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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WCB: WC Docket No. 12-375; FCC 16-102]

Rates for Interstate Inmate Calling Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission continues its reform of the inmate calling services (ICS) marketplace by responding to points raised in a petition filed by Michael S. Hamden, seeking reconsideration of certain aspects of the Commission's 2015 ICS Order. Specifically, the Commission amends its rate caps to better allow ICS providers to recover costs incurred as a result of providing inmate calling services, including the costs of reimbursing facilities for any costs they may incur that are reasonably and directly related to the provision of service. The Order also clarifies the definition of "mandatory taxes and fees" and addresses other arguments raised by Mr. Hamden.

DATES: The rules adopted in this document shall become effective [**INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER**], except for the amendments to 47 CFR 64.6010(a) and (c), which shall become effective March 13, 2017.

FOR FURTHER INFORMATION CONTACT: Gil Strobel, Wireline Competition Bureau, Pricing Policy Division at (202) 418-1540 or at Gil.Strobel@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission Order on Reconsideration, released August 9, 2016. The full text of this document may be downloaded at the following internet address: https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-

102A1.docx This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. .

I. EXECUTIVE SUMMARY

1. In this order, we respond to the petition filed by Michael S. Hamden and amend our rate caps to improve the ability of providers to cover costs facilities may incur that are reasonably related to the provision of ICS.

- The Commission is statutorily mandated to ensure ICS rates are just, fair, and reasonable and to promote access to ICS by inmates and their families and friends. In response to claims our prior decision not to include certain costs in our rate cap calculations threatens the further deployment of ICS, we are increasing the rate caps to reflect the costs facilities may incur that are reasonably related to the provision of ICS.
- Acting upon the current record, including Hamden Petition and other input received after the 2015 ICS Order, the Commission concludes that facilities may incur costs directly related to the provision of ICS. Providers and facilities claim the 2015 rate caps prevent them from recovering all of their reasonable costs. We now revise our rate caps to expressly account for the possibility of reasonable facility costs related to ICS.
- Our rate caps continue to reflect the difference in the per-minute costs between smaller facilities and their larger counterparts, thus ensuring providers are fairly compensated for their ICS costs.
- After reviewing the record and the Hamden Petition, we amend the definition of “Mandatory Tax or Mandatory Fee.” The amended definition eliminates

confusion and more clearly reflects the Commission's decision to prohibit providers from marking up mandatory taxes or fees that they pass through to consumers, unless the markup is specifically authorized by statute, rule, or regulation.

- Having considered the Hamden Petition and the record as a whole, we deny all other aspects of the Petition. Specifically, we are not persuaded to reconsider our decision to refrain from regulating site commissions. Nor are we persuaded, based on the current record, of the need to further clarify the Single-Call Rule adopted in the 2015 ICS Order.

II. BACKGROUND

2. This Order is the latest in a proceeding that began in 2012, when the Commission issued a notice of proposed rulemaking 78 FR 4369, January 22, 2013 in response to long-standing petitions seeking relief from certain ICS rates and practices. The Hamden Petition seeks partial reconsideration of the 2015 ICS Order, in which we adopted comprehensive reforms to the ICS market, including tiered rate caps for both interstate and intrastate ICS calls, and limits on ancillary service charges. In the 2015 ICS Order, we focused on our core authority over ICS rates, adopting rate caps in fulfillment of our obligation to ensure that compensation for ICS calls is fair, just, and reasonable. We capped ICS rates at levels that we found would be just and reasonable and would ensure that providers are fairly compensated, as required by the Act. In setting the rate caps, we declined to include the cost of site commissions, which are payments from facilities to providers, because we found that such payments are not a legitimate cost of providing ICS. We did not, however, prohibit providers from paying site commissions. Instead, we let providers and facilities negotiate over whether providers would make site commission

payments and, if so, what payments are appropriate. Our approach offered ICS providers and facilities the freedom to negotiate compensation that is fair to each, while also ensuring that ICS consumers are charged rates that are fair, just, and reasonable.

3. In addition to setting rate caps for interstate and intrastate ICS calls, we discussed what costs, if any, facilities incur that are reasonably attributable to ICS. Specifically, we considered whether we should expressly provide for recovery of such costs through an additive to the per-minute rate caps limiting the prices providers may charge inmates and their families. The record before us on this point was relatively limited. Moreover, the data we had was mixed regarding the costs, if any, facilities incur that are reasonably related to the provision of ICS. Some commenters argued that many of the activities that facilities claim as ICS-related costs are actually performed by ICS providers. Other commenters, however, asserted that correctional facilities incur a variety of costs related to ICS that providers do not. These costs included expenses related to “call monitoring, responding to ICS system alerts, responding to law enforcement requests for records/recordings, call recording analysis, enrolling inmates for voice biometrics, and other duties.” As we noted, “[e]ven commenters asserting that facilities incur costs that are properly attributable to the provision of ICS do not agree on the extent of those costs.” In the 2015 ICS Order, we declined to adopt a per-minute “additive,” because of our view that the costs facilities claimed to incur in allowing ICS were “already built into our rate cap calculations and should not be recovered through an ‘additive’ to the ICS rates.”

4. Following the release of the 2015 ICS Order, four ICS providers filed petitions for stay before the Commission, including Global Tel*Link Corporation (GTL), Securus Technologies, Inc. (Securus), Telmate, LLC (Telmate), and CenturyLink. GTL and Telmate, in particular, argued that the Commission was required to include the costs of paying site commissions in the rate caps and that it set the rate caps below the documented costs of many

ICS providers. The Wright Petitioners opposed the petitions, stressing the importance of the “overwhelmingly positive public interest benefits from the adoption of the [2013 ICS Order]” and expressing concern that a stay of the 2015 ICS Order would delay relief to consumers and harm the public interest.

5. On January 22, 2016, the Wireline Competition Bureau (WCB or Bureau) issued an order denying the stay petitions of GTL, Securus, and Telmate. The Bureau found that the petitioners failed to demonstrate that they would suffer irreparable harm if the 2015 ICS Order was not stayed. The Bureau also was not persuaded that the petitioners were likely to succeed on the merits of their arguments or that a stay would be in the public interest. To the contrary, the Bureau noted that other parties – particularly ICS consumers – would likely be harmed if the relevant provisions of the 2015 ICS Order were stayed.

6. After the Bureau issued its order denying the stay petitions, the providers appealed the 2015 ICS Order to the D.C. Circuit. On March 7, 2016, the court stayed two provisions of the Commission’s ICS rules: 47 CFR 64.6010 (setting caps on ICS calling rates that vary based on the size and type of facility being served) and 47 CFR 64.6020(b)(2) (setting caps on charges and fees for single-call services). The D.C. Circuit’s March 7 Order denied motions for stay of the Commission’s ICS rules “in all other respects.” On March 23, 2016, the D.C. Circuit modified the stay imposed in the March 7 Order to provide that “47 CFR 64.6030 (imposing interim rate caps)” be stayed as applied to “intrastate calling services. Final briefs from the parties are due to the Court on October 5, 2016, and oral arguments have not yet been scheduled.

7. On January 19, 2016, Michael S. Hamden, an attorney who has both represented prisoners and served as a corrections consultant filed a Petition for Partial Reconsideration,

seeking reconsideration of certain aspects of the 2015 ICS Order. Hamden asks the Commission to reconsider its decision not to prohibit providers from paying site commissions or, in the alternative, to mandate a “modest, per-minute facility cost recovery fee that would be added to the rate caps.”¹ In short, Hamden, like several of the ICS providers, asserts that at least some portion of site commissions serves to reimburse facilities for reasonable costs that facilities incur in providing ICS, and that excluding site commissions entirely from our rate cap calculations results in rates that are too low to allow providers to pay facilities for their reasonable ICS-related costs and still earn a profit. Hamden also asks the Commission to clarify “the meaning of the terms ‘mandatory fee,’ ‘mandatory tax,’ and ‘authorized fee’ as they are used in the [2015 ICS Order].” Finally, Hamden seeks clarification that ICS providers “cannot circumvent the Second ICS Order’s rule regarding charges for single-call services through the use of unregulated subsidiaries to serve as the companies that charge third-party transaction fees for such services.” On February 11, 2016, the Commission’s Consumer and Government Affairs Bureau (CGB) issued a Public Notice seeking comment on the Hamden Petition. Multiple parties submitted responses and oppositions to the Hamden Petition, including ICS providers, facilities, and the Wright Petitioners. Hamden also submitted a reply to the responses and oppositions on April 4, 2016. We now act on these filings.

III. DISCUSSION

8. After reviewing the Hamden Petition, the arguments made in response to the Petition, and other relevant evidence in the record, we find that: (1) at least some facilities likely incur costs that are directly and reasonably related to the provision of ICS, (2) it is reasonable for those facilities to expect providers to compensate them for those costs, (3) such costs are a

¹ Although never clearly stated, the Petition appears to seek to limit any payments to facilities to the proposed “facility cost-recovery fee” that would be added to the per-minute rate caps.

legitimate cost of ICS that should be accounted for in our rate cap calculations, and (4) our existing rate caps do not separately account for such costs. Accordingly, out of an abundance of caution, we increase our rate caps to better ensure that ICS providers are able to receive fair compensation for their services, including the costs they may incur in reimbursing facilities for expenses reasonably and directly related to the provision of ICS. Specifically, we increase our rate caps for debit and prepaid ICS calls to \$0.31 per minute for jails with an average daily population (ADP) below 350, \$0.21 per minute for jails with an ADP between 350 and 999, \$0.19 per minute for jails with an ADP of 1,000 or more, and \$0.13 per minute for prisons. As discussed below, we also increase the rate caps for collect calls by a commensurate amount.

9. We find that our revised rate caps will allow inmate calling providers to recover their costs of providing ICS even while reimbursing facilities for any costs they may incur that are reasonably and directly related to the provision of ICS.² We also find that these rate caps will adequately ensure that rates for ICS consumers will be fair, just, and reasonable. Thus, we grant the Hamden Petition to the extent that it seeks an increase in the ICS rate caps to expressly account for reasonable facility costs.³ We also grant the Hamden Petition to the extent that it seeks a clarification of the definitions of the terms “Mandatory Taxes” and “Mandatory Fees.” We deny the Hamden Petition in all other respects.

² As explained below, because we do not regulate site commissions in this order (and have not done so previously), any revenues derived under these rate caps may be passed through to facilities.

³ As noted above, Hamden appears to favor an approach whereby the Commission would adopt an “additive” to our existing rate caps and prohibit providers from paying any site commissions beyond the additive. We maintain our view that prohibiting site commission payments is not necessary at this time. As we noted in the 2015 ICS Order, “this approach is consistent with the Commission’s general preference to rely on market forces, rather than regulatory intervention, wherever reasonably possible.” Correctional authorities have every incentive to accept whatever commissions providers can pay within the rate caps given the benefits ICS confers on both facilities and inmates. In addition, we note that our approach obviates the need to address arguments challenging our authority to regulate site commission payments. Contrary to the suggestion in one dissent, although we have not elected to adopt the precise mechanism that Hamden appears to have advocated for “offset[ting]” the facilities’ claimed costs of providing access to ICS, our approach to ensuring that our rate caps adequately account for facilities’ reasonable ICS-related costs is, at a minimum, a logical outgrowth of the Hamden Petition.

A. The Rate Caps Should Account for Costs Reasonably and Directly Related to the Provision of ICS

10. The Commission has a statutory duty to set rates that are fair, just, and reasonable and to promote access to ICS by inmates and their families and friends. Accordingly, one of our goals is to ensure that inmates and their families have as much access as possible to this vital communications service. Some parties in the reconsideration proceeding have asserted that our prior decision not to include certain costs in our rate cap calculations could pose a risk to the continued deployment and development of ICS. Our reforms would not achieve their purpose if they resulted in less robust services for inmates and those who wish to communicate with them. As a result, out of an abundance of caution, we are increasing the rate caps to better reflect the costs that facilities claim to incur that are directly and reasonably related to the provision of ICS. This action better enables the Commission to achieve its twin statutory mandates of promoting deployment of ICS and ensuring that ICS rates are fair to both providers and consumers.

11. As the Commission has repeatedly explained, providers should be able to recover costs that are “reasonably and directly related to the provision of ICS” through the ICS rates. The Commission has also recognized that correctional facilities may incur costs that are reasonably related to the provision of ICS. With both the Mandatory Data Collection and the 2014 ICS FNPRM, the Commission took steps to determine the costs involved in providing ICS. For example, in the Mandatory Data Collection, the Commission required ICS providers to submit their costs related to the provision of ICS, including costs related to telecommunications, equipment, and security. In addition, in the 2014 ICS FNPRM, the Commission sought comment on the “actual costs” that facilities may incur in the provision of ICS and the appropriate vehicle for enabling facilities to recover such costs. The Commission also sought

comment on whether any such costs should be recoverable through the per-minute rates ICS providers charge inmates and their families.

12. After considering a “wide range of conflicting views” regarding facilities’ costs, we acknowledged, in the 2015 ICS Order, the possibility that facilities incur some costs to provide ICS. We concluded, however, that the record at that time “indicate[d] that if facilities incurred any legitimate costs in connection with ICS, those costs would likely amount to no more than one or two cents per billable minute.” We further concluded that the rate caps we adopted were “sufficiently generous to cover any such costs.” Accordingly, we declined to adopt any of the proposals seeking an “additive” to our rate caps to cover facilities’ costs.

B. The Hamden Petition and Underlying Record Demonstrate That the Existing Rate Caps May Not Adequately Account for Facility Costs

13. With the benefit of the record developed since the 2015 ICS Order, we now conclude that at least some facilities likely incur costs directly related to the provision of ICS and that those costs may in some instances amount to materially more than one or two cents a minute.⁴ Providers and facilities have claimed that the current rate caps prevent them from recovering all of their reasonable costs. Similarly, some parties have argued that our 2015 rate caps may not have been “generous” or conservative enough to cover all of the ICS-related costs that we expected providers to incur.

14. The Hamden Petition asks the Commission, among other things, to reconsider its decision not to “mandate a modest, per-minute facility cost-recovery fee that would be added to

⁴ We continue to hold that site commission payments should not be considered in determining fair or reasonable rates, except to the extent those payments reflect costs facilities incur that are directly related to the provision of ICS. As we explained in the 2015 ICS Order, “[p]assing the non-ICS-related costs that comprise site commission payments...onto inmates and their families as part of the costs used to set rate caps would result in rates that exceed the fair compensation required by section 276 and that are not just and reasonable, as required by section 201.”

the rate caps.” Notwithstanding the debate regarding the nature and extent of the costs that correctional facilities incur, the Petition asserts that “it seems clear that facilities do incur some administrative and security costs that would not exist but for ICS.” Hamden notes that the idea of a cost recovery mechanism has gained support from a broad range of parties, including “ICS providers, law enforcement, a state regulator, and some in the inmate advocacy community.” Finally, Hamden concludes that “[t]he lack of perfectly accurate data . . . does not preclude a rational cost recovery mechanism and a legally sustainable Order.” As Hamden notes, “[e]ven in the absence of absolute certainty regarding . . . facility administrative costs, the Commission can make a rational decision” based on the record before us.

15. In response to the Hamden Petition, we received comments from numerous parties agreeing that the existing rate caps do not adequately account for ICS costs that facilities may incur. While not all of the commenters agree with Hamden’s preferred approach, many of the comments submitted assert that facilities incur costs greater than those we allowed for under our 2015 rate caps. For example, NSA states that “[i]n many cases, the duties performed by Sheriffs and jails are the same or similar in nature as the security features and duties found by the Commission as recoverable cost, including monitoring calls, determining numbers to be blocked and unblocked, enrolling inmates in voice biometrics service and maintenance and repair of ICS equipment.” NSA acknowledges that providers perform security and administrative tasks “in some cases,” but asserts that in many other cases, those tasks fall to Sheriffs and jails, not providers. This view is supported by Pay Tel, which has asserted that “jails, not ICS providers, perform the lion’s share of administrative tasks associated with the provision of ICS and, more importantly . . . handle ALL of the monitoring of inmate calls.”

16. NSA’s arguments echo claims other parties have made in their filings before the D.C. Circuit. For example, representatives of state and local governments cite “evidence that

jails and prisons incur real and substantial costs in allowing access to ICS.” More specifically, they contend that correctional facilities can spend “over \$100,000 a month to provide ICS privileges to inmates, most of which goes into the labor hours required to facilitate and monitor inmates’ use of ICS.” Similarly, Telmate has argued that our 2015 rate caps are not “sufficiently generous” to cover the “costs that facilities bear in providing ICS.”

17. These arguments are consistent with earlier filings claiming that facilities may incur costs related to the provision of ICS that are “non-trivial.” Out of an abundance of caution, we now revise our rate caps to incorporate those costs more fully.

C. We Increase Our Rate Caps to Better Reflect Evidence in the Record

18. In view of the further evidence and arguments we have received, we now reconsider our earlier rate caps insofar as they did not separately account for ICS costs that facilities may incur.⁵ Accordingly, we increase our rate caps to better reflect the costs that facilities incur that are reasonably related to the provision of ICS. In addition, consistent with our findings in the 2015 ICS Order and with the evidence in the record, we recognize that the per-minute costs associated with ICS are higher in smaller facilities than in larger ones. Thus, we increase our rate caps more for smaller facilities than for larger ones.⁶ Specifically, we rely on the analyses submitted by NSA and by Baker/Wood to increase our rate caps by \$0.02 per minute for prisons, by \$0.05 per minute for larger jails, and by \$0.09 per minute for the smallest

⁵ We do not, however, revisit the rate structure or overall methodology used in the *2015 ICS Order*. Specifically, we reject Telmate’s argument that our rate caps “are based on a flawed methodology, and thus cannot be saved by the proposed rate increase[s].” This argument addresses the fundamental structure of our rate caps and methodology and goes to the heart of our 2015 ICS Order. As such, the argument appears to be an untimely – and improperly presented – request for reconsideration of that order.

⁶ Consistent with our conclusion in the 2015 ICS Order, we find that providers will need more time to transition all of the country’s jails to the new rate caps than to transition prisons. Accordingly, we adopt a six-month transition period for jails, in order to “give providers and jails enough time to negotiate (or renegotiate) contracts to the extent necessary to comply” with our new rules.

jails.⁷ In adopting these revisions to our rate caps, we once again rely on our core ratemaking authority.⁸

19. As noted above, in the 2015 ICS Order, we agreed with parties that argued that facilities' reasonable ICS-related costs likely amounted to no more than one or two cents per minute and did not require an adjustment to our rate caps. Upon further consideration, and with the benefit of an expanded record, we now conclude that we should increase our rate caps in light of claims that that some facilities may incur more significant costs that are reasonably related to the provision of ICS. After reviewing the Hamden Petition, and the record developed in response to the Petition, we find that facilities – particularly smaller facilities – may face costs that are considerably higher than one or two cents per minute. Out of an abundance of caution, we increase our rate caps to account for this possibility and to better ensure that providers are fairly compensated for their reasonable ICS costs – including costs they may incur in reimbursing facilities for expenditures that are reasonably related to the provision of ICS – and that providers and facilities have stronger incentives to promote increased deployment of, and access to, ICS.⁹

20. The rate caps we adopted in the 2015 ICS Order were based on 2012 and 2013 data that providers submitted in response to the Mandatory Data Collection. While we still find that the cost data from Mandatory Data Collection are an appropriate basis for constructing rate caps, we also recognize that due to our jurisdictional limitations, the Mandatory Data Collection only included cost information from *providers*, and not from *facilities*. Providers reported their

⁷ As explained below, Baker/Wood and NSA provided the most credible data regarding facilities' costs and we find that a hybrid of those two proposals yields the most reliable basis for determining how much we must increase our rate caps to ensure that providers can compensate facilities for the costs the facilities incur that are reasonably related to the provision of ICS. The rate increases we adopt today are also supported by the Pay Tel Proposal.

⁸ Accordingly, and for the reasons described below, we do not prohibit or regulate site commission payments.

⁹ Several parties have warned that access to ICS may be reduced if our rate caps fail to account for facilities' reasonable ICS-related costs.

own costs, but were not obligated to submit information about costs incurred by facilities. Indeed, there is no reason to believe that providers necessarily had access to the information needed to determine facility costs. As a result, the information on facilities' ICS-related costs before the Commission came from filings received in response to the 2014 ICS FNPRM.¹⁰ Unlike the responses to the Mandatory Data Collection, however, which required providers to quantify various costs incurred in providing ICS, facilities' responses to the questions in the 2014 ICS FNPRM about facility costs were purely voluntary and consisted mostly of more general, narrative descriptions. The paucity of quantitative data made facility costs more difficult to measure than providers' costs, a problem exacerbated by disputes in the record regarding which of the costs involved in providing ICS could reasonably be attributed to providers, and which could reasonably be attributed to facilities. This led us to discount claims that facilities faced costs that should be recovered through the ICS rates.

21. Given these limitations, we relied almost completely on submissions from providers and their representatives to arrive at an estimate of facilities ICS-related costs in the 2015 ICS Order. In contrast, the approach we adopt today relies largely on proposals submitted by parties representing a much more diverse range of interests. The Baker/Wood Proposal, for example, was submitted by Darrell Baker, the Director of the Utility Services Division of the Alabama Public Service Commission, and Don Wood, an economic consultant for Pay Tel Communications who also has done work for other ICS providers. And the NSA proposal is based on data the NSA collected from individual sheriffs regarding the costs they incur to

¹⁰ Providers did submit information about total site commission payments made to facilities, but, as noted above, we did not take those payments into account in setting our rate caps. Indeed, we still find that the bulk of site commission payments should not be considered in calculating the rate caps because most of the money providers pay to facilities is not directly related to the provision of ICS. We also note that it is likely that the costs submitted by providers include other costs that are not reasonably related to the provision of ICS. In our decision today, however, we conclude that the costs that facilities incur that are reasonably related to the provision of ICS may be more than *de minimis* and we therefore increase our rate caps to better accommodate those costs.

provide security and perform administrative functions necessary to allow ICS in jails, including the salaries and the benefits for the officers and employees performing ICS-related duties. We find these two proposals provide a sounder basis for determining facilities' ICS-related costs than did the provider-generated proposals we relied on in 2015.¹¹

22. The rate caps we adopt today are based on a hybrid of the Baker/Wood and NSA Proposals. The Baker/Wood proposal is premised on Baker's view that "some form of facility cost recovery is critical," and is supported by Baker's and Wood's independent reviews of cost support data. The NSA Proposal is based on the NSA's cost survey, which gathered information on the costs to sheriffs of providing security and administrative functions necessary to allow ICS in jails, including the salaries and the benefits for the officers and employees performing the ICS-related duties. Both of these proposals merit significant consideration, particularly given that they arrive at similar conclusions: Baker and Wood recommend adopting a cost recovery mechanism of \$0.07 per minute for jails with ADP less than 349, \$0.05 for jails with ADP between 350 and 999, \$0.05 for jails with ADP between 1000 and 2500 ADP, and \$0.03 for prisons; NSA, for its part, supports the adoption of a cost recovery mechanism in the range of \$0.09 to \$0.11 per minute for facilities with ADP less than 349, \$0.05 to \$0.08 for facilities with 350 to 2499 ADP, \$0.01 to \$0.02 per minute for jails with ADP greater than 2500, and \$0.01 to \$0.02 per minute for prisons. Not only are the two proposals fairly consistent with each other, they are notably closer to each other than they are to most other proposals in the record, including those that we relied on in the 2015 ICS Order.

23. Even given the similarities between the NSA and Baker/Wood Proposals, we acknowledge that the record on what the costs facilities actually incur in relation to ICS is still

¹¹ We have also taken account of arguments that correctional authorities and ICS providers have raised to the D.C. Circuit concerning our decision in the 2015 Order not to separately account for potential facility costs when calculating the rate caps.

imperfect. Nonetheless, we find that the record is sufficient to warrant an increase in the rate caps. As state and local governments have explained in their court filings, even faced with “less-than-ideal data,” it is the Commission’s obligation to “determine as best it can ICS-related facility costs.” Thus, based on the information in the record, including, in large part, the recommendations submitted by NSA and by Baker/Wood, we increase the rate caps by \$0.02 for prisons, and \$0.09, \$0.05, and \$0.05, respectively, for small, medium, and large jails. This translates into revised debit/prepaid rate caps of \$0.13 per minute for prisons, \$0.19 per minute for jails with an ADP greater than 1000, \$0.21 for jails with ADP between 350 and 999, and \$0.31 per minute for jails with ADP below 350. It also leads to revised collect rate caps of \$0.16 per minute for prisons, \$0.54 per minute for jails with ADP greater than 1000, \$0.54 per minute for jails with ADP between 350 and 999, and \$0.58 per minute for jails with ADP less than 350.¹² To arrive at these numbers, we compared the Baker/Wood and NSA proposals and, in order to produce a conservative rate, took the higher additive rate of the two proposals.¹³ In the instance where even the low end of NSA’s proposed rate range was greater than the rate proposed by Baker and Wood, we selected the lower end of the NSA rate range to better account for the suggestions of both proposals.¹⁴

¹² As we did in the 2015 ICS Order, we adopt a separate rate cap tier for collect calling, as well as a two-year step-down transitional period that will decrease the collect rates over time and, by 2018, will bring the collect rates down to the debit/prepaid rates we adopt today. This is consistent with the Commission’s prior actions in adopting a separate collect calling rate tier based on data indicating that collect calls were more expensive than other types of ICS calls and on the Commission’s decision to encourage correctional institutions to move away from collect calling.

¹³ Our decision on reconsideration rests on a desire to take a cautious approach that minimizes any concerns that our rate caps fail to allow for fair, just, and reasonable compensation. Indeed, the very decision to reconsider our earlier order is prompted by our view that it is better to err on the side of caution than to risk undercompensating providers and facilities for their reasonable costs that are directly related to ICS. Consistent with this approach, when the NSA and Baker/Wood Proposals differed, we opted for the choice that resulted in the higher rate cap. This decision is informed, in part, by the fact that NSA’s proposal already reflects an effort to reduce rates below the levels that the raw data might support, absent any analysis or refinement. As explained above, however, our rate caps provide a ceiling, and we expect that in many instances providers will charge rates far below the maximums permitted under our rate caps.

¹⁴ NSA proposed a rate increase of \$0.09-\$0.11 per minute for the smallest jails, while Baker/Wood proposed adding only \$0.07 per minute for those facilities. Given that the low end of NSA’s proposed rate range was higher than the rate proposed by Baker/Wood, we took the lowest number proposed by NSA (*i.e.*, \$0.09/minute).

24. The approach we use to increase the rates to the levels we adopt today has the primary advantage of being supported by two separate and independent sets of data. It has the additional advantage of being supported by credible, independent participants in this proceeding, including Baker, an objective public service employee who has participated in this proceeding and has been working on inmate calling reform at the state level,¹⁵ and Wood, an outside economic consultant to Pay Tel whom seven ICS providers engaged to prepare a joint report that was filed with the Commission. Our approach is also based on data provided by the NSA, which, as an organization representing sheriffs, is well situated to understand and estimate the costs that facilities face to provide ICS.¹⁶

25. Given that we find NSA's cost data to be credible we disagree with commenters who suggest the contrary. Andrew Lipman, in particular, denigrated NSA's cost survey for including only three months of data from only about five percent of NSA's members.¹⁷ NSA convincingly defends its cost survey in its Opposition to the Hamden Petition, however, arguing that "[t]he Commission fails to explain . . . why these criticisms doom the NSA cost survey data even though they all equally apply to the cost recovery data and analysis performed by GTL's cost consultant, which the Commission apparently accepts." NSA also argues that the

¹⁵ In the Baker/Wood Proposal, Baker and Wood state that Baker's "experience with ICS in Alabama informs his view that some form of facility cost recovery is critical. He explained that the APSC regularly inspects ICS at jails and prisons in Alabama and is therefore very familiar with the activities and responsibilities that facility personnel undertake in administering ICS and in monitoring inmate calls. He concludes that facilities incur costs associated with ICS and should be provided an opportunity to recover their costs."

¹⁶ While agreeing with our assessment that NSA is well-equipped to gauge facilities' costs, one dissenting commissioner nonetheless faults us for relying (in part) on NSA's estimates of those costs. In claiming that "the rate increases set forth in this *Order* are insufficient to cover the facility-administration costs" that jails incur in providing access to ICS, this commissioner relies on raw data from the NSA survey that NSA itself reasonably elected to discount when estimating jails' actual costs. NSA treated its survey data as "inputs" that, once "compared to and tested by" information elsewhere in the record, could be refined to generate more reliable estimated ranges of facilities' reasonable costs of providing access to ICS. Those ranges are the cost data we find credible—particularly given that, as noted above, the NSA and Baker/Wood Proposals arrive at similar conclusions. Thus, contrary to the dissent's contention that our rate caps, as revised in this *Order*, are "confiscatory," we are confident that they fall well within the zone of reasonableness.

¹⁷ We note as well that Lipman did not identify his client, except as "certain clients with an interest in the regulation of inmate calling services," when filing prior to the 2015 ICS *Order*. Lipman has subsequently acted as counsel to Securus.

Commission “fails to explain why it entirely ignores the data provided by other parties that show a much higher facility compensation fee than one or two cents per minute.” We agree with NSA’s arguments and find that NSA’s cost survey is a credible (though imperfect) source of data regarding the costs facilities incur in relation to ICS. We are particularly persuaded by NSA’s point that the criticisms of the NSA cost survey made by Andrew Lipman, and recited in the 2015 ICS Order, apply with equal force to other proposals, including the analysis performed by GTL’s cost consultant that supported the one to two cent estimate that informed our decision in the 2015 ICS Order. Moreover, we note that Pay Tel, which has no affiliation with NSA, has rebutted many of the arguments raised by Lipman and concluded that NSA’s survey results constitute a “robust and significant data set.”

26. We are confident that the new rate caps we adopt today will ensure that inmates and their families have access to ICS at rates that are fair to consumers, providers, and facilities.¹⁸ By adjusting the rate caps to better account for the reasonable costs that facilities may incur in connection with ICS, we ensure that providers will be able to charge rates that cover all of their costs that are reasonably related to the provision of ICS.¹⁹ Based on our analysis of the data providers submitted to the Mandatory Data Collection, the new rates should allow virtually all providers to recover their overall costs of providing ICS.²⁰ To come to this conclusion, we calculated each provider’s cost per minute, by tier, based on their reported numbers. We then compared each provider’s cost per minute to our new rates for each tier. The difference between these two amounts allowed us to calculate the net impact that each provider

¹⁸ In sum, we agree with Hamden that reconsideration of our rates will “pave the way for the comprehensive reform that the Commission has promised, that ICS consumers deserve, and that the ICS industry needs, while also ensuring that facilities will continue to facilitate ICS and that providers will earn a reasonable return on their investments.”

¹⁹ Indeed, although recognizing that the revised rate caps will “ensure that ICS consumers avoid paying unjust, unreasonable and unfair ICS rates,” the Wright Petitioners assert that our revised rate caps are so conservative as to be “well above” providers’ costs.

²⁰ Based on Commission analysis, this is true for nearly 100 percent of the ICS market, and all of the largest ICS providers. As noted above, there is only one small provider that might not be able to cover all of its ICS-related costs under the new rate caps.

will face as a result of our new rate caps. Our analysis indicates that the new rate caps will allow all but one provider to recover its costs, on average.²¹ Although we conclude that virtually all providers will be able to recover their legitimate ICS costs (including a reasonable return on capital) under the new rate caps, we reiterate that our waiver process remains available to any providers that find that the rate caps do not result in fair compensation for their services.²²

D. We Amend the Definition of “Mandatory Tax or Mandatory Fee”

27. In the 2015 ICS Order, we defined a Mandatory Tax or Mandatory Fee as “a fee that a Provider is required to collect directly from Consumers, and remit to federal, state, or local governments.” In his Petition, Hamden asks us to clarify these definitions. After considering the Hamden Petition, the record developed in response to that petition, and the text of the 2015 ICS Order, we now amend the definition of Mandatory Tax or Mandatory Fee to read: “a fee that a Provider is required to collect directly from consumers, and remit to federal, state, or local governments. A Mandatory Tax or Fee that is passed through to a Consumer may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation.” The amended definition more clearly captures the Commission’s decision to allow carriers to collect applicable pass-through taxes, but to prohibit markups, other than those

²¹ Our analysis of the data indicates that some providers may lose money on collect calls, but more than make up for any lost revenue with profits from debit and prepaid calls. In the 2015 ICS Order, we recognized that collect calling represents a small and declining percentage of inmate calls. The record further suggests that collect calls will continue to decline to a negligible share of ICS calls. In light of that, we are not concerned about losses that are recovered and that we predict will continue to decrease in the future. Providers will be able to recover their costs as a whole under our rate caps. Moreover, as noted above, we continue to be concerned that allowing the rate caps for collect calls to remain higher than the caps for other ICS calls on an ongoing basis would create incentives for providers to drive consumers to make collect calls. Such a result would drive up the costs of ICS for the average consumer and, therefore, would not be in the public interest.

²² We also reiterate that “[i]f any provider believes it is being denied fair compensation . . . due, for example, to the interaction of our rate caps with the terms of the provider’s existing service contracts – it may . . . seek preemption of the requirement to pay a site commission, to the extent that it believes that such a requirement is a state requirement and is inconsistent with the Commission’s regulations.”

specifically authorized by law.²³

28. In his petition, Hamden claims that there has been “confusion” regarding the Commission’s definitions of the terms “authorized fee,” “mandatory tax,” and mandatory fee” in the 2015 ICS Order, and regarding “what fees and taxes the Commission intended to include as permissible under those terms.” Although some commenters assert that the terms “Mandatory Tax” and “Mandatory Fee” were adequately defined by the 2015 ICS Order, other parties are open to further clarification from the Commission. The Wright Petitioners, for example, assert that “Mr. Hamden’s comments regarding the clarification of the rules associated with the definition of ‘Authorized Fee,’ ‘Mandatory Tax,’ and ‘Mandatory Fee’ do merit further consideration.”

29. After further review, we agree with Hamden that we should clarify the definition of Mandatory Tax and Mandatory Fee. While the definitions of these terms were clear from the text of 2015 ICS Order, we take this opportunity to amend our rules to more clearly track the language and intent of the 2015 ICS Order. The prohibition against markups that we adopted in the 2015 ICS Order is an important part of our efforts to ensure that the rates and fees end users pay for ICS are fair, just, and reasonable. Thus, we now amend 47 CFR 64.6000 to read: “Mandatory Tax or Mandatory Fee means a fee that a Provider is required to collect directly from Consumers, and remit to federal, state, or local governments. A Mandatory Tax or Fee that is passed through to a Consumer may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation.”

²³ This rule allows providers to collect Universal Service fees, and similar government taxes and fees, from consumers and remit the funds to the relevant government entity, in keeping with existing federal and state requirements. As the 2015 ICS Order makes clear, we distinguish between such taxes and fees and site commission payments.

E. We Deny All Other Aspects of the Hamden Petition

30. As previously noted, the Hamden Petition asks the Commission to reconsider or clarify two additional aspects of the 2015 ICS Order. First, Hamden urges the Commission to reconsider its treatment of site commissions.²⁴ Second, Hamden asks that the Commission clarify that ICS providers cannot use unregulated subsidiaries to circumvent the rule regarding charges for single call services. After considering Hamden’s arguments, as well as the rest of the record, we deny both requests.

1. There Is No Need to Regulate Site Commissions at This Time.

31. In the 2015 ICS Order, we affirmed the Commission’s previous finding that “site commissions do not constitute a legitimate cost to the providers of providing ICS” and, accordingly, did not include site commission payments in the cost data we used in setting our rate caps. Furthermore, although we encouraged states and correctional facilities to curtail or prohibit such payments, we concluded that “we do not need to prohibit site commissions in order to ensure that interstate rates for ICS are fair, just, and reasonable and that intrastate rates are fair.”

32. Hamden now seeks reconsideration of this conclusion, arguing that the Commission should “prohibit payments to facilities in all forms.” In the absence of such a ban, Hamden argues, “facilities will continue to demand, and ICS providers will continue to pay site commissions” Hamden also expresses concern that if providers are unwilling or unable to pay site commissions, ICS services “may be curtailed, especially in smaller, less profitable facilities.”

²⁴ As noted above, Hamden asks that the Commission consider adopting an additive to the ICS rate caps as an alternative to banning all payments to facilities. We address that alternative at length in the discussion above and increase our 2015 rate caps to better accommodate facilities’ ICS-related costs. We find no other changes to our rate caps are warranted. Nor do we find any need to regulate site commissions at this time.

33. Several commenters oppose Hamden’s request. ICSolutions, for example, asserts that we lack the legal authority to regulate site commissions.²⁵ NCIC contends that prohibiting or capping site commissions will result in facilities being unable to recover their ICS-related costs, which, in turn, will lead to a reduction in inmate access. Finally, the Wright Petitioners argue that, even if the Commission were to ban site commissions, it is likely that providers and correctional facilities would simply “seek new and innovative ways to funnel additional funds in connection with entering into their exclusive contracts.”

34. After reviewing the Hamden Petition and the subsequent record, we are not persuaded to reconsider our decision to refrain from regulating site commissions. We are not convinced, based on the current record, that regulation of site commissions is necessary or in the public interest. As we noted in the 2015 ICS Order, the “decision to establish fair and reasonable rate caps for ICS and leave providers to decide whether to pay site commissions – and if so, how much to pay – is supported by a broad cross-section of commenters . . . underscor[ing] the reasonableness of our approach.” Based on the record on reconsideration, as well as the record in the underlying proceeding, we find that the prudent course remains to “focus on our core ratemaking authority in reforming ICS and not prohibit or specifically regulate site commission payments.”²⁶

²⁵ As was the case in the 2015 ICS Order, we need not reach these arguments, given our decision to let facilities and providers negotiate a reasonable approach to facility costs, subject only to providers’ obligations to adhere to our rate caps. In addition, as discussed above, we have raised the rate caps to a level that should ensure that providers are able to earn a reasonable profit even after compensating facilities for any costs they incur that are reasonably related to the provision of ICS. This should help ensure that facilities recover the costs they incur that are directly related to the provision of ICS.

²⁶ Our commitment to maintain our approach to site commission payments is further bolstered by our decision today to increase the rate caps to ensure that providers are able to compensate facilities for the reasonable costs they incur that are directly related to the provision of ICS. Our decision to increase our rate caps to better account for facilities’ costs does not require us to cap or limit site commission payments. In other words, nothing in our rules, as revised by this Order, restricts a provider’s ability to distribute as it chooses whatever revenue it collects under the adopted rate caps.

2. There Is No Need to Further Clarify the Single-Call Rule Adopted in the 2015 ICS Order.

35. In the 2015 ICS Order, we held that “for fees for single-call and related services and third-party financial transaction fees, we allow providers to pass through only the charges they incur without any additional markup.” Hamden asserts that the Commission should clarify that the rule adopted in the 2015 ICS Order that single-call service costs must be passed through to end users with no additional markup may not be circumvented by providers using unregulated subsidiaries imposing “excessive financial transaction fees.”

36. Most commenters disagree with Hamden’s requested clarifications. Several commenters assert that the rule regarding charges for single call services is adequately defined in the 2015 ICS Order, and as a result, no clarification is needed.

37. Having reviewed the arguments on both sides of the matter, we agree with the majority of commenters that there is no need to clarify the rule regarding single-call service costs. We are not persuaded, based on the current record, that the clarifications Hamden seeks are either necessary or in the public interest. Additionally, we reiterate our finding from the 2015 ICS Order that “a major problem with single-call and related services is that customers are often unaware that other payment options are available, such as setting up an account.... We encourage providers to make clear to consumers that they have other payment options available to them.” We find that no further action is necessary at this time, particularly given that we already have sought further comment on third-party financial transactions and potential fee-sharing.

IV. PROCEDURAL MATTERS

A. Paperwork Reduction Act

38. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. Therefore, it does not contain any new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

B. Congressional Review Act

39. The Commission will send a copy of this Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. See 5 U.S.C. 801(a)(1)(A).

C. Final Regulatory Flexibility Analysis

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

V. ORDERING CLAUSES

41. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 1, 2, 4(i)–(j), 201(b), 215, 218, 220, 276, 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)–(j), 201(b), 215, 218, 220, 276, 303(r), and 403, 405 and

sections 1.1, 1.3, 1.427, and 1.429 of the Commission's rules, 47 CFR 1.1, 1.3, 1.427, and 1.429, the Petition for Reconsideration filed by Michael S. Hamden on January 19, 2016, IS GRANTED IN PART, and is otherwise DENIED, as described above.

42. IT IS FURTHER ORDERED that part 64 of the Commission's Rules, 47 CFR part 64, is AMENDED as set forth in Appendix A of the Order. These rules shall become effective **[INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**, except for the amendments to 47 CFR 64.6010(a) and (c), which shall become effective March 13, 2017.

43. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order on Reconsideration to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 64

Claims, Communications common carriers, Computer technology, Credit, Foreign relations, Individuals with disabilities, Political candidates, Radio, Reporting and recordkeeping requirements, Telecommunications, Telegraph, Telephone.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is revised to read as follows:

Authority: 47 U.S.C. 154, 254(k); 403(b)(2)(B), (c), Pub. L. 104-104, 110 Stat. 56.

Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 227, 228, 254(k), 276, 616, 620, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, unless otherwise noted.

Subpart FF – Inmate Calling Services

2. Revise § 64.6000 paragraph (n) to read as follows:

§ 64.6000 Definitions

* * * * *

- (n) Mandatory Tax or Mandatory Fee means a fee that a Provider is required to collect directly from consumers, and remit to federal, state, or local governments. A Mandatory Tax or Fee that is passed through to a Consumer may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation;

* * * * *

3. Effective **[INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**, amend § 64.6010 by revising paragraphs (b) and (d) through (f) to read as follows:

§ 64.6010 Inmate Calling Services rate caps.

* * * * *

(b) No Provider shall charge, in any Prison it serves, a per-minute rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of:

- (1) \$0.13;
- (2) [Reserved]

* * * * *

(d) No Provider shall charge, in the Prisons it serves, a per-minute rate for Collect Calling in excess of:

- (1) \$0.16 after the **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER];**
- (2) \$0.15 after July 1, 2017; and
- (3) \$0.13 after July 1, 2018, and going forward.

(e) For purposes of this section, the initial ADP shall be calculated, for all of the Correctional Facilities covered by an Inmate Calling Services contract, by summing the total number of inmates from January 1, 2015, through the effective date of the Order, divided by the number of days in that time period;

(f) In subsequent years, for all of the correctional facilities covered by an Inmate Calling Services contract, the ADP will be the sum of the total number of inmates from January 1st through December 31st divided by the number of days in the year and will become effective on January 31st of the following year.

4. Effective March 13, 2017, revise § 64.6010(a) and (c) to read as follows:

§ 64.6010 Inmate Calling Services rate caps.

(a) No Provider shall charge, in the Jails it serves, a per-minute rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of:

- (1) \$0.31 in Jails with an ADP of 0-349;
- (2) \$0.21 in Jails with an ADP of 350-999; or
- (3) \$0.19 in Jails with an ADP of 1,000 or greater.

* * * * *

(c) No Provider shall charge, in the Jails it serves, a per-minute rate for Collect Calling in excess of:

Size and Type of Facility	Collect Rate Cap per MOU as of effective date	Collect Rate Cap per MOU as of July 1, 2017	Collect Rate Cap per MOU as of July 1, 2018
0-349 Jail ADP	\$0.58	\$0.45	\$0.31
350-999 Jail ADP	\$0.54	\$0.38	\$0.21
1,000+ Jail ADP	\$0.54	\$0.37	\$0.19

* * * * *

[FR Doc. 2016-21637 Filed: 9/12/2016 8:45 am; Publication Date: 9/13/2016]