



**6712-01**

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 64**

**[WC Docket No. 12-375, FCC 20-111; FRS 17047]**

**Rates for Interstate Inmate Calling Services**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission continues to comprehensively reform inmate calling services rates and charges to ensure just and reasonable rates for interstate and international inmate calling services. In response to a directive from the United States Court of Appeals for the District of Columbia Circuit, the Commission determined that, except in limited circumstances, it is impractical to separate out the intrastate and interstate components of ancillary service charges imposed in connection with inmate calling services. For the limited circumstances in which the components may be distinguished, inmate service providers are subject to the Commission's ancillary service charge rules, which constrain providers to only five specific types of ancillary service charges and related fee caps. The Commission also reinstated its rule prohibiting providers from marking up mandatory taxes or fees and adopted rule changes in response to the D.C. Circuit that clarify that the Commission's inmate calling service rate and fee cap rules apply only to interstate and international inmate calling services.

**DATES:** The rules adopted in this document take effect on **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.

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**SUPPLEMENTARY INFORMATION:** This is a final rule summary of the Commission’s Report and Order, released August X, 2020. A full-text version of this document can be obtained from the following internet address: <https://docs.fcc.gov/public/attachments/FCC-20-111A1.pdf>.

## Synopsis

### I. INTRODUCTION

1. The Communications Act divides jurisdiction for regulating communications services, including inmate calling services, between the Commission and the states. Specifically, the Act empowers the Commission to regulate interstate communications services and preserves for the states jurisdiction over intrastate communications services. Because the Commission has not always respected this division, the U.S. Court of Appeals for the District of Columbia Circuit has twice remanded the agency’s efforts to address rates and charges for inmate calling services.

2. Today, the Commission responds to the court’s remands and takes action to comprehensively reform inmate calling services rates and charges. First, the Commission addresses the D.C. Circuit’s directive that it consider whether ancillary service charges—separate fees that are not included in the per-minute rates assessed for individual inmate calling services calls—can be segregated into interstate and intrastate components for the purpose of excluding the intrastate components from the reach of its rules. The Commission finds that ancillary service charges generally cannot be practically segregated between the interstate and intrastate jurisdictions except in the limited number of cases where, at the time a charge is imposed and the consumer accepts the charge, the call to which the service is ancillary is a clearly intrastate-only call. As a result, inmate calling services providers are generally prohibited from imposing any ancillary service charges other than those permitted by the

Commission's rules and providers are generally prohibited from imposing charges in excess of the Commission's applicable ancillary service fee caps.

3. The Commission believes that its actions today will ensure that rates and charges for interstate and international inmate calling services are just and reasonable as required by section 201(b) of the Act and thereby enable incarcerated individuals and their loved ones to maintain critical connections. At the same time, given that the vast majority of calls made by incarcerated individuals are intrastate calls, the Commission urges its state partners to take action to address the egregiously high intrastate inmate calling services rates across the country.

## **II. BACKGROUND**

4. Access to affordable communications services is critical for all Americans, including incarcerated members of our society. Studies have long shown that incarcerated individuals who have regular contact with family members are more likely to succeed after release and have lower recidivism rates. Unlike virtually every other American, however, incarcerated people and the individuals they call have no choice in their telephone service provider. Instead, their only option is typically an inmate calling services provider chosen by the correctional facility that, once chosen, operates as a monopolist. Absent effective regulation, rates for inmate calling services calls can be unjustly and unreasonably high and thereby impede the ability of incarcerated individuals and their loved ones to maintain vital connections.

5. **Statutory Background.** The Communications Act of 1934, as amended (the Act) establishes a system of regulatory authority that divides power over interstate, intrastate, and international communications services between the Commission and the states. More specifically, section 2(a) of the Act empowers the Commission to regulate "interstate and foreign communication by wire or radio" as provided by the Act. This regulatory authority includes ensuring that "[a]ll charges, practices, classifications, and regulations for and in connection with" interstate or international communications services are "just and reasonable" in accordance with section 201(b) of the Act.

Section 201(b) also provides that “[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out” these provisions.

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

7. Although the Telecommunications Act of 1996 “chang[ed] the FCC’s authority with respect to some intrastate activities,” “the strictures of [section 2(b)] remain in force.” That is, “[i]nsofar as Congress has remained silent . . . , [section 2(b)] continues to function.” Thus, while section 276 of the Act specifically directs the Commission to ensure that payphone service providers, including inmate calling services providers, “are fairly compensated for each and every completed intrastate and interstate call using their payphone,” that provision does not authorize the Commission to regulate intrastate rates. Nor does section 276 give the Commission the authority to determine “just and reasonable” rates.

8. **Prior Commission Actions.** The Commission has taken repeated action to address inmate calling services rates and charges. In the 2012 ICS Notice, the Commission sought comment on whether to establish rate caps for interstate inmate calling services calls. In the *2013 ICS Order*, the Commission established interim interstate rate caps for debit and prepaid calls as well as collect calls and required all inmate calling services providers to submit data (hereinafter, the First Mandatory Data Collection) on their underlying costs so that the agency could develop a permanent rate structure. In the *2014 ICS Notice*, the Commission sought comment on reforming charges for services ancillary to the provision of inmate calling services and on establishing rate caps for both interstate and intrastate inmate calling services calls. In the *2015 ICS Order*, the Commission attempted to adopt a

comprehensive framework for interstate and intrastate inmate calling services. More specifically, the Commission adopted limits on ancillary service charges; set rate caps for interstate and intrastate inmate calling services calls; extended the interim interstate rate caps it adopted in 2013 to intrastate calls pending the effectiveness of the new rate caps; and sought comment on whether and how to reform rates for international inmate calling services calls. The Commission also addressed inmate calling services providers' ability to recover mandatory applicable pass-through taxes and regulatory fees. Additionally, the Commission adopted a Second Mandatory Data Collection to enable it to identify trends in the market and adopt further reform, and it required inmate calling services providers to annually report information on their operations, including their current interstate, intrastate, and international rates and their current ancillary service charge amounts. In the *2016 ICS Reconsideration Order*, the Commission increased its rate caps to account for certain correctional facility costs related to the provision of inmate calling services.

9. The Commission's attempts to reform inmate calling services rates and charges have a long history in the courts and have not always been well received. In January 2014, in response to inmate calling services providers' petitions for review of the *2013 ICS Order*, the D.C. Circuit stayed the application of certain portions of that Order but allowed the Commission's interim rate caps to remain in effect. Later that year, the court held the petitions for review in abeyance while the Commission proceeded to set permanent rates. In March 2016, in response to inmate calling services providers' petitions for review of the *2015 ICS Order*, the D.C. Circuit stayed the application of that Order's rate caps and ancillary service charge cap for single-call services while the appeal was pending. Later that month, the court stayed the application of the Commission's interim rate caps to intrastate inmate calling services. In November 2016, the court stayed the *2016 ICS Reconsideration Order* pending the outcome of the challenge to the *2015 ICS Order*. In 2017, in *GTL v. FCC*, the D.C. Circuit vacated the rate caps in the *2015 ICS Order*, finding that the Commission lacked the statutory authority to regulate intrastate rates and that the methodology used to set the caps was arbitrary and capricious. The court

remanded for further proceedings with respect to certain rate cap issues; remanded the ancillary service charge caps in that Order; and vacated one of the annual reporting requirements in that Order.

10. Because this procedural history is somewhat complicated, the Commission provides background on the relevant issues in turn below.

11. **Ancillary Service Charges.** Ancillary service charges are fees that inmate calling services providers assess on inmate calling service consumers that are not included in the per-minute rates assessed for individual calls. In the *2015 ICS Order*, in light of the continued growth in the number and dollar amount of ancillary service charges, and the fact that such charges inflate the effective price that consumers pay for inmate calling services, the Commission adopted reforms to limit such charges. The Commission established five types of permissible ancillary service charges, which are defined as follows: (1) Fees for Single-Call and Related Services—billing arrangements whereby an incarcerated person’s collect calls are billed through a third party on a per-call basis, where the called party does not have an account with the inmate calling services provider or does not want to establish an account; (2) Automated Payment Fees—credit card payment, debit card payment, and bill processing fees, including fees for payments made by interactive voice response, web, or kiosk; (3) Third-Party Financial Transaction Fees—the exact fees, with no markup, that inmate calling services providers are charged by third parties to transfer money or process financial transactions to facilitate a consumer’s ability to make account payments via a third party; (4) Live Agent Fees—fees associated with the optional use of a live operator to complete inmate calling services transactions; and (5) Paper Bill/Statement Fees—fees associated with providing customers of inmate calling services an optional paper billing statement. The Commission then capped the amount of each of these charges and prohibited inmate calling services providers from assessing any other ancillary service charges. The D.C. Circuit stayed the rule setting the ancillary service charge cap for single-call services on March 7, 2016, before the rest of the ancillary service charge caps were to go into effect. Therefore, the ancillary service charge cap for single-call services never became effective.

12. In the *2015 ICS Order*, the Commission applied these caps to all services ancillary to inmate calling services, regardless of whether the underlying service was interstate or intrastate. In particular, the Commission held that “section 276 of the Act authorizes the Commission to regulate charges for intrastate ancillary services.” On review, the D.C. Circuit held that “the Order’s imposition of ancillary fee caps in connection with interstate calls is justified” given the Commission’s “plenary authority to regulate interstate rates under § 201(b), including ‘practices . . . for and in connection with interstate calls.’” The court held, however, that just as the Commission lacks authority to regulate intrastate rates pursuant to section 276, the Commission likewise “had no authority to impose ancillary fee caps with respect to intrastate calls.” Because the court could not “discern from the record whether ancillary fees can be segregated between interstate and intrastate calls,” it remanded the issue “to allow the Commission to determine whether it can segregate [the ancillary fee] caps on interstate calls (which are permissible) and the [ancillary fee] caps on intrastate calls (which are impermissible).”

13. **Mandatory Pass-Through Taxes and Fees.** In the *2015 ICS Order*, the Commission found record evidence that inmate calling services providers were charging end users fees under the guise of taxes. The Commission therefore held that such providers “are permitted to recover mandatory-applicable pass-through taxes and regulatory fees, but without any additional mark-up or fees.” To implement this determination, the Commission added rules governing an “Authorized Fee” and a “Mandatory Tax or Mandatory Fee.” The rule regarding authorized fees included language precluding markups in the absence of specific governmental authorization. The rule regarding mandatory taxes or fees, however, contained no parallel language. To correct this oversight, the Commission amended the rule in the *2016 ICS Reconsideration Order* to specify: “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.”

14. On review, the D.C. Circuit vacated the *2016 ICS Reconsideration Order* “insofar as it purport[ed] to set rate caps on inmate calling service” and remanded “the remaining provisions” of that

Order to the Commission “for further consideration . . . in light of the disposition of this case and other related cases.” As a result, the Commission’s rule governing Mandatory Taxes or Mandatory Fees was vacated to the extent that it “purport[ed] to set rate caps.”

15. Rate Caps. In the *2013 ICS Order*, in light of record evidence that rates for inmate calling services calls greatly exceeded the reasonable costs of providing service, the Commission adopted interim interstate rate caps of \$0.21 per minute for debit and prepaid calls and \$0.25 per minute for collect calls. In the *2015 ICS Order*, in light of “egregiously high” rates for intrastate inmate calling services calls, the Commission relied on section 276 and section 201(b) of the Act to adopt rate caps for both intrastate and interstate inmate calling services calls. The Commission set tiered rate caps of \$0.11 per minute for prisons; \$0.14 per minute for jails with average daily populations of 1,000 or more; \$0.16 per minute for jails with average daily populations of 350 to 999; and \$0.22 per minute for jails having average daily populations of less than 350. The Commission calculated these rate caps using industry-wide average costs and stated that this approach would allow providers to “recover average costs at each and every tier.” Additionally, the Commission held that site commissions—payments made by inmate calling services providers to correctional facilities or state authorities that are often required to win the contract for provision of service to a given facility —were not costs reasonably related to the provision of inmate calling services. The Commission therefore excluded site commission payments from the cost data used to set the rate caps.

16. On reconsideration in 2016, the Commission increased the rate caps for both interstate and intrastate inmate calling services to expressly account for correctional facility costs that are directly and reasonably related to the provision of inmate calling services. The Commission set the revised rate caps at \$0.13 per minute for prisons; \$0.19 per minute for jails with average daily populations of 1,000 or more; \$0.21 per minute for jails with average daily populations of 350 to 999; and \$0.31 per minute for jails with average daily populations of less than 350.

17. On review, the D.C. Circuit in *GTL v. FCC* vacated the rate caps adopted in the *2015 ICS Order*. First, the court held that the Commission lacked the statutory authority to cap intrastate inmate calling services rates. The court explained that the Commission’s authority over intrastate calls is, except as otherwise provided by Congress, limited by section 2(b) of the Act and nothing in section 276 of the Act overcomes this limitation. In particular, section 276 “merely directs the Commission to ‘ensure that all [inmate calling services] providers are fairly compensated’ for their inter- and intrastate calls,” and it “is not a ‘general grant of jurisdiction’ over intrastate ratemaking.”

18. Second, the D.C. Circuit held that the “Commission’s categorial exclusion of site commissions from the calculus used to set [inmate calling services] rate caps defie[d] reasoned decisionmaking because site commissions obviously are costs of doing business incurred by [inmate calling services] providers.” The court directed the Commission to “assess on remand which portions of site commissions might be directly related to inmate calling services and therefore legitimate, and which are not.” The court did not reach inmate calling services providers’ remaining arguments “that the exclusion of site commissions denies [them] fair compensation under [section] 276 and violates the Takings Clause of the Constitution because it forces providers to provide services below cost,” and it stated that the Commission should address these issues on remand once it revisits the exclusion of site commissions.

19. Third, the D.C. Circuit held that the Commission’s use of industry-wide averages in setting rate caps was arbitrary and capricious because it lacked justification in the record and was not supported by reasoned decisionmaking. More specifically, the court found the Commission’s use of a weighted average per-minute cost to be “patently unreasonable” given that such an approach made calls with above-average costs unprofitable and thus did “not fulfill the mandate of [section] 276 that ‘each and every’” call be fairly compensated. Additionally, the court found that the *2015 ICS Order* “advances an efficiency argument—that the larger providers can become profitable under the rate caps if they operate more efficiently—based on data from the two smallest firms,” which “represent less than

one percent of the industry,” and that the Order did not account for conflicting record data. The court therefore vacated this portion of the *2015 ICS Order* and remanded to the Commission for further proceedings.

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

21. More Recent Developments. In the *2015 ICS Order*, the Commission directed that the Second Mandatory Data Collection be conducted two years from publication of Office of Management and Budget (OMB) approval of the information collection. The Commission received such approval in January 2017 and publication occurred on March 1, 2017. Accordingly, on March 1, 2019, inmate calling services providers submitted their responses to the Second Mandatory Data Collection. The Commission’s Wireline Competition Bureau (Bureau) and Office of Economics and Analytics (OEA) undertook a comprehensive analysis of the Second Mandatory Data Collection responses and conducted multiple follow-up discussions with inmate calling services providers to supplement and clarify their responses.

22. In February 2020, the Bureau issued a public notice seeking to refresh the record on ancillary service charges in light of the D.C. Circuit’s remand in *GTL v. FCC*. The Bureau sought comment on, among other issues, (1) whether each permitted inmate calling services ancillary service charge may be segregated between interstate and intrastate calls and, if so, how; (2) how the Commission should proceed in the event any permitted ancillary service is “jurisdictionally mixed” and cannot be segregated

between interstate and intrastate calls; and (3) any steps the Commission should take to ensure that providers of interstate inmate calling services do not circumvent or frustrate the Commission's ancillary service charge rules.

23. In April 2020, inmate calling services providers submitted data pursuant to the Commission's annual reporting requirements and they did so using a revised annual reporting form and accompanying instructions. First, the Bureau made minor revisions to the form and instructions in light of the D.C. Circuit's vacatur of the Commission's annual reporting requirement for video visitation services offered by inmate calling services providers. The *GTL* court held that the video visitation services reporting requirement adopted in the *2015 ICS Order* was "too attenuated to the Commission's statutory authority to justify this requirement." Accordingly, the Bureau eliminated questions regarding video visitation from the annual reporting form.

24. Second, the Bureau made additional revisions to the annual reporting form and instructions based on its experience in analyzing past annual reports and based on formal and informal input from inmate calling services providers, thereby making the annual reports easier to understand and analyze. Bureau and OEA staff used the April 2020 annual report responses to supplement their understanding of the Second Mandatory Data Collection responses.

25. Commission staff also analyzed the intrastate rate data submitted as part of inmate calling services providers' most recent annual reports. Staff's analysis reveals that the vast majority of inmate calls—roughly 80%—are reported to be intrastate and that inmate calling services providers are charging egregiously high intrastate rates across the country. Intrastate rates for debit or prepaid calls substantially exceed interstate rates in 45 states, with 33 states allowing rates that are at least double the Commission's cap and 27 states allowing excessive "first-minute" charges up to 26 times that of the first minute of an interstate call. Indeed, while interstate rates for the first minute and all subsequent minutes may not exceed \$0.25, inmate calling services providers' first-minute charges for intrastate calls may range from \$1.65 to \$6.50. For example, one provider reported the first-minute intrastate rate of

\$5.341 and the additional per-minute intrastate rate of \$1.391 in Arkansas while reporting the per-minute interstate rate of \$0.21 for the same correctional facility. Similarly, another provider reported the first-minute intrastate rate of \$6.50 and the additional per-minute intrastate rate of \$1.25 in Michigan while reporting the per-minute interstate rate of \$0.25 for the same correctional facility. Further, Commission staff identified instances in which a 15-minute intrastate debit or prepaid call costs as much as \$24.80—almost seven times more than the maximum \$3.15 that an interstate call of the same duration would cost.

### **III. REPORT AND ORDER ON REMAND**

26. In this Report and Order on Remand (Remand Order), the Commission responds to the D.C. Circuit’s directive in *GTL v. FCC* that the Commission determine whether ancillary service charges can be segregated between interstate and intrastate inmate telephone service calls. The Commission also amends its rule regarding mandatory pass-through taxes and fees in light of the court’s vacatur and remand in *Securus v. FCC*. Additionally, the Commission revises certain of its other inmate calling services rules to comport with the D.C. Circuit’s decisions in those cases.

#### **A. Ancillary Service Charges**

27. The Commission finds that ancillary service charges generally cannot be practically segregated between the interstate and intrastate jurisdiction except in the limited number of cases where, at the time a charge is imposed and the consumer accepts the charge, the call to which the service is ancillary is a clearly intrastate-only call. The record strongly supports this determination. As such, providers are generally prohibited from imposing any ancillary service charges in connection with inmate calling services other than those specified in the Commission’s rules and providers are generally prohibited from imposing charges in excess of the Commission’s applicable ancillary service fee caps.

##### **1. The Extent of the Commission’s Authority**

28. In creating a dual federal-state regulatory regime to govern interstate and intrastate communications services in sections 1 and 2(b) of the Act, Congress “attempt[ed] to divide the world of

telephone regulation neatly into two separate components.” However, “since most aspects of the communications field have overlapping interstate and intrastate components, these two sections do not create a simple division.” Decades of precedent reconciling these statutory provisions recognizes that the Commission may regulate services having both interstate and intrastate components, referred to as “jurisdictionally mixed” services, where it is impossible or impracticable to separate out their interstate and intrastate components.

29. Courts have recognized that as “a basic underpinning of our federal system . . . state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Thus, although the Commission is “generally forbidden from entering the field of intrastate communication service,” courts have interpreted the Act and the Supremacy Clause of the U.S. Constitution to allow federal regulation of the intrastate portion of jurisdictionally mixed services in spite of section 2(b) where: “(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption [regulation] is necessary to protect a valid federal regulatory objective; and (3) state regulation would ‘negate[] the exercise by the FCC of its own lawful authority’ because regulation of the interstate aspects of the matter cannot be ‘unbundled’ from regulation of the intrastate aspects.” When all three criteria are met, the Commission may regulate the jurisdictionally mixed service falling within the “impossibility exception” as jurisdictionally interstate.

30. Stated differently, where the Commission has jurisdiction under section 201(b) of the Act to regulate rates, charges, and practices of interstate communications services, the impossibility exception extends that authority to the intrastate portion of jurisdictionally mixed services “where it is impossible or impractical to separate the service’s intrastate from interstate components” and state regulation of the intrastate component would interfere with valid federal rules applicable to the interstate component. As the *Vonage Order* made clear, “we need not demonstrate absolute future impossibility to justify federal preemption here. The Commission need only show that interstate and

intrastate aspects of a regulated service or facility are inseverable as a practical matter in light of prevailing technological and economic conditions.”

31. The Bureau’s public notice seeking to refresh the record sought comment on how the Commission should proceed in the event a permitted ancillary service is “jurisdictionally mixed” and cannot be segregated between interstate and intrastate calls. No commenter disputed the Commission’s authority to regulate jurisdictionally mixed ancillary services charges that cannot be segregated. Where a consumer of inmate calling services would incur an ancillary service charge in connection with inmate telephone service and the charge is not clearly and entirely applicable to intrastate calling, the Commission applies the impossibility exception criteria to determine whether that ancillary service charge should be subject to its authority and rules. The Commission rejects one federal District Court’s suggestion that *GTL v. FCC* held that the Commission may not cap ancillary fees “except to the extent those for interstate calls ‘can be segregated’ from intrastate calls.” As Pay Tel points out, the District Court did “not engage in the relevant preemption analysis—indeed not once [did] the decision even mention the term ‘mixed jurisdiction.’” And no party argues that *Mojica v. Securus* provides the appropriate reading of *GTL v. FCC*. Given the long history of Supreme Court and federal appellate court precedent on jurisdictionally mixed services and the specific language of the D.C. Circuit in *GTL v. FCC* (which remanded the issue of “whether ancillary fees can be segregated between interstate and intrastate calls” to the Commission “for further consideration”), the Commission finds that the D.C. Circuit did not instruct the Commission on how it should proceed if it were impossible or impracticable to segregate some ancillary fees but instead left that question open for the Commission to resolve in the first instance.

## **2. Applying the Commission’s Authority to Particular Ancillary Services**

32. Single-Call Service (and Related Service) Fees. Where no prepaid or debit inmate calling services account has been established, an incarcerated individual can make individual collect calls to family members or others. Third parties assess fees on a per-call basis to bill the called family member

or other party for such calls. In 2015, the Commission adopted rules that would preclude inmate calling services providers from charging more than the exact fee the third-party charges for these transactions, with no markup.

33. Because single-call service is associated with a specific call, the Commission finds that the ancillary service can be jurisdictionally determined based on the classification—interstate or intrastate—of the underlying call. Single-call service (and related service) associated with an interstate call is subject to the Commission’s ancillary service charge rules. Single-call service (and related service) associated with an intrastate call is beyond the reach of the Commission’s regulations. In the *2015 ICS Order*, the Commission held that “for single call and related services, we permit ICS providers to charge the amount of the third-party financial transaction (with no markup) added to a per-minute rate no higher than the applicable rate cap.” However, the D.C. Circuit stayed section 64.6020(b)(2) before that rule took effect. The D.C. Circuit in *GTL* remanded the “imposition of ancillary fee caps” in the *2015 ICS Order* without specifically addressing the effect of that remand on the single-call service rule or dissolving the court’s earlier stay of that rule. The “no-mark-up” portion of the single-call service rule never became effective. Because the D.C. Circuit remanded section 64.6020(b)(2) without vacating, finding fault, or otherwise addressing the no-markup clause, the Commission reinstates section 64.6020(b)(2) today for the same reasons it adopted this prohibition in 2015. Nothing in the record of this proceeding since that time suggests the Commission should refrain from doing so, and hence it has good cause to reinstate section 64.6020(b)(2) without further notice and comment.

34. Automated Payment Fees. Automated payments fund prepaid or debit accounts that can be used to pay for inmate calling services. Inmate calling services consumers typically make these payments to fund their accounts to pay for future calls to family or other loved ones and any associated ancillary services charge fees. These payments occur through multiple methods or types of transactions including “credit card payment, debit card payment, and bill processing fees, including fees for payments by interactive voice response[], web, or kiosk.” They are also made to pay inmate calling

service bills for calls that have already been made. The Commission limits these fees to a maximum of “\$3.00 per use,” based on its prior finding that a \$3.00 cap would “more than ensure[] that ICS providers [could] recoup the costs of offering these services.”

35. Because a prepaid or debit account can generally be used to make both interstate and intrastate calls, automated payment fees are generally jurisdictionally mixed and subject to the Commission’s ancillary service charge rules. For example, accounts that allow the dialing of any mobile telephone number (such as one assigned by a mobile wireless provider or a nomadic interconnected voice over Internet Protocol (VoIP) provider) are inherently jurisdictionally mixed because the called party need not be located in the same state as the incarcerated individual at the time of a call. This is true even if the called party’s residence, as commenters point out, is in the same state as the correctional facility. And it is true even if the area code and NXX prefix of the called party’s telephone number are associated with the state of the correctional facility. Similarly, if the account only allows a certain number of non-mobile numbers to be called, such an account is jurisdictionally mixed if any one of those numbers is assigned to a fixed location in a different state. The Commission uses a fixed landline telephone number in its example here but recognizes that fixed wireless technology may also have the same “fixed” location characteristics as fixed wireline service and thus the same jurisdictional analysis would apply. Indeed, accounts where an incarcerated individual may make a call to any telephone number or add a telephone number to the list of authorized numbers (even if that telephone number must go through a screening process before it is authorized) may be inherently jurisdictionally mixed. Because automated payments typically are made to fund accounts before calls are completed or fees are incurred, the record suggests that it may be impractical, if not impossible, to connect these payments to any specific subsequent calls made. When automated payments cannot be segregated by jurisdiction, they are subject to the Commission’s ancillary service charge rules.

36. The Commission recognizes, however, that automated payments are sometimes made to pay inmate calling service bills after calls have already been made. In that circumstance, an inmate

calling services provider could potentially confirm that not one call with an outstanding balance was made that crossed state lines and thus that the service charge would be ancillary only to intrastate inmate calling services. Because the Commission must respect the boundary on its jurisdiction drawn by Congress, it cannot impose its automated payment fee cap in such circumstances.

37. The Commission rejects Securus' claim that "since the jurisdiction of any given payment transaction depends on the specific circumstances surrounding the transaction, Securus does not believe that the Commission can reach any conclusion regarding the application of these [Automated Payment Fee] caps as a generic matter." It is precisely because providers generally impose (and consumers are charged) these fees before it is possible to determine whether such payments are ancillary to interstate or intrastate calls that precedent dictates that the Commission find these automated payments to be jurisdictionally mixed—and thus application of the Commission's rule to all such transactions is necessary to protect interstate callers.

38. Third-Party Financial Transaction Fees. Consumers often make use of third parties, such as Western Union or MoneyGram, to transfer money or process financial transactions that enable these consumers to make payments to inmate calling services accounts. These third parties charge fees to inmate calling services providers, which the providers then pass on to consumers. The Commission's ancillary services charges rules limit the amount of third-party fees that an inmate calling services provider can pass on to consumers to the exact third-party fees, with no markup.

39. As with automated payments, because third-party financial transactions typically fund accounts before calls are placed or associated fees are incurred, it is generally impossible to know whether the fees will be applied to interstate calls, intrastate calls, or a mix of the two. Therefore, third-party financial transactions are generally jurisdictionally mixed and subject to the Commission's ancillary service charge rules in the same way as automated payments. The Commission declines in this Order to consider NCIC's suggestion that it further cap third-party processing fees. Setting aside whether the Commission would have the authority to prohibit an inmate calling services provider from passing along

the costs itself incurs for conducting a service on a consumer's behalf, NCIC's suggestion is beyond the scope of the remand in this proceeding.

40. To the extent Securus suggests that third-party financial transactions "raise no jurisdictional dispute," the Commission agrees so long as such a transaction is tied to a particular jurisdictionally identifiable call—which, as with automated payments, the Commission would expect would only occur if the fee is imposed after calls have been made. And such an inquiry would only matter where the inmate calling services provider can confirm that no call with an outstanding balance was interstate or international—otherwise, the only way to protect the interstate caller from unjust and unreasonable fees is to apply the Commission's ancillary service charge rules to the entire third-party financial transaction.

41. Live Agent Fees. Consumers may optionally use live operators to complete a range of inmate calling services-related tasks, including setting up an account, adding money to an account, or assisting with making a call. In practice, multiple transactions can be, and often are, made via a single live operator interaction, which the Commission caps at \$5.95 per interaction, regardless of the number of tasks the live operator completes in a single session.

42. As with automated payments and third-party financial transactions, because live agents are often used to set up accounts or add money to accounts before any call is made, live agent services are generally jurisdictionally mixed and subject to the Commission's ancillary service charge rules. In contrast, to the extent a live agent is used to place a particular call, then that service can be jurisdictionally determined by the classification of the call, just as single-call services are. And to the extent a live agent is used after calls have been made to, for example, pay a bill, then the Commission's ancillary service charge rules apply unless every call with an outstanding balance can be determined to be intrastate. Similarly, to the extent a live agent session is used to complete multiple tasks, the Commission finds that service is jurisdictionally mixed (and thus subject to its ancillary service charge

rules) unless the inmate calling services provider can demonstrate that each action taken by the live agent was ancillary only to an intrastate telephone service.

43. The Commission rejects Securus' claim that because Live Agent fees are based on multiple different types of transactions, it cannot reach a conclusion as to whether or not the Commission's ancillary service charge rule applies. Again, the Commission can reach a conclusion here precisely because it has found that live agent services can, and do, involve both interstate and intrastate tasks within a single transaction session. As a result, failing to treat live agent services as generally jurisdictionally mixed would conflict with the federal law requiring these fees to be just and reasonable for all interstate callers.

44. Paper Bill Fees. Inmate calling services consumers have the option to obtain paper bills or statements reflecting all charges that occurred during a billing cycle, including those related to calls and ancillary service charges. The Commission has capped fees for paper bills at \$2.00 per statement.

45. Because the creation of a paper bill occurs only after calls have been made, it may be possible to jurisdictionally segregate this service. Generally, the Commission would expect such bills to be jurisdictionally mixed as incarcerated people may make calls to those both in and outside of the state of the correctional facility—and thus subject to its ancillary service charge rules. However, if an inmate calling services provider can confirm that no call on the bill is interstate or international, then the paper bill service would only be ancillary to intrastate calls and beyond the reach of the Commission's rules.

### **3. Related Issues**

46. Effect on State Regulation. As in prior cases, the Commission exercises its authority under the Supremacy Clause to preempt state regulation of jurisdictionally mixed services to the extent that such regulation conflicts with federal law. The Commission's rules apply to all ancillary service charges imposed for and in connection with interstate inmate calling services. To the extent those charges relate to accounts or transactions having interstate as well as intrastate components, the federal requirements will operate as ceilings limiting potential state action. To the extent a state allows

or requires an inmate calling services provider to impose fees for ancillary services other than those permitted by the Commission's rules, or to charge fees higher than the caps imposed by the Commission's rules, that state law or requirement is preempted except where such ancillary services are provided only in connection with intrastate inmate calling services. In contrast, to the extent a state allows or requires an inmate calling services provider to impose fees lower than those contained in the Commission's rules, that state law or requirement is not preempted by the Commission's action here.

47. Attempts to Exploit the Dual Regulatory Environment and Evade the Commission's Rules. The Commission shares the concern of commenters that inmate calling services providers may undermine or negate its caps on ancillary service charges for interstate inmate calling services (and, in turn, its interstate rate caps) by departing from their current business practices and taking new steps to segregate interstate and intrastate activity. For example, commenters point out that providers may newly decide to create separate paper bills for intrastate and interstate services in order to evade the Commission's cap on paper bill fees. The Commission recognizes, in view of the D.C. Circuit's decision in *GTL*, that the Commission lacks authority to limit the fees providers assess for purely intrastate activity. But it is within the Commission's authority to ensure that fees for interstate activity are just and reasonable. And because providers have not historically distinguished between interstate and intrastate ancillary service charges, the Commission anticipates that the costs associated with providing jurisdictionally separate ancillary services, should providers seek to do so in the future, would often or always be "common" to both the interstate and intrastate service. It would frustrate the Commission's efforts to ensure that charges for interstate ancillary services are just and reasonable if providers could recover, through their interstate ancillary service charges, costs that should be allocated to a parallel intrastate ancillary service, or that providers have already recovered through their intrastate ancillary service charges.

48. To ensure that providers do not negate the effectiveness of the Commission's caps on interstate ancillary service charges in this manner, the Commission determines that if a provider takes

new steps to segregate interstate and intrastate activity (for example, by providing separate paper bills for interstate and intrastate inmate calling services, and assessing separate ancillary service charges for those bills), the Commission will presumptively consider such actions as unjust and unreasonable practices that are prohibited under federal law. The Commission directs the Wireline Competition Bureau and the Enforcement Bureau to take appropriate action should they become aware of such actions. Any inmate calling services provider that takes such actions should be prepared to demonstrate to the Commission that its affected interstate ancillary service charges are just and reasonable, including that the affected charges do not recover jurisdictionally common costs that are already, or should properly be, recovered through the provider's corresponding intrastate ancillary service charges.

49. Relatedly, the Commission cautions providers that they are prohibited, either directly or indirectly, from imposing ancillary service charges falling outside the five categories of charges permissible under its rules, and that they are prohibited from collecting, directly or indirectly, amounts that exceed the ancillary service fee caps set forth in its rules. The Commission further cautions that it intends to exercise the full breadth of the agency's jurisdiction to curb attempts to evade its rate cap and ancillary service charge rules through arrangements with third parties. For example, one commenter has suggested that other providers may have entered into arrangements with a third party in connection with single-call service transactions whereby excessive one-time transaction fees associated with these calls are imposed, passed on without markup to the consumer of the inmate calling service, and then the revenue obtained from the consumer is shared by the service provider and the third party. Evidence of arrangements such as this that appear to result in the service provider indirectly marking up the third-party transaction fee in circumvention of the Commission's rules is subject to immediate referral to the Enforcement Bureau for investigation.

50. Similarly, inmate calling services providers are required to certify annually that the information in their Annual Reports, including the information on their ancillary services fees, is "true and accurate" and that they are in compliance with the Commission's inmate calling services rules. The

Commission will not hesitate to take action to ensure full compliance with its ancillary services fee caps and other inmate calling services rules. To that end, the Commission directs the Enforcement Bureau to issue an Enforcement Advisory, within 60 days of the effective date of this Order, reminding inmate calling services providers of their obligations under the Commission's rules, their duty of candor in connection with their interactions with the Commission, and the potential penalties for noncompliance.

51. **Classifying Calls by Jurisdiction.** There is significant debate within the record on whether it is possible for inmate calling services providers to classify the jurisdiction of certain calls and thus the jurisdiction of the services ancillary to such calls. On the one hand, GTL argues that the "jurisdictional nature of calls themselves is easily classified as either interstate or intrastate based on the call's points of origin and termination," and Securus asserts that an inmate calling services provider knows the jurisdiction of a call because it is "from a known originating telephone number to a single, known terminating number." On the other hand, Pay Tel argues that the Commission should generally treat inmate calling services as jurisdictionally mixed across the board because providers cannot practically and reliably determine the location of each called party.

52. This confusion calls for some clarification. First, the Commission reminds providers that the jurisdictional nature of a call depends on the physical location of the endpoints of the call and not on whether the area code or NXX prefix of the telephone number, or the billing address of the credit card associated with the account, are associated with a particular state. In other words, certain providers are incorrect to argue that comparing the incarcerated person's local access and transport area and phone number with the account holder's will let an inmate calling services provider identify whether a call or account is interstate or intrastate. Although that may be true for legacy wireline networks, more modern networks such as wireless networks and interconnected VoIP networks allow the portability of such numbers across state lines. And given the prevalence of such networks and the increasing reliance on mobile wireless and VoIP services, it would be unreasonable for an inmate calling services provider to rely on a telephone number alone to determine the location of a particular called

party. Today, a phone number provides little indication of the physical location of a called party or a calling party. Telephone numbers have been readily ported between wireline providers, and between wireline and wireless service providers, since at least 2003. And VoIP providers have been porting numbers since at least 2008. Thus, a telephone number only identifies the state and rate center where the number was originally assigned, and not where it is currently assigned. Moreover, because a wireless telephone user may make or receive a call anywhere there is wireless reception, their phone number readily may not indicate their location. And the chance of a phone number being one that is used by a mobile phone is high: The telephone numbers used by mobile phones make up about half of all assigned telephone numbers. Second, the Commission disagrees with Pay Tel's argument that the location of a wireless caller is unknowable. As Securus points out, "wireless carriers can determine the locations of their customers at the time of each call, so it is possible to establish the jurisdiction of each individual call." Third, the Commission recognizes that just because some provider can establish the location of a caller (and thus the jurisdiction of a call) does not mean that every inmate calling services provider can or does do so. As such the Commission agrees with Pay Tel that, to the extent an inmate calling services provider cannot definitively establish the jurisdiction of a call, it may and should treat the call as jurisdictionally mixed and thus subject to the Commission's ancillary service charge rules. Such treatment is necessary to carry out the requirement of the Communications Act that all interstate charges and practices be just and reasonable. Or to put it another way, any other treatment of jurisdictionally indeterminate calls would strip interstate callers of the protections guaranteed by federal law.

53. GTL and Securus take issue with the Commission's jurisdictional approach, arguing that it is inconsistent with Commission and provider practices for determining the jurisdictional nature of calls. These providers misread Commission precedent, however. While the Commission has allowed carriers to use proxies for determining the jurisdictional nature of calls in specific contexts, typically related to carrier-to-carrier matters or payment of fees owed, it has never adopted a general policy

allowing the broad use of such proxies outside of specific facts and circumstances which are not applicable here. Indeed, the Commission has never applied proxies to telecommunications resellers generally, or inmate calling services providers specifically, with respect to assessing different interstate and intrastate rates and charges on their customers for those customers' interstate and intrastate telephone calls. Indeed, the examples that GTL and Securus provide relate specifically to carrier-to-carrier arrangements involving intercarrier compensation or applicable federal fees due between carriers and the Commission, not to using a proxy for charging a customer a higher or different rate than it would otherwise be subject to based on whether the customer's call is interstate or intrastate.

54. The Commission is also unpersuaded by the "precedent" cited by GTL and Securus. Much of what those parties cite is drawn from Notices of Proposed Rulemaking. Even insofar as those Notices include observations about historical industry practice as context for those requests for comment, the Notices do not establish actual Commission policy. Nor is the Commission persuaded by their citation of a 2002 Bureau-level Order resolving an interconnection arbitration. That Bureau decision involved baseball-style arbitration, and an arbitrator concluded that those parties could use NPA-NXX codes for purposes of determining whether calls were local or toll. That conclusion was a function of the limits of the carriers' respective proposals there—nothing in that case made the use of NPA-NXX codes applicable to the entire industry. Moreover, this 18 year-old decision did not involve carriers terminating calls to VoIP and mobile wireless telephone numbers, which is the Commission's concern here. The industry is very different today than it was in 2002 and the rules applicable to numbering resources have changed substantially, calling into question whether that arbitrator would have reached the same conclusion today with respect to reliance on NPA-NXX codes. In still other cases, GTL cites state commission decisions or an industry white paper, which likewise do not demonstrate Commission policy. Thus, these filings by GTL and Securus do not demonstrate any actual Commission policy for the industry from which the Commission would be departing here.

55. Independently, the Commission Notices and Bureau Order cited by GTL and Securus involve materially different policy contexts. In particular, they generally involve scenarios where the Commission is seeking to ensure a reasonable aggregate outcome across a mass of transactions. This is the case under the telecommunications relay service (TRS) program, where a single entity—the Commission—is providing all of the compensation that providers receive from the interstate TRS Fund. To the extent that interstate vs. intrastate distinctions arise in that context, the Commission must ensure a reasonable approach across the aggregation of TRS calls handled by each provider rather than necessarily requiring jurisdictional accuracy on a call-by-call basis. This also is the case with intercarrier compensation, for example, where carriers exchange large volumes of calls and the jurisdictional status of any individual call is less important for intercarrier compensation purposes than ensuring that, in the aggregate, the payments carriers exchange reflect a reasonable accounting of the relative portion of that mass of calls that are interstate vs. intrastate. Furthermore, under the framework of sections 251 and 252 of the Act, Commission rules merely establish a default, with individual carriers free to negotiate alternative approaches. In that context, Congress thus anticipated that regulators generally would defer to industry-derived outcomes where they emerged. The situation here is quite different, however. Currently, charges for inmate calling services calls are imposed on a call-by-call basis. As a result, to ensure the rate caps serve their purpose of ensuring just and reasonable rates for interstate services, those protections must apply on a call-by-call basis. Even assuming *arguendo* that proxies could be identified that would yield an approximately accurate differentiation between interstate and intrastate traffic when viewed across the entire aggregation of a providers' calls, that would be cold comfort to the end-user consumers. Nor, in any case, does the record reveal proxies that would be reasonable even if it made sense to focus on aggregate outcomes. For example, the record does not reveal why proxies or the like that industry might have used in the context of traditional telephone calls would make sense in the inmate calling services context given potential differences in the types of calls that are placed, potential differences in frequency and duration of calls, or other possible

considerations. At the same time, relying on proxies such as telephone numbers could be self-defeating, since consumers could purchase wireless phones from a different state (with a number from that state) and then place calls from within the same state as the inmate in order to gain the protections of the interstate inmate calling services rules. Such activities would impose their own costs and could lead to disparate application of the protections of the interstate inmate calling services rules based on the relative sophistication of the particular consumers receiving calls from inmates. The Commission finds all these concerns persuasive both in connection with its inmate calling services rate caps and in connection with its regulation of fees for ancillary services. Those consumers would lose the protection of the Commission's rate caps for particular calls that are, in fact, interstate calls because per-call regulation turned on proxies developed in the context of aggregations of calls with no guarantee—or necessarily even likelihood—of seeing offsetting benefits in the case of other inmate calling services calls they make or receive. Likewise, when it comes to fees for jurisdictionally mixed ancillary services, the Commission merely seeks to vindicate its statutory interests whenever interstate inmate calling services are implicated. Indeed, in the *Vonage Order* cited by GTL, the Commission responded to the difficulty in directly determining the jurisdiction of calls by broadly preempting the state's attempted regulation of the service at issue. Thus, although the Commission leaves providers free to follow state law where the associated effects can be limited to intrastate inmate calling services, the record here does not persuade it to neglect its interest when there is an effect on interstate services even if it falls below some (undefined) threshold.

56. Additionally, the end-to-end analysis that the Commission relies upon in this Order is the analysis that the Commission “has traditionally used to determine whether a call is within its interstate jurisdiction.” The Commission has not extended to inmate calling services any of the jurisdictional proxies it has adopted for specific and limited purposes in other contexts, nor has it ever had any reason to suspect that inmate calling services providers were not appropriately complying with this most basic regulatory obligation of telecommunications services providers with respect to their

customers—determining the proper jurisdiction of a call when charging its customers the correct and lawful rates for those calls using the end-to-end analysis. The Commission therefore disagrees with GTL and Securus that its approach is a departure from established precedent and imposes a “burden” on them.

57. For the same reasons, the Commission also disagrees with GTL and Securus that requiring inmate calling services providers to classify incarcerated people’s calls as interstate or intrastate based on their end points constitutes a change in Commission policy requiring prior notice and an opportunity to comment. On the contrary, the Commission’s approach simply clarifies the long-established standard that inmate calling services providers must apply in classifying calls for purposes of charging customers the appropriate rates and charges. And, in any event, the Bureau’s public notice seeking to refresh the record on ancillary service charges in light of *GTL v. FCC* sought comment “on how the Commission should proceed in the event any permitted ancillary service is ‘jurisdictionally mixed’ and cannot be segregated between interstate and intrastate call” and defined jurisdictionally mixed services as “[s]ervices that are capable of communications both between intrastate end points and between interstate end points.” Since the permitted ancillary services include single-call services (i.e., services related to a specific call), GTL and Securus received notice of, and a full opportunity to comment on, the jurisdictional status of inmate calling services calls.

58. Ancillary Service Charges Rule Revisions. The Commission revises its ancillary services charge rules consistent with its findings herein. These amendments reflect the D.C. Circuit’s holding that the Commission lacks authority over intrastate inmate calling services as well as the Commission’s actions exercising its authority to ensure just and reasonable rates under section 201(b) for ancillary services charges for and in connection with jurisdictionally mixed inmate calling services for which it is impossible or impracticable to segregate the interstate and intrastate components.

59. The Commission also changes section 64.6020(a)’s cross-reference to section 64.6000 to more precisely cross-reference section 64.6000(a). The Commission finds good cause to correct the

cross-reference without notice and comment because this change is non-substantive. It is well established that the Commission need not seek comment on amendments to its rules designed “to ensure consistency in terminology and cross references across various rules or to correct inadvertent failures to make conforming changes when prior rule amendments occurred.” In the absence of any indication of changed circumstances regarding the markup of Mandatory Taxes or Mandatory Fees, the Commission finds it unnecessary to seek additional comment on these matters.

**B. Mandatory Pass-Through Taxes and Fees**

60. As a result of the D.C. Circuit’s decision in *Securus*, the rule amendments in the *2016 ICS Reconsideration Order* to include language precluding markups of a “Mandatory Tax or Mandatory Fee” in the absence of specific governmental authorization were vacated to the extent they capped rates. The Commission therefore amends its rules to reinstate the language added in the *2016 ICS Reconsideration Order* in response to the court’s vacatur and remand. The Commission also adds language clarifying that this rule applies only in connection with interstate and international inmate calls. This amendment will ensure that end users will pay for “the cost of the service they have chosen and any applicable taxes or fees, and nothing more” for inmate calling services subject to the Commission’s jurisdiction, thereby helping ensure that the charges imposed in connection with those services are just and reasonable.

61. The amendment is consistent with the Commission’s prior intent regarding mandatory taxes or fees and the record previously developed in this proceeding. The Commission bases its reinstatement on the same record, and finds no basis to depart from its prior determination that adopting this rule best comports with its application of section 201(b). Further, this amendment harmonizes the rules regarding a “Mandatory Tax or Mandatory Fee” and an “Authorized Fee” to prohibit markups on either category of charges, thereby eliminating at least some potential confusion from the disparate definitions regarding whether inmate calling services providers may mark up such charges.

**C. Revisions to Certain Inmate Calling Services Rules**

62. Finally, the Commission revises certain of its rules governing inmate calling services to comport with the D.C. Circuit's decisions in *GTL* and *Securus*. First, the court vacated the rate caps that the Commission adopted in the *2015 ICS Order* and the *2016 ICS Reconsideration Order*, and the Commission thus eliminates section 64.6010, which contained those rate caps. Second, the *GTL* court vacated the reporting requirement the Commission had adopted for video visitation services. The Commission thus eliminates section 64.6060(a)(4), which contained that rule. Third, the *GTL* court found that the Commission lacks ratemaking authority over intrastate inmate calling services rates. The Commission thus revises sections 64.6000(b), 64.6000(n), 64.6030, 64.6050, 64.6070, 64.6080, 64.6090, and 64.6100 to reflect that these rules only apply to interstate and international inmate calling services. Fourth, the Commission revises section 64.6000(t) of its rules to change the reference to "ICS" therein to "Inmate Calling Services."

63. The Commission finds good cause to implement these revisions without notice and comment. The Administrative Procedure Act states that notice and comment procedures do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." With the exception of its change to section 64.6000(t), the Commission's revisions are non-discretionary changes to the Commission's rules necessary to effectuate the D.C. Circuit's decisions in *GTL* and *Securus*. Seeking notice and comment before implementing the D.C. Circuit's non-discretionary mandate would serve no purpose because commenters could not say anything during a notice and comment period that would change the D.C. Circuit's decision and the Commission does not have discretion to depart from the court's mandate.

64. The Commission also finds good cause to revise section 64.6000(t) without notice and comment because this change is non-substantive. The Commission need not seek comment on amendments to its rules designed "to ensure consistency in terminology and cross references across

various rules or to correct inadvertent failures to make conforming changes when prior rule amendments occurred.

#### **IV. PROCEDURAL MATTERS**

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

66. **Congressional Review Act.** The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management Budget concurs, that this rule is non-major under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this Report and Order on Remand to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

67. **Supplemental Final Regulatory Flexibility Act Analysis.** As required by the Regulatory Flexibility Act of 1980 (RFA), as amended, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (FRFA) relating to this Report and Order on Remand. The FRFA is set forth below.

68. **Paperwork Reduction Act.** This Report and Order on Remand does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002 (SBPRA).

#### **V. SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS**

69. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the 2014 ICS Notice. The Commission sought written public comment on the proposals in that Notice, including comment on the IRFA. The Commission did not receive comments directed toward the IRFA. Thereafter, the Commission issued a

Final Regulatory Flexibility Analysis (FRFA) conforming to the RFA. This Supplemental FRFA supplements that FRFA to reflect the actions taken in the Report and Order on Remand (Remand Order) and conforms to the RFA.

**A. Need for, and Objectives of, the Order on Remand**

70. The Remand Order adopts rules segregating ancillary service charges provided in connection with inmate calling services into interstate and intrastate components in response to a remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). It also amends the Commission's rule regarding mandatory pass-through taxes and fees in light of a second remand from the D.C. Circuit. Finally, it revises certain of the Commission's other inmate calling services rules to comport with the D.C. Circuit's decisions in those cases, and reinstates the Commission's rule providing an ancillary service charge cap for single-call services.

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

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

**C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration**

72. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

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

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

operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

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

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

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

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

providers of incumbent local exchange service are small businesses that may be affected by the Commission's action.

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

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

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

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

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

83. Other Toll Carriers. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it

has 1,500 or fewer employees. According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.

Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the Commission's action.

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

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

85. Recordkeeping, Reporting, and Certification. The Order on Remand requires inmate calling services providers to properly identify whether ancillary services associated with inmate calling services are interstate, intrastate, or jurisdictionally mixed. To the extent those ancillary services are interstate or jurisdictionally mixed, the provider must comply with fee caps or limits previously adopted by the Commission. The Remand Order also requires inmate calling services providers to not mark up mandatory taxes or fees passed on to consumers of interstate or international inmate calling services, and places an ancillary service charge cap on single-call services.

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

86. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following

four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”

87. The FRFA that the Commission previously issued in connection with the *2015 ICS Order* addressed in full the steps taken to minimize the economic impact on small entities and the significant alternatives considered.

**G. Report to Congress:**

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

**VI. ORDERING CLAUSES**

89. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i)-(j), 201(b), 218, 220, 276, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b), 218, 220, 276, and 403, this Report and Order on Remand **IS ADOPTED**.

90. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1, 2, 4(i)-(j), 201(b), 218, 220, 276, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b), 218, 220, 276, and 403, that the amendments to the Commission’s rules **ARE ADOPTED**, effective 30 days after publication of a summary in the Federal Register.

91. IT IS FURTHER ORDERED that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Report and Order on Remand,

including the Supplemental Final Regulatory Flexibility Analysis, to the Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

92. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Report and Order on Remand, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

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

Communications common carriers, Individuals with disabilities, Prisons, Reporting and recordkeeping requirements, Telecommunications, Telephone, Waivers.

FEDERAL COMMUNICATIONS COMMISSION

**Marlene Dortch,**

**Secretary.**

#### **Final Rules**

For the reasons set forth in the preamble, the Federal Communications Commission amends part 64, of title 47 of the Code of Federal Regulations as follows:

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

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

AUTHORITY: 47 U.S.C. 151, 152, 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 262, 276, 403(b)(2)(B), (c), 616, 620, 1401-1473, unless otherwise noted; Pub. L. 115-141, Div. P, sec. 503, 132 Stat. 348, 1091.

2. Amend § 64.6000 by revising paragraphs (a), (b), (n), and (t) and by adding paragraph (u) to read as follows:

#### **§ 64.6000 Definitions.**

\*\*\*\*\*

(a) *Ancillary Service Charge* means any charge Consumers may be assessed for, or in connection with, the interstate or international use of Inmate Calling Services that are not included in the per-minute charges assessed for such individual calls. Ancillary Service Charges that may be assessed are limited only to those listed in paragraphs (a)(1) through (5) of this section. All other Ancillary Service Charges are prohibited. For purposes of this definition, "interstate" includes any Jurisdictionally Mixed Charge, as defined in paragraph (u) of this section.

\* \* \* \* \*

(b) *Authorized Fee* means a government authorized, but discretionary, fee which a Provider must remit to a federal, state, or local government, and which a Provider is permitted, but not required, to pass through to Consumers for or in connection with interstate or international Inmate Calling Service. An Authorized Fee may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation.

\* \* \* \* \*

(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 for, or in connection with, interstate or international Inmate Calling Services may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation;

\* \* \* \* \*

- (t) *Site Commission* means any form of monetary payment, in-kind payment, gift, exchange of services or goods, fee, technology allowance, or product that a Provider of Inmate Calling Services or affiliate of a Provider of Inmate Calling Services may pay, give, donate, or otherwise provide to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide Inmate Calling Services, a governmental agency that oversees a correctional facility, the city, county, or state where a facility is located, or an agent of any such facility.
- (u) *Jurisdictionally Mixed Charge* means any charge Consumers may be assessed for use of Inmate Calling Services that are not included in the per-minute charges assessed for individual calls and that are assessed for, or in connection with, uses of Inmate Calling Service to make such calls that have interstate or international components and intrastate components that are unable to be segregated at the time the charge is incurred.

**§ 64.6010 [Removed and Reserved]**

3. Remove and reserve § 64.6010.
4. Section 64.6020(a) is revised to read as follows:

**§ 64.6020 Ancillary Service Charge.**

- (a) No Provider of interstate or international Inmate Calling Services shall charge an Ancillary Service Charge other than those permitted charges listed in § 64.6000(a).

\*\*\*\*\*

5. Section 64.6030 is revised to read as follows:

**§ 64.6030 Inmate Calling Services interim rate cap.**

No provider shall charge a rate for interstate Collect Calling in excess of \$0.25 per minute, or a rate for interstate Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of \$0.21 per minute. These interim rate caps shall remain in effect until permanent rate caps are adopted and take effect.

6. Section 64.6050 is revised to read as follows:

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

No Provider shall prohibit or prevent completion of an interstate or international Collect Calling call or decline to establish or otherwise degrade interstate or international Collect Calling solely for the reason that it lacks a billing relationship with the called party's communications service provider, unless the Provider offers Debit Calling, Prepaid Calling, or Prepaid Collect Calling for interstate and international calls.

§ 64.6060 [Amended]

7. In § 64.6060, remove and reserve paragraph (a)(4).

8. Section 64.6070 is revised to read as follows:

**§ 64.6070 Taxes and fees.**

No Provider shall charge any taxes or fees to users of Inmate Calling Services for, or in connection with, interstate or international calls, other than those permitted under § 64.6020, and those defined as Mandatory Taxes, Mandatory Fees, or Authorized Fees.

9. Section 64.6080 is revised to read as follows:

**§ 64.6080 Per-Call or Per-Connection Charges.**

No Provider shall impose a Per-Call or Per-Connection Charge on a Consumer for any interstate or international calls.

10. Section 64.6090 is revised to read as follows:

**§ 64.6090 Flat-Rate Calling.**

No Provider shall offer Flat-Rate Calling for interstate or international Inmate Calling Services.

11. Section 64.6100 is revised to read as follows:

**§ 64.6100 Minimum and maximum Prepaid Calling account balances.**

- (a) No Provider shall institute a minimum balance requirement for a Consumer to use Debit or Prepaid Calling for interstate or international calls.
- (b) No Provider shall prohibit a consumer from depositing at least \$50 per transaction to fund a Debit or Prepaid Calling account that can be used for interstate or international calls.