed under the name of the firm that is the primary contract holder.

55. Inclusion of the overhead costs reported by the subcontractors overstates the cost recovering rate if, as is likely, they charge a markup over their direct costs. The markup would be part of the prime contractor's reported expenses, and to avoid double counting, we would need to remove the markup from our calculations. We cannot determine the amount of this markup, however. One approach would be to assume the markup matched our overhead cost allocation. In that case, the overhead costs of a subcontractor that are allocated to a subcontract would not be counted as they would be captured in the prime contractor's costs. However, if the markup exceeded this amount, we would still be double counting costs, while if the markup was less than this amount, then we would be understating costs. Table 5 shows the impact of this adjustment.

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[81] *See* Report and Order, *supra* Part III.C.3; *2020 ICS Notice*, 35 FCC Rcd at 8513, paras. 81-82; *see also* Public Interest Parties Brattle Report at 7.

[82] *Infra* Part F.

[83] In 2018, of CenturyLink's {[ ]} calling services contracts, we have data on {[ ]} which were subcontracted. CenturyLink has {[ ]} subcontracts with {[ ]} but {[ ]} did not report data for these contracts), and a {[ ]} contract has no reported subcontractor. If we were to remove all subcontractor overhead costs allocated to CenturyLink's contracts, the average per-minute cost of CenturyLink's contracts would decrease from {[ ]}. If we removed only half of the overhead, this would result in an average per-minute cost of {[ ]}. While Crown employed NCIC as a subcontractor for all of its {[ ]} contracts, the providers' data descriptions and justifications suggest there was no double-counting. *See* Description and Justification for Crown's Mandatory Data Collection Report, WC Docket No. 12-375, at 1 (filed Mar. 1, 2019) (stating that "All [inmate calling services] Direct Costs are strictly associated with the cost of the broadband facilities required to connect the inmate telephone system via IP to NCIC's Inmate Phone System.").

Table 5 – Cost Allocator Rate Cap, Implied Anomalous Contracts and Total Contracts Adjusted to Avoid Double Counting of Subcontractor Overheads

Cost Allocator	Implied Rate Cap (Mean per-minute allocated cost + 1 standard deviation)	Contracts with per-minute allocated cost greater than implied rate cap		Contracts with per minute provider revenues greater than their per-minute allocated cost		Total Contracts
		Number	Percent	Number	Percent	Number
Minutes	$0.149	194	6.7	2,540	87.6	2,900
Calls	$0.208	244	8.4	2,360	81.4	2,900
ADP	$11.114	28	1.0	2,157	76.9	2,804
Revenue	$0.334	250	8.6	2,304	79.4	2,900
Contracts	$318.635	23	0.8	915	31.6	2,900
Facilities	$303.684	20	0.7	1,009	34.8	2,900
Direct Costs	$2.417	12	0.6	1,735	81.6	2,125

56. Table 5, when compared with Table 4, shows the impact of assuming that the markup matches our overhead cost calculation on the implied rate caps of the seven possible cost allocators to be small. Specifically, for the per-minute cost allocator, the implied rate remains the same, the number of contracts with a per-minute allocated cost greater than the implied rate cap decreases from 196 to 194, and the percentage of contracts where the per-minute revenues are greater than per-minute allocated costs increases from 87.3% to 87.6%. This analysis of the adjusted data reinforces our finding above that a call minute cost allocator remains the most reasonable choice for setting per-minute inmate calling services rate caps.

57. *Rejecting Alternative Allocation Approaches Proposed in the Record*. With sufficient record evidence, we would simultaneously identify the unit of sale for the service to price and choose a cost allocator. Commenters explain with some merit that when considering allocators other than costs per minute, we should not rule out those allocators by considering only the implied cost-per-minute estimates those allocators produce.[84] Instead, we also should examine the costs and implied prices using the cost allocator as the unit of account. For example, if we allocate costs by average daily population, we should not divide these by minutes, producing a per-minute rate, to consider whether an average daily population allocator is sensible. Instead, we should consider the resulting distribution of costs per incarcerated person per day. The chief line of reasoning for focusing on cost expressed in the same unit of account as the allocator is that to do otherwise mathematically favors the chosen unit of account. A per-minute cost allocator can be expected to produce per-minute costs with less variance than, for example, an average daily population allocator with costs also expressed per minute. The reverse also holds. An average daily population allocator can be expected to produce per person costs with less variance than if costs are allocated per person and then expressed per minute.

58. We do not dispute the accuracy of this critique. However, the record provides no real

[84] *See* Securus FTI Report at 17 fig. 9 (showing a cost per allocation key comparison, using costs per minute, per average daily population, and per call as the units of account).

guidance as to how we would regulate prices using a call, average daily population, revenue, contract, facility cost, or direct cost allocator. For example, minimizing the variance of cost estimates for a call allocator would require estimating per-call costs, not per-minute costs. This would result in a cap on call prices of $11.10,[85] regardless of whether the call lasted a minute or an hour. Thus, a 30-second call, say, to reach voice mail, could be charged $11.10, the same charge as would apply for a 30-minute call or even an hour-long call. However, there is essentially no discussion of the implications of taking such an approach in the record. Additionally, a per call price of $11.10 does not result in a per-minute rate of less than our current prepaid cap of $0.21 until the 53rd minute of the call ($11.10 / 53 = $0.209 per minute). This alone is sufficient to rule out this approach.

59. Allocating costs using average daily population, and then applying a per-person cap set to the contract mean plus one standard deviation would result in a cap of $437.38 per person per year.[86] Operationalizing an average daily population allocator to minimize variance would require setting per-person per-period charges for two reasons. First, it would be inequitable to charge the many people who can spend only a few hours or days incarcerated the same as what is charged someone who spends much longer. Second, since average daily population is not the same as the number of people who are admitted to a facility in a year, an annual rate applied to people who are incarcerated for shorter periods would grossly over recover costs.[87] Thus, a cap would have to be applied for a relatively short time period. A daily cap would be equal to $1.20 (= $437.38 / 365.25) per person, and would apply day in and day out, whether the incarcerated person made any calls that day or not. This would make calling cheaper for those with high demand, but more expensive for those with low demand.[88] The record provides almost no support for any of this.

60. The record provides even less guidance as to how we would regulate prices if a revenue, contract, facility or direct cost allocator were used, but a per-minute rate cap was not set. Price cannot be set per dollar of revenue or per contract or per facility or per dollar of direct cost without specifying some unit relevant to an incarcerated person. The only approach with a solid basis in the record is a per-minute rate.

61. *Applying the Per-Minute Allocator*. We define our upper bound as the mean plus one standard deviation of per-minute contract costs, separately for prisons and larger jails. For prisons, the upper bound is $0.133, and for larger jails, the upper bound is $0.218. These estimates rely on providers' reported costs in the Second Mandatory Data Collection, with minimal corrections for anomalies[89] and indirect costs allocated among each providers' contracts using a per-minute cost allocator.[90] Including one standard deviation in the upper bound recognizes that providers' costs vary. We present the upper bound estimates in Table 6 below.

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[85] Across all contracts, the mean per-call rate is $2.754, with a standard deviation of $8.341, which sum to $11.095. A 15-minute call would cost $ 0.74 per minute.

[86] Across all contracts, the mean per-average daily population rate is $281.159, with a standard deviation of $156.220, which sum to $437.379.

[87] Consider a jail with an average daily population of 10. The $437.38 cap is intended to bring annual revenues of $4,373.80. But if the jail houses ten new people every two weeks, and each new group of ten also brings in annual revenues of $4,373.80, then the total revenues for the year will be 26 times that amount. The problem is avoided by charging each person a fraction of the $437.38 where that fraction equals the fraction of the year they are incarcerated.

[88] If incarcerated persons were allowed to opt out on a daily basis, the daily charge would have to be increased to ensure cost recovery for providers. For example, if everyone were to opt out for 50% of their days, then the rate would have to double. However, the record provides no basis that could be used to determine the appropriate rate if occasional opting out were allowed.

[89] *Supra* Part C.

[90] *Supra* para. 50.

Table 6 – Upper Bound Estimates

	Contracts	Mean	Std. Dev.	Mean+1 Std. Dev.	Mean+2 Std. Dev.
Larger Jails	182	0.100	0.118	0.218	0.336
Prisons	129	0.092	0.041	0.133	0.174

62. We find these upper bounds likely overstate providers' inmate calling services costs for several reasons. First, providers have some incentive to overstate their costs because higher costs would lead to higher interstate rate caps and higher profits. Second, a lack of specificity in the Instructions for the Second Mandatory Data Collection, particularly those related to how providers should account for indirect costs, permitted providers to inflate reported costs further. These factors shift costs upward, resulting in higher upper bounds than would result with more accurate data. These costs are further overstated because of our treatment of costs shared between contractors and subcontractors.[91]

F. Assessing and Ensuring the Commercial Viability Under the New Interim Interstate Provider-Related Rate Caps

63. In the Report and Order, we set new interim interstate provider-related rate caps of $0.12 per minute for prisons and $0.14 per minute for larger jails, respectively. To help evaluate the reasonableness of those caps, we consider the commercial viability of contracts under the selected interim rate caps compared to revenues reported by providers in the Second Mandatory Data Collection.

64. We first compare revenues and costs by provider in 2018, and then consider what would happen to revenues under interim provider-related rate caps of $0.12 per minute for prisons and $0.14 per minute for larger jails.[92] In the first instance, we take a straightforward, but simplistic approach using minutes of use as our allocator. We hold call minutes, automated payment revenues, and paper billing revenues constant and project that those new interim caps would allow providers to recover their allocated costs for 71% of their prison contracts and 99% of their contracts for larger jails. To test the robustness of this analysis, we then determine the percentage of prison, and separately larger jail, contracts for which the new interim caps would allow providers to recover the revenues they earned in 2018. We find the percentages to be 74% for prisons and 65% for larger jails. Our examination of the remaining contracts shows that they, on average, have lower per-minute costs than the contracts under which providers would recover their 2018 revenues, and thus all of the contracts are also likely to be viable under our new interim rate caps. Lastly, recognizing that revenues in 2018 represent an upper bound on costs, and allowing call volumes to expand because our new interim caps will lower prices to incarcerated persons (leading to more call minutes), we find that 77% of prison and 73% of larger jail contracts are projected to recover costs consistent with the revenues earned on each contract in 2018. Each of these estimates, except for our estimate that all contracts will be viable under the new interim rate caps, are conservative.

65. *Comparing Reported Revenues and Costs*. Table 7 shows the following for each provider and for the industry as a whole: inmate calling revenues, which include amounts collected to pay site commissions; automated payment revenues; paper billing and account revenues; the sum of the preceding three types of revenues; inmate calling services costs, which for this purpose include site commissions; and profits defined as the difference between those summed revenues and inmate calling costs. Thus, profit nets out site commissions. Again, only {[ ]} fails to recover its reported costs, incurring a surprisingly large {[ ]} loss of {[ ]} million on its inmate calling services operations, even when its revenues from ancillary service charges are included in its revenue total. That {[ ]} reports losses despite being the winning bidder on {[ ]} contracts, the industry's largest provider by most measures, and one of the industry's most sophisticated providers, suggests {[ ]} revenues

[91] *Supra* paras. 52-56 (discussing the treatment of subcontracts).

[92] *See* Report and Order, *supra* Part III.C.3 (explaining our choice of interim interstate rate caps).

may be a more accurate estimate of its costs than are its reported costs.

Table 7 – Inmate Calling Services Revenues and Costs

Inclusive of Site Commissions by Provider in 2018 (in $ thousands)

Provider	ICS Revenues	APF Revenues	PBF Revenues	Total Revenues	Total Costs	Profits
ATN	{[					}
CenturyLink	{[					]}
Correct	{[					]}
CPC	{[					]}
Crown	{[					]}
GTL	{[					]}
ICSolutions	{[					]}
Legacy	{[					]}
NCIC	{[					]}
Pay Tel	{[					]}
Prodigy	{[					]}
Securus	{[					]}
Industry	**1,093,192**	**115,757**	**410**	**1,209,359**	**1,181,611**	**27,748**

Notes: "APF" means automated payment fee, and "PBF" means paper billing fee.

66. Table 8 shows the following for each provider, and across all providers, split by prisons and larger jails: number of contracts; contract shares; the contract mean for total revenues per paid minute (that is, the mean for the sum of inmate calling revenues, including amounts collected to pay site commissions, plus automated payment revenues and paper billing revenues, all divided by paid minutes for each of the 2,900 contracts); the contract mean of costs per paid minute, again including site commissions; the contract difference per paid minute between the preceding (profit), which nets out site commissions; and the contract mean of direct costs per paid minute, excluding site commissions. In 2018, for prisons, both {[ ]} and {[ ]} on average incurred losses (i.e., had per-minute costs exceeding their per-minute revenues); and, for larger jails, only {[ ]} on average incurred such losses. This may be due, in part, to these providers bidding overly aggressively for some contracts and to our cost allocation approach being unable to reliably allocate indirect costs for as many as 12.7% of contracts, due to limitations of the reported cost data.[93] Additionally, at least three of the direct cost per-minute entries are misleading: two carriers, {[ ]} and {[ ]}, report zero direct costs, while one, GTL only reports bad debt as a direct cost. These three providers almost certainly have substantially larger direct costs and hence substantially larger direct costs per minute.

[93] *Supra* Part E, tbl. 4, second-to-last column, top row (12.7% = 100% - 87.3%).

Table 8 – Inmate Calling Services Per-Minute Revenues and Costs Inclusive of Site Commissions by Provider and Facility Type in 2018

Firm	Type	# of Contracts	Percent Share of Contracts	Average Per-Minute Revenues ($)	Average Per-Minute Costs ($)	Average Per-Minute Profits ($)	Average Per-Minute Direct Costs ($)
ATN	Larger Jail	{[					]}
CenturyLink	Larger Jail	{[					]}
Correct	Larger Jail	{[					]}
CPC	Larger Jail	{[					]}
GTL	Larger Jail	{[					]}
ICSolutions	Larger Jail	{[					]}
Legacy	Larger Jail	{[					]}
NCIC	Larger Jail	{[					]}
Pay Tel	Larger Jail	{[					]}
Securus	Larger Jail	{[					]}
Industry	Larger Jail	**182**	**100**	**0.247**	**0.218**	**0.029**	**0.026**
CenturyLink	Prison	{[					]}
GTL	Prison	{[					]}
ICSolutions	Prison	{[					]}
Legacy	Prison	{[					]}
NCIC	Prison	{[					]}
Securus	Prison	{[					]}
Industry	**Prison**	**129**	**100**	**0.148**	**0.137**	**0.011**	**0.010**

Notes: Direct costs are costs, excluding site commissions, recorded at the contract level in the Second Mandatory Data Collection responses. Averages are across contracts.

67. *Recovery of Allocated Costs Under the New Interim Provider-Related Rate Caps*. We estimate the inmate calling services revenues that providers would have earned in 2018 under our new interim caps, assuming no change in minute volumes. Table 9 presents the number and percentage of contracts for which these estimated inmate calling services revenues would exceed allocated costs or would exceed reported direct costs, first excluding automated payment and paper billing revenues, and second including these revenues (referred to as ancillary revenues in the table).[94] On this basis, we find that providers would recover their allocated costs under 71% of prison contracts. All of the other {[ ]} prison contracts are contracts {[ ]} held in 2018. Based on its reported costs, {[ ]} would incur per-minute losses ranging from {[ ]} to {[ ]} with a median loss of {[ ]} per minute.[95] Providers would recover their allocated costs under 99% of larger jail contracts. The other 1% (or two contracts) were contracts {[ ]} and {[ ]} held in 2018. Based on their reported costs, these providers would incur per-minute losses of {[ ]} and {[ ]}, respectively.[96] The 71% and 99%

[94] The number of {[ ]} and GTL contracts that cover direct costs as reported in the third-to-last and last columns are overstated because {[ ]} did not record any direct costs, and GTL only recorded bad debt.

[95] If automated payment and paper billing fees are excluded, {[ ]} contracts would have per-minute costs above the $0.12 interim cap, ranging from {[ ]} to {[ ]}. Of these contracts, all held by {[ ]}, {[ ]} have per-minute revenues of less than $0.12.

[96] If automated payment and paper billing fees are excluded, {[ ]} contracts would have per-minute costs above the $0.14 interim cap, ranging from {[ ]} to {[ ]}. Of these {[} contracts, {[ ]} were allocated per-

(continued….)

figures are likely underestimates for several reasons: many providers' reported costs may be overstated; the full range of ancillary fees that contribute toward recovering inmate calling services costs may not be reported, while some costs associated with these may be included in inmate calling services costs; some contracts where subcontracting occurs likely double-count costs; and minutes of use may over allocate costs to certain contracts.[97]

Table 9 – Number and Percentage of Contracts for Which Specified Revenue Estimates Cover Specified Costs

Firm	Facility Type	Contracts	Allocated Costs Covered by ICS Revenues Without Ancillary Revenues		Direct Costs Covered by ICS Revenues Without Ancillary Revenues		Allocated Costs Covered by ICS Revenues and Ancillary Revenues		Direct Costs Covered by ICS Revenues and Ancillary Revenues	
		#	#	%	#	%	#	%	#	%
ATN	Larger Jail	{[								]}
CenturyLink	Larger Jail	{[								]}
Correct	Larger Jail	{[								]}
CPC	Larger Jail	{[								]}
GTL	Larger Jail	{[								]}
ICSolutions	Larger Jail	{[								]}
Legacy	Larger Jail	{[								]}
NCIC	Larger Jail	{[								]}
Pay Tel	Larger Jail	{[								]}
Securus	Larger Jail	{[								]}
Industry	Larger Jail	182	167	92	179	98	180	99	182	100
CenturyLink	Prison	{[								]}
GTL	Prison	{[								]}
ICSolutions	Prison	{[								]}
Legacy	Prison	{[								]}
NCIC	Prison	{[								]}
Securus	Prison	{[								]}
Industry	Prison	129	63	49	129	100	91	71	129	100

Notes: In this table, allocated costs are the costs allocated to a contract using the per-minute cost allocator, direct costs are costs recorded at the contract level in the Second Mandatory Data Collection responses, and ancillary revenues are revenues from automated payment and paper billing fees.

68. *Contracts with Per-Minute Revenues Under the New Interim Caps*. The preceding analysis relied on our cost allocation to conservatively determine the fraction of contracts that are viable under our new interim interstate provider-related rate caps. However, the cost allocation approach in some instances is not perfect. For example, the cost allocation approach suggests that 12.7% of current

(Continued from previous page)
minute costs below {[ ]}. All {[ ]} contracts with per-minute costs above {[ ]} reported revenues below their allocated costs.

[97] Revenues from automated payment fees and paper billing fees alone covered the costs of five, or 3%, of larger jail contracts in 2018. The importance of these revenues is shown in Table 9 when comparing Total Costs Covered by Project Revenues With and Without Ancillary Revenues, as the overall industry costs covered increases from 92% (without) to 99% (with).

contracts are loss making, implausibly implying providers in all those cases made mistaken bids.[98] An alternative approach to determining the fraction of our contracts that are viable under our new interim caps is to examine the fraction of contracts that would recover at least the same revenues as they would in 2018. We find 74% of prison contracts and 65% of larger jail contracts satisfy this condition. And, when we examine the remaining contracts, we find they are on average likely to have lower costs than the contracts that would recover at least the same revenues, and thus are also likely to be viable. Separately, comparing revenues of the remaining contracts to allocated costs suggests 81% of prison and 96% of larger jail contracts cover costs.

69. *Prison Contracts with Revenues Under the New Interim Caps*. Revenue analysis shows that the bulk of prisons likely would be commercially viable at rates capped at $0.12 per minute (i.e., the contracts have per-minute costs less than the cap after allowing for a possible $0.02 per minute site commission allowance). In 2018, approximately 74% of prisons had per-minute revenues net of commissions of less than $0.12 per minute (hereinafter "low per-minute revenue prisons").[99] Our new interim caps should not impact these contracts. Further, these contracts, with rare exceptions, should be commercially viable. If that were not the case, providers would not have voluntarily accepted such contracts. That result is all the more probable since providers may supplement their call revenues through automated payment and paper billing fees not accounted for in capping rates received by providers at $0.12 per minute.[100] The remaining 26% of prisons have revenues, net of commissions, that are greater than or equal to $0.12 per minute (hereinafter "high per-minute revenue prisons"). Thus, our new interim caps will potentially affect cost recovery for these prisons.

70. Table 10 compares high and low per-minute revenue prison contracts. For both sets of prisons contracts, the table gives the mean value for seven contract characteristics, as well the p-value from a two-sided difference in means statistical test—with a lower p-value indicating a lower likelihood that the difference in the two means is due to random error.[101] Apart from the variables Total Revenue Per Minute and Revenue Minus Commission Per Minute, each of the variables included is likely to be related to a contract's costs. The difference in means between the two groups for the five plausible cost-determining variables are not statistically different at the 95% confidence level, except for minutes, which should cause the low per-minute revenue contracts to have higher, not lower, costs. The similarities along cost-determinative characteristics suggests that to the extent that a $0.12 per-minute rate cap is viable for low per-minute revenue prisons, it should also be viable for high per-minute revenue prisons.[102]

Table 10 – Mean Characteristics for Prison Contracts by Revenue Type

[98] *Supra* note 93.

[99] Staff analysis of Second Mandatory Data Collection.

[100] While our revenue analysis includes revenues from automated payment and paper billing fees, our rate caps only apply to calling fees. Thus, providers can earn additional revenues through automated payment and paper billing fees.

[101] For example, a p-value of 0.05 says that if the two means were the result of samples from two identical populations, that outcome would only be observed in 5% of cases. David Jean Biau, Brigitte M. Jolles, & Raphaël Porcher, *P Value and the Theory of Hypothesis Testing: An Explanation for New Researchers*, 468 Clinical Othopaedics and Related Research 885-92 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2816758/?report=classic.

[102] Commissions per minute may be a proxy for differences in contract regulatory environments,—for example, correctional authorities that seek high site commissions may have other common characteristics that influence costs, including other services they require under an inmate calling services contract. We place less weight on the facility data given that the providers acknowledged they had limited abilities to accurately report such data. Revenues per minute and revenues net of commission per minute are statistically higher for the high per-minute revenue contracts since we defined the groups by whether they had lower or higher per-minute revenues. In any case, revenues do not, independent of minutes, cause costs, and we control for minutes.

	High Per-Minute Revenue Contracts	Low Per-Minute Revenue Contracts	P-Value for Two-Sided Difference in Means Test
Total Revenue Per Minute	$ 0.24	$ 0.12	0.00
Commission Per Minute	$ 0.04	$ 0.05	0.54
Revenue Minus Commission Per Minute	$ 0.20	$ 0.07	0.00
Facilities Per Contract	1.91	5.39	0.21
Average Daily Population	6,665	12,018	0.20
Contract Includes Urban Facilities	0.32	0.49	0.09
Minutes	15,482,499	41,681,215	0.05
Observations	34	95	

71. An alternative method to analyze whether a $0.12 per minute cap for prisons is commercially viable is to consider the per-minute cost allocation associated with the high per-minute revenue prison contracts. As before, 74% of prisons could be expected to recover costs since their revenues are already below $0.12. Of the remaining 26%, which we labeled high per-minute revenue prisons, 27% have allocated per-minute costs below $0.12.[103] This suggests that 81% (= 74% + (26% * 27%)) of all prison contracts could cover their costs with a rate of $0.12. To the extent the providers' unaudited costs are overstated,[104] or that unit costs will fall as reduced rates expand call volumes, this number would be higher.

72. *Contracts for Larger Jails with Revenues Under the New Interim Caps*. Revenue analysis shows the bulk of larger jail contracts are likely to have per-minute costs less than our interim cap of $0.14 per minute and would therefore be commercially viable at that capped rate. In 2018, approximately 65% of contracts for larger jails had per-minute revenues net of commissions of less than $0.14 per minute (hereinafter "low per-minute revenue jails").[105] Our new interim caps should not impact these contracts. Further, these contracts, with rare exceptions, should be commercially viable. If that were not the case, providers would not have voluntarily accepted such contracts. That result is all the more probable since providers may supplement their call revenues through automated payment and paper billing fees not accounted for in capping rates at $0.14 per minute. The remaining 35% of larger jails have revenues, net of commissions, which are greater than or equal to $0.14 per minute (hereinafter "high per-minute revenue jails").[106]

73. We find that cost-determinative characteristics for high per-minute revenue jails are similar as those for low per-minute revenue jails. This implies a $0.14 per minute rate cap would ensure the vast majority of contracts for larger jails are viable. Table 11 compares cost-determinative characteristics between high and low per-minute contracts. A lower p-value indicates a lower likelihood that the difference in the two means is due to random error. The difference in means between the two groups for the listed plausible cost-determinative variables are not statistically different at the 95%

[103] Of all the high per-minute revenue prisons, nine contracts had costs less than $0.12 per minute and 25 contracts had costs greater than or equal to $0.12 per minute.

[104] *Supra* para. 61.

[105] Staff analysis of Second Mandatory Data Collection.

[106] Staff analysis of Second Mandatory Data Collection.

confidence level.

Table 11 – Mean Characteristics for Larger Jail Contracts by Revenue Type

	High Per-Minute Revenue Contract	Low Per-Minute Revenue Contract	P-Value for Two-Sided Difference in Means Test
Total Revenue Per Minute	$ 0.34	$ 0.19	0.00
Commission Per Minute	$ 0.13	$ 0.11	0.26
Revenue Minus Commission Per Minute	$ 0.22	$ 0.08	0.00
Facilities Per Contract	1.88	1.85	0.94
Average Daily Population	2,215	2,447	0.60
Contract Includes Urban Facilities	0.84	0.85	0.95
Minutes	7,883,827	10,895,979	0.06
Observations	64	118	

74. An alternative method to analyze whether a $0.14 per minute cap for larger jails is commercially viable is to consider the per-minute cost allocation associated with the high per-minute revenue contracts. Doing this suggests at least 96% of contracts for larger jails would likely recover their costs at a rate cap of $0.14 per minute. As before, 65% of contracts for low per-minute revenue jails could be expected to recover costs since their revenues are already below $0.14. Of the remaining 35%, 89% have allocated per-minute costs less than $0.14.[107] This suggests that 96% (= 65% + (35% * 89%)) of all larger jail contracts could cover their costs with a rate of $0.14. Again, to the extent the providers' unaudited costs are overstated, or that unit costs will fall as reduced rates expand call volumes, this number would be higher. For example, 47% of the contracts for low per-minute revenue jails have allocated costs in excess of their revenues per minute, indicating that allocated costs are an imperfect measure.

75. *Contract Viability Allowing for Call Volume Adjustment.* Our previous revenue analysis showed that 74% of prison and 65% of larger jail contracts are already operating under our new interim caps according to reported data.[108] Since these contracts were likely to have been commercially viable prior to this Report and Order, they should still be so after our new interim caps take effect. Further, some of the remaining contracts would still be commercially viable under the new interim rate caps, because lower prices will lead incarcerated persons to increase time spent on the telephone, which in this industry will reduce per-minute costs. We conservatively estimate that when the increase in demand due to lower end-user prices is accounted for, 77% of prison and 73% of larger jail contracts will earn per-minute revenues that cover their implied costs. These estimates take no account of the various factors discussed above that imply an even higher percentage of contracts would be commercially viable.[109]

[107] Of all the high per-minute revenue jails, 57 had costs less than $0.14 per minute, and 7 had costs greater than or equal to $0.14 per minute.

[108] *See supra* paras. 69 (prisons), 72 (larger jails).

[109] For example, these numbers are understated to the extent that: (i) the providers' revenues are an overstatement of their costs; (ii) our elasticity estimates are understated; and (iii) estimates of the cost of an additional minute are

(continued….)

76. To obtain these estimates, we use inmate calling service revenues plus revenues for automated payment and paper billing fees net of site commissions divided by paid minutes as a proxy for contract rates. We then assume that each prison and larger jail contract with rates as just defined above our new caps recovers, through those rates, its direct costs and makes any necessary contribution to overheads to account for costs associated with the provision of inmate calling services, but earns no more than that. This is conservative, as providers could earn more than that, but are unlikely to systematically earn less than that, since that would imply they are overall making losses. However, even making this "break-even" assumption, our new interim caps could still allow providers to recover their costs under these contracts. This is because our new caps will lead to increased inmate calling, allowing providers to spread relatively high fixed costs over more minutes.[110]

77. For example, consider a hypothetical larger jail inmate calling services contract, voluntarily entered into, that charges incarcerated people $0.25 per minute with a $0.10 per minute site commission. Assume further that this results in 1,000 calling minutes. The provider would earn $150 (= ($0.25 - $0.10) * 1,000) in revenue and, given the contract's voluntary nature, the contract would presumably be commercially viable. Now suppose the provider lowered rates to be consistent with our new interim caps, charging $0.16, with the provider receiving $0.14 and with $0.02 for site commissions. Suppose further, at the lower price of $0.16 per minute, incarcerated people increase their calling minutes from 1,000 to 1,132 total minutes.[111] This would generate revenues for the provider of $158.48 (= 1,132 * $0.14) compared with the revenues of $150 earned at a $0.25 per minute rate with $0.10 per minute in site commission payments. If, at the same time, each additional minute costs the provider $0.01, and the provider was originally breaking even, then the provider's costs would rise from $150 to $151.32 (= $150 + (132 * $0.01)), implying per-minute costs of approximately $0.134 (= $151.32 / 1,132), less than the original per minute costs of $0.15 (= $150 / 1,000). Thus, the provider would earn $7.16 (= $158.48 - $151.32) more than in the original situation.[112]

78. In connection with the preceding example, we estimated the call-minute volumes that would result for each contract that in 2018 had per-minute revenues greater than those allowed under our

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overstated. *See, e.g.*, *supra* para. 61. Relatedly, GTL also argues that any reduced rates faced by incarcerated people as a result of the Commission's proposed caps would not lead to increased call volume. *See* Letter from Chérie R. Kiser, Counsel for GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach., Paul E. Godek, Economists Incorporated, Second Supplemental Report in Support of Comments of Global Tel*Link Corporation Regarding the FCC's Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking at 8-9 (filed Apr. 26, 2021). We are unconvinced, and the record suggests otherwise. GTL has itself refuted this position in other submissions. *See* Letter from Chérie R. Kiser, Counsel for GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Apr. 19, 2021) (explaining how much call volumes increased when calls were provided for free). While incarceration authorities sometimes place tight restrictions on call frequency and length, there is ample evidence in the record that lower prices result in greater call minutes, because high prices do more to discourage calling than these restrictions do. *See supra* para. 201 n.595-99 (collecting examples of providers lowering their rates and experiencing increases in call volumes). Further, economic theory echoes the record evidence, and predicts that providers will increase output when a price cap lowers their rates as long as the additional revenue exceeds any corresponding increase in costs. Here, not only do current per-minute rates exceed per-minute costs, but they exceed the per-minute costs of supplying additional minutes by a wide margin; thus, a rational provider will find it profitable to increase its output.

[110] Inmate calling services have high fixed costs (e.g., installation of secure telephone equipment), and low additional costs for each minute of inmate telephone use. *See, e.g.*, Public Interest Parties Brattle Reply Report at 5 (stating that "[t]he data reflect that a large part of the expenses are overhead and fixed costs that have a weak connection to facility size").

[111] This assumes a demand elasticity of 0.3, as we provide in the following paragraph. Thus, a 44% (= 0.25 - 0.16 / (0.25 + 0.16) / 2) decline in price leads to 13.2% (= 44% * 0.3) increase in call minutes.

[112] If supply for this contract were competitive, then the provider winning the bid for this contract would require a price of just below $0.154 per minute (= $0.02 + ($151.32 / 1,132)).

new caps, assuming a demand elasticity of 0.3.[113] Using those projected call volumes, and assuming a generous additional or incremental per-minute cost of $0.01,[114] we found 77% of prison and 73% of larger jail contracts would recover as much as they had at the lower 2018 volumes plus enough to cover their additional per-minute costs. Thus, a material majority of contracts would be able to recover their costs under our new interim rate caps. Given that the estimates presented here are based on the upper bound of costs for a contract, that we leaned toward understating demand responsiveness, the true share of contracts that are cost covering is likely larger.

[113] This is the low end of the inmate calling services elasticities found in our record. *See* Report and Order, *supra* Part III.F.

[114] Many direct costs are independent of the need to carry additional call minutes. For example, the cost of each additional telephone installed at a facility would be a direct cost of the facility and is independent of how many call minutes originate from that telephone. Thus, the cost of $0.01 per additional minute assumed here is therefore a very conservative estimate of the cost of an additional call minute. For example, {[ ]} operated two contracts at rates of $0.009 and $0.0119—suggesting that under these rates the provider can cover the marginal cost of a minute of calling as well as cover their fixed costs. Worth Rises Comments at 12. Similarly, six contracts in the Second Mandatory Data Collection report providers earning per-minute rates net of site commissions of less than $0.01, including the {[ ]} contract for the {[ ]}. Indeed, the cost of an additional minute may be *de minimis*, with the cost of both originating and terminating a call being near zero. On termination costs, *see 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, 17908, para. 746 & n.1309 (2011), *pets. for review denied sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). On origination costs, *see 8YY Access Charge Reform*, WC Docket No. 18-156, Report and Order, 35 FCC Rcd 11594, 11640, para. 103 (2020) ("[B]ill-and-keep [for 8YY originating traffic] will move prices closer to being cost-reflective.").

APPENDIX F

Sensitivity Testing: Additional Statistical Analysis of Cost Data

1. We analyze inmate calling services providers' responses to the Second Mandatory Data Collection to determine whether certain characteristics of inmate calling services contracts can be shown to have a meaningful association with contract costs on a per-minute basis, as reported by the providers.[1] The Commission previously performed this analysis in Appendix F of the *2020 ICS Notice*.[2] That analysis found that provider identity and the state a facility is located in were by far the most important predictors of a contract's per-minute costs. It also found that other facility and contract variables, such as the average daily population of the facilities covered by the contract, the type of those facilities (prison or jail), and the rurality of the facilities, had virtually no additional predictive power. In comments submitted to the Commission, the finding that per-minute costs were not significantly impacted by facility size and type was criticized.[3] This Appendix repeats the analysis from Appendix F of the *2020 ICS Notice* using updated data.

2. To perform our analysis, we use a recognized statistical method named least absolute shrinkage and selection operator (Lasso) to identify which, if any, variables serve as accurate predictors of per-minute contract costs for calling services.[4] This method identifies predictors of an outcome variable—in our case the logarithm of costs per minute—by trading off goodness of fit against the complexity of the model, as measured by the number of predictors. As used here, the Lasso model seeks to identify factors that are predictive of an inmate calling service provider's costs per minute, balancing a number of competing considerations. Lasso is especially useful in situations like this where many variables, and interactions among those variables, can potentially predict outcomes.[5] In our Lasso model, we find the main predictors of costs per minute to be provider identity and the state where the contract's facilities are located. We also find that facility type (whether the facility is a prison or jail) is a predictor of costs per minute, although not as strong as provider identity and state. Finally, we find that a wide range of other variables have less, or essentially no, predictive power.

3. We choose the inmate calling services contract as the unit of observation for our analysis for two reasons. First, providers bid for contracts rather than separately bidding for each individual facility, which indicates that commercial decisions are made at the contract level. Second, many contracts

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[1] In this Appendix, we frequently refer to inmate calling services providers by short names or acronyms. These providers are: ATN, Inc. (ATN); CenturyLink Public Communications, Inc. (CenturyLink); Correct Solutions, LLC (Correct); Combined Public Communications (CPC); Crown Correctional Telephone, Inc. (Crown); Global Tel*Link Corporation (GTL); ICSolutions, LLC (ICSolutions); Legacy Long Distance International, Inc. (Legacy); NCIC Inmate Communications (NCIC); Pay Tel Communications, Inc. (Pay Tel); Prodigy Solutions, Inc. (Prodigy); and Securus Technologies, LLC (Securus).

[2] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking, 35 FCC Rcd 8485, 8566, Appx. F (2020) (*2020 ICS Order on Remand* or *August 2020 ICS Notice or 2020 ICS Notice*).

[3] *See, e.g.*, National Sheriffs' Association Comments at 7; Pay Tel Communications, Inc. Comments at 15 (Pay Tel Comments); Securus Comments Attach. D, FTI Consulting, Inc., Declaration of Robert O. Fisher, Brian F. Pitkin & Steven E. Turner at 20, 23 (Securus FTI Report); National Sheriffs' Association Reply at 2-3.

[4] *See* Robert Tibshirani, *Regression Shrinkage and Selection via the Lasso*, 58 J. Royal Stat. Soc'y, Series B (methodological) 267 (1996), https://www.jstor.org/stable/2346178.

[5] Given that we are interested in determining the potential cost effects of many categorical variables as well as their interactions with one another, the overall number of potential variables is extremely large, and estimating the effects of all variables on costs via more traditional methods (such as linear regression) is infeasible. *See* Bruce E. Hansen, Econometrics 911 (March 11, 2021) (unpublished manuscript), https://www.ssc.wisc.edu/~bhansen/econometrics/Econometrics.pdf (discussing in Chapter 29, Section 3, how Lasso models can address the problem of high dimensional regression, for which other more traditional methods are inadequate).

cover more than one facility, but several providers did not report data on those facilities separately, which precludes any meaningful analysis at the facility level.[6] We focus on the logarithm of costs per minute as the dependent variable—*i.e.*, we seek to evaluate what factors are predictive of an inmate calling service provider's costs per minute. The contract variables that we consider in our analysis are as follows:

- The identity of the inmate calling services provider;
- The state(s) in which the correctional facilities covered by a contract are located;
- The Census division(s) and region(s) in which the facilities covered by a contract are located;
- The type of facility (prison or jail);
- An indicator for joint contracts (i.e., contracts for which an inmate calling services provider subcontracts with another inmate calling services provider);
- Contract average daily population;
- Contract average daily population bins (average daily population ≤ 25; average daily population ≤ 50; average daily population ≤ 100; average daily population ≤ 250; average daily population ≤ 500; average daily population ≤ 1,000; average daily population ≤ 5,000);
- Rurality of the facilities covered by the contract (rural, if all the facilities covered by the contract are located in a census block designated by the Bureau of Census as rural; urban, if all facilities are located in a census block not designated as rural; or mixed, if the contract covers facilities in census blocks designated as both rural and not rural); and
- Various combinations (i.e., multiplicative interactions) among the above variables.

4. *Lasso and Costs per Minute*. The Lasso results indicate economically significant differences in costs per minute across different providers and states. The provider identity and state variables retained by Lasso as predictors of cost explain approximately 67% of the variation in costs across contracts. Provider identity is an especially meaningful predictor of costs; a Lasso model with it alone explains over 60% of the variation in costs across contracts. The differences in costs measured by the provider identity variable may reflect systematic differences in costs across providers, but are more likely indicative of systematic differences in the way costs are calculated and reported to us by providers.[7] The differences in cost measured by the state variables may reflect statewide differences in costs arising from different regulatory frameworks or other state-specific factors. Lasso results also indicate differences in costs per minute by facility type (prison or jail), rurality, and region. However, these variables are not economically significant: when retained as predictors by Lasso, these variables explain less than 1% of the variation in costs that are explained by the provider identity and state variables alone.

5. A group of contracts representing a significant fraction—about 11%—of observations contained insufficient information to ascertain the rurality of facilities included in those contracts.[8] As a result, in our baseline model that includes all contracts, we interpret the effect of the rurality variables as differences from the contracts for which we do not have rurality information. To ensure that this is a sound approach, we use a sample selection model to confirm that the factors that may be associated with a contract not having sufficient rurality information are not significantly correlated with costs.[9] We also

[6] *See* Appx. E, *supra* Part C (discussing reasons for making contract level the unit of analysis). As in Appendix E, jails with average daily populations of less than 1,000 are included in our totals to ensure that our sensitivity analysis is comprehensive among our total dataset of 2,900 contracts. But, because we do not address jails with average daily populations of less than 1.000 in the Report and Order for purposes of arriving at revised interim rate caps based on the Second Mandatory Data Collection, we do not include any results based on such jails in this Appendix.

[7] *See* Report and Order, *supra* Part III.C.3 (discussing differences in provider interpretation of the cost reporting instructions, and variations in the cost allocation methodologies used).

[8] *See* Appx. E, *supra* Part C (discussing the geocoding process).

[9] We estimate a Heckman sample selection model where selection is for observations that contain rurality information. The dependent variable and controls in this model were chosen to be the same as the ones in Lasso. We find that the coefficient on the inverse Mills ratio is not significant at reasonable levels of significance (p-value

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conduct our analysis using only the contracts that contain rurality information and obtain Lasso results that are similar to the results we obtain with our baseline model.

6. We also explore the differences in the costs reported by the top three providers by size using a double selection Lasso model.[10] We focus on GTL, ICSolutions, and Securus because these firms' costs explain the bulk of industry costs. These providers supply 58% of all inmate calling services contracts, and cover approximately 78% of all incarcerated people as measured by average daily population.[11] These three firms are also more suitable for making cross-firm comparisons because they do not subcontract the provision of inmate calling services to a third party, and because they are the largest three of the five providers that serve prisons, covering 111—or 86%—of all prison contracts.[12] The results illustrate how implausible GTL's reported costs are relative to those of its nearest peers, showing GTL's costs to be —all other things being equal—{[ ]} greater than the costs reported by Securus and {[ ]} greater than the costs reported by ICSolutions. These cost differences are statistically significant at confidence levels greater than 99%.[13]

7. The results of the double selection Lasso model also indicate that—all other things being equal—the costs of providing inmate calling services are approximately 22% greater in jails than in prisons; this difference is statistically significant at confidence levels greater than 99%.[14]

8. The Lasso model allows us to consider how a wide array of variables affect a contract's per-minute cost. However, the limitations of the available data may cause the Lasso model to understate the impact of certain variables. For example, because reported costs vary greatly across providers, Lasso may be under-ascribing importance to other variables such as size and type of facility. Commenters criticized the Commission's analysis of reported costs in the *2020 ICS Notice*.[15] In addition to critiquing the shortcomings of the data used, commenters disagreed with the notion that costs were similar across facility type and size. Some commenters argued that prisons should be expected to have lower per-unit costs than jails, and that larger jails should have lower per-unit costs than jails with average daily

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is 0.21), allaying potential concerns about sample selectivity. *See generally* James J. Heckman, *Sample Selection Bias as a Specification Error*, 47 Econometrica 153 (1979), https://www.jstor.org/stable/1912352.

[10] *See generally* Alexandre Belloni, Victor Chernozhukov, & Christian Hansen, *Inference on Treatment Effects After Selection Among High-Dimensional Controls*, 81 Rev. Econ. Stud. 608 (2014), https://www.jstor.org/stable/43551575. Double selection Lasso is a method of statistical inference that selects control variables in two stages: the first stage runs a Lasso regressing the dependent variable on a set of common controls; the second stage regresses the explanatory variables of interest on the same set of common controls. A simple Lasso only selects predictors, without the possibility of statistical inference afforded by double selection.

[11] *See* Appx. E, *supra* Part D, tbl. 1 (staff calculations of Second Mandatory Data Collection). These shares may in fact represent an understatement of their industry share because, for example, CenturyLink, a large provider when judged by average daily population, subcontracts almost all of its contracts to ICSolutions, and, in the case of the large Texas Department of Corrections contract, to Securus.

[12] Of the remaining prison providers, CenturyLink supplies {[ ]} prison contracts, Legacy supplies {[ ]}, and NCIC supplies {[ ]}.

[13] When the sample is restricted to the contracts with no missing rurality information, GTL's costs are—all other things being equal—approximately {[ ]} greater than the costs reported by Securus, and {[ ]} greater than the costs reported by ICSolutions.

[14] For the sample restricted to contracts with complete rurality information, this estimate is approximately 21% and significant at the 99% level of confidence.

[15] *See, e.g.*, GTL Comments Attach., Paul E. Godek, Economists Incorporated, Report in Support of Comments of GTL Regarding the FCC's Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking at 14-15.

populations less than 1,000.[16] Given the concerns that differences in provider data filing practices impede the Lasso's ability to capture the significance of other variables, as well as the economic rationale for the presence of economies of scale in this market, we find these arguments to be persuasive.[17] We perform additional analyses to investigate differences in cross-provider costs in Appendix G. The approach we use there attempts to address provider-level cost differences that obscure the relationship between variables such as facility size and a contract's cost.

[16] *See, e.g.*, National Sheriffs' Association Comments at 7; Pay Tel Comments at 15; Securus FTI Report at 20, 23; National Sheriffs' Association Reply at 2-3.

[17] *See* Report and Order, *supra* Part III.C.3; Securus Comments Attach. B, Robert O. Fisher et al., FTI Consulting, Inc., Inmate Calling Services Cost Analysis for Securus at 21 (recognizing that Securus benefits from economies of scale not available to smaller providers).

APPENDIX G

Lower Bound Analysis

1. Given deficiencies of the cost data submitted by providers, the removal of invalid, incomplete, and otherwise anomalous contracts performed in Appendix E is a necessary step towards determining accurate per-minute costs.[1] Using those data, we then develop the upper bounds of the zones of reasonableness for the interim interstate provider-related rate caps based on a mean plus one standard deviation approach.[2] However, the upper bounds overstate true per-minute costs by substantial margins. In addition to generally applicable grounds for overstatement,[3] each bound's construction includes a number of contracts that we identify as statistical outliers, and includes all GTL contract costs as reported, despite abundant indicia that GTL's reported costs are both unreliable and significantly higher than its true costs.[4]

2. In the following analysis we make further adjustments to the submitted cost data using generally accepted statistical and econometric techniques. We begin by performing an analysis of statistical outliers to determine whether certain remaining contracts in our data are well outside of the mean of per-minute costs, and remove those observations revealed to be outliers by use of these metrics. Next, we perform a cost adjustment of GTL's reported per-minute contract costs, using reliable information reported for GTL's own contracts as well as the contract information of other inmate calling services providers to identify surrogate observations to use instead of GTL's reported per-minute costs. The results of this analysis allow us to derive lower bounds of per-minute contract costs for prisons and larger jails.[5]

A. Analysis of Outliers

3. As we review in detail in Appendix E, we perform an initial round of data cleaning on the contract-level dataset derived from the Second Mandatory Data Collection by removing contracts with invalid or incomplete data, excluding anomalous contracts, and making additional data adjustments.[6] We now turn to outlier detection and removal. Using conservative thresholds for both parametric and non-parametric outlier detection techniques (that is, techniques that rely on normality assumptions about the distribution of the cost data versus techniques that do not), we find and remove the data points that are well outside of the central tendency of the distribution of per-minute costs as measured by the mean and

[1] *See* Appx. E, *supra* Part B. In this Appendix, we frequently refer to inmate calling services providers by short names or acronyms. These providers are: ATN, Inc. (ATN); CenturyLink Public Communications, Inc. (CenturyLink); Correct Solutions, LLC (Correct); Combined Public Communications (CPC); Crown Correctional Telephone, Inc. (Crown); Global Tel*Link Corporation (GTL); ICSolutions, LLC (ICSolutions); Legacy Long Distance International, Inc. (Legacy); NCIC Inmate Communications (NCIC); Pay Tel Communications, Inc. (Pay Tel); Prodigy Solutions, Inc. (Prodigy); and Securus Technologies, LLC (Securus).

[2] Report and Order, *supra* Part III.C.3.

[3] *See* Report and Order, *supra* Part III.C.3.

[4] *See* Appx. E, *supra* Part D (discussing GTL's cost data and suggesting it is the only provider making a loss on calling services); *see also* Appx. E, *supra* Part E (indicating that GTL reported only bad debt as direct costs); Report and Order, *supra* Part III.C.3 (incentives to overstate costs).

[5] They additionally allow us to address concerns raised in the record regarding expected differences in contract costs across facilities of different types and sizes. *See* Appx. F, *supra*.

[6] *See* Report and Order, *supra* Part III.C.3 (discussing the steps taken to calculate the upper bound); *see also* Appx. E, *supra* Part B. The final dataset contains 2,900 contract-level observations and is the starting point for the outlier analysis presented here.

standard deviation.[7]

4. We first employ two closely related parametric techniques: the Grubbs test and the modified Thompson Tau test.[8] Both tests detect the largest absolute deviations from the mean divided by the standard deviation. For each approach, if the data point with the largest deviation is above a critical threshold then it is considered an outlier and removed. Both tests continue to iterate through the dataset, recalculating the test statistic and comparing it to the critical value until they no longer detect any outlying observations.[9]

5. We perform this analysis on the average cost per minute[10] for each contract, and separately for prisons, larger jails, and jails with average daily populations less than 1,000.[11] To be as conservative as possible, we choose the confidence level for the critical value to be 99%. The Thompson Tau test identifies 98 total outliers: 94 jails with average daily populations less than 1,000, 3 larger jails, and 1 prison. The Grubbs test identifies 25 total outliers: 22 jails with average daily populations less than 1,000 and three larger jails.

6. Both the Grubbs and Thompson Tau tests assume that each observation is drawn from a normal distribution, and that outlier observations are those that would not typically occur from the same data generating process.[12] To ensure our outlier results are robust to normality assumptions, we also employ a well-known non-parametric approach to outlier detection: the box plot. This approach does not rely on the assumption of normality and instead uses only the mean, median, and quartiles of the data. A box plot defines outlier observations as those that are more than 1.5 times the interquartile range from the upper or lower quartiles of the per-minute cost data (the upper and lower bounds).[13] The procedure

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[7] *See generally* Victoria J. Hodge & Jim Austin, *A Survey of Outlier Detection Methodologies*, 22 A.I. Rev. 85-126 (2004) (providing an overview of commonly used outlier detection methods).

[8] *See generally* Frank E. Grubbs, *Sample Criteria for Testing Outlying Observations*, 21 Annals Mathematical Stat. 27 (1950); *see also* Frank E. Grubbs, *Procedures for Detecting Outlying Observations in Samples*, 11 Technometrics 1–21 (1969); William R. Thompson, *On a Criterion for the Rejection of Observations and the Distribution of the Ratio of Deviation to Sample Standard Deviation*, 6 Annals Mathematical Stat. 214 (1935).

[9] The critical regions for the Grubbs and Thompson Tau tests are similar but are based on a different version of the Student's t test statistic. For the Grubbs test, the Student's t is based on N-2 degrees of freedom and a tail value equal to $\alpha/2N$. For the Thompson Tau test, the Student's t is based on N-2 degrees of freedom and a tail value of $\alpha/2$. This difference results in the Thompson Tau test always calculating a lower test statistic than the Grubbs, leading to the detection of more outliers at a given confidence level but also a higher likelihood of false positives.

[10] S*ee* Appx. E, *supra* Part E. The contract-level cost per minute is defined as: (contract direct costs + contract allocated overhead costs) / (contract total paid minutes).

[11] *See* Appx. E, *supra* Part C. Larger jails have average daily population greater than or equal to 1,000. As in Appendix E, jails with average daily populations of less than 1,000 are included in our totals to ensure that our outlier detection and removal is comprehensive among our total dataset of 2,900 contracts. But, because we do not address such jails in the Report and Order for purposes of arriving at interim provider-related rate caps based on the Second Mandatory Data Collection, our discussion of them in this Appendix is limited.

[12] However, if the true data-generating process leads to a right-skewed distribution, then observations identified as outliers under an assumption of normality may in fact be legitimate data points. In a right-skewed distribution, the mean is greater than the median. *See generally* Eberly College of Science, Pennsylvania State University, § 2.2.4.1 Skewness & Central Tendency, https://online.stat.psu.edu/stat200/lesson/2/2.2/2.2.4/2.2.4.1 (last visited Mar. 28, 2021). *See Sample Criteria for Testing Outlying Observations*, *supra* note 8, at 27-30; *Procedures for Detecting Outlying Observations in Samples*, *supra* note 8, at 1-3; *On a Criterion for the Rejection of Observations and the Distribution of the Ratio of Deviation to Sample Standard Deviation*, *supra* note 8, at 214-16 (providing discussions of the statistical definition of an outlying observation and normality assumptions regarding the distribution of the population of interest).

[13] These bounds are referred to as "Tukey's fences." *See generally* John W. Tukey, Exploratory Data Analysis 43 (1977).

identifies a total of 52 observations above the upper bound: 49 jails with average daily populations less than 1,000 and 3 larger jails.

7. The Grubbs, Thompson Tau, and box plot approaches identify the same overlapping set of contracts as outliers, but with increasing restriction based on the technique. Specifically, there is no outlier identified by Grubbs that is not also an outlier for Thompson Tau and the box plot. Similarly, there is no outlier identified by the box plot that is not also an outlier for Thompson Tau. Though Thompson Tau appears to be least conservative and Grubbs most conservative, what is important is that all three approaches lead to the identification of the same nested set of outlier observations. To retain as much data as possible, and to be as conservative with our analysis as possible, we exclude from the contracts data only those 25 observations identified by Grubbs as being outliers.

8. The results of the outlier analysis are presented in Tables 1, 2, and 3 below. Table 1 lists the outlier observations for each firm and facility type, while Table 2 presents the full list of contracts identified as outliers. Finally, Table 3 presents the summary statistics of per-minute costs for the group of outlier contracts.

Table 1 – Outlier Observations by Firm and Facility Type (# of Contracts)

	ATN	**Correct**	**Crown**	**GTL**	**Pay Tel**	**Securus**	**Total**
Smaller Jails	2	5	4	2	6	3	22
Larger Jails	0	3	0	0	0	0	3
Total	2	8	4	2	6	3	25

Table 2 – Contracts Classified as Outliers

Firm	Contract Identifier	Facility Type	ADP	CPM	RPM
Correct	Williamson	Larger Jail	{[		]}
Correct	San Luis	Larger Jail	{[		]}
Correct	West Texas	Larger Jail	{[		]}
ATN	{[ ]}	Smaller Jail	{[		]}
ATN	{[ ]}	Smaller Jail	{[		]}
Correct	Morgan City	Smaller Jail	{[		]}
Correct	Little River	Smaller Jail	{[		]}
Correct	Rolling Plains	Smaller Jail	{[		]}
Correct	Wise	Smaller Jail	{[		]}
Correct	Livingston WR	Smaller Jail	{[		]}
Crown	Graham County Jail (NCIC - Crown)	Smaller Jail	{[		]}
Crown	Thayer County Jail (NCIC - Crown)	Smaller Jail	{[		]}
Crown	Pawnee County Jail (NCIC - Crown)	Smaller Jail	{[		]}
Crown	Phillips County Jail (NCIC - Crown)	Smaller Jail	{[		]}
GTL	{[ ]}	Smaller Jail	{[		]}
GTL	{[ ]}	Smaller Jail	{[		]}
Pay Tel	{[ ]}	Smaller Jail	{[		]}
Pay Tel	{[ ]}	Smaller Jail	{[1		]}
Pay Tel	{[ ]}	Smaller Jail	{[		]}
Pay Tel	{[ ]}	Smaller Jail	{[		]}
Pay Tel	{[ ]}	Smaller Jail	{[		]}
Pay Tel	{[ ]}	Smaller Jail	{[		]}
Securus	{[ ]}	Smaller Jail	{[		]}
Securus	{[ ]}	Smaller Jail	{[		]}
Securus	{[ ]}	Smaller Jail	{[		]}

Notes: "ADP" is average daily population covered by the contract; "CPM" is a contract's average cost per minute; and "RPM" is a contract's average revenue per minute, net of any commissions paid.

Table 3 – Outlier Analysis Summary Statistics

	# of Contracts	Mean ($)	Median ($)	Std. Dev. ($)	Minimum ($)	Maximum ($)
Smaller Jails	22	0.410	0.359	0.128	0.283	0.734
Larger Jails	3	0.782	0.512	0.656	0.303	1.529
Total	25	0.455	0.370	0.255	0.283	1.529

9. Our outlier procedure identifies and removes a total of 25 observations (22 jails with average daily populations less than 1,000, and 3 larger jails). This amounts to 1.6% of observations of larger jails and 0.8% of observations of jail with average daily population less than 1,000. The outlier procedure removes three contracts for larger jails operated by Correct. The remaining 22 observations are all jails with average daily populations less than 1,000 whose per-minute costs also fall outside of the bounds of all three outlier detection methods.

10. It is evident that the outlier contracts have average per-minute costs that are significantly above the norm. All of the larger jails have revenues per minute below their per-minute costs, suggesting

the cost data are unreliable in these cases. Of the jails with average daily populations less than 1,000, 11 have per-minute revenues that are less, and in some cases substantially less, than their per-minute costs, again suggesting that their costs are unlikely to be valid. The remaining outliers also have per-minute costs that are well outside of the central tendency of the data, adding further validity to the Grubbs procedure.

B. GTL Data Adjustment

11. Though we believe the contract-level cost data to be improved after removing the outlier observations, we find the costs reported by certain contracts which are not identified as outliers to be outside of what is reasonable given comparable contracts in the data. Specifically, GTL's per-minute costs for its prison contracts, as calculated using the data GTL reported, are significantly higher than per-minute costs calculated based on data submitted by providers operating similarly sized facilities. Likewise, both GTL and {[ ]} are high-cost providers for larger jails.[14] However, {[ ]} only has two such contracts while GTL has 62. As such, while {[ ]}'s inconsistent larger jail contracts should be explored, they do not have nearly as significant an effect on overall costs per minute as do GTL's contracts.[15]

12. To illustrate the large discrepancy between GTL's per-minute costs for prison and larger jail contracts and those of all other providers, we present the histograms in Figure 1 below. Rather than a normal distribution of per-minute costs across contracts, the histograms appear bimodal due to GTL's costs. GTL's average per-minute costs for prisons and larger jails are about {[ ]} as large as those of all other providers. In fact, for prisons, GTL's least costly contract is still higher than any other provider's most costly contract.

[14] {[ ]}'s average costs per minute for larger jails drop to a lower level after the removal of the three larger jail contracts in the outlier analysis.

[15] GTL, {[ ]}, and {[ ]} are also the highest-cost providers of inmate calling services for smaller jails, but those contracts are not the primary focus of this analysis.

Figure 1 – Cost per Minute (CPM) Distributions for Prisons and Larger Jails

{[ ]}

Notes: "CPM" is cost per minute. Dark red areas are where the Non-GTL and GTL bars overlap.

13. Given the large discrepancy between GTL's costs and those of all other providers, we find it implausible that GTL's actual cost of providing inmate calling services to prisons and larger jails is as high as its reported data suggest. Therefore, in order to address GTL's costs, we implement a *k*-nearest neighbor matching algorithm to match each GTL contract to multiple other contracts by non-GTL providers based on similar contract characteristics. More formally, the multivariate *k*-nearest neighbor regression is a nonparametric method that uses the Euclidian distance between continuous variables to determine the "closeness" of observations.[16] It is a well-established approach to data imputation issues, where missing or unreliable observations need to be replaced with plausible values from the same dataset.[17] We implement the *k*-nearest neighbor approach to find contracts similar to GTL's and then adjust GTL's per-minute costs based on the per-minute costs of those other contracts.[18]

[16] *See generally* Evelyn Fix & J.L. Hodges, Jr., *Discriminatory Analysis - Nonparametric Discrimination: Consistency Properties*, 57 Int'l Stat. Rev. 238-47 (1989) (reprint); T.M. Cover & P.E. Hart, *Nearest Neighbor Pattern Classification*, 13 IEEE Trans. Inform. Theory 21 (1967).

[17] *See* R. Malarvizhi & Antony Selvadoss Thanamani, *K-Nearest Neighbor in Missing Data Imputation*, 5 Int'l J. Eng'g Rsch. and Dev. 05, 07 (2012); Lorenzo Beretta & Alessandro Santaniello, *Nearest Neighbor Imputation Algorithms: A Critical Evaluation*, 16 BMC Med. Informatics and Decision Making 197 (2016), https://bmcmedinformdecismak.biomedcentral.com/track/pdf/10.1186/s12911-016-0318-z.pdf.

[18] In their attempt to address outliers, the report of The Brattle Group utilizes a data censoring technique known as winsorization to replace all per-minute cost observations above $0.50 with the next highest values in the cost distribution. Wright Petitioners, Prison Policy Initiative, and Public Knowledge Comments Appx. A, Coleman Bazelon et al., The Brattle Group, Brattle Report at 14. We believe a combination of outlier removal and cost adjustment using *k*-nearest neighbor regression to be an improvement over winsorization. Whereas winsorization replaces a set percentage (or number) of observations above a predetermined threshold, the Grubbs procedure relies on the variation in the data to determine observations likely drawn from a different population distribution.

(continued….)

14. We perform the analysis with $k = 3$. That is, we find the three nearest neighbors to each GTL contract. The matching is done on the following variables:[19] average daily population, total inmate calling services minutes of use, total commissions paid, and facility type.[20] Matching was done on these four variables, as economic rationale and comments submitted to the Commission argue that each of the four is important in determining a contract's cost of provision.[21] We create two adjusted per-minute costs for GTL. The first takes a weighted average cost per minute of each nearest neighbor, weighted by each neighbor's inverse distance from GTL.[22] The second approach is more conservative and relies on the maximum cost per minute of all nearest neighbors.[23] Table 4 presents summary statistics for GTL's original per-minute costs for non-outlier prison and larger jail contracts, as well as the weighted and maximum costs per minute that result from the nearest neighbor matching algorithm.

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Likewise, *k*-nearest neighbor relies on a multivariate measure of the "closeness" of contracts to determine the adjustment to GTL observations, making fewer assumptions and utilizing more information in the contracts.

[19] We have also performed the analysis with the addition of other variables such as revenues, geography, and rurality, and obtained similar results. In the case of encoded categorical variables such as geography, we forced the algorithm to make a match to ensure that the distance measure was not attempting to minimize distance between unrelated states/regions based on how they were coded in the dataset. Though the resulting adjusted per-minute costs were largely unchanged, this is not our preferred specification as forcing a match on any given dimension will invariably weaken the match on the other covariates. Additionally, while our Lasso analysis set forth in Appendix F pointed to provider identity as the dominant predictor of a contract's per minute costs, we do not match on provider identity. The Commission finds no economic rationale for why certain providers should have higher costs than their competitors for comparable facilities, nor do comments filed with the Commission make this argument. Furthermore, as explained in Appendix F, the importance attributed to provider identity by the Lasso model is most likely the result of asymmetric provider data filing practices, rather than actual differences in costs of provision.

[20] A neighbor to a specific GTL contract is the contract that is closest to the GTL contract along these dimensions. For example, if a GTL contract had an average daily population of 100, 15,000 total minutes, and paid $3,000 in site commissions, then another contract with an average daily population of 110, 16,000 total minutes, and paid site commissions of $3,400 would be a nearer neighbor than a third contract with an average daily population of 600, 100,000 minutes, and paid site commissions of $18,000.

[21] Numerous commentators argued that average daily population and facility type are important to a contract's per minute costs. *See, e.g.*, Pay Tel Comments at 15-17; Securus Comments at 40, National Sheriffs' Association at 2, 8-9. Total minutes of use is included because inmate calling contracts have high fixed costs. *See, e.g.*, Public Interest Parties Brattle Reply Report at 5 (stating that "[t]he data reflect that a large part of the expenses are overhead and fixed costs"). As such, a contract's per minute costs will depend in part on minutes of use, as higher minutes of use allow fixed costs to be spread across more minutes, reducing a contract's per minute costs. Total commissions paid is included because, as first concluded in the *2020 ICS Notice*, site commissions may represent negotiations between providers and facility authorities in which providers agree to incur additional costs related to the provision of inmate calling services in exchange for not having to pay site commissions. *See 2020 ICS Notice*, 35 FCC Rcd at 8572, Appx. H, para. 2.

[22] That is, of the three nearest neighbors, we put more weight on the neighbors that are more similar to GTL according to the Euclidian distance measure. *See generally* N.S. Altman, *An Introduction to Kernel and Nearest-Neighbor Nonparametric Regression*, 46 Am. Statistician 175 (1992) (discussing *k*-nearest neighbor approaches to curve-fitting and data interpolation).

[23] We have run the matching on various values of *k* and find the results are robust to the choice of *k*. Even at $k = 6$, we obtain reasonable results for the maximum per-minute cost of the six nearest neighbors. Though as expected, when adding more neighbors, the maximum per-minute cost of the new group of neighbors continues to increase. As this is not a classification analysis, there is no methodology or metric for choosing the optimal *k*. However, we find $k = 3$ to be reasonable. Our choice is further supported by the use of $k = 3$ in the existing literature. *See Nearest Neighbor Imputation Algorithms: A Critical Evaluation*, *supra* note 17, at 204.

Table 4 – GTL Matching Summary Statistics

Pre-Matching						
	# of Contracts	**Mean ($)**	**Median ($)**	**Std. Dev. ($)**	**Minimum ($)**	**Maximum ($)**
Larger Jails	{[					]}
Prisons	{[					]}
Post-Matching Weighted						
	# of Contracts	**Mean ($)**	**Median ($)**	**Std. Dev. ($)**	**Minimum ($)**	**Maximum ($)**
Larger Jails	{[					]}
Prisons	{[					]}
Post-Matching Maximum						
	# of Contracts	**Mean ($)**	**Median ($)**	**Std. Dev. ($)**	**Minimum ($)**	**Maximum ($)**
Larger Jails	{[					]}
Prisons	{[					]}

15. Prior to the adjustment, GTL's per-minute costs are both high compared to other providers and essentially flat across facility types. There is no statistically significant difference in per-minute costs between GTL's larger jails and prisons. This is highly unusual, as we would expect firms to exhibit economies of scale by spreading their fixed costs over more call minutes, thereby reducing their per-minute costs on larger contracts.[24] For example, {[

]} After performing the *k*-nearest neighbor adjustment, GTL costs also exhibit economies of scale, and the difference in per-minute costs between GTL prisons and larger jails is statistically significant at the 1% level.

16. We can now estimate the effect that the GTL cost adjustment has on the overall distribution of per-minute costs in our contract-level data. Table 5 presents the average per-minute costs across all non-outlier prison and larger jail contracts after adjusting GTL costs.

Table 5 – All Contracts Post-Matching Summary Statistics

Post-Matching Weighted						
	# of Contracts	**Mean ($)**	**Median ($)**	**Std. Dev. ($)**	**Minimum ($)**	**Maximum ($)**
Larger Jails	{[					]}
Prisons	{[					]}
Post-Matching Maximum						
	# of Contracts	**Mean ($)**	**Median ($)**	**Std. Dev. ($)**	**Minimum ($)**	**Maximum ($)**
Larger Jails	{[					]}
Prisons	{[					]}

[24] For comparison, the average larger jail contract has 9.3 million minutes of use while the average prison contract has 34.6 million minutes of use.

17. Even when using the conservative approach of replacing GTL's per-minute costs with the highest costs of the three nearest neighbors, the overall per-minute cost of prisons and larger jails drops substantially. This is unsurprising as not only are GTL's costs high, but GTL also operates {[ ]} prison contracts and {[ ]} larger jail contracts. With the adjusted GTL observations, the full contracts data now indicate a decreasing per-minute cost of operating larger facilities. The reason is twofold: first, because GTL has a larger market share in the provision of inmate calling services for prisons than for larger jails, even a uniform reduction in its costs per minute across facility types would exert greater downward pressure on the average costs of prisons compared to larger jails; and second, because other firms do exhibit returns to scale, the results of the nearest neighbor matching procedure highlight this important aspect of the data. Hence our procedure adjusts GTL per-minute costs for each facility type to reflect this market reality.

18. Finally, to better visualize the GTL data adjustment, we present overlaid histograms of GTL and non-GTL per-minute costs for prison and larger jail contracts after performing the *k*-nearest neighbor matching procedure in Figures 2 and 3.[25] {[

]}

Figure 2 – CPM Distributions for Prisons with *k*-Nearest Neighbor Matching

{[ ]}

Notes: "CPM" is cost per minute. Dark red areas are where the Non-GTL and GTL bars overlap.

[25] These are overlaid histograms rather than stacked bar charts. Therefore, the dark red color represents the intersection of GTL and non-GTL contracts, and the total number of contracts at any cost bin is the sum of the GTL and non-GTL bars.

Figure 3 – CPM Distributions for Larger Jails with *k*-Nearest Neighbor Matching

{[ ]}

Notes: "CPM" is cost per minute. Dark red areas are where the Non-GTL and GTL bars overlap.

C. Analysis of GTL "Neighborhoods"

19. To further examine our nearest neighbor results, we explore the matches for each of GTL's {[ ]} non-outlier contracts. Aside from our choice of contract characteristics on which to perform the matching, the approach is nonparametric and relies only on the data to find the nearest neighbors of each observation. Nevertheless, we want to understand whether a single firm is dominant in our matches or if there is variation in the neighbors found.[26] In Table 6 below, we present the total number and percentage of time that each firm matches with a GTL contract, categorized by type of facility.[27]

[26] Even if the matches are overwhelmingly to a single firm, the legitimacy of the procedure is not in doubt as it is only a reflection of the data. However, the results would be less robust if an argument could be made for that firm also having unreliable cost data.

[27] We note that within our total dataset of 2,900 contract observations, GTL's smaller jail contracts only matched with other providers' smaller jail contracts.

Table 6 – Provider Matches to GTL by Facility Type

	Smaller Jail		Larger Jail		Prison		Overall	
	# of Matches	Percent	# of Matches	Percent	# of Matches	Percent	# of Matches	Percent
Securus	{[							]}
ICSolutions	{[							]}
CPC	{[							]}
NCIC	{[							]}
Legacy	{[							]}
Pay Tel	{[							]}
CenturyLink	{[							]}
Correct	{[							]}
ATN	{[							]}
Crown	{[							]}
Prodigy	{[							]}

20. The numbers in parentheses represent the percentage of all non-outlier and non-GTL contracts that each firm has, thereby allowing for a comparison of frequency of nearest neighbor matches to overall frequency in the data. Unsurprisingly, given the large market share of each, Securus is a frequent match to GTL. Of the {[ ]} GTL contracts included in our analysis, {]} of them (19.7%) include zero Securus contracts in their neighborhood;[28] {]} (34.8%) include one Securus contract in their neighborhood; {[ ]} (29.4%) include two Securus contracts in their neighborhood; and {[ ]} (16.1%) include three Securus contracts in their neighborhood. On average, a GTL contract's neighborhood is comprised of {[ ]} (47.3%) Securus contracts. As Securus comprises roughly 40% of all non-GTL contracts in our data, the results are reasonable and suggest that Securus does not have an outsized influence on our matching relative to its size in the market. After Securus, the providers whose contracts constitute the largest number of neighbors to GTL contracts are ICSolutions, CPC, and NCIC, with the average neighborhood consisting of {[ ]} contracts from each provider, respectively.

21. That no firm plays an outsized role in the nearest neighbor matching holds across the different types of facilities. {[

[28] By neighborhood, we refer to the set of three matched contracts for each GTL contract.

]} In general, the smallest firms in the market tend to be under-represented in the matching, likely because scale economies make the bigger players look more similar along multiple dimensions of a contract, even within a particular facility type.

22. The results of this analysis indicate that GTL is being matched to every other firm in our data at least some of the time. Though its nearest neighbors are usually other large providers, that is in no way surprising. The variation in the match data supports the validity of the results, while shedding additional light on the contracts that look closest to GTL's for the purposes of our data adjustment procedure.

D. Determining Lower Bound for Interim Rate Caps

23. With confidence that our outlier and GTL data adjustment procedures are valid and robust to a variety of assumptions, we can now construct the lower bounds for the zones of reasonableness. As with the upper bound approach, we define our lower bound as the mean plus one standard deviation of per-minute contract costs, separately for prisons and larger jails. These estimates rely on the full contract-level data excluding the identified outliers and replacing the original GTL cost data with the per-minute cost estimates derived from the nearest neighbor adjustment procedure. We present the lower bound estimates in Table 7 below.

Table 7 – Lower Bound Estimates

Lower Bound – Weighted GTL Adjustment					
	# of Contracts	**Mean ($)**	**Std. Dev. ($)**	**Mean+1 Std. Dev. ($)**	**Mean+2 Std. Dev. ($)**
Larger Jails	179	0.065	0.015	0.080	0.095
Prisons	129	0.052	0.012	0.064	0.076
Lower Bound – Maximum GTL Adjustment					
	# of Contracts	**Mean ($)**	**Std. Dev. ($)**	**Mean+1 Std. Dev. ($)**	**Mean+2 Std. Dev. ($)**
Larger Jails	179	0.070	0.019	0.089	0.108
Prisons	129	0.058	0.015	0.073	0.088

24. As with our previous results, we present lower bound estimates derived from a weighted average GTL adjustment as well as more conservative estimates based on the maximum of GTL's nearest neighbors. As both approaches are valid, we select the weighted average results as our estimates of the lower bound for the zone of reasonableness. For prisons, the lower bound is $0.064, and for larger jails, the lower bound is $0.08. These are the most plausible, lowest estimates of per-minute interim rate caps across all contracts in our data.

E. Maximum GTL Costs Support the New Interim Provider-Related Rate Caps

25. We have established the lower bounds of the zones of reasonableness as being $0.064 for prisons and $0.080 for larger jails based on an analysis that removes outlier observations and adjusts unreliable GTL per-minute cost data. Given GTL's size and presence in the inmate calling services market, we now determine the maximum per-minute costs that GTL could hypothetically incur that would still support our interim provider-related rate caps. That is, we ask what GTL's highest average per-minute costs would need to be, separately for its prison and larger jail contacts, such that the overall per-minute cost plus one standard deviation across all calling services contracts would be no higher than $0.12 per minute for prisons and $0.14 per minute for larger jails. We refer to this as the critical cost threshold for GTL, as it is the cost that must be exceeded for our provider-related rate caps to no longer be supported by the analysis.

26. To determine GTL's critical cost threshold, we present a critical cost analysis to support our new interim provider-related rate caps of $0.12 per minute for prisons and $0.14 per minute for larger jails.[29] The analysis calculates GTL's threshold per-minute costs that would bring the overall average cost per minute across all calling services contracts, plus a buffer, to $0.12 per minute and $0.14 per minute for prisons and larger jails, respectively. We examine a buffer of both one and two standard deviations from the mean. A buffer of one standard deviation reflects our approach to rate-setting, while a two standard deviation buffer is an even more conservative assumption because it requires per-minute costs to be even lower in order to remain under the interim rate caps. As such, GTL's threshold per-minute cost derived from this analysis will ensure that our rate caps are set at a level that allows the majority of firms to recover their costs.

27. We rely on the per-minute cost data from the contract-level dataset described in Appendix E after removing the 25 identified outliers. To determine the critical cost thresholds, we optimize over the set of GTL prison and larger jail contracts to find the cost per minute that sets the overall cost per minute plus a buffer across all prison contracts to $0.12 and across all larger jail contracts to $0.14. We perform four constrained optimizations: two each for prisons and larger jails with two different buffers (1 and 2 standard deviations). We present the results in Table 8.

Table 8 – GTL Critical Cost Thresholds ($)

Facility Type	Per-Minute Rate Cap	1 Std. Dev. Buffer	2 Std. Dev. Buffer
Prison	0.120	0.117	0.094
Larger Jail	0.140	0.153	0.117

28. Even with a large buffer of two standard deviations from the mean (which would allow the vast majority of firms to recover costs with certainty), GTL's average per-minute costs for prisons and larger jails need only be at or below $0.094 per minute and $0.117 per minute, respectively. These thresholds are still $0.041 per minute and $0.053 per minute higher than the average per-minute costs of all non-GTL prison and larger jail contracts. Furthermore, after applying a conservative *k*-nearest neighbor matching algorithm that sets GTL's contract costs to the maximum of its three neighbors, GTL's per-minute costs are $0.063 and $0.078 for prisons and larger jails, respectively. These cost estimates are well below the threshold values necessary to support the interim rate caps. As such, with reasonable high-end estimates of GTL's costs, our analysis indicates that the interim rate caps would allow nearly all firms to recover their costs of providing inmate calling services as reported in response to the Second Mandatory Data Collection.

[29] *See* Report and Order, *supra* Part III.C.3.

APPENDIX H

Analysis of Site Commission Payments

1. We permit a $0.02 per minute interim allowance for reasonable correctional facility costs for prisons and larger jails where site commission payments are part of a negotiated contract.[1] We base our decision on two separate and independent grounds. First, this allowance is based on estimates of the portion of site commission payments that are legitimately related to inmate calling services based on the approach set forth in Appendix H of the *2020 ICS Notice*, which we have updated below with corrected cost data consistent with the record.[2] Second, this allowance is based on record evidence reintroduced by Pay Tel and the National Sheriffs' Association supporting a $0.02 allowance.[3]

2. To improve comparability between contracts which do and do not involve payment of a site commission, we removed invalid, incomplete, and anomalous contracts from the cost data submitted by providers in response to the Second Mandatory Data Collection using the process described in Appendix E. The resulting data do not specify the costs, if any, that correctional facilities incur that are directly related to the provision of inmate calling services.[4] In the absence of direct information on the level of those costs, we estimate the costs correctional facilities incur by comparing the relative costs per minute to providers for contracts with and without site commissions, as shown in Table 1. As the Commission concluded in the *2020 ICS Notice*,[5] we continue to find that it is reasonable that the higher costs per minute for contracts without site commissions reflect, at least in part, give-and-take negotiations in which providers agree to incur additional costs related to the provision of inmate calling services in exchange for not having to pay site commissions.[6] In the context of contractually-prescribed site commission payments, facilities may seek that providers pay a site commission as part of a request for proposal.[7] In other cases, a correctional facility may not seek a site commission payment but may indicate that offers to make such payments will be a factor in the bid evaluation process. In either case, bidders' choices about whether to offer a site commission payment and at what level are informed by

[1] *See* Report and Order, *supra* Part III.C.4 (establishing the rate and explaining that site commissions are payments from inmate calling services providers to correctional facilities). In this Appendix, we frequently refer to inmate calling services providers by short names or acronyms. These providers are: ATN, Inc. (ATN); CenturyLink Public Communications, Inc. (CenturyLink); Correct Solutions, LLC (Correct); Combined Public Communications (CPC); Crown Correctional Telephone, Inc. (Crown); Global Tel*Link Corporation (GTL); ICSolutions, LLC (ICSolutions); Legacy Long Distance International, Inc. (Legacy); NCIC Inmate Communications (NCIC); Pay Tel Communications, Inc. (Pay Tel); Prodigy Solutions, Inc. (Prodigy); and Securus Technologies, LLC (Securus).

[2] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking, 35 FCC Rcd 8485, 8572, Appx. H (2020) (*2020 ICS Order on Remand* or *August 2020 ICS Notice or 2020 ICS Notice*).

[3] Report and Order, *supra* Part III.C.4; National Sheriffs' Association Comments at 7 (referring to their 2015 cost survey); Pay Tel Comments at 12 (referring to data submitted by the National Sheriffs' Association); Wright Petitioners, Prison Policy Initiative, and Public Knowledge Reply at 10; National Sheriffs' Association Comments, WC Docket No. 12-375, at 3 (filed Jan. 12, 2015) (listing administrative services provided by, and duties of, facility officers to support inmate calling services).

[4] *See* Appx. E, *supra* Part B (describing the Second Mandatory Data Collection, initial data cleaning, and reported site commissions).

[5] *2020 ICS Notice*, 35 FCC Rcd at 8572, Appx. H, para. 2.

[6] *See* Report and Order, *supra* Part III.C.4 (explaining that Securus's and GTL's data in support of higher site commission allowances "fail[s] to isolate or otherwise account for only those portions of payments related to reasonable facility-related costs of providing inmate calling services").

[7] *See* Report and Order, *supra* Part III.C.4 (explaining the different conceptual scenarios in which site commission payments can arise).

their discretionary business decisions about which strategies are more or less profitable to pursue.[8] Consequently, it is reasonable to conclude that providers and correctional facilities have at least some give-and-take during the negotiation process, which, at least in part, contributes to higher costs for contracts that do not provide for site commission payments compared to similarly situated providers operating under contracts that do provide for such payments.

Table 1 – Site Commissions and Per-Minute Costs

Facility Type	Site Commission	Mean ($)	Std. Dev. ($)	Mean + Std. Dev. ($)	Number of Contracts		
					Below	Above	Total
Larger Jails	No Commission Paid	0.100	0.042	0.142	11	1	12
	Commission Paid	0.100	0.121	0.221	167	3	170
	All Larger Jails	0.100	0.118	0.218	179	3	182
All Jails	No Commission Paid	0.097	0.061	0.158	260	13	273
	Commission Paid	0.093	0.056	0.150	2,325	173	2,498
	All Jails	0.093	0.057	0.150	2,583	188	2,771
Prisons	No Commission Paid	0.097	0.038	0.135	38	2	40
	Commission Paid	0.089	0.042	0.131	82	7	89
	All Prisons	0.092	0.041	0.133	120	9	129
All Facilities	No Commission Paid	0.097	0.059	0.155	298	15	313
	Commission Paid	0.093	0.056	0.149	2,408	179	2,587
	All Facilities	0.093	0.056	0.150	2,708	192	2,900

3. The bottom three rows of Table 1 (for all facilities) show a $0.004 difference in mean costs per minute between contracts without site commissions ($0.097) and contracts with site commissions ($0.093). The difference in mean costs per minute between contracts without site commissions and contracts with site commissions is $0.008 for prisons ($0.097 - $0.089) and $0.004 for jails ($0.097 - $0.093). For larger jails, there is no difference in mean costs per minute between contracts without site commissions and contracts with site commissions ($0.10 - $0.10).

4. These differences between mean costs per minute for contracts that do and do not provide for payment of site commissions are lower than the estimates from the *2020 ICS Notice*.[9] However, the Second Mandatory Data Collection did not require the reporting of data on the costs, if any, that facilities incur that are directly related to the provision of calling services for incarcerated people. Because the absence of such data prevents us from more accurately determining the portion of site commissions directly related to the provision of inmate calling services, we decline to reduce the $0.02 allowance at this time.

[8] *See* Report and Order, *supra* Part III.C.4.

[9] *2020 ICS Notice*, 35 FCC Rcd at 8572, Appx. H.