

**DISSENTING STATEMENT OF  
COMMISSIONER AJIT PAI**

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

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

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

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

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

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

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

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

<sup>2</sup> *Id.* § 2(14).

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

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

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

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

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

#### I.

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

#### A.

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

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

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

<sup>7</sup> *Id.* at 16637–38, paras. 20–23.

<sup>8</sup> *Id.* at 16638–39, paras. 24–26.

<sup>9</sup> *Id.* at 16639–40, para. 28.

<sup>10</sup> *Id.* at 16640–41, paras. 30–32.

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

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

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

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

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<sup>11</sup> *Id.* at 16641, para. 34.

<sup>12</sup> *Id.* at 16641–42, paras. 33, 36.

<sup>13</sup> *Id.* at 16643, para. 39.

<sup>14</sup> The *Order* implicitly acknowledges as much when it describes the *Inmate Calling NPRM* as proposing “possible rate caps for interstate ICS; the ICS Provider Data Submission; collect, debit, and prepaid ICS calling options; site commissions; issues regarding disabilities access; and the Commission’s statutory authority to regulate ICS” but not the cost-based, rate-of-return methodology the *Order* in fact adopts. See *Order* at para. 10.

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

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

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

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

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

<sup>20</sup> *Time Warner Cable Inc.*, slip op. at 61.

<sup>21</sup> See *id.* at 62.

ICS rates.<sup>22</sup> And given ICS providers' comments strenuously opposing a rate cap, it strains credulity to think that they would have chosen to stay silent about rate-of-return regulation had they realized it was a possible endpoint.<sup>23</sup>

The *Order* also attempts to establish notice by citing a variety of paragraphs in which the Commission sought information about "costs."<sup>24</sup> But just because we sought information about "costs" as an input in evaluating eight discrete proposals does not mean that *every* possible "cost-based" solution is a logical outgrowth of the *Inmate Calling NPRM*,<sup>25</sup> let alone a cost-based solution as complex as the one contained in the *Order*. The *Order* admits that "cost"-based ratemaking is itself ambiguous<sup>26</sup> and could mean ratemaking based on historical costs,<sup>27</sup> projected costs,<sup>28</sup> or even forward-looking modeled costs.<sup>29</sup> That not a single commenter to my knowledge (and the *Order* cites none) discussed these issues simply confirms that no one realized that granular rate-of-return regulation was imminent.

The *Order* lastly attempts to establish notice by pointing to various questions about how to establish rate caps.<sup>30</sup> But no one doubts the notice for the rate caps adopted in the *Order* (rule 64.6030). The question is whether there was notice for an independent rule, the rate-of-return regulations contained in rule 64.6010. And in my view there was not, given the lack of any discussion in the *Inmate Calling NPRM* of requiring rates to be cost based (rather than simply capped), let alone any mention of rate-of-return regulation.

Notice deficiencies extend to at least two further aspects of the rate-of-return system adopted by the *Order*. *First*, the safe harbor adopted by the *Order* only makes sense as part of a rate-of-return

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<sup>22</sup> As such, the *Order*'s claim that the framework adopted by the Commission here was the subject of "extensive comments, reply comments, and ex parte submissions in the record" is simply wrong. See *Order* at note 222. Indeed, the *Order* does not cite *any* submission from *any* service provider commenting on rate-of-return regulation. Instead, the lengthiest discussion of the subject comes from the Wright Petitioners themselves, who explained why rate caps (as proposed in the *Inmate Calling NPRM*) were superior to traditional rate-of-return regulation. Martha Wright *et al.* Comments at 32 ("[T]he FCC has previously found that the adoption of price caps provide a powerful incentive for service providers to become more efficient. . . . The price cap regime was imposed because of a concern that traditional rate-of-return regulation did not result in sufficient incentives to improve efficiency. Indeed, the FCC's previous reviews of rate-of-return regulation over many years led it to conclude that, under certain circumstances, rate-of-return regulated firms have an incentive to raise rather than lower their costs by increasing investment in the asset base on which the regulated return is calculated well beyond the efficient level.").

<sup>23</sup> For all of these reasons, a generic request for comment on "any other proposals" is best seen as an indication that the agency may consider in a Further Notice any ideas raised in the record that are beyond the initial NPRM. Indeed, the Commission does just that with its Further Notice to extend today's action to intrastate rates—a proposal that originated in comments and inspired discussion in the record (unlike rate-of-return regulation).

<sup>24</sup> See *Order* at note 191 (citing *Inmate Calling NPRM*, 27 FCC Rcd at 16637–38, 16642–43, paras. 18–21, 25–26, 37); *id.* at note 222 (citing *Inmate Calling NPRM*, 27 FCC Rcd at 16637–38, paras. 20, 22–23 & n.76).

<sup>25</sup> See *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Ass'n, Inc. v. Donovan*, 453 U.S. 913 (1981).

<sup>26</sup> *Order* at para. 52; see also *id.* at para. 163 (seeking comment on whether the Commission should continue to measure cost for purposes of rate-of-return regulation based on "historical" or "forward looking" costs).

<sup>27</sup> 47 C.F.R. § 61.39 (setting forth tariffing parameters for historical "cost schedule" carriers).

<sup>28</sup> 47 C.F.R. § 69.106 (setting forth access charges for non-price cap incumbents based on their "projected annual revenue requirement," *i.e.* their projected costs).

<sup>29</sup> *Verizon Comm. Inc. v. FCC*, 535 U.S. 467, 500 (2002) (upholding the FCC's decision to use a forward-looking cost model to establish "cost-based" rates).

<sup>30</sup> See *Order* at note 222.

system—indeed, the safe-harbor rule explicitly ties itself to the rate-of-return ratemaking rule.<sup>31</sup> And just as the *Inmate Calling NPRM* did not propose *de facto* rate-of-return regulation, so too did it fail to fairly apprise commenters that a safe harbor might be a part of that regulation.<sup>32</sup>

*Second*, the *Order* extends rate-of-return regulation to ancillary charges, even though the *Inmate Calling NPRM* did not make any such proposal, did not propose capping or otherwise regulating such charges, and did not even contain the phrase “ancillary charges.” At most, the *Inmate Calling NPRM* observed that “there are outstanding questions with prepaid calling such as: how to handle monthly fees; how to load an inmate’s account; and minimum required account balance.”<sup>33</sup> But the Commission didn’t make that comment—the Wright petitioners did.<sup>34</sup> And the *Inmate Calling NPRM* repeated it not in the context of proposing to regulate such charges but as a counterweight to assertions that prepaid calling should be an “alternative to collect and debit calling.”<sup>35</sup> At most, the questions posed in the *Inmate Calling NPRM* could form a basis for regulating ancillary charges related to prepaid calling *if* we were to make the offering of prepaid calling an alternative to other forms of regulation.<sup>36</sup> But the *Order* does not take that step. As the Second Circuit recently reminded the Commission, “[e]ven if it was the FCC’s intent to solicit comment on a [particular] rule, ‘an unexpressed intention cannot convert a final rule into a logical outgrowth that the public should have anticipated.’”<sup>37</sup> Accordingly, the *Inmate Calling NPRM* provides no basis for rate-of-return regulation of all ancillary charges.

The *Order* appropriately does not attempt to rely on the public notice titled “More Data Sought on Extra Fees Levied on Inmate Calling Services” to satisfy the notice-and-comment requirement with respect to ancillary charges.<sup>38</sup> For one thing, that public notice did not seek to expand the scope of the *Inmate Calling NPRM*, but instead to “seek[] comment on certain issues raised in the *Rates for Interstate Inmate Calling Services NPRM* that is intended to refresh the record regarding rates for interstate ICS calling.”<sup>39</sup> For another, that public notice could not have expanded the scope of the *Inmate Calling*

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<sup>31</sup> See Rule 64.6020(a) (“A Provider’s rates are presumptively in compliance with section 64.6010 (subject to rebuttal) . . .”).

<sup>32</sup> As before, the only party to argue for a safe harbor in the context of rate-of-return regulation was the National Association of State Utility Consumer Advocates. See NASUCA Comments at 5–6 (discussing a “benchmark” rate similar to the safe harbor rate adopted in the *Order*).

<sup>33</sup> *Inmate Calling NPRM*, 27 FCC Rcd at 16641, para. 33; *Order* at para. 90 (relying on this observation for purposes of complying with the Administrative Procedure Act). The *Order* also relies on a few disparate filings made between 2008 through 2013 that mention ancillary charges and the need for some sort of regulation of them. See *Order* at note 338. But expecting the public to piece together a hodgepodge of comments strewn over several years is hardly the fair notice required by the Administrative Procedure Act and does not make “clear that the agency [is] contemplating a particular change.” *CSX Trans. v. Surface Trans. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

<sup>34</sup> *Inmate Calling NPRM*, 27 FCC Rcd at 16641, para. 33 (“Petitioners note that . . .”); see Martha Wright *et al.* Alternative Wright Petition Reply at 29–30.

<sup>35</sup> *Inmate Calling NPRM*, 27 FCC Rcd at 16641, para. 33 (noting that prepaid ICS calling is offered “usually at a discount” to collect or debit calling).

<sup>36</sup> The *Inmate Calling NPRM* asked the following questions: “If these issues can be sufficiently addressed, is prepaid calling a viable ICS option? Do any ICS providers currently offer prepaid calling? What are some other concerns or considerations with prepaid calling?” *Id.* (footnote omitted).

<sup>37</sup> *Time Warner Cable Inc.*, slip op. at 61 (quoting *Council Tree Commc’ns, Inc. v. FCC*, 619 F.3d 235, 254 (3d Cir. 2010) (internal quotation marks omitted)).

<sup>38</sup> *Order* at note 338 (“To be clear, we are not suggesting that this Bureau-level request itself provided notice with respect to ancillary charges . . .”).

<sup>39</sup> *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Public Notice at 2 (Wireline Comp. Bur. June 26, 2013).

*NPRM* given that the Wireline Competition Bureau cannot propose rules on its own.<sup>40</sup> For yet another, that public notice was not published in the Federal Register until July 15, just two days before comments and nine days before replies were due.<sup>41</sup> An agency must provide commenters “enough time with enough information,”<sup>42</sup> so that “[t]he opportunity for comment [is] a meaningful opportunity.”<sup>43</sup> Two days for comments and one more week for replies is surely insufficient.

## B.

Lack of notice is not the *Order*’s only legal infirmity. Also problematic is the fact that the record evidence simply does not support the Commission’s one-size-fits-all approach or its chosen safe harbor and rate cap.

The Commission establishes an across-the-board safe harbor of 12 cents a minute and an across-the-board cap of 21 cents a minute for debit calls at *all* correctional institutions. It does not matter whether an ICS provider is serving a prison with thousands of inmates or a county jail with fewer than twenty beds. The same safe harbor and cap applies.

Yet the record is replete with evidence that the costs<sup>44</sup> of serving a statewide prison system are different than the costs of serving large county jails, which in turn are much different than the costs of serving small jails, secure mental health facilities, and juvenile detention centers.<sup>45</sup> One provider’s cost study, for example, shows that it costs 12 cents more a minute to serve midsize jails than statewide prisons or the largest jails—and the cost of serving the smallest jails tops \$1.39 a minute.<sup>46</sup> Another provider shows that the average cost of serving jails is almost 20 percent higher than that of serving state prisons, and the highest-cost jail the company serves costs 20 percent more than the most expensive prison.<sup>47</sup> Again, the smallest institutions like jails with fewer than 100 beds, secure mental health

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<sup>40</sup> See 47 C.F.R. § 0.291(e).

<sup>41</sup> See 78 Fed. Reg. 42034 (July 15, 2013).

<sup>42</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2010).

<sup>43</sup> *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (*Rural Cellular Ass’n I*).

<sup>44</sup> For purposes of making apples to apples comparisons, all cost data discussed here exclude site commissions, which the *Order* recognizes may be an underinclusive approach given that correctional institutions themselves often incur costs to provide ICS and those costs may need to be included in any cost-of-service estimates. See *Order* at note 203.

<sup>45</sup> See, e.g., Pay Tel Reply at 8 (“Generally speaking, the inherent and fundamental differences between state prison and county jail calling result in increased costs to providers servicing local facilities.”); NCIC Comments at 3–4 (“The Market Analysis explored by Petitioners using the Federal Bureau of Prisons and Department of Correction facilities to determine their benchmark rates completely disregards the diversity of specific service costs relating to city holding facilities, county jails and privately owned facilities.”); CenturyLink Comments at 7 (“There is an incredibly wide variance in the costs associated with providing interstate ICS to different facilities.”); Global Tel\*Link Comments at 6–7 (“Petitioners’ desire to impose a one-size-fits-all approach in the form of nationwide rate caps is wholly at odds with the enormous variability among correctional institutions across the United States.”); Letter from Glenn B. Manishin, Counsel for Telmate, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (July 26, 2013) (“[T]here are substantial differences in terms of scale, capacity, broadband costs and inmate ‘churn’ between larger state department of corrections (‘DOC’) systems and the thousands of smaller county and municipal jails served by ICS providers like Telmate.”).

<sup>46</sup> See Expert Report of Stephen E. Siwek on behalf of Securus Technologies, Inc., WC Docket No. 12-375, at 3, 5 (Mar. 25, 2013) (Siwek Report) (calculated by subtracting site commissions from costs and dividing by the number of minutes), available at <http://go.usa.gov/jM7V>.

<sup>47</sup> Letter from John E. Benedict, Vice President – Federal Regulatory Affairs & Regulatory Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2–3 (Aug. 2, 2013) (CenturyLink Report) (noting (continued....))

facilities, and juvenile correctional facilities are in a whole other category of costs; for these facilities, costs “vary widely” and go up to 70.9 cents per minute.<sup>48</sup> Even the 2008 cost study relied upon by the Commission showed an increase in the average per-minute cost of 20 percent when it was adjusted to include small facilities “whose traffic characteristics cause them to represent locations at which cost recovery is unlikely.”<sup>49</sup>

Why does the cost of ICS vary widely between prisons, large jails, and smaller correctional institutions? The record suggests several explanations. One is that the majority of costs for ICS are fixed and do not vary with the length or number of calls. As such, the fewer minutes of use at a given facility, the greater the average cost per minute.<sup>50</sup> This means that the average cost per minute in a jail can be much higher than the average cost per minute in a prison, both because of size differences and because phone calls made by prison inmates tend to last longer on average than calls placed by those in jail.<sup>51</sup> Another explanation is that jails experience a significantly heavier turnover of inmate populations than do prisons: 62.2 percent per week in jails versus just 1.01 percent in prisons.<sup>52</sup> Because the costs for setting up payment features such as debit account creation and maintenance and for activating security features such as approved calling lists are incurred for each new inmate, even jails comparable in size to prisons are likely to cost more to serve.<sup>53</sup> Yet another explanation is that inmates in jails are more likely than inmates in prison to use free telephone services—to call an attorney, for example—increasing the costs of service while reducing the volume over which fixed costs can be spread.<sup>54</sup>

The *Order* sets out five reasons for ignoring this variability and adopting a single set of safe harbors and a single set of caps to apply to all facilities. None of them carry the day, in my view. *First*, the *Order* asserts that the 2008 cost study submitted by ICS providers reported average costs across a

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CenturyLink’s per-minute costs of 11.6 cents for prisons on average, 13.7 cents for jails on average, 18.8 cents for the highest cost prison, and 22 cents for the highest cost jail).

<sup>48</sup> *Id.* at 2.

<sup>49</sup> Don J. Wood, Inmate Calling Services Interstate Call Cost Study, CC Docket No. 96-128, at 4–5 (Aug. 15, 2008) (Wood Report), available at <http://go.usa.gov/jMA4>; see also Telmate Comments at 15 (reporting that average per-minute costs for prepaid calling are 40 percent higher for “county” facilities than the average for “all” facilities but not explaining whether those costs include site commissions).

<sup>50</sup> Wood Report at 5; Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 4 (July 23, 2013) (Pay Tel Report); see also, e.g., CenturyLink Comments at 7.

<sup>51</sup> See Siwek Report at 8 (average length of interstate call made in state prisons is 12.51 minutes compared to 7.10 minutes in small jails).

<sup>52</sup> Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (July 3, 2013).

<sup>53</sup> Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. (Aug. 1, 2013) (“In the jail market, Pay Tel’s typical customer accepts calls for less than a week and then closes his prepaid account and requests a refund of any available balance. Conversely, at the prison level, a single account remains in place anywhere from six months to several years.”).

<sup>54</sup> Telmate Comments at 15 (reporting that 21 percent of minutes from county facilities are free vis-à-vis 12 percent of minutes from all facilities); Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. (Aug. 1, 2013) (“Jails require ICS providers to provide free calls to specific telephone numbers (e.g., bail bondsmen, public defenders, etc.), . . . 33% of inmates who are booked make *only* free calls and are then released (meaning ICS providers do not see a penny for provision of services to these inmates) . . .” (emphasis in original)).

variety of facilities, rendering appropriate a single safe harbor and a single cap.<sup>55</sup> But that study did not claim that costs were the *same* across all facilities; indeed, the supplements to that study showed that the costs of providing service varied significantly from one facility to the next.<sup>56</sup> Using the same 15-minute methodology as the *Order*, the lowest per-minute debit rate at a facility was 7.1 cents, the highest was \$1.59, the unweighted average was 30.6 cents, and the standard deviation was 32.6 cents. For collect calls, the lowest was 12.9 cents, the highest was \$2.05, the unweighted average was 42.8 cents, and the standard deviation was 42.3 cents.<sup>57</sup>

*Second*, the *Order* suggests that because we have adopted a “uniform rate” for public payphones, a single safe harbor and cap is suitable here as well.<sup>58</sup> But different records justify different rules. In the public payphone context, the Commission found insufficient evidence that costs varied significantly from one payphone to the next<sup>59</sup> where the number of calls varied by up to 46 percent at a particular location.<sup>60</sup> In contrast, the record here specifically demonstrates that the costs of service are higher at jails than in prisons and even higher at small correctional institutions.<sup>61</sup> And call volumes vary much more dramatically with ICS. Small institutions might have only about 1,200 monthly minutes of use whereas prisons have up to 15,000 times as much traffic.<sup>62</sup>

*Third*, the *Order* dismisses the importance of small jails, stating that “[f]acilities of these sizes hold only a very small share of inmates nationally.”<sup>63</sup> Hence, the *Order* concludes that cost data for these facilities “do not necessarily reflect the costs of serving [the] vast majority of inmates that generate nearly all calls.”<sup>64</sup> This might be a good argument for exempting such facilities from the safe harbor and rate

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<sup>55</sup> See *Order* at para. 81 (“ICS providers themselves submitted a single set of costs for the multiple providers participating in the ICS Provider Data Submission, regardless of the differing sizes of the correctional institutions they served.”).

<sup>56</sup> See Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Attach. (Aug. 22, 2008); Report of Several Providers of Inmate Telephone Service, CC Docket No. 96-128 (Oct. 15, 2008).

<sup>57</sup> *Id.* (redacted numbers reverse-engineered from unredacted information).

<sup>58</sup> *Order* at para. 81 (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2613, para. 149 (1999) (*Payphone Third Report and Order*)); see also *id.* at note 280 (noting that “[t]he use of averaged rates and data is common in the communications industry and telecommunications regulation”).

<sup>59</sup> *Payphone Third Report and Order*, 14 FCC Rcd at 2613–15, paras. 149–53 (noting that while payphone costs may differ from one location to the next, “there is no support in the record for MCI’s assertion that the fixed costs at a marginal payphone location will be significantly different from the fixed costs at an average payphone location” and verifying “that a marginal location can support an average payphone”).

<sup>60</sup> *Payphone Third Report and Order*, 14 FCC Rcd at 2607–08, para. 140 (noting the number of monthly calls per payphone ranged from 478 to 700 in the record).

<sup>61</sup> The *Order*’s primary response to this record evidence appears to be the assertion of one party that “technical innovations in the provision of prison phone services imply that variation in costs at different facilities has largely been eliminated.” *Order* at para. 81 (quoting Martha Wright *et al.* 2013 Comments, Exh. C at 5 (Bazelon Report)). The problem with that assertion is that the commenter never discussed the variation in *costs* between state prisons, county jails, and small correctional institutions but instead focused on the variation in *rates* among state prisons. See Bazelon Report at 15–16 (“The underlying costs of providing prison phone service may vary somewhat state by state, but nothing that would support the variation [in rates] reported in Table 1.”).

<sup>62</sup> See Siwek Report at 2 (reporting that the “low 10” institutions had between 885 and 1,668 minutes of calling each month, whereas state prisons had between 2,488,244 and 120,643,191 minutes).

<sup>63</sup> *Order* at para. 26.

<sup>64</sup> *Id.*



cap. But so long as the Commission insists on subjecting small jails to each, it cannot refuse to take into account the uncontroverted cost data for small jails on the grounds that they don't house many inmates.<sup>65</sup> Indeed, the Commission's deliberate refusal to take account of different costs of serving different types of facilities defines arbitrary decision-making.<sup>66</sup> The *Order*, moreover, ignores the reality that a substantial percentage of facilities covered by our rules will in fact be small jails. After all, most jails in our nation have fewer than 100 inmates, and about 35 percent of jails house fewer than 50.<sup>67</sup>

*Fourth*, the *Order* suggests that setting uniform safe harbors and caps without regard to the size of the facility being served is reasonable because "ICS providers typically use uniform rates when they serve multiple correctional facilities with differing cost and demand characteristics under a single contract"<sup>68</sup> and thus "even if a provider may under-recover at some facilities, it may over-recover at others."<sup>69</sup> Such assertions might have some relevance if the *Order* only regulated state prison systems (where statewide contracts appear to be the norm) or if small facilities were only covered if part of a larger contract. But the *Order* insists that its safe harbors and caps apply to all correctional institutions, without exception, and there is absolutely no evidence in the record that jails in different counties are covered under the same contracts or that county jails are covered under the same contracts as state prisons.

Indeed, the *Order* conspicuously does not claim (and cannot claim) that ICS providers set uniform rates across all of the facilities they serve. The record evidence contradicts such a claim generally,<sup>70</sup> and there is zero evidence in the record that ICS providers set uniform rates across local jails in different counties. Moreover, the *Order* contains no credible explanation for why any provider would continue to serve any county jail where it is unable to recoup all of its costs. After all, providers are under no legal obligation to provide inmate calling services to any particular correctional facility. Should they make the rational business decision to withdraw from facilities where they would have to operate at a

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<sup>65</sup> To be fair, the *Order* includes some small jail data in calculating the collect call rate cap. See *Order* at note 307. But that does not change the fact that, even in that calculation, the higher cost of serving small jails is offset by averaging with the cost of serving larger facilities, nor does it address the propriety of applying the other caps to small jails.

<sup>66</sup> See *United States Telephone Ass'n v. FCC*, 188 F.3d 521, 525 (D.C. Cir. 1999) (finding FCC's rate determination arbitrary and capricious where agency eliminated outlying data points in reaching a judgment and did not explain "why the outliers were unreliable or their use inappropriate").

<sup>67</sup> U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Census of Jail Facilities (2006)*, available at <http://dx.doi.org/10.3886/ICPSR26602.v1>.

<sup>68</sup> *Order* at note 280. The *Order* supports this claim by pointing to a contract with the state of California's prison system, another with the state of Nebraska's prison system, and a third with U.S. Immigration and Customs Enforcement at the Department of Homeland Security. See *id.* at note 226 (citing ICS contract between Public Communications Services, Inc. and Nebraska Department of Correctional Services, dated July 8, 2008, available at <http://www.prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=Nebraska>); *id.* at note 280 (citing State of California, California Technology Agency, IWTS/MASS Agreement Number OTP 11-126805, available at <http://prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=California>, and citing note 493, which in turn cites Letter from Glenn Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed July 26, 2013)). Although note 493 also cites two additional comments, those comments discuss "postalized" rates within a facility (*i.e.*, the same rates for local and long-distance calls), not uniform rates across facilities.

<sup>69</sup> *Order* at note 301.

<sup>70</sup> For example, the letter touted by the *Order* for its discussion of a contract with U.S. Immigration and Customs Enforcement at the Department of Homeland Security goes on to explain the different rates that same ICS provider offers for state prisons and county jails. See Letter from Glenn Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed July 26, 2013).

loss, inmates in those facilities ultimately will suffer.<sup>71</sup> And even if a provider for some reason chooses to engage in cross-subsidization between prisons and county jails, uniform safe harbors and caps mean that long-term prison inmates will be forced to subsidize the calls of short-term jail inmates.

*Fifth*, the *Order* suggests that because the safe harbor and cap are set conservatively, they already account for cost variances across facilities.<sup>72</sup> Unfortunately, calling a measure “conservative” 34 times doesn’t make it so.<sup>73</sup>

Consider the cap on debit rates. The *Order* primarily relies on Pay Tel’s cost data to establish a cap of 21 cents per minute.<sup>74</sup> But Pay Tel’s *average* costs were 20.8 cents. Unless this is a most unusual situation in which no jails have above-average costs—a Bizarro Lake Wobegon—a cap of 21 cents almost certainly means that a significant number of small jails will be capped at below-cost rates. Other evidence in the record leads to a similar conclusion. The Siwek Report points to smaller correctional facilities where costs average \$1.39 per minute, a figure almost seven times the rate cap.<sup>75</sup> And CenturyLink reports that its highest-cost large jails cost 22 cents a minute to serve, not including an additional 4 cents for more recent security features.<sup>76</sup> Moreover, CenturyLink explains that smaller jails with 100 or fewer inmates “are much costlier to serve, with CenturyLink’s costs to serve as high as [70.9 cents] per minute.”<sup>77</sup> So the evidence in the record demonstrates that a rate cap for debit calls of 21 cents per minute is not a conservative approach—it is arbitrarily low as applied to jails.

So too with the cap on collect rates. The 25 cent cap here is based on a 24.6 cent *average* cost of service in 2008.<sup>78</sup> Right off the bat, this means costs in many facilities are likely to be above the cap, as true for the cap on debit rates. And the 24.6 cent average is only true if you both assume the average call lasts 15 minutes and include only the 25 least expensive locations in that study. Using the actual average call length (12 minutes), the average cost jumps to 27.8 cents per minute. Including the three highest cost locations, the average cost jumps to 28.3 cents. Taking into account both of these adjustments pushes the average cost up to 33.6 cents. So based on a full and fair review of the record, average costs of the facilities in that study are more than 34 percent above the cap. And even that assumes that costs have

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<sup>71</sup> Although the *Order* quotes a single ICS provider that occasionally serves small facilities at a loss when it “represent[s] that community or . . . ha[s] a lot of facilities in that area,” *Order* at note 301, it is naïve to expect that charitable intentions will lead ICS providers to serve all the small institutions with below-cost rates.

<sup>72</sup> See, e.g., *Order* at para. 62 (“We set our interim safe harbor at conservative levels to account for the fact that there may be cost variances among correctional facilities.”); *id.* at para. 79 (noting that the data underlying the cap calculation “represent the highest cost of a per-minute collect call in the record, and includes cost data from locations with varying cost and call volume characteristics” (indirectly citing Wood Report at 4)); *id.* at note 230 (“[W]e are not simply ‘calling’ our measures conservative . . . but rather are relying on record evidence in a conservative fashion.”).

<sup>73</sup> Cf. Inigo Montoya, *The Princess Bride* (Act III Communications 1987) (“You keep using that word. I do not think it means what you think it means.”).

<sup>74</sup> *Order* at para. 76.

<sup>75</sup> The fact that *average* costs in the Siwek Report (referred to by the *Order* as the cost study submitted by Securus, see *Order* at para. 77) were below the cap does nothing to establish that 21 cents per minute is a reasonable cap as applied to jails when that same study shows that costs in small jails averaged \$1.39 a minute.

<sup>76</sup> CenturyLink Report at 3.

<sup>77</sup> *Id.* This information, as well as other data described above, simply cannot be squared with the Commission’s claim that the interim rate caps were established “us[ing] the highest costs in the record.” *Order* at para. 74; see also *id.* at note 230 (“[T]he rates we set for the safe harbor and cap reflect costs that *exceed* the cost data that any party submitted in the record.”).

<sup>78</sup> *Order* at para. 78.

held steady over the past five years. The record, however, shows that the cost of security measures such as biometric voice scanning and real-time monitoring have actually increased over time.<sup>79</sup>

Next, consider the safe harbor. It is based on the *prison* rates of seven states that have eliminated site commissions. No data for jails (service to which, again, requires higher per-minute costs) was used to calculate the safe harbor, even though that benchmark applies to jails. It is therefore not surprising that the safe harbor is below the average per-minute costs of serving jails.

Additionally, the safe harbor of 12 cents does not make sense even as applied to prisons. While acknowledging that rates charged for services do not necessarily correlate with the costs,<sup>80</sup> the item nevertheless concludes that a subset of seven states that have eliminated site commissions in prisons “provides a reasonable basis for establishing a conservative proxy for cost-based rates.”<sup>81</sup> And yet, the safe harbor is based on *averaging*, so some prison rates in these states will by definition come out above the benchmark. So it is that rates in Michigan and Rhode Island are above the benchmark even though both states have adopted the reforms the *Order* suggests are necessary to correlate rates with costs.<sup>82</sup> (Ironically, even though the rates in Rhode Island are used to compute the safe harbor, ICS providers there cannot continue to charge those rates going forward given that they are not only above the safe harbor but also above the cap.)

The Commission’s calculations also skew the average rate of these seven states lower than it actually is. For example, the *Order* assumes the average ICS calls lasts 15 minutes (rather than 12<sup>83</sup>) because it “anticipate[s] that call durations would tend to increase under our rates.”<sup>84</sup> And the *Order* rounds the average rate down (which would place the average rate itself outside the safe harbor) rather than up. Taking the less aggressive approach in each situation would have yielded safe harbors two cents

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<sup>79</sup> See, e.g., Pay Tel Report at 3 (noting that the use of continuous biometric identification, once unavailable, now costs Pay Tel 1.93 cents per minute); CenturyLink Report at 2 (asserting that “current generation security features” require payments of 4 cents a minute to third-party software vendors); Securus Supplement at 5–6 (Mar. 27, 2013) (“Another area in which Securus’s costs have gone up is software development. Because of the unique nature of inmate telephone services, in 2012 alone Securus spent over \$4.5 million on the development of safety, security, and investigative software for its inmate telephone systems.”); Securus Reply (Declaration of Kelly Solid) (Apr. 22, 2013) (describing the proprietary THREADS software program that mines inmate calling data “to predict, prevent, or address activity that would be harmful to inmates or the general public,” such as apprehending an escapee or preventing attempts to assassinate law enforcement officials”).

<sup>80</sup> Record evidence suggests that the rates charged in many jurisdictions do not correlate with the costs. Even in states that have adopted reforms, there is evidence that ICS providers have raised ancillary charges to offset revenue losses from low interstate calling rates. See, e.g., Michael S. Hamden Ancillary Charges PN Comments at 5 (asserting that “New Mexico ICS providers also generate revenue through imposing a wide variety of charges to establish pre-paid accounts and to maintain those accounts”); Michael S. Hamden Ancillary Charges PN Reply at 1. Cf. *MCI Telecomm. Corp. v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998) (“The Commission never explained why a market-based rate for coinless calls could be derived by subtracting costs from a rate charged for coin calls. If costs and rates depend on different factors, as they sometimes do, then this procedure would resemble subtracting apples from oranges.”).

<sup>81</sup> *Order* at para. 62.

<sup>82</sup> To try to get out of this box, the item later concludes that something must be rotten in the States of Michigan and Rhode Island. See *Order* at notes 235, 237. But it cites no evidence in support of that assertion. Furthermore, if this is true, then it begs the question of why these two states were used to calculate the safe harbor in the first place. Cf. *id.* at note 237 (“A statistical analysis of the state rate data would also lead to exclusion of these two states.”).

<sup>83</sup> The average duration in California prisons was 12.1 minutes in 2010, Bazelon Report at 14, and the average call duration across Securus-served facilities was 11.63 minutes in 2012, Siwek Report at 8.

<sup>84</sup> *Order* at note 232.

higher than those adopted in the *Order*.<sup>85</sup> And again, the result would be even higher for jails (two additional cents higher), where the average call lengths are even shorter and less price elastic.<sup>86</sup>

Considering all these facts together, I believe that the decision to establish a safe harbor and cap that applies to all correctional institutions, regardless of their size and regardless of their nature, is arbitrary. I also believe that the specific safe harbor and cap chosen by the Commission are not supported by substantial evidence. By ignoring the differences between prisons and jails (among other things), the Commission has “fail[ed] to consider an important aspect of the problem” before us.<sup>87</sup> And by setting a safe harbor and cap that is unreasonably low for jails, especially smaller ones, the Commission has made a decision that “runs counter to the evidence” in the record.<sup>88</sup>

To be sure, the *Order* affixes an “interim” label on the safe harbor and the cap as well as the rate structure and rate levels adopted. Perhaps this is meant to invoke courts’ “particularly deferential” review of interim rules.<sup>89</sup> The problem is that such deference is premised on “[a]voidance of market disruption pending broader reforms”<sup>90</sup> and the agency “act[ing] to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated.”<sup>91</sup> Neither factor obtains here. In fact, the interim rules in this case will significantly disrupt the market given that 21 state prison systems (and the Federal Bureau of Prisons) have interstate rates above the cap and another 11 have rates above the safe harbor, not to mention the thousands of jails and smaller facilities with ICS that will be affected. This approach is intended to perturb, not preserve, the status quo.<sup>92</sup>

Nor does the “interim” designation bridge the evidentiary gap that will persist until the completion of the mandatory data collection appended to the *Order*.<sup>93</sup> The data collection seeks the costs

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<sup>85</sup> Specifically, the average rate for collect calls would have been 16 cents (rounded up from 15.21 cents) and for debit/prepaid calls 14 cents (rounded up from 13.03 cents).

<sup>86</sup> See CenturyLink Comments at 11 (noting that call lengths in jail do not appear to be particularly sensitive to price). The average call length was 10.45 minutes for midsize jails and 7.1 minutes for small jails. Siwek Report at 8. For midsize jails, the average rate for collect calls would have been 17 cents (rounded up from 16.03 cents) and for debit/prepaid calls 14 cents (rounded up from 13.57 cents). For small jails, the average rate for collect calls would have been 20 cents (rounded up from 19.02 cents) and for debit/prepaid calls 16 cents (rounded up from 15.58 cents).

<sup>87</sup> *Motor Vehicle Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>88</sup> *Id.* The *Order* sets up a straw man by arguing that under my approach, “the averaging of relevant record data” would never be allowed. See *Order* at note 230. The permissibility of averaging costs depends upon the particular market and particular record at issue. And my position, as explained in detail above, is that relying on an average-cost approach is arbitrary in light of the nature of the market for ICS and the record compiled in this proceeding. By contrast, where providers are required by law to serve all locations within a geographic area, then an average-cost approach could well have merit.

<sup>89</sup> *Rural Cellular Ass’n I*, 588 F.3d at 1105; see also *Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1095 (D.C. Cir. 2012).

<sup>90</sup> *Rural Cellular Ass’n I*, 588 F.3d at 1106 (quoting *Competitive Telcomms. Ass’n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002)).

<sup>91</sup> *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

<sup>92</sup> Given that today’s *Order* is not an interim rule as envisioned by these precedents, I need not broach the question of whether Congress intended courts to apply a more deferential standard to interim rules. Cf. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (rejecting a change in the standard of deference where “statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action”).

<sup>93</sup> It is worth noting too that interim rules can remain in place for a significant period of time. Compare *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-

(continued....)

of all ICS providers to serve all their facilities, including how joint and common costs are apportioned among facilities, as well as certain rate and usage information.<sup>94</sup> With this cost information, the Commission could determine how to adequately address the cost variability shown in the present record. But without it, the cart at this point stands in front of the horse.<sup>95</sup>

For all of these reasons, I fear the *Order* invites protracted litigation, which may tie up the agency for years to come and delay any hope of reducing the most egregious ICS rates in the near term.<sup>96</sup>

## II.

Leaving aside the *Order*'s legal infirmities, I cannot support an *Order* that we cannot administer with consequences we cannot control. I would have supported action to institute simple and reasonable rate caps. But this item instead combines *de facto* rate-of-return regulation for ICS providers at all correctional institutions in America, which we will not be able to administer effectively, with a flawed rate cap that will result in county jails, secure mental health facilities, and juvenile detention centers scaling back their security measures or even terminating inmate calling services entirely.

### A.

To understand the challenges of administering the *Order*, consider what it requires. *First*, each ICS provider must adjust its interstate ICS rates and ancillary charges so that they are “cost based.” If the Commission determines those rates are not cost based, it may reduce an ICS provider’s rates, impose forfeitures, and require refunds. *Second*, each ICS provider must determine whether *all* of those cost-based rates fall beneath the safe harbor or *any* of those cost-based rates rise above the cap. *Third*, each

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10593, Report and Order, 27 FCC Rcd 10557, 10558, 10561, paras. 1, 7 (2012) (suspending certain rules on an “interim” basis and stating that a data collection will commence by October 22, 2012), *with* Comment Deadlines Extended in Special Access Proceeding, WC Docket No. 05-25, RM-10593, Public Notice (July 31, 2013) (noting that the Office of Management and Budget has not yet approved the special access data collection and collection will not likely commence until “the end of this year or early next year”).

<sup>94</sup> *Order* at para. 125.

<sup>95</sup> I do not suggest that the Commission must “assemble perfect data” before acting nor that the Commission must set an “exquisitely granular rate[,] unsullied by any taint of averaging,” as hyperbolically suggested by the *Order*. See *Order* at notes 230, 308; *cf. infra* Part III. But I do insist that any solution adopted actually be supported by the record. So do the courts. See *State Farm*, 463 U.S. at 43 (agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made”) (internal quotation marks and citation omitted). If the record contains uncontroverted evidence that the costs of serving different correctional institutions varies widely, as it does here, the Commission must either tailor its solution to that evidence or defer action until it obtains new evidence. It is arbitrary and capricious for the Commission to set aside the record evidence (by averaging) and adopt far-reaching regulations in the hope that later data will justify them.

<sup>96</sup> I tend to doubt the *Order*'s severability clause will help the Commission avoid or escape the thicket. That clause notes that even though “[a]ll of the rules . . . are designed to work in unison,” “[i]f any of the rules is declared invalid or unenforceable for any reason, it is our intent that the remaining rules shall remain in full force and effect.” *Order* at para. 127. Practically speaking, of course, the severability clause may mean nothing at all. After all, some rules (like the safe harbor) make no sense without others (like the requirement that all interstate ICS rates be cost-based). And courts do not accept without question agencies’ assessments of what rules can stay and what rules can go. Perhaps for these reasons, we rarely include such clauses when we adopt rules and have done so only three times in the last decade by my count. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17241, n.139 (2011); *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18149, para. 1405 (2011); *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 06-121 et al., Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2018, para. 12 (2008) (subsequent history omitted).

ICS provider must report annually on the rates charged, minutes billed, calls disconnected, and other information for each correctional institution it serves. And *fourth*, each ICS provider must document its costs for the past year and report those costs to the Commission on an institution-by-institution basis. Together these requirements amount to the imposition on ICS providers of all-out rate-of-return regulation, with its requisite cost studies, separations, cross-subsidizations, tariffing, and other accoutrements. I'll address each piece in turn.

1.

*First*, all interstate ICS rates and all ancillary charges must be cost based.<sup>97</sup> In this context, this means that rates must be based on “historical costs that are reasonably and directly related to the provision of ICS” plus some return on investment.<sup>98</sup> To calculate this, an ICS provider must record and document its costs of providing service. It must distinguish between eligible costs (such as “costs of the equipment housed in the confinement facility,” the costs of “originating, switching, and the transport and termination of calls,” “the costs of recording and screening calls,” the costs of “blocking mechanisms,” the costs of “biometric caller verification,” the costs of “storage of inmate call recordings,” and the costs of “billing and collection”<sup>99</sup>) and ineligible costs (such as some, but not all, site commissions<sup>100</sup>). If the provider uses the same equipment or personnel to provide ICS and another service (for example, if a jail requires that ICS be integrated with commissary ordering), the provider must figure out some way to unbundle the eligible costs from the ineligible costs. For capital investments, the provider must determine an amortization schedule, a depreciation method, the appropriate rate of return, and a tax rate. After answering all these questions, the ICS provider will presumably have determined its historical costs.

But there's more. While some costs will be tied to the provision of a service at a particular facility, many ICS costs today are joint and common costs, such as corporate operating expenses (including the cost of complying with FCC rules) or the cost of a centralized inmate calling recording platform that serves multiple facilities. For these costs, the ICS provider must apportion them among the prisons, jails, and other correctional institutions it serves and between ICS and “ancillary” services in a just and reasonable manner. Then, at least for ICS, the provider must separate the costs of interstate service from the costs of intrastate service since only interstate costs can factor into interstate rates. And then the ICS provider must translate those interstate, eligible costs into per-call and per-minute rates.

To administer this same process for incumbent rate-of-return carriers, the Commission has rules spanning at least five different parts of the Code of Federal Regulations. Part 64 explains how carriers must allocate costs between eligible and ineligible services.<sup>101</sup> Part 32 explains how carriers should account for their different categories of expenses.<sup>102</sup> Part 36 explains how carriers should separate their interstate costs from their intrastate costs.<sup>103</sup> Part 65 explains how carriers should calculate their rates of return.<sup>104</sup> And Part 69 explains how carriers should translate their interstate costs into interstate rates.<sup>105</sup>

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<sup>97</sup> See Rule 64.6010.

<sup>98</sup> *Order* at para. 52.

<sup>99</sup> *Id.* at note 196. Notably, the *Order* only states that these costs are “likely” eligible.

<sup>100</sup> *Id.* at note 203.

<sup>101</sup> 47 C.F.R. Part 64, Subpart I (Allocation of Costs).

<sup>102</sup> 47 C.F.R. Part 32 (Uniform System of Accounts for Telecommunications Companies).

<sup>103</sup> 47 C.F.R. Part 36 (Jurisdictional Separations Procedures; Standard Procedures for Separating Telecommunications Property Costs, Revenues, Expenses, Taxes and Reserves for Telecommunications Companies).

<sup>104</sup> 47 C.F.R. Part 65 (Interstate Rate of Return Prescription Procedures and Methodologies).

<sup>105</sup> 47 C.F.R. Part 69 (Access Charges).

But this *Order* leaves most of the questions on how to actually implement such regulation wholly unanswered. For example, must ICS providers follow the principles of Part 32 accounting, or may they employ Generally Accepted Accounting Principles (GAAP)? Should the rate of return be the same as for rural incumbent local exchange carriers (11.25 percent) or should it reflect the ICS market? And what adjustments to rate-of-return accounting are necessary given that ICS providers compete against each other for contracts that last only a few years (by contrast, rate-of-return principles were developed to police state-granted monopolies)?

Complicating this exercise for ICS providers is that most are not free to adjust their rates unilaterally. Instead, most ICS rates are subject to contracts between the ICS provider and the correctional institution—contracts that will remain in place even after the *Order* becomes effective.<sup>106</sup> As such, an ICS provider must renegotiate existing contracts or pursue other legal recourse, all in the next 90 days,<sup>107</sup> in addition to calculating new, cost-based rates for interstate ICS calls and ancillary charges.

If an ICS provider's rates are challenged, things get even more complicated. The Commission may investigate their rates, whether or not inmates file complaints. ICS providers bear the burden of production in all such cases, meaning they must submit all documentation necessary to prove that their rates are just and reasonable. And ICS providers will usually bear the burden of proof.<sup>108</sup> The Commission must then evaluate on a facility-by-facility basis which costs are legitimate and which are not, and determine whether it agrees with the way the ICS provider accounted for its costs, separated them, and translated them into rates.

If the Commission disagrees with the ICS provider's accounting after the fact, the provider must lower its rates. In ordering rate changes, the Commission reserves the right to decide that "[s]ome averaging of costs must occur" so that it may "require that an ICS provider be fairly compensated on the basis of either the whole of its ICS business or by groupings that reflect reasonably related cost characteristics, and not on the basis of a single facility it serves."<sup>109</sup> In other words, after the Commission looks at the costs of serving each of a provider's facilities, it might order an ICS provider to start cross-subsidizing—charging inmates at one facility more in order to reduce the cost of serving another facility. But the *Order* provides no guidance as to when the Commission may impose this remedy.

In some cases, the Commission may order refunds and forfeitures, but the *Order* does not mention how the former would be implemented. How far back would refunds go? How long must ICS providers track who paid how much at a particular rate? If an inmate has already left the jail or prison, must the ICS provider track him or her down? May the ICS provider include the cost of administering refunds in its rates going forward? None of these questions is asked, much less answered.

## 2.

*Second*, the *Order* establishes both a safe harbor (of 12 cents minute) and a cap (of 21 cents) for debit and prepaid calls, and a higher safe harbor (14 cents) and cap (25 cents) for collect calls.<sup>110</sup> For ease of discussion, let's focus on a provider's debit rates.

Take first the safe harbor. To qualify for it, an ICS provider's rates must be 12 cents a minute or less. But having rates at a particular facility or within a particular state below 12 cents is not sufficient—

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<sup>106</sup> *Order* at para. 100 ("Nothing in this Order directly overrides such contracts.").

<sup>107</sup> Note that the effective date of the *Order* is 90 days after publication in the Federal Register. For ease of exposition, I assume that such publication will occur shortly after release.

<sup>108</sup> *Order* at para. 121. The ICS provider always bears the burden of proof for ancillary charges. For ICS rates, the burden may shift to complainants if the provider meets the safe harbor, as discussed below.

<sup>109</sup> *Order* at para. 123.

<sup>110</sup> Notably, there is no safe harbor for, and no cap on, ancillary charges.

the safe harbor applies only if *all* of an ICS provider's rates are below 12 cents.<sup>111</sup> If the rates for a single facility are above that benchmark, the ICS provider will not qualify for the safe harbor at *any* facility. Because there is uncontroverted evidence in the record that the cost of serving many county jails is far above 12 cents a minute,<sup>112</sup> this means that one of two things will happen. Either ICS providers will continue to provide service to county jails and none of them will qualify for the safe harbor, so it will be a dead letter. Or in order to qualify for the safe harbor, ICS providers will stop providing service to numerous jails across the country.<sup>113</sup>

Moreover, the "safe harbor" is a bit of a misnomer since it provides no refuge from complaints. The *Order* explicitly states that "[p]arties can file a complaint challenging the reasonableness of interstate ICS rates" even if those rates are within the safe harbor.<sup>114</sup> If those rates are challenged, the Commission will have to decide whether they are cost-based and may reduce a provider's rates even further below the safe harbor. To be sure, the provider will benefit from a rebuttable presumption that its rates are just and reasonable, but rebuttable means that the safe harbor isn't really safe.

Next, turn to the cap of 21 cents. If any of an ICS provider's cost-based rates are above the cap, the Commission's message appears to be "too bad." Unless the Commission decides to grant a special dispensation, providers serving county jails will be subject to what is perhaps best described as negative rate-of-return regulation. Under the *Order*, a provider cannot charge cost-based rates at a small jail with above-average costs unless and until the Commission grants a waiver for "extraordinary circumstances." In deciding whether to grant such a waiver, the Commission may examine not just the costs of serving that one facility, but its costs of serving each and every facility, including "costs directly related to the provision of interstate ICS and ancillary services; demand levels and trends; a reasonable allocation of common costs shared with the provider's non-inmate calling services; and general and administrative cost data."<sup>115</sup>

Given that the record shows that the cost of serving jails, and especially small jails, can be significantly higher than 21 cents a minute, there are sure to be many jails, juvenile correctional institutions, and secure mental health facilities, with costs above the cap.<sup>116</sup> Given that the *Order* requires ICS providers to charge below-cost rates at such facilities until the Commission says otherwise, either providers will stop serving smaller jails or the waiver requests will come in swiftly. And given that our country has 2,859 jails, of which 1,681 have fewer than 100 beds and 1,129 have fewer than 50 beds,<sup>117</sup>

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<sup>111</sup> *Order* at notes 226, 429.

<sup>112</sup> *See supra* Part I.B.

<sup>113</sup> Theoretically, an ICS provider could raise rates in some facilities (such as the prisons of New York and New Mexico) in order to reduce rates below cost in others (e.g., county jails). But the *Order* offers no meaningful guidance as to when (and to what extent) such cross-subsidization would be permissible, other than to say that "ICS providers should not read this *Order* as providing a basis to increase rates" unless "necessary to ensure recovery of costs directly and reasonably related to the provision of ICS on a holding-company level." *Order* at note 19; *see also id.* at note 225. So the Commission has put a Sword of Damocles over the ICS providers that continue to serve jails, as the Commission could well decide after the fact that a provider's decision to cross-subsidize is unjust and unreasonable. So while, as explained earlier, it is naive to expect that charitable intentions will lead ICS providers to serve all small correctional institutions with below-cost rates, expecting them to serve institutions where they will lose money *and* where doing so may invite enforcement action by the Commission is less an indication of naiveté than wishful thinking.

<sup>114</sup> *Id.* at para. 120.

<sup>115</sup> *Id.* at paras. 82–83.

<sup>116</sup> As I explain above, the cap is not "conservative," and I do not see the basis for the *Order*'s "expect[ation] that the rates of most facilities, whether jails or prisons, large or small, should fall below this rate." *Id.* at para. 77.

<sup>117</sup> U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of Jail Facilities (2006), available at <http://dx.doi.org/10.3886/ICPSR26602.v1>.



the waiver requests might apply to hundreds or thousands of facilities across the country.<sup>118</sup> I cannot see how the Commission will process these waivers in an effective or timely manner considering our limited resources. Indeed, recent experience counsels otherwise.<sup>119</sup>

And assume that the Commission finds, after a grueling review, that an ICS provider has justified its waiver request. What then? Presumably the provider may, at that point, raise its rates above the cap. But how can the ICS provider recoup the revenues it lost while the Commission required it to charge below-cost rates? The short answer is it cannot. And thus the rate-of-return regulations adopted in the *Order* are a one-way ratchet—all designed to lower rates regardless of the consequences.

3.

*Third*, each ICS provider must file by April a list of the interstate and intrastate rates it charges at each correctional institution it serves, as well as the “their charges to consumers that are ancillary to providing the telecommunications piece of ICS.”<sup>120</sup> This is effectively a tariffing requirement that allows the Commission to scrutinize the rates of all providers, especially given that ICS providers must update these filings every year going forward. May an ICS provider change its rates between filings? Perhaps. Will the Commission require providers to update their filing if they do? Not yet. But will the Commission likely cast a skeptical eye on rate increases between filings? Almost certainly. And where we will get the resources to review the effectively tariffed rates at each of the thousands of correctional institutions in America? I don’t know. In order to administer the rules contained in this *Order*, the Commission may need to create its own Bureau of Prisons.

4.

*Finally*, there is the massive data collection. Each ICS provider must document its costs for the past year and report them to the Commission on an institution-by-institution basis. Those costs must be broken down into five separate categories (connections, equipment, maintenance, security, and ancillary), which must be apportioned among three methods of cost accrual (fixed, per call, and per minute), and which must then again be divided between direct costs and joint and common costs. In addition, ICS providers must report the costs for establishing, maintaining, and closing debit and prepaid accounts, for sending paper statements, and for calling wireless phones, as well as the rates they charge for these services. And ICS providers must report “data on their interstate and intrastate long distance and local demand (*i.e.*, minutes of use) and . . . apportion the minutes of use between interstate and intrastate calls.”<sup>121</sup> For jails alone, that’s 122,937 separate pieces of information.<sup>122</sup> How we will review that information, check it for errors, and analyze it within a reasonable time frame is a mystery.

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<sup>118</sup> The *Order* suggests that because the three largest ICS providers “account for over 90% of ICS provided in the country,” processing waiver requests will not be a problem. *Order* at note 270. But that statistic is irrelevant for these purposes. The vast majority of ICS minutes come from state and federal prisons, where providers are unlikely to require waivers. The question instead is whether the Bureau has the capacity to process waivers covering the country’s 2,859 jails, each of which may face different costs of service.

<sup>119</sup> *Cf. Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663,17842, para. 544 (2011) (directing the Wireline Competition Bureau to process waivers filed by Tribal or insular carriers for certain new universal service rules to complete review within 45 days of the record closing).

<sup>120</sup> *Order* at para. 116.

<sup>121</sup> *Id.* at para. 125.

<sup>122</sup> The calculation is 43 pieces of information collected from each of the 2,859 jails in the United States. U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of Jail Facilities (2006), *available at* <http://dx.doi.org/10.3886/ICPSR26602.v1>.

What is more, the mere fact of this data collection means that the safe harbor is ephemeral. Even if an ICS provider qualifies for the safe harbor (an uncertain proposition for the reasons described above), it must submit data that the Commission may well use to require that provider's rates to be reduced even further.<sup>123</sup>

As if all these administrative problems were not enough, the Commission proposes to expand these same rules to local and intrastate services. This novel interpretation of section 276 would empower the Commission to preempt the role of state regulatory commissions in overseeing local and intrastate long-distance rates.<sup>124</sup> And it would foist even more work on our already-crowded plate.

## 5.

The *Order* rejects the rate-of-return label for its approach, instead terming it alternately a “rate cap regulatory regime[,]” a “rate cap approach,” “rate caps . . . similar to rate benchmarks,” a “rate cap framework,” “rate caps under a framework,” a “kind of variant on rate caps,” “rate caps that include a safe harbor mechanism,” “a system that relies on rate caps as well as potential complaints that rates are not based on costs,” or even “caps and . . . other steps to ensure that rates reflect costs.”<sup>125</sup> But whatever it's called, the name matters less than the substance. And the substance of the *Order* is *de facto* rate-of-return regulation.

At its core, rate-of-return regulation is about limiting the profits providers make by tying rates to historical costs plus a rate of return; it's the regulatory equivalent of a cost-plus contract.<sup>126</sup> As outlined above, that's exactly what the *Order* requires: “[I]nterstate ICS rates . . . must be cost-based,”<sup>127</sup> and costs are defined as “historical costs”<sup>128</sup> plus a “reasonable return on investment.”<sup>129</sup> The fact that the *Order* also caps the rates of ICS providers does not convert this rate-of-return regulation into something else; indeed, the Commission has used caps to supplement rate-of-return regulation before.<sup>130</sup>

In rebuttal, the *Order* suggests that its approach is “fundamentally different than rate-of-return regulation” because it “does not rely on a prescribed rate of return, ex ante review, tariff filings, or compliance with cost accounting rules.”<sup>131</sup> Set aside for the moment whether this assertion is true—whether, for example, the *Order* does not rely on tariff filings (despite the annual rate-filing requirement)

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<sup>123</sup> *Order* at note 433.

<sup>124</sup> An ICS provider in today's market usually plays three separate roles under the statute: a payphone service provider (providing the equipment to connect to the network), a local exchange carrier (providing the connection to the local network), and an interexchange carrier (providing the connection beyond the local area). We have never before suggested that section 276 allows us to evaluate whether intrastate rates and practices are just and reasonable (a la section 201) for local exchange carriers and interexchange carriers just because they connect to a payphone.

<sup>125</sup> *Order* at para. 59 & notes 195, 222, 224, 280.

<sup>126</sup> See *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6787, 6789, paras. 1, 22 (1990) (*Price Cap Order*).

<sup>127</sup> *Order* at para. 50; see also *id.* at para. 119 (“we require ICS providers to charge cost-based rates and charges”); *id.* at para. 120 (“we require all interstate ICS rates and charges to be cost-based”).

<sup>128</sup> *Id.* at para. 52.

<sup>129</sup> *Id.* at para. 53.

<sup>130</sup> See 47 C.F.R. § 69.104 (prescribing caps for the subscriber line charge for rate-of-return carriers).

<sup>131</sup> *Order* at note 195. I note that I cannot find any source—and the *Order* cites none—suggesting that all (let alone any) of the proffered regulatory methods are necessary requirements of rate-of-return regulation. By my reading, the Commission has used these methods in numerous circumstances, sometimes as part of rate-of-return regulation and sometimes not. See, e.g., *Price Cap Order*, 5 FCC Rcd at 6787–91, paras. 5–37 (maintaining the use of these methods for price-cap regulation).

or does not require compliance with cost accounting rules (despite the fact that ICS providers must allocate their costs as specified in the *Order*) or does not require ex ante review (despite the fact that carriers may not charge cost-based rates above the cap without ex ante review). The larger problem with this argument is that it seeks to sell a bug of the *Order* as a feature—the lack of clarity over how the Commission will implement its rate-of-return regulation (such as the prescribed rate of return) will lead to less certainty and more *ex post* decision-making. After all, ICS providers are not going to be able to choose whatever rate of return they desire; the *Order* even suggests that the 11.25 percent rate of return assumed by ICS providers “likely” overstates the cost of capital.<sup>132</sup> As the Commission goes about implementing this *Order*, it eventually will have to reveal to service providers what their rate of return may be. In short, whatever label the *Order* slaps on this package of new rules, it cannot deny that the contents constitute *de facto* rate-of-return regulation.<sup>133</sup>

## B.

Turning from administrative difficulties to unintended consequences, I believe, as set forth above, that the rates in the item are below the costs of serving most jails (the majority of jails in our nation hold fewer than 100 inmates), secure mental health facilities, and juvenile detention centers. This arbitrarily low rate will impede the continuing deployment of current-generation security measures and the development of next-generation security techniques. The end result will be more crime. Over time, I also fear that ICS providers will reduce service to some facilities and entirely eliminate service to others.

No one disputes that public safety and security are important. Although many use ICS only for its intended purposes—staying in touch with friends and family—not all inmates are so benign. Some “[i]nmates utilize the telephone to communicate with individuals in the community to conspire and carry out serious criminal activities” such as intimidating witnesses and crime victims or coordinating gang activity.<sup>134</sup> Indeed, the *Order* appropriately notes that “security features, such as call recording and monitoring . . . advance the safety and security of the general public.”<sup>135</sup>

And yet, security does not come cheap. ICS providers are constantly developing and deploying new security techniques, many of which are required just to keep pace with the tactics of certain inmates. For example, “inmates try to hide their identities through pin sharing, pin stealing, and/or three-way calls” in 1 out of every 14 calls, and biometric identification technologies have allowed for increased detection of such activities.<sup>136</sup> The cost of these new techniques may be significant, adding two to four cents per minute on top of the other costs (including call monitoring and recording) of a call.<sup>137</sup> If an ICS

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<sup>132</sup> *Order* at note 203.

<sup>133</sup> The *Order* also tries to ditch the rate-of-return label by noting that the safe harbor and cap are based on averages and claiming that “the use of average cost data is not common in rate of return regulation because a provider’s rates, although often averaged across its own facilities, are generally premised on that provider’s individual costs.” *Order* at note 280. That just proves the point, though, since the requirement that each ICS provider’s rates be cost based apparently means “averag[ing] across its own facilities, . . . that provider’s individual costs.” See, e.g., *id.* at note 301 (suggesting an ICS provider may average its costs among its facilities in establishing rates); *id.* at para. 83 (suggesting that an ICS provider seeking a waiver must average its costs among its facilities in establishing rates).

<sup>134</sup> Letter from Danielle Burt, Counsel for JLG Technologies, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. A at 3 (July 30, 2013) (JLG *Ex Parte* Letter); see also Statement of Commissioner Ajit Pai, Promoting Technological Solutions to Combat Contraband Wireless Device Use in Correctional Facilities, GN Docket No. 13-111, available at <http://go.usa.gov/jM75>.

<sup>135</sup> *Order* at para. 2.

<sup>136</sup> JLG *Ex Parte* Letter at 1 (reporting that “JLG’s biometric based 3-way call detection technology detected at least one 3-way call on 3.8% of the suspicious calls that its systems uncovered”).

<sup>137</sup> JLG *Ex Parte* Letter at 1 (reporting that JLG charges ICS providers 2 cents a minute for its technology); Pay Tel Report at 3 (noting third-party expenses for biometric analysis of 1.93 cents a minute); CenturyLink Report at 2 (noting a cost of 4 cents a minute for “current generation technologies”).

provider's costs of providing service are already just below or at the cap (as is likely the case at some jails), these security features will likely never be deployed since there will be no way for the ICS provider to recover the additional costs without going through the trouble of seeking a waiver from the Commission. And what about those jails where the cost of providing service is just above the cap? Far from taking on additional security costs, many of them will aim to reduce costs to get under the cap, and existing security measures could end up being jettisoned in the process.

Those who protect our safety day in and day out agree that maintaining security measures are vital. The National Sheriffs' Association explains that "dangerous individuals in local jails . . . try to continue their criminal activities on the outside while they are incarcerated," "contact witness[es] with wrongful intent," "call their victims," and "plot and plan criminal enterprises . . . with startling regularity, literally every day."<sup>138</sup> The sheriff of Rock County, Wisconsin, writes that current technology measures have "uncover[ed] information that assisted with the prosecution of an attempted homicide," "led to countless drug investigations, and dramatically reduced the amount of contraband that enters our facility."<sup>139</sup> The sheriff's office of Deschutes County, Oregon, explains that recording calls and verifying the voice of the caller before connecting a call have "reduced the amount of witness tampering and violations of no-contact orders."<sup>140</sup>

And they too believe that burdensome rate regulation, like that adopted today, will undermine that security. The California State Sheriffs' Association argues that rate regulation "would seriously hamper the ability of California Sheriffs to effectively secure and manage their jails."<sup>141</sup> The sheriff of Marion County, Oregon, explains that such regulation "will have serious impacts on the safety and security of correctional facilities."<sup>142</sup> The Captain of the Detention Division of the Elmore County Sheriff's Office, Idaho, fears the "extremely detrimental" effects of losing the security measures he calls "critical for the safety of staff and inmates, as well as for the continued reduction and prosecution of crimes."<sup>143</sup> And the sheriff's office of Coconino County, Arizona, believes that unduly low rates will end the "technological advances and free services that have been so effective in the prevention and prosecution of crimes. . . . The only ones to benefit are those people involved in criminal activity, as preventing and prosecuting crime will become much more difficult."<sup>144</sup> Indeed, the record contains overwhelming opposition to today's *Order* from our nation's sheriffs.<sup>145</sup> These are front-line perspectives from those who put their lives on the line every day to keep us safe. While the Commission must take into account the interests of inmates and their families, we must also do what's right for crime victims, witnesses, and other law-abiding Americans.

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<sup>138</sup> Comments of Sheriff Larry D. Amerson, President, National Sheriffs' Association.

<sup>139</sup> Comments of Robert D. Spoden, Rock County Sheriff, Janesville, Wisconsin.

<sup>140</sup> Comments of Captain Michael Espinoza, Deschutes County Sheriff's Office, Bend, Oregon.

<sup>141</sup> Comments of Keith Royal, Sheriff, Nevada County, and President, California State Sheriffs' Association.

<sup>142</sup> Comments of Jason Myers, Marion County Sheriff, Salem, Oregon on behalf of the Oregon State Sheriffs' Association.

<sup>143</sup> Comments of Rob "Lynn" McCallum, Captain, Detention Division, Elmore County Sheriff's Office, Mountain Home, Idaho.

<sup>144</sup> Comments of Kurt Braatz, Commander, Detention Services, Coconino County Sheriff's Office, Flagstaff, Arizona.

<sup>145</sup> See also Comments of John Buncich, Lake County Sheriff, Lake County, Indiana; Comments of Todd L. Thomas, Chief Deputy of Corrections, Thurston County Sheriff's Office, Olympia, Washington; Comments of Vaughn Killeen, Executive Director, Idaho Sheriffs' Association; Comments of Craig Roberts, Sheriff, Clackamas County Sheriff's Office, Portland, Oregon; Comments of Robert D. "Bobby" Timmons, Executive Director, Alabama Sheriffs Association.

Moreover, when faced with this loss of security measures, America's smaller correctional institutions will then be put to a choice: endanger the public or eliminate service. In the words of the Oregon State Sheriffs' Association: "If correctional facilities cannot ensure that inmate phone calls do not present threats to the safety of the facility and the public, many will choose—or be forced—to restrict phone access or remove phones entirely."<sup>146</sup> Ironically, this means that some of the inmates and families today's *Order* is meant to serve may soon be prevented from connecting with one another at *any* price.

### III.

The *Order*'s approach was not inevitable. I proposed to my colleagues that we cap interstate calling rates for prisons at 19 cents a minute for debit calls, with higher rates for collect calls and for ICS provided at the largest jails in the country.<sup>147</sup> There is APA notice for such an approach: The Alternative Wright Petition proposed capping the interstate rates of ICS providers, and so did the *Inmate Calling NPRM*.<sup>148</sup> The record evidence supports that approach, too. The highest cost in the record of providing current service to a prison is 18.8 cents a minute,<sup>149</sup> and there is no evidence in the record that the cost of serving state prisons—the largest correctional institutions where ICS providers experience the greatest economies of scale—exceeds 19 cents a minute. And that approach is administratively feasible.<sup>150</sup> For a bright line eliminates the need for cost studies, investigations, and tariffs and grants an actual safe harbor to all those providers below the cap. And the consequences of my proposal are easily foreseen: The elimination of the most egregious rates in the country at prison payphones without any loss of security or access.

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In conclusion, I very much hope that my concerns about today's *Order* prove to be unfounded. I hope that these rules will be easy to administer. I hope no inmates will lose access to calling services. And I hope that security inside and outside of prisons does not suffer. But because I can only make these statements out of hope rather than belief, I must respectfully and regretfully dissent.

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<sup>146</sup> Comments of Jason Myers, Marion County Sheriff, Salem, Oregon on behalf of the Oregon State Sheriffs' Association; *see also* Comments of Vaughn Killeen, Executive Director, Idaho Sheriffs' Association ("If the FCC enacts price caps which severely reduce or eliminate the financial incentive of private telephone companies to provide inmate phone service (and the security features that are imperative to such services), some jails will simply be unable to afford to provide phone services to inmates at all.").

<sup>147</sup> Because the record contains widely varying information on the costs of serving the country's smaller jails, and we lack detailed data regarding the costs of serving juvenile correctional institutions and secure mental health facilities, I would have deferred consideration of rate caps for those facilities until after our Further Notice of Proposed Rulemaking.

<sup>148</sup> Indeed, the *Order* does not dispute that there was notice for such an approach—appropriately so. In the *Inmate Calling NPRM*, we asked "[i]f the Commission decides to implement rate caps in the ICS market how should we?", noted that "parties argue that differences between correctional facilities including size, location, security levels, facility age and staffing levels will not allow a one size fits all solution," and then asked "[h]ow can the Commission establish a solution that addresses the many variations among confinement facilities?" *Inmate Calling NPRM*, 27 FCC Rcd at 16638, paras. 22–23. Applying one per-minute cap to prisons, applying another to large jails, and deferring consideration of rates involving small correctional institutions responds directly to these questions.

<sup>149</sup> CenturyLink Report at 2 (noting that the cost to serve its most expensive prison is 18.8 cents a minute).

<sup>150</sup> Notably, this simple cap would not have required rate-of-return regulation for those with rates at or below the cap (thus eliminating the need for a safe harbor), would not have required tariffing, would not have applied to those facilities that are most likely to have costs above the cap, and would have allowed those serving high-cost facilities covered by the cap to seek a waiver based on their costs without any cross-subsidy requirements.