



## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 64

[WC Docket No. 12-375, FCC 21-60; FRS 35682]

#### Rates for Interstate Inmate Calling Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; denial of reconsideration.

**SUMMARY:** In this Order on Reconsideration, the Federal Communications Commission (Commission) denies a petition for reconsideration filed by Global Tel\*Link Corp. (GTL) seeking reconsideration of the *2020 ICS Order on Remand*, released on August 7, 2020. The Commission reiterates that the jurisdictional nature of a telephone call from a prison or jail depends, for purposes of charging consumers, on the physical location of the originating and terminating endpoints of the call. To the extent the endpoints of any particular call from a prison or jail could be either intrastate or interstate and such endpoints are not known or easily knowable, consistent with Commission precedent, rates or charges for such calls may not exceed any applicable federally prescribed rates or charges.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Federal Communications Commission, 45 L Street, NE, Washington, DC 20554.

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

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Order on Reconsideration, FCC 21-60, released on 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 an Order on Reconsideration denying GTL’s petition for reconsideration of the *2020 ICS Order on Remand*, published at 85 FR 67450 (Oct. 23, 2020), and reiterates that the jurisdictional nature of a telephone call for purposes of charging consumers depends on the physical location of the originating and terminating endpoints of the call. To the extent the endpoints of any particular call could be either intrastate or interstate and such endpoints are not known or easily knowable, consistent with the Commission’s precedent, rates or charges for such calls may not exceed any applicable federally prescribed rates or charges.

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 the Commission’s universal, basic need to communicate. Although the Commission uses various terminology throughout this item to refer to the intended beneficiaries of the Commission’s 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.” The statute explicitly exempts telecommunications relay service calls for hearing disabled individuals from the requirement that providers must be compensated for “each and every” completed call. 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. Judge Pillard dissented from this view, finding permissible the Commission’s contrary interpretation of the meaning of “fairly compensated” in section 276.

## **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 the *2012 ICS Notice* 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, were readopted in 2015, 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 the *2014 ICS Notice*, the Commission sought comment on reforming charges for services ancillary to the provision of inmate calling services and on establishing rate caps for both interstate and intrastate 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 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 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. *2020 ICS Order on Remand and Notice*. In February 2020, the Wireline Competition Bureau (Bureau or WCB) issued a public notice seeking to refresh the record on ancillary service charges in light of the D.C. Circuit’s remand in *GTL v. FCC*. This Public Notice 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 adopted the *2020 ICS Order on Remand* and *2020 ICS Notice*. 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 ICS Notice 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 *2020 ICS Notice* 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 Notice*, 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. ORDER ON RECONSIDERATION**

25. The Commission denies the GTL Petition in full on the merits and, independently, dismisses that petition as procedurally defective, insofar as it relies on arguments the Commission already considered and rejected in the underlying order. The Commission considered and rejected GTL's arguments regarding so-called Commission "precedent" purporting to establish a general policy of reliance on NPA-NXX as a proxy for jurisdiction and whether the Commission's statement required prior notice and an opportunity to comment. GTL seeks reconsideration of a single sentence from the *2020 ICS Order on Remand*, reiterating that "the jurisdictional nature of a call depends on the physical location of the endpoints of the call and not on whether the area code or NXX prefix of the telephone number . . .

associated with the account, are associated with a particular state.” GTL claims that this sentence (1) ignores telecommunications carriers’ historical reliance on NPA-NXX codes to classify calls as interstate or intrastate; (2) unfairly singles out providers of calling services for incarcerated people; (3) presents implementation issues; (4) potentially compromises state programs funded by assessments on intrastate revenues; and (5) promulgates a new rule without notice and an opportunity to comment. The Commission finds each of these claims to be without merit and affirm the Commission’s continued use of the traditional end-to-end jurisdictional analysis relied upon in the *2020 ICS Order on Remand*.

#### **E. Background**

26. Last year, the Commission responded to the D.C. Circuit’s directive that it consider whether ancillary service charges can be segregated into interstate and intrastate components to exclude the intrastate components from the reach of the Commission’s rules. The Bureau issued the *Ancillary Services Refresh Public Notice*, published at 85 FR 9444 (Feb. 19, 2020), seeking to refresh the record in light of the D.C. Circuit’s remand. Based on the record developed in response to that public notice, the Commission found that “ancillary service charges generally cannot be practically segregated between the interstate and intrastate jurisdiction except in the limited number of cases where, at the time a charge is imposed and the consumer accepts the charge, the call to which the service is ancillary is a clearly intrastate-only call.” Thus, the Commission concluded that providers are generally prohibited from imposing ancillary service charges, other than those explicitly permitted by the Commission’s rules, and are also generally prohibited from imposing ancillary service charges in excess of the permitted ancillary service fee caps in the Commission’s rules.

27. In the *2020 ICS Order on Remand*, the Commission addressed record debate about the jurisdictional classification methodology for certain inmate calling services calls and the ancillary services provided in connection with those calls by reminding providers that “the jurisdictional nature of a call depends on the physical locations of the endpoints of the call,” rather than on the area codes or NXX prefixes of the telephone numbers used to make and receive the call. GTL and Securus objected to this approach, asserting that relying on a call’s endpoints was inconsistent with prior Commission decisions and with providers’ practice of using NPA-NXX codes as proxies for jurisdiction. GTL and Securus raised these objections in *ex parte* filings during the public circulation period of the *2020 ICS Order on*

*Remand* but before the Commission adopted that *Order* on August 6, 2020. GTL and Securus also claimed that the Commission’s clarification regarding how carriers are to determine the jurisdictional nature of a call required prior notice and an opportunity to comment. In addition, NCIC questioned “the FCC’s determination that [inmate calling services] providers will be able to determine the location of the terminating point of an [inmate calling services] wireless call—and thus determine whether the call is intrastate or interstate in nature.”

28. In response to these objections, the Commission explained that although it has allowed the use of proxies to determine the jurisdictional nature of certain calls, it has done so only in specific contexts “typically related to carrier-to-carrier matters or payment of fees owed” and that it “never adopted a general policy allowing the broad use of such proxies.” The Commission distinguished the so-called “precedent” cited by GTL and Securus, explaining that none of those decisions established actual Commission policy or practice regarding the use of jurisdictional proxies and that the examples provided “relate specifically to carrier-to-carrier arrangements involving intercarrier compensation or applicable federal fees due between carriers and the Commission, not to using a proxy for charging a customer a higher or different rate than it would otherwise be subject to based on whether the customer’s call is interstate or intrastate.” The Commission, therefore, rejected GTL’s and Securus’s argument that application of the end-to-end analysis required prior notice and an opportunity to comment, explaining that it was merely clarifying “the long-established standard that inmate calling services providers must apply in classifying calls for purposes of charging customers the appropriate rates and charges.” The Commission further explained that the Bureau’s public notice seeking to refresh the record on ancillary service charges in light of the D.C. Circuit’s remand provided “notice of, and a full opportunity to comment on, the jurisdictional status of inmate calling services calls” because the public notice sought comment on how to proceed if ancillary services were “jurisdictionally mixed” and defined jurisdictionally mixed services as those that are “capable of communications both between intrastate end points and between interstate end points.”

29. In November 2020, GTL filed a petition seeking reconsideration of the application of the end-to-end jurisdictional analysis in the *2020 ICS Order on Remand*. The Bureau released a Public Notice announcing the filing of GTL’s Petition and establishing deadlines for oppositions and replies to

the Petition. The Bureau received comments from Pay Tel and replies from NCIC and GTL.

## **F. Discussion**

30. *Standard of Review.* Any interested party may file a petition for reconsideration of a final action in a rulemaking proceeding. Reconsideration “may be appropriate when the petitioner demonstrates that the original order contains a material error or omission, or raises additional facts that were not known or did not exist until after the petitioner’s last opportunity to present such matters.” Petitions for reconsideration that do not warrant consideration by the Commission include those that: “[f]ail to identify any material error, omission, or reason warranting reconsideration; [r]ely on facts or arguments which have not been previously presented to the Commission . . . ; [r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding;” or “[r]elate to matters outside the scope of the order for which reconsideration is sought.” The Commission may consider facts or arguments not previously presented if: (1) they “relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission;” (2) they were “unknown to petitioner until after [their] last opportunity to present them to the Commission, and [the petitioner] could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity;” or (3) “[t]he Commission determines that consideration of the facts or arguments relied on is required in the public interest.”

### **1. GTL’s Substantive Arguments Against the End-to-End Analysis Do Not Warrant Reconsideration**

31. GTL’s Petition provides no new substantive facts or arguments that justify reconsideration of the Commission’s application of the end-to-end jurisdictional analysis to calling services for incarcerated people. Although GTL cites various documents it claims establish a general Commission policy on the use of jurisdictional proxies for classifying interstate and intrastate calls, none of the cited documents establish such a policy, especially in the provision of inmate calling services. The Commission is also unpersuaded by GTL’s arguments regarding the possible discriminatory treatment of providers of these calling services, its reliance on third parties to make jurisdictional determinations, or its unsubstantiated claims about the effects the Commission’s jurisdictional analysis may have on state programs.

32. GTL first argues that the end-to-end analysis ignores what it claims is the industry

custom and practice of using NPA-NXX codes to determine whether a call is interstate or intrastate. GTL asserts that the “Commission’s prior statements have recognized that using NPA-NXX *is* an appropriate industry standard for determining whether a call is interstate or intrastate.” In this regard, GTL emphasizes the 2003 *Starpower Damages Order*. For its part, NCIC argues that the Commission’s “precedent” has been “correctly cited by GTL,” and that the Commission should “continue to follow that precedent” in the context of calling services for incarcerated people.

33. The Commission disagrees. The Commission reaffirms the Commission’s prior conclusion that not one of the decisions cited in GTL’s Petition adopted a general policy allowing broad use of jurisdictional proxies, such as NPA-NXX codes. Those decisions primarily concern the use of jurisdictional proxies to determine the appropriate rating between and among various types of service providers routing calls originating from one NPA-NXX code to a terminating NPA-NXX code and vice versa. None of them allow for the use of jurisdictional proxies in the context of inmate calling services for which consumers may be charged different rates based on whether a call is classified as interstate or intrastate. Instead, the decisions GTL cites merely reflect that the Commission “has allowed carriers to use proxies for determining the jurisdictional nature of calls in specific contexts, typically related to carrier-to-carrier matters or payment of fees owed.”

34. At bottom, GTL requests that the Commission engraft into its inmate calling services rules a jurisdictional proxy—relying on NPA-NXX codes for all telephone calls from incarcerated people to a called party regardless of the called parties’ service provider of choice—that the Commission has never suggested might be used in determining the jurisdictional classification of an inmate calling services call. The Commission thus is not persuaded that GTL’s approach reflects a reasonable interpretation of the Commission’s existing rules.

35. GTL seizes on certain language in the *Starpower Damages Order* that, GTL claims, establishes a “historical” or “consistent” use of NPA-NXX codes. Contrary to GTL’s assertions, however, the *Starpower* decision did not announce a general policy permitting the use of jurisdictional proxies. Rather, *Starpower* was narrowly concerned with an intercarrier compensation dispute, the resolution of which hinged on the treatment of traffic under a Verizon tariff. In the liability phase of the proceeding, *Starpower* obtained an order from the Commission obligating Verizon to pay reciprocal

compensation under an interconnection agreement “for whatever calls Verizon South bills to its own customers as local calls under the Tariff, regardless of whether a call is jurisdictionally interstate.” In the damages phase, Verizon argued that, under its tariff definition, the physical location of the called parties, and not the telephone numbers, determined whether service was “local.” But the Commission concluded that Verizon rated and billed ISP-bound traffic under its tariff by looking to the telephone numbers of the parties to a call and not the parties’ physical locations. The Commission held that since Verizon treated ISP-bound calls as “local under the Tariff,” Verizon was obligated to pay reciprocal compensation under the interconnection agreement. Thus, although *Starpower* contains passing references to the use of NPA-NXX to determine the jurisdictional nature of certain traffic, the decision ultimately turned on the Commission’s interpretation of Verizon’s tariff and Verizon’s own practices in applying that tariff. Accordingly, *Starpower* does not establish any Commission or industry-wide policy on the use of jurisdictional proxies. The fact that *Starpower* involved Internet service provider-bound traffic—i.e., traffic to another type of service provider, which at the time was a separate unsettled jurisdictional issue, rather than an end user telephone subscriber—alone, makes this case entirely inapposite.

36. In any event, it is simply not reasonable or reliable now, nor has it been for many years, to assume that a called party is physically located in the geographic area (rate center) of the switch to which the party’s NPA-NXX code is native. Before Congress adopted the 1996 Act, when incumbent LECs controlled 99% of the local voice marketplace, one could reasonably assume that a called party was physically located in the geographic area associated with a particular NPA-NXX, as NPA-NXX codes were associated only with a particular incumbent’s rate center. Since that time, however, number porting between and among competing wireline LECs, wireless carriers, and fixed and nomadic VoIP providers has rendered NPA-NXX codes an all-too-frequently unreliable means to determine whether a called party is physically located within a particular state when it receives and answers a given call.

37. In the 1996 Act, Congress included the requirement that each LEC “provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.” This definition now appears in section 3(37) of the Act. The number portability rules subsequently adopted by the Commission, as modified over time, limit number porting between wireline incumbents and wireline competitors to ports within the same rate center. With respect to wireline-to-wireless



porting, the Commission requires wireline carriers to port to requesting wireless carriers “where the requesting wireless carrier’s ‘coverage area’ overlaps the geographic location in which the customer’s wireline number is provisioned, provided that the porting-in carrier maintains the number’s [NPA-NXX] original rate center designation following the port.” In other words, when the wireline number is ported to the wireless carrier’s customer, the original rate center designation is maintained for routing and rating purposes by other service providers. A wireless carrier may only port a number to a wireline carrier if the number is associated with the rate center of the wireline carrier where the customer is located. Nomadic VoIP “is usually a VoIP phone installed in a portable computer which can be taken with the subscriber” so that “[c]alls can be made from anywhere in the world.” By comparison, fixed VoIP is not movable. “The [fixed] service is provided by a cable company, for example, where the telephone does not leave the residence.” The Commission began its work implementing the 1996 Act’s number portability requirement with its 1996 *First Number Portability Order*, in which it adopted an initial set of rules governing wireline-to-wireline, wireless-to-wireless, and wireline-to-wireless number portability obligations. It required that LECs in the 100 largest Metropolitan Statistical Areas (MSAs) begin implementing a long-term number portability methodology on a phased deployment schedule, and that CMRS providers be able to port numbers by the wireline carriers’ deadline to complete number portability implementation and to support network-wide roaming thereafter. The Commission also established LEC number portability implementation obligations outside of the 100 largest MSAs. Subsequently, in 2007, the Commission extended local number portability obligations to interconnected VoIP providers, both fixed and nomadic. In 2015, the Commission opened direct access to numbering resources to interconnected VoIP providers.

38. Today, consumers increasingly rely on nomadic VoIP and mobile voice services for telephone service. Nomadic interconnected VoIP services are provided as over-the-top applications and are not associated with any specific geographic location. “In this way, nomadic interconnected VoIP service is similar to mobile service, but distinct from fixed telephony service.” “Over-the-top” VoIP providers are VoIP providers that are not facilities-based. The consumer of an over-the-top VoIP service “uses an independent data service over a broadband connection.” The Commission’s December 2019 FCC Form 477 data reflected 12.9 million over-the-top VoIP subscriptions in the United States at that

time. Subscribers to these services can readily move to other rate centers throughout the country while retaining their telephone numbers. And nearly half of all assigned telephone numbers are associated with wireless phones, which is unsurprising given that the majority of households in the United States no longer subscribe to a landline service. The *combination* of the Commission's number portability orders and the significant technological changes to the communications marketplace means that NPA-NXX codes reflected in telephone numbers are often subject to movement across state lines, on a permanent, nomadic, or mobile basis, making them unreliable as a geographic indicator of endpoints for a given call. As the foregoing analysis suggests, *only* where the calling party (here, the incarcerated person) and the called party each have wireline telephone numbers, can an inmate calling services provider reasonably and reliably determine the jurisdictional nature of a call between those parties based on the NPA-NXX codes of the originating and terminating telephone numbers. That is the case because the Commission's rules require the NPA-NXX of a wireline telephone subscriber to necessarily physically remain within the particular rate center from which each wireline telephone number originated. Unlike for wireless voice service and nomadic VoIP service, the Commission's number porting rules do not permit telephone numbers of wireline subscribers to port across rate center boundaries.

39. GTL next complains that the Commission's confirmation of the end-to-end analysis inappropriately "singles out [inmate calling services] providers," and that the Commission "cannot target particular classes of telecommunications service providers in its rulemaking when the legal basis for it (and the criticisms that undergird it) are of universal applicability." This complaint is completely without merit. The Commission has not singled out inmate calling services providers for disparate treatment. The end-to-end analysis is, and remains, the generally applicable, default standard for all telecommunications carriers—not just inmate calling services providers—for determining the jurisdictional classification of a telephone call. In addition, inmate calling services providers *are* unlike other telecommunications carriers. Calling service providers have a captive consumer base at each correctional facility they serve for which they rarely, if ever, offer all-distance calling plans with uniform rates and charges for intrastate and interstate calls as do most, if not all, other telecommunications services providers. Indeed, inmate calling services providers typically have a myriad of different rates and charges applicable to different jurisdictional call types (i.e., intraLATA intrastate, interLATA intrastate, intraLATA interstate, and

interLATA interstate). And while providers have not explained in detail what their resale arrangements with underlying telecommunications carriers entail, it is the Commission's understanding that providers typically pay a flat rate for all minutes of use (except for international calling) regardless of the jurisdictional nature of the call. Calling service providers continue to charge incarcerated people (or their families) different rates and charges purportedly based on differences in costs to serve these different call types, even though those rates are based on fictional determinations that have nothing to do with actual geographic endpoints, except in the case of wireline-to-wireline calls.

40. As explained above, the generally accepted method of determining the jurisdictional nature of any given call is by an end-to-end analysis. Thus, contrary to the providers' claims, jurisdictional proxies are the exception, not the rule. It is only "[w]here the Commission has found it difficult to apply an end-to-end approach for jurisdictional purposes, [that] it has proposed or adopted proxy or allocation mechanisms to approximate the end-to-end result." The Commission subsequently adopted permissible proxies for determining what portion of such jurisdictionally indeterminate VoIP services to attribute to the interstate jurisdiction for Universal Service Fund (USF) payment purposes, but such proxies did not pertain to classifying the underlying calls as either interstate or intrastate for purposes of billing consumers different rates for telephone calls. In the *Vonage Order*, for example, the Commission expressly declined to adopt the use of proxies for determining whether a call was jurisdictionally intrastate or interstate or to address the conflict between federal and state regulatory regimes. Indeed, GTL itself recognized the general applicability of the end-to-end analysis in its comments on the *Ancillary Services Refresh Public Notice*, explaining that "[t]he *jurisdictional nature of calls themselves is easily classified* as either interstate or intrastate *based on the call's points of origination and termination*. This accords with *the Commission's traditional end-to-end analysis for determining jurisdictional boundaries* 'beginning with the end point at the inception of a communication to the end point at its completion.'" GTL fails to explain how the application of the Commission's long-established approach for determining the appropriate jurisdiction of a call unfairly singles out providers of calling services for incarcerated people given that, by GTL's own admission, the Commission generally applies this "traditional" analysis to all telecommunications providers.

41. Because an NPA-NXX code frequently fails to provide any indication of the actual

physical location of a called party (unless it is known that the called party is a wireline telephone subscriber), it generally cannot be relied upon to determine the jurisdictional nature of a call. As the Commission stated in the *2020 ICS Order on Remand*, to do so would undercut interstate callers' federal protection from unjust and unreasonable interstate charges and practices.

42. GTL also alleges, through reliance on decades-old discussions of rating based on NPA-NXX and industry guides, that there are technical barriers that prevent providers of calling services for incarcerated people from applying the traditional end-to-end analysis. These allegations arise from the fact that providers rely on third parties to classify the jurisdiction of calls. As GTL explains it, calls from correctional facilities, whether to wireline, wireless, or VoIP numbers, “are handed off to unaffiliated third-party telecommunications service providers that route them across the public switched telephone network to their appropriate termination point, based on the called number’s entry in the Local Exchange Routing Guide.” The Local Exchange Routing Guide (LERG) is “an industry guide generally used by carriers in their network planning and engineering and numbering administration. It contains information regarding all North American central offices and end offices.” GTL adds that “[inmate calling services] providers assess charges on inmate calls by purchasing access to third-party databases that classify them as intrastate, interstate, or international” and that these databases do not provide the “actual geographical location associated with a particular device or service.” Relatedly, Securus explains that these third parties use “telephone numbers or, since the advent of local number portability, the Local Routing Number . . . as a proxy for . . . jurisdiction,” and lack “the information needed to apply the end-to-end analysis.” The Local Routing Number is a “telephone number assigned in the local number portability database for the purposes of routing a call to a telephone number that has been ported. When a call is made to a number that has been ported, the routing path for the call is established based on the L[ocal] R[outing] N[umber] rather than on the dialed number.” GTL concludes that “[g]iven indicia that classification determinations have, for decades, been under the control of entities over which many providers exercise no authority, critical logistical and financial questions present themselves, such as the costs attendant upon [inmate calling services] providers should they be required to design, deploy, and implement an alternative call classification system.”

43. The Commission finds these arguments unpersuasive. The Commission’s rules specify

that providers of inmate calling services are currently prohibited from charging more than \$0.21 per minute for interstate Debit Calling, Prepaid Calling, or Prepaid Collect Calling and prior to today's accompanying Report and Order more than \$0.25 per minute for interstate Collect Calling. The current rule language tracks the language adopted in 2013 but adds the term "interstate." The term "interstate" was added to section 64.6030 of the Commission's rules as a non-substantive change to reflect a D.C. Circuit decision that the Commission's regulation of inmate calling services rates could extend no further than the extent of its authority over interstate (and international) calls. The fact that the addition of "interstate" was a non-substantive change to reflect a court decision limiting the Commission's inmate calling services rate regulations to the limit of the Commission's authority further reinforces the reasonableness of interpreting "interstate" consistent with the Commission's historical jurisdictional approach. The Commission's interpretation of the term "interstate" in its rule accords not only with the use of that terminology in the Communications Act, but also with the Commission's traditional approach to defining jurisdiction. It is the *provider's* responsibility to "appropriately comply[] with this most basic regulatory obligation of telecommunications service providers with respect to their customers—determining the proper jurisdiction of a call when charging its customers the correct and lawful rates for those calls using the end-to-end analysis." Providers did not express any concerns about their ability to determine the jurisdiction of any given call when the Commission's adopted "interim rate caps . . . for *interstate* [inmate calling services]" in 2013. Nor did they express such concerns in the following years, as those interim rate caps continued to apply. Indeed, despite GTL's claims here, it and other providers use the Commission's historical approach when defining the terms "interstate" and "intrastate" in at least some of their tariffs and price lists. It is unclear why GTL, or any provider, would base its rates on the geographic locations of the parties to a call if the service provider could not, in fact, determine where the parties are located at the time of the call. The record also provides no indication that the third parties upon which GTL and others claim they rely for determining the jurisdiction of their calls could not accurately determine whether a consumer is making calls between NPA-NXX codes assigned to wireline, wireless, or nomadic VoIP numbers to determine whether those calls are subject to the Commission's interstate rate caps without relying on another methodology to determine the actual endpoints of the call.

44. Further, many of the guides and brochures to which GTL cites in this regard relate

predominantly to call *routing* rather than rating. For example, GTL cites to the iconectiv brochure “Route It Right Every Time with LERG OnLine.” That brochure contains precisely two references to rating, neither of which relate to the billing of end-user customers. GTL also points to an iconectiv Catalog of Products and Services, but that document is similarly unhelpful for GTL. Finally, the iconectiv catalog to which GTL cites notes that the Telecom Routing Administration’s products “are a mainstay in supporting the various offerings of service providers . . . and, bottom line, in ensuring calls placed by their customers and through their network complete without any problems.” In other words, the Telecom Routing Administration provides data that supports the *routing* of calls. Nowhere in that catalog does it state that providers should rely solely on NPA-NXX codes for rating calls to end users. The Commission also disagrees with GTL’s characterization of the Local Exchange Routing Guide as requiring the use of NPA-NXXs for determining the jurisdictional nature of a call. Once again, GTL conflates the relationship of an NPA-NXX code to that code’s original rate center designation, reflected in the Local Exchange Routing Guide for *routing* purposes, with using the same rate center information to determine whether the terminating call to that NPA-NXX code is jurisdictionally intrastate or interstate. The original rate center designation of an NPA-NXX number has no bearing on where calls to that number actually terminate when the called party is a customer of a wireless or nomadic VoIP provider, at a minimum. But even if it did, that would have no bearing on inmate calling services providers’ obligations to charge incarcerated people and those whom they call lawful rates.

45. To the extent that the technical issues raised by GTL make it impracticable or impossible to determine whether a call is interstate or intrastate based on the geographical endpoints of the call, the Commission does not require providers of calling services for incarcerated people to redesign or deploy other call classification systems. Instead, the Commission reaffirms that providers must charge a rate at or below the applicable interstate cap for that call. Pay Tel complains that today’s Order “effectively classif[ies] all [inmate calling services] calls as jurisdictionally ‘interstate.’” Pay Tel asserts that, as a consequence, consumers will face significant rate increases due to assessment of federal Universal Service Fund charges on all calls, in addition to a host of other concomitant consequences. The Commission finds such concerns misplaced. Under the Commission’s end-to-end analysis, charges for a call that is jurisdictionally indeterminant may not exceed the applicable interim interstate rate cap, but

where a state has a lower rate cap in place for intrastate calls, charges for a call of indeterminate nature must comply with the lower state rate cap. The Commission also disagrees that there would necessarily be a significant impact on Universal Service Fund assessments as Pay Tel and Securus allege. First, the Commission does not reclassify any calls as interstate calls; and second providers may continue to use whatever proxy or good faith determination of interstate revenue for purposes of universal service contributions that they have used in the past for this traffic. The Commission's actions today go only to the question of the appropriate jurisdictional treatment for purposes of determining the rates providers may charge for telephone calls to consumers. The Commission's actions neither limit the ability of providers to avail themselves of applicable proxies or safe harbors used for purposes of Universal Service Fund reporting nor suggest that providers have been incorrectly complying with the Commission's universal service contribution rules. Finally, the Commission takes this opportunity to remind providers that they are permitted but not required to pass through universal service charges to their end users. As the Commission explained in the *2020 ICS Order on Remand*, "where the Commission has jurisdiction under section 201(b) of the Act to regulate rates, charges, and practices of interstate communications services, the impossibility exception extends that authority to the intrastate portion of jurisdictionally mixed services 'where it is impossible or impractical to separate the service's intrastate from interstate components' and state regulation of the intrastate component would interfere with valid federal rules applicable to the interstate component." There is no dispute that the Commission has jurisdiction over providers' interstate rates, and GTL does not dispute the Commission's authority to regulate jurisdictionally indeterminate services. Accordingly, to the extent that GTL and other providers find it impossible or impracticable to determine the actual endpoints, hence the actual jurisdictional nature of a call, they must treat that call as jurisdictionally indeterminate and must charge a rate at or below the applicable interstate cap.

46. The Commission rejects GTL's argument that the Commission's application of the end-to-end analysis violates the jurisdictional limitation in section 221(b) of the Act. That section has been narrowly interpreted to "enable state commissions to regulate local exchange service in metropolitan areas . . . which extend across state boundaries." Section 221(b), which refers to "telephone exchange service" says nothing about payphone service, which is separately defined in section 276 of the Act.

“Telephone exchange service” is broadly defined as “service within a telephone exchange” or “comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.” Indeed, the statute recognizes and treats payphone service separately from exchange service in section 276(a), which prevents Bell operating company-owned payphones from receiving subsidies “from . . . telephone exchange service operations.” The Commission has previously recognized this distinction, explaining that although states traditionally regulated payphones, including by setting local rates, that role was “in the context of LECs providing local payphone service as part of their regulated service.” By disallowing LEC payphones from receiving subsidies from their basic exchange service, the Commission emphasized that section 276 “greatly changes the way in which states set local coin rates.” In sum, the Act treats the exchange service in section 221(b) separate from payphone service in section 276, and the courts have narrowly interpreted section 221(b) to apply only to a state’s ability to regulate local exchange service. The Commission is therefore unpersuaded by GTL’s argument that the Commission violated section 221(b) or acted in a manner precluded by the implementation of that provision by reiterating that providers of calling services for incarcerated people must charge their end users for interstate and intrastate calls based on the physical endpoints of the call.

47. The Commission is also unpersuaded by GTL’s claim that the Commission’s jurisdictional analysis might have some “potential impact” on state communications programs that depend on assessments of intrastate revenues or that the Commission is somehow limiting the ability of state commissions to use NPA-NXX as a jurisdictional proxy. GTL provides no evidence that applying an end-to-end analysis for purposes of complying with the federal interstate rate cap for inmate calling services charges would either interfere with state authority to use NPA-NXX as a proxy for determining which calls are within their jurisdiction or would somehow result in the “reclassification of all telecommunications traffic that relies on NPA-NXX . . . as interstate.” The Commission does not disturb state and local laws or regulations that use NPA-NXX or other proxies to determine, for example, the application of state fees and taxes. The end-to-end jurisdictional analysis that the Commission reaffirms today only affects what calling providers may charge incarcerated people and their loved ones for jurisdictionally indeterminate telephone calls, and as the Commission has indicated above, continued



compliance with applicable state and local laws that are not in conflict with federal law remain unaffected.

## 2. GTL's Procedural Arguments Do Not Warrant Reconsideration

48. The Commission rejects GTL's claim that the Commission needed to provide additional notice and an additional opportunity for comment before it clarified in the *2020 ICS Order on Remand* that providers must use the geographical endpoints of a call rather than the area code or NXX prefix of the call's recipient to determine whether the call is interstate or intrastate. The Commission rejects this claim on procedural grounds insofar as the Commission considered and responded to these arguments in the *2020 ICS Order on Remand*, 35 FCC Rcd at 8502-04, paras. 52-54. The Commission also rejects it on substantive grounds as discussed herein. GTL mischaracterizes the Commission's clarification as a "new and unprecedented [r]ule" and a "serious departure from prior practice." On the contrary, after identifying confusion and debate in the record, the Commission "remind[ed]" and "clarifie[d]" for providers the end-to-end analysis it "has traditionally used to determine whether a call is within its interstate jurisdiction" to ensure that providers of calling services for incarcerated people do not "circumvent or frustrate [the Commission's] ancillary service charge rules." Providers of calling services for incarcerated people have been on notice since the Commission adopted interstate rate caps in 2013 that they could not charge more than the capped amounts for interstate calls. By interpreting the rate cap rule as requiring that inmate calling services calls be classified based on their endpoints, the Commission applied the ordinary meaning of the term "interstate" as that term is defined in the Communications Act. The Communications Act defines "interstate communication" or "interstate transmission" as [C]ommunication or transmission (A) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (B) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than second 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State

commission. There has been no new legislative rule that would have required notice and an opportunity to comment. The Commission's reminder clearly served the purpose of an interpretive rule. The Administrative Procedure Act (APA) exempts interpretive rules from the procedural requirements of notice and comment rulemaking. An interpretive rule is a clarification or explanation of existing laws or regulations rather than a substantive modification in or adoption of new regulations.

49. In essence, GTL contends that "interstate" as used in the Commission's inmate calling services rules had a different meaning than "interstate" as used in the Communications Act and therefore that it could classify as intrastate a call that originates in one state and terminates in another state based solely on NPA-NXX codes. GTL's claim is unavailing and has no bearing on the question of whether the Commission was required to provide additional notice and an additional opportunity to comment prior to clarifying that "interstate" as used in the inmate calling services rules continues to have the same meaning as "interstate" as used in the Communications Act and historical Commission usage of the term.

50. In any event, the *Ancillary Services Refresh Public Notice* fully apprised all interested parties that the Commission would be considering how it should proceed in the event an ancillary service could not "be segregated between interstate and intrastate calls." That public notice also invited comment on what additional steps the Commission should take to ensure that providers of interstate inmate calling services do not circumvent or frustrate the Commission's ancillary service charge rules. GTL claims that the *Ancillary Services Refresh Public Notice* was insufficient to inform stakeholders that the Commission might reexamine "the methodology used to determine whether a call or charge is interstate or intrastate." But the *Public Notice* made clear that the Commission would be considering when an ancillary service is interstate, which necessarily involves a determination whether the calls in connection with that service are interstate. For this reason, the Commission also rejects Pay Tel's assertion that the *Ancillary Services Refresh Public Notice* did not contemplate an evaluation of the jurisdictional classification of inmate calling services calls. And, when the record revealed that certain providers were using NPA-NXX codes, rather than endpoints, to classify calls as interstate or intrastate, the Commission properly clarified, consistent with the text of the Act and long-standing precedent, that using the geographic endpoints was the proper method to determine call jurisdiction. Thus, the Commission's clarification that providers must use an end-to-end analysis in classifying calls as interstate or intrastate was, at the very least, a

logical outgrowth of the *Ancillary Services Refresh Public Notice*. Indeed, absent such clarification, the Commission could not have responded fully to the D.C. Circuit's directive to ascertain on remand whether ancillary service charges could be segregated between interstate and intrastate components.

51. For the reasons stated herein, the Commission denies GTL's petition on the merits and dismiss it as procedurally defective.

#### **IV. SEVERABILITY**

52. All of the rules and policies that are adopted in the Commission's Third Report and Order and this Order on Reconsideration are designed to ensure that rates for inmate calling services are just and reasonable while also fulfilling the Commission's obligations under sections 201(b) and 276 of the Act. Each of the separate reforms the Commission undertakes here serves a particular function toward these goals. Therefore, it is the Commission's intent that each of the rules and policies adopted herein shall be severable. If any of the rules or policies is declared invalid or unenforceable for any reason, the remaining rules shall remain in full force and effect.

#### **V. PROCEDURAL MATTERS**

53. *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](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at (202) 418-0530.

54. *Congressional Review Act*. The Commission will not send a copy of this Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA), *see* 5 U.S.C. 801(a)(1)(A), because it does not adopt any rule as defined in the CRA, 5 U.S.C. 804(3).

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

56. *Final Paperwork Reduction Act Analysis*. The Order on Reconsideration does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. Therefore, it does not contain any new or modified information collection

burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

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

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

57. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Second Further Notice of Proposed Rulemaking in the Commission's Inmate Calling Services proceeding. The Commission sought written public comment on the proposals in that *Notice*, including comment on the IRFA. The Commission did not receive comments directed toward the IRFA. Thereafter, the Commission issued a Final Regulatory Flexibility Analysis (FRFA) conforming to the RFA. This Supplemental FRFA supplements that FRFA to reflect the actions taken in the Order on Reconsideration and conforms to the RFA.

58. The Order on Reconsideration denies a Petition for Reconsideration of the *2020 ICS Order on Remand* and reiterates that the jurisdictional nature of an inmate calling services telephone call depends on the physical location of the originating and terminating endpoints of the call.

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

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

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

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

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

61. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. Pursuant to 5 U.S.C. 601(3), 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 Small Business Administration (SBA).

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

63. *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. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Thus, under this size standard, the majority of firms in this industry can be considered small.

64. *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.

65. *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. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. 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.

66. 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 Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. 632(a); *see also* 5 U.S.C. 601(2). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 CFR § 121.102(b). The Commission has therefore included small incumbent LECs in this RFA analysis, although it emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

67. *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. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. 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 it emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

68. *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. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. 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.

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

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

71. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the Commission's action.

72. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers, a group that includes inmate calling services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has



1,500 or fewer employees. According to Commission data, 535 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 531 have 1,500 or fewer employees and four have more than 1,5000 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the Commission's action.

73. *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).

74. *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. Under this category and the associated small business size standard, a majority of the ten TRS providers can be considered small.

#### **E. Description of Projected Reporting, Recordkeeping, and Other Compliance**

## **Requirements for Small Entities**

75. The Order on Reconsideration confirms that providers must properly identify the physical location of the originating and terminating endpoints of the call in order to determine the jurisdictional nature of the call. To the extent those services are interstate, international, or jurisdictionally mixed, the provider must comply with interim interstate and international inmate calling services caps or limits adopted by the Commission.

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

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

77. The Commission’s rate caps differentiate 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. The Commission adopts new interim interstate provider-related rate caps for prisons and larger jails and for collect calls from jails with average daily populations below 1,000. The Commission believes these actions properly recognize that, in comparison to prisons and larger jails, jails with average daily populations below 1,000 may be relatively high-cost facilities for providers to serve. The Commission also adopts rate caps for international calls originating from facilities of any size.

78. The Commission adopts new interim interstate facility-related rate components for prisons and larger jails to allow providers to recover portions of site commission payments estimated to be directly related to the provision of inmate calling services and to separately list these charges on consumers’ bills. Providers must determine whether a site commission payment is either (1) mandated pursuant to state statute, or law or regulation and adopted pursuant to state administrative procedure statutes where there is notice and an opportunity for public comment that operates independently of the contracting process between correctional institutions and providers (Legally Mandated facility rate

component), or (2) results from contractual obligations reflecting negotiations between providers and correctional facilities arising from the bidding and subsequent contracting process (the Contractually Prescribed facility rate component). For Legally Mandated site commission payments, providers may pass these payments through to consumers without any markup, as an additional component of the new interim interstate per-minute rate cap. For Contractually Prescribed site commission payments, providers may recover an amount up to \$0.02 per minute to account for these costs. To promote increased transparency, the Third Report and Order requires providers to clearly label a Legally Mandated or Contractually Prescribed facility rate component, as applicable, in the rates and charges portion of a consumer's bill, including disclosing the source of such provider's obligation to pay that facility-related rate component.

79. The Commission recognizes that it cannot foreclose the possibility that in certain limited instances, the interim rate caps may not be sufficient for certain providers to recover their costs of providing interstate and international inmate calling services. To minimize the burden on providers, the Commission adopts a waiver process that allows providers to seek relief from its rules at the facility or contract level if they can demonstrate that they are unable to recover their legitimate inmate calling services-related costs at that facility or for that contract. The Commission will review submitted waivers and potentially raise each applicable rate cap to a level that enables the provider to recover the costs of providing inmate calling services at that facility. This waiver opportunity should benefit any inmate calling services providers that may be small businesses and that are unable to recover their interstate and international costs under the new interim rate caps.

#### **G. Report to Congress**

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

## VII. ORDERING CLAUSES

81. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 617, this Order on Reconsideration IS ADOPTED.

82. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 617, the Petition for Reconsideration, filed November 23, 2020, by Global Tel\*Link Corp. IS DENIED IN FULL and DISMISSED IN PART as described herein.

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

Federal Communications Commission.

**Marlene Dortch,**

*Secretary.*

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