



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 12-375, FCC 20-111; FRS 17046]

Rates for Interstate Inmate Calling Services

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission continues to comprehensively reform inmate calling services rates to ensure just and reasonable rates for interstate and international inmate calling services. Specifically, the Commission proposes to lower the current interstate rate caps to \$0.14 per minute for debit, prepaid, and collect calls from prisons and \$0.16 per minute for debit, prepaid, and collect calls from jails. The Commission also proposes to cap rates for international inmate calling services, which remain uncapped today. The Commission proposes a waiver process that would allow providers to seek relief from its rules at the facility or contract level if they can demonstrate that they are unable to recover their legitimate inmate calling services-related costs at that facility or for that contract. Finally, the Commission invites comment on whether the Commission should require the providers to submit additional data, and if so, how; on how the Commission's regulation of interstate and international inmate calling services should evolve in light of marketplace developments and innovations, including alternative rate structures; and on the needs of incarcerated people with hearing or speech disabilities.

DATES: Comments are due **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Reply Comments are due **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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

FOR FURTHER INFORMATION CONTACT: Minsoo Kim, Pricing Policy Division of the Wireline Competition Bureau, at (202) 418-1739 or via e-mail at Minsoo.Kim@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Fourth Further Notice of Proposed Rulemaking, FCC 20-111, released August 7, 2020. This summary is based on the public redacted version of the document, the full text of which can be obtained from the following internet address: <https://docs.fcc.gov/public/attachments/FCC-20-111A1.pdf>.

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. The Commission proposes rate reform of the inmate calling services within its jurisdiction. As a result of the D.C. Circuit’s decisions, the interim interstate rate caps of \$0.21 per minute for debit and prepaid calls and \$0.25 per minute for collect calls that the Commission adopted in 2013 remain in effect today. Based on extensive analysis of the most recent cost data submitted by inmate calling services providers, the Commission proposes to lower its interstate rate caps to \$0.14 per minute for debit, prepaid, and collect calls from prisons and \$0.16 per minute for debit, prepaid, and collect calls from jails. In so doing, the Commission uses a methodology that addresses the flaws underlying the Commission’s 2015 and 2016 rate caps and that is consistent with the mandate in section 276 of the Act that inmate calling services providers be fairly compensated for each and every completed interstate call. Additionally, the Commission proposes to cap rates for international inmate calling services, which remain uncapped today.

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 its 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]nosfar

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 reform.

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. FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

26. As a result of the D.C. Circuit’s decisions in *GTL* and *Securus*, the interim interstate rate caps that the Commission adopted in the *2013 ICS Order*—\$0.21 per minute for debit and prepaid calls and \$0.25 per minute for collect calls—remain in effect today. Based on extensive analysis by Commission staff of the most recent cost data submitted by inmate calling services providers, the Commission proposes comprehensive rate reform of the inmate calling services within its jurisdiction.

27. First, the Commission proposes to lower its rate caps for interstate inmate calling services to \$0.14 per minute for debit, prepaid, and collect calls from prisons and \$0.16 per minute for debit, prepaid, and collect from jails. In so doing, the Commission accounts for reasonable correctional facility costs, consistent with the court’s opinion in *GTL*, and the Commission accounts for the fair compensation mandate of section 276 of the Act. The Commission further proposes to find that the benefits of its interstate rate cap proposal far exceed the costs.

28. Second, the Commission proposes to cap rates for international inmate calling services, which remain uncapped today. Specifically, the Commission proposes to adopt a rate cap formula that permits a provider to charge an international inmate calling services rate up to the sum of the provider’s per-minute interstate rate cap for that correctional facility *plus* the amount that the provider must pay its underlying international service provider for that call on a per-minute basis. The Commission believes these proposals will ensure that the rates that incarcerated individuals and their loved ones pay for interstate and international inmate calling services are just and reasonable as required by section 201(b) of the Act.

29. The Commission seeks comment on its proposals, including their impact on small businesses, and the Commission seeks comment on any alternative proposals.

A. Proposing New Interstate Rate Caps

30. The Commission proposes to adopt permanent rate caps for interstate inmate calling

services of \$0.14 per minute for debit, prepaid, and collect calls from prisons and \$0.16 per minute for such calls from jails. These rate caps would apply to all calls that a provider identifies as interstate and to calls that the provider cannot definitively identify as intrastate.

31. The proposed rates are based on its analyses of detailed cost data submitted by inmate calling services providers in their Second Mandatory Data Collection responses. These data demonstrate that the proposed rates, in conjunction with the fees permitted for ancillary services, will generally allow providers to recover their costs, including their overheads, and reimburse correctional facilities for any costs that they incur that are directly related to the provision of inmate calling services. The Commission defines “overheads” as the difference between the costs inmate calling services providers assigned to their contracts and their total inmate calling services costs. The Commission establishes its proposed rate caps based on (1) its calculated mean contract costs per paid minute to provide inmate calling services as reported by providers plus one standard deviation; and (2) an allowance for recovery of correctional facility costs directly related to the provision of inmate calling services observed in that data. “Contract costs per paid minute” refers to the sum of a contract’s direct costs and allocated overheads divided by the number of paid minutes of use reported for that contract. The Commission calculates the mean of this value across all contracts for each facility type and use those averages in determining its proposed rate caps. The Commission’s proposed rate cap methodology and its impact on providers’ ability to recover their costs differ materially from the methodology and impact that were before the D.C. Circuit in *GTL v. FCC*. The Commission seeks comment on each aspect of its proposed rate cap methodology and on whether it will result in interstate inmate calling services rates that are just and reasonable as required by the Communications Act.

32. Uniform Caps for Prepaid/Debit and Collection Calls. The Commission proposes to adopt identical interstate rate caps for prepaid/debit and collect calls based on the absence of any data demonstrating a material difference in the costs of providing these different types of calls. For convenience, the Commission refers herein to prepaid and debit calls collectively as prepaid/debit calls. While each of these call types is separately defined in the Commission’s rules, 47 CFR 64.6000(g) and (p), each involves a form of advanced payment for inmate telephone calls as distinguished from collect

calls for which payment is sought from the called party at the time that the inmate call is placed. What is more, collect calling is no longer a popular method of inmate calling, and data show that the number of collect calls is small and has been declining relative to prepaid or debit calls. In 2014, collect call minutes represented 4.9% of all paid call minutes. In 2018, the share of collect calls in all paid call minutes had fallen to 2.2%. These findings are based on staff analysis of the data received in the Second Mandatory Data Collection. The Commission seeks comment on current trends for collect calling, and on its proposal to adopt a single rate cap for prepaid/debit and collect calls made from the same facilities and on the overall data upon which the Commission bases its proposal. Are there cost differences between collect and prepaid/debit calls that providers failed to identify in response to its data collection? If so, commenters should submit additional data on this point into the record. The Commission also seeks comment on whether attempting to distinguish between the costs of providing prepaid/debit calls and collect calls is necessary (or administratively efficient) given that collect calls appear to be a disappearing service.

33. The Commission do notes one apparent difference between collect and prepaid/debit calls: Specifically, collect calls are more likely to be initiated through the use of a live operator. The Commission tentatively does not believe, however, that this difference merits different rates because inmate calling service providers are already permitted to charge a separate fee if an incarcerated individual makes use of a live operator to place an interstate collect call. This additional ancillary service charge is on top of the per-minute rate for the interstate collect call. Are there nevertheless reasons to maintain different interstate rate caps for collect versus prepaid/debit calling? If so, commenters should explain these reasons in detail.

34. Different Caps for Prisons and Jails. The Commission proposes to distinguish between two distinct facility types, proposing a rate cap for jails that is \$0.02 per minute higher than the rate cap the Commission proposes for prisons. This \$0.02 per-minute differential reflects the Commission's analysis of the cost data, which shows greater variations from mean costs for jails than prisons (and therefore a greater standard deviation from the mean for jail than prisons). This two-tier rate structure departs from the four-tier rate structure the Commission adopted in the *2015 ICS Order*, which

established a rate cap for prisons as well as three different rate caps for jails, based on the jails' average daily populations. As discussed in greater detail in an Appendix, staff analysis of the data submitted by the providers indicates that the average daily population for jails does not meaningfully influence per-minute costs. The analysis similarly indicates that per-minute costs are not materially influenced by other characteristics of the facilities being examined. The Commission seeks comment on this analysis.

35. The Commission seeks comment on its proposal to adopt a single rate cap for prisons and a single rate cap for jails. Are there differences in the costs of serving different types of prisons or jails that are not apparent from the data submitted in response to the Second Mandatory Data Collection? If so, commenters should provide additional analysis or data establishing those differences and explain how the Commission should take them into account in setting interstate rate caps for different types of facilities.

36. Cost Recovery at the Contract Level. The Second Mandatory Data Collection responses make clear that inmate calling services providers seek to recover their costs at the contract, rather than facility, level. The providers therefore do not typically keep, and have not submitted, data that would capture cost differences among facilities of differing sizes under the same contract. In these circumstances, the Commission proposes to set interstate rate caps based on its analysis of costs at the contract level. The Commission invites comment on this approach.

37. Effective Date for New Interstate Rate Caps. The Commission proposes that its new rate caps take effect 90 days after notice of them is published in the Federal Register. This is the same transition timeframe that the Commission adopted when providers first became subject to the current interim caps, and the record in this proceeding indicates that implementation occurred without difficulty. The Commission seeks comment on this view and on its proposal. Any commenter favoring a shorter or longer transition period should provide a detailed explanation of precisely what steps providers and correctional facilities must take before they can implement new rate caps for interstate inmate calling services and how much time they anticipate it will take to accomplish each of those steps.

1. Methodology

38. Calculating Mean Contract Costs per Paid Minute. The Commission's rate cap

methodology begins with the calculation of mean contract costs per paid minute in the provision of inmate calling services. This calculation is based on data for the most recent year (2018) submitted in providers' Second Mandatory Data Collection responses, as supplemented and clarified in the record via follow-up discussions with each provider. While the Second Mandatory Data Collection collected data for 2014 to 2018, the Commission relies on data from 2018 because it is likely to be most representative of the current situation. Although the Commission requested data for each facility a provider serves, including information such as the average daily inmate population, the number of calls annually, the number of annual call minutes, and the cost of serving that facility, in many instances providers reported data only at the contract level. The cost data include both (1) costs that may be directly attributed to the provider's inmate calling services operations and, in many instances, to a given inmate calling services contract; and (2) costs, such as general corporate overheads, that cannot be directly attributed to a particular facility or even, in some cases, a particular line of business.

39. The collected data are subject to certain limitations based on differences in recordkeeping practices among the respondent providers. For example, many providers assess their inmate calling services operations on a contract-by-contract basis, although many contracts include multiple correctional facilities. Based on staff analysis of the data, CenturyLink treated the Wisconsin DOC contract similarly, and GTL treated many, and perhaps all, of its multifacility contracts similarly. These providers therefore reported information—and the Commission analyzed that information—on a contract, rather than a facility, basis. The Commission seeks comment on this approach, in the absence of information provided about the costs incurred on a facility-by-facility basis.

40. The Second Mandatory Data Collection sought information about costs in several steps. A filer must first identify which of its and its corporate affiliates' total costs are directly attributable to inmate calling services and which are directly attributable to other operations. The filer must then allocate the remainder of the inmate calling services provider's and its affiliates' total costs (i.e., the costs identified as indirect costs or overhead) between inmate calling services and the affiliate groups' other operations. The filer may then choose to allocate some or all of these costs to its particular inmate calling services contracts or even to a given facility. The Commission notes that some providers interpreted

different steps in different ways. The Commission seeks comment on each aspect of the submitted data and invite parties to submit their own analyses consistent with the terms of the *Protective Order* in this proceeding. Are there other issues regarding the data that the Commission should consider? Are there other types of data the Commission could seek to more fully capture industry costs beyond the detailed and comprehensive data the Commission has already collected and which providers claim reflects the level of granular cost data they keep? The Commission invites parties to submit alternative proposals for us to consider in further evaluating the Second Mandatory Data Collection responses. To the extent that commenters believe the Commission should collect additional data, the Commission seeks comment on the likelihood that inmate calling services providers would be able to provide the requested data, and, if so, at what cost and in what timeframe.

41. The Second Mandatory Data Collection did not require providers to allocate costs that are not directly associated with a specific contract among their different contracts. The Commission therefore needs to perform such an allocation. The Commission proposes to use the reported minutes of use associated with each contract to perform that allocation. The Commission seeks comment on this allocation method, including whether reported minutes of use provides a reasonable allocator. Would a different allocator better capture how costs are caused, and if so, why? Are there systematic differences in costs or systematic differences in the way costs are calculated that the Commission should consider in its analysis?

42. In developing its Second Mandatory Data Collection response, one provider, GTL, allocated indirect costs between its inmate calling services operations and its other operations based on the percentages of total company revenue each operation generated. GTL and certain other providers also used relative revenues to allocate their indirect costs among contracts. The Commission has long disclaimed this allocation methodology because it fails to provide a reliable method for determining the costs of providing inmate calling services given that “revenues measure only the ability of an activity to bear costs, and not the amount of resources used by the activity.” One way of viewing the problem of using revenues as a cost allocation key is to consider two identical services that have different prices. A revenue cost allocation key would allocate costs to the two services differently even though, by definition,

they have the exact same costs. Consider allocating costs between the interstate and intrastate jurisdiction based on revenues. The record shows no reason to think that intrastate costs should be any higher than interstate costs. However, because intrastate calls have higher prices and earn higher revenues per minute, such a mechanism would imply intrastate costs are significantly higher than interstate costs. A related problem is that using revenues to allocate costs is somewhat circular—because the whole point of allocating costs is to help determine what revenues need to be to cover those costs. Thus, a revenue-based allocator tends to “lock in” the historical pricing decisions of providers rather than drive rates toward actual costs. The Commission instead considered several other means of allocating costs: call minutes, call numbers, contracts, and facilities, and determined call minutes to be the most reasonable. The Commission invites comment on these observations and this allocator, and ask parties to suggest alternative ways to more appropriately allocate costs for rate-making purposes that would provide more reliable results.

43. Calculating Interstate Rate Caps for Prisons and Jails. The Commission next calculates proposed interstate rate caps for both prisons and jails. Those proposed caps equal the mean contract costs per minute for all reporting providers, plus one standard deviation, plus an additional \$0.02 for correctional facility costs. Its calculations use total industry costs, both interstate and intrastate, because the available data do not suggest that there are any differences between the costs of providing interstate and intrastate inmate calling services. Nor do such data suggest a method for separating reported costs between the intrastate and interstate jurisdictions that might capture such differences, if any. Finally, providers do not assert any such differences. The Commission seeks comment on these views.

44. The Commission’s analysis of the cost data shows greater variations from mean costs for jails than for prisons, and its proposed rate caps reflect these standard deviations. The Commission examined whether various characteristics, such as location or size, would reveal additional, meaningful differences in costs that would justify separate rate caps for different groups of contracts. The Commission found the main predictors of both costs per minute and high-cost contracts were the provider’s identity and the state where the facilities subject to a particular contract are located. The Commission also found that facility type (whether the contracts covered prisons or jails) was a less strong

predictor of costs per minute and high-cost contracts. By contrast, other variables such as facility size (measured by average daily population) and rurality, or combinations of such variables provided negligible predictive value. The Commission seeks comment on this analysis and on whether the Commission nevertheless should set interstate rate caps on a more granular basis. The Commission invites parties to suggest alternative approaches. Any commenter proposing an alternative approach should submit an explanation of how the data support such an approach, as well as a discussion of the administrative feasibility of the proposed alternative.

45. The Commission believes its proposed rate caps will permit cost recovery for interstate inmate calling services and the Commission seeks comment on this view. The Commission specifically invites comment on whether its proposed interstate rate caps would allow providers to recover their costs of providing interstate inmate calling services, including their direct costs of providing interstate inmate calling services under each of their contracts and correctional facility costs directly related to the provision of inmate calling services, while making reasonable contributions to providers' indirect costs that are associated with inmate calling services.

46. The Commission's calculations show a limited number of contracts where providers' reported costs plus its allocation of overhead exceed the revenues that the proposed interstate rate caps would generate: specifically, in only two out of 131 prison contracts, and 114 out of 2,804 jail contracts. The Commission notes that the inmate calling services providers' reported costs exclude site commission payments, although they do report information on site commission payments. The Commission has determined previously that some portion of these site commission payments do reflect legitimate costs that correctional facilities incur that are reasonably related to the provision of inmate calling services. Based on its analysis, the Commission's proposed rate caps include a \$0.02 per minute allowance for these correctional facility costs. If revenues that are currently generated from certain ancillary services, such as automated payment fees and paper billing and statement fees, are included, only 42 jail contracts fail to recover costs under the Commission's allocation of overheads. Over half of these 42 jail contracts belong to a single provider, but account for a small portion of that provider's broad contract portfolio. Based on staff analysis of these 42 jail contracts, approximately [REDACTED]. In addition, the

Commission does not include revenues earned from live operator fees because those data were not collected, even though the costs of live operators were collected and are included in its analysis. The Commission seeks comment on this approach and on whether the Commission should exclude both the costs of, and revenues from, live operator interactions from its analysis.

47. In *GTL v. FCC*, the Court found the Commission's reliance on industry average costs unreasonable because even if any cost component of site commissions were disregarded, the proposed caps were "below average costs documented by numerous ICS providers and would deny cost recovery for a substantial percentage of all inmate calls." Unlike that result, however, the Commission proposes a methodology that begins with an industry mean cost, increases that mean by a standard deviation, and then adds an additional amount—\$0.02 per minute—to account for correctional facility costs. The revenues from the proposed rate caps would enable the vast majority of providers to recover at least their reported costs, leaving only 1.5% (or 42/2,804) of all jail contracts with reported average costs above what the proposed interstate rate caps would recover (and the Commission seeks comment below on potentially waiving its caps in these extraordinary cases).

48. As discussed in an Appendix, the Commission assigned costs to contracts based on relative minutes of use. For robustness, the Commission also takes the data at face value and analyzes its proposed caps against those data. In that scenario, only one prison contract and 32 jail contracts would fail to recover reported direct costs based on the Commission's analysis. And only one prison contract or 0.8% (1/131) of prison contracts and 21 or 0.7% (21/2,804) of jail contracts would fail to recover their reported direct costs after accounting for certain ancillary service fees. The Commission seeks comment on this analysis. The Commission also asks whether it would be appropriate to set rates based on the costs of the vast majority of providers (for example, all but the one or two providers with the highest average costs per minute), in order to incent providers with above average costs to be more efficient. While the court in *GTL* rejected an efficiency argument advanced by the Commission, its concern in that case was that the "average rates" relied on cost data from firms representing only a small fraction of the industry and were not sufficiently supported by the record. The approach the Commission proposes here, however, is based on the costs of a majority of providers and is consistent with the record.

49. The presence of a number of prisons and jails with rates below the proposed interstate rate caps is further evidence that leads the Commission to conclude that its proposed caps will broadly allow cost recovery. The Commission has identified nearly 800 prisons in 35 states that have set their interstate debit, prepaid, and collect inmate calling service rates at levels below its proposed cap of \$0.14. These include prisons in locations as diverse as Alabama, California, New Jersey, New Mexico, West Virginia, and Wyoming. Similarly, nearly 200 jails in 35 states set all of their interstate debit, prepaid, and collect inmate calling service rates at levels below the Commission's proposed caps. Confirming the Commission's analysis of the cost data, facility size also does not seem to matter in these cases. The Commission seeks comment on whether these data suggest that its proposed interstate rate caps should be lowered even further notwithstanding the fact that its proposed rates reflect what the providers have most recently reported as their inmate calling services costs. Is this evidence that some providers have indeed reported costs in excess of their actual costs?

50. The Commission notes that its rate cap calculations do not account for revenues earned from certain ancillary services, even though the costs of these services, which were not independently collected, are included in reported inmate calling services costs. The Commission invites comment on whether the Commission should adjust the proposed interstate rate caps to address ancillary services. For example, should the Commission exclude the costs from these services from its calculations? The Commission notes that while revenues from such services are small or do not exist for many contracts, in other cases, they are significant. For example, the contract mean of automated payment and paper bill/statement revenues per paid minute of use is approximately \$0.05. This is calculated by taking the mean of the quotient of revenues from automated payment and paper bill and statement fees and paid minutes of use for each contract. The Commission seeks comment on how the Commission should take these revenue sources into account in setting interstate rate caps. Should the Commission reduce its proposed interstate caps by \$0.05 across the board or would this distort providers' pricing decisions, especially in the case of contracts where automated payment and paper bill/statement fees are small or zero? Should the Commission instead impose an interstate revenue cap and let providers decide how to raise those revenues? Or would that type of discretion lead to rates that are hard to police in practice?

What alternative mechanisms could be applied to ensure that a provider's total revenue from interstate inmate calling services and related ancillary services allows the provider an opportunity to recover its costs of providing those services without subjecting incarcerated people and those they call to unreasonably high interstate rates?

51. The Commission also asks whether there is any other source of revenue from inmate calling services that the Commission should consider in its analysis. For example, in the *2015 ICS Further Notice*, the Commission expressed concern regarding alleged revenue sharing arrangements between inmate calling services providers and financial companies. Some commenters argue that certain inmate calling services providers have entered into revenue-sharing arrangements with third-party processing companies such as Western Union and MoneyGram where a third-party processing company shares its revenues generated from processing transactions for an inmate calling services provider's customers. In contrast to typical third-party processing companies such as Western Union and MoneyGram, Pay Tel argues that affiliates of an inmate calling services provider should not be treated as third parties in applying the Commission rules as the affiliated processing company's revenues will end up in the same bucket as the affiliated inmate calling services provider's revenues. Commenters further argue that the shared revenue is an additional source of profits for these inmate calling services providers. One commenter suggests that certain providers have effectively created a third-party entity with whom those providers share revenue that is passed through to consumers in the form of a third-party fee for single-call services. Marking up third-party fees, whether directly or indirectly, is prohibited under the Commission's rules. The Commission seeks any evidence that providers are using kickbacks or other means to indirectly mark up such fees. What is the best way for us to detect these types of practices? Should we, for example, require providers to include in their Annual Reports detailed information on all sources of revenue in connection with their inmate calling services operations and, if so, what specific additional data should the Commission require providers to submit? The Commission also invites comment on how the Commission should account for any revenue that providers receive from such arrangements in its rate cap calculations. For example, should the Commission reduce the amount that a provider may recover through per-minute rates and ancillary fees by the amount it receives from sharing

arrangements with third parties? The Commission seeks comment on any additional modifications to the language in its current ancillary services rules that may be necessary to clarify what providers are permitted and not permitted to do with respect to ancillary services charges.

2. Necessary Adjustments to Data

52. The interstate rate caps the Commission proposes reflect certain adjustments to some provider data to correct for anomalies that would improperly skew its results and lead to unreasonably high interstate rate caps vis-à-vis rate caps that approximate the true costs of providing inmate calling service. The Commission seeks comment on these adjustments. Specifically, to calculate the return component of its costs, GTL uses what it refers to as the “invested capital of GTL.” That value equals the amount GTL’s current owners paid in 2011 to purchase the company from its prior owners plus the amounts GTL paid for subsequent acquisitions. In December 2011, American Securities purchased GTL from Goldman Sachs Capital Partners and Veritas Capital Fund Management LLC for \$1 billion, including a \$50 million contingencies bonus. That purchase price significantly exceeded the \$345 million that Goldman Sachs and Veritas had paid to purchase GTL in February 2011. Those amounts as a matter of basic financial theory reflect GTL’s estimate of the future profit streams the company would generate as an ongoing concern in the provision of inmate calling services and the other services GTL provides incarcerated people. Consequently, these prices include any expected market rents embodied in those profit streams. “Market rents” refers to the stream of profits that a company expects to earn that it would not otherwise earn if faced with effective competitive market constraints. Use of GTL’s invested capital as a basis for a regulated cost-based rate is inconsistent with the well-established principle that the purchase prices of companies that possess market power “are not a reliable or reasonable basis for ratemaking.”

53. The Commission proposes to reduce the costs reported by GTL by 10% in order to reduce or eliminate the distortion caused by the Commission’s estimate of the market rents reflected in GTL’s reported costs and to use those reduced costs in calculating its interstate rate caps for inmate calling services. The Commission adjusts its proposed interstate rate caps to reflect its reasoned estimate of the market rents captured in GTL’s reported costs. As explained more fully in an Appendix, the

Commission estimates those market rents by analyzing GTL's goodwill, as reported on its balance sheet. GTL's goodwill reflects the unamortized portion of excess purchase price and, presumably, market rents. This excess purchase price includes the value remaining after accounting for fair market values for tangible and intangible assets (excluding goodwill) and liabilities at the time of acquisition. The Commission computes the share of GTL's net assets that its goodwill represents, and then further reduce this computed share to represent only the portion that corresponds with capital costs. The Commission invites comment on this approach. Do commenters believe it overstates, or understates, the market rents included in GTL's cost calculations? Would another adjustment method yield more accurate results? Would it be better to refrain from any adjustment to account for this apparent overstatement of GTL's costs? If so, why?

54. The Commission recognizes that additional measures may be needed to eliminate what appear to be other significant overstatements in the inmate calling services costs reported by GTL. Indeed, the Commission's analysis of the cost data from all providers makes clear that GTL's reported costs are likely significantly overstated—both vis-à-vis other providers and in absolute terms. First, the Commission's analysis shows that GTL's reported costs are substantially greater than the industry average, an anomalous result given that the Commission would expect GTL—as the largest provider in the inmate calling services market—to benefit from economies of scale and scope. The Commission notes that ICSolutions and CenturyLink have just filed section 214 transfer of control applications with the Commission whereby ICSolutions would acquire control of all of CenturyLink's inmate calling services business, except for the Texas Department of Corrections contract which CenturyLink subcontracts with Securus. GTL's reported share of the total costs reported by all providers of inmate calling services is roughly 1.5 times greater than its reported share of the industry's minutes of use. Indeed, GTL's per paid minute contract costs are higher than those of all but two of the other providers. This data is difficult to reconcile with GTL's scale and scope, and apparent efficiency, which suggest that GTL's per-minute costs should be lower than other provider's costs. Scale economies arise when certain upfront costs, such as inmate calling services platform costs, can be shared over increasing volumes of service. Consistent with this, GTL, in its 2018 Description and Justification, reports [REDACTED]% of

its assets to be intellectual property. The costs of developing and maintaining such assets are generally not related to extension of supply of call minutes, and so as call minutes increase, the per minute share of these costs decline. Economies of scope arise when certain upfront costs, such as a payment platform, can be shared over increasing numbers of services, such as inmate calling services, commissary services, and tablet access and Internet access. This again applies to GTL. While GTL may not face full competitive pressure when it bids to supply inmate calling services, it is the largest provider in the industry. This suggests it is a reasonably effective competitor, which in turn suggests it is not a high cost provider, and therefore, its reported costs are likely significantly overstated. Second, even after a 10% reduction, GTL is still an outlier among the larger providers, having a materially higher share of reported costs than minutes and with reported costs still substantially above the industry average. While the reduction lowers GTL's average costs from [REDACTED] per minute, GTL's average costs remain [REDACTED] above the industry average per minute cost. Upon reducing GTL's costs by the proposed percentage, the industry average per minute cost falls from \$0.089 to \$0.084. Third, the highest per minute rates charged on many, including some large GTL contracts, are materially less than the Commission's estimate of the contract's per paid minute costs.

55. While some of this imbalance stems from GTL's inflated asset valuations, other aspects of GTL's Second Mandatory Data Collection response suggest that the company's costing methodology systematically overstated its inmate calling services costs. For example, the Second Mandatory Data Collection required all providers to identify their direct costs (i.e., those costs that are completely attributable to a specific service, such as inmate calling services). GTL ignored this instruction and instead identified as direct inmate calling services costs only those costs "that could be directly attributable to a particular correctional facility contract." This failure to comply with the instructions resulted in GTL incorrectly reporting as indirect inmate calling services costs its "expenses for originating, switching, transporting, and terminating ICS calls" and "costs associated with security features relating to the provision of ICS," among other costs that appear to be completely attributable to and thus properly identifiable as direct costs of inmate calling services. The net result of this failure is that GTL's only reported direct inmate calling services cost is its "bad debt expense."

56. Viewed in isolation, GTL's noncompliance with the instructions could have merely shifted its inmate calling services costs from one contract to another, a result that would have no impact on GTL's total reported costs for inmate calling services. GTL's Second Mandatory Data Collection response, however, leaves open the possibility that the company also failed to properly identify the direct costs of its non-inmate calling services operations. In that case, then GTL's method of identifying its indirect inmate calling services cost—"multiplying its total indirect costs by a percentage received from ICS divided by its total revenue"—almost certainly overstated its inmate calling services costs. Indeed, allocating total company costs based on revenue is particularly inappropriate for a company, like GTL, that is not only expanding beyond a core business—inmate calling services—by investing in other lines of business, but that also reaps revenues from egregiously high intrastate rates that serve to increase the amount of indirect costs allocated to inmate calling services reported under this methodology.

57. In light of the impact that overstatements of this magnitude by one of the market's largest providers may have on its analysis, the Bureau has directed GTL to provide additional information regarding its operations, costs, revenues, and cost allocation procedures. The information GTL files in response to this directive will be available to commenters, subject to the *Protective Order* in this proceeding. How should the Commission properly value GTL's assets in a manner that excludes all market rents? How should the Commission properly identify the direct costs of GTLs' inmate calling services and other operations? How should the Commission allocate GTL's indirect costs using methods that reflect how those costs are incurred? The Commission asks parties to address all aspects of GTL's responsive submission that may affect its ability to meaningfully evaluate GTL's cost data and methodology. The Commission also asks how the Commission should use the information in that submission in setting interstate rate caps for inmate calling services.

58. It also appears that other providers, notably Securus, may have also overstated their inmate calling services costs, although likely not to the same degree as GTL. The Commission invites each provider to reexamine its costing methodology in light of this *Further Notice* and to address in detail in its comments whether that methodology properly identifies and allocates its inmate calling services costs. Providers should also update their Second Mandatory Data Collection responses to correct any

discrepancies. To the extent that providers do not do so, should the Commission discount their reported costs and, if so, to what extent? Or should the Commission instead require them to provide additional information regarding their operations, costs, revenues, and cost allocation procedures so that the Commission can meaningfully evaluate their cost data and methodologies?

3. Accounting for Correctional Facilities Costs

59. The Commission's proposed interstate rate caps of \$0.14 per minute for prisons and \$0.16 per minute for jails include \$0.02 per minute to account for the costs correctional facilities incur that are directly related to the provision of inmate calling services and that represent a legitimate cost for which providers of inmate calling services may have to compensate facilities. This \$0.02 per-minute allowance reflects its analysis of data submitted in response to the Second Mandatory Data Collection. The Second Mandatory Data Collection indicates that payments in excess of \$0.02 per minute would exceed the costs correctional facilities incur in the provision of inmate calling services. Nevertheless, the Commission recognizes that for contracts covering only smaller jails, the facility costs at these particular facilities may exceed \$0.02 per minute. The Commission therefore considers adopting higher allowances for correctional facility costs for such contracts if the record in response to this *Further Notice* supports such allowances. The Commission invites comment on these proposals.

60. Background. Site commissions are payments that inmate calling services providers make to correctional facilities. They have two components. They compensate correctional facilities for the costs they reasonably incur in the provision of inmate calling services, and they compensate those facilities for the transfer of their market power over inmate calling services to the inmate calling services provider. That market power is created by incarcerated people's inability to choose an inmate calling services provider other than the provider the correctional facility selects, effectively creating a monopoly for inmate calling services within a prison or jail. This dynamic produces site commission payments that exceed correctional facilities' costs. The responses to the Second Mandatory Data Collection show that inmate calling services providers paid [REDACTED] in site commissions which amounts to [REDACTED] of total inmate calling services-related revenues in 2018. The record in previous proceedings and the First Mandatory Data Collection also showed high site commission payments. In the

2013 ICS Order, the record showed that site commission payments are often based on a percentage of revenues, which could range from 20% to 88%. Data from the First Mandatory Data Collection showed that site commissions for at least one contract had reached as much as 96% of gross revenues.

61. Allowing inmate calling services providers to treat all their site commission payments as “costs” would almost inevitably result in unjust and unreasonably high rates for incarcerated individuals and their loved ones to stay connected. Prior to 2016, the Commission viewed these payments solely as an apportionment of profits between providers and facility owners even though it recognized some portion of them may be attributable to legitimate facility costs. In the *2016 ICS Reconsideration Order*, however, the Commission recognized that “some facilities likely incur costs that are directly related to the provision of ICS,” and determined that “it is reasonable for those facilities to expect ICS providers to compensate them for those costs . . . [as] a legitimate cost of ICS that should be accounted for in [the] rate cap calculations.” The Commission therefore increased the rate caps it had adopted in 2015 to allow for the recovery of the facilities’ legitimate costs. Because the qualitative record before it indicated that those per-minute costs increased as facilities’ inmate populations decreased, the Commission varied its allowance for site commission payments based on correctional facilities’ average daily populations. The rate caps for prepaid/debit inmate calling services calls were increased 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.” The Commission also increased the rate caps for collect calls by a commensurate amount. The Commission based these adjustment factors on comments and information provided in the record at that time but did not base its adjustments on an analysis of provider-submitted data as the Commission does herein.

62. In 2017, the D.C. Circuit held that the “wholesale exclusion of site commission payments from the FCC’s cost calculus” in the *2015 ICS Order* was “devoid of reasoned decision-making and thus arbitrary and capricious.” The court therefore vacated the Commission’s decision to exclude site commission payments from its cost calculus and remanded the matter to the Commission for further consideration.

63. Allowance for Reasonable Correctional Facility Costs. Consistent with the D.C. Circuit’s

opinion in *GTL v. FCC*,²⁵⁰ the Commission proposes to include an allowance for site commission payments in the interstate rate caps to the extent those payments represent legitimate correctional facility costs that are directly related to the provision of inmate calling services. The \$0.02 per minute that the Commission proposes reflects its analysis of the costs correctional facilities incur that are directly related to providing inmate calling services and that the facilities recover from inmate calling services providers as reflected by comparing provider cost data for facilities with and without site commission requirements. This analysis treats any costs associated with site commission payments as correctional facility costs, and not inmate calling services provider costs. The Commission requests comment on this analysis, which is discussed in more detail in an Appendix. Does it properly capture the costs that providers should reasonably be expected to pay correctional facilities to cover the costs those facilities reasonably incur in connection with interstate inmate calling services? If not, how should the Commission adjust its analysis? Should we, for example, vary the allowance for reasonable correctional facility costs based on a facility's average daily population, annual minutes of use, or other measure of expected calling volume? The Commission asks correctional facilities to provide detailed information concerning the specific costs they incur in connection with the provision of interstate inmate calling services, to the extent those costs are not already reflected in providers' costs, and why those costs should be considered directly related to the provision of inmate calling services. The Commission also seeks alternative analyses that explain whether a \$0.02 per-minute allowance would properly cover those correctional facility costs that are legitimately related to inmate calling services. The Commission similarly seeks comment on whether the Commission should reduce the allowance for prisons to \$0.01 based on the analysis reflecting the differential of providers' costs with and without a site commission obligation for prison facilities.

64. The Commission also invites comment on whether a \$0.02 per minute allowance would be adequate to cover the costs that smaller jails incur in connection with the provision of interstate inmate calling services. The Commission asks that parties seeking a higher allowance in this situation document in detail the specific costs smaller jails reasonably incur in the provision of interstate inmate calling services. The Commission also seeks comment on whether there is any other category of contracts or correctional facilities for which a \$0.02 per-minute allowance may be inadequate.

65. In *GTL v. FCC*, the D.C. Circuit directed that the Commission address on remand the issue of whether “the exclusion of site commissions . . . violates the Takings Clause of the Constitution because it forces providers to provide services below cost.” The Commission does not believe that there are any potential taking concerns arising from its rate cap proposals. The Commission has not received any post-remand comments addressing the takings issue with respect to adopting permanent interstate rate caps. The Commission did, however, receive a single comment from an inmate calling services provider in response to the Worth Rises Request that inmate calling services providers offer “unlimited free service” during COVID-19 in the event ICS providers did not sign the Chairman’s Keep America Connected Pledge. The “takings” reference in that response, however, pertained to a request that providers offer service with no compensation, unlike the actions proposed herein where the Commission proposes just and reasonable rate caps that include recovery for facility provider costs, based on providers’ reported costs. Inmate calling services providers’ payment of site commissions is consistent with agreements between other types of payphone providers and property owners. Because “many of the payphone locations are controlled by owners that can limit the entry of competing payphones,” the property owners “attempt to limit entry to increase the profitability of payphones and then demand at least a share of the profits in the form of a location rent.” The Commission has acknowledged that, as a result of the dynamic between payphone operators and property owners, the Commission would “not expect to see money-losing payphones[.]” Because site commissions are part of voluntary, negotiated agreements between inmate calling services providers and the correctional facilities they serve, the Commission similarly does not expect inmate calling services providers to be forced to provide services at a loss, provided that the rate caps allow them to recover their actual costs plus a reasonable opportunity for profit. Here, the Commission’s proposed rate caps include an allowance of \$0.02 per minute, as indicated above, to account for correctional facility costs included in reasonable site commissions; thus they reflect the actual costs of providing service as reported by providers in the record, plus a reasonable opportunity for profit. Because the Commission’s proposed rate caps allow the correctional facility and the inmate calling services provider to recover all of their costs that are reasonably related to the provision of inmate calling services plus a reasonable opportunity for profit, there is no concern that the proposed rate caps

violate the Takings Clause. The Commission seeks comment on these views.

66. The Public Interest Advocates assert that, in *GTL v. FCC*, the D.C. Circuit “did not consider several important factors in the FCC’s decision-making, including decades of consistent competition policy excluding locational monopoly payments from rates . . . and repeated FCC decisions to preempt state and local rules or contract provisions that the FCC finds are anti-competitive” To ensure a complete record, the Commission seeks comment on this view. Notwithstanding the Commission’s decision in 2016 recognizing that some portion of site commissions reflect legitimate facility costs related to the provision of inmate calling services, the Commission seeks comment on whether including an allowance for correctional facility costs in its rate caps will have adverse competitive effects that the Commission should consider. If so, what are those effects?

67. The Commission seeks comment on what types of correctional facility costs should properly be recovered through the rates that consumers pay for inmate calling services. Commenters are encouraged to provide detailed responses, describing with specificity which types of correctional facility costs they contend should, or should not be, recovered through those rates. The Commission asks, in particular, whether correctional facilities’ security and surveillance costs in connection with inmate calling services should be recovered through inmate calling services rates. As the Public Interest Advocates point out, correctional facilities do not pass on the costs of other types of security measures, such as scrutinizing mail, to incarcerated people or their families. Given this, to what extent, if at all, should security and surveillance costs be recovered through inmate calling services rates, particularly in light of the D.C. Circuit’s decision in *GTL v. FCC*?

4. Waiver Process for Outliers

68. The Commission proposes to adopt a waiver process that permits inmate calling services providers to seek waivers on a facility-by-facility or contract basis if the rate caps adopted by the Commission pursuant to this *Further Notice* would prevent the provider from recovering the costs of providing interstate inmate calling services at that facility or at the facilities covered by that contract. The Commission seeks comment on this proposal. Since first adopting interstate rate caps in the *2013 ICS Order*, the Commission has permitted an inmate calling services provider to file a petition for waiver if it

believed it could not recover its costs under the Commission-adopted rate caps. The Commission has required that, for “substantive and administrative reasons, waiver petitions would be evaluated at the holding company level.” The Commission proposes to revise the waiver process so that it must be evaluated at a facility or contract level. The Commission seeks further comment on administering the waiver process to address cost recovery on a facility or contract basis. In particular, are there ways to decrease the administrative burdens of processing such requests on a facility or contract basis?

69. The Commission proposes that a provider seeking a waiver of its interstate rate caps must demonstrate, through the submission of reliable, accurate, and transparent cost, demand, and revenue data, including data on any ancillary services it provides, that it will be unable to recover its costs for each facility or contract for which a waiver is sought. At a minimum, the Commission proposes that a provider seeking such a waiver be required to submit, among other information: (a) the providers’ total company costs, including the original costs of the assets it uses to provide inmate calling services at the facility or under the contract; (b) the provider’s methods for identifying its direct costs and for allocating its indirect costs among its various operations, contracts, and facilities; (c) the revenue the provider receives from interstate inmate calling services, including the portion of any permissible ancillary services fees attributable to interstate inmate calling services at the contract and facility level; (d) an unredacted copy of the contract with the correctional facilities and any amendments to such contract; and (e) a copy of the initial request for proposals and bid response. The Commission seeks comment on these proposed requirements. Is there additional information available on a contract or facility level that the Commission should require providers to submit besides the information, documents, and data the Commission has proposed?

70. The Commission also proposes to require that the provider explain why circumstances associated with that facility or contract differ from other similar facilities it serves, and from other facilities within the same contract, if applicable. Finally, the Commission proposes to require a company officer with knowledge of the underlying information to attest to the accuracy of all of the information the provider submits in support of its waiver request. The Commission seeks comment on these proposals.

71. Consistent with its past waiver process for inmate calling services, the Commission

proposes to direct the Bureau to rule on such petitions for waiver, and to seek any additional information as needed. The Commission also proposes to direct the Bureau to endeavor to complete its review of any such petitions within 90 days of the provider's submission of all information necessary to justify such a waiver, although the Bureau may extend this timeframe for good cause. The Commission proposes that, if a provider carries its burden of demonstrating that its rate caps are insufficient to cover the costs it incurs to serve a particular facility, the Bureau would waive the otherwise applicable rate cap and allow the provider to charge a rate sufficient to allow the provider an opportunity to recover its costs of providing interstate inmate calling services at that facility. The Commission seeks comment on this proposed approach and on the proposed remedies. The Commission also seeks comment on whether there are alternative procedures that would more efficiently facilitate the effective operation of the waiver process.

5. Consistency with Section 276 of the Act

72. Section 276(b)(1)(A) of the Act requires that the Commission “ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call.” In this *Further Notice*, the Commission proposes to adopt rules that satisfy this statutory mandate by setting rate caps for interstate calls that generate sufficient revenue for such calls (including any ancillary fees attributable to those calls) that (1) allow the provider to recover from those calls the direct costs of that call and (2) reasonably contribute to the provider's indirect costs related to inmate calling services. This approach would recognize that inmate calling services contracts typically apply to multiple facilities and that inmate calling services providers do not expect each call to make the same contribution toward indirect costs. The Commission invites comment on this proposal.

73. In the *2015 ICS Order*, the Commission set tiered rate caps, applicable to both interstate and intrastate inmate calling services using industry-wide average costs derived from inmate calling services providers' responses to the First Mandatory Data Collection. In *GTL v. FCC*, the D.C. Circuit rejected as “patently unreasonable” the Commission's “averaging calculus” in setting the 2015 rate caps. The court explained that the Commission erred in setting rate caps using industry average costs, because calls with above-average costs would be “unprofitable,” in contravention of the “mandate of § 276 that ‘each and every’ inter- and intrastate call be fairly compensated.”

74. The Commission finds that its proposed rules are consistent with *GTL v. FCC* in this regard. Though the D.C. Circuit found that the Commission's averaging calculus did not comport with the fair compensation mandate under section 276, this finding does not mean that each and every completed call must make the same contribution to a provider's indirect costs. Instead, compensation is fair if each call "recovers at least its incremental costs, and no one service recovers more than its stand-alone cost." The Commission's proposed rate methodology, as detailed in an Appendix, is consistent with this approach. As the Commission recognized in the *2002 ICS Order*, the "lion's share of payphone costs are those that are 'shared' or 'common' to all services," and there are "no logical or economic rules that assign these common costs to 'each and every call.'" As a result "a wide range of compensation amounts may be considered 'fair.'" The Commission seeks comment on this view. Is compensation "fair" if inmate calling services providers can recover their direct costs for a given call and receive a reasonable contribution to their indirect costs? Why or why not? Can inmate calling services providers assign indirect or common costs for each and every call? If so, how? Commenters arguing that indirect costs can be assigned to each call must provide data regarding how that assignment can be done and a justification for why a given allocation is reasonable.

75. The Commission has estimated that more than 99% of existing contracts for both prisons and jails would recover their reported costs at its proposed rates, even accepting all the providers' costs submissions at face value with no adjustments. To the extent that the Commission's proposed rates would make it impossible in the unusual case where a contract was not able to recover its costs, providers may avail themselves of the Commission's waiver process. Moreover, the record in this proceeding strongly suggests that inmate calling services providers do not, in fact, expect that each call or even facility will make a contribution to their indirect costs. This is evidenced most acutely by the fact that providers largely fail to even record their costs on anything less than a contract basis, often where multiple facilities exist under one contract. For example, CenturyLink reports its inmate calling services cost data "by correctional system," explaining that "each facility within that correction[al] system reflects the costs developed for serving that contract." This evidence suggests that CenturyLink bids for contracts covering multiple facilities within a single correctional system, offering service at a single rate for all of those

facilities, even though they may have different costs. Thus, the company does not expect to make the same profit from each facility or expect each call to contribute equally to CenturyLink's indirect costs. Similarly, Securus explains that its "accounting systems track costs as a company, and not on a customer or facility level" but that "facility-specific costs are taken from a separate data base used to track profits and losses for each site." And the assertion that Securus tracks costs "as a company" rather than on a customer or facility level strongly suggests that Securus, like other providers, bids for contracts, rather than specific facilities, with the idea that the company will profit from the contract as a whole but will not make the same amount from each facility or each call. It also appears that inmate calling services providers bid on contracts covering multiple facilities and offer a single interstate rate for calls from those facilities even though the provider may incur different costs to serve various facilities covered by a single contract. Do commenters agree? What factors do providers of inmate calling services consider in bidding on contracts, particularly contracts covering more than one facility? The Commission seeks comment on this issue and on whether commenters agree that its proposed rate caps would meet the fair compensation standard of section 276 of the Act.

6. Cost-Benefit Analysis

76. The Commission proposes to find that, independent of its statutory obligation, the benefits of its interstate rate cap proposal (reducing its current caps on interstate inmate calling rates to \$0.14 per minute for prisons and \$0.16 per minute for jails) exceeds the costs at least five-fold. Specifically, the Commission expects an increase in interstate inmate call volumes elicited by lowered rates would conservatively generate approximately \$7 million in direct benefits due to expanded call volumes, primarily to the benefit of incarcerated people, their families, and friends. The Commission also expects resulting expanded call volumes to reduce recidivism, which will in turn reduce prison operating costs, foster care costs, and crime. The Commission estimates these secondary benefits to well-exceed \$23 million. The Commission estimates the one-time cost of implementing the interstate rate cap changes to be \$6 million. The Commission seeks comment on these estimates.

77. **Expected Benefits of Expanded Call Volumes.** To estimate the benefits of its proposed lower rates the Commission estimates how many call minutes are currently made at prices above those

rates, the price decline on those call minutes that moving to its rates would imply, and the responsiveness of demand to a change in price. The Commission estimates, in 2018, approximately 592 million interstate prepaid and debit minutes and 3.3 million interstate collect minutes were made to or from prison individuals incarcerated in prisons at rates above its proposed caps, and approximately 453 million interstate prepaid and debit minutes and 2 million interstate collect minutes were made to and from individuals incarcerated in jails at rates above its proposed caps. The Commission used rate information from the 2019 Annual Reports and interstate minutes from the Second Mandatory Data Collection. These estimates are calculated as the difference between total interstate minutes in each category and the equivalent interstate minutes from nine states—Alaska, Delaware, Hawaii, Maryland, New Mexico, Texas, Vermont, Washington, and West Virginia—where either the rates of some important contracts are below the caps the Commission proposes, or all of the rates are below the caps the Commission proposes. These estimates likely understate the number of interstate minutes with rates that exceed the proposed caps because the Commission excludes from its calculations many contracts which have rates in excess of its proposed rates, even if in some cases the Commission includes those relatively rare contracts with rates below its proposed rates. The Commission estimates prices for those call minutes decline by half of the difference between its current caps and its proposed caps. Its current interim rate caps are \$0.21 for debit and prepaid calls and \$0.25 for collect calls. Its proposed rates imply the following price declines from these rates: for prison debit and prepaid calls, 33% ($(\$0.21 - \$0.14) / \$0.21$); for prison collect calls, 44% ($(\$0.25 - \$0.14) / \$0.25$); for jail debit and prepaid calls, 24% ($(\$0.21 - \$0.16) / \$0.21$); and for prison collect calls, 36% ($(\$0.25 - \$0.16) / \$0.25$). To allow for contracts with rates below the current caps, the Commission assumes inmate calling services rates fall only one-half the difference between the existing rate caps and the proposed caps. Finally, the Commission estimates, relying on a price elasticity of demand at the lower end of those estimated for interstate calling, a price elasticity of demand at the lower end of those estimated for interstate calling: that for each percentage point drop in rates, inmate calling services demand will increase by 0.2%. The Commission assumes a price elasticity of -0.2. This estimate comes from the most recent data available to us and is conservative relative to most other estimates the Commission reviewed. On the one hand, this is likely an understatement because on average incarcerated

individuals and their families and friends have lower incomes than the general population. On the other hand, inmates may not be fully able to respond to lower prices given limits on making calls. For example, call lengths are often limited to 15 or 20 minutes (based on staff analysis of the Second Mandatory Data Collection). Under these assumptions, the Commission estimates annual benefits of approximately \$1 million, or a present value over ten years of approximately \$7 million. The present value of a 10-year annuity of \$1 million at a 7% discount rate is approximately \$7 million. The Office of Management and Budget recommends using discount rates of 7% and 3%. Erring on the side of understatement, the Commission uses the 7% rate. Additionally, even at current demand levels, the Commission estimates the cost savings to incarcerated individuals, their families, and friends, from lower calling rates alone, to be \$32 million per year or \$225 million in present value terms over 10 years. The Commission notes this benefit is not a “net” benefit, however, given that it is offset for purposes of its analysis by the loss of the inmate calling service industry of \$218 million in revenues in present value terms over 10 years.

78. The Commission also expects greater call volumes to reduce recidivism, generating further benefits well in excess of \$23 million. It is well established that family-to-incarcerated individual contact reduces recidivism. Although the Commission does not know exactly how much increased telephone contact would reduce recidivism among incarcerated individuals, savings of more than \$3 million per year, or more than \$20 million over 10 years in present value terms, would result if only 100 fewer individuals were incarcerated due to recidivism each year. Approximately \$33,274 per year would be saved for every case of recidivism avoided, or \$3.3 million per year for 100 cases avoided. The average annual cost of incarceration for federal inmates was a comparable \$34,704 in Fiscal Year 2016. One hundred fewer cases of recidivism in each year would represent approximately 0.02% of those released from prison each year, a negligible decline in the recidivism rate. To allow for releases to continue to exceed admissions, the calculation assumes that 500,000 persons are released every year. In 2018, approximately 600,000 persons were admitted to prison. The present value of a ten-year annuity of \$3.3 million at a discount rate of 7% is approximately \$23.2 million. Other savings would also be realized, for example, through reduced crime, and fewer children being placed in foster homes. The

potential scale of fiscal saving—in addition to the immense social benefits—is suggested by the fact that administrative and maintenance costs incurred by state and local governments average \$25,782 per foster placement. The Commission seeks comment on these expected societal cost reductions.

79. **Costs of Reducing Rates for Interstate Inmate Calling Services Calls.** The costs of reducing rates for interstate inmate calling services calls are likely to be modest for providers, estimated at approximately \$6 million. Including the Federal Bureau of Prisons and Immigration and Customs Enforcement, approximately 3,000 inmate calling services contracts would need to be revised if the Commission were to adopt its proposed rules, and a smaller number of administrative documents may need to be filed to incorporate lower interstate rates. The Commission estimates that these changes would require approximately 25 hours of work per contract. The Commission uses a \$70 per hour labor cost to implement billing system changes, adjust contracts, and to make any necessary website changes. The Commission uses an hourly wage for this work of \$42. (The Commission examined several potential wage costs. For example, in 2019, the median hourly wage for computer programmers was \$41.61, and for accountants and auditors, it was \$34.40. The Commission chose the higher of these. This rate does not include non-wage compensation. To capture this, the Commission marks up wage compensation by 46%. In March 2020, hourly wages for the civilian workforce averaged \$25.91, and hourly benefits averaged \$11.82 yielding a 46% markup on wages. The result is an hourly rate of \$61.32 (= \$42 x 1.46), which the Commission rounds up to \$70. The estimated cost of these actions is \$5,139,750 (= 2,937 (number of contracts)*25 (hours of work per contract) *\$70 per hour), which the Commission rounds up to \$6 million to be conservative. The Commission seeks comment on this estimate of costs.

80. The Commission also recognizes that lowering per-minute rates could result in lower investment because a substantial proportion of industry costs do not vary with minutes carried, but must be covered. The Commission does not expect, however, reduced investment to be a significant concern, however, given its findings that the proposed rates would more than recover efficient total costs of operation. The Commission seeks comment on this view.

81. **Summary of Benefits and Costs.** On net, the Commission estimates that the actions the Commission proposes today would result in benefits which far exceed their costs. While the Commission

identifies a range of benefits, for the purposes of a cost benefit analysis, the Commission only quantifies the direct benefits from some of these. Looking out only ten years, the conservative estimate of these benefits alone is approximately \$30 million in present value terms. The Commission expects other substantial benefits due to reduced recidivism. By contrast, the Commission conservatively estimates the high side of costs of its actions to be approximately \$6 million. The Commission seeks comment on ways to improve these estimates, including how to quantify any indirect or secondary benefits the Commission unable to quantify here, as well as on any additional costs and benefits of its proposed actions that the Commission has not considered.

B. Proposing International Rate Caps

82. The Commission proposes to establish a rate cap formula that inmate calling services providers must use in setting the maximum permissible per-minute rates for international inmate calling services. The Commission seeks comment on its proposal to cap international inmate calling service rates. In the *2015 ICS Further Notice*, the Commission sought specific comment on whether and how to reform rates for international inmate calling services, including on extending its domestic inmate calling service rate caps to international inmate calling service calls. The Commission has also collected international inmate calling service rate and cost data from inmate calling services providers, including in annual reports and the Second Mandatory Data Collection.

83. There is no question that the Commission has authority to adopt rate caps for international inmate calling services pursuant to section 201(b) of the Act. Moreover, while the record on the need for international inmate calling service reform is mixed, the Commission's most recent data reflecting international calling rates for many inmate service providers convinces the Commission such reform is needed. Some commenters have urged the Commission to regulate international inmate calling services rates, arguing that the Commission has the authority and obligation to ensure just and reasonable rates. Another party has claimed that international calling is such a small percentage of inmate calling that it need not be regulated.

84. Calculating International Rate Caps. The Commission proposes to adopt a rate cap formula for international inmate calling services calls that permits a provider to charge a rate up to the

sum of the inmate calling services provider's per-minute interstate rate cap for that correctional facility plus the amount that the provider must pay its underlying international service provider for that call on a per-minute basis (without a markup). This allowance for international transmission capability would exclude any amount that is rebated to, or otherwise shared with, the inmate calling services provider. The Commission seeks comment on this proposal. Its proposal is designed to enable the provider to recover the full costs of the international telephone service it is essentially reselling to the inmate calling services consumer, plus the cost it incurs to make that service available to persons incarcerated in that facility. As a result, the Commission believes this international rate cap would be just and reasonable under section 201(b) of the Act and would enable inmate calling services providers to account for the widely varying costs and associated international rates they are charged by their wholesale suppliers of international calling capability. The Commission seeks comment on this view.

85. The Commission believes its proposal has the benefit of simplicity and ease of administrability. It would allow inmate calling services providers to recover the additional costs they incur to resell international calling services, yet should result in substantial reductions in international calling rates for incarcerated individuals and their families based on what many providers report for certain international calling rates in their latest Annual Reports. Additionally, it would account for the varied international rates identified by some commenters, and enable providers to charge higher international calling services rates than charged for domestic calls to the extent international settlement rates and foreign termination rates make the costs to transport and terminate international calls higher than those for domestic calls. The Commission seeks comment on this proposed approach. Would capping international rates in this way ensure that incarcerated individuals and their families and other loved ones do not pay unreasonably high international rates? Why or why not? Would it address the concerns of GTL and Pay Tel that imposing a single rate cap would be difficult because international calling rates vary based on factors including the location called or the type of call? Are there other factors besides the costs incurred by inmate calling services providers in paying their underlying facilities-based or wholesale international services providers that the Commission should consider in formulating international rate caps? If so, what are those factors and how could the Commission account for them in

determining appropriate rate caps?

86. The record contains a wealth of information regarding international inmate calling services rates. CenturyLink suggests that “[t]he cost to terminate residential or business international calls is often many times greater than the cost to terminate calls in the United States, even for frequently called countries like Canada and Mexico.” CenturyLink also explains that “simple network and termination costs—ignoring other prison-specific costs related to such things as security, billing and consumer services—to many African and East European countries can be \$0.25 per minute or greater.” According to some commenters, international rates are exceedingly high in some correctional facilities, some as high as \$45 for a 15-minute call. Another commenter cites rates of \$0.75 per minute, or \$11.25 for a 15-minute international call, at a facility in California. These data compare with a total permissible rate of \$6.90 or \$7.50 for a 15-minute debit/prepaid or collect call, respectively, under the Commission’s interim interstate rate caps (\$3.15 or \$3.75) plus the \$0.25 per minute that CenturyLink’s suggests are the costs for some international calls (\$3.75). The Commission believes its proposal addresses the differences in international inmate calling services costs even without more specific information about each individual cost component of any specific international inmate calling services call. Do commenters agree? If not, why not, and what data should the Commission rely on instead to establish international rate caps?

87. The Commission disagrees with commenters that suggest that because international inmate calling services calls represent such a small percentage of all inmate calls that the Commission should not consider establishing rate caps. In 2018, international call minutes represented 0.195% of all calling minutes.” From 2014 to 2018, international calling in prisons did not exceed 0.5% of total annual minutes of use, while for jails, international calling never exceeded 0.4% of total minutes of use. But the Commission is unable to determine from the record, however, whether these small percentages result from the needs of the incarcerated population or excessively high rates for international inmate calling services calls. For example, one provider reports international calling rates as high as \$8.58 per minute for debit calls, yet other providers report far lower international rates (but still more than two to five times higher than interstate rate caps) for debit calls to that same country. GTL failed to provide in its most recent Annual Report the international rate it charges to call each country, and instead provides only the

highest rate charged for an international call at each facility it serves without identifying the country to which that rate applies. When the Commission compares that GTL international rate to the highest international rate that other providers charge to serve any country, and assuming that highest rate is to the same country GTL charges \$8.58 to serve (for example, CenturyLink's highest international rate to any country is \$1.00 per minute; NCIC's highest is \$1.50; Pay Tel's highest is \$0.95; Prodigy's highest rate is \$0.50 and ICSolutions's highest is \$1.00), the Commission finds it difficult to believe such massive disparities in rates to the same foreign country are really attributable to cost differentials. What is more, just because international calls from correctional facilities may represent a small overall percentage of inmate calls does not mean incarcerated individuals and their loved ones reliant upon international telephone calls to stay in touch are not entitled to the same just and reasonable protections afforded domestic callers under the Act. This is especially the case when loved ones residing in foreign locations may be unable to take advantage of in- person visitation.

88. Alternative Proposals. The Commission seeks comment on alternative proposals for establishing an international rate cap. The Commission invites commenters to propose specific alternative methodologies and associated rate caps for international calls that ensure that incarcerated individuals and their families pay just and reasonable rates for international inmate calling services while inmate calling providers receive fair compensation.

89. Waiver Process for Outliers. In the event that its proposed international rate cap would prevent a provider from recovering the costs of providing international inmate calling services at a facility or facilities covered by a particular contract, the Commission proposes to adopt a waiver process similar to that discussed above for its proposed interstate rate caps. The Commission seeks comment on this proposal.

90. Consistency with Section 276 of the Act. The Commission proposes to find that its international rate cap proposals are consistent with section 276 of the Act's "fair compensation" provisions for the same reasons the Commission proposes to find its interstate rate cap proposals to be consistent with section 276. The Commission seeks comment on this proposal.

C. Other Issues

91. Ancillary Service Fee Caps. The Commission seeks comment on whether its ancillary services fee caps should be lowered or otherwise modified. What data should the Commission collect or rely upon in making such a determination? If the Commission were to revise its ancillary service fee caps, how frequently should the Commission revise those caps? Additionally, should the Commission limit the third-party transaction fees that providers may pass through to consumers and, if so, what should those limits be?

92. Additional Data Collection. Pursuant to its annual reporting requirements, inmate calling services providers must submit data on their operations, including their current rates as well as their current ancillary service charge amounts. To ensure that providers' interstate and international rates as well as their ancillary service charges for inmate calling services are just and reasonable, the Commission invites comment on whether the Commission should require providers to submit additional data—including cost data—in the future and, if so, what data the Commission should collect. Should the Commission use the Second Mandatory Data Collection as the starting point in designing any additional data collection? If so, how should the Commission modify that collection to ensure that the Commission has sufficient information to meaningfully evaluate providers' reported cost data and methodology? Or should the Commission follow a different approach, such as that used in the First Mandatory Data Collection? If the Commission were to adopt a new data collection, the Commission seeks comment on whether the Commission should require providers to update their responses to that data collection periodically. What would be the relative benefits and burdens of a periodic data collection versus another one-time data collection? If the Commission were to require a periodic collection, how frequently should the Commission collect the relevant data? For example, would a biennial or triennial collection covering multiple years better balance those benefits and burdens than an annual collection?

93. The Commission also seeks comment on how the Commission can ensure that inmate calling services providers submit accurate data to the Commission. The Public Interest Advocates express concern that “some providers, such as GTL, appear to submit inflated data to the Commission with impunity.” It is imperative that inmate calling services providers proceed in good faith and with

absolute candor in their interactions with the Commission. The Commission's rules already require providers to certify annually that the information in their Annual Reports is "true and accurate" and that they are in compliance with the Commission's inmate calling services rules. The certifying senior executive must have "first-hand knowledge of the accuracy and completeness of the information provided" in the provider's Annual Report and also "acknowledge that failure to comply with the [Commission's inmate calling services rules] may result in civil or criminal prosecution." Should any subsequent data collection contain a similar certification requirement? While the Commission takes this opportunity to again remind inmate calling services providers of their duty to provide complete and accurate information in required reports and responses, the Commission seeks comment on additional measures the Commission can take. Additionally, the Commission seeks comment on how the Commission can ensure that providers update their filings if they discover any material error or misrepresentation in their reported data and responses. Finally, the Commission seeks comment on whether there are any other methods of obtaining accurate cost data upon which to base just and reasonable rates that does not require reliance on service providers' self-reported cost data. The Commission asks commenters to provide a detailed explanation of how any such data may otherwise be obtained.

94. Marketplace Developments. The Commission invites comment on how its regulation of interstate and international inmate calling services should evolve in light of marketplace developments to better accommodate the needs of incarcerated people while ensuring that providers are reasonably compensated for providing inmate calling services. The Commission's rules restrict providers to charging consumers on a per-minute basis, an approach that evolved from the need of payphone operators to collect payment from each of their transient users. The Commission invites comment on whether the Commission should change its rules to recognize industry innovations, such as emerging pay models where local jails pay for calls in a manner "more similar to the modern marketplace" and thus seek contracts on a per-line rather than a per-minute basis. For example, some jurisdictions are paying for the costs of calling just as they pay for other utilities such as electricity and water. The Public Interest Advocates state that when New York City negotiated a contract that was not billed on a per-minute rate,

the overall cost of telephone service decreased substantially, from \$10 million annually to approximately \$2.5 million annually, while call volume increased 40 percent. Would such contracts reduce the amounts incarcerated people and their loved ones pay to stay connected? Are there other innovations that the Commission should consider in revising its inmate calling services rules?

95. Similarly, the Commission invites comment on how overall fees and per-minute rates for inmate calling services affect consumers and on whether alternative rate structures would reduce total consumer costs. The Public Interest Advocates assert that inmate services providers pressure correctional facilities to sign contracts that allow the providers to provide additional items or services such as tablets and video calling in addition to inmate calling services. The Commission invites comment on the prevalence of this type of “bundling” practice and on the effects these types of practices may have on rates and fees for inmate calling services.

96. Disability Access. The Commission seeks comment on the needs of incarcerated people with disabilities, including the types of Telecommunications Relay Services access technologies that these individuals require. Section 225 of the Act requires every common carrier that provides voice services to offer access to Telecommunications Relay Service within their service areas. Currently, the Commission requires two forms of Telecommunications Relay Services: TTY-based Telecommunications Relay Services and speech-to-speech services. Thus, all common carriers must make available or ensure the availability of these types of Telecommunications Relay Services. The Commission reminds inmate calling services providers of their obligations to ensure the availability and provision of these forms of Telecommunications Relay Services. Although the Commission currently requires these two types of Telecommunications Relay Services, the Commission recognizes that newer forms of these services, such as Internet Protocol Captioned Telephone Service, Video Relay Service, and Real-Time Text, have come to the market in part as a result of “ongoing technology transitions from circuit switched to IP-based networks.” In 2016, the Commission amended its rules to permit wireless carriers to support Real-Time Text in lieu of TTY technology. To further its mandate to ensure the availability of Telecommunications Relay Services, the Commission seeks comment broadly on the needs of incarcerated people with hearing or speech disabilities. Do these individuals have adequate access to

Telecommunications Relay Services? Considering technological developments, what forms of Telecommunications Relay Services should inmate calling services providers make available, and what can the Commission do to facilitate that?

IV. PROCEDURAL MATTERS

97. Filing of Comments and Replies. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System. *See FCC, Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (May 1, 1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
 - Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.
 - Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. *See FCC Announces Closure of FCC Headquarters*

Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20-304 (March 19, 2020), <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

98. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules. The Commission directs all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to use a table of contents, regardless of the length of their submission. The Commission also strongly encourages parties to track the organization set forth in the *Fourth Further Notice of Proposed Rulemaking* in order to facilitate its internal review process.

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

100. Ex Parte Presentations. The proceeding that this *Fourth Further Notice of Proposed Rulemaking* initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies).

101. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission

staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with section 1.1206(b) of the Commission's rules. Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

102. Initial Regulatory Flexibility Act Analysis. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Fourth Further Notice of Proposed Rulemaking (Fourth Further Notice)*. The IRFA is set forth below. The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *Fourth Further Notice*. The Commission will send a copy of the *Fourth Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Fourth Further Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.

103. Initial Paperwork Reduction Act Analysis. This *Fourth Further Notice of Proposed Rulemaking* may propose new or modified information collections subject to the PRA requirements. If the Commission adopts any new or modified information collection requirements, they will be submitted to OMB for review under section 3507(d) of the PRA. The Commission, as part of its continuing effort to reduce paperwork burdens, will be inviting OMB, the general public, and other federal agencies to comment on any new or modified information collection requirements contained in this *Fourth Further Notice of Proposed Rulemaking*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, the Commission seeks specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

104-105. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Fourth Further Notice of Proposed Rulemaking (Further Notice)*. The Commission requests written

public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of this *Further Notice*. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Further Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.

A. Need for, and Objectives of, the Proposed Rules

105. In this *Further Notice*, the Commission seeks comment on its proposal to address the broken inmate calling services marketplace. The Commission proposes to reduce rate caps from the current interim rate caps to \$0.14 per minute for all interstate inmate calling services calls from prisons and to \$0.16 per minute for all interstate inmate calling services from jails. This rate cap reduction is designed to ensure that inmate calling services providers will have the opportunity to recover their costs—including their indirect costs—of providing interstate inmate calling services. Additionally, the proposed interstate rate caps include an allowance for the recovery of correctional facility costs that are legitimately related to the provision of inmate calling services. The Commission anticipates that its actions will have long-term and meaningful impacts on incarcerated individuals and their families while promoting competition in the inmate calling services marketplace.

106. The Commission also proposes to cap inmate calling services rates for international calls on a facility basis. The Commission's proposal to adopt a rate cap formula that permits a provider to charge an international inmate calling services rate up to the sum of the provider's per-minute interstate rate cap for the inmate's facility plus the amount that the provider must pay its underlying international service provider for that call on a per minute basis has the benefits of simplicity and ease of administration. It would allow inmate calling services providers to recover the additional costs they incur to resell international calling services, yet should result in substantial reductions in international calling rates for incarcerated individuals and their families.

B. Legal Basis

107. The legal basis for any action that may be taken pursuant to the *Fourth Further Notice* is contained in sections 1, 2, 4(i)-(j), 201(b), 218, 220, 276, and 403 of the Communications Act of 1934, as

amended, 47 U.S.C. 151, 152, 154(i)-(j), 201(b), 218, 220, 276, and 403.

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

108. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” 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 SBA.

109. Small Businesses, Small Organizations, Small Governmental Jurisdictions. The Commission’s actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 30.7 million businesses.

110. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.” The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2018, there were approximately 571,709 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

111. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.” U.S. Census Bureau data from the 2017 Census

of Governments indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 36,931 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,040 special purpose governments - independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of “small governmental jurisdictions.”

112. Wired Telecommunications Carriers. The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.” 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. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

113. Local Exchange Carriers (LECs). Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated for the entire year. Of that total, 3,083 operated with fewer than 1,000 employees. Thus under this category and the associated size standard, the Commission estimates that the majority of local exchange carriers are small entities.

114. Incumbent Local Exchange Carriers (Incumbent LECs). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated the entire year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by its actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees. Thus, using the SBA's size standard the majority of incumbent LECs can be considered small entities.

115. 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.

116. Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on these data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these

1,442 carriers, an estimated 1,256 have 1,500 or fewer 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. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

117. Interexchange Carriers (IXCs). Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. The closest applicable NAICS Code category is Wired Telecommunications Carriers. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year. Of that number, 3,083 operated with fewer than 1,000 employees. According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

118. Local Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities.

119. 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 provisions of toll resale services. Of this total, 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 its action.

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

121. 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 this total, 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 its action.

122. All Other Telecommunications. The "All Other Telecommunications" category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and

receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for All Other Telecommunications, which consists of all such firms with annual receipts of \$35 million or less. For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than \$25 million and 15 firms had annual receipts of \$25 million to \$49, 999,999. Thus, the Commission estimates that the majority of “All Other Telecommunications” firms potentially affected by its action can be considered small.

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

123. Whereas the current interim rate caps differentiated between prepaid and debit calls and collect calls, the Commission proposes to adopt identical interstate rate caps for prepaid, debit, and collect calls. These proposed rates differentiate between facility types, proposing a rate cap for jails that is \$0.02 per minute higher than the rate cap the Commission proposes for prisons. The Commission also proposes to adopt, for the first time, rate caps for international inmate calling services calls. The Commission recognizes that these proposed changes to the rate cap structure will likely require providers to make adjustments to their billing systems. The Commission proposes a 90-day transition period to alleviate any burden on providers associated with this change and to allow providers sufficient time to make the necessary changes.

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

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

small entities. The Commission expects to consider all of these factors when the Commission receives substantive comment from the public and potentially affected entities.

125. The Commission's proposed rate caps differentiate between prisons and jails to account for differences in costs incurred by inmate calling services providers servicing these different facility types. The Commission believes the proposed rate caps will ensure that inmate calling services providers serving jails, which may be smaller, higher-cost facilities, and larger prisons, which often benefit from economies of scale, can both recover their legitimate inmate calling services-related costs. To further ease the burdens on providers serving smaller jails, the Commission proposes to adopt higher allowances for correctional facility costs for inmate calling services providers serving smaller jails if the record supports such allowances. The Commission's proposed rate caps also include \$0.02 allowance for costs correctional facilities incur that are directly related to the provision of inmate calling services and that represent a legitimate cost for which providers of inmate calling services may have to compensate facilities. The Commission recognizes that for contracts covering only smaller jails, the facility costs at these particular facilities may exceed \$0.02 per minute, and seeks comment on whether the rate caps should adopt higher allowances for correctional facility costs for such contracts.

126. The Commission recognizes that it cannot foreclose the possibility that in certain limited instances, the proposed rate caps may not be sufficient for certain providers to recover their legitimate costs for providing inmate calling services. To minimize the burden on providers, the Commission proposes a waiver process that allows providers to seek relief from its rules at the facility or contract level if they can demonstrate that they are unable to recover their legitimate inmate calling services-related costs at that facility or for that contract. If the provider demonstrates that its higher costs at the facility or contract level are legitimately related to the provision of inmate calling services, the Commission proposes to raise each applicable rate cap to a level that enables the provider to recover the costs of providing inmate calling services at that facility. The Commission seeks comment on this proposed waiver process, and on whether the same waiver process should be employed with respect to the proposed international rate caps.

127. Given the significant reduction in interstate inmate calling services rates proposed by the

Commission, some providers may need to re-negotiate their existing contracts with correctional facilities. To provide inmate calling services providers adequate time to make necessary adjustments to their contracts, and to mitigate any other burdens that may result from implementing the proposed interstate and international rate caps, the Commission proposes to allow a 90-day transition period for the proposed rate caps to take effect. The Commission seeks comment on the length of this transition period and whether it will afford inmate calling services providers and correctional facilities sufficient time to implement the proposed rate caps.

128. The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the *Further Notice* and this IRFA, in reaching its final conclusions and promulgating rules in this proceeding. Specifically, the Commission will conduct a cost-benefit analysis as part of this proceeding and consider the public benefits of any such requirements it might adopt to ensure that they outweigh any impact on small business.

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

129. None

VI. ORDERING CLAUSES

131. 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* and this *Fourth Further Notice of Proposed Rulemaking* ARE ADOPTED.

132. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415, 1.419, interested parties may file comments on this *Fourth Further Notice of Proposed Rulemaking* on or before 30 days after publication of a summary of this *Fourth Further Notice of Proposed Rulemaking* in the Federal Register and reply comments on or before 60 days after publication of a summary of this *Fourth Further Notice of Proposed Rulemaking* in the Federal Register.

133. 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 and Fourth Further Notice of Proposed Rulemaking, including the Initial and 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).

134. 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 and Fourth Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis and 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,
Federal Communications Commission.

Proposed Rules

For the reasons set forth above, the Federal Communications Commission proposes to amend 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. Section 64.6010 is revised to read as follows:

§ 64.6010 Interstate and International Inmate Calling Services rate caps.

(a) No Provider shall charge, in any Jail it serves, a per-minute rate for interstate Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of \$0.16.

(b) No Provider shall charge, in any Prison it serves, a per-minute rate for interstate Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of \$0.14.

(c) No Provider shall charge, in any Prison or Jail it serves, a per-minute rate for International Calls in excess of the applicable interstate rate set forth in paragraphs (a) and (b) of this section plus the amount that the provider must pay its underlying international service provider for that call on a per-minute basis.

Note: The following Appendices will not appear in the Code of Federal Regulations.

APPENDIX A

Analysis of Responses to the Second Mandatory Data Collection

1. In response to the Second Mandatory Data Collection, 13 providers of inmate calling services submitted data to the Commission (*see* Table 1). The collected data included information on numerous characteristics of the providers' contracts, such as:

- Whether the contract was for a prison or a jail;
- The average daily inmate population (average daily population) of all the facilities covered by the contract;
- The total number of calls made annually under the contract, broken out by paid and unpaid, with paid calls further broken out by debit, prepaid, and collect;
- Total call minutes; call minutes broken out by paid and unpaid; interstate, intrastate, and international; and prepaid, debit, and collect calls;
- Inmate calling services revenues, broken out by prepaid, debit, and collect;
- Automated payment revenues and paper bill or statement revenues, earned under the contract (live operator revenues were not collected);
- Site commissions paid to facility operators under the contract; and
- Each provider's inmate calling services costs in total, exclusive of site commissions.

2. Inmate calling services costs are for inmate calling services only, and thus do not include costs for lines of business such as video visitation services, or fees passed through to callers, such as credit card processing fees. While providers generally reported at least some inmate calling services costs at the level of the contract, and more rarely at the level of the facility, each did this differently. In this Appendix, the Commission defines costs reported at the level of the contract or facility respectively as the

the BOP contract as described below. This resulted in a final dataset of 2,935 contracts, accounting for 2.2 million incarcerated individuals and 7.8 billion paid minutes.

5. Adjustments to the underlying data. Unless otherwise noted, the Commission accepted the filers' data and related information "as provided" (i.e., without any modifications). The Commission applied three processes to ultimately geocode 3,784 or 88% of the 4,319 filed facilities. Geocoding is a process of associating longitude and latitude coordinates to a facility's address to conduct geographic analyses. The Commission first used ArcMap software version 10.8 to geocode 3,321 or 77% of the 4,319 filed facilities. The Commission used the geocoding database ArcGIS StreetMap Premium North America (2020 Release 1). The Commission then took a random sample of 170, or 17%, of the 998 addresses the Commission was unable to geocode, and where possible, corrected them manually. The Commission was able to geocode 164 of these 170 addresses. Finally, the Commission developed a Python script to clean up the remaining addresses—which the Commission then manually checked—and were able to geocode 299 additional facilities this way. In instances of contracts with multiple facilities, the Commission was unable to geocode the relevant facilities where a filer only provided a single address. In some instances a mailing address was reported. If this was different from the facility's physical address and the address correction process did not detect this error, then the mailing address was used.

6. Unit of analysis. The Commission's analysis was typically conducted at the contract level. This approach is consistent with the Commission's view that the contract is the primary unit of supply for inmate calling services. That is, providers bid on contracts, rather than facilities (though in many instances the contract is for a single facility). This approach is also consistent with how the data were submitted. The Commission requested information to be submitted for each correctional facility where a provider offers inmate calling services, and some key variables—for example, the quantity of calls and minutes of use—were reported by facility. However, even though over 90% of contracts were reported as representing a single facility, most filers do not maintain all of the data the Commission requested by facility in the ordinary course of their business. As a result, in some instances, contracts were reported that covered multiple facilities without any breakout of those facilities. In other cases, some facility-level data was not reported. Examples of the latter include average daily inmate population

and credit card processing costs. In any event, because the Commission required providers to cross-reference their contracts with the facilities they covered, the Commission was able to group facilities by contract, which facilitated its ability to conduct its analysis at the contract level.

7. Cost allocation. General and administrative costs are, by definition, not directly attributable to any contract. In this Appendix, the difference between a filer’s total costs and its direct costs (i.e., the costs it reported at the level of the contract or facility) is termed “overheads.” Each filer applied its own accounting practices in reporting overheads. For example, GTL reported bad debt as its only direct cost, all the way down to the facility. All of its other costs thus appear as if they were overheads. By contrast, one provider allocated all of its costs using the number of phones that it had installed down to the level of the contract, implying it had no overheads. Other firms allocated some costs using a fully distributed cost key, such as shares of minutes; others used revenue shares which typically have no relation to why costs are incurred.

8. To provide a common basis of comparison, and to allow a focus on per-minute rates, the Commission allocated overheads among each provider’s contracts in proportion to the contracts’ shares of the provider’s total minutes. The Commission used total minutes at both the contract level and the provider level, rather than paid minutes, because all minutes cost something to provide, regardless of whether they generate any revenue.

9. Once all costs were allocated, the per-minute cost of a contract was calculated by dividing the total cost of each contract by its quantity of paid minutes. Paid minutes were used because those are the minutes that providers rely on to recover their costs. *See* Table 2.

Table 2 – Contract Per-Minute Costs by Facility Type Using an All-Minute Cost Allocation

Key

Metric (2018 Data Only)	Prisons	Jails
Mean	\$0.091	\$0.084
Standard Deviation	\$0.040	\$0.062
Mean + One Standard Deviation	\$0.131 (= \$0.091 + \$0.040)	\$0.146 (= \$0.084 + \$0.062)
# of Outliers (Mean + 1 Std. Dev.)	9/131 contracts; 6.9%	193/2,804 contracts; 6.9%
Mean + Two Standard Deviations	\$0.171 (= \$0.091 + \$0.040 x 2)	\$0.208 (= \$0.084 + \$0.062 x 2)
# of Outliers (Mean + 2 Std. Dev.)	1/131 contracts; 0.8%	50/2,804 contracts; 1.8%

10. Choosing among cost allocation keys. After looking at six possible cost allocation keys

that the data would allow us to implement—call minutes, average daily population, calls, revenues, contracts, and facilities—the Commission found call minutes to provide the best allocator.

11. The primary aim of a cost allocation key is to find a reasonable way of attributing costs, in this case to contracts, that either cannot be directly attributed, such as true overheads, or that, while conceptually could be attributed to a specific contract, cannot be attributed based on how providers' accounts are kept. Such a key must be likely to reflect cost causation and result in rates that demand can bear. On this basis, the Commission is able to narrow its focus to a call minute key or call key. The Commission chose call minutes over calls on the basis that a call minute key is the natural choice given the ubiquity of call minute pricing.

12. Tables 3 and 4 provide information about the distribution of contract costs per minute under each of the six possible keys. The average daily population, contract, and facility cost allocation keys result in many contracts with implausible contract-level per-minute costs. For example, the average daily population cost allocation key shows an average prison contract cost per paid minute of nearly \$0.58 and a jail contract per paid minute cost of nearly \$7. By contrast, average call revenue per paid minute including automated payment and paper bill/statement revenues is \$0.148 for prison contracts, and \$0.360 for jail contracts. (Ideally live operator service revenues would also be accounted for, but the Commission does not have these data.) The average daily population cost allocation key shows 10% of prison contracts have costs in excess of \$0.319 per paid minute. Yet, 99% of prison contracts have an average paid minute rate (the sum of inmate calling services, automated payment, and paper bill or statement revenues divided by all paid minutes) of less than \$0.319. The equivalent number for jail contracts is 37% have costs above \$0.333 (the 90th percentile per paid minute cost for jail contracts with an average daily population cost allocation key), which looks more reasonable, but there is no reason to think allocating costs by average daily population should work for prisons, but not jails. Given that such contracts are surely mutually beneficial to both the provider and the correctional facility, they must generate enough revenues to cover costs. Just as implausibly, four jail contracts would have per-minute costs in excess of \$240 (*see* Table 4), and three would have per-minute costs in excess of \$480 (not shown in Table 4). Again, by contrast, when using the call minute key, no prison contracts have per-

minute costs above \$0.226, and the highest jail per-minute cost is \$1.460.

13. The average daily population key is additionally problematic because average daily population data are often inaccurate, and—in the case of 89 contracts—simply missing from the providers’ responses. A cost allocation key based on the number of facilities is also problematic as facility data were not reported for many contracts with multiple facilities.

14. The cost allocations based on contracts and facilities are even more unrealistic, with both displaying a mean contract per-minute cost in excess of \$40 (see Table 3).

Table 3 – The Distribution of Contract Per-Minute Costs by Facility Type Using Various Cost Allocators

Allocation Key	Facility Type	Mean	Std. Dev.	Percentiles						
				1st	10th	25th	50th	75th	90th	99th
Minutes	Jail	0.084	0.062	0.009	0.027	0.055	0.073	0.118	0.137	0.262
	Prison	0.091	0.040	0.028	0.041	0.051	0.121	0.122	0.127	0.166
ADP	Jail	6.974	236.854	0.000	0.022	0.044	0.075	0.132	0.333	10.495
	Prison	0.577	4.184	0.000	0.030	0.043	0.072	0.145	0.319	12.806
Calls	Jail	0.107	0.097	0.009	0.025	0.052	0.090	0.132	0.197	0.448
	Prison	0.100	0.091	0.009	0.026	0.047	0.089	0.120	0.172	0.440
Revenue	Jail	0.135	0.121	0.007	0.027	0.059	0.107	0.172	0.266	0.522
	Prison	0.100	0.170	0.013	0.032	0.040	0.063	0.114	0.206	0.257
Contracts	Jail	42.658	1,005.685	0.006	0.034	0.090	0.280	1.190	4.906	221.786
	Prison	3.869	37.995	0.003	0.008	0.019	0.055	0.232	0.915	26.031
Facilities	Jail	41.284	1,002.770	0.006	0.034	0.085	0.237	1.034	4.446	158.262
	Prison	3.786	37.116	0.003	0.012	0.022	0.060	0.227	0.894	25.429

Table 4 – Contract Per-Minute Costs by Facility Type Using Various Cost Allocators

Allocation Key	Facility Type	Mean + One Std. Dev.	Total Contracts	Contracts Below	Contracts Above	Contracts Above (%)
Minutes	Jail	0.146	2,804	2,610	194	6.9
	Prison	0.131	131	122	9	6.9
ADP	Jail	243.828	2,804	2,800	4	0.1
	Prison	4.761	131	129	2	1.5
Calls	Jail	0.204	2,804	2,558	246	8.8
	Prison	0.191	131	122	9	6.9
Revenue	Jail	0.256	2,804	2,441	363	12.9
	Prison	0.270	131	130	1	0.8
Contracts	Jail	1,048.343	2,804	2,794	10	0.4
	Prison	41.864	131	130	1	0.8
Facilities	Jail	1,044.054	2,804	2,794	10	0.4
	Prison	40.902	131	130	1	0.8

15. Although a revenue cost allocation key may be used for certain accounting purposes, a

revenue key is inappropriate for regulatory purposes because revenue is not a cost driver. While costs can be expected to increase with quantity sold, revenues do not always increase with quantity sold, and this can lead to perverse effects. Quantity sold increases as price falls. Starting from a price where no sales are made, revenues also increase as prices fall. However, at some point as prices fall, revenues also begin to fall: the revenue gain from new sales made at the lower price is smaller than the revenue loss incurred due to the lower price as applied to all purchases that would have been made at the higher price. In that circumstance, holding other things constant, a revenue cost allocator would allocate less costs to a contract with a greater sales volume, contrary to cost causation. This also means a revenue key can reinforce monopoly prices. The exercise of market power can result in higher revenues than would be earned in a competitive market. In that circumstance, holding other things constant, a revenue allocation key would allocate more costs to monopolized services than competitive ones.

16. This leaves call minutes and calls as potential cost allocation keys. A call minute cost allocation key is the natural choice for setting per-minute inmate calling services rates. It is common in inmate calling services supply to charge per-minute rates, and not per call rates, even if sometimes the first minute has a different rate from subsequent rates.

17. Subcontracts. Some inmate calling services providers subcontract some or all of their contracts to a second provider. In 2018, of CenturyLink's [REDACTED] inmate calling services contracts, the Commission has data on [REDACTED] which were subcontracted (CenturyLink has [REDACTED] subcontracts with [REDACTED] but [REDACTED] did not report data for these contracts), and a third contract has no reported subcontractor; additionally, [REDACTED] employed a subcontractor for all of its [REDACTED] contracts.). This raises the question of how to deal with overhead costs in the case of subcontractors. The Commission takes an approach that may double count some overhead costs, as the Commission cannot identify what fraction of the subcontractors' overhead costs are captured in what they charge the prime contractor.

18. The reporting of costs for shared contracts varies by provider. Where the prime contractor only reported the cost of supplying the broadband connection on its contracts, while the subcontractor reported the costs of servicing the facilities (installation, maintenance, etc.), the

Commission aggregated their costs. Because the reported costs represent the provision of different services, the Commission does not believe these contracts have costs that were double-counted. Other providers operating as prime contractors reported all costs (including subcontractors' costs). Where their associated subcontractor did not file reports on the subcontracts, the Commission used the costs as reported by the prime contractor. However, where the associated subcontractors reported their costs, the Commission removed their direct costs to avoid counting them twice.

19. The subcontracting filers were also the main inmate calling services suppliers on other contracts, raising the question of how to avoid double counting the allocation the Commission made for overhead costs for their subcontracts. Leaning toward overstating costs, overhead on each shared contract was assigned using the methodology described above (i.e., a shared contract is allocated the overhead of both providers that report the contract). Afterwards, the two observations were aggregated into one and placed under the name of the firm that is the primary contract holder.

20. Inclusion of the overhead costs reported by the subcontractors overstates the cost recovering rate if, as is likely, they charge a markup over their direct costs. The markup would be part of the prime contractor's reported expenses, and to avoid double counting, the Commission would need to remove the markup from its calculations. The Commission cannot determine the amount of this markup, however. One approach would be to assume the markup matched the Commission's overhead cost allocation. In that case, the overhead costs of a subcontractor that are allocated to a subcontract would not be counted as they would be captured in the prime contractor's costs. However, if the markup exceeded this amount, the Commission would still be double counting costs, while if the markup was less than this amount, then the Commission would be understating costs. Table 5, when compared with Table 3, shows the impact of assuming that the markup matches the Commission's overhead cost calculation on the distribution of per-minute costs to be small.

Table 5 – Contract Per-Minute Costs by Facility Type Using Various Cost Allocators Adjusted to Avoid Double Counting of Subcontractor Overheads

Allocation Key	Facility Type	Mean	Std. Dev	Percentiles						
				1st	10th	25th	50th	75th	90th	99th
Minutes	Jail	0.084	0.062	0.009	0.027	0.055	0.073	0.118	0.136	0.262
	Prison	0.090	0.041	0.023	0.039	0.050	0.121	0.122	0.127	0.166
ADP	Jail	6.977	236.896	0.000	0.022	0.044	0.075	0.132	0.333	10.495
	Prison	0.579	4.200	0.000	0.029	0.041	0.068	0.145	0.330	12.806
Calls	Jail	0.106	0.097	0.009	0.025	0.052	0.089	0.132	0.196	0.448
	Prison	0.100	0.091	0.009	0.026	0.047	0.088	0.120	0.173	0.440
Revenue	Jail	0.134	0.122	0.007	0.027	0.058	0.107	0.171	0.266	0.522
	Prison	0.099	0.171	0.013	0.029	0.037	0.053	0.114	0.206	0.257
Contracts	Jail	42.672	1,005.864	0.006	0.034	0.088	0.279	1.187	4.906	221.786
	Prison	3.898	38.140	0.003	0.007	0.019	0.053	0.232	0.922	26.031
Facilities	Jail	41.297	1,002.949	0.006	0.034	0.082	0.236	1.033	4.446	158.262
	Prison	3.813	37.259	0.003	0.011	0.022	0.058	0.227	0.897	25.429

21. If the Commission were to remove all subcontractor overhead costs allocated to CenturyLink’s contracts, the average per-minute cost of CenturyLink’s contracts would decrease from [REDACTED]. If the Commission removed only half of the overhead, this would result in an average per-minute cost of [REDACTED].

22. Ancillary Revenues and Cost Recovery. Inmate calling services revenues do not include ancillary revenues. However, in many instances, ancillary revenues contribute toward cost recovery. The Commission distinguishes two sources of ancillary revenues. The first are those earned from passthrough fees, that is fees that are required to no more than match the costs the provider pays to a third party. Examples are credit card processing revenues and third-party transaction revenues. The costs that are passed through to incarcerated people in this manner are not included in inmate calling service costs. Thus, they net out of any cost-recovery estimation, and here the Commission considers them no further.

23. The second are revenues earned on three ancillary services: automated payments, paper billing and statements, and live agent services. The costs of these services are included in the providers’ inmate calling costs. Thus, matching revenues with costs requires that the revenues from these sources also be included. However, it is likely the data the Commission collected do not fully match relevant ancillary revenues with reported inmate calling services costs because the Commission did not collect data on live agent service revenues and because the Commission does not know how providers allocated costs of shared services and revenues to inmate calling services. As an example, consider a payment

account which must be used to purchase inmate calling services, as well as commissary services, tablet access, and other services. If usage fees are charged to set up or to deposit money, then the provider may not have reported these in their ancillary revenues, considering them not to solely be attributable to inmate calling services. However, they may have allocated some or all the costs of the payment system to inmate calling services.

24. Table 6 shows for each provider, and for all providers, inmate calling revenues, automated payment revenues, paper billing and account revenues, the sum of these three revenues, inmate calling costs, and the difference between those summed revenues and inmate calling costs.

**Table 6 – Inmate Calling Services Revenues and Costs
by Provider and for Industry (in \$ millions)**

Provider	ICS Revenues	APF Revenues	PBF Revenues	Total Revenues	Total Costs	Difference
ATN	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
CenturyLink	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Correct	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
CPC	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Crown	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
GTL	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
ICSolutions	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Legacy	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
NCIC	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Prodigy	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Securus	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Industry	1,096,391	116,124	410	1,212,926	697,321	515,605

25. Table 7 shows for each provider, and for all providers, split by prisons and jails, the contract mean of total per paid minute revenues (that is, the mean for each contract of the sum of inmate calling revenues, automated payment revenues, paper billing and account revenues divided by paid minutes), the contract mean of per paid minute costs, the contract mean of per paid minute direct costs. At least three of the direct cost per minute entries are misleading: Legacy and NCIC report zero direct costs, while GTL only reports bad debt as a direct cost, the result being GTL’s direct costs per minute are

[REDACTED]. In actuality, these three providers almost certainly have substantially larger direct costs and hence substantially larger direct costs per minute.

Table 7 – Inmate Calling Services per Minute Revenues and Costs by Provider and for Industry by Jail and Prison (\$)

Provider	Facility Type	Contract Mean Revenues Per Paid Minute	Contract Mean Costs Per Paid Minute	Contract Mean Direct Costs Per Paid Minute
ATN	Jail	[REDACTED]	[REDACTED]	[REDACTED]
CenturyLink	Jail	[REDACTED]	[REDACTED]	[REDACTED]
Correct	Jail	[REDACTED]	[REDACTED]	[REDACTED]
CPC	Jail	[REDACTED]	[REDACTED]	[REDACTED]
Crown	Jail	[REDACTED]	[REDACTED]	[REDACTED]
GTL	Jail	[REDACTED]	[REDACTED]	[REDACTED]
ICSolutions	Jail	[REDACTED]	[REDACTED]	[REDACTED]
Legacy	Jail	[REDACTED]	[REDACTED]	[REDACTED]
NCIC	Jail	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel	Jail	[REDACTED]	[REDACTED]	[REDACTED]
Prodigy	Jail	[REDACTED]	[REDACTED]	[REDACTED]
Securus	Jail	[REDACTED]	[REDACTED]	[REDACTED]
Industry	Jail	0.360	0.084	0.024
CenturyLink	Prison	[REDACTED]	[REDACTED]	[REDACTED]
GTL	Prison	[REDACTED]	[REDACTED]	[REDACTED]
ICSolutions	Prison	[REDACTED]	[REDACTED]	[REDACTED]
Legacy	Prison	[REDACTED]	[REDACTED]	[REDACTED]
NCIC	Prison	[REDACTED]	[REDACTED]	[REDACTED]
Securus	Prison	[REDACTED]	[REDACTED]	[REDACTED]
Industry	Prison	0.148	0.091	0.010

26. Table 8 shows the number and percent of contracts for which various revenue estimates cover total and direct costs. The number of Legacy, NCIC, and GTL contracts that cover direct costs as reported in the third last and last columns are overstated for the reasons just given. The Commission projects, at the proposed rates and assuming ancillary service revenues remain the same, 98% of contracts would recover their total costs as allocated (or 99%, if the 10% discount of GTL’s costs is applied). This

is likely an underestimate since many providers' costs may be overstated, and the full range of ancillary fees that contribute toward recovering inmate calling service costs are not reported.

Table 8 – Number and Percent of Contracts for Which Various Revenue Estimates Cover Total and Direct Costs

Provider	Facility Type	Total Costs Covered by Ancillary Revenues	Total Costs Covered by Projected ICS Revenues	Direct Costs Covered by Projected ICS Revenues	Total Costs Covered by Projected ICS Revenues and Ancillary Revenues	Direct Costs Covered by Projected ICS Revenues and Ancillary Revenues
ATN	Jail	[REDACTED]				
CenturyLink	Jail					
Correct	Jail					
CPC	Jail					
Crown	Jail					
GTL	Jail					
ICSolutions	Jail					
Legacy	Jail					
NCIC	Jail					
Pay Tel	Jail					
Prodigy	Jail					
Securus	Jail					
Industry	Jail					
CenturyLink	Prison	[REDACTED]				
GTL	Prison					
ICSolutions	Prison					
Legacy	Prison					
NCIC	Prison					
Securus	Prison					
Industry	Prison	0 (0%)	123 (94%)	131 (100%)	129 (98%)	131 (100%)

APPENDIX B

Sensitivity Testing: Additional Statistical Analysis of Cost Data

1. The Commission analyzed inmate calling services providers' responses to the Second Mandatory Data Collection to determine whether certain characteristics of inmate calling services contracts could be shown to have a meaningful association with contract costs on a per-minute basis as reported by providers. In this analysis, the Commission considered characteristics such as the average daily population of the facilities covered by the contract, the type of those facilities (prison or jail), and rurality of those facilities. If such an association exists, it might be appropriate to set rates that vary according to the variables the Commission identified.

2. The Commission used a statistical method called Lasso to explore: (a) which variables are good predictors of per-minute contract costs and (b) the likelihood that a given contract is in the top 5% of contracts on a cost per minute basis (hereinafter referred to as an outlier). Lasso identifies predictors of an outcome variable—the logarithm of costs per minute, or outlier status in this case—by trading off goodness of fit against model parsimony. Lasso retains a set of predictors that optimally balance the quality of the prediction against the complexity of the model, as measured by the number of predictors, and is especially useful in situations like this where many variables, and interactions among those variables, could predict an outcome of interest. The Commission found the main predictors of both costs per minute and outlier contracts to be provider identity and the state where the contract's correctional facilities were located. The Commission also found that whether the facility is a prison or jail is a predictor of costs per minute, although weaker than provider identity and state. Finally, the Commission found a wide range of other variables have less or essentially no predictive power.

3. The Commission chose the inmate calling services contract as the unit of observation for its analysis for two reasons. First, providers bid for contracts rather than individual facilities, so the contract is the level at which commercial decisions are made. Second, many contracts cover more than one facility but providers did not report data on those facilities separately, which precludes any analysis at the facility level. For example, this commonly occurred in the filings of both GTL and CenturyLink. For example, GTL's [REDACTED]. Contracts where the separate facilities were not reported would distort any facility-based analysis. The Commission focused on the logarithm of costs as the dependent variable. The contract variables that the Commission considered in its analysis are as follows:

- The identity of the inmate calling services provider;
- The state(s) in which correctional facilities covered by a contract are located;
- The Census division(s) and region(s) in which facilities covered by a contract are located;
- The type of facility covered by the contract (prison or jail);
- An indicator for joint contracts (i.e., contracts for which an inmate calling services provider subcontracts with another inmate calling services provider);
- Contract average daily population;
- Contract average daily population bins (average daily population ≤ 25 , average daily population ≤ 50 , average daily population ≤ 100 , average daily population ≤ 250 , average daily population ≤ 500 , average daily population ≤ 1000 , average daily population ≤ 5000);

- Rurality of the facilities covered by the contract (rural, if all the facilities covered by the contract are located in a census block designated by the Bureau of Census as rural, and urban, if all facilities were located in a census block not designated as rural, or mixed if the contract covered facilities designated as rural and not rural); and
- Various combinations (i.e., multiplicative interactions) among the above variables.

4. Lasso and costs per minute. The Lasso results indicate economically significant differences in costs per minute primarily across providers and states. The provider and state variables retained by Lasso as predictors of cost explain approximately 71% of the variation in costs across contracts. Lasso results also indicate less important differences in costs per minute by facility type (prison or jail), average daily population and average daily population-related variables, and rurality. When retained as predictors by Lasso, these variables explain approximately 1% more of the variation in costs than the state and provider variables alone. The differences in costs measured by provider identity may reflect either systematic differences in costs across providers, or systematic differences in the way costs are calculated and reported by providers. The differences in cost measured by the state variables may reflect statewide differences in costs arising from different regulatory frameworks or other state-specific factors.

5. One concern arising in the analysis is that a group of contracts representing a significant fraction—about 11%—of observations contained insufficient information to ascertain the rurality of facilities included in a contract. As a result, in the Commission’s baseline model that includes all contracts, the Commission interprets the effect of the rurality variables as differences from the contracts for which the Commission did not have rurality information. To ensure that this is a sound approach, the Commission checked using a sample selection model that the factors that may be associated with a contract not having sufficient rurality information are not significantly correlated with costs. The Commission estimated a Heckman sample

selection model where selection is for observations that contain rurality information. The dependent variable and controls in this model were chosen to be the same as the ones in Lasso. The Commission found that the coefficient on the inverse Mills ratio is not significant at reasonable levels of significance (p-value is 0.22), allaying potential concerns about sample selectivity. The Commission also ran its analysis using only the contracts that contain rurality information and found similar Lasso results to its baseline model.

6. The Commission also explored the differences in the costs reported by the top three providers by size using a double selection Lasso model. Double selection Lasso is a method of statistical inference that uses Lasso for the dependent variable and for the variables of interest using a set of common controls; simple Lasso only selects predictors, without the possibility of statistical inference afforded by double selection. The Commission focuses on GTL, ICSolutions, and Securus because these firms' costs explain the bulk of industry costs. These providers supply [REDACTED] of all inmate calling services contracts and cover approximately [REDACTED] of all incarcerated individuals (*see* Table 1). These shares may in fact represent a significant understatement of their industry share because they are often subcontractors. For example, [REDACTED] instead for considering this part of the Commission's analysis considering factors that may impact costs. These three firms are also more suitable for making cross-firm comparisons because they do not subcontract the provision of their inmate calling service contracts to a third party, and because they are the largest three of the five providers that service prisons, covering [REDACTED] of all prison contracts. The results suggest that GTL's costs are—all other things equal—[REDACTED]. These cost differences are statistically significant at confidence levels greater than 99.99%. When the sample is restricted to the contracts with no missing rurality information, GTL's costs are—all other things equal—approximately [REDACTED].

7. The results of the double selection Lasso model also indicate that—all other things equal—the costs of providing inmate calling services are approximately 18% greater in jails than in prisons; this difference is statistically significant at confidence levels greater than 99.99%. For the sample restricted to contracts with complete rurality information, this estimate is approximately 17%, also statistically significant at confidence levels greater than 99.99%.

Table 1 – Inmate Calling Services Providers Ranked by Number of Contracts

Provider	Contracts	Prison Contracts	Facilities	Average Daily Population*
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Industry Total	2,935	131	3,668	2,246,940

*Notes: * Average daily population was reported for only 2,846 contracts.*

8. Lasso and outlier status. The Commission also analyzed the drivers of the likelihood of a contract to be included in the top 5% of costs per minute using logit Lasso. Similar to the linear Lasso employed for cost per minute, logit Lasso selects an optimal set of predictors for the likelihood of a contract to be an outlier in the sense defined above. The results were similar to those for cost per minute: provider and state variables were retained by Lasso as the principal predictors of a contract’s likelihood of being a cost outlier.

APPENDIX C

Estimating a Discount Factor to Remove Market Rents from GTL's Reported Costs

1. GTL reports costs that are high relative to the industry and its nearest peers, Securus and ICSolutions. GTL reports a ratio of total costs to total paid minutes of [REDACTED], more than a third higher than that of the industry, \$0.089. This ratio is more than twice the same ratio for both that of Securus, [REDACTED], and that of ICSolutions, [REDACTED]. Similarly, the mean per paid minute cost of a GTL contract, [REDACTED], is more than a third higher than that of the industry, \$0.91, more than double that of Securus, [REDACTED], and nearly triple that of ICSolutions, [REDACTED]. GTL's costs are nearly three times greater than those of Securus and nearly twice those of ICSolutions when the Commission controls for confounding factors. This is particularly surprising given the economies of scale and scope GTL should be able to take advantage of, and given its success in the industry. Certain aspects of GTL's approach to measuring costs may partially explain why its costs appear so high. One is in how it derived its capital expenses. GTEL Holdings, Inc., and Subsidiaries (hereafter GTLH) included a Consolidated Financial Statement for 2018 as part of GTL's response to the Second Mandatory Data Collection. Based on its analysis of the financial information set forth in that Financial Statement, the Commission finds that a 10% reduction of GTL's inmate calling services costs as reported in that response is necessary to remove market rents incorporated into these costs as explained below.

2. Market forces tend to result in a purchase price for an acquired firm reflecting the market's expectation of the present value of the expected future stream of net cash flows that the purchase would bring. This is especially the case with two or more informed purchasers, and a rational seller. A profit-maximizing firm seeking to acquire another firm would pay no more than its estimate of the present value of the expected future stream of net cash flows the purchase

would bring. The selling party would not be willing to sell at a price less than what it could obtain from another purchaser. Nor would the selling party be willing to sell at a price less its estimate of the present value of the expected future stream of net cash flows it could obtain if it continued with the asset rather than selling it. To the extent the expected net cash flows that determine the purchase price are greater than what would be expected if the purchaser, using the purchased assets, faced effective competition, the purchaser expects to earn market rents. In that case, since the purchase price is capitalized on the purchaser's balance sheet, these market rents are also capitalized. The capitalized value of these market rents is periodically reflected as a depreciation or amortization expense in determining earnings on an income statement. Thus, to the extent there are such market rents in GTLH's capital base, these rents would be reflected in the expenses GTL reported in its Second Mandatory Data Collection response, likely in part accounting for GTL's reported costs appearing so far above those of other providers. For ratemaking purposes, however, any such rents should be excluded when evaluating costs, as they would not be earned in a competitive market, and the Commission's rate-cap setting efforts are designed to approximate competitive market conditions.

3. GTLH's balance sheet reflects the cumulative total of the remaining unamortized value of "goodwill" associated with GTLH's various acquisitions at different points in time. GTLH records goodwill at the time it acquires a new firm as the difference between the purchase price and its estimate of the fair value of acquired tangible and identifiable intangible assets, net of assumed liabilities at the time of acquisition. Thus, goodwill should reflect these market rents—the amount over and above what one could earn from disposing of the underlying assets separately at a fair market rate, rather than together in a whole as part of the ongoing business.

4. Thus, for the purpose of developing a regulated, cost-based rate for inmate calling services, the Commission excludes goodwill-related expenses from GTL's reported expenses to

approximate costs in competitive marketplace rather than the locational monopoly environment within which GTL operates. To identify the share of GTL's reported expenses that represents goodwill-related expenses, the Commission multiplies the share of goodwill in GTLH's assets, as reported in GTLH's consolidated balance sheet, by the share of capital expenses in GTLH's total expenses reported in the consolidated statement of operations and consolidated income (losses) for 2018. GTL is a direct subsidiary of GTLH and, as explained in the Description and Justification accompanying GTL's Second Mandatory Data Collection response, GTL's reported inmate calling services costs are directly derived from the costs reported on the balance sheet for that consolidated entity. GTLH's 2018 balance sheet reports goodwill, net of amortization of [REDACTED]. GTLH's goodwill estimate has been declining since January 1, 2014 as GTLH has been amortizing goodwill over a 10-year period.

5. GTLH's income statement for 2018 shows that [REDACTED] of GTLH's expenses were attributable to capital. To identify the share of capital expenses in GTL's reported expenses, the Commission relies on GTLH's 2018 statement of operating expenses in the consolidated statement of operations and consolidated income, dividing total expenses related to capital by total expenses. Total expenses excluding interest are [REDACTED]. The sum of depreciation and amortization expenses plus interest expenses is [REDACTED]. This is the amount of GTLH's total expenses that can be attributed to capital. Thus, the share of expenses, including interest expenses that can be attributed to capital is [REDACTED]. Staff also performed more detailed calculations to account for income tax treatment of capital expenses and other items on GTLH's financial statements but these other calculations do not yield materially different estimates.

6. The product of these two percentages is 10.9% (= [REDACTED]). The Commission finds that this provides a reasonable approximation of the market rents included in

GTL's reported inmate calling services costs. This estimate is stable over time: the same methodology yields discount factors of 10.9% in 2014; 11.3% in 2015; 11.1% in 2016; and 10.9% in 2017. Although these discount factors are closer to 11% than 10% for each year from 2014 through 2018, in order to be conservative, the Commission uses a discount factor of 10%. The Commission finds that this is an appropriate cost disallowance to remove the impact of market rents on the expenses that GTL reports in its Second Mandatory Data Collection response.

7. The Commission also considered alternate methods, such as estimating the amount of market rents in proportion to historical market valuations, or in proportion to an estimate of GTL's total intangibles, or by some combination of such approaches. However, these other methods require data, such as market valuation and total intangibles, that are either unavailable, unhelpful because of the timing issues, or not well-suited to ratemaking purposes.

APPENDIX D

Analysis of Site Commission Payments

1. The Commission proposes to incorporate a \$0.02 allowance for recovery of correctional facility costs directly related to the provision of inmate calling services. Although the Commission has no direct information on the level of costs incurred by the correctional facilities related to the provision of inmate calling services, the Commission can estimate these costs by comparing the relative per-minute costs for contracts with and without site commissions, as shown in Table 1.

Table 1 – Site Commissions and Per-Minute Costs

Facility Type	Site Commission	Mean	SD	Mean + SD	Number of Contracts		
					Below	Above	Total
Jails	No Commission Paid	0.094	0.085	0.179	277	10	287
	Commission Paid	0.080	0.056	0.137	2,323	194	2,517
	All Jails	0.082	0.060	0.142	2,619	185	2,804
Prisons	No Commission Paid	0.087	0.033	0.120	39	2	41
	Commission Paid	0.083	0.035	0.118	83	7	90
	All Prisons	0.084	0.034	0.118	122	9	131
All Facilities	No Commission Paid	0.093	0.081	0.174	318	10	328
	Commission Paid	0.080	0.056	0.136	2402	205	2,607
	All Facilities	0.082	0.059	0.141	2,741	194	2,935

2. It is reasonable that the higher per-minute costs for contracts without site commissions reflect, at least in part, give-and-take negotiations in which inmate calling services providers agree to incur additional inmate calling services-related costs in exchange for not having to pay site commissions. The lowest third of Table 1 shows a \$0.013 difference in mean costs per minute reported by providers between contracts without site commissions (\$0.093) and contracts with site commissions (\$0.080). The Commission rounds upwards to allow for individual contracts for which this matters more than the average contract, and thereby reaches its \$0.02 per minute allowance for correctional facility costs. Site commissions appear less critical for prisons than jails, with prison contracts without commissions earning on average only

\$0.004 more than per paid minute costs, while for jails this difference is \$0.014. However, again to ensure the Commission does not harm unusual prison contracts, the Commission applies the same \$0.02 markup for both prisons and jails.

3. The interstate rate caps for prisons and jails the Commission proposes include the \$0.02 per minute allowance for reasonable facility costs. Accordingly, the Commission's proposed rate caps would allow inmate calling services providers to recover their direct costs of providing interstate inmate calling services to each correctional facility it serves. The rate caps the Commission proposes would also allow providers to reimburse correctional authorities for the costs they reasonably incur in making their facilities available for inmate calling services, while making reasonable contributions to providers' indirect costs.

[FR Doc. 2020-19954 Filed: 10/22/2020 8:45 am; Publication Date: 10/23/2020]