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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 12–375, FCC 21–60; FRS 35679]

Rates for Interstate Inmate Calling Services

AGENCY: Federal Communications Commission

ACTION: Proposed Rule

SUMMARY: In this Fifth Further Notice of Proposed Rulemaking, the Commission seeks to obtain detailed comment to enable it to make further progress toward ensuring that the rates, charges, and practices for and in connection with interstate and international inmate calling services meet applicable statutory standards. The Commission seeks comment about the provision of functionally equivalent communications services to incarcerated people with hearing and speech disabilities and whether the Commission should expand inmate calling services providers' reporting requirements to include all accessibility-related calls. The Commission also seeks comment on issues regarding the setting permanent interstate and international rate caps for calling services to incarcerated people; potential reforms to the treatment of site commission payments, including whether the Commission should preempt state and local laws imposing legally-mandated site commission payments; on providers' costs to serve different types of facilities; on how it should reform its rules permitting certain types of ancillary service charges in connection with interstate or international calling services and on how it should refine its methodology for setting international rate caps; on whether it should adopt an on-going periodic data collection and, if so, whether it should impose specific recordkeeping on providers; and on the characteristics of the bidding market for inmate calling services contracts and the optimal regulatory regime for inmate calling services in view of those characteristics.

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, 45 L Street NE, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Michael Scott, Disability Rights Office of the Consumer and Governmental Affairs Bureau, at (202) 418-1264 or via email at michael.scott@fcc.gov regarding portions of the Fifth Further Notice of Proposed Rulemaking relating specifically to the provision of communications services to incarcerated people with hearing and speech disabilities and Katherine Morehead, Pricing Policy Division of the Wireline Competition Bureau, at (202) 418-0696 or via email at katherine.morehead@fcc.gov regarding other portions of the Fifth Further Notice of Proposed Rulemaking.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Fifth Further Notice of Proposed Rulemaking, FCC 21–60, released May 24, 2021. 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-21-60A1.pdf.

I. INTRODUCTION

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

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

3. The Commission expects today's actions to have immediate meaningful and positive impacts on the ability of incarcerated people and their loved ones to satisfy our universal, basic need to communicate. Although the Commission uses various terminology throughout this item to refer to the intended beneficiaries of the actions herein, unless context specifically indicates otherwise, these beneficiaries are broadly defined as the people placing and receiving inmate calling services (ICS) calls, whether they are incarcerated people, members of their family, or other loved ones and friends. The Commission also may refer to them, generally, as consumers.

II. BACKGROUND

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

A. Statutory Background

5. The Communications Act of 1934, as amended (Communications Act or Act) divides regulatory authority over interstate, intrastate, and international communications services between the Commission and the states. Section 2(a) of the Act empowers the Commission to regulate "interstate

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

B. History of Commission Proceedings Prior to 2020

8. In 2003, Martha Wright and her fellow petitioners, current and former incarcerated people and their relatives and legal counsel (Wright Petitioners), filed a petition seeking a rulemaking to address "excessive" inmate calling services rates. The petition sought to prohibit exclusive inmate calling services contracts and collect-call-only restrictions in correctional facilities. In 2007, the Wright

Petitioners filed an alternative petition for rulemaking in which they emphasized the urgency of the need for Commission action due to "exorbitant" inmate calling services rates. The Wright Petitioners proposed benchmark rates for interstate long distance inmate calling services calls and reiterated their request that providers offer debit calling as an alternative option to collect calling. The Commission sought and received comment on both petitions.

9. In 2012, the Commission commenced an inmate calling services rulemaking proceeding by releasing a document seeking comment on, among other matters, the proposals in the Wright Petitioners' petitions and whether to establish rate caps for interstate inmate calling services calls.

10. In the *2013 ICS Order*, in light of record evidence that rates for calling services used by incarcerated people greatly exceeded the reasonable costs of providing those services, the Commission adopted interim interstate rate caps of $0.21 per minute for debit and prepaid calls and $0.25 per minute for collect calls. These interim interstate rate caps were first adopted in 2013 and remain in effect as a result of the vacatur, by the D.C. Circuit, of the permanent rate caps adopted in the *2015 ICS Order*. Under the Commission's rules, "Debit Calling" means "a presubscription or comparable service which allows an Inmate, or someone acting on an Inmate's behalf, to fund an account set up [through] a Provider that can be used to pay for Inmate Calling Services calls originated by the Inmate." "Prepaid Calling" means "a presubscription or comparable service in which a Consumer, other than an Inmate, funds an account set up [through] a Provider of Inmate Calling Services. Funds from the account can then be used to pay for Inmate Calling Services, including calls that originate with an Inmate." "Collect Calling" means "an arrangement whereby the called party takes affirmative action clearly indicating that it will pay the charges associated with a call originating from an Inmate Telephone." In the First Mandatory Data Collection, the Commission required all inmate calling services providers to submit data on their underlying costs so that the agency could develop permanent rate caps. In 2014, the Commission sought comment on reforming charges for services ancillary to the provision of inmate calling services and on establishing rate caps for both interstate and intrastate calls. Ancillary service

charges are fees that providers assess on calling services used by incarcerated people that are not included in the per-minute rates assessed for individual calls.

11. The Commission adopted a comprehensive framework for interstate and intrastate inmate calling services in the *2015 ICS Order*, including limits on ancillary service charges and permanent rate caps for interstate and intrastate inmate calling services calls in light of "egregiously high" rates for inmate calling services calls. Because of continued growth in the number and dollar amount of ancillary service charges that inflated the effective price paid for inmate calling services, the Commission limited permissible ancillary service charges to only five types and capped the charges for each: (1) Fees for Single-Call and Related Services—billing arrangements whereby an incarcerated person's collect calls are billed through a third party on a per-call basis, where the called party does not have an account with the inmate calling services provider or does not want to establish an account; (2) Automated Payment Fees—credit card payment, debit card payment, and bill processing fees, including fees for payments made by interactive voice response, web, or kiosk; (3) Third-Party Financial Transaction Fees—the exact fees, with no markup, that providers of calling services used by incarcerated people are charged by third parties to transfer money or process financial transactions to facilitate a consumer's ability to make account payments via a third party; (4) Live Agent Fees—fees associated with the optional use of a live operator to complete inmate calling services transactions; and (5) Paper Bill/Statement Fees—fees associated with providing customers of inmate calling services an optional paper billing statement. The Commission relied on sections 201(b) and 276 of the Act to adopt rate caps for both interstate and intrastate inmate calling services. 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 based on data from the First Mandatory Data Collection and stated that this approach would allow providers to "recover average costs at each and every tier." The Commission did not include site commission payments in its permanent rate caps, finding these payments were not costs reasonably related to the provision of inmate calling services. The Commission also readopted the interim

interstate rate caps it had adopted in 2013, and extended them to intrastate calls, pending the effectiveness of the new rate caps, and sought comment on whether and how to reform rates for international inmate calling services calls. At the same time, the Commission adopted a Second Mandatory Data Collection to identify trends in the market and form the basis for further reform as well as an annual filing obligation requiring providers to report information on their current operations, including their interstate, intrastate, and international rates as well as their ancillary service charges.

12. In the *2016 ICS Reconsideration Order*, the Commission reconsidered its decision to entirely exclude site commission payments from its 2015 permanent rate caps. The Commission increased those permanent rate caps to account for claims that certain correctional facility costs reflected in site commission payments are directly and reasonably related to the provision of inmate calling services. 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.

C. Judicial Actions

13. In January 2014, in response to providers' petitions for review of the *2013 ICS Order*, the D.C. Circuit stayed the application of certain portions of the *2013 ICS Order* but allowed the Commission's interim rate caps to remain in effect. 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 providers' petitions for review of the *2015 ICS Order*, the D.C. Circuit stayed the application of the *2015 ICS Order*'s permanent rate caps and ancillary service charge caps for Single Call Services while the appeal was pending. Single-Call Services mean "billing arrangements whereby an Inmate's collect calls are billed through a third party on a per-call basis, where the called party does not have an account with the Provider of Inmate Calling Services or does not want to establish an account." Later that month, the court stayed the application of the Commission's interim rate caps to intrastate inmate calling services. In November 2016, the D.C. Circuit also stayed the *2016 ICS Reconsideration Order*, pending the outcome of the challenge to the *2015 ICS Order*.

14. In 2017, in *GTL v. FCC*, the D.C. Circuit vacated the permanent rate caps adopted in the *2015 ICS Order*. First, the panel majority held that the Commission lacked the statutory authority to cap intrastate 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 providers [of calling services to incarcerated people] are fairly compensated' for their inter- and intrastate calls," and it "is not a 'general grant of jurisdiction' over intrastate ratemaking." The court noted that it "need not decide the precise parameters of the Commission's authority under § 276."

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

16. Third, the D.C. Circuit held that the Commission's use of industry-wide averages in setting rate caps was arbitrary and capricious because it lacked justification in the record and was not supported by reasoned decision making. Judge Pillard also dissented on this point, noting that the Commission has "wide discretion" under section 201 of the Act to decide "which costs to take into

account and to use industry-wide averages that do not necessarily compensate 'each and every' call." More specifically, the court found the Commission's use of a weighted average per-minute cost to be "patently unreasonable" given that such an approach made calls with above-average costs unprofitable and thus did "not fulfill the mandate of § 276 that 'each and every'" call be fairly compensated. Additionally, the court found that the *2015 ICS Order* "advance[d] an efficiency argument—that the larger providers can become profitable under the rate caps if they operate more efficiently—based on data from the two smallest firms," which "represent[ed] less than one percent of the industry," and that the *Order* did not account for conflicting record data. The court therefore vacated this portion of the *2015 ICS Order.*

17. Finally, the court remanded the ancillary service charge caps. 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 that the Commission "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 so the Commission could determine whether it could segregate ancillary fee caps on interstate calls (which are permissible) and on intrastate calls (which are impermissible). The court also vacated the video visitation annual reporting requirements adopted in the *2015 ICS Order*.

18. In December 2017, after it issued the *GTL v. FCC* opinion, the D.C. Circuit in *Securus v. FCC* ordered the *2016 ICS Reconsideration Order* "summarily vacated insofar as it purports to set rate caps on inmate calling service" because the revised rate caps in that *2016 ICS Reconsideration 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) remain in effect for interstate inmate calling services calls.

D. 2020 Rates and Charges Reform Efforts

19. In February 2020, the Wireline Competition Bureau (Bureau or WCB) issued a document seeking to refresh the record on ancillary service charges in light of the D.C. Circuit's remand in *GTL v. FCC*. This document was published in the Federal Register. In the *Ancillary Services Refresh Public Notice*, the Bureau sought comment on "whether each permitted [inmate calling services] ancillary service charge may be segregated between interstate and intrastate calls and, if so, how." The Bureau also sought comment on any steps the Commission should take to ensure, consistent with the D.C. Circuit's opinion, that providers of interstate inmate calling services do not circumvent or frustrate the Commission's ancillary service charge rules. The Bureau also defined jurisdictionally mixed services as "'[s]ervices that are capable of communications both between intrastate end points and between interstate end points'" and sought comment on, among other issues, how the Commission should proceed if any permitted ancillary service is "jurisdictionally mixed" and cannot be segregated between interstate and intrastate calls.

20. In August 2020, the Commission responded to the court's remands and took action to comprehensively reform inmate calling services rates and charges. First, the Commission addressed the D.C. Circuit's directive that the Commission consider whether ancillary service charges—separate fees that are not included in the per-minute rates assessed for individual inmate calling services calls—can be segregated into interstate and intrastate components for the purpose of excluding the intrastate components from the reach of the Commission's rules. The Commission found that ancillary service charges generally are jurisdictionally mixed and cannot be practicably segregated between the interstate and intrastate jurisdictions except in the limited number of cases where, at the time a charge is imposed and the consumer accepts the charge, the call to which the service is ancillary is clearly an intrastate call. As a result, the Commission concluded that inmate calling services providers are generally prohibited from imposing any ancillary service charges other than those permitted by the

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

21. Second, the Commission proposed 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. Commission staff performed extensive analyses of the data it collected in the Second Mandatory Data Collection as well as the data in the April 1, 2020, annual reports. 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 OMB approval in January 2017, and Federal Register publication occurred on March 1, 2017. Accordingly, on March 1, 2019, inmate calling services providers submitted their responses to the Second Mandatory Data Collection. WCB and the Office of Economics and Analytics (OEA) undertook a comprehensive analysis of the Second Mandatory Data Collection responses, and conducted multiple follow-up discussions with providers to supplement and clarify their responses, in order to conduct the data analysis upon which the proposals in the August 2020 document are based. Based on that analysis, the Commission proposed to lower the interstate rate caps to $0.14 per minute for debit, prepaid, and collect calls from prisons and $0.16 per minute for debit, prepaid, and collect calls from jails. In so doing, the Commission used a methodology that addresses the flaws underlying the Commission's 2015 and 2016 rate caps (which used industry-wide averages to set rate caps) and that is consistent with the mandate in section 276 of the Act that inmate calling services providers be fairly compensated for each and every completed interstate call. The Commission's methodology included a proposed 10% reduction in GTL's costs to account, in part, for seemingly substantially overstated costs. The Commission also proposed to adopt a waiver process that would permit providers to seek waivers of the proposed rate caps on a facility-by-facility or contract basis if the rate caps would prevent a provider from recovering the costs of providing interstate inmate calling services at a facility or facilities covered by a contract. The Commission also proposed "to adopt a rate cap formula for international inmate calling services calls that permits a provider to charge a rate up to

the sum of the inmate calling services provider's per-minute interstate rate cap for that correctional facility plus the amount that the provider must pay its underlying international service provider for that call on a per-minute basis (without a markup)." The Commission explained that this cap "would enable inmate calling services providers to account for widely varying costs," be consistent with the "just and reasonable' standard in section 201(b) of the Act, and comport with the "fair compensation" provision of section 276 of the Act.

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

23. *Intrastate Rate Reform Efforts*. By April 1 of each year, inmate calling services providers file annual reports with the Commission that include rates, ancillary service charges, and site commissions. In an effort to compare interstate inmate calling services rate levels with intrastate rate levels, Commission staff analyzed the intrastate rate data submitted as part of the providers' April 1, 2020, annual reports. Commission staff's review revealed that intrastate rates for debit or prepaid calls exceed interstate rates in 45 states, with 33 states allowing rates that are at least double the Commission's interstate cap and 27 states allowing "first-minute" charges that can be more than 25 times that of the first minute of an interstate call. For example, one provider reported a first-minute intrastate rate of $5.34 and additional per-minute intrastate rates of $1.39 while reporting the per-minute interstate rate of $0.21 for the same correctional facility. Similarly, another provider reported a first-minute intrastate rate of $6.50 and an additional per-minute intrastate rate of $1.25 while reporting the per-minute interstate rate of $0.25 for the same correctional facility. Further, Commission staff identified instances in which a 15-minute intrastate debit or prepaid call costs as much as $24.80—almost seven times more than the maximum $3.15 that an interstate call of the same duration would cost.

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

III. FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING

25. In this document the Commission seeks further evidence and comments from stakeholders to consider additional reforms to inmate calling services rates, services, and practices within its jurisdiction, including permanent rate caps. To that end, the Commission seeks comment on the provision of functionally equivalent communications services to incarcerated people with hearing and speech disabilities, the methodology for establishing permanent rate caps, further reforms to the treatment of site commission payments, including at jails with average daily populations less than 1,000, and revisions to its ancillary service charge rules, among other matters.

A. Disability Access

26. While there are barriers to telecommunications access for incarcerated people, the obstacles are much larger for those who are deaf, hard of hearing, or deafblind, or who have a speech disability. The Commission refers to this class of people generally as incarcerated people with communication disabilities. Because functionally equivalent means of communication with the outside world are often unavailable to incarcerated people with communication disabilities, they are effectively trapped in a "prison within a prison." The ability to make telephone calls is not just important to maintain familial and intimate relationships necessary for successful rehabilitation, but also crucial to allow for communication with legal representatives and medical professionals.

1. Background

27. The Commission first sought comment in 2012 on access to inmate calling services for incarcerated people with communication disabilities. In 2015, the Commission affirmed the obligation

of inmate calling services providers, as common carriers, to provide incarcerated people access to "mandatory" forms of TRS—TTY-based TRS and speech-to-speech relay service (STS). TTY-based TRS allows an individual with a communication disability to communicate by telephone with another party, such as a hearing individual, by using a text telephone (TTY) device to send text to a communications assistant (CA) over a circuit-switched telephone network. To connect a hearing individual as the other party to the call, the CA establishes a separate voice service link with the hearing party and converts the TTY user's text to speech. The CA listens to the hearing party's voice response and converts that speech to text for the TTY user. STS "allows individuals with speech disabilities to communicate with voice telephone users through the use of specially trained CAs who understand the speech patterns of persons with speech disabilities and can repeat the words spoken by that person." The Commission also amended its rules to prohibit inmate calling services providers from levying or collecting any charge for TRS calls. For TTY-to-TTY calls, which require substantially longer time than voice calls, the Commission limited permissible charges to 25% of the applicable per-minute voice rate.

28. The Commission recognized in the *2015 ICS Order* that other, more advanced forms of TRS, many of which use the Internet, had been developed and recognized as eligible for TRS Fund support. For example, video relay service (VRS) makes use of video communications technology to allow individuals whose primary language is American Sign Language (ASL) to communicate in ASL. VRS is a form of TRS that "allows people with hearing and speech disabilities who use sign language to communicate with voice telephone users through video equipment. The video link allows the [communication assistant] to view and interpret the party's signed conversation and relay the conversation back and forth with a voice caller." Internet Protocol Captioned Telephone Service (IP CTS) and its non-Internet counterpart, Captioned Telephone Service (CTS), allow a person who is hard of hearing to participate in direct voice communications while receiving captions of the other party's voice—thereby eliminating much of the delay inherent in more traditional forms of TRS. IP CTS is a form of TRS "that permits an individual who can speak but who has difficulty hearing over the telephone to use a telephone and an Internet Protocol-enabled device via the Internet to simultaneously listen to the other party and read captions of what the other party is saying." And IP Relay enhances traditional text-

based relay by making use of the faster transmission speeds offered by the Internet. Today, among people with communication disabilities, there is far more demand for these forms of TRS than for TTY-based TRS and STS. In its annual TRS usage projections for TRS Fund Year 2020-21, the TRS Fund administrator projected that interstate usage of TTY-based TRS from July 2020 through April 2021 would total 1,361,038 minutes, and interstate usage of STS for the same period would be 141,313 minutes. Taking account of likely intrastate usage, total usage of TTY-based TRS in this period will not exceed 6 million minutes, and total usage of STS will not exceed 500,000 minutes. Although these statistics are for calendar year 2019, an earlier period, TTY-based TRS usage has been declining over time, and STS usage has not increased significantly in recent years. Therefore, the corresponding intrastate usage statistics for TRS Fund Year 2020-21 are likely to be lower (in the case of TTY-based TRS) or not substantially higher (in the case of STS) than these totals. By contrast, projected usage of VRS for the same period is 140,575,160 minutes (about 23 times the usage of TTY-based TRS) and projected usage of IP CTS is 542,340,606 minutes (about 90 times the usage of TTY-based TRS).

29. The Commission also "agree[d] with commenters that limiting all inmates with communication disabilities to one form of TRS, particularly what many view as an outdated form of TRS that relies on TTY usage, may result in communication that is not functionally equivalent to the ability of a hearing individual to communicate by telephone." However, noting that the newer forms of TRS (other than STS) are not "mandatory" for common carriers to provide, the Commission declined to require calling service providers to make them available. Instead, it "strongly encourage[d] correctional facilities to work with [inmate calling services] providers to offer these other forms of TRS," and to "comply with obligations that may exist under other federal laws, including Title II of the ADA**,** which require the provision of services to inmates with disabilities that are as effective as those provided to other inmates." The Commission stated it would "monitor the implementation and access to TRS in correctional institutions and may take additional action if inmates with communications disabilities continue to lack access to functionally equivalent service."

30. In 2015, the Commission sought comment on the accessibility implications of the increasing availability to incarcerated people of video calling and video visitation services. Recognizing that video calling could enable incarcerated sign language users to access and use VRS, as well as communicate directly with other sign language users, the Commission sought comment on the bandwidths and broadband speeds currently used for video visitation, the interoperability of video visitation systems with VRS, the prevalence of VRS access in correctional institutions, and the steps that should be taken to ensure that charges for video calling services offered to deaf incarcerated people are just and reasonable. In 2020, the Commission sought comment more broadly on the needs of incarcerated people with communication disabilities, including whether they have adequate access to TRS, whether additional forms of TRS should be made available by inmate calling services providers, and what the Commission can do to facilitate such access. In response to the 2015 and 2020 ICS documents, the Commission has received information describing the lack of functionally equivalent access to telecommunications services for incarcerated people with communication disabilities. The Commission has also received several individual comments urging it to require more access to communications in correctional facilities and sharing personal experiences with disability access to telecommunications in correctional facilities. As a result of these limitations, the Accessibility Coalition asserts, many incarcerated people with communication disabilities have been unable to stay in contact with their loved ones.

2. Making Modern Forms of TRS Available

31. In light of the comments filed in response to the 2020 ICS document, as well as other evidence, the Commission proposes to amend the Commission's rules to require that inmate calling services providers provide access, wherever feasible, to all forms of TRS that are eligible for TRS Fund support—including (in addition to TTY-based TRS and STS) CTS (a non-Internet-based telephone captioning service) and the three forms of Internet-based TRS: VRS, IP CTS, and IP Relay. In proposing that inmate calling services providers offer access to all forms of TRS, the Commission does not contemplate that providers would necessarily provide TRS directly. They would only need to ensure

that incarcerated people with hearing and speech disabilities can be connected to an existing, authorized provider of the appropriate form of TRS.

32. As the Commission has recognized, "functional equivalence" is an evolving standard for the level of communications access that TRS must provide. "Functional equivalence is, by nature, a continuing goal that requires periodic reassessment. The ever-increasing availability of new services and the development of new technologies continually challenge us to determine what specific services and performance standards are necessary to ensure that TRS is functionally equivalent to voice telephone service." The current record confirms the Commission's initial assessment in the *2015 ICS Order* that TTY-based TRS and STS may be insufficient by themselves to ensure functionally equivalent communication for people with communication disabilities. As explained above, among the general population of people with communication disabilities, TTY-based TRS and STS are currently the *least* frequently used forms of relay service. TTY-based TRS is little used today because it is based on an obsolete technology, which is very slow and cumbersome compared with current Internet technology. Further, given the availability of VRS, limiting sign-language users to TTY-based TRS unnecessarily precludes them from communicating in their primary language. Similarly, for individuals who are hard of hearing, captioned telephone services such as CTS and IP CTS frequently provide far more efficient and effective means of communication than TTY-based TRS. Further, current transitions to modern IP-based networks have adversely affected the quality and utility of TTY-based communication. In the *2016 RTT Order*, the Commission recognized the limitations of TTY technology in an IP environment, and adopted rules to facilitate a transition from TTY technology to real-time text (RTT) as a reliable and interoperable universal text solution over wireless IP-enabled networks for people who are deaf, hard of hearing, deafblind, or have a speech disability.

33. Although the Commission has not mandated the provision of the more advanced forms of TRS by state TRS programs or common carriers, their "non-mandatory" status does not reflect a lower level of need for these forms of TRS. These forms of TRS are "non-mandatory" only in the limited sense that the Commission does not require that they be included in the offerings of Commission-certified

state TRS programs (and, in the event that a state does not have a certified TRS program, does not require common carriers in that state to make their own arrangements to provide such relay services). Instead, Internet-based TRS are made available by TRS providers operating on a nationwide basis and certified by the Commission. However, *support* for *all* forms of TRS is mandatory for all carriers and VoIP service providers, which must support the provision of these services through mandatory contributions to the TRS Fund. As noted above, among the general population of people with communication disabilities, there is far more demand for "non-mandatory" than "mandatory" relay services. Further, the comments submitted in response to the 2015 and 2020 ICS documents persuade us that access to commonly used, widely available relay services such as VRS and IP CTS is equally or more important for incarcerated people with communication disabilities than it is for the general population. Further, incarcerated people—unlike the general population—have no ability to connect to a suitable form of TRS on their own. Therefore, to fulfill the statutory TRS mandate with respect to this subset of people with communication disabilities, it appears to be incumbent on the Commission to take additional steps in this proceeding to ensure that they can access those relay services needed for functionally equivalent communication, regardless of the "mandatory" or "non-mandatory" status of such services as provided in other contexts. The Commission seeks comment on this analysis.

34. *Legal Authority*. As a threshold matter, the Commission seeks comment on the extent of its statutory authority to require inmate calling services providers to provide access to TRS. Section 225 of the Act directs the Commission to "ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to [individuals with communications disabilities] in the United States," and incarcerated people are not excluded from this mandate. To this end, section 225 expressly provides the Commission with authority over common carriers providing intrastate as well as interstate communications services, including the authority to require carriers to provide access to TRS "to the extent possible." Section 225 also expressly requires common carriers to "provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers." Does section 225

authorize the Commission to require that inmate calling services providers provide access to appropriate forms of TRS, as well as to regulate the manner in which such access is provided?

35. As alternative sources of authority, section 255 of the Act requires providers of telecommunications services to ensure that their services are "accessible to and usable by individuals with disabilities 'if readily achievable.'" Similarly, section 716 of the Act requires providers of advanced communications services (including VoIP services) to ensure that such services are accessible to and usable by individuals with disabilities "unless [these requirements] are not achievable," prohibits such providers from installing "network features, functions, or capabilities that impede accessibility or usability," and authorizes the Commission to adopt implementing regulations. The Commission seeks comment on the extent to which, independently of section 225, these provisions authorize the Commission to require inmate calling services providers to provide access to appropriate forms of TRS.

36. As noted earlier in the accompanying Report and Order, correctional authorities "exercise near total control over how incarcerated people are able to communicate with the outside world." In general, the Communications Act does not provide us with authority to regulate the actions of correctional authorities (except to the extent that they also act as communications service providers or other entities subject to its authority). As a practical matter, therefore, its ability to compel an inmate calling services provider to make additional forms of TRS available in a particular facility may depend, for example, on whether the correctional institution agrees—or is required by other applicable law—to make suitable communications devices and network access available to incarcerated people with disabilities, or to permit a service provider to do so. The Commission seeks comment on the extent to which Title II of the ADA or other federal or state laws require such access. Access to telecommunications for incarcerated people with disabilities may also involve issues of constitutional rights. The Commission also stresses that, although the obligations of inmate calling service providers under any rules the Commission adopts may be limited to measures that are "feasible" in the circumstances of a particular correctional facility, the Commission does not propose to preempt other requirements under state or federal law, whether applicable to service providers or correctional

authorities, which may expand the scope of access to TRS that would otherwise be deemed "possible" under section 225.

37. *Benefits and Costs*. To supplement the current record, the Commission seeks further comment on the benefits and costs of requiring that providers of inmate calling services provide access to all authorized forms of TRS. First, to establish a baseline, the Commission seeks additional, specific information on the extent to which VRS, IP Relay, IP CTS, and CTS are currently being made available in correctional facilities. According to comments on the 2020 ICS document, VRS and IP CTS already have been made available in some correctional facilities. ZP Better Together, LLC, a certified VRS provider, notes that a number of state facilities that allow video visitations also have added VRS and point-to-point video communications for those with accessibility needs. Where available, how are Internet-based relay services and CTS provided? Do correctional facilities make arrangements directly with TRS Fund-supported TRS providers to provide these services, or are they accessed through an inmate calling services provider? What kinds of devices are used to access these forms of TRS, and how and by which entities are they provided? Similarly, how is broadband Internet access provided to the facility—by arrangement with an inmate calling services provider or some other entity? Where access to additional forms of TRS has been made available, what operational or other challenges were encountered, and how were they addressed?

38. Second, the Commission seeks additional comment on the benefits of making VRS, IP CTS, IP Relay, and CTS available in correctional facilities where they are *not* currently available. As noted above, the record to date strongly suggests that TTY-based TRS and STS, by themselves, are insufficient to ensure that incarcerated people with communications disabilities have access to functionally equivalent communications. The Commission seeks additional, specific information on how and to what extent each of the other TRS-Fund supported relay services would enhance communications for incarcerated people with communications disabilities. Where available, what specific benefits do these services offer that TTY-based TRS and STS cannot? What communications limitations of TTY-based TRS and STS would be remedied by providing modern relay services? For example, how would access to

additional forms of TRS improve communications access for incarcerated people who are deafblind? Should each of these relay services—VRS, IP CTS, IP Relay, and CTS—be available, or would a combination of some of them collectively provide adequate access to telecommunications for incarcerated people with communication disabilities? Would the provision of modern relay services also benefit the people that incarcerated people with communication disabilities want to call?

39. As part of its assessment of the potential benefits of making other forms of TRS available, the Commission also seeks comment on the extent to which, as a practical matter, TTY-based TRS is actually available and usable in correctional facilities. To what extent is access to TTY-based TRS subject to more restrictions (e.g., physical access, limited hours, dependence on correctional staff) than telephone access? For example, to what extent are TTY devices incorporated into the telephones used by the general incarcerated population, or are TTY devices available only upon request? The Commission also seeks comment on the extent to which the TTYs available at correctional facilities are actually functional and capable of making calls. Are TTYs adequately maintained? Further, in light of the incompatibilities between TTYs and IP networks, the Commission seeks comment on the extent to which correctional facilities have upgraded to IP-enabled voice service. For those that have upgraded, how do correctional facilities ensure that incarcerated people with communication disabilities are able to use TTYs successfully? Do incarcerated people with disabilities wishing to use TTY-based TRS encounter difficulties navigating inmate calling services (e.g., accessing the system to complete steps require to make an outgoing call)? What kinds of difficulties are encountered by individuals eligible to use STS? To what extent could such difficulties in using TTY-based TRS and STS be overcome by providing access to other forms of TRS?

40. Third, what security or other issues do inmate calling services providers and correctional facilities face that could be affected by the provision of VRS, IP CTS, IP Relay, and CTS, and how could such issues be effectively addressed? The Commission has recognized that security is a significant concern for inmate calling services generally. However, service providers and correctional facilities have developed methods for effectively monitoring, recording, and administering inmate calls, and some

commenters have stated that these solutions are applicable or adaptable to the TRS context. Is there evidence that security issues are more challenging for TRS than for inmate calling services in general, and if so, why? What specific security issues are raised by incarcerated people's access to TRS? Are there specific concerns with respect to VRS, given its use of video? How have security concerns been addressed with respect to TTY-based TRS and STS, and in facilities where VRS is currently available? What measures are available to address such security concerns with respect to other forms of TRS?

41. Fourth, what additional costs would be incurred—and by which entities—in providing access to VRS, IP CTS, IP Relay, and CTS, respectively, for incarcerated people? For example, would inmate calling services providers or other entities incur costs associated with upgrading or modifying existing technology configurations, operations, or associated network infrastructure? To what extent would additional broadband services be needed for transmission and completion of TRS calls, what costs would be involved, and which entity would incur such costs—the correctional institution or the inmate calling services provider? To what extent would additional costs be incurred by TRS providers to provide relay services in correctional facilities? Would it be necessary to provide training to correctional facilities personnel regarding modern TRS, and which entity would incur such costs? To what extent would additional costs be incurred, and by which entity, in ensuring that the provision of VRS, IP CTS, IP Relay, and CTS is secure? The Commission seeks detailed estimates of the costs described above and how they would be incurred—including discussion of the actual costs incurred in those instances where access to some of these forms of TRS is already being provided.

42. The Commission also seeks comment on how the various costs attributable to the provision of TRS access should be recovered. Which, if any, of the additional costs that may be incurred by TRS providers should be treated as eligible for TRS Fund support? To the extent that costs are incurred by inmate calling services providers, to what extent should they be recoverable in generally applicable inmate calling services charges that are subject to Commission regulation? As discussed below, the Communications Act restricts the extent to which parties to a TRS call may be charged for TRS access.

43. *Feasibility, TRS Equipment, and Internet Access*. As noted above, its proposed expansion of inmate calling services providers' obligations to provide access to TRS is necessarily conditional on the extent to which associated communications capabilities, such as Internet access and suitable user devices, can be made available in a particular correctional facility. The Commission cannot compel providers to provide access to all forms of TRS in those facilities where it is not feasible to do so. The Commission seeks comment on how to determine feasibility in this context and how potential limitations on the availability of Internet service and user devices could be addressed and overcome. In order to access relay services, certain hardware is necessary. The Commission notes that people who are deafblind may need devices that have refreshable Braille output or text enlarging capabilities. To access TTY-based relay, a TTY is necessary. For CTS, a telephone with a display suitable for captioning, and compatible with the applicable state-program captioning service, is required. For Internet-based forms of TRS, broadband Internet access is required, as well as appropriate devices. Various devices may be used for IP CTS, such as a caption-displaying telephone compatible with an IP CTS provider's service, a personal computer, a laptop, a tablet, or a smartphone. IP Relay, similarly, may be accessed using a personal computer, a laptop, a tablet, or a smartphone. Finally, VRS requires a device with a screen and a video camera, such as a standalone videophone, a personal computer, a laptop, a tablet, or a smartphone. Internet-based services (IP Relay, IP CTS, and VRS) also require certain software that is available from TRS providers. With respect to VRS, the Commission requires that any user devices and associated software distributed by a VRS provider must be interoperable and usable with all VRS providers' services.

44. As a threshold matter, the Commission seeks comment on the extent to which broadband Internet access, as well as the various user devices described above, are currently made available in correctional facilities for use by incarcerated people. To what extent are broadband Internet access services currently available for use by incarcerated people, and could such services be used to support access to Internet-based TRS? For example, the record indicates that remote video visitation, where available, is often provided by an inmate calling service provider. Where an inmate calling service provider or affiliated company is providing video visitation using broadband Internet access, is it feasible

for the provider to also use such broadband service to provide access to VRS or other forms of Internet-based TRS? To what extent are off-the-shelf user devices suitable for Internet access, such as personal computers, laptops, tablets, smartphones, or specialized videophones, available to incarcerated people? For VRS, to what extent are video-capable versions of such devices available? To what extent do correctional facilities place restrictions on people with disabilities' access to the Internet and Internet-capable devices (e.g., physical access, limited hours, dependence on correctional staff) that are not imposed on the use of telephones by hearing people? The Commission also seeks comment on any security issues specific to certain types of equipment that may be used to access TRS. Are such security issues more easily or effectively addressed with certain kinds of video-capable user devices than with others?

45. To what extent is the provision of broadband Internet access or TRS-compatible user devices (other than TTYs) by a correctional facility required by the ADA or other laws? Federal prisons and other facilities receiving federal funds are subject to section 504 of the Rehabilitation Act of 1973 and implementing regulations. State and local correctional facilities are subject to Title II of the ADA, 42 U.S.C. 12131 *et seq.*, and implementing regulations adopted by the Department of Justice. For example, public entities must "furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." Such "auxiliary aids and services" include "qualified interpreters on-site or through video remote interpreting (VRI) services; . . . real-time computer-aided transcription services; . . . telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing." The Commission invites parties to comment on the extent to which this or other applicable ADA regulations mandate the

availability to incarcerated people of appropriate equipment for accessing TRS. To the extent that such access services and devices are *not* otherwise available, should the Commission require inmate calling services providers to provide Internet access service or user devices? The Commission also notes that TRS providers frequently distribute suitable user devices to TRS users, although its rules do not permit recovery of device-related costs from the TRS Fund. Should the Commission make TRS Fund support available for the provision of these items by a certified TRS provider to an incarcerated person, as an exception to the cost-recovery prohibition? The Commission seeks comment on the merits, costs, and benefits of these alternatives, and whether the Commission has statutory authority to adopt each of them.

46. To what extent do these feasibility issues implicate the agreements between calling service providers and correctional facilities, and how should the Commission treat such contractual issues in defining providers' obligations? For example, an inmate calling services provider may claim that access to a particular form of TRS is infeasible at a particular facility because the correctional authority has withheld permission for incarcerated people to use that form of TRS—or has withheld permission for the inmate calling services provider or TRS provider to provide Internet access or suitable user devices. How should the Commission evaluate such possible defenses? For example, should the Commission require the inmate calling services provider to provide written evidence that the necessary permissions were withheld? Should the Commission require providers to make a good faith effort to secure necessary permissions, and how should a sufficient effort be defined? Should the Commission require the provider to show that it assured the correctional authority of its willingness to abide by reasonable use limitations and security restrictions? If there is sufficient evidence of infeasibility of access to some form of TRS due to the policy of the correctional authority, are there any steps that the Commission could take to encourage the facility to alter its practice? The Commission invites commenters to discuss the Commission's legal authority for any measures advocated in this regard.

3. Application of Existing TRS Rules

47. The Commission seeks comment on whether any modifications of its existing TRS rules may be appropriate in conjunction with expanded TRS access for incarcerated people. In general, the rules governing Internet-based forms of TRS are more complex than those applicable to TTY-based TRS. For example, to prevent waste, fraud, and abuse and allow the collection of data on TRS usage, its rules require that people using VRS, IP Relay, or IP CTS be registered with a TRS provider and that such providers submit information on users registered for VRS and IP CTS to a central User Registration Database (User Database). The VRS provider must "obtain a written certification from the individual responsible for the videophone, attesting that the individual understands the functions of the videophone[,] that the cost of VRS calls made on the videophone is financed by the federally regulated Interstate TRS Fund," and that the institution "will make reasonable efforts to ensure that only persons with a hearing or speech disability are permitted to use the phone for VRS." In addition, the VRS provider must collect and submit to the User Database the following information: (1) the VRS provider's name; (2) the telephone number assigned to the videophone; (3) the name and physical address of the institution (and the Registered Location of the phone, if different from the physical address); (4) the type of location where the videophone is placed within the institution; (5) the date of initiation of service to the videophone; (6) the name of the individual responsible for the videophone, confirmation that the provider has obtained the certification described above, and the date the certification was obtained; and (7) whether the device is assigned to a hearing individual who knows sign language. VRS providers, however, may register videophones maintained by businesses, organizations, government agencies, or other entities and designated for use in private or restricted areas as "enterprise videophones." In lieu of individual registration, should the Commission also permit such enterprise device registration for equipment used by incarcerated people to access IP Relay and IP CTS? Should the information and documents collected by TRS providers for purposes of such enterprise or individual user registration be the same, or different from, the information and documents currently required by its rules? Are additional safeguards necessary for the provision of certain relay services in the inmate calling services context, to prevent waste, fraud, and abuse? What steps should be taken to ensure that

compliance with user registration rules or other TRS rules does not create a significant delay for telecommunication access for incarcerated people with disabilities?

48. Should incarcerated people be able to select the TRS provider they wish to use, or should the TRS provider be selected by the inmate calling services provider serving a facility (or by the facility itself)? Should a TRS provider be required to identify inmate calling services calls in their claims for TRS Fund compensation, or to submit additional or different information to the TRS Fund administrator regarding TRS calls involving incarcerated people? To assist the Commission in evaluating the level of service incarcerated people are receiving, and the effectiveness and efficiency of such service, should the Commission require TRS providers to report annually on the provision of TRS to incarcerated people? What kinds of information should be included in such reports—e.g., identification of the correctional facilities served, the number and type of devices provided at each facility, and the number of minutes handled per facility?

49. Are any changes in the Commission's TRS confidentiality rules necessary to address the security concerns of correctional facilities? For example, section 64.604(a) states:

> Except as authorized by section 705 of the Communications Act, 47 U.S.C. 605, CAs [(communications assistants)] are prohibited from disclosing the content of any relayed conversation regardless of content, and with a limited exception for STS CAs, from keeping records of the content of any conversation beyond the duration of a call, even if to do so would be inconsistent with state or local law.

This rule, which the Commission has recognized as fundamental to ensuring that TRS is "functionally equivalent" to voice communications and maintaining the trust of TRS users in the TRS program, applies to TRS providers and their CAs but does not expressly impose obligations on other parties, such as an inmate calling services provider that does not employ CAs and is only providing a communications link to an authorized TRS provider. The Commission tentatively concludes that the existing rule does not prohibit an inmate calling services provider or correctional facility from monitoring the transmissions

sent and received between an incarcerated person and the TRS provider's CA, in the same way as they monitor other inmate calls, provided that the TRS provider and CA are not directly facilitating such monitoring. The Commission seeks comment on this tentative conclusion. The Commission also seeks comment on whether such monitoring that does not require affirmative steps by the TRS provider or CA is sufficient to ensure that a facility's security needs are protected as effectively as for other inmate calls. The Commission notes that, by monitoring transmissions to and from the incarcerated user's device, without involving the TRS provider, the inmate calling services provider or facility would have access to the entire content of the incarcerated person's conversation with the other party to the call. That is, the inmate calling services provider or facility could monitor the incarcerated person's communication directly, and could monitor the speech of the other party as conveyed in text or ASL video by the TRS CA. To the extent that monitoring permitted by the current rule is insufficient to protect institutional security, the Commission seeks comment on whether there are ways to narrowly address such security needs in order to avoid eroding the legitimate privacy interests of TRS users.

50. The Commission seeks comment on whether any other modifications to its TRS rules are necessary to address the special circumstances that characterize inmate calling services. For example, what, if any, changes are needed in the TRS rules governing the types of calls TRS providers must handle (47 CFR 64.604(a)(3)), the TRS Numbering Directory (47 CFR 64.613, 64.615(a)(1)-(2)), change of default TRS provider (47 CFR 64.630-64.636), and TRS customer proprietary network information (47 CFR 64.5101-64.5111)? In the inmate calling services context, should any of the rules under part 64, subpart F, that currently apply to TRS providers be applicable to inmate calling services providers as well—and if so, which rules?

4. Charges for TRS Calls

51. *Prohibition of Provider Charges for TTY-Based TRS Calls*. In 2015, the Commission amended its rules to state that "No [inmate calling services] Provider shall levy or collect any charge or fee for TRS-to-voice or voice-to-TTY calls." Notwithstanding this rule, some commenters allege that some calling service providers are imposing fees on the receiving end of TTY-based TRS calls placed by

incarcerated people. In addition, at least one commenter suggests that incarcerated people with disabilities may be subject to charges for using or accessing the TTY or telephone devices needed to make TRS calls. To prevent circumvention of the rule, advocates and VRS providers have requested that the Commission clarify that it does not allow either party to be charged for a TRS call, or for access to equipment when used to place or receive a TRS call. The Commission seeks additional comment and information on whether, and to what extent, such practices have continued after section 64.6040(b) of the rules became effective, and by which entities—inmate calling services providers or correctional institutions—such charges are being imposed.

52. The Commission notes that, by its terms, section 64.6040(b) prohibits *any* charge for TRS calling, regardless of the person on whom such a charge might be assessed, or whether such a charge is formally applied to the service itself or to a device used to access the service. Prior to the adoption of section 64.6040, other provisions of the rules might have been read to suggest that inmate calling services providers were free to charge the called party for TRS calls. Specifically, in the payphone provisions of the rules, adopted more than 20 years ago, section 64.1330(b) states that "[e]ach state must ensure that access to dialtone, emergency calls, and telecommunications relay service calls for the hearing disabled is available from all payphones at no charge to the *caller*." However, the Commission sees no basis for inferring that the Commission, in adopting section 64.6040, intended an unstated qualification that similarly limits its application to the assessment of charges on the initiator of a call. In any event, the proposed amendment would put to rest any conceivable doubt that inmate calling services providers are prohibited from charging other parties to a TRS call. Nonetheless, to more effectively deter the charging practices described above, the Commission proposes to amend the rule to expressly prohibit inmate calling services providers from levying or collecting any charge on *any* party to a TRS call subject to this rule, regardless of whether the party is the caller or the recipient and whether the party is an incarcerated person or is communicating with such individual, and regardless of whether the charge is formally assessed on the service itself or on the use of a device needed to make the call. The Commission seeks comment on this proposal, including its costs and benefits. The Commission also

seeks comment on its legal authority in this regard, including section 225 of the Act, which the Commission relied upon in the *2013 ICS Order*, as well as the interplay with section 276 of the Act.

53. *Provider Charges for Other Forms of TRS*. In light of its proposal above to expand the kinds of relay services that incarcerated people are able to access, the Commission also proposes to amend section 64.6040 to prohibit inmate calling service providers from charging for other forms of TRS to which an inmate calling services provider provides access. The Commission seeks comment on the costs, benefits, and statutory authority for this proposal.

54. To the extent that incarcerated people currently have access to forms of TRS not currently covered by the ban on TRS charges, the Commission seeks comment on the extent to which callers or called parties are currently being charged for such TRS calls, and whether such charges are assessed by the inmate calling services provider, the correctional facility, the TRS provider, or another entity. Are the same charges assessed for all types of TRS calls allowed at a given correctional facility, or only some? If certain charges are only being assessed for some types of TRS, which types are being assessed? If charges are imposed on either party for relay calls, what justification, if any, is proffered for imposing such charges? Are incarcerated people with communication disabilities being charged to access equipment needed to make relay calls? If so, how are they being charged (e.g., per use, or per minute), and how much are they being charged? Are there any comparable charges for the use of telephones in correctional facilities? Which entities impose charges for the use of relay equipment in correctional facilities, and what justification, if any, is proffered for such charges? Where charges are *not* imposed for calls involving such additional forms of TRS, how are costs attributable to such calls currently being recovered, and how should they be recovered?

55. To the extent that the Commission has discretion to permit calling service providers to assess charges for non-TTY TRS, to what extent should such charges be allowed? Should the Commission allow charges for some forms of TRS and not others? For example, while VRS cannot be used for video communication unless the user knows sign language, CTS and IP CTS have no similar inherent barriers to use—and consequently are more susceptible to abuse by ineligible users. Could

requiring the free provision of CTS and IP CTS create an undesirable incentive for ineligible incarcerated people to place calls using such relay services, simply to avoid the applicable charges for using non-TRS inmate calling services? Are correctional facilities able to effectively mitigate such risks? Should any allowed charges be calibrated, like TTY-to-TTY calls, to take into account that VRS, IP Relay, IP CTS, or CTS calls, like TTY-to-TTY calls, are of longer duration than "functionally equivalent" calls using "voice communications services"? On this point, the Commission invites commenters to submit evidence regarding the relative duration of various kinds of TRS calls and voice calls.

56. *Correctional Institution Charges*. Regarding charges for the use of relay services (whether TTY-based or modern) or related user devices or access services that are imposed directly by a correctional facility, rather than by an inmate calling services provider, the Commission seeks comment on whether the Commission has authority to regulate or prohibit such charges, either directly or indirectly, the source of any such authority, and how any such rules should be structured. The Commission also seeks comment on the legality of such charges under other laws, including other titles of the ADA.

5. Direct Video Communication by Incarcerated People with Communication Disabilities

57. *Availability of Direct Communication*. Many incarcerated people with communication disabilities have family and loved ones who also have communication disabilities. Communication with these people requires direct communication without TRS. This is a particular concern for incarcerated persons who are deaf and whose primary language is ASL. For these individuals, direct communication in their primary language requires direct video communication. To facilitate direct communication among ASL users, the Commission has long required VRS providers to handle point-to-point calls between a registered VRS user and another ASL user with an assigned VRS telephone number. Further, the record indicates that the number of correctional facilities that allow some form of direct video communication by incarcerated people has grown in recent years.

58. Because of the key role of video communications for ASL users, because VRS providers are already set up to provide direct video service in conjunction with VRS, and because the equipment and Internet connection needed for VRS is also sufficient for direct video, the Commission proposes to require that, wherever inmate calling services providers provide access to VRS, they also provide access to direct video service, through a VRS provider or by another effective method. The Commission seeks comment on this proposal, including its costs and benefits and relevant sources of statutory authority. The Commission invites commenters to provide additional information on specific benefits that direct video communication provides, beyond those offered by VRS. In terms of benefits, costs, and feasibility, what are the differences between video visitations, which some facilities currently allow, and direct video communications using VRS provider networks? Is one form of direct video communication generally more available than the other? What are the security concerns, and related costs, with providing direct video communication in ASL using broadband Internet in correctional facilities? How can such concerns be effectively addressed to increase the availability of direct video communication to incarcerated people with disabilities?

59. With respect to direct *text-based* communication for incarcerated people with disabilities, the record is insufficient for us to formulate a proposed rule. What kinds of direct text-based communication services—such as SMS messaging and real-time text—are currently available to incarcerated people with disabilities, and to what extent? Do direct text communications raise security concerns, and if so, how can they be addressed to enable increased availability of text communication to incarcerated people with communication disabilities?

60. *Charges for Direct Communication*. The Commission's current rules limit the rates charged by inmate calling services providers for TTY-to-TTY calls to no more than 25% of the rates they charge for traditional inmate calling services. The Commission invites comment on whether and how to expand the scope of this rule to include charges for other types of direct communications.

61. First, the Commission seeks additional information on current charging practices for other types of direct communications by incarcerated people with communication disabilities. With

respect to direct video communication that is currently available in correctional facilities, are incarcerated people being charged for such calls, and if so, how much? Are different charges currently applied to point-to-point videophone calls by sign-language-using individuals with communication disabilities than for video visitation by other incarcerated people? How do charges for direct video communication and video visitation compare with charges for voice telephone calls? Regarding direct text services for incarcerated people with communication disabilities, are there charges for such services? If so, what are the rates? Are there differences in how much incarcerated people with communication disabilities are charged to engage in direct text communication and how much other incarcerated people are charged for similar services?

62. The Commission invites comment on whether the Commission should impose limits on the charges that may be assessed for direct video communications by ASL users, as well as the costs and benefits and its statutory authority for regulating such charges. Are such limits justified by fairness and nondiscrimination considerations, such as those underlying the TTY-pricing rule? For example, should the Commission require that an inmate calling services provider's charges for direct video communication by an incarcerated ASL user should be no greater than the provider's charges for a voice call of equivalent duration? Are similar limits needed and appropriate for direct text communication by people with communication disabilities?

6. Accessibility-Related Reporting

63. As a part of the Commission's Annual Reporting and Certification Requirement, inmate calling services providers are required to submit certain information related to accessibility: (1) "[t]he number of TTY-based Inmate Calling Services calls provided per facility during the reporting period"; (2) "[t]he number of dropped calls the . . . provider experienced with TTY-based calls"; and (3) "[t]he number of complaints that the . . . provider received related to[,] e.g., dropped calls, [or] poor call quality[,] and the number of incidents of each by TTY and TRS users." Inmate calling services providers must submit annual reporting and certifications forms to the Commission by April 1 of each year. Required information to submit include international, interstate, and intrastate inmate calling services

rates and ancillary service charges. In the *2015 ICS Order*, the Commission concluded that tracking TTY-based calls would not be overly burdensome because: (1) TTY-based TRS calls make up only a small portion of inmate calling services calls; and (2) the need for specialized equipment or calling a designated TRS number (such as 711), or both, makes tracking easier. The Commission also found the burdens of reporting TTY-based calls to be far outweighed by the benefits of greater transparency and heightened accountability on the part of inmate calling services providers. In the same order, the Commission established a safe harbor, allowing inmate calling services providers to avoid TRS-related reporting obligations if: (1) the provider operates in a facility that allows additional forms of TRS beyond those already mandated by the Commission, or (2) the provider has not received any complaints related to TRS calls. Although the TRS-related reporting may not be required under this safe harbor, the provider would need to provide a certification from an officer of the company stating which prong(s) of the safe harbor the provider has met. This safe harbor was adopted to help encourage correctional facilities to adopt more modern forms of TRS. Accessibility Coalition requests that the Commission expand the reporting requirement to foster accountability on the part of inmate calling services providers, and to eliminate the safe harbor. Specifically, they ask to include the functionality and status of accessible equipment in correctional facilities in the reporting requirements. At this time, the Commission does not propose a rule on reporting of accessible equipment by inmate calling services providers, pending further information and analysis regarding the current availability of such equipment and the role of inmate calling services providers in providing such equipment. Generally, GTL is opposed to additional data collection on the basis it would create an administrative burden.

64. Given its proposal to expand the types of TRS that inmate calling services providers are required to provide, the Commission seeks comment on whether to expand the inmate calling services providers' reporting requirements to include all other accessibility-related calls. What are the benefits or burdens, including on small entities, of imposing these additional requirements? Has its safe harbor, in fact, driven more correctional facilities to adopt forms of TRS other than TTY-based TRS and STS? If the reporting requirements are expanded to include other types of TRS, should the safe harbor be modified so that inmate calling services providers can avoid TRS-related reporting obligations only if

they have not received complaints related to TRS calls? Alternatively, should the Commission eliminate the safe harbor and require all inmate calling services providers to report the required information?

B. Permanently Capping Provider- and Facility-Related Rate Components

1. Overall Methodology

65. The Commission seeks comment on what methodology the Commission should use to permanently cap provider-related rate components for interstate and international inmate calling services. In the Report and Order the Commission adopts today, the Commission uses data from the Second Mandatory Data Collection to establish zones of reasonableness from which the Commission selects separate interim provider-related rate caps for prisons and larger jails. Although those data are more than sufficient to support the interim rate caps, the Commission recognizes that more disaggregated, consistent and uniformly reported data will be needed for us to set permanent rate caps for interstate and international inmate calling services that more accurately reflect the cost of providing inmate calling services, including to jails with average daily populations less than 1,000. Accordingly, the Commission establishes another Mandatory Data Collection to enable us to obtain those data.

66. The Commission seeks comment on how the Commission should use the data from the Mandatory Data Collection in establishing permanent provider-related rate caps for interstate and international inmate calling services. Should the Commission use those data to calculate industry-wide mean contract costs per paid minute of use, and the associated standard deviation, in the provision of calling services to incarcerated persons? Should the Commission, instead, analyze costs at the facility level, which seems necessary to capture potential differences in costs associated with smaller facilities? If so, how would the Commission do that if providers keep their costs only on a contract basis? Does that fact suggest that, for any particular contract, so long as the permanent rate caps enable the provider to recover the contract costs for interstate and international services without regard to the different facilities comprising the contract, the caps would be consistent with the fair compensation provision of section 276 of the Act? Or should the Commission use an alternative methodology and, if so, what methodology should the Commission use?

67. The Commission also seeks comment on whether the Commission should employ a zone of reasonableness approach in establishing permanent rate caps. If so, should the Commission establish separate zones of reasonableness for prisons, larger jails, and jails with average daily populations less than 1,000? Or should the Commission use different groupings of facilities? Precisely how should the Commission establish the upper and lower bounds of the zones of reasonableness for each group of facilities? Should the Commission follow the approach set forth in the Appendices to the Report and Order in developing the database that the Commission use to set any upper and lower bounds? If not, what alternative approach should the Commission take? What other steps, if any, should the Commission take to make sure that any upper and lower bounds reflect the costs of providing interstate and international inmate calling services? And what criteria should the Commission use in picking interstate rate caps from within those zones? How should the Commission determine permanent rate caps if the Commission does not use a zone of reasonableness approach? Should the Commission set the caps at its best estimates of industry-wide mean costs per paid minute of use plus one standard deviation or should the Commission use another methodology? And, if so, what methodology should the Commission use?

68. The Commission's rules preclude providers from imposing on consumers of interstate inmate calling services any charges other than per-minute usage charges and the permissible ancillary services fees. The Commission invites comment on whether the Commission should consider alternative rate structures, such as one under which an incarcerated person would have a specified—or unlimited—number of monthly minutes of use for a predetermined monthly charge. Should providers be permitted to offer different options of rate structures as long as one of their options would ensure that all consumers of inmate calling services have the ability to choose a plan subject to the Commission's prescribed rate caps? Would such an optional rate structure benefit incarcerated persons and their families? For example, incarcerated people and their families enjoy free telephone calling in New York City and San Francisco for calls made from jails. Or would a different alternative rate structure be preferable? Securus requests that the Commission adopt a waiver from per minute requirements to allow ICS providers to establish alternative rate-based pilot programs to allow families the option of

utilizing a flat rate plan. Securus also requests that the Commission adopt a presumption in favor of granting such waiver requests upon a showing that the alternative rate plan would result in a lower effective rate than the interim provider-related per minute rate caps. The Commission seeks comment on whether the Commission should adopt such a waiver process, including the presumption Securus seeks. What incremental costs, if any, would providers incur to develop an alternative rate structure and implement it on an ongoing basis? The Commission asks interested parties to address the relative merits of different rate structures and their impact on calling services consumers and providers.

2. Provision of Service to Jails with Average Daily Populations Below 1,000

69. In 2020, the Commission sought comment on its proposal to adopt a single interstate rate cap for prisons and a single interstate rate cap for jails. The Commission asked, however, whether there are differences in providers' costs to serve different types of facilities, and, if so, how it should take those differences into account in setting interstate rate caps for different types of facilities. The Commission now seeks to expand the record on these matters.

70. The available data do not make clear how, if at all, jail size affects the costs providers incur in providing inmate calling services. Securus asserts that jail size is a "critical cost factor" in providing calling services to incarcerated people, identifying jails with average daily populations less than 1,000 as being the most costly to serve. The National Sheriffs' Association, for example, contends that there are a number of factors that result in jails with fewer incarcerated people having higher costs per minute, noting that jails are typically operated by local jurisdictions that are under the authority of the county government or an elected sheriff, and that jails lack the economies of scope and scale of federal or state prisons. The National Sheriffs' Association's 2015 survey shows, in general, that jails with larger average daily populations have lower per-minute costs than jails with average daily populations less than 1,000, but even if this is the case, would the fact that the jails themselves may have higher costs make providers' costs to provide service at jails with fewer incarcerated people any higher? Pay Tel's outside consultant argues that "some locations, particularly small jails, have characteristics that make them more costly for an [inmate calling services] provider to serve, and that

the higher level of costs precludes any ability to pay site commissions." Is this the case for other providers as well? High turnover rates may play a role, as Pay Tel explains, because "the cost of establishing service or 'selling' to a new customer is greater than the cost of continuing to service or maintain an existing customer." But to the extent providers are able to recover the cost of account setup and funding through ancillary service fees, how does setting up new accounts for newly incarcerated people differ in any material way from funding existing accounts?

71. The Commission seeks comment on the particular factors that result in higher costs of serving jails having average daily populations below 1,000 and ask commenters to address how the Commission should take those factors into account in setting permanent interstate rate caps using data from the upcoming Mandatory Data Collection. Are there characteristics that are consistent across all jails with average daily populations less than 1,000 and that contribute to making those facilities more costly to serve on a per-minute basis? What factors affect providers' costs of serving these jails? Are the characteristics that make it more costly to serve these jails related to size, geography, state or local law, or other factors? Does the length of the average incarcerated person's stay influence providers' costs of serving jails having average daily populations below 1,000 and, if so, how? What one-time costs, if any, do providers incur when first offering service to a newly incarcerated person that differ from the costs of the services permitted under its ancillary services rules? What is the effect of turnover of incarcerated people in jails with average daily populations less than 1,000 on a provider's cost to serve that jail? Finally, are there other cost categories, such as account setup, customer service, or refund processing, that the Commission should consider in determining appropriate rate caps for jails having average daily populations below 1,000? Commenters are asked to share any additional information that may be relevant for the Commission to consider in establishing new permanent rate caps for jails with average daily populations less than 1,000 vis-à-vis larger jails.

72. The Commission also seeks comment on how its methodology for setting permanent interstate rate caps can quantify the factors that make jails with average daily populations less than 1,000 more costly to serve than prisons and larger jails. What steps should the Commission take to

distinguish the direct costs of serving these jails from the direct costs of serving prisons and larger jails? How can the Commission ensure that jails with average daily populations less than 1,000 are allocated an appropriate proportion of providers' common costs? Should the Commission use a combination of allocation methods to apportion those costs among facilities and, if so, what allocation methods should the Commission use?

73. Finally, the Commission seeks comment whether the current definition of the average daily population sufficiently addresses fluctuations in jail populations and variations in how correctional facilities determine average daily populations. Currently, its rules define the average daily population as "the sum of all inmates in a facility for each day of the preceding calendar year, divided by the number of days in the year." However, the record suggests that average daily populations may fluctuate, and "[v]arious states and localities track these numbers differently." Should the Commission modify the definition and if so, how? What other steps, if any, should the Commission take to ensure that average daily populations are determined on a consistent basis for all correctional facilities?

3. Correctional Facility Costs

74. In the Report and Order the Commission adopts today, the Commission reforms, on an interim basis, the current treatment of site commission payments related to inmate calling services for prisons and larger jails based on the record before us. The Commission uses the term "larger jails" to refer to facilities with average daily populations greater than or equal to 1,000. The Commission permits recovery of payments or portions of site commission payments mandated by federal, state or local law or regulation (legally mandated) and those resulting from contractual obligations imposed by correctional facilities or agencies (contractually prescribed). For legally mandated site commission payments, the Commission permits providers to pass through these payments to consumers, without any markup, up to a maximum total interstate rate of $0.21 per minute. For contractually prescribed payments, the Commission adopts a new interim rate component of up to $0.02 per minute for both prisons and larger jails. The Commission refrains from including jails with average daily populations less than 1,000 from today's interim rate cap reforms because the Commission finds the record information

insufficient to reasonably consider such reforms, including for discretionary site commission payments, at this time. The Commission seeks comment to supplement the record to account for this fact, specifically with respect to facility costs reflected in site commission payments. The Commission seeks broad comment on potential site commission reforms with respect to all correctional facilities. ICSolutions requests that the Commission require in-kind site commission payments to be explicitly stated on consumer bills. The Commission seeks comment on this request. Would such a requirement be administratively difficult and confusing to consumers? The Commission also seeks more targeted data and detailed information that would better enable us to undertake further reforms in how providers recover site commission payments going forward, especially for jails with average daily populations less than 1,000, if permitted at all, that are legitimately related to, and necessary for, the provision of inmate calling services. Although in some places the Commission uses the term "smaller jails" to refer to facilities with average daily populations less than 1,000, that usage is not meant to imply that such jails are small in any absolute sense.

75. In *GTL v. FCC*, the court left it to the Commission to determine "*which portions* of site commissions *might be directly related to the provision of ICS and therefore legitimate*, and which are not." As the Commission explained in 2020, site commissions have two components: compensating facilities for the costs they incur in providing inmate calling services and compensating the facilities for the transfer of market power over inmate calling services from the facilities to the providers. Prior to the *2016 ICS Reconsideration Order*, the Commission viewed these payments solely as an apportionment of profits between providers and correctional facility owners even though it recognized some portion of site commission payments may be attributable to legitimate facility costs. In the *2016 ICS Reconsideration Order*, the Commission recognized that "some facilities likely incur costs that are directly related to the provision of [inmate calling services]," and determined that "it is reasonable for those facilities to expect [inmate calling services] providers to compensate them for those costs . . . [a]s a legitimate cost of [inmate calling services]." But, as the Public Interest Parties' expert explains, it is "difficult to disentangle which part of the site commission payment goes towards reasonable costs and which portion is due to the transfer of market power." Even the National Sheriffs' Association

acknowledges that some portion of site commission payments are "locational rents," while other parts may be attributable to other factors. How and where should the Commission draw the line between legitimate and illegitimate portions of site commissions? The Commission seeks comment on the specific costs that the Commission should consider to be legitimate for recovery through site commission allowances as the Commission moves from the interim steps the Commission takes today to a more permanent policy. Specifically, what costs are directly related to, and necessary for, the provision of inmate calling services? What costs are too attenuated or indirect to be directly related to the provision of inmate calling services? Commenters should be as specific as possible in describing specific costs or cost categories. If commenters identify categories of costs that they believe are directly related to the provision of inmate calling services, those commenters should identify with specificity what those costs cover and why they would not be incurred but for the fact that inmate calling services are provided at that facility.

76. *Methodology to Estimate Costs*. The Commission also seeks comment on other methodologies to estimate correctional facility costs directly related to the provision of inmate calling services and whether and how the Commission should consider accounting for legitimate facility costs related to inmate calling in the future. Should the Commission continue to permit recovery through an additive per-minute rate component like the interim $0.02 rate component the Commission adopts today for larger jails and prisons? Should the Commission consider some other method of recovery such as a flat fee per billing period or on a per-call basis? The Commission seeks comment, generally, on any other factors that the Commission should consider in determining legitimate facility-related costs to enable inmate calling services and whether those costs are reflected in site commission payments or recovered by facilities in some other way, and whether it is appropriate to even permit providers to recover those costs from end users of inmate calling services. If they are recovered through other means, how best can the Commission account for that fact so as to ensure there is no double recovery at the expense of incarcerated people and their families?

77. Given the difficulties and complexities evidenced in accounting for and isolating what portion of site commission payments may be related to legitimate facility costs for enabling inmate calling, should the Commission simply consider prohibiting providers from entering into any contract requiring the payment of contractually prescribed site commissions for interstate and international calling services? Would such a prohibition be the best way to ensure incarcerated people and their families do not bear a financial burden that is unrelated to costs necessary to provide their calling services? The Commission believes section 201(b) of the Act provides sufficient authority for us to prohibit such payments. Do commenters agree? What other legal authority does the Commission have to make this determination? Would restricting such payments ensure that providers recover fair compensation pursuant to section 276 of the Act? Would prohibiting such payments eliminate the incentive for facilities to select providers that pay the highest site commissions, even if those providers do not offer the best service or lowest rates? Would prohibiting such payments encourage facilities to allow multiple providers of inmate calling services to serve a given facility, instead of awarding monopoly franchises? Does permitting providers to recover any portion of site commission payments through interstate and international rates decrease incentives of providers to negotiate with facilities to lower or eliminate such payments altogether? The Commission seeks comment on whether contractually prescribed site commissions are commonly paid on intrastate calls. If so, will the ability to charge site commissions on intrastate calls render ineffective any Commission efforts to encourage correctional facilities to prioritize the selection of providers with the best service or lowest rates, rather than those which pay the highest site commission?

78. The Commission seeks comment on legally mandated site commission payments. As Judge Pillard explained in her dissent in *GTL v. FCC* and as the United Church of Christ and Public Knowledge emphasize, "the fact that a state may demand them does not make site commissions a legitimate cost of providing calling services." Do commenters agree? Why or why not? If there is a legal requirement to pay site commissions in a state, on what basis could the Commission say that this legal requirement is not recoverable through interstate inmate calling services rates? Should the Commission preempt state or local laws that impose these payments on interstate and international

calling services because they interfere with federal policy and its statutory duty to consumers of inmate calling service that their interstate rates be just and reasonable? What effect would such a prohibition have on inmate calling services? How do these various possible approaches comport with sections 201(b) and 276 of the Act, and cases interpreting those provisions, including *GTL v. FCC*? Would preventing providers from paying site commissions (or certain types of site commissions) comport with principles of federalism? Should the Commission consider continuing to allow the payment of site commissions but prohibit the recovery of any portion of site commissions in interstate and international rates?

79. *Facility Costs for Jails with Average Daily Populations Less Than 1,000*. Several commenters responding to the 2020 ICS document argue that a $0.02 rate component is inadequate for smaller jails to recover their costs related to inmate calling services. They point to the National Sheriffs' Association 2015 cost survey to support the claim that "the per minute cost incurred by the vast majority of Sheriffs and jails for security and administrative duties associated with [inmate calling services] greatly exceeds $0.02 per minute." Pay Tel contends that a uniform $0.02 allowance for all size facilities is at odds with the Commission's tiered treatment of site commissions in the *2016 ICS Reconsideration Order*, which adopted higher allowances for smaller facilities, based on a finding that those facilities incur higher per-minute costs than larger facilities. Here, commenters suggest that legitimate facility costs related to inmate calling services may indeed be higher for smaller facilities. Unfortunately, they did not provide sufficient evidence to enable us to quantify any such costs.

80. The Commission seeks that comment now. While the National Sheriffs' Association points us to its 2015 survey for evidence that correctional facility costs for smaller facilities are higher, the survey data for jails with fewer incarcerated people varied far too widely to comfortably estimate any values that would withstand scrutiny today. This is particularly the case when even the National Sheriffs' Association itself explains that "each individual jail facility has its own per minute cost because of differences in officer, supervisor and other employee hours spent on various duties; the compensation rates for officer, supervisors and other employees; and differences in minutes of use,"

and states that in some cases, jails with similar average daily populations have "significantly different cost per minute." The Commission understands there are many potential variables that impact facilities' cost of enabling inmate calling services inmate calling services in addition to size. The Commission seeks detailed comment on those variables, including jail funding sources that may come from state or local government budgets to offset these costs.

81. The Commission seeks comment on what costs, if any, jails with average daily populations less than 1,000 incur related to the provision of inmate calling services that prisons and larger jails may not incur. If costs are indeed higher, either in an absolute sense or on a per-unit basis, at jails with average daily populations less than 1,000, what are the characteristics that make those facilities more costly to serve? Are these characteristics related to geography, state or local law, or other factors, and if so, how should the Commission account for that in its facility-rate component analysis? Are there particular factors or characteristics that are consistent across all jails with average daily populations less than 1,000? The Commission encourages commenters, especially correctional facilities and agencies, to provide detailed descriptions and analyses of the cost drivers for jails with average daily populations less than 1,000.

82. The Commission also seeks comment on the effect of turnover of incarcerated people in jails with average daily populations less than 1,000. The National Sheriffs' Association explains that jails "contain people who have been arrested and not convicted and, as a result they experience a much greater number of admissions and higher turnover." Pay Tel's outside consultant points to data previously submitted by Pay Tel estimating that the average weekly turnover is 62.2% for jails compared with 1.01% for prisons. According to Pay Tel, this turnover impacts both provider and facility costs. While these turnover costs might lead to increased costs for the provider due to, for example, larger numbers of account setups and larger quantities of called numbers to be vetted, do they similarly increase costs for the facility? If so, how and by how much, and how is that related specifically to inmate calling services? The National Sheriffs' Association explains that the relatively shorter stays in jails with fewer incarcerated people leave correctional facilities with less time to recover their costs

from incarcerated people which, in turn, leads to higher "per inmate cost" in these jails." The Commission seeks detailed comment and analysis on the relationship between turnover and correctional facilities' costs, but more specifically, between turnover and inmate calling service costs. For example, if an intake process requires certain tasks associated with newly incarcerated people, including explaining the availability of inmate calling services, the Commission sees no reason why any portion of the costs of that intake process should be included as a legitimate facility cost related to inmate calling. This is because intake procedures are not specific to the provision of inmate calling services. Facilities incur costs related to these procedures regardless of whether the correctional facility staff explain the availability of inmate calling services. The Commission also seeks data regarding turnover rates and legitimate facility costs unique to jails with average daily populations less than 1,000, if any. The Commission also seeks specific information and comment on how the Commission avoids duplication in cost recovery for inmate calling services-related costs that both facilities and providers say they incur for the same functions. Commenters should be specific in identifying cost categories and providing supporting data for each category.

83. Pay Tel, which "serves many small facilities," indicates that it has experienced increases in site commissions over the last four years, but there is no indication that these increases are attributable to legitimate facility costs related to inmate calling services. What accounts for these increases and why should incarcerated people and their families bear the burdens of these costs when other services are provided to incarcerated people for which they need not pay any fee or rate? Is there any evidence such increases have any relationship to inmate calling services at all except that they are being extracted from an inmate calling services provider? Do these increases reflect other market dynamics, such as providers offering increasingly larger site commissions? Have other providers that serve smaller facilities observed a similar trend? Is this increase attributable to smaller facilities undertaking a greater share of administrative and security tasks that calling providers would ordinarily perform for larger facilities? Are these increases observed at all jails with average daily populations less than 1,000 or only at the jails with the fewest people? Conversely, have other providers experienced a decrease in site commissions at smaller facilities in recent years? If so, what has caused this decrease?

The Commission encourages commenters to submit current data and detailed analyses of these increases or decreases and to what they are attributable to enable the Commission to better understand cost causation at these smaller facilities. The Commission also seeks comment on whether providers have sought to pay lower site commissions in connection with inmate calling services and whether such attempts have been rebuffed or successful.

84. Some commenters advocate for a tiered jail structure based on average daily population, with the jails with the fewest incarcerated people receiving the largest per-minute facility-related cost recovery. The Commission seeks comment on whether the Commission should adopt separate tiers that distinguish between jails with average daily populations of less than 350 and somewhat larger jails (e.g., those with average daily populations of 350 to 999). If so, what tiers should the Commission adopts? The Commission previously adopted site commission allowances for tiers that reflected three categories of incarcerated people (i.e., jails with average daily populations below 350; medium-sized jails with average daily populations of 350 to 999; and larger jails). Should the Commission adopt these same tiers or different sizes or number of tiers? If so why? Or would a single tier covering all jails with average daily populations below 1,000 be more appropriate? Alternatively, should the Commission conclude, as certain commenters suggest, that a uniform facility-related allowance is the most appropriate if any such allowance is permitted? Commenters arguing that the Commission should adopt different site commission rate components based on jail size should provide data and supporting analysis for any proposals submitted. Pay Tel and the National Sheriffs' Association ask the Commission to consider the data that are already in the record. But Pay Tel's representation that it has seen upticks in site commission costs at some of the smaller facilities it serves suggests that the landscape has changed since those data became part of the record in this proceeding. The Commission therefore requests renewed data and analysis regarding reasonable inmate calling services costs at facilities with average daily populations between 0 and 999.

85. *Facility Costs for Prisons and Larger Jails*. The Commission also seeks comment on whether the Commission should further reduce or eliminate the $0.02 rate component allowance for

contractually prescribed site commissions for prisons, larger jails, or both. The Commission seeks comment on the same questions the Commission poses for jails with average daily populations less than 1,000 regarding what factors impact a facility's legitimate costs to enable inmate calling services. Should the Commission consider different tier sizes for larger jails? For example, the National Sheriffs' Association proposes categorizing the largest jails as those with average daily populations exceeding 2,500. What would be the basis for different-sized tiers for prisons and larger jails? Are there material differences in unit costs that facilities reasonably incur as sizes increase? As explained above in connection with jails with average daily populations less than 1,000, there is record evidence suggesting that small facilities incur higher costs due to turnover of the incarcerated population. Are larger jails and prisons similarly affected by turnover rates? If not, what effect, if any, does turnover have at larger facilities? As the Commission does for jails with average daily populations less than 1,000, the Commission asks commenters to provide data on turnover rates for prisons and larger jails.

86. *Security and Surveillance*. Several commenters argue that facilities' security and surveillance costs should not be recovered through inmate calling services rates as these tasks are "not related to the provision of communication service and provide no benefit to consumers." Others argue that these costs should be recovered through providers' calling rates because correctional facilities incur them to provide incarcerated people with access to inmate calling services. In the survey data the National Sheriffs' Association provided, facilities reported often hundreds of hours a week on security and related administrative functions associated with inmate calling. How can the Commission ensure that these functions are not normal security functions a facility already incurs? How can the Commission determine to what extent some of these security-related costs are for services that should more appropriately be deemed to be general security services that are added on to inmate calling services but not actually necessary to the provision of the calling service itself? In other words, the Commission seeks to determine if inmate calling service providers are providing two different services to facilities when it comes to these so-called security and surveillance costs: (1) a communication service that enables incarcerated people to make telephone calls; and (2) a separate security service that aids the facility's general security efforts but would more appropriately be paid for directly by the facility

rather than by the users of the communications service who receive no benefit from these security features that are unnecessary to enable them to use the calling service. The Commission also notes that the functions described by the National Sheriffs' Association appear to duplicate many of the same security functions for which providers reported costs. What types of security and surveillance functions, if any, are appropriately and directly related to inmate calling? For example, ICSolutions suggests that a basic phone system requires security related to identifying the incarcerated individual placing a call, restricting who that individual can and cannot call, providing the called party with the ability to accept, reject, or block the caller, and providing the facility with the ability to monitor and record calls. This is consistent with the position of Worth Rises, which argues that providers "have routinely introduced new security and surveillance services that are not required by procuring agencies." The United Church of Christ, however, disagrees with ICSolutions's assertions about "what is considered a minimum necessary service for the consumer, as opposed to the carceral facility." ICSolutions suggests that anything more than this is not required for secure calling and that additional products are "gold-plated offerings." What functions should be disallowed as too attenuated to claim as legitimate costs? What methodology would permit the Commission to verify or otherwise isolate telephone calling-related security and surveillance costs from general security and surveillance costs in correctional facilities? Worth Rises cautions that isolating and thus being able to quantify calling-related security and surveillance costs is an important step in determining how, if at all, such costs should be recovered through rates. The Commission seeks comment on how to isolate and quantify these from general security and surveillance costs.

87. *Obtaining Correctional Facility Cost Data*. Several commenters discuss the difficulty in determining facilities' actual costs related to the provision of inmate calling services from examining providers' reported costs. For example, GTL asserts that correctional facilities "are in the best position to provide information regarding their costs related to [inmate calling services]," which fall into several generic categories, namely "administrative security, monitoring investigative, maintenance, and staffing." The National Sheriffs' Association again points to its 2015 survey as the most recent data available about correctional facility costs as reported by correctional officials. Are the data from the

National Sheriffs' Association survey accurate today regarding the functions and related costs that jails legitimately incur in connection with inmate calling services? The Commission invites the National Sheriffs' Association and others to provide updated data and analysis in this regard. The Commission also seeks comment more broadly on how the Commission can obtain reliable data on correctional facility costs. Are there specific questions the Commission could ask of providers or other stakeholders that would elicit data appropriate to establish a permanent allowance for recovering legitimate facility-related costs that are included in site commission payments? Should the Commission condition any rate element for correctional facility costs on the provision of reliable correctional facility cost data provided to us by the facilities themselves? Or should the Commission specify a default rate cap, similar to the $0.02 per minute that the Commission adopts on an interim basis in the accompanying Report and Order, and disallow recovery of any amount above that default rate cap absent the provision of reliable facility cost data that supports a higher rate cap?

C. Revising Ancillary Service Charges Rules

88. The Commission seeks comment on its current rules for permitted ancillary service charges, and whether the Commission should revisit the rules and the level of charges. Ancillary service charges are fees that providers of calling services for incarcerated people assess on calling services consumers that are not included in the per-minute rates assessed for individual calls. Currently, the Commission allows five types of ancillary service charges in connection with interstate or international inmate calling services:

(1) Fees for Single-Call and Related Services;

(2) Automated Payment Fees;

(3) Third-Party Financial Transaction Fees;

(4) Live Agent Fees; and

(5) Paper Bill/Statement Fees.

89. The Commission has explained that these charges are unchecked by market forces because incarcerated people and their families must either incur them when making a call or forego contact with their loved ones. Ancillary charges have in the past drawn Commission scrutiny and reform because they were excessive and not cost-justified. The record reflects concerns that consumers may still be overpaying ancillary service charges in various ways. The Commission seeks comment on these concerns. Certain providers argue that the Commission need not consider making any changes its ancillary service charge cap rules. Do commenters agree? Why or why not?

90. The record suggests that some providers of inmate calling services may impose "duplicate transaction costs" on the same payments, such as charging both an automated payment fee and a third-party financial transaction fee also covering credit/debit card processing fees, for example, when a consumer makes an automated payment to fund its account with the services provider. There appears to be some confusion among industry stakeholders regarding the relationship between the automated payment fee and third-party transaction fees as they relate to credit card processing fees. In connection with automated payment fees, the Commission has suggested that credit card processing fees that providers incur are already included in the automated payment fee, which is capped at $3.00. At the same time, the Commission referred to "credit card processing fees" in its discussion of third-party financial transaction fees in the *2015 ICS Order*. The Commission seeks comment on whether the credit card processing fees encompassed in the automated payment fee are the same credit card processing fees referred to in the third-party financial transaction fee. If they are the same, then permitting providers to charge both an automated payment fee and a credit card processing fee when consumers use a credit or debit card to make an automated payment would, indeed, seem to allow for double recovery. And if credit or debit card companies or other third parties are also charging the consumer a fee for using a credit or debit card to fund their account, permitting the services provider to double recover would mean the consumer might potentially be paying for the same processing fees *three* times. Do commenters agree? Alternatively, is the credit card processing embedded in the automated payment fee related to providers' costs of allowing credit card and debit card payments in the facilities they serve separate and apart from any other fees providers might incur from the third-

party financial institution for enabling such payments when third parties are involved in the transaction? Are the "credit card processing fees" charged by third parties, such as Western Union, Money Gram, or credit card companies, fees associated solely with transferring *cash* from a consumer's credit card to an incarcerated person's calling account? If so, are those fees passed on to the services provider, or the consumer requesting the cash transfer, or both? If a third-party transaction fee can only be passed on by the provider to the consumer when a third party is directly involved in the transaction with the provider (as opposed to indirectly when the consumer uses its credit or debit card to fund an account or pay a bill using an automated method), when would it be the case that a third-party financial transaction fee is incurred by the provider that could appropriately be passed on to the consumer? The Commission seeks comment on how the Commission should amend its rules to clarify when providers may pass through separate third-party financial transaction fees and when they may not.

91. Alternatively, the Commission seeks comment on whether its rules clearly prohibit services providers from charging an automated payment fee and a third-party financial transaction fee for the same transaction in spite of some providers' apparent confusion. The Prison Policy Initiative argues that "the Commission's record overwhelmingly indicates that carriers should not be allowed to double-dip by charging an automated payment fee and passing through third-party fees on the same transaction." Do commenters agree? As discussed above, if the credit card processing costs associated with the automated payment fee are different than the credit card processing costs inherent in the fee associated with the third-party financial transaction fee, how are providers double-dipping? CPC argues that there is no double-dipping associated with charging an automated payment fee and a third-party financial transaction fee for the same transaction. And GTL asserts that "[t]he rationale for and purpose of Automated Payment Fees and Third-Party Financial Transaction Fees are therefore distinct; the former cannot substitute for or subsume the latter." Do commenters agree with this assertion? Why or why not? Can commenters point us to specific evidence of other forms of double-dipping in the record? Are there other costs embedded in the automated payment and third-party transaction fees that could lead to double recovery? If there is no overlap between the costs recovered in the automated payment fee and the third-party financial transaction fee, on what basis would the Commission say that providers

cannot charge both for the same transaction provided that the charges are at or below the applicable caps?

92. Similar to its inquiry above, should the Commission specifically prohibit providers from charging a live agent fee and a third-party financial transaction fee in the same transaction, if no third party is directly involved when the consumer provides the agent with credit or debit card information? The Prison Policy Initiative alleges that at least one provider may be charging "an automated-payment or live-agent fee *and* passing through its credit- or debit-card processing costs." They point to tariff language that appears to couple live agent fees with third-party transaction fees. In the *2015 ICS Order*, the Commission explained that "interaction with a live operator to complete [inmate calling services] transactions may add to the costs of providing ICS" recognizing that providers incur costs associated with use of a live operator. But it is unclear from the current record whether third-party costs are involved with all or even some such live agent transactions, or whether such costs are already included in the live agent fee. For example, if the provider uses its own live agents, do such agents ever engage in three-way calls with third parties, such as Western Union or MoneyGram to transfer money to effectuate the transaction? If so, would it be the provider or the consumer that would incur the third-party transaction fee imposed by Western Union or MoneyGram for transferring the money? Even if there were third parties involved, the Commission has been clear that the fee for use of a live agent applies "regardless of the number of tasks completed in the call." Does this suggest that there should be no other fees passed through to the consumer in connection with the use of a live operator? Why or why not? ICSolutions characterizes third-party fees, automated payment fees, and live agent fees as fees related to funding accounts and suggests that the Commission should amend its rules to prevent providers from charging more than one of these types of fees per funding event. Do commenters support this proposal? Why or why not?

93. Finally, the Commission seeks comment on how the Commission can ensure that third parties are involved when third-party financial transaction fees are charged. The Commission has explained that the third-party financial transaction fees necessarily must involve third parties. The

Prison Policy Initiative suggests that certain fees characterized as third-party financial transaction fees may not actually involve third parties. In the case of GTL, for example, the Prison Policy Initiative explains that "the customer makes a payment via GTL's website, thus making only two parties to the transaction." The Prison Policy Initiative acknowledges that "other entities may participate behind the scenes (such as the customer's card issuer and GTL's acquiring bank), but these entities are not directly third parties to the transaction; they are merely agents of the payor and payee." Should the Commission amend its rules to require calling service providers to specify the third party involved in the transaction whose fees are being passed through to the consumer? Why or why not? Should the Commission define a third party in its rules as a company that is not related to the calling services provider as ICSolutions suggests? How should the Commission define "not related" for purposes of such a rule?

94. The record also reveals that "15 states now explicitly exclude any automated payment (or deposit) fees from being charged to end users because the costs of automated payments are already factored into the [inmate calling services] provider's direct or indirect costs of providing service." What is the basis for these states' decisions to exclude these types of fees? Do providers already include these costs in the cost of providing inmate calling services? To the extent providers claim that it costs more to serve smaller facilities because higher turnover rates result in opening proportionately more new accounts, does this confirm that providers consider the processing of automated payments (necessary to establish a new account) as a cost included in their general inmate calling services accounts? The Commission seeks comment on whether the Commission should similarly prohibit providers from charging automated payment fees. Should the Commission instead reduce such fees to account for the third-party charges embedded in those fees? If so, what would be the appropriate cap?

95. In the Report and Order, the Commission adopts an interim cap of $6.95 for fees related to single-call services and third-party financial transaction fees based on data provided by the Prison Policy Initiative and acknowledged by other public interest advocates that providers were circumventing the "pass through without markup" rule previously in place. NCIC has proposed that the Commission

cap the third-party financial transaction fee associated with single-call services at the $3.00 cap for automated payment fees or the $5.95 cap for live agent fees, as applicable. And ICSolutions similarly suggests that the Commission cap third-party fees at the $5.95 live agent fee cap or the $3.00 automated fee cap. As the Commission explains in the Report and Order, however, the record does not contain sufficient evidence to adopt these proposals at this time. The Commission seeks comment on these proposals here. Why would it be reasonable to tie fees for single-call services and/or third-party transaction fees to the caps for automated payment or live agent fees? What is the relationship between these fees? Should the Commission consider adopting two separate caps on third-party financial transaction fees, one for money transfer companies like Western Union and a separate one for credit card companies? Given the evidence provided by the Prison Policy Initiative suggesting that one of the more prevalent money transmitter services charges more than NCIC's proposed caps, on what basis would the Commission adopts NCIC's lower caps? In the absence of a revenue-sharing agreement, do these third parties legitimately charge more than NCIC's proposed caps, and if so, do providers—due to the volume of business conducted with these money transfer companies—have an ability to negotiate lower fees?

96. Relatedly, the Commission remains concerned about the adverse effect of revenue-sharing arrangements between calling service providers and third-party financial institutions. In the *2020 ICS Order on Remand*, the Commission cited evidence that inmate calling services providers have "entered into revenue-sharing arrangements with third-party processing companies such as Western Union and MoneyGram where a third-party processing company shares its revenues generated from processing transactions for an inmate calling services provider[s]' customers." While the Commission sought additional evidence that providers were using revenue-sharing or other arrangements to indirectly mark up ancillary service charge fees, the Commission received relatively little responsive comment. The Commission therefore seeks renewed comment on how revenue sharing arrangements work in the context of ancillary service charges, including concrete evidence of these arrangements. There is evidence in the record that revenue sharing can run from the third party to the calling services provider whereby the third-party provider charges the consumer a fee, which the third party then

shares with the providers. The record also suggests that providers may charge the incarcerated person inflated fees and then split the resulting revenue with third parties. Is one scenario more prevalent than the other? How do commenters suggest that the Commission detect these types of practices? Will its adoption of a specific monetary cap—instead of permitting the pass-through of any third-party financial transaction fee—mitigate this issue, or could it still occur even under the adopted caps? Should the Commission adopt a rule disallowing the revenue-sharing arrangements with respect to interstate or international inmate calls or accounts altogether? If so, how should the Commission ensure compliance with such a rule?

97. Certain parties point out that the Commission's present ancillary services charge caps are based on cost data that are over six years old and assert that all ancillary service charge caps should be immediately reduced by 10%. These commenters argue that the caps should also be adjusted in the future based on more current cost data. The Commission seeks comment on these proposals. The Commission notes that the Mandatory Data Collection that the Commission authorizes in the accompanying Report and Order will collect cost data on the permissible ancillary service charges. Should the Commission adjust the ancillary service charge caps based on the new data collection the Commission will receive from the upcoming Mandatory Data Collection? What factors should the Commission consider in evaluating that cost data for ancillary service charges in connection with interstate and international inmate calling services?

98. The Commission asks commenters to address specific factors that the Commission should consider in evaluating the cost data to ensure the Commission addresses and accounts for anomalies that may distort its analysis. The Commission encourages participation, and seek input, from any state public utility commission or similar state regulatory agency colleagues having jurisdiction over inmate calling services based on their expertise setting appropriate ancillary service charge caps.

99. Should the Commission consider revising the ancillary service charge caps on a standard periodic basis? If so, how frequently should the Commission revise those caps and what process should the Commission follow? Commenters should provide the reasoning and justification for their responses.

For example, how should the Commission balance related benefits and burdens to all relevant stakeholders and serve the public interest in determining how frequently to update ancillary service charge caps to enable the Commission to continually maintain interstate and international rates and charges that are just and reasonable and provide fair compensation to providers? How frequently should the Commission require providers to file updated ancillary charges cost data to make this possible?

100. The Commission also seeks comment generally on any other matters related to ancillary services that the Commission should consider in reforming its ancillary service charges rules. For example, record evidence suggests that certain providers fail to close accounts and issue refunds to families of incarcerated people when they are released. It appears that some state authorities, such as the Alabama Public Service Commission, have addressed this problem. The Commission are concerned that any unused funds are not refunded to the account holder and invite comment on this issue. Should the Commission adopt a rule requiring automatic refunds after a certain period of inactivity? If so, what timeframe would be appropriate? Should the timeframe vary based on the size and type of facility? If the Commission requires these refunds, how should such refunds be made? Is this issue sufficiently related to setting up an account and making automatic payments that the Commission can address it in its existing ancillary services charges rules, or should the Commission adopt a separate rule to address this issue? The Commission also seeks comment on whether the Commission should add a rule relating to account setup fees to prohibit charging separate fees for establishing an account. Do providers assess separate fees for account setup? The Commission also seeks comment on the issue of dropped calls as it relates to ancillary service charges. Should the Commission amend its rules to prevent providers from assessing the same ancillary service charge in cases where calls are dropped after a call is successfully connected? For example, should providers be permitted to charge a fee for single-call services if a consumer makes a call that is dropped and then must make another call to finish the conversation? Why or why not? If not, how should the Commission amend its ancillary service charge rules to prevent this? Are there other issues regarding dropped calls in the ancillary services context that the Commission should be aware of? More broadly, are there other practices in which providers engage

that the Commission should also consider addressing in the context of its ancillary services rules? If so, the Commission asks commenters to describe such practices in detail and discuss how best the Commission should address them. Finally, the Commission seeks comment on whether fees for single-call services are "already covered under the other fees applicable to all calls" as ICSolutions alleges. Do commenters agree with this assertion? If so, how are these fees embedded in the other permitted ancillary service charges? Should the Commission consider eliminating fees for single-call services as a permissible ancillary service charge? Why or why not and on what basis would the Commission do so? NCIC and ICSolutions also mistakenly assume that fees for single-call services are capped at either the $5.95 live agent fee or the $3.00 automated payment fees, but the Commission's rules do not establish these caps in connection with fees for single-call services. Relatedly, should the Commission reduce the cap on fees for single calls as the Prison Policy Initiative asks? If so, what would be an appropriate cap?

D. Refining International Rate Methodology to Prevent Double Counting

101. In the Report and Order, the Commission adopts interim rate caps for international inmate calling services based on a formula that permits a provider to charge a rate up to the sum of the provider's per-minute interstate rate cap for a particular correctional facility plus the amount that the provider must pay its underlying international service provider for that call on a per-minute basis. The interim rate caps for international calls will benefit incarcerated people by lowering the rates for most of their international calls, while allowing providers to recover their costs for those calls. Nonetheless, the Commission is concerned that the new interim rate caps for international calls may be based on an overestimation of the costs providers actually incur in providing international inmate calling services.

102. In particular, the Commission is concerned by the Public Interest Parties' assertion that the interim rate caps for international calls that the Commission sets today may be double counting providers' costs for international calls because such costs are already included in their overall inmate calling services costs that the Commission uses to set interim interstate rate caps. As the Public Interest Parties explain, "some [inmate calling services] providers reported zero international costs but positive international minutes and revenues [which] suggests that international costs are already included in their total costs, and thus accounted for in the interstate rates."

103. The Commission seeks comment on this assertion. Do the data reflect such double counting? Is some degree of double counting a natural consequence of the way providers reported their costs associated with international calls as part of their total costs associated with inmate calling services? Despite Public Interest Parties' concerns, the record indicates that some providers separately reported international calling costs in their responses. The Commission anticipates that in the upcoming Mandatory Data Collection, WCB and OEA will require calling service providers to report separately the amounts they pay international service providers for international calls. Will this eliminate the double counting of international inmate calling services costs, to the extent it exists? If not, how should the Commission address this issue if providers do not ordinarily track international call costs separately? What allocation method should providers use to reliably separate their international costs from their interstate costs? The Commission further asks what types of costs should legitimately be considered as additional costs associated with international calls. Do those additional costs include only the charges imposed by international carriers?

104. The Commission also askes commenters to consider other ways in which the Commission could reform international rates on a permanent basis to ensure they are just and reasonable. For example, there is evidence in the record that in addition to varying by country/rate zone, international rates also vary depending on whether the call terminates on a mobile or fixed-line network. Should the Commission address this type of rate variation in setting permanent rate caps for international calls, and if so, how? Are there other types of international voice communications that could be provided to incarcerated people that would result in significantly reduced financial burdens for international calling to their family and loved ones abroad? Should the Commission require providers to work with facilities to enable alternatives to traditional types of voice communications that would be less expensive? Are there any other issues the Commission should take into account in setting permanent rate caps for international inmate calling services?

E. Recurring Mandatory Data Collection

105. The Commission seeks comment on whether the Commission should conduct cost data collections on a more routine, periodic basis than the Commission has since the First and Second

Mandatory Data Collections in 2012 and 2019. In 2020, the Commission sought comment on whether, in the event that it adopted a new data collection, it should require providers to update their responses to that collection periodically. The Commission invited comment on the relative benefits and burdens of a periodic data collection versus another one-time data collection. The Commission also asked how frequently it should collect the relevant data, inquiring whether a biennial or triennial collection covering multiple years would balance the benefits and burdens better than an annual collection.

106. In the Report and Order, the Commission institutes a Third Mandatory Data Collection. GTL asserts that data filed in the Annual Reports are sufficient to evaluate calling service providers' rates, but the Commission disagrees. Instead, the Commission agrees with the Public Interest Parties who explain that the Annual Reports only include information on rates and charges and not the type of cost data required to establish and ensure continued cost-based rates. The Commission seeks comment on whether the Third Mandatory Data Collection should be required to be updated within a specific future timeframe to enable us to evaluate the reasonableness of providers' interstate and international rates on a regular basis. The Public Interest Parties assert that, to further refine rate caps in the future, the Commission should institute a "routine, periodic data collection with clear, structured questions, commit to reviewing that data through scheduled ratemaking proceedings, and adjust [inmate calling services] rates accordingly." The Public Interest Parties contend that the Commission should first establish an annual data collection to ensure it has sufficient and updated information to reevaluate rate caps, and then establish a triennial rate review process to evaluate the prior two years' cost data to determine whether interstate rates for inmate calling services and ancillary service charge caps should be lowered. According to the Public Interest Parties, a three-year review cycle would strike the appropriate balance between the need for the Commission to fulfill its statutory mandate and the administrative burdens to providers. Free Press supports conducting routine future data collections and implementing a biennial or triennial review process to evaluate rates based on those data collections. Free Press asserts that a periodic collection will provide the Commission with the opportunity to conduct trend analysis on costs, revenues, and prices charged over time, and that it may give providers an incentive to collect more uniform and consistent data over time. The Commission seeks comment on

these proposals or alternative proposals that similarly enable us to monitor costs and revenue for the purpose of continuing to lower the rate caps.

107. The Commission recognizes that the periodic collection and assessment of cost data could yield valuable information but are conscious of potential burdens on providers. If the Commission were to adopt a periodic collection, how could the Commission best structure the collection in order to maximize its benefits, while at the same time reducing administrative burdens on providers? Would a triennial review, as described by the Public Interest Parties, be the ideal structure? What are the relative benefits and burdens of conducting a triennial review versus a biennial review, or some other type of review?

108. The Commission invites comment on how providers should maintain their records in the event the Commission requires a periodic collection, such as a triennial review? Should the Commission impose specific recordkeeping requirements on providers of inmate calling services? What would be the type of recordkeeping requirements necessary for a biennial or triennial review, as opposed to a one-time collection? Is there a relatively small but precisely defined set of investment and expense accounts that the Commission could establish relative to providers' inmate calling service assets and labor activities or categories of assets and labor activities to facilitate consistent data reporting among all providers? If so, what specific accounts should be included in the prescribed set of accounts? Securus considers its cost study "to be a comprehensive view" of its cost structures and encourages "the Commission to consider similar data collection from other providers." Should the Commission use this cost study as a model for future mandatory data collections, especially in regard to the cost categories and methodologies set forth therein? Why or why not? Should a portion of revenues from ancillary services be netted out of the inmate calling service costs to the extent that costs are incurred for assets or labor shared among inmate calling services and ancillary services if the full amount of these shared costs is reported as inmate calling service costs? If so, how should it be calculated? The Commission believes its authority under sections 201 and 220 of the Act permits us to impose certain recordkeeping obligations on providers for the purpose of ensuring just and reasonable rates. Do commenters agree?

What other authority does the Commission have to adopt such requirements should they be necessary? How can the Commission ensure that providers comply with any recordkeeping requirements? Are there other requirements associated with a periodic collection, as opposed to a one-time data collection, that the Commission should consider?

109. Alternatively, should the Commission require providers to comply with an annual or biennial certification obligation attesting to the fact that no substantial change in costs has occurred that would warrant a change in rates? Would such a certification in conjunction with providers' annual reporting obligation on rates provide us sufficient basis to avoid periodic data collection on a more routine basis? The Commission seeks comment on this alternative and any others that stakeholders may propose.

F. Revisions to the Commission's Definition of "Jail"

110. The Commission proposes to amend section 64.6000(m) of its rules to clarify the definition of "Jail" in several ways. These amendments would apply equally to the definition of "Prison" because its rules explain that "Prisons" include "*facilities that would otherwise fall under the definition of a Jail* but in which the majority of inmates are post-conviction or are committed to confinement for sentences of longer than one year." First, the Commission proposes to modify the definition of "Jail" in section 64.6000(m) of its rules to include facilities operated by the Federal Bureau of Prisons (BOP) and Immigration and Customs Enforcement (ICE), whether directly or by contract with third parties. Second, the Commission proposes to add "juvenile detention facilities" and "secure mental health facilities" to that definition. The Commission seeks comment on these proposals, which are consistent with the *2015 ICS Order* and are meant to prevent potential confusion as to the application of its rules.

111. In the *2015 ICS Order*, the Commission explained that the rate caps adopted in that order were meant to apply to "jails, prisons and immigration detention facilities, secure mental health facilities and juvenile detention facilities." The Commission further explained that the general term "Jail" was meant to include facilities operated by local, state, or federal law enforcement agencies and "city, county or regional facilities that have contracted with a private company to manage day-to-day

operations; privately-owned and operated facilities primarily engaged in housing city, county or regional inmates; and facilities used to detain individuals pursuant to a contract with ICE and facilities operated by ICE." But the codified rule only includes "facilities used to detain individuals *pursuant to a contract*" with ICE, and does not explicitly include facilities operated directly by ICE. Similarly, while the BOP is a "federal law enforcement agency" such that BOP facilities fall within the purview of its rules, the codified rule does not explicitly distinguish between facilities operated by the BOP and those operated under a contract with the BOP. The Commission therefore proposes to explicitly list ICE and BOP facilities, whether operated directly by the relevant law enforcement agency or by contract, in the definition of "Jail." The Commission finds these proposed changes to 64.6000(m) of its rules to be clarifying in nature given the Commission's stated intent in 2015 to include all facilities directly operated by law enforcement agencies and those operated pursuant to a contract with a third party. The Commission seeks comment on this analysis. The Commission also seeks comment on whether there are other types of correctional facilities that should be explicitly added to its codified definitions of "Jail" or "Prison."

112. The Commission also proposes to list "juvenile detention facilities" and "secure mental health facilities" within the definition of "Jail" in section 64.6000(m). In the *2015 ICS Order*, the Commission concluded that providing inmate calling services in these facilities was "more akin to providing service to jail facilities" and instructed that "[t]o the extent that juvenile detention facilities and secure mental health facilities operate outside of jail or prison institutions" they would be subject to the rate caps applicable to jails. However, the codified definition of "Jail" does not include the phrases "juvenile detention facilities" or "secure mental health facilities." As relevant to juvenile facilities, the National Center for Youth Law explains that it is "unclear which rate cap will apply to juvenile facilities, many of which are not described by the proposed definitions of 'jail' or 'prison.'" The Commission therefore proposes to add these terms to the definition of "Jail" in section 64.6000(m) and seek comment on this proposal.

G. Characteristics of the Bidding Market

113. The Commission has already determined that inmate calling services providers have market power at the facility level once they win a contract. However, some providers claim that they win contracts through a competitive bidding process, and thus, that the market or markets to supply inmate calling services are competitive. To assess this claim, and its relevance to permanent rate caps, the Commission seeks comment on the characteristics of the bidding market. The Commission proposes to define every contract or request for proposal as a market in which calling service providers participate based on its understanding that providers generally make contract-by-contract decisions about whether or not to bid on a particular request for proposal, and they do not bid on all open requests for proposals. The Commission seeks comment on these proposed bidding market boundaries or whether there are other boundaries the Commission should consider.

114. The Commission also seeks comment on the extent of competition in these bidding markets. What share of providers' contracts are won through a competitive bidding process? Does this vary across providers? Does the number of bidders vary from request for proposal to request for proposal, and if so, what determines bidders' decisions to compete? Does the number of bidders vary depending on the type and size of facility? Do large providers have a competitive advantage in bidding for certain contracts, such as contracts for state prisons, or large or multiple facility contracts? Are there providers who cannot compete for such contracts at all? Are some providers unable to bid beyond certain geographies because of logistical difficulties or difficulties associated with meeting different governmental requirements? Are some providers uninterested in certain requests for proposals (e.g., those for the jails with the fewest people)? What are the implications of these answers for competition for different requests for proposals? Should the Commission consider prisons, larger jails, and contracts for multiple facilities to be in separate market segments? Are there other potential market segments the Commission should consider? It is common, in measuring market power in bidding markets, to analyze bids across many requests for proposals to determine the impact of the number and identity of bidders on contract prices. In the context of a merger, the U.S. Department of Justice and Federal Trade Commission recommend examining "the frequency or probability with which, prior to the merger, one

of the merging sellers had been the runner-up when the other won the business." Should the Commission collect data to enable such analysis?

115. The Commission seeks to understand how correctional authorities select a winning bid. To what extent do correctional authorities evaluate inmate calling service bids based on costs (both to incarcerated people and to the facility), quality of service, or other factors? What is the relevance of site commissions? Do calling service providers compete on the basis of site commissions? If so, how? Are providers aware of site commissions offered by other providers in the bidding process? If not, how do they determine the level of the site commission to offer to ensure that they remain competitive? Assuming no site commission is legally mandated, can a provider win a bid if it offers no site commission to the facility? The Commission has observed differences in criteria for awarding contracts among various requests for proposals that the Commission has reviewed. Is this seeming heterogeneity in the criteria used by authorities when selecting a winning bid typical? If so, is this heterogeneity more pronounced in some jurisdictions or jail types than in others?

116. The Commission understands that once a local correctional authority awards the contract to a particular provider, it is locked into a multi-year contract, typically with options to renew that avoid the need for further competitive bidding to serve the facility after the expiration of the initial term. Is there a typical contract length, and if so, does this vary across prisons and jails or by contract size? Are there typical timeframes for options to renew? Does exercising options to renew lead to contract amendments that also avoid competitive bidding to effectuate contractual changes? Is contract length ever a dimension along which provider's bids are compared, in addition to criteria pre-specified in the request for proposal? Do correctional authorities give more weight to some criteria than others, and if so, which ones? How easy or difficult is it to modify the terms of the contract or terminate it during the contract term if the correctional authority is dissatisfied with the provider's rates, site commissions, terms, or quality of service? How common is it for a contract to be extended by correctional authorities, and does this occurrence vary as between prisons or jails, or by contract size?

117. The Commission has found that the inmate calling services industry is highly concentrated, and that GTL possesses the largest market share, controlling [REDACTED] of the market as measured by paid minutes. Another provider, Securus, controls [REDACTED] of the market, which means these two firms collectively control [REDACTED] of the market. The record also shows high industry concentration as measured by the Herfindahl-Hirschman Index (HHI). The Commission seeks comment on these findings. Are these shares still accurate? Does a large industry share, together with entry barriers and other market characteristics, give the two largest inmate calling services providers a degree of market power in bidding for certain or all requests for proposals?

118. The Commission seeks comment on barriers to entering the inmate calling services markets, both generally and in terms of bidding on a particular request for proposal. What impediments do potential providers face when considering entering the inmate calling services market? The Commission also seeks comment on actual entry into the market in the past. How many firms have entered or exited the inmate calling services market in the past twenty years? What barriers does a provider face once it enters the market? What services, other than inmate calling services, must be offered, at a minimum, by a provider in order to successfully participate in the bidding market given record evidence of service bundling required by many facilities when issuing requests for proposals?

119. The Commission also understands that providers frequently provide multiple nonregulated services at the facilities where they provide inmate calling services, including commissary services, access to email and the Internet, video services, video visitation and calling, and access to tablets. Do correctional authorities sometimes or typically require that the same company bundle some or all of these services? If so, are there any exceptions to this (i.e., do correctional authorities enter into separate contracts for certain services with different providers), and how common is this? What other services outside of telephone communications do providers competitively bid on at the same facility? Are providers more likely to win bids if they offer other services at the same facility? Have calling service providers used their market power, to the extent they have such power, in the communications services market to affect bidding for other services? The Commission asks whether the Commission

should consider any additional aspects of the bidding market and invite parties to submit alternative evidence in the record.

120. If the Commission does find that some providers possess market power in the bidding market, should the Commission act to make it easier for small providers to compete? Would doing so better ensure just and reasonable rates? For example, should the Commission prohibit dominant providers from including certain terms and conditions in their contracts with correctional authorities? In many instances, won contracts are not publicly available. Would requiring the contracts to be made publicly available make bidding more competitive? The Commission seeks comment on potential ways to even the playing field among large and small providers in the bidding market, and on whether doing so would lower interstate rates paid by incarcerated people and their families. The Commission also seeks comment on whether such regulations would result in supporting providers that are currently not as successful in winning contracts with correctional facilities in spite of continuing to bid for contracts.

121. The Commission also seeks comment on the optimal regulatory regime for inmate calling services. If the Commission finds that certain providers possess market power in the bidding market, should the Commission classify those providers as dominant carriers? In the past, the Commission imposed rate-of-return regulation on providers with market power. Would this type of regulation be appropriate in the event that market power in the bidding market is found to exist? If not, what type of regulatory regime would promote regulatory certainty and permit us to ensure that inmate calling services rates and charges are just and reasonable? What other type of regulatory framework would be appropriate to achieve its objectives if the Commission determines that some or all inmate calling service providers should be considered dominant carriers? What are the relative costs and benefits of the alternative approaches? Finally, the Commission welcomes comments by all stakeholders on appropriate alternative frameworks and ideas that will promote increased transparency and just and reasonable inmate calling services rates and charges for incarcerated people.

IV. PROCEDURAL MATTERS

122. *Filing of Comments and Replies*. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System. *See* FCC, Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (May 1, 1998). The Protective Order issued in this proceeding permits parties to designate certain material as confidential. Filings which contain confidential information should be appropriately redacted, and filed pursuant to the procedure described therein.

123. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: https://www.fcc.gov/ecfs/.

124. 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.

125. 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.

126. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.

127. Effective March 19, 2020, and until further notification, 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.

128. 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 Fifth Further Notice of Proposed Rulemaking in order to facilitate its internal review process.

129. *People with Disabilities*. The Commission asks that requests for accommodations be made as soon as possible in order to allow the agency to satisfy such requests whenever possible. Send an email to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530.

130. *Ex Parte Presentations.* This proceeding 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).

131. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in the prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with section 1.1206(b) of the Commission's rules. Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

132. *Initial Regulatory Flexibility Act Analysis*. As required by the RFA, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on

small entities by the policies and rules proposed in the Fifth Further Notice of Proposed Rulemaking. The Commission requests written public comments on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in the Fifth Further Notice of Proposed Rulemaking. The Commission will send a copy of the Fifth Further Notice of Proposed Rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the Fifth Further Notice of Proposed Rulemaking and the IRFA (or summaries thereof) will be published in the Federal Register.

133. *Initial Paperwork Reduction Act Analysis*. The Fifth Further Notice of Proposed Rulemaking contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites OMB, the general public, and other Federal agencies to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), 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

134. 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 Fifth Further Notice of Proposed Rulemaking (FNPRM). 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 document. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the FNPRM and the IRFA (or summaries thereof) will be published in the Federal Register.

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

135. In this document, the Commission seeks more detailed evidence and comments from industry stakeholders to consider further reforms to inmate calling services rates within its jurisdiction, including permanent interstate and international rate caps. The Commission seeks to ensure that functionally equivalent access is provided to people who are deaf, hard of hearing or deafblind, or have speech disabilities. The TTY-based telecommunications relay service (TRS) and speech-to-speech relay service (STS)—the only relay services for which inmate calling services providers currently are required to provide access under the Commission's rules—are insufficient to meet the range of needs of incarcerated people with communication disabilities using today's networks. The Commission seeks comment on requiring inmate calling services providers to make available newer forms of TRS, such as Captioned Telephone Service (CTS) (a non-Internet-based telephone captioning service), and the three forms of Internet-based TRS: video relay service (VRS), IP Captioned Telephone Service (IP CTS), and IP Relay (a text-based relay service using IP). The Commission seeks comment on whether to modify the existing TRS rules for application to the provision of such services at correctional facilities. The Commission seeks comment on whether to expand the scope of the rule prohibiting charges for TRS provided at correctional facilities. Further, the Commission seeks comment on whether to require inmate calling services providers to provide access to direct video communication for incarcerated people with communication disabilities. Finally, the Commission seeks comment on whether new TRS services provided to incarcerated people with communication disabilities should be included in the existing accessibility-related reports.

136. The Commission seeks comment on what methodology it should use to permanently cap provider-related rate components for interstate and international inmate calling services. It seeks comment on the provision of communications services to jails with average daily populations below 1,000 and on further reforms to the treatment of site commission payments in connection with interstate and international inmate calling services, including at jails with average daily populations below 1,000. Next, the Commission seeks comments on revisions to its ancillary service charge rules and refining its international rate methodology to prevent double counting of international call costs

that are already included in the providers' overall inmate calling services cost. The Commission also seeks comment on the need to adopt an on-going periodic cost data collection to ensure interstate and international calling services rates are just and reasonable and on revisions to the Commission's definition of "jail" to clarify the term to include certain types of facilities. Finally, the Commission seeks comment on the characteristics of the bidding market in order for the Commission to assess some providers' claims that they win contracts through a competitive bidding process and thus the inmate calling services market is competitive.

2. Legal Basis

137. The legal basis for any action that may be taken pursuant to the FNPRM 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.

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

138. 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. The statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 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.

139. *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.

140. 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. The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C. 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. The Commission notes that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field. 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.

141. 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. While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only

data from independent school districts is included in the special purpose governments category. 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." This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments – independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments – Organizations Tables 5, 6, and 10.

142. *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.

143. *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.

144. *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.

145. 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 contents that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.

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

147. *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 internally developed 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.

148. *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.

149. *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.

150. *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 its action.

151. *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.

152. *TRS Providers.* TRS can be included within the broad economic category of All Other Telecommunications. Ten providers currently receive compensation from the TRS Fund for providing at least one form of TRS: ASL Services Holdings, LLC (GlobalVRS); Clarity Products, LLC (Clarity); ClearCaptions, LLC (ClearCaptions); Convo Communications, LLC (Convo); Hamilton Relay, Inc. (Hamilton); MachineGenius, Inc. (MachineGenius); MEZMO Corp. (InnoCaption); Sorenson Communications, Inc. (Sorenson); Sprint Corporation (Sprint); and ZP Better Together, LLC (ZP Better Together).

153. *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. TRS can be included within the broad economic census category of All Other Telecommunications. Under this category and the associated small business size standard, a majority of the ten TRS providers can be considered small.

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

154. *Compliance with Caps on Permanent Per-Minute Rate, and Ancillary Service Charges.* In the FNPRM, the Commission seeks comments on further reform of inmate calling services, including permanent rate caps on interstate and international telephone services and on revising ancillary service charges rules. To the extent that permanent rate caps are lower than the interim interstate and international rate caps or they apply to all types of facilities (including jails with average daily populations below 1,000), providers (including any smaller entities) must comply with the new rate caps. Likewise, providers of all sizes must comply with any new caps or limits on permissible ancillary service charges.

155. *Compliance with Requirements to Provide Access to Additional Telecommunications Relay Services*. In the FNPRM, the Commission seeks comment on requiring inmate calling services providers to provide access to several additional TRS and direct video communications services, and whether such services should be provided at no charge. If such rules are adopted, they would apply to inmate calling service providers of all sizes.

156. *Recordkeeping, Reporting, and Certification*. The FNPRMseeks comments on adopting an on-going periodic cost data collection to ensure calling services rates are just and reasonable. It also seeks comments on revising the Commission's definition of "jail" to include certain types of facilities. To the extent the Commission imposes a new periodic cost data collection and clarifies the term "jail" to include certain types of facilities, providers of all sizes must maintain and report their cost data in accordance with the Commission's rules. Similarly, if the Commission imposes expanded data collection or other new rules specific to services provided to incarcerated people with communication disabilities,

the data collection and other rules will be applicable to inmate calling services providers of all sizes. However, some providers may opt to not make the data filings based on the "safe harbor" applicable to entities, basically, that offer more than the mandatory TRS services or that have had no complaints, provided that the safe harbor is expanded and not eliminated entirely.

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

157. 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 will consider all of these factors when the Commission receives substantive comment from the public and potentially affected entities.

158. The Commission seeks comment on differences in costs between prisons, larger jails, and jails with average daily populations below 1,000 to account for differences in costs incurred by providers servicing these different facility types and sizes. To that end, the Commission seeks comment on provisioning of inmate calling services to small jails and different correctional facility costs involving different facility sizes. The Commission also seeks comment on employing separate zones of reasonableness in establishing permanent rate caps for prisons, larger jails, and jails with average daily populations below 1,000 to ensure that even small providers serving jails, which may be smaller, higher-cost facilities, and larger prisons, which often benefit from economies of scale, can recover their legitimate inmate calling services-related costs.

159. The Commission also seeks comment on whether it should revise its ancillary service charge caps on a standard periodic basis and if so, how frequently the Commission should do so while balancing related benefits and burdens to all relevant stakeholders and serve the public interest and

ensuring that the interstate and international rates are just and reasonable and provide fair compensation to providers.

160. The Commission asks whether its proposed periodic data collection would impose unreasonable burdens and costs. The Commission also seeks comment on how to structure the data collection in order to maximize its benefits, while at the same time reducing the administrative burdens on providers by asking, for example, how frequently the Commission should require the cost data collection to occur and whether the Commission should allow a certification of no substantial change in lieu of a full data collection to alleviate burdens on providers.

161. Given the Commission's long-standing finding that every provider has a monopoly in the facilities it serves, the Commission seeks comment on whether calling services providers have market power in bidding for calling services contracts. The Commission also asks for comment on what kind of regulation would be appropriate in the event that market power in the bidding market is found to exist.

162. Regarding the provision of functionally equivalent access to people who are deaf, hard of hearing or deafblind, or have speech disabilities, the Commission does not expect that the implementation of new forms of TRS or direct video communication would have much impact on small providers of inmate calling services. The TRS itself is provided by other entities. Small inmate calling services providers would need to provide access to that TRS, which may require special equipment (such as videophones) and appropriate billing and security features. The data obtained from providing these additional services may be additional data that would be required for annual accessibility-related reports. The Commission seeks comment on the impact of expanded reporting requirements on small entities, including the modification or elimination of the safe harbor for entities that have had no TRS-related complaints.

163. The Commission will consider the economic impact on small entities, as identified in comments filed in response to the FNPRM and this IRFA, in reaching its final conclusions and promulgating rules in this proceeding.

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

164. None.

VI. ORDERING CLAUSES

165. 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, 403, and 617, this Fifth Further Notice of Proposed Rulemaking IS ADOPTED.

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

167. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Fifth Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis and the Supplemental Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

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.

For the reasons set forth above, the Federal Communications Commission proposes to amend Part 64, subpart FF of Title 47 of the Code of Federal Regulations as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is 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), 255, 262, 276, 403(b)(2)(B), (c), 616, 620, 716, 1401-1473, unless otherwise noted; Pub. L. 115-141, Div. P, sec. 503, 132 Stat. 348, 1091.

2. Amend § 64.6000 by revising paragraph (m)(3) and adding new paragraphs (y) through (aa) to read as follows:

§ 64.6000 Definitions.

* * * * *

(m) * * *

(3) Post-conviction and awaiting transfer to another facility. The term also includes city, county, or regional facilities that have contracted with a private company to manage day-to-day operations; privately-owned and operated facilities primarily engaged in housing city, county or regional Inmates; facilities used to detain individuals operated directly by the Federal Bureau of Prisons or U.S. Immigration and Customs Enforcement, or pursuant to a contract with those agencies; juvenile detention centers; and secure mental health facilities;

* * * * *

(y) *Incarcerated person with a communication disability* means an incarcerated individual who is deaf, hard of hearing, or deafblind, or has a speech disability.

(z) *Telecommunications relay services (TRS)* and other TRS-related terms used in this subpart are defined in 47 CFR 64.601.

(aa) *TRS Fund* means the Telecommunications Relay Services Fund described in 47 CFR 64.604(c)(5)(iii).

3. Amend § 64.6040 by revising the section heading and paragraph (b) and adding paragraphs (c) through (d) to read as follows:

§ 64.6040 Communications Access for Incarcerated People with Communication Disabilities.

* * * * *

(b) No Provider shall levy or collect any charge or fee on or from any party to a TRS call to or from an incarcerated person, including any charge for the use of a device or transmission service when used to access TRS from a correctional facility.

(c) A Provider shall provide access for incarcerated people with communication disabilities to any form of TRS that is eligible for TRS Fund support.

(d) A Provider shall provide access to direct video service for incarcerated people eligible to access video relay service (VRS).

4. Amend § 64.6060 by revising paragraphs (a)(5) and (6) to read as follows:

§ 64.6060 Annual reporting and certification requirement.

(a) * * *

(5) The number of calls provided per facility, and the number of dropped calls per facility, during the reporting period in each of the following categories:

(i) TTY-to-TTY Inmate Calling Services calls;

(ii) Direct video calls placed or received by ASL users;

(iii) TRS calls, broken down by each form of TRS that can be accessed from the facility; and

(6) The number of complaints that the reporting Provider received related to dropped calls and poor call quality, respectively, in each of the categories set forth in paragraph (a)(5) of this section.

* * * * *

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