FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 12–375; FCC 15–136]

Rates for Interstate Inmate Calling Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts comprehensive reforms of Inmate Calling Services, regardless of the technology used to provide service, to ensure just reasonable and fair rates as mandated by the Communications Act.

DATES: The rules in this document will become effective March 17, 2016, and the *Compliance Date* for this Second Report and Order will be January 19, 2016.

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Report and Order, WC Docket 12–375, released November 5, 2015. The full text of this document may be downloaded at the following Internet Address: *http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1105/FCC-15-136A1.pdf.* To request alternative formats for persons with disabilities (*e.g.* accessible format documents, sign language, interpreters, CARTS, etc.) send an email to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 or (202) 418–0432 (TTY).

I. Introduction

1. Twelve years have passed since Martha Wright of Washington, DC petitioned this Commission for relief from exorbitant phone rates charged by inmate calling service (ICS) providers, so that she might afford telephone contact with her incarcerated grandson. For families, friends, clergy, and attorneys to the over 2 million Americans behind bars and 2.7 million children who have at least one parent behind bars, maintaining phone contact has been made extremely difficult due to prohibitively high charges on those calls. Family members report paying egregious amounts, adding up to hundreds of dollars each month, just to stay connected to incarcerated spouses, parents and children. For over a decade, they have pleaded with this agency for help fighting these excessive and unaffordable phone charges.

2. In the Report and Order, we grant relief, answer the call of those millions of citizens seeking ICS reform, and adopt comprehensive reform of interstate and intrastate ICS calls to ensure just, reasonable and fair ICS rates as mandated by the Act. (Interstate communication ''means communication 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 State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia. Consistent with our authority under the Communications Act, this Order applies to all states and U.S. territories including Puerto Rico, Guam, and the U.S. Virgin Islands.) We follow these reforms with a Further Notice that recognizes there is more work yet to be done. While the Commission prefers to rely on competition and market forces to discipline prices, there is little dispute that the ICS market is a prime example of market failure. Market forces often lead to more competition, lower prices, and better services. Unfortunately, the ICS market, by contrast, is characterized by increasing rates, with no competitive pressures to reduce rates. With respect to the consumers who pay the bills, ICS providers operate as unchecked monopolists. The record indicates that, absent regulatory intervention, ICS rates and associated ancillary fees likely will continue to rise. After the adoption of interim interstate rate caps in 2013, there was hope that states would take a more active role in reforming intrastate ICS rates and ancillary fees. While this has occurred in a handful of states, such as Alabama, Minnesota, New Jersey, and Ohio, the unfortunate reality is that many states have not tackled reform and intrastate ICS rates have continued to increase since the *2013 Order.* 78 FR 67956, Nov. 13, 2013.

3. Given this market failure, the Commission has a duty to act to fulfill our statutory mandate of ensuring that ICS rates are just, reasonable, and fair. Ensuring that rates comply with the statute also has several positive public interest benefits. Studies have shown that family contact during incarceration reduces recidivism and allows inmates to be more present parents for the 2.7 million children who suffer when an incarcerated parent cannot afford to keep in touch. One commenter tells us that ''[m]y family paid outrageous amounts, between $300 and $400 a month for the 10 months while I was incarcerated in the state of MD. Their savings were drained just so they could correspond with their only daughter who was pregnant with their first grandchild at the time.'' One mother writes: ''I pay 40 dollars a week for calls. I can't afford them but it puts a smile on my kid's face;'' another writes that her family has, at times, gone without food in order to pay these phone charges, ''so we don't grow apart and so my kids feel like they still have a father.'' These 2.7 million children are already coping with the anxiety of having an incarcerated parent, and often suffer additional economic and personal hardships that hinder their performance in school. By charging inmates exorbitant phone rates, ICS providers prevent incarcerated parents from maintaining a presence in their children's lives through regular phone contact. The testimony of a father in St. Cloud, Minnesota underscores the need for our efforts: ''I want to be able to raise my child even if it's over the phone for the time being. I would love to be in her life as much as possible, but it's hard to do so when the phone [price] is steadily climbing higher and higher. I know I'm paying my debt to society for my crime, but I need to stay in contact with family.''

4. Furthermore, inmates given access to regular phone contact with family are less likely to return to jail or prison. A 2014 report by the Department of Justice found that a staggering 75 percent of individuals released from prison were rearrested within five years. Of the inmates who do find success and reintegrate after release, many credit phone contact and family support during their incarceration. As one former inmate writes, ''The phone was my life line to that family and they got me through it intact. I thank God that my family was able to afford the phone calls. What happens to the families that can't? We all end up paying for it.'' Incarceration costs taxpayers an average of $31,000 per inmate per year. If telephone contact is made more affordable, we will help ensure that former inmates are not sent home as strangers, which reduces both their chances of returning to prison or jail and the attendant burden on society of housing, feeding, and caring for additional inmates.

5. Another commenter stresses how regular phone contact makes prisons and jails safer spaces for inmates and officers alike:

> I get to see my loved one once in every six months or so, and he doesn't get any visitors apart from me, so calling daily helps him retain his sanity. I think the connection he's given to his family is really important; there are so many times that he's called really

angry at other inmates, saying that he just wanted to talk so that he can cool down and not start a fight. If calls are made more affordable, especially for indigent families, it may reduce prison violence as well as make the prisons a safer place for [corrections officers] to work in.

6. The record indicates that our interim interstate rate caps increased call volumes, without compromising correctional facility security requirements. Similarly, we expect our actions in this Order to reduce rates and increase call volume, while ensuring that ICS providers receive fair compensation and a reasonable return. Some commenters have argued that lowering ICS rates will compromise security in correctional facilities and fail to cover the cost of providing calling services. Some have even argued the financial strain from rate regulation could lead to correctional facilities banning inmate calls altogether. However, we find these assertions unpersuasive and unsupported by the record and our experience from the 2013 reforms.

7. While the actions taken to date have been positive in key respects (*e.g.,* lower interstate rates and increased interstate call volume), more remains to be done. The Commission adopted interim interstate rate caps, but over 80 percent of calls to and from correctional facilities are intrastate, and were not subject to the reforms of the *2013 Order.* Throughout this proceeding, the Commission has repeatedly called on states to reform inmate calling within their jurisdictions, but rates remain egregiously high in over half the states. The Commission has the legal authority to reform the rate structure for all ICS calls, and herein we determine it is appropriate and necessary to do so.

8. In addition, we commit to continue evaluating the impact of these reforms and to conduct a review in two years to evaluate the changes in the market and determine whether further refinements are appropriate.

II. Executive Summary

9. In the Order, we adopt comprehensive reform of all aspects of ICS to correct a market failure, foster market efficiencies, encourage ongoing state reforms, and ensure that ICS rates and charges comply with the Communications Act. As a threshold matter, we make clear that the reforms adopted herein apply to ICS offered in all correctional facilities, regardless of the technology used to deliver the service. Specifically, we take the following steps, which together form a comprehensive package of long-overdue reform to inmate calling services:

- Adopt tiered debit and prepaid rate caps that apply to all interstate and intrastate ICS, as well as a tiered rate cap for collect calling (which, after two years, will phase down to the rate caps adopted for prepaid and debit calls);
- Address payments to correctional institutions by excluding site commission costs from our rate caps (we otherwise discourage, but do not prohibit, ICS providers from sharing their profits and paying site commissions to facilities);
- Limit and cap ancillary service charges and address the potential for loopholes and gaming, including third-party services, thus addressing a disturbing trend in which ancillary service charges increased exponentially and unfairly, to the detriment of inmates and their families and in contravention of the statute;
- Prohibit ICS prepaid calling account funding minimums and establish an ICS prepaid calling account funding maximum limit;
- Establish a periodic review of ICS reforms, recognizing that further refinements may be appropriate as the marketplace evolves—thus complementing the Further Notice we initiate today (described in more detail below);
- Make clear that the rate caps and reforms we adopt today operate as a ceiling in states that have not enacted reforms with equal or lower caps on rates and ancillary fees and that we will preempt state laws that are inconsistent with the federal framework;
- Take measures to address ongoing concerns with access to ICS by inmates and their families with communications disabilities, including requiring that the per-minute rates charged for TTY-to-TTY calls be no more than 25 percent of the rates the providers charge for traditional inmate calling services and that no provider shall levy or collect any charge or fee for TRS-to-voice or voice-to-TTY calls;
- Adopt a transition period for rate caps and ancillary service charge reforms of March 17, 2016 for ICS provided in prisons and June 20, 2016 for ICS provided in jails to enable providers time to adjust contracts if necessary, given that the reforms adopted herein constitute regulatory changes and thus may trigger change-in-law provisions in existing ICS contracts;
- Take measures to prevent possible gaming during the transition to the new rules adopted herein;
- Require annual reporting and certification by ICS providers, to allow the Commission to ensure compliance and enable monitoring of developments, and require the providers to be transparent with regard to disclosure of their rates and policies;
- Confirm that section 276 of the Act is technology neutral and thus any service—regardless of name—that meets the definitional criteria for ''inmate calling services'' is subject to our rules, including the reforms adopted today; and
- Make clear that ICS providers may seek waivers if they are unable to receive fair compensation or request that the Commission preempt inconsistent state laws, and encourage the Wireline Competition Bureau to resolve such waivers within 90 days of submission of complete information.

We adopt the following rate caps.

TABLE ONE

Size and type of facility	Debit/prepaid rate cap per MOU	Collect rate cap per MOU as of effective date	Collect rate cap per MOU as of July 1, 2017	Collect rate cap per MOU as of July 1, 2018
0–349 Jail ADP	$0.22	$0.49	$0.36	$0.22
350–999 Jail ADP	0.16	0.49	0.33	0.16
1,000+ Jail ADP	0.14	0.49	0.32	0.14
All Prisons	0.11	0.14	0.13	0.11

We prohibit any ancillary service charges except for the following.

TABLE TWO

Permitted ancillary service charges and taxes	Monetary cap per use/instruction
Applicable taxes and regulatory fees	Provider shall pass these charges through to consumers directly with no markup.
Automated payment fees	$3.00.
Fees for single-call and related services, *e.g.*, direct bill to mobile phone without setting up an account.	Provider shall directly pass through third-party financial transaction fees with no markup, plus adopted, per-minute rate.
Live agent fee, *i.e.*, phone payment or account set up with optional use of a live operator.	$5.95.
Paper bill/statement fees (no charge permitted for electronic bills/statements).	$2.00.
Prepaid account funding minimums and maximums	Prohibit prepaid account funding minimums and prohibit prepaid account funding maximums under $50.
Third-party financial transaction fees, *e.g.*, MoneyGram, Western Union, credit card processing fees and transfers from third party commissary accounts.	Provider shall pass this charge through to end user directly, with no markup.

10. These reforms supersede the reforms adopted in the *2013 Order* and therefore will replace the interim interstate rate caps and cost-based framework previously adopted. Accordingly, the extensive reforms we adopt in this Order constitute material changes of law and may also trigger contractual force majeure clauses. To comply with the new rules we adopt herein, we therefore expect that ICS providers may need to renegotiate many of their contracts with correctional facilities but note that ICS rates in numerous states are already below our adopted caps.

11. While the steps we take today are significant, our work is not complete. With that in mind, in today's Further Notice, we seek additional comment on rates for international calls, promoting competition in the ICS industry, the benefits of a recurring Mandatory Data Collection, as well as a requirement that ICS providers file their ICS contracts with the Commission, video visitation, and other newer technologies to increase ICS options, and seek additional comment on the operations and economic impacts of providing those services as experienced by end users, correctional facilities, and ICS providers.

III. Background

12. In 2003, Martha Wright and her fellow petitioners, current or former prison inmates and their relatives and legal counsel (Wright Petitioners or Petitioners), filed a petition seeking a rulemaking to address high long-distance ICS rates. The petition sought to prohibit exclusive ICS contracts and collect-call-only restrictions in correctional facilities. In 2007, the Petitioners filed an alternative rulemaking petition, asking the Commission to address high ICS rates by requiring a debit-calling option in correctional facilities, prohibiting per-call charges, and establishing rate caps for interstate, interexchange ICS. The Commission sought and received comment on both petitions (Wright Petitions).

13. In December 2012, in response to the Wright Petitions, the Commission adopted a Notice of Proposed Rulemaking seeking comment on, among other things, the proposals in the Wright Petitions. The *2012 NPRM,* 78 FR 4369, Jan. 22, 2013, proposed ways to ''balance the goal of ensuring reasonable ICS rates for end users with the security concerns and expense inherent to ICS within the statutory guidelines of sections 201(b) and 276 of the Act.''

14. On August 9, 2013, the Commission adopted the *Inmate Calling Report and Order and FNPRM (2013 Order),* finding that market forces were not operating to ensure that interstate ICS rates were just, reasonable, and fair. The Commission concluded that, in light of the absence of competitive pressures working to keep rates just and reasonable in the ICS market, the default of cost-based regulation should apply. As such, the Commission focused on reforming interstate site commission payments, rates, and ancillary service charges. The Commission also determined that site commission payments ''were not part of the cost of providing ICS and therefore not compensable in interstate ICS rates.'' Analyzing data submitted into the record and public data, the Commission adopted interim per-minute interstate ICS safe harbor caps of $0.12 for debit and prepaid calls and $0.14 for collect calls and hard rate caps of $0.21 for debit and prepaid calls and $0.25 for collect calls. The Commission gave guidance to ICS providers regarding the process for obtaining waivers of the interim rate caps. The Commission also required that ancillary service charges be cost-based. At the time, the Commission declined to address intrastate ICS, noting instead that it had ''structured [its reforms] in a manner to encourage . . . states to undertake reform and sought comment on intrastate reforms as part of the FNPRM.'' Finally, the record indicates that as a result of our interim interstate rate caps, interstate call volumes have increased as much as 70 percent, while interstate debit and prepaid rates have decreased, on average, 32 percent and interstate collect rates have decreased, on average, 44 percent.

15. To enable the Commission to enact ICS reform, the *2013 Order* adopted a Mandatory Data Collection requiring ICS providers to file information regarding the costs of providing ICS, and an Annual Reporting and Certification Requirement for ICS rates. The Commission noted that the Mandatory Data Collection would help it ''develop a permanent rate structure, which could include more targeted tiered rates in the future.'' Through the data collected pursuant to the Mandatory Data Collection, the Commission obtained significant cost and operational data, including ancillary service charge cost data, from a variety of ICS providers representing well over 85 percent of the ICS market.

16. Prior to the effective date of the *Order,* the United States Court of Appeals for the District of Columbia Circuit stayed three rules adopted by the Commission pending resolution of the appeal, including the rule requiring rates to be based on costs, the rule adopting interim safe harbor rates, and the rule requiring ICS providers to file annual reports and certifications. The court allowed other aspects of the *2013 Order* to take effect, including the interim interstate rate caps and Mandatory Data Collection. Due to the partial stay, the requirement that ancillary service charges be based on costs did not go into effect. As a result,

there have been no reforms to ancillary service charges and fees and they have continued to increase since the *2013 Order.* The litigation has been held in abeyance pending resolution of this Order.

17. Since adoption of the *2013 Order,* the Commission has continued to monitor the effects of its reforms on the ICS industry and pursue additional reform, including holding a workshop entitled ''Further Reform of Inmate Calling Services'' on July 9, 2014. The workshop evaluated options for additional ICS reforms, discussed the effects of the *Order,* the role ancillary service charges play in the ICS market, the provision of ICS at different types of facilities, and communications technologies beyond traditional payphone calling being deployed in correctional facilities.

18. *Second Further Notice of Proposed Rulemaking.* In October 2014, the Commission adopted a *Second FNPRM* (79 FR 69682) and sought comment on several proposals in the record urging comprehensive ICS reform. The proposals the Commission sought comment on suggested a variety of ways to deal with issues identified in the record, including rate caps, site commission payments, and ancillary fees that were offered by various entities with differing perspectives in addressing ICS reform. For example, three ICS providers, GTL, Securus, and Telmate, jointly filed a proposal to comprehensively reform all aspects of ICS. Several other individual ICS providers, including CenturyLink and Pay Tel, submitted their own proposals for reform. The Wright Petitioners, along with several public interest groups, also urged the Commission to consider its proposals for comprehensive reform. Finally, the Commission sought comment on costs incurred by correctional facilities in the provision of ICS and the data received in response to the Mandatory Data Collection.

19. *State Reforms.* Several states have undertaken ICS reform since the *2013 Order* that reflect and are meant to address circumstances specific to their jurisdiction. The Alabama Public Service Commission (Alabama PSC), for example, adopted comprehensive ICS reforms that include tiered intrastate rate caps as well as a restricted number of ancillary service charges at caps it established. The Minnesota Department of Corrections initiated a pilot program in a limited number of correctional facilities in which a flat rate of $0.07 per minute is charged for all local and long-distance debit calls, bringing the cost of a 15-minute call to $1.05, plus applicable tax. New Jersey recently entered into a new ICS contract lowering rates for all interstate and intrastate calls from state prison facilities to $0.04348 a minute effective August 25, 2015. The Ohio Department of Rehabilitation and Correction reduced rates to $0.05 per minute for all ICS calls as of April 1, 2015. In announcing its change, the Ohio Department of Rehabilitation and Correction noted that ''[t]elephone calls are one of the primary means of inmates maintaining connections with family and loved ones during incarceration; maintaining these connections positively influences behavior in prison and the likelihood an offender will succeed upon release from prison.'' Inmates in the West Virginia Division of Corrections now pay $0.032/minute for all domestic ICS. We are pleased that some states have taken positive steps to reduce intrastate rates but remain concerned that many intrastate rates remain high and some have even increased following the *2013 Order.* The actions we take today embrace previous reforms and encourage additional states to follow and enact more-tailored relief in their states. The framework we adopt today acts as a ceiling to enable reforms, such as those undertaken by New Jersey, Ohio, and West Virginia.

IV. Report and Order

A. Rate Caps That Comply With the Statute

20. In this section we adopt tiered rate caps for intrastate and interstate ICS that will allow providers to continue to offer safe and secure ICS while complying with the requirements of the Communications Act. These rate caps will apply to jails, prisons and immigration detention facilities, secure mental health facilities and juvenile detention facilities.

21. A review of the record, including over 100 comments and replies, costs reported in response to the Mandatory Data Collection, and various *ex parte* filings, indicates that, notwithstanding our interim caps on interstate rates, more work still must be done to bring ICS rates in conformance with the mandates of the Communications Act. The record demonstrates that many interstate rates are not ''just and reasonable rates as required by Sections 201 and 202'' and that many interstate and intrastate rates result in compensation that exceeds the fair compensation permitted by section 276. The Commission's finding in the *2013 Order* that the marketplace alone has not ensured that ICS rates are just, reasonable, and fair remains true today. Nor has the risk of complaints filed under section 208, or enforcement actions pursuant to section 201(b) or section 276, been sufficient to keep ICS rates at levels that are just and reasonable and fairly compensatory. We therefore act, pursuant to our statutory authority, to ensure that ICS rates comply with the Communications Act, while balancing the unique security needs related to providing telecommunications service in correctional institutions and ensuring that ICS providers receive fair compensation and a reasonable return on investment.

22. Specifically, we adopt a rate cap of $0.22/MOU for debit and prepaid calls from jails with an ADP of 0–349; a $0.16/MOU cap for debit and prepaid calls from jails with an ADP of 350–999; and a $0.14/MOU cap for debit and prepaid calls from jails with an ADP of 1,000 or more. Debit and prepaid calls from prisons will be capped at a rate of $0.11/MOU. Collect calls from jail facilities will be capped at $0.49/MOU and collect calls from prison facilities will be capped at $0.14/MOU until July 1, 2017, and then transition down on an annual basis to the applicable debit/prepaid rate cap as described herein.

TABLE THREE

Size and type of facility	Debit/prepaid rate cap per MOU	Collect rate cap per MOU as of effective date	Collect rate cap per MOU as of July 1, 2017	Collect rate cap per MOU as of July 1, 2018
0–349 Jail ADP	$0.22	$0.49	$0.36	$0.22
350–999 Jail ADP	0.16	0.49	0.33	0.16
1,000+ Jail ADP	0.14	0.49	0.32	0.14
All Prisons	0.11	0.14	0.13	0.11

23. In the subsections that follow, we describe our methodology for adopting these rate caps. Specifically, we: (1) Discuss the decision to adopt a tiered structure that distinguishes between jails and prisons, and, within jails, based upon ADP, (2) describe the reasoning for adopting the specified tiers, (3) describe the methodology and analysis supporting the specific rate caps adopted, using a carefully considered combination of analysis of the Mandatory Data Collection (including evidence suggesting that some providers submitted inflated cost data), successful reform in certain states, experience with the interim rate caps, and other data in the voluminous record of this proceeding, (4) explain the need for a temporary, separate rate for collect calls, which will phase out over a two-year period to equalize the rate for these calls with those of debit/prepaid calls, (5) reject per-call/per-connection charges and flat-rate calling as inherently unjust, unreasonable, and unfair in contravention of the statute, and (6) explain our legal authority to adopt these reforms.

1. Tiered Structure Distinguishing Between Jails and Prisons

24. Before determining the specific amount of any rate *caps*, a key question before us is the appropriate rate *structure* for ICS—*i.e.*, whether there should be a single unitary rate for inmate calling services regardless of the facility type or size. We find in this Order that the record supports distinguishing between the type of facility (jails vs. prisons) as well as, for jails, tiering based on the size of the facility.

a. Justification for Separate Tiers

25. In both the *2013 FNPRM* (78 FR 68005) and *Second FNPRM*, the Commission sought comment on rate tiering. In the *Second FNPRM*, the Commission also sought comment on the appropriate definition of ''prison'' and ''jail,'' and on the potential suitability of rate tiering based on differences between jails and prisons as well as population size. As discussed below, there was substantial record support for such an approach.

26. *Background.* Some commenters support differentiating rates between different facility types or sizes. For example, Petitioners assert that the ''cost of providing service in these large facilities is substantially less than the cost of providing service in small jails, and that ICS providers can serve these larger facilities with less administrative costs.'' Other commenters assert that ''characteristics unique to different types of facilities'' should lead to rate tiering. Some commenters contend that it costs more to provide ICS in smaller jails than it does in larger jails. These parties argue that a one-size-fits-all rate cap will not work, ignores the record and likely will lead to a violation of sections 201 and 276 of the Act. We note that the Alabama PSC recently adopted rate tiers tied to facility type, with separate rates for jails and prisons.

27. The Los Angeles Sheriff's Department advocates that the Commission ''resist the temptation to set uniform rates'' because the differences in security requirements, inmates, age, infrastructure and maintenance needs of facilities must be accounted for in the Commission's decision-making process.'' The California State Sheriff's Association echoes these concerns, explaining that in California, the smallest jail can hold a maximum of 14 inmates, while the largest jail can hold a maximum of over 14,000 inmates, and contends that accounting for these differences ''is much more important and realistic than attempting to craft a single 'solution' for uniformity's sake.'' NCIC also supports tiering in order to ''balance the needs of inmates, their families, correction facilities and ICS providers.''

28. Moreover, some commenters assert that, without tiering, providers serving small- to medium-sized jails ''would likely be forced out of the market, particularly if the larger companies cross-subsidize between low-cost (Prison) and high-cost (Jail) facilities'' because it is more costly to providers to serve smaller facilities (as confirmed by our analysis of the Mandatory Data Collection). Additionally, there is evidence that some large ICS providers refuse to bid on contracts to serve only smaller institutions—suggesting again that the cost structure of serving smaller institutions is higher than that of larger institutions.

29. Other commenters, however, disagree with a tiered rate approach and counter that the Commission should continue to impose unitary rate caps, similar to the current, interim rate caps. These commenters contend that unitary rates are less complex to understand and to administer, and that no real difference exists between the cost of serving jails and prisons. For instance, GTL and CenturyLink contend that ''there is no clean proxy for cost that could be relied upon to create tiers.'' Additionally, some commenters argue that adopting tiers based on a prison/jail distinction would be arbitrary, especially as many large providers serve both prisons and jails. Securus claims that ''to adopt vastly different calling rates based on that empty [jails vs. prisons] distinction would constitute dissimilar treatment of customers that plainly are similarly situated,'' which it asserts is ''unjustifiable.''

30. *Discussion.* Based on the record and market evidence, we find that tiering based on jail versus prison is appropriate, and therefore reject proposals that we should adopt a unitary rate similar to the unitary rate caps adopted in the *2013 Order.*

31. In the *2013 Order*, the Commission found it appropriate to adopt interim unitary rates for a number of reasons. First, the Commission observed the challenges to setting interim rates, including the fact that although the Commission relied on the best data available to it at the time, that data represented a very small subset of data, and included cost data from locations with varying cost and call volume characteristics. Second, the Commission noted that it considered setting different rate caps based on the size or type of correctional facility, but stated that ''the record contains conflicting assertions as to what those distinctions should be.'' Instead, the Commission adopted interim interstate rate caps ''for correctional facilities generally,'' ''based on the highest cost data available in the record, which [it] anticipated will ensure fair compensation for providers servicing jails and prisons alike.'' Finally, the Commission noted that unitary rates were the focus of the original petition for rulemaking and the focus of the majority of comments at that time. Upon release of that item, the Commission adopted the Mandatory Data Collection to ''enable [it] to take further action to reform rates, including developing a permanent cap or safe harbor for interstate rates, as well as to inform our evaluation of other rate reform options in the Further Notice.'' The responses to the Mandatory Data Collection have greatly expanded the cost data available to us for analysis.

32. We conclude that adopting tiered interstate and intrastate rates accounts for the differences in costs to ICS providers serving smaller, higher-cost facilities, such as the vast majority of jails. A similar concern applies to the potential for over-compensating ICS providers serving larger, lower cost facilities, such as very large jails and prisons. We agree with those commenters who assert that the $0.20 and $0.24 rate caps proposed in the Joint Provider Proposal could result in excessive profits for the largest providers to the detriment of end users who would have to pay inflated rates far

above the providers' costs. For example, in the public portion of its cost data filing Securus noted that its overall cost per minute across all of its ICS contracts is $0.1776. GTL similarly provided its overall cost per minute across all ICS contracts, which it estimated at $0.1341. These averaged, self-reported, costs are well below the $0.20 and $0.24 rate caps proposed by these same providers in the Joint Provider Proposal.

33. The record, and our analysis of costs reported in response to the Mandatory Data Collection, support rate tiering because, holding other factors constant, the costs to serve prisons are lower than to serve jails. This is not surprising. Prisons typically have more stable, long-term inmate populations. For example, there is less than one percent inmate churn in prisons per week compared to an average of 58 percent inmate churn in jails. The record suggests that higher churn rates increase costs to process and grant a new inmate access to calling services, and also when an inmate exits a facility. The record also indicates that prison inmates make fewer but longer calls and providers appear to incur fewer bad debt costs when serving prisons.

34. We also find that economies of scale, such as the recovering of fixed ICS costs over a larger number of inmates, support the tiering approach we adopt today. In the *2013 Order*, the Commission noted that unit or average costs of providing ICS were decreasing as scale increased because of, for example, centralized application of security measures and ''the ability to centrally provision across multiple facilities.'' More generally, providers of ICS typically incur a range of costs that do not scale with volume, sometimes known as fixed costs. For example, the cost of a calling center is largely shared over a provider's entire operations, so the unit costs of the calling center fall quickly as call volumes increase. Similarly, the cost of connecting a facility to the ICS provider's network increases at a much lower rate when minutes of use increase. Indeed, in general, the incremental cost of a minute of use is almost zero. The Kansas Department of Corrections echoes these findings, stating in its support for rate tiering that ''[t]he cost to provide an ICS is largely driven by the size of a facility and length of stay. Larger facilities benefit from the economies of scale that allows agencies and ICS providers to spread the cost among a larger population.'' Pay Tel also reports that there are material fixed costs in providing ICS which can be distributed across larger facilities, like prisons, more readily than smaller facilities such as jails. Indeed, many ICS providers currently offer service to multiple facilities under one contract, reflecting the benefits of centralizing fixed costs across a larger base of customers. Lastly, ongoing industry consolidation supports our finding that there are economies of scale in the provision of ICS, *i.e.*, the incentive to become more efficient through scale is an incentive for providers to enter into mergers.

35. Recent state reforms also support tiering. Indeed, the Alabama PSC recently adopted rate tiers tied to facility type with separate rates adopted for jails and prisons. In December 2014, the Alabama PSC adopted a rate structure that ''provides lower rates [for prisons] in recognition that the per-minute costs for service in prisons is lower than it is for jails.'' In order ''to ensure ample opportunity to correct any funding shortfalls resulting from potential reductions in site commissions,'' the adopted rate caps included a two-year phase-down period from $0.30/minute to $0.25/minute for collect and debit/prepaid calling from jails and $0.25/minute to $0.21/minute for debit/prepaid calling from prisons, while the prison collect rate stays at the initial $0.25/minute rate cap.

36. We disagree with assertions that a tiered rate structure would be difficult for the Commission to administer, for ICS providers to implement, and for correctional officials to oversee. Those commenters who make such assertions already charge different rates across different ICS contracts and provide no real evidence or support for why rate tiers would be any more difficult or challenging than their current approaches.

37. For all of these reasons, we conclude that adopting rate tiers based on facility type as well as size, or ADP, allows us to recognize the differences in the costs of serving facilities of different types as well as providing multiple checks to prevent gaming or manipulation as discussed below. Tiering will limit ''the impact of the higher rates to those facilities most in need, while ensuring that the vast majority of ICS calls are charged at a rate commensurate with the cost of providing the ICS service.''

b. Determination of Facility Type and Average Daily Population

38. *Defining Jails and Prisons.* Given that our rates will differ for prisons and jails, it is necessary to define these key terms with specificity. The Commission sought comment on defining the terms ''prison'' and ''jail'' in the *Second FNPRM.* Subsequent to the *Second FNPRM,* several commenters provided suggested definitions. We have considered these submissions and adopt the following definitions.

39. Specifically, for purposes of this proceeding a jail is defined as the facility of a local, state, or federal law enforcement agency that is used primarily to hold individuals who are: (1) Awaiting adjudication of criminal charges, (2) post-conviction and committed to confinement for sentences of one year or less, or (3) post-conviction and are awaiting transfer to another facility. The term also includes city, county or regional facilities that have contracted with a private company to manage day-to-day operations; privately-owned and operated facilities primarily engaged in housing city, county or regional inmates; and facilities used to detain individuals pursuant to a contract with U.S. Immigration and Customs Enforcement (ICE) and facilities operated by ICE. For purposes of this proceeding a prison is defined as a facility operated by a territorial, state, or federal agency that is used primarily to confine individuals convicted of felonies and sentenced to terms in excess of one year. The term also includes public and private facilities that provide housing to other agencies such as the State Departments of Correction and the Federal Bureau of Prisons; and facilities that would otherwise fall under the definition of a jail but in which the majority of inmates are post-conviction or are committed to confinement for sentences of longer than one year.

40. *Facility or Institution.* The record indicates concern that some ICS providers may try to take advantage of the rate tiering structure we adopt in this Order by increasing the number of ''facilities'' in which they are allowed to charge the higher rate caps adopted for smaller jails above. For example, ICS providers may do this, commenters explain, by seeking to divide a detention facility into sub-units, such as wards or wings. The Commission sought comment on these possibilities in the *Second FNPRM.* Comments received in response confirmed that concerns that providers might try to game our rules were justified. Such gaming would be contrary to this Order, and would serve to frustrate the underlying purposes of sections 201 and 276 of the Communications Act. It would allow providers to appear as though they are serving smaller jails than they actually are, even though they achieve economies of scale by combining multiple small facilities under a single contract, because they are able to centralize services, like call monitoring

and recording, thereby reducing their overall costs. In order to establish and maintain just, reasonable, and fair ICS compensation, we must consider these issues and take steps to ensure that our adopted tiered rate caps cannot be undone by gaming.

41. As such, we find that a jail, as defined above, and a prison, as defined above, cannot be divided into multiple wings, units, or wards by, for example, for the purpose of taking advantage of our tiered rate caps. If interested parties believe such gaming is occurring they may bring the issue to the Commission's attention, at which time the Commission will review the totality of the circumstances (*e.g.,* treatment of the facility under state law, relevant contracts, physical attachment or proximity of units, etc.) to determine whether unlawful gaming has occurred.

42. *Average Daily Population for Jails.* As an initial matter, for purposes of the reforms adopted in this Order, the initial average daily population will be the sum of all inmates in a facility each day in the 12-month period prior to the effective date of this Order divided by the number of days in the year. This definition is consistent with that used by the Department of Justice's Bureau of Jail Statistics. We note that correctional institutions often publicly report their ADP. This publicly-reported population data should be used, where available, to determine the appropriate ADP for a facility. Going forward, when the relevant ADP is not publicly reported, beginning with January 31, 2017, the ADP will be calculated on a calendar year basis as the sum of all inmates in a facility each day between January 1 and December 31 of the previous year, divided by the number of days in the year. The applicable ADP will then be determined as of January 31 of each year pursuant to the ADP from the previous year and will remain in effect throughout that year. Consistent with this approach, if a correctional facility adds a new building or wing to a facility, the inmate population of the new wing will not be accounted for immediately. Rather, the inmate population of a new building or wing will first be considered in the calculations for ADP to be applied in the following year. For example, if a new wing is established anytime between January 1, 2017 and December 31, 2017, its inmate population during this time frame will be included in the ADP to be applied on January 31, 2018. We find this to be the most administratively efficient and feasible option, rather than potentially having numerous rate changes during a calendar year. New buildings or wings may not be filled immediately, and it may take some time before population levels in a newly-established wing increase enough to push the facility as a whole into a new tier. We find these detailed definitions are necessary to ensure that end users are charged just, reasonable, and fair rates and that ICS providers receive fair compensation for the costs they incur in providing ICS to smaller and larger facilities.

43. *Categorization of Certain High-Cost Facilities.* In the *Second FNPRM* the Commission sought comment on suggestions that it either exclude from any adopted rate caps what are reported to be high-cost facilities, such as juvenile detention facilities or secure mental health facilities, or provide a blanket waiver for such facilities. While the Commission did not request that providers separately calculate and report their costs for providing service to secure mental health facilities or juvenile detention facilities outside of jails or prisons in response to the Mandatory Data Collection, we agree with commenters that these facilities may be more costly to serve due to the smaller number of inmates. This is also consistent with our analysis above. We therefore conclude that the costs of providing ICS to juvenile detention facilities and secure mental health facilities are more akin to providing service to jail facilities. To the extent that juvenile detention facilities and secure mental health facilities operate outside of jail or prison institutions, they will be subject to the jail rate caps adopted herein.

2. Tiers for Jails

44. After placing issues relating to the Mandatory Data Collection out for public comment, the Bureau reviewed written comments, met with interested parties, and adopted a template for submission of required data in the Mandatory Data Collection. In it, the Bureau directed ICS providers to document applicable costs and fees by ''contract size.'' Potential contract size categories for jails include 0–99, 100–349, 349–999, and 1000 ADP and greater, and potential categories for prisons include 1–4999, 5000–19,999, and 20,000 ADP and greater.

45. The Commission sought comment on proposed rate tiering in the *Second FNPRM.* Pay Tel asserts that it supports three rate tiers, one for ''small-to-medium sized jails (less than 350 ADP) based on 'demonstrated operational and functional differences between prisons and jails—and the cost differences associated with [the] provision of ICS therein.''' Petitioners support a two-tiered structure and suggest rate caps for facilities with 0–349 ADP and facilities with 350 and over ADP in order to take into account the ''alleged higher costs incurred by small jails. The Joint Provider Proposal does not favor any rate tiers. Securus asserts that if the Commission adopts a tiered rate structure, ''the tiers should be defined in a way that account[s] not only for ADP but also differences in the investment required to serve a site. . . . And, as Securus previously has stated, ADP must be very closely defined such that carriers cannot game the system in the way that they report those figures.''

46. In this Order we adopt rate tiers based on the following ADP for jails: 0–349, 350–999, and 1,000 and greater. We adopt these rate tiers for jails because we find that they most closely resemble the breakdown between small-to-medium jails, large jails, and very large, or mega-jails. We have decided not to include a 0–99 ADP breakdown in the rate tiers in part because, according to the Bureau of Justice Statistics, jails with an ADP under 99 make up less than 10 percent of the inmate population. We also believe that adopting fewer tiers than those requested in response to the Mandatory Data Collection responds to comments in the record expressing concern over potential confusion and burden of multiple rates. By adopting these tiers for jails, we conclude that our rate caps will most closely conform to the costs as filed in the record. As a group, jails are more varied than prisons and, as we have discussed herein, there are economies of scale to be gained as facility size increases. Finally, as discussed below, the data received in response to the Mandatory Data Collection support these tiers.

47. Below we explain how we have determined that our prescribed rates will allow efficient providers to recover their costs. We rely principally upon: (1) Analysis of data received in response to the Mandatory Data Collection, which shows that firms operating efficiently would earn substantial profits under our prescribed rates, (2) evidence suggesting that providers' reported costs in response to the mandatory data collection are overstated, and (3) other evidence in the record, including ICS providers' provision of service in jurisdictions with rates lower than those we prescribe here.

3. Determination of Specific Rate Caps

48. Having determined the basic structure of rate caps, we describe the methodology for the specific rate caps within that structure. Specifically, we find that the following rate caps will ensure that ICS rates are just,

reasonable, and fair for inmates, their families and loved ones, as well as the ICS providers, and will incorporate the costs associated with the necessary security protocols: $0.22/MOU for debit and prepaid calls from jails with an ADP of 0–349; $0.16/MOU for debit and prepaid calls from jails with an ADP of 350–999; and $0.14/MOU for debit and prepaid calls from jails with an ADP of 1,000 or more. Debit and prepaid calls from prisons will be capped at a rate of $0.11/MOU. Collect calls from jails will be capped at $0.49/MOU and collect calls from prisons will be capped at $0.14/MOU until July 1, 2017, and then transition down to the appropriate debit/prepaid rate cap.

a. Marketplace Evidence of Rates in Certain States

49. Evidence of rates at the state level generally provides further support that the rate caps we adopt today allow sufficient room for providers to earn a fair profit. As noted above, Ohio eliminated site commissions and reduced ICS rates by 75 percent to $0.05 for Ohio Department of Rehabilitation and Correction (ODRC) facilities. West Virginia's Division of Corrections recently reviewed bids without regard to site commissions offered by the bidders (*i.e.,* the DOC did not take site commissions into account in deciding the winning bidder). New Jersey recently awarded an ICS contract for state prisons that eliminated site commission payments and reduced rates below $0.05 per minute, yet the winning bidder, GTL, reported to the Commission average 2012 through 2013 ICS costs of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. The Pennsylvania Department of Corrections (DOC) contracted with Securus at a $0.059 per-minute rate for all ICS and the elimination of all ancillary fees, while offering a 35 percent site commission, even though Securus reported to the Commission that its average cost of providing ICS over 2012 and 2013 was [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. Similarly, in New Hampshire, the state DOC lowered intrastate rates to less than $0.06 per minute with a 20 percent site commission. That providers bid for these contracts, and supply ICS at rates consistent with these constraints, strongly suggests that efficient providers can provide ICS at rates closer to $0.05 per minute—less than half of our lowest rate cap of $0.11 per minute. This is not surprising, as a per-minute rate of approximately $0.05 per minute approximates the lowest average per-minute costs reported to us. We observe that it is unlikely that any provider would supply any state if the rates allowed in those states did not at least cover the incremental costs of supplying each of those states, which further suggests that reported costs may be inflated. We also note that no provider clearly argued that such rate levels are the result of cross-subsidization, and there is no data in the record to support such a conclusion. While one provider made statements unsupported by data that might be so interpreted, those statements are too vague to evaluate.

b. Analysis of Data Received in Response to the Mandatory Data Collection

50. *Rate Methodology.* In the *2013 Order,* the Commission adopted the Mandatory Data Collection to enable it ''to take further action to reform rates, including developing a permanent cap or safe harbor for interstate rates, as well as to inform our evaluation of other rate reform options in the Further Notice.'' In 2014, the Wireline Competition Bureau (Bureau) developed a template and related instructions for ICS providers to use in responding to the Mandatory Data Collection. The Commission also provided notice of the data collection, its due date, and information on contacting Bureau staff available to answer specific questions on how to comply with the filing requirement and the template and instructions. The instructions, template, and other related material were posted on the Commission's Web site, and the data collection due date was announced by Public Notice which was also published in the **Federal Register**, 79 FR 35956, Nov. 21, 2014. Responsive data were received in August 2014.

51. The Commission directed the Bureau to create the template in a manner intended to allow a provider to include all costs incurred in the provision of ICS. Without limiting or restricting costs or cost categories, the Bureau directed providers to report their ICS-related costs for telecommunications, equipment, and security, as well as any costs not captured in these categories (*i.e.,* ''other costs''). The Commission directed providers to submit the data for fiscal years 2012, 2013, and 2014, which provided the two most recent years of actual data and one year of partial actual and partial forecasted data. Providers were required to report intrastate, interstate and international ICS cost data in the aggregate for debit, prepaid, and collect calling services. For each service, providers were required to identify which costs were direct or common, and to allocate costs by facility type and size. Providers also submitted call volume data (MOU and number of calls) for each category. The Commission received data filings from 14 of the 25 anticipated ICS provider respondents. We estimate that the 14 responding providers together represent over 90 percent of the market.

52. The debit and prepaid rate caps we adopt are based on 2012 and 2013 data submitted by the 14 responding providers. The caps rely on the 2012 and 2013 data because it represents actual, rather than projected, data, and allows averaging across the two years to account for cost variations that may occur between the years. Costs per minute were calculated using a weighted average per minute cost (which is the same as dividing aggregate costs (*i.e.,* the entirety of all costs reported by the providers for any category) by aggregate minutes of use in that category). This prevents small outliers from having a disproportionate impact on our analysis.

53. Based on the record and our analysis described below, we believe the applicable rate caps will ensure just, reasonable and fair compensation for ICS. We have relied on the cost data and allocations as submitted by ICS providers in calculating these rate caps. We note that the providers cost data reflect their determinations about how to allocate certain common costs, such as call centers and back-office operations. It is generally understood that an economically rational provider will serve a facility if it can recover its incremental cost of doing so, which the record and our analysis indicate will be the case. We take the data at face value, even though the analysis shows that there is significant evidence—both from our own analysis and commenters' critiques—suggesting that the reported costs are overstated. We also find support in the record evidence of increased demand and additional scale efficiencies, which are not included in our quantitative analysis. Our analysis and the record evidence support our conclusion that efficient providers would be able to operate profitably under our rate caps.

54. *Discussion and Analysis.* Based on the record and our own analysis described below, we find that our prescribed rate caps as outlined above are more than sufficient to allow providers to recover efficiently-incurred ICS costs (excluding reported commissions).

55. The record supports our conclusion. Coleman Bazelon, economics consultant for the Wright Petitioners, analyzed our rate caps and concluded that they ''will largely cover the individual ICS providers' costs in

providing service.'' [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] The Bazelon economic analysis does not take into account the evidence that lower rates will spur demand, such that the vast majority of the industry costs will be covered by the rates adopted today.

56. ICSolutions, an ICS provider, states that it ''can comply with the proposed rules'' and notes that this ''strongly suggests that any entity failures in the industry are likely a result of inefficient operations.'' NCIC also supports our rate caps. Praeses ''believes that Providers will generally be able to provide services pursuant to these rate caps at a profit.'' Praeses also reports that interstate call volume and resulting revenue have increased since our 2013 interim reform, with facilities operated by its clients seeing approximately 76 percent interstate call volume increases and overall interstate revenue growth of approximately twelve percent. This is unsurprising, as reduced prices typically lead to higher volume. ICSolutions reports seeing call volumes increase ''by as much as 150%, and revenues increase by about 30%'' when it implements lower call rates. In addition, our rate caps are generally higher than rates that have been adopted in several states that have undertaken reform and there is no evidence in the record that such rates have made provision of ICS unprofitable. Also, nothing in the record suggests that states that have adopted such reforms are different from those states that have not adopted reform with respect to either costs or revenues.

57. Our own analysis likewise shows that the rate caps will permit just, reasonable, and fair recovery for the provision of ICS. Our approach is conservative in its analysis of both costs and call volumes (and hence revenues). It includes all the reported data, assumes they do not overstate costs, and takes no account of likely increases in call volumes that our rates would induce, thereby understating expected revenues. This analysis thus likely reflects a worst-case scenario, and, as discussed below, even in the worst-case scenario, our rates are fair and reasonable.

58. *Costs.* Our analysis of costs supports our conclusion that efficient providers will be assured just, reasonable, and fair compensation under our rate caps. In particular, based on the unaudited costs for 2012 and 2013 reported by the 14 respondents to the Commission's Mandatory Data Collection, the lowest rate cap we prescribe ($0.11) is greater than the average per minute cost of each of the more efficient reporting providers. Two of these providers are quite small, and operate in relatively small jails only. As a result, as discussed below, the expected efficient cost of these small providers on a per minute basis is likely higher than the efficient costs larger reporting providers face, which implies that larger providers should also be able to operate at a profit at our prescribed prices. We recognize that some providers may supply a range of services that go beyond ICS, and the prices that they charge may be used to cross-subsidize these services. However, we do not consider it appropriate for non-ICS services, such as location-monitoring, to be paid for by inmates and their families and friends through ICS rates.

59. Further, we find that providers reporting high costs could recover those costs and receive just, reasonable, and fair compensation under our rate caps through increased efficiencies. Our analysis suggests that providers generally may have been over inclusive in reporting their costs and that the supply of ICS is not fully competitive, implying that the adopted rate caps are conservative. We also note that no providers have submitted evidence that their higher costs may be attributable to higher-quality or more technologically-advanced ICS.

60. Other evidence reinforces our view that respondents' reported costs may in some cases exceed economic costs, and lead us to conclude that our prescribed rate caps will allow efficient firms to recover their economic costs, including a reasonable return. For example, the average per-paid minute cost of each of the seven largest firms substantially exceeds the average per-paid minute average cost of each of three smaller providers. This data point suggests these larger firms are either economically inefficient or that they overstated their costs of ICS provision. On one hand, if there were economies of scale or constant returns to scale in production of calls or call minutes of use, then larger firms would have lower or the same average costs as the smaller firms, implying that these larger firms' reported costs are above efficient levels. On the other hand, if there were diseconomies of scale (that is, the average per-minute cost rises with MOU volumes), then these firms are inefficiently large (they would be more effective broken up into smaller firms), and we should not subsidize that anomaly.

61. More generally, we find above that average costs should fall with the provider's size. However, the reported data (implausibly) show only a very weak negative relationship between average costs and the number of calls or MOU. Similarly, the data (again implausibly) do not support *a priori* assumptions about underlying costs. For example, regression analysis indicates that the firms' costs were highly correlated with different measures of MOU, type of call, and facilities serviced. However, in most specifications the coefficients associated with the MOU and call variables were implausible: they were typically well above the expected marginal cost of an additional MOU. Further, in some specifications, the differences between the marginal costs of different types of calls were implausibly large and statistically significant. Both of these facts (the lack of scale economies in call production and minutes of use and oddities about reported marginal costs) suggest that the data do not reflect the actual economic costs of supply and lead us to doubt the extent to which reported costs accurately reflect efficient costs. Additionally, reinforcing our view that reported costs are inefficiently high, there is evidence that some of the providers' costs include services that are not directly related to the provision of ICS. In short, all these observations make it all the more likely that our prescribed rate caps would allow an efficient provider to earn economic profits.

62. There is also evidence that competition to supply ICS may not always be robust, which in turn suggests providers are able to earn more than economic costs, and if faced with lower revenues, may remain profitable. The most important evidence in this last respect is that the providers' unaudited cost data show that roughly similarly situated providers have substantially different costs. This not only suggests that the higher cost providers are unlikely to be economically efficient, but also that if they were to operate more efficiently, they would have no difficulties in recovering their economic costs. For example, a lack of robust competition would explain why the reported cost data does not seem reflective of underlying costs (a result that is inconsistent with effective competition). Analysis of that data also finds a tight relationship between costs and output levels, both when commissions are included and excluded. This suggests a high degree of homogeneity in the industry between reported costs (with and without commissions) and output. One might expect such results if all bids for ICS were either competitive or non-competitive, but, as noted, other aspects

of the cost data are inconsistent with competition, and other evidence suggests competition, if it exists, is not found everywhere.

63. Two of the six smallest responding providers when ranked by paid MOU would earn substantial imputed profits at our prescribed rates. For example, over 2012 and 2013, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] had an average per paid minute cost of $0.05 (and a similar average per all minute cost) when rounded to the nearest $0.05, earning imputed profits of well over 200 percent. Similarly, in 2012 and 2013, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] had an average per-paid minute cost of $0.10 when rounded to the nearest $0.05, earning imputed profits in excess of 100 percent.

64. In contrast, our conservative approach imputed reductions in providers' ability to recover costs under our initial rate caps to seven of the reporting providers, but we find that all of these providers would be highly profitable if their cost structures resembled those of the two small efficient firms we identified. Four of these are among the six smallest responding providers. Each reported average per-paid minute costs over 2012 and 2013 of $0.25 or higher. That is, in all cases their average per-paid minute costs were more than two and a half times, and in some cases several multiples of, the highest paid MOU average cost of the two small providers with imputed profits. Consequently, if these four providers' average costs were halved, so that they still exceeded those of the two small providers with imputed profits, then all four would operate at a profit given our conservative revenue assumptions. The remaining three providers with imputed reductions in cost recovery are considerably larger than the two small providers with imputed profits discussed above, and more than one supplies services in prisons as well as jails. Yet, each has an average per-paid minute cost that is at least three times as high as that of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (which we found to have large imputed profits). Again, if these providers' costs were considerably closer to, but still well above those of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL], then they would be able to earn profits while charging rates consistent with our prescribed rate caps. In the two subsequent years, providers' ability to recover costs would change, but in all cases if these providers were as efficient as the two efficient providers discussed above, they would earn an economic profit in all of the years discussed.

65. *Revenue.* Turning to revenue, our analysis likewise demonstrates that our rate caps permit fair, reasonable, and just compensation. Once again, we take the provider's data as filed despite the evidence that they are overstated. Moreover, even assuming the same call volumes as experienced in 2012 and 2013, no other revenue sources, and no improved efficiency in service provision, we can impute in the initial year that all providers, if operating efficiently, would be profitable under our prescribed rate caps. With more realistic assumptions (greater call volumes, revenues from ancillary services, and productivity improvements), it is likely that any provider facing imputed revenue reductions in the range of 10 percent would remain profitable even if its reported costs were not overstated (and we find to the contrary). For example, for the reasons described below and based on record filings, capping rates is likely to increase minutes of use, thus raising revenues, and this would likely make up for such imputed reduction in revenue. The few remaining providers potentially could face larger imputed reductions in revenue (assuming their reported costs were efficient). However, these providers have reported costs significantly higher than the industry average, even more strongly suggesting that they are likely to be inefficient providers. In any event, to the extent such providers can demonstrate that they are unable to receive fair compensation under our rate caps, they would be eligible to seek a waiver as described below.

66. In short, our revenue estimates are likely understatements, for the reasons described below. We also find that many of the providers' reported costs are likely to be higher than efficiently-incurred costs, and this is specifically the case for the carriers just discussed. Consequently, we have a high degree of confidence that our prescribed caps would allow efficient providers of ICS to operate profitably.

67. Our revenue imputation likely underestimates the actual revenues providers would obtain for four reasons. First, our analysis does not take into account the demand stimulation from lower rates. But there is substantial record evidence showing that, to the extent that our caps lower existing rates, they will increase minutes of use and raise provider revenues.

68. Second, we impute rates that in some cases will be lower than the rates the providers may actually charge. The resulting revenue underestimate could be material for six of the providers for which we impute losses at our prescribed rate caps, meaning that as a practical matter they could make up for any shortfall. All these providers have jail contracts with ADPs of at least 350, and some of these providers have a large number of such contracts. To estimate each provider's revenues under the rate caps we adopt today, we calculate the revenues the provider would have earned given the MOU the provider reported for 2012 and 2013 for debit and prepaid calls in the three different jail size categories, 0–349, 350–999, and 1,000+, for prisons, and for collect calls (so, for example, if a carrier had 1,000 debit MOU in the 0–349 category, we assume the provider would earn $220 (= 1,000*$0.22)). This approach can understate revenues because providers reported contracts according to *the sum of the ADP of the facilities covered under the contract,* but in some cases providers will charge different rates in different facilities supplied under the same contract. In that case, when the contract has an ADP of 350 or more, but the provider serves under the contract jails with an ADP that is lower than the contract ADP, our estimate will understate the revenues they would have earned if our prescribed rates were applied. For example, a contract with an ADP of between 350 and 999 that currently sets different rates for different facilities might cover three jails, each with an ADP of 150. In that case, while we would impute a rate of $0.16 to the prepaid and debit MOU reported under that contract, in reality the provider could be entitled to the $0.22 rate cap on all those MOU. Similarly, all jails reported under contracts with an ADP of 1,000 or more were imputed the debit and prepaid rate of $0.14, but some of these jails could have ADPs of less than 1,000, and in some cases of less than 350. If the contract specified separate rates by facility, then the provider could be entitled to either the $0.16 or the $0.22 rate in those smaller jails.

69. Third, our analysis also does not take into account the caps that we impose on ancillary service charges, which likely will lead to an increase in minutes of use. Finally, our analysis does not take into account the fact that international calls are not subject to our rate caps and therefore, such calls will produce more revenue than reflected.

70. A few providers, including GTL, Securus and Telmate, contend that our rate caps are too low and will not allow them to recover their costs. Others assert that our rate caps may be too low with respect to particular facilities. Some representatives of jail facilities express concern that the provision of ICS in

their facilities may be in jeopardy. Based on our analysis and the record, we find these assertions unpersuasive. Several providers dispute their claims, noting that GTL, Securus, and Telmate failed to break out their costs by facility type, and proposed rate caps well above their reported average costs over both prisons and jails. As a result, ''any claim that the Commission's draft rates are demonstrably below carriers' reported costs is wholly unsubstantiated and without merit.'' Our analysis indicates that the rate caps we adopt will permit just, reasonable, and fair compensation. Moreover, we expect that the reforms adopted will lead to increased minutes of use, incentivize increased efficiency, and permit providers to generate increased revenues. Thus, we do not believe that there is a reason for service to facilities to be in jeopardy but, as noted below, there is a process for considering any unique circumstances that may justify a waiver to ensure fair compensation.

c. Evidence That the Mandatory Data Collection Likely Overstates Providers' Costs

71. In addition to the analysis detailed above, evidence in the record suggesting that a number of ICS providers overstated their costs in response to the Mandatory Data Collection provides us with further comfort that the rate caps adopted today are appropriate and ensure fair compensation to the providers.

72. For instance, providers were directed to file a Description and Justification (D&J) with their Mandatory Data Collection response to document and explain their cost submissions. Three providers did not submit a D&J to the Commission. The D&Js received varied widely in detail and thoroughness. Five providers (CenturyLink, GTL, Pay Tel, Securus, and Telmate) claimed a cost of capital of 11.25 percent in developing their cost data submission. (While other providers did not specify a cost of capital, given the length of this proceeding and the fact that the Commission clearly signaled its focus on setting appropriate ICS rates, as well as the fact that these respondents are sophisticated parties, we think that it is reasonable to assume that all responding providers included a cost of capital whether they specified it or not.) The cost of capital has to be estimated and their estimate of 11.25 percent might be significantly higher than the prevailing cost of capital for companies that provide telecommunication services. In any event, none of these companies submitted evidence as to their costs of debt or equity capital or capital structure, the three components of the cost of capital, and so have not justified any cost of capital estimate. In addition, several providers (Securus, Telmate, and CenturyLink) included in their costs financing items as well as interest expense, which is included in the cost of capital. This suggests that these providers, and possibly others, have over-estimated their capital costs, potentially double-counting their cost of debt. The five providers that specifically reported using 11.25 percent account for a large portion of the market, and thus a commensurate weight is reflected in the weighted average caps that we calculate. Consequently, in the unlikely event that a provider omitted its cost of capital, the omission is unlikely to have a significant impact on the weighted average caps. We also note that the Bureau has recommended to the Commission that a zone of reasonableness for the Weighted Average Cost of Capital (WACC) is between 7.39 and 8.72 percent.

73. We also find that the manner in which the data was collected and the clearly-stated purpose of the data collection, which occurred in the context of a Commission effort to set caps on ICS rates, gave providers every incentive to represent their ICS costs fully, and possibly, in some instances, even to overstate these costs. For example, one provider noted in its D&J that it even included in its ICS-related costs amounts for dues, subscriptions, entertainment and meals. We question the appropriateness of including such costs as ICS-related costs but as noted below we accept these reported costs without discounting or manipulating them. We have observed that at least one reporting provider did not actually calculate the percentage of traffic for each service (debit, prepaid or collect) represented but rather used the same percentage for each and merely offered a ''guess'' in reporting its 2014 data projections. This information forces us to call into question the accuracy of this provider's data and how rigorous this provider was in preparing its Mandatory Data Collection response. That the adopted rate caps include such costs, as well as the costs of international calls that are not subject to our rate caps, causes us to conclude that the adopted caps are generous. An analysis of the adopted rate caps shows that some providers will recover more than their stated costs, while others will recover less (because the caps are based on weighted industry averages but, as explained above, we believe all providers can more than recover the efficient costs of ICS supply).

74. Moreover, comments in the record have also highlighted how the data likely overstate costs. For example, the Petitioners' economist, Coleman Bazelon, and Pay Tel's economic consultant Don Wood identified problems they observed with the data. Dr. Bazelon also reported that, based on an analysis that included information not included in the provider's Mandatory Data Collection submissions, the reported costs of Securus and GTL ''include many incorrectly calculated additions such as inappropriately recoverable financing costs.'' Dr. Bazelon reports that, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].

75. After recalculating the providers' costs, Dr. Bazelon then concludes that their reported costs should be discounted by approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. While we do not discount the costs as recommended by Dr. Bazelon and, instead, take a more conservative approach of using the data at face value, this analysis underscores that the data submitted likely overstates costs and, as a result, the rate caps we adopt today are conservative.

d. Alternative Proposals in the Record

76. Numerous commenters have submitted rate reform proposals in the record. The Petitioners, along with several public interest groups, initially urged the Commission to adopt a $0.07 per minute rate cap for all interstate debit, prepaid, and collect calls, with no per-call charge, and no ancillary fees or taxes allowed. GTL, Securus, and Telmate, who describe themselves as ''the primary providers of inmate calling services . . . in the United States and represent[ ] 85% of the industry revenue in 2013,'' jointly filed a proposal to comprehensively reform all aspects of ICS. The Joint Provider Proposal urges the adoption of rate caps of $0.20 per minute for debit and prepaid interstate and intrastate ICS, and $0.24 per minute for all interstate and intrastate collect ICS, effective 90 days after adoption of a final order. The Joint Provider Proposal does not indicate that it is based on cost data received in response to the Mandatory Data Collection. In addition, the Joint Provider Proposal was signed by only three of the 14 ICS providers that responded to the Mandatory Data Collection. Pay Tel submitted what it calls an ''Ethical Proposal,'' in which it proposes rate caps of $0.08 per minute for all prisons regardless of population, $0.26 per minute for jails with 1–349 ADP, and

$0.22 per minute for jails with 350 plus ADP. The Commission sought comment on these proposals in the *Second FNPRM.*

77. In response to the *Second FNPRM,* Petitioners submitted another reform proposal. The Petitioners propose a rate of $0.08/minute for prepaid and debit calls and $0.10/minute for collect calls from all prisons and jails with over 350 beds. Petitioners propose a rate of $0.18/minute for prepaid and debit calls and $0.20/minute for collect for facilities with fewer than 350 beds. Petitioners suggest that the Commission adopt these tiered rates to account for higher churn rates, increased non-revenue calls, and higher bad debt issues experienced in smaller facilities. In its comments to the *Second FNPRM,* PPI supports a cap of $0.05 to $0.07 per minute.

78. Several commenters submitted economic justifications for their rate proposals, each of which relied on a slightly different subset of the data in the Mandatory Data Collection. For the reasons described below, the Commission declines to adopt any of these proposals.

79. After comments were received in response to the *Second FNPRM,* Pay Tel filed an additional proposal based on its economic consultant's analysis of the data filed in response to the Mandatory Data Collection. The company proposes tiered per-minute rate caps, for all call types, plus institution cost recovery amounts to be added to those caps. The rates (rate cap plus additional facility cost recovery) would range from $0.10/min for prisons to $0.29/min for jails of 0–349 inmates. Specifically, Pay Tel's economic consultant, Don Wood, excluded from his analysis, and subsequent proposed rate caps, the data from ATN, Encartele, and Protocall because he did not receive data from those providers, and from Combined Public Communications, Custom Teleconnect and Correct Solutions, because he deemed them ''unreliable for the purpose at hand.'' Mr. Wood then observed that the remaining eight reporting ICS providers' data included no description of how their cost studies were performed, and stated that ''a number of the studies are decidedly imperfect, and more complete documentation would certainly be desirable.'' Regardless, Mr. Wood suggested that ''key results of these studies should be relied upon by the Commission when making any decisions regarding the level and structure of ICS costs.'' We conclude that our approach is more appropriate because it includes data from all providers, rather than excluding six of the fourteen reporting providers' data. This approach is less reliable than our rate caps because of its selective nature. While we agree that the data are not perfect, we do not believe it is appropriate to ignore the filed data and we find Mr. Wood's rationale for excluding certain providers' data unpersuasive without additional justification. As such, the rate caps adopted herein are derived from all data filed in the record.

80. In comments to the *Second FNPRM,* the Wright Petitioners' economist, Coleman Bazelon, identified problems he observed with the data received in response to the Mandatory Data Collection. For example, Dr. Bazelon identified inconsistencies in how providers categorized and allocated costs. Dr. Bazelon then discussed the rate caps that the Wright Petitioners' proposed in their comments. These rate caps were based on Securus' and GTL's average cost data, which Dr. Bazelon then discounted because of concerns regarding Securus' cost-reporting methodology. As noted above, Dr. Bazelon found errors in Securus' and GTL's submissions, which led them to likely overstate their reported costs. After adjusting for these errors, the Wright Petitioners suggest that an appropriate rate cap for service to prison facilities should be $0.08/minute for debit/prepaid calling and $0.10/minute for collect calling.

81. We appreciate Dr. Bazelon's analysis highlighting that the data are likely to be overstated, but we do not believe it is appropriate for our purposes. Dr. Bazelon's analysis suggests that one provider may have overstated its costs by some significant amount. We find Dr. Bazelon's analysis of the submitted data troubling and believe that his conclusions, if true, might support discounting cost data from certain providers. (We note, however, that our filing instructions did not specify in detail how providers should account for the data that Dr. Bazelon discussed, although we required providers to identify and explain all costs in the accompanying Description and Justification. The lack of specific instruction regarding the method of cost reporting should not have been interpreted as license to manipulate or over-report cost data, and the reference to the penalty for willful false statements should have made that evident.) While we are concerned that the analysis from Dr. Bazelon suggests that costs were overstated, we do not believe it is appropriate to adopt a rate cap based on discounting a single provider's costs when we have data from 13 other providers. In addition, we determine above that we should not manipulate the data but more conservatively accept the providers' costs as filed to avoid potentially arbitrary means of working with the data.

82. Alabama Public Service Commission Utility Services Division Director Darrell Baker likewise reviewed the data. His proposal includes four tiers each for prisons and jails, based on inmate population, with both rate caps and additional facility cost-recovery amounts, yielding rates ranging from $0.12/min (prisons with more than 19,999 inmates) to $0.25/min (jails of less than 100 inmates). In support of his proposal for prison rates, Mr. Baker relied on cost data from only seven of the reporting 14 providers. He excluded from his rate cap and cost-recovery calculations the seven smallest reporting providers, on the basis ''that the . . . [remaining] providers serve the overwhelming majority of jails and prisons and that . . . an analysis of their data should provide accurate and reliable results that are applicable across the entire industry.'' In support of his proposal for jail rates, Mr. Baker relied on data from only six of the reporting providers, excluding one of the seven remaining providers' data because that ''[o]ne provider's cost per MOU deviates substantially from the cost per MOU of other providers.'' We find Mr. Baker's approach problematic because it eliminated the higher cost data in the record. Put another way, the seven smallest providers submitted what were among the highest reported costs of providing ICS and the other excluded provider by process of elimination must be a larger provider that is responsible for a more-significant portion of ICS minutes of use. Additionally, Mr. Baker appears to have given no consideration to potential justifications, if any, for that provider's higher costs. We are unable, on the record before us, to exclude providers' reported data in calculating the appropriate rate caps.

83. The comments in the record largely agree that the data are problematic but disagree on the reasons why and the overall effect on the reported data. Each analysis described above is based on a different data set and criticizes the data for slightly different reasons. We take seriously the concerns that the commenters have raised about inconsistencies in the data, and for at least some of the reasons described above, conclude that the reported data likely overstates the providers' actual costs. But, as explained herein, we are unable to agree with and do not adopt any of the commenters' choices about which data to exclude or discount.

e. Rate Caps for Collect Calls

84. In this section, we conclude that it is appropriate to put in place a temporary, distinct rate structure for collect calls, with a two-year phase down after which rate caps for collect calls will be the same as those of debit and prepaid calls.

85. In the *2013 Order,* the Commission established a rate cap for interstate debit and prepaid calling and a separate rate cap for interstate collect calling. The interim interstate collect calling rate cap was $0.25. In setting this separate rate cap, the Commission recognized that, based on the data available at the time, collect calling can be more expensive for ICS providers to offer than debit and prepaid calling. The Commission encouraged facilities to move away from collect calling, noting that the use of prepaid calling helps called parties to better manage their budgets for ICS, thus making end-user costs for maintaining contact more predictable. The Commission also noted that debit and prepaid calling address the problem of call blocking associated with collect calling by enabling service providers to obtain payment for calls up front, thus eliminating the risk of nonpayment.

86. In the *Second FNPRM,* the Commission sought comment on retaining the differentials between debit/prepaid and collect calling. The Commission noted that data received from the Mandatory Data Collection suggest that collect calling costs are higher than costs for prepaid and debit calls, and that collect calling accounted for less than nine percent of revenue producing minutes in the data collection in 2013. Commenters suggest that collect calling is more costly to provide because of bad debt, billing costs, uncollectible debts and issues related to collection of non-payment. For example, some commenters still assert that the Commission should adopt a higher rate cap for collect calling, largely because of the higher costs associated with collect call service. The Commission, along with several commenters, has noted that use of collect calling in correctional facilities has dropped significantly in recent years. Data received in response to the Mandatory Data Collection confirm this decline. Between 2012 and 2014, collect-calling minutes of use decreased over 50 percent, from 15 to 7 percent of minutes of use. CenturyLink recently told the Commission that ''that traditional collect calling represents a small and *declining* percentage of inmate calls.''

87. Based on our analysis of the record, including data submitted in response to the Mandatory Data Collection, we predict that collect calling usage will continue to decrease in the future. We do not want to include high collect calling costs in debit and prepaid rate tiers because that would compel the majority of ICS end users that do not use collect calling to subsidize such calls. In light of that concern, and because we continue to encourage correctional institutions to move away from collect calling, as the Commission did in the *2013 Order,* we adopt a separate rate cap tier for collect calling. This separate tier is consistent with the Commission's prior actions in adopting a separate collect calling rate tier based on data indicating that collect calls were more expensive than other types of ICS calls. Since the adoption of our interim rate caps, only one provider has been granted a waiver based on an assertion of unreasonable or unsustainable rate caps, further supporting the reasonableness of the rate of the interim collect calling rate caps.

88. We adopt a collect calling rate cap based on the cost data received in response to the Mandatory Data Collection, as well as a two-year step-down transitional period, as follows. First, we adopt a collect calling rate of $0.49/per minute for all jails and $0.14 for all prisons until July 1, 2017. Beginning July 1, 2017, we adopt a rate of $0.36/per minute for jails of 0–349 ADP, $0.33/per minute for jails of 349–999 ADP, and $0.32/per minute for jails of 1,000 or greater ADP, and $0.14/per minute for all prisons. This rate is halfway between the initial rate and the rates that are adopted in this Order for debit and prepaid calling. Finally, effective July 1, 2018 and beyond, we adopt a collect calling rate of $0.22/per minute for jails of 0–349 ADP, $0.16/per minute for jails with 359–999 ADP, and $0.14/per minute for jails of 1,000 or greater ADP, and $0.11/per minute for all prisons, in order to arrive at rates that are identical to those adopted in this Order for jails and prisons and the respective tiers therein.

89. We conclude that these separate tiers for collect calling rates will phase out after a two-year transition period. This two-year framework is justified by the data filed in response to the Mandatory Data Collection, showing that collect calling volume is decreasing and will most likely be at a nominal level in two years. By adopting a two-year glide path, the rates ICS providers are permitted to charge phase down over time, with certainty and sufficient time to adapt to a changed landscape that includes reduced use of collect calling overall. We find that this transitional approach will be administratively efficient for both providers and the Commission, as it involves a straightforward two-year step-down process and reflects our expectation that providers will gain efficiencies in their contracts and collect calling, and that they will thus more easily adjust to the lower rate caps adopted for debit and prepaid calling.

90. Moreover, the record supports a uniform rate for collect calls. Indeed, several commenters no longer support a separate rate cap for collect calling, indicating that collect calling costs may not, in fact, differ significantly from debit or prepaid calling costs, or that collect calling accounts for a relatively small portion of calls. The record indicates that this is because correctional institutions favor debit or prepaid calling over collect calling. For example, when the Commission adopted the *2013 Order,* evidence in the record indicated that collect calling was the only ICS option offered in four states and now the record indicates that collect calling is the only ICS option in one state. As the Commission has stated previously, we encourage providers and facilities to move away from collect calling for the many efficiencies and cost savings that other types of calling offer. Finally, we find that a two-year transition will allow the Bureau to monitor collect calling and address any potential traffic arbitrage issue that might occur if providers shift calling patterns to take advantage of the higher collect calling rate caps.

91. We acknowledge that the collect calling rate caps will be higher in year one than several of the collect calling caps proposed in the record. We expect that these caps will serve as backstops, not a target for providers, as efficiencies are gained by providers, and contracts are changed, or new contracts are entered into between parties. As discussed above, we expect that the trend towards declining collect calling volume will continue, and the adopted rate caps may be further modified in response to further data received as part of the MDC adopted herein.

92. We delegate to the Bureau the authority to seek comment on the possibility of adjusting the adopted collect calling rate cap if necessary to address any gaming issues that may arise prior to completion of the phase-down. As part of the annual reporting and certification requirement adopted herein, the Bureau will be monitoring collect call volume in order to review trends and to ensure that gaming does not occur. As discussed below, the

Commission also plans to collect rate data, including data about collect calling rates that will further inform this review.

f. Cost-Benefit Analysis

93. In adopting these rate caps, we have carefully considered each proposal or suggestion from the extensive comments in the record and weighed its potential benefit against any potential burden it may impose, bearing in mind our statutory mandate that ICS rates must be just, reasonable, and fair, maximizing the public benefit from any proposal we adopt. We find, on balance, that the benefits of our rate caps outweigh any potential burden that may be imposed. For example, regular family contact not only benefits the public broadly by reducing crime, lessening the need for additional correctional facilities and cutting overall costs to society, but also likely has a positive effect on the welfare of inmates' children. Ensuring just and reasonable ICS rates will foster regular contact between inmates and families, reduce the economic burden on ICS end users, support more cost-effective communication between inmates and their counsel, and produce cost savings for the justice system.

94. Additionally, as the Commission discussed in the *2012 NPRM,* studies show that regular contact with family reduces inmate recidivism. Children who continue to stay in touch with their parent in prison exhibit fewer disruptive and anxious behaviors. Yet, according to one study, only 38 percent of inmates reported ''at least'' monthly phone calls with their children. Real telephone contact between inmates and their loved ones at high rates places a heavy burden on inmates' families because families typically bear the burden of paying for the calls. The Government Accountability Office (GAO) has twice recognized the conclusions of Federal Bureau of Prisons officials that contact with family ''aids an inmate's success when returning to the community'' and thus lowers recidivism. Moreover, the GAO has found that ''crowded visiting rooms make it more difficult for inmates to visit with their families'' and that ''[t]he infrastructure of the facility may not support the increase in visitors as a result of the growth in the prison population.''

95. As discussed above, there is little dispute that the ICS market is experiencing market failure. Numerous commenters have expressed as much. Various parties encourage the Commission to reform rates within inmate calling, and some offer specific reform proposals. Reforms are necessary to ensure that the benefits discussed above, which are in the public interest, will be realized.

96. The Order recognizes, however, that imposing rate caps may impose burdens on some providers. We have taken steps to minimize burdens on providers. As discussed below, we allow a 90-day transition period for the rate caps adopted in this Order to take effect for prisons and six months for the applicable rate caps to take effect in jails. We find that this length of time adequately balances the pressing need for reform while affording ICS providers and facilities sufficient time to prepare for the new rates. Further, our rate caps are designed to ensure that efficient providers will recover all legitimate costs of providing ICS, including a reasonable return, and, to the extent a provider can demonstrate special circumstances, it may seek relief from our rules in the form of a waiver. Specifically, the Commission will consider requests from a provider arguing that particular facts, when considered in the context of the totality of the relevant circumstances, deprive the provider of fair compensation or have a substantial and deleterious effect on competition in the ICS market.

97. Additionally, the rate caps adopted in the Order include fewer tiers than the number of tiers used in the data requested in our Mandatory Data Collection. The Commission collected data, for example, on the costs of serving jail facilities with 0–99 ADP, a grouping comprising less than 10 percent of the inmate population, but we did not adopt that as a rate tier, thereby mitigating any administrative burden on providers of adding a separate rate tier for this comparatively small grouping. The rate caps we adopt today respond to commenter concerns regarding potential confusion and burden caused by multiple rates. We also adopt a single rate cap for prisons, which should minimize the burden on providers that serve prisons. Finally, we disagree with those commenters who assert that adopting a tiered rate structure would be unduly burdensome and difficult for the Commission to administer and for ICS providers and correctional officers to implement. We find these allegations unsupported and commenters provide no persuasive evidence that our rate tiers would be more difficult for them to administer than the current approaches.

4. Rejection of Certain Types of Charges

a. No Per-Call or Per-Connection Charges

98. *Background.* Per-call or per-connection charges are one-time fees often charged to ICS users at call initiation. In the *2013 Order,* the Commission noted problems with per-call charges, ''potentially rendering such charges unjust, unreasonable and unfair.'' Problems included calls dropped ''without regard to whether there is a potential security or technical issue, and a per-call charge . . . imposed on the initial call and each successive call.'' The Commission expressed ''serious concerns about such charges'' and sought comment about the risks of such charges, but did not ban them.

99. In the *Second FNPRM,* the Commission sought additional comment about such charges. First, the Commission asked if it should consider per-call or per-connection charges to be part of the ICS rate and ''therefore subject to the section 276 mandate to ensure fair compensation.'' Second, the Commission asked, in the alternative, if it should consider per-call or per-connection fees more analogous to the ancillary fees discussed in section 276(d). The Commission asked if there are ''instances in which the correctional facility or some other third party assesses a per-call or per-connection fee,'' and, if so, the Commission sought comment on its authority to ban such charges. Finally, the Commission sought comment on whether the elimination of per-call charges would allow for just and reasonable interstate and intrastate ICS rates and fair compensation for ICS providers, on ''transitions'' away from such charges, and on its legal authority to act on per-call or per-connection charges.

100. We received limited comment in the record, but all supported the elimination of per-call or per-connection fees. For example, HRDC supports the ''elimination of per-call charges'' for existing contracts. Legal Services for Prisoners with Children asserts that ''per-call'' or connection fees are ''unreasonably high'' and that the Commission ''should ban these charges'' or, ''at the very least,'' should introduce a ''dropped call'' provision that ''prohibits ICS providers from charging multiple times for a call that has been reinitiated within a few minutes.'' Pay Tel notes that if the Commission adopts ''any rate cap regime—including Pay Tel's Proposal—that does not allow providers to charge end users an upfront surcharge or per-call surcharge, it will

successfully eliminate the problem of premature disconnection of calls.''

101. *Discussion.* We disallow the use of per-call or per-connection charges pursuant to our legal authority to ensure just, reasonable, and fair ICS rates. No evidence in the record supports a conclusion that these charges are a necessary part of cost recovery for ICS calls. Indeed, no commenters indicated that these fees are tied to a cost that providers incur in initiating a call. Providers did not break out per-call or per-connection costs when they filed their per-minute costs in response to the Mandatory Data Collection, indicating that any costs incurred on a per-call basis were included in their per-minute cost calculations. Allowing providers to recover such charges on top of the per-minute rates we adopt in this Order would therefore risk allowing double recovery. Additionally, these fees appear to be less prevalent than they once were. Recent provider-drafted reform proposals in the record do not include per-call or per-connection charges, and many recently-adopted ICS contracts likewise do not include these fees. All of these factors indicate to us a trend away from the inclusion of such fees. Finally, we agree with the Commission's earlier finding in the *2013 Order* that allowing such fees may encourage providers to charge end users for dropped calls, which could lead to the ''assessment of multiple per-call charges for what was, in effect, a single conversation,'' which has no place in a framework for just, reasonable, and fair compensation. We find that disallowing such fees is in the public interest because it will decrease the cost to end users for shorter ICS calls and allow more contact between inmates and their loved ones.

b. No Flat-Rate Calling

102. *Background.* In the *2013 Order* the Commission noted that commenters raised issues regarding per-call charges that may be unjust, unreasonable, and unfair; callers are often charged more during a single conversation when calls are dropped, which the record reveals can be a frequent occurrence, thus resulting in multiple calls for a single conversation, each subject to a separate flat-rate charge. The Commission stated that ''a rate will be considered consistent with our rate cap for a 15-minute conversation if it does not exceed $3.75 for a 15-minute call using collect calling, or $3.15 for a 15-minute call using debit, prepaid, or prepaid collect calling.'' Rule 64.6030 mirrors this language and was intended to illustrate that the rate for a five-minute collect call must be capped at $1.25 and the rate for a five-minute debit or prepaid ICS call must be capped at $1.05, while a 30-minute collect call could cost consumers no more than $7.50 and a 30-minute debit or prepaid ICS call no more than $6.30.

103. *Discussion.* Subsequent to the *2013 Order,* Securus sought additional guidance on this issue, asking whether providers were allowed to impose a flat rate based on the interim rate caps for a 15-minute call regardless of actual call duration. That is, it wished to know if it could charge a flat fee of $3.75 for a collect call of any duration up to 15 minutes. The Commission sought comment on Securus' question, as well as on whether it should revise the existing rules to prohibit flat-rate charges or to develop new rules prohibiting flat-rated charges.

104. The record reflects minimal support for this practice. The Alabama PSC opposes Securus' proposed clarification, stating that ''flat-rate pricing allows providers to maximize call revenues and to dictate phone usage to the end users.'' It further asserts that flat-rate calling increases complaints related to dropped calls and penalizes inmates that want to make shorter calls. Several commenters suggest that ICS providers will benefit from a ban on flat-rate calls because it will lower their costs related to consumer complaints and bill adjustments. HRDC notes that the proposed flat rates ''only fall within the rate caps when a full 15-minute call is actually completed'' and argues that ''this practice does not reflect the spirit'' of the Commission's *2013 Order.* Pay Tel asserts that ''numerous ICS providers have taken advantage of this language and vague guidance since release of the ICS Order and are charging end users a flat rate of $3.15 or $3.75 per call, even if the call is disconnected prior to expiration of fifteen minutes,'' which it asserts is ''an abuse of the intent of the Commission's rules.''

105. We prohibit the imposition of flat-rate calling. There is minimal record support for such charges, which penalize those who make shorter calls (the record indicates that ICS calls last typically less than 15 minutes). If an end user is charged for a 15-minute call but the duration of that call is less than 15 minutes, the price for that call is disproportionately high. We also agree with those commenters who assert that allowing providers to charge a flat rate based on a 15-minute call does not comport with our requirement to make ICS rates just, reasonable, and fair. As such, we ban flat-rate calling rate plans.

5. Legal Authority for Intrastate and Interstate Rate Caps

106. *Background.* In the *2013 FNPRM,* the Commission tentatively concluded that section 276 affords it broad authority to reform intrastate ICS rates and practices that deny fair compensation, as well as to preempt inconsistent state requirements. The Commission sought comment on these tentative conclusions. Multiple commenters supported the Commission's tentative conclusion that it has jurisdiction over intrastate as well as interstate ICS rates. These commenters argue that section 276 provides the Commission with clear jurisdiction, and that it must regulate intrastate rates to ensure comprehensive ICS reform. After examining the record, we affirm the tentative conclusion that intrastate ICS rates are well within the Commission's jurisdiction for the reasons described below.

107. Our authority to ensure the reasonableness of rates and practices for interstate ICS is not in dispute. Under section 201(b) of the Communications Act, the FCC is empowered to ''prescribe such rules and regulations as may be necessary'' to ensure that ''[a]ll charges [and] practices . . . for and in connection with [interstate] communication service'' by wire or radio are ''just and reasonable.'' Section 276 directs the Commission to ''establish a per call compensation plan to ensure that all payphone service providers''—which the statute defines to include providers of ICS—''are fairly compensated for each and every completed intrastate and interstate call.'' (The Commission has previously found that the term ''fairly compensated'' permits a range of compensation rates that could be considered fair, but that the interests of both the payphone service providers and the parties paying the compensation must be taken into account.) We find that these statutory sections provide the Commission with the authority to regulate interstate ICS rates and practices, including the use of per-call or per-connection fees as well as flat-rate calling.

108. *Legal Authority to Reform Intrastate Rates.* The Commission's authority over intrastate telecommunications is, except as otherwise provided by Congress, generally limited by section 2(b) of the Act, which states that ''nothing in this Act shall . . . give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio.'' As the Supreme Court has held, however, section 2(b) has no

effect where the Communications Act, by its terms, unambiguously applies to intrastate services. We conclude that such is the case here.

109. Under section 276 of the Communications Act, the Commission is charged with implementing Congress's directive ''that all payphone service providers [be] fairly compensated for each and every completed intrastate and interstate call.'' Section 276 contains several express references both to ICS and intrastate calling, making it clear that the Commission has the authority to regulate intrastate ICS calling. For example, section 276 requires the Commission to broadly craft regulations to ''promote the widespread development of payphone services for the benefit of the general public'' including, notably, ''the provision of *inmate telephone service in correctional institutions,* and any ancillary services.'' In addition to this general grant of jurisdiction, section 276 includes a mandate to ''establish a per call compensation plan to ensure that *all* payphone service providers are fairly compensated for each and every completed *intrastate* and interstate call using their payphone.'' Section 276 also expressly directs the Commission to ''discontinue the *intrastate* and interstate carrier access charge payphone service elements. . .and all *intrastate* and interstate payphone subsidies.'' In addition, section 276 explicitly grants the Commission authority to preempt state requirements to the extent they are inconsistent with FCC regulations.

110. Furthermore, significant judicial precedent supports the Commission's authority to regulate intrastate ICS. In *Illinois Public Telecommunications Association,* the U.S. Court of Appeals for the D.C. Circuit found that the Act's requirement that ''all payphone service providers are fairly compensated'' provides the FCC with ''authority to set local coin call rates''—which included intrastate service rates. Additionally, in *New England Public Comm'ns Council, Inc.* v. *FCC,* the same court found that ''section 276 unambiguously and straightforwardly authorizes the Commission to regulate . . . intrastate payphone line rates.'' Therefore, we conclude that both section 276 and the associated case law give the Commission the authority to regulate ICS provider compensation for intrastate calls, including the rates ICS providers charge end users, per-call or per-connection charges, and flat-rate charges.

111. We find arguments that the Commission lacks the authority to regulate intrastate ICS unpersuasive. For example, we disagree with commenters who argue that section 276 is limited to prohibiting discrimination by Bell operating companies (BOCs). While section 276(a) includes provisions specifically prohibiting discrimination by BOCs, we do not believe Congress intended for that subsection to limit the scope of the remaining provisions of section 276. For example, section 276(b)(1) expressly mandates that the Commission adopt regulations addressing five specific subjects related to payphone services; only two of those subjects—clauses (C) and (D)—relate to preventing BOC discrimination.

112. In addition, although section 276(a) refers to Bell operating companies, and applies only to the BOCs, section 276(b) refers more broadly to ''payphone service providers.'' If Congress had intended for the regulations prescribed under section 276(b) to be limited to the narrow purpose of effectuating the nondiscrimination goals set forth in section 276(a), it easily could have made that clear. Instead, Congress made clear that it was conferring a broader mandate in section 276(b), stating that: ''[i]n order to promote competition among payphone service providers and to promote the widespread deployment of payphone services . . . , the Commission shall take all actions necessary . . . to prescribe regulations that . . . [*inter alia*] ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s] . . . .''

113. We also disagree with commenters who argue that the Commission has never determined that section 276 extends to intrastate rates or that section 276 applies only to ''local calls made from a payphone and paid with coins.'' Section 276 does not specify that compensation is only for calls paid by coin but rather ''each and every'' call. Indeed, the very Commission order under review in *Illinois Public Telecommunications* held that the Commission had the authority to regulate intrastate payphone rates and preempt state regulation of intrastate rates. Therefore, the Commission's position regarding its authority over intrastate rates under section 276 has remained consistent.

114. *Rate Caps are Just, Reasonable and Fair.* As noted above, we have accepted the data submitted by providers in response to the Mandatory Data Collection as reported even though there is evidence that they are overstated. As a result, we believe our rate caps are conservative and include sufficiently generous margins to allow providers to earn a profit. More generally, it is well-established that rates can be lawful if they fall within a zone of reasonableness, and hence a particular state's cap might be lower than our caps and still fall within that zone. The rate caps we adopt today are intended both to ensure that ICS rates are ''just and reasonable'' and do not take unfair advantage of inmates, their families, or providers consistent with the ''fair compensation'' mandate of section 276.

115. The Commission has broad discretion in establishing just and reasonable rates, as long as it articulates a rational basis for its decisions and as long as the result is not confiscatory. As the Supreme Court has explained in construing the similar ''just and reasonable rates'' provision of the Natural Gas Act, ''the Commission is not required by the Constitution or the Natural Gas Act to adopt as just and reasonable any particular rate level; rather, courts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness.''' Section 276(b) charges us with ensuring that ''all payphone service providers [be] fairly compensated.'' This provision must be read in conjunction with our obligation under section 201(b) to ensure that charges and practices be just and reasonable. Neither section 276(b) nor 201(b) require us to allow for recovery of costs that are not just, reasonable and fair.

116. We recognize that some ICS providers may see their profits decrease because the adopted caps are below the costs they reported to us under the Mandatory Data Collection (assuming that MOU stay constant). The Commission has broad authority to set rate caps to apply to a particular service and does not have to set provider-specific rates that embody a rate of return for each individual provider. Indeed, as at least one provider has explained in this proceeding, courts have recognized that the use of industry-wide average cost data to set rates is not arbitrary, and therefore agencies may use composite industry data or other averaging methods to set rates. We therefore find that the rates we adopt today are reasonable for the reasons provided above and will allow economically efficient—possibly all—providers to recover their costs that are reasonably and directly attributable to ICS. The costs reported by the providers that are above our rate caps represent significant outliers, suggesting that their reporting methods may have varied from those of other providers or that

they may be less efficient than their peers. Indeed, encouraging efficiency will lead to lower rates, which will both benefit end users as well as increase calling demand, thus furthering the dual goals of section 276 ''to promote competition among payphone service providers'' and encourage the ''widespread deployment of payphone services to the benefit of the public.''

B. Payments to Correctional Institutions

117. The record indicates that, in many cases, ICS bids are predicated on the winning providers' willingness to share part of its ICS revenues with the correctional facility. These payments, commonly referred to as ''site commissions,'' may take the form of monetary payments, in-kind payments, exchanges, or allowances. In this Order, we define the term ''site commission'' broadly, to encompass any form of monetary payment, in-kind payment requirement, gift, exchange of services or goods, fee, technology allowance, product or the like.

118. After carefully considering the evidence in the record, we affirm our previous finding that site commissions do not constitute a legitimate cost to the providers of providing ICS. Accordingly, we do not include site commission payments in the cost data we use in setting the rate caps established in this Order. We conclude that we do not need to prohibit site commissions in order to ensure that interstate rates for ICS are fair, just, and reasonable and that intrastate rates are fair. We reiterate, however, that site commissions have been a significant driver of rates and that ICS rates have dropped dramatically in states that have eliminated site commissions. We therefore encourage other states and correctional facilities to curtail or prohibit such payments as part of an effort to further ensure that inmates and their families have access to ICS at affordable rates.

119. We recognize that some states have adopted reasonable rates that include a margin sufficient to allow providers to pay site commissions, thus demonstrating that it is possible to have rates that are consistent with our rate caps but still allow for the payment of site commissions. The decision to establish fair and reasonable rate caps for ICS and leave providers to decide whether to pay site commissions—and if so, how much to pay—is supported by a broad cross-section of commenters, including consumer advocates, such as the Wright Petitioners; ICS providers, such as CenturyLink, NCIC and ICSolutions; representatives of correctional facilities, such as Praeses; and state regulators, such as the Alabama PSC. This broad support from practically every type of interested party underscores the reasonableness of our approach. We will continue to monitor the market and will take appropriate action if we find that, notwithstanding our rate caps, site commissions are somehow driving ICS rates to levels that are unjust, unreasonable, or unfair.

1. Background

120. In the *2002 Order,* the Commission concluded that, consistent with prior precedent, site commissions ICS providers paid to inmate facilities were not a cost of providing payphone service, ''but represent an apportionment of profits between the facility owners and the providers of [ICS].'' In the *2012 NPRM,* the Commission sought comment on its longstanding conclusion that site commissions are not a cost of providing ICS, and additional comment and data on site commissions and their impact on ICS rates.

121. In the subsequent *2013 Order,* the Commission affirmed the previous determination that site commissions ''are not costs that are reasonably and directly related to the provision of ICS'' and determined that site commissions were ''a significant factor contributing to high [ICS] rates.'' The Commission concluded that, ''under the Act, [site] commission payments are not costs that can be recovered through interstate ICS rates.'' The Commission noted, however, the possibility that correctional facilities may incur costs in making ICS available to inmates and sought comment on whether there were any such costs that should be compensable through ICS rates.

122. In the *Second FNPRM,* the Commission sought additional comment on potential reforms to site commissions and its legal authority to ''restrict the payment of site commissions in the ICS context pursuant to sections 276 and 201(b) of the Act.'' As the Commission explained, site commissions ''distort[] the ICS marketplace'' by creating incentives for the facilities to select providers that pay the highest site commissions, even if those providers do not offer the best service or lowest rates. The Commission cited responses to the Mandatory Data Collection showing that ICS providers paid over $460 million in site commissions in 2013 alone. Press reports have cited even higher figures. These payments represent a significant portion of total ICS revenues. Indeed, as the Commission has noted, site commissions can amount to as much as 96 percent of gross ICS revenues. The Commission, therefore, sought comment on whether it should prohibit all site commission payments for interstate and intrastate ICS. The Commission also sought comment on whether correctional institutions incur any costs in the provision of ICS, and requested data demonstrating that any costs that facilities bear are ''directly related to the provision of ICS.'' To the extent that correctional facilities were found to incur costs ''reasonably and directly related to making ICS available,'' the Commission sought comment on whether recovery of those costs should be ''built into any per-minute ICS rate caps.''

2. Discussion

123. Although we do not prohibit providers from paying site commissions, we do not consider the cost of any such payments in setting our rate caps. (Regardless of whether site commission payments constitute an ''appointment of profits'' or a cost to the provider, they cannot be recovered through ICS rates unless they are ''reasonably and directly related to the provision of ICS.) Evidence submitted in response to the *Second FNPRM* reinforces the Commission's conclusion that the site commissions ICS providers pay to some correctional facilities are not reasonably related to the provision of ICS and should not be considered in determining fair compensation for ICS calls. HRDC, for example, describes site commissions as ''legal bribes to induce correctional agencies to provide ICS providers with lucrative monopoly contracts.'' Other parties use less colorful language, but still indicate that site commissions often ''have nothing to do with the provision'' of ICS. We agree with commenters opposed to recovery of site commissions in ICS rates and find that site commission payments should not be included in our rate cap calculations.

124. We therefore agree with inmate advocates, such as the Wright Petitioners and the Civil Rights Coalition, a group of 20 national civil rights and social justice organizations; providers, such as CenturyLink and NCIC; United States Senators; and state regulators, such as the Alabama PSC that, at this time, we should focus on our core ratemaking authority in reforming ICS and not prohibit or specifically regulate site commission payments. While we continue to view such payments as an apportionment of profit, and therefore irrelevant to the costs we consider in setting rate caps for ICS, we do not prohibit ICS providers from paying site commissions. (Of course, providers' rates must comply

with our rate caps, regardless of whether the provider pays site commissions.)

125. The record supports excluding site commission payments from the costs used to calculate the rate caps for ICS. Indeed, even many of the commenters that oppose a prohibition on site commissions urge the Commission to consider only costs related to the provision of ICS in calculating the rate caps. If site commissions were factored into the costs we used to set the rate caps, the caps would be significantly higher. Passing the non-ICS-related costs that comprise site commission payments including contributions to general revenue funds, onto inmates and their families as part of the costs used to set rate caps would result in rates that exceed the fair compensation required by section 276 and that are not just and reasonable, as required by section 201.

126. We note that several commenters argue that the programs currently supported by site commissions should be paid for out of tax funds collected from the population at large, or from other sources. HRDC, for example, argues that ''all taxpayers should fund the cost of operating correctional facilities, including the cost of providing ICS,'' just as homeowners pay taxes to fund schools, regardless of whether they have school-age children. We need not reach such arguments to support our decision. Rather, we conclude that, because the programs in question are unrelated to the provision or use of ICS, the burden of paying for them may not, under the Communications Act, be imposed on end users of ICS. As the Commission has explained, how facilities use the site commission payments they receive from ICS providers is irrelevant to our analysis: ''[t]he Act does not provide a mechanism for funding social welfare programs or other costs unrelated to the provision of ICS, no matter how successful or worthy.'' Consistent with the record in this proceeding, as well as the Commission's decision in the *2013 Order,* we therefore exclude site commission payments from our rate cap calculations.

127. In the *Second FNPRM,* the Commission sought comment on whether it could or should prohibit site commissions. A variety of commenters support such a prohibition, primarily based on their belief that a rule against site commissions is needed to ensure that ICS rates are fair, just, and reasonable. Other commenters, primarily sheriffs and others associated with correctional facilities, favor the continued use of site commissions. As noted above, many of these parties, however, appear to be concerned mostly with ensuring that facilities can recover costs they incur in allowing access to ICS. As a threshold matter, as noted herein the record is not clear as to whether the correctional facilities in fact bear a cost in the provision of ICS that is unique to the provision of phone service in addition to the costs of operating a correctional facility. The record suggests that site commissions are used mainly to fund a wide and disparate range of activities, including general governmental or correctional activities unrelated to the costs of providing ICS by either the provider or facility. Even assuming facilities do incur costs tied to the provision of ICS, we have addressed such a concern by not prohibiting providers from sharing their profits with correctional facilities to recover such costs, if appropriate. Some of these commenters also argue that site commissions should be preserved because they provide an important incentive for facilities to make ICS available to their inmates. Another group of commenters question the Commission's legal authority to prohibit site commissions and argue that prohibiting site commissions would not produce any material benefit. A number of commenters, representing a wide range of interests, urge the Commission to follow the lead of the Alabama PSC and restrict site commissions only indirectly, by imposing caps on ICS providers' rates, thereby limiting the amount of profit available to pay site commissions. The Wright Petitioners, among others, suggest that we adopt a similar approach here, arguing that the Commission should ''simply establish an ICS rate that complies with Sections 201, 205, and 276 of the Act, and let ICS providers and correctional authorities allocate the revenue in any manner they wish.'' ICS provider NCIC ''agrees that jails and prisons should be allowed [to seek] site commission payments after the FCC caps the rates, ancillary fees and convenience payment options, which will reduce commission payments to reasonable levels to provide cost-recovery.'' GTL disagrees, however, arguing that under the Alabama model, ''providers must generate revenue to pay the unconstrained site commissions . . . which puts upward pressure on end-user prices.'' In fact, GTL and others contend that a regulatory regime that permitted providers to make site commission payments, but did not take those payments into account in setting the rates would result in an unconstitutional ''taking'' in violation of the Fifth Amendment, and is ''arbitrary and capricious.''

128. Based on the evidence in the record, we conclude that we do not need to prohibit site commissions at this time to achieve the statutory directives of ensuring that ICS rates are just, reasonable, and fair. The fact that we do not prohibit site commission payments does not mean, however, that we have failed to address site commissions. To the contrary, we have addressed the harmful effects of outsized site commissions by establishing comprehensive rate caps and caps on ancillary service charges that may limit providers' ability to pass site commissions through to ICS consumers. We have also made the considered decision to establish caps on rates and ancillary service charges and allow market forces to dictate adjustments in site commission payments. As noted below, this approach is consistent with the Commission's general preference to rely on market forces, rather than regulatory intervention, wherever reasonably possible. Our expectation that ICS providers and correctional facilities will find an approach that meets their needs and complies with our rate caps is neither arbitrary nor capricious. In fact, evidence in the record demonstrates that ICS rates can be set at levels that are well within our rate caps while allowing for fair compensation and still leaving room for site commission payments. For example, in Pennsylvania, the per-minute rate of $0.059 includes a 35 percent site commission. Similarly, in New Hampshire, the state DOC lowered intrastate rates to less than $0.06 per minute with a 20 percent site commission. Thus, it is possible to have reasonable rates and fair compensation without expressly prohibiting site commissions.

129. We emphasize that the actions we take here are based on our ratemaking authority and are intended to ensure fair, just, and reasonable ICS rates. The caps and restrictions we impose on providers' rates should eliminate or substantially reduce the ability of site commissions to inflate rates above providers' costs or reasonable profit to otherwise distort ICS rates. As explained elsewhere in this Order, we have seen some positive steps toward the lowering and/or elimination of site commissions and we believe that this trend, coupled with the actions we take today, constitutes a reasonable means of addressing ICS issues one step at a time, given the fact that some portion of some site commissions are said to represent the recovery of reasonable institutional

costs. We reiterate that we will, however, continue to monitor the ICS market and will not hesitate to take additional action to prohibit site commissions, if necessary.

130. Our decision not to prohibit site commission payments should not be viewed as an endorsement of such practices. Rather, our decision simply reflects our focus on achieving our statutory objectives with only limited regulatory intervention. We understand the positions of those parties calling for the regulation of site commission practices, or even those calling for a complete ban of them. We also acknowledge that some commenters have questioned our legal authority to prohibit site commissions. Other parties argue that we have clear authority to regulate site commission payments. Ultimately, however, we do not need to determine whether we have authority to ban site commission payments, given our decision to take a less heavy-handed approach, similar to that adopted by the Alabama PSC. This approach is consistent with the Commission's general preference to rely on market forces, rather than regulatory fiat, whenever possible.

131. We expect that the approach adopted in this Order will result in lower site commissions, and strongly encourage additional jurisdictions to eliminate site commissions altogether to help ensure that inmates and their families have access to ICS at affordable rates. We applaud recent efforts by New Jersey and Ohio to eliminate site commissions. The per-minute intrastate ICS rates in these states have dropped considerably (from $0.15 to under $0.05 in New Jersey and $0.39 to $0.05 in Ohio). Pay Tel estimates that in eight states that have eliminated site commissions the rates average less than $0.07/minute. The actions taken by these states demonstrate that site commissions can be eliminated without sacrificing facilities' ability to implement robust security protocols. Additional states continue to take similar steps to curb or prevent the use of site commissions in their state prison systems and we urge other states to take similar actions. We also reiterate that rates can be significantly below our rate caps and still offer ICS providers sufficient profit to allow them to pay reasonable site commissions.

132. Further, we note that, despite what some entities appear to suggest, this Order does not maintain the *status quo* in the ICS market. To the contrary, we conclude that our actions in this Order constitute changes in law and/or instances of force majeure that are likely to alter or trigger the renegotiation of many ICS contracts. We also think it reasonable to anticipate that ICS providers are on notice of these changes in law and, going forward, will not enter into contracts promising exorbitant site commission payments that they will not be able to recover through their ICS rates under our rate caps. Indeed, we anticipate that the reforms adopted in this Order will help recalibrate ICS market competition by motivating correctional facilities to evaluate bids based on factors other than the highest site commission. However, as noted above, we will monitor the market and will take appropriate action if our prediction proves inaccurate.

a. Facility Costs Related To Providing ICS

133. *Background.* In the Mandatory Data Collection, the Commission required ICS providers to submit their costs related to the provision of ICS, including their telecommunications, equipment and security costs. For example, in the Mandatory Data Collection Instructions, the Bureau directed ICS providers to include ''security costs incurred by the ICS provider in the provision of inmate calling services, such as, but not limited to, voice biometrics technology and call recording and monitoring.'' In their responses, ICS providers indicated that the data they filed included costs associated with security features relating to the provision of ICS.

134. In the *Second FNPRM,* the Commission noted that the record to-date was mixed regarding how much, if anything, facilities spend on ICS. It sought comment on the ''actual costs'' that facilities may incur in the provision of ICS and the appropriate vehicle for enabling facilities to recover such costs. The Commission also sought comment on whether any such costs should be recoverable through the per-minute rates ICS providers charge inmates and their families. In response, some law enforcement representatives assert that correctional facilities incur costs related to ''call monitoring, responding to ICS system alerts, responding to law enforcement requests for records/recordings, call recording analysis, enrolling inmates for voice biometrics, and other duties,'' including ''administrative duties'' that arguably are related to ICS. Some ICS providers, however, contend that many of the activities the facilities claim as ICS-related costs are, in fact, handled by the ICS provider. For example, Securus states that it performs most ICS-related tasks for facilities, including handling U.S. Marshal inquiries, cell phone detection and interception, listening to calls, and providing call recordings to courts. Similarly, GTL explains that the ''established industry protocol'' is for ICS providers to handle security duties for the correctional facilities they serve, either as part of a turnkey ICS product or as a condition of the contract award, regardless of the size of the facility.

135. Although some commenters argue that allowing ICS creates costs for facilities, others question whether correctional facilities incur any costs that should be passed on to consumers as part of the per-minute rates for ICS. One issue is whether the costs parties seek to attribute to ICS are, in fact, costs that facilities would incur regardless of whether they allowed ICS. Andrew Lipman, for example, argues that many correctional facilities seek payment for ''activities that have nothing to do with the provision of a telecommunications service.'' These parties argue that the costs facilities seek to pass on to ICS providers and users are more properly classified as law enforcement costs related to operating a correctional facility that should be borne by the government and not ICS users.

136. Even commenters asserting that facilities incur costs that are properly attributable to the provision of ICS do not agree on the extent of those costs. A group of the largest ICS providers, for example, notes that while they support the recovery of ''legitimate costs incurred by correctional facilities that are directly related to the provision of inmate calling services,'' they cannot agree on how those costs should be calculated. The NSA suggests that the Commission approve a ''compensation amount for the security and administrative duties performed in jails in connection with ICS that is an additive amount to the ICS rate.'' Relying, in large part, on the results of a survey it took of its members, as well as analyses submitted by other parties, NSA suggests that this additive amount should range from $0.01 to $0.11 per minute, depending on the size of the facility being served.

137. Several commenters offer critiques of NSA's survey data, however. GTL's economic consultant, for example, concludes that NSA's latest proposal would offer facilities ''significantly larger'' annual compensation than would be justified by estimates derived from the analyses conducted by itself and other parties, particularly for small facilities such as jails with an ADP below 350. Even Pay Tel, which generally supported the NSA's survey as a ''robust and significant dataset,'' agrees that NSA failed to remove outliers from its calculations and that NSA included

costs that are ''typically associated with on-going investigations that would not be considered for Cost Recovery purposes.'' Andrew Lipman notes that the NSA survey was based on only three months of data from only approximately five percent of NSA's members and that NSA had not provided any indication of whether the survey respondents were representative of NSA's broader membership. Mr. Lipman also points out that the NSA did not provide the raw data, a copy of the survey, any information on the methodology used by members to allocate time, or detailed descriptions of the tasks encompassed by various categories of costs, such as ''administrative,'' ''security'' or ''other.'' Relying on other evidence in the record, Mr. Lipman suggests that it would be unreasonable for providers to agree to pay more than $0.01–$0.03 per minute to reimburse facilities for any costs they may incur in agreeing to make ICS available to inmates. Darrell Baker of the Alabama PSC recommends a cost recovery rate of $0.04 per minute for jails of all sizes and $0.01 to $0.02 per minute for prisons, while an earlier analysis from GTL yields median cost recovery rates of $0.005 per minute for prisons and $0.016 per minute for jails.

138. *Discussion.* The record contains a wide range of conflicting views regarding whether correctional facilities incur any costs that are directly and reasonably related to making ICS available and that must be recovered through ICS rates. As at least one commenter points out, ICS continues to be offered in states that have prohibited payments from ICS providers to facilities. This evidence undermines claims that facilities incur unique costs that are attributable to ICS and that must be recovered from ICS rates. These claims are further undermined by the fact that ''[n]one of the correctional facilities and associations submitted sufficient detail in this proceeding to support the amount of their alleged costs, or to demonstrate that these costs meet the used and useful standard.''

139. Some commenters argue that the costs claimed by facilities are ''basic law enforcement activities [such as surveillance and investigation of calls] and not costs for providing a telecommunications service.'' The record is not clear that the costs facilities claim to incur due to ICS would actually be eliminated if the facilities ceased to allow inmates to have access to ICS. Moreover, providers indicate that costs that facilities claim to incur in allowing ICS are, in fact, borne directly by the providers. Those costs are already built into our rate cap calculations and should not be recovered through an ''additive'' to the ICS rates. Accordingly, while we strongly encourage the elimination of site commission payments, we do not dictate what an ICS provider can do with its profits and conclude that the most reasonable and fair approach is to leave it to ICS providers and facilities to negotiate the amount of any payments from the providers to the facilities, provided that those payments do not drive the provider's rates above the applicable rate cap. We note, however, that evidence submitted in the record—and discussed above—indicates that if facilities incurred any legitimate costs in connection with ICS, those costs would likely amount to no more than one or two cents per billable minute. Our rate caps are sufficiently generous to cover any such costs.

140. As noted above, some parties contend that correctional facilities will remove or limit access to telephones if the Commission acts to limit site commission payments. We find it highly unlikely, however, that facilities would eliminate or limit access to ICS as a result of this Order. Given that we do not ban site commissions, facilities have no basis for taking such extreme measures. Notably, the record contains no indication that ICS deployment has decreased in states that have eliminated site commissions. This is unsurprising, given what we anticipate would be an intensely negative backlash to such an action. In addition, the record indicates that ICS provides valuable, non-monetary benefits to correctional facilities, such as correctional management and incentives to inmates who exhibit good behavior.

b. Ensuring Fair Compensation

141. Some parties argue that it would be confiscatory for the Commission to exclude the costs of site commission payments from our rate cap calculations without also explicitly prohibiting ICS providers from paying such commissions. According to these parties, ICS providers will not be able to afford the site commission payments demanded of them by correctional facilities if the providers' revenues are limited by the rate caps established here. These claims rest largely on the fact that existing ICS contracts may obligate providers to pay site commissions to the facilities they are serving. As explained further below, we conclude that these concerns are largely unfounded.

142. For the same reasons set forth in the *2013 Order,* we reject arguments that the reforms we adopt herein effectuate unconstitutional takings. The offering of ICS is voluntary on the part of ICS providers, who are in the best position to decide whether to bid to offer service subject to the contours of the request for proposal (RFP). There is no obligation on the part of the ICS provider to submit bids or to do so at rates that would be insufficient to meet the costs of serving the facility or result in unfair compensation. We also reiterate that our rate caps are based on the reported costs that the providers themselves submitted into the record without any adjustment by the Commission. Thus, the rate caps provide ample room for an economically efficient provider of ICS to earn a reasonable profit on its services. The fact that our rate caps do not include an explicit allowance for site commission payments does not render them confiscatory. As explained above, the record does not support a conclusion that site commission payments are costs that are ''reasonably related to the provision of ICS.'' The fact that providers choose to pay site commissions is not enough to render them compensable through the ICS rate, particularly in light of section 276's requirement that ICS compensation must be ''fair.'' Excluding site commission payments from the rate cap calculation is no different than excluding any other cost that is not reasonably related to the provision of the service. For example, if a provider decided to purchase a fleet of private jets to ferry its executives from place to place, we would not prohibit such an expenditure, but—because the purchase of private jets is not ''reasonably related'' to the provision of ICS—we would not include such an expense in the costs used to determine a fair compensation rate for ICS.

143. In addition, we re-emphasize that a party carries a heavy burden if it seeks to demonstrate that a regulation creates an unconstitutional ''taking.'' For instance, to succeed on a ''takings'' claim, a party must demonstrate that the losses caused by the regulation in question are so significant that the ''net effect'' is confiscatory. When confronted with a ''takings'' claim, courts will examine the net effect of the regulation on the company's enterprise as a whole, rather than on a specific product or service. Thus, it is not enough for a provider to show that it is losing money on a particular service or in serving a particular customer. Instead, a provider seeking to show that our rate caps are confiscatory will have to demonstrate that any cognizable harm caused by our regulations is so severe that it meets the high bar for a takings with respect to the company as a whole, *e.g.,* by ''destroying the value of [the provider's]

property for all the purposes for which it was acquired.'' Moreover, providers have been on notice for years that the Commission might adopt rate caps, or even eliminate site commissions. Thus, any claims that our actions today upset ''investment-backed expectations of ICS providers'' are likely to fail, particularly claims from providers that recently entered into new contracts with high site commissions in an effort to circumvent possible Commission regulations. We find it unlikely that our rates will result in a ''taking,'' but the waiver process described below should offer providers an adequate avenue for relief if they find our ICS regulations unworkable.

C. Ancillary Service Charges and Taxes

1. Background

144. The record contains evidence that ancillary service charges have increased since the *2013 Order,* which highlights the fact that, absent reform, ICS providers have the ability and incentive to continue to increase such charges unchecked by competitive forces. Indeed, the continuing growth in the number and dollar amount of ancillary service charges represents another example of market failure necessitating Commission action. These charges are unchecked by market forces because inmates and their families must either incur them when making a call or forego contact with their loved ones. Ancillary service charges inflate the effective price consumers pay for ICS. According to some estimates, ancillary service charges may represent as much as 38 percent of total consumer ICS payments. The sheer number of ancillary service charges, their varying nomenclature, and the variability of the amounts charged make for a confusing system.

145. The record overwhelmingly supports the need to reform ancillary service charges. While we would prefer to allow the market to discipline rates, the evidence since the Commission's *2013 Order* confirms that ancillary service charges have not only increased, but new charges have appeared. We find our statutory directive requires us to adopt reforms to limit ancillary service charges. As described below, we adopt caps for certain ancillary fees, and we prohibit all other charges that are ancillary to ICS.

146. Our Mandatory Data Collection confirmed that various ICS providers charge a plethora of ancillary service charges, and that different providers may describe the same charge by different names. Commenters suggest that ancillary service charges inflate the cost of ICS to end users without justification. For example, some providers charge account set-up, maintenance, closure, and refund fees. Praeses contends that ''[p]roviders should not be permitted to charge any ancillary fees to recover . . . intrinsic ICS costs, such as validation fees or fees related to Facility-required security.'' This distinction between what is an intrinsic part of providing ICS, and what is not, has helped us to select the ancillary service charges we find appropriate and to ban all other ancillary service charges.

147. In responding to the unique challenges posed by escalating ancillary fees, this Order establishes a limited list of ancillary fees that the Commission will permit ICS providers to charge. The amount of each of these fees is capped, and ICS providers are restricted from charging any ancillary fees not specifically allowed in our Order. For fees for single-call and related services and third-party financial transaction fees, we allow providers to pass through only the charges they incur without any additional markup. We limit automated payment fees to $3.00, live agent fees to $5.95, and paper statement fees to $2.00. Apart from these specific fees, no additional ancillary service charges are allowed. Taxes are discussed separately and must be passed through with no markup. We also take action to avoid potential loopholes in these rules, such as artificial limits on minimum and maximum account balances that could require inmates to reload accounts frequently and unnecessarily increase costs borne by consumers. This approach involved analyzing the data submitted by carriers, as well as comments in the record, to determine which fees ICS providers should legitimately be able to charge end users.

2. Discussion

148. *Review of Ancillary Service Charges in the Record.* In response to the Mandatory Data Collection, the Commission received some data regarding ancillary service charges, but providers did not follow consistent approaches in assessing and labeling such fees, and allocated and reported these costs in inconsistent ways. Accordingly, in the *Second FNPRM* the Commission sought comment on these data inconsistencies and on the ancillary service charge data generally. The Commission also sought comment on prohibiting separate ancillary service charges for functions that are typically part of normal utility overhead and should be included in the rate for any basic ICS offering, and asked if certain types of ancillary service charges, such as refund charges, should be disallowed altogether.

149. In response to the *Second FNPRM,* commenters disagreed over the exact nature of the reforms that should be implemented, but the majority agreed that many or all ancillary service charges should be eliminated. ICS provider CTEL claims that ancillary service charges, not site commissions, drive high ICS calling rates. ICS users also supported reforming ancillary service charges with examples of the impact of such charges on their ability to make calls. Even when consumers are made aware of the fees, they can still seem unjustified or unclear. The record indicates that ICS providers can receive fair compensation and provide secure services with a simplified ancillary service charge structure.

150. *Prohibiting Ancillary Service Charges.* The Commission sought comment on prohibiting ancillary service charges altogether. Certain parties argued that the best approach to ancillary service charges was to ban them outright. The Wright Petitioners, for example, contend that no cost data in the record justifies the existence of ancillary fees, and that ancillary fees differ significantly among providers for no reason except that ICS providers will charge as much as they can. If the Commission does not eliminate ancillary service charges, then the Wright Petitioners contend that any rules addressing ancillary service charges must specifically identify the fees that may be charged and prohibit all others. PLS argues the Commission should prohibit ancillary service charges because many of these fees bear no relation to ICS costs.

151. *Reducing Categories of Ancillary Service Charges.* The Commission also sought comment on limiting the number of allowable ancillary service charges. Many commenters support this approach as enabling ICS providers to still earn a profit, while providing their services at just and reasonable rates. CenturyLink explains that ''the overall cost of ICS to inmate families will not be reduced without restrictions on ancillary fees'' and recommends that the Commission ''eliminate all but a narrow class of ancillary fees and impose reasonable rate caps on those that it allows.'' One commenter explains that ancillary fees have ''no actual relation to actual costs borne by ICS providers and have become a mechanism by which providers sustain or increase their overall revenues.'' Indeed, even ICS providers have recognized the need for reform and have submitted various proposals to that end.

152. Parties differ about which ancillary service charges should be capped. For example, a number of commenters believe that the Commission should eliminate all fees for services that a consumer is required to pay in order to access basic ICS, including, but not limited to, account set-up, maintenance, funding, refund, and closure fees. In addition, Praeses suggests that ''[a]ll costs that Providers necessarily and unavoidably incur as part of completing an inmate call should be recovered through ICS rates. As a result, Providers should not be permitted to charge any ancillary fees to recover such intrinsic ICS costs, such as validation fees or fees related to Facility-required security.''

153. Of additional concern is the ability of ICS providers to evade any limitation on a particular ancillary service charge simply by changing its name. ICSolutions notes that if an RFP for ICS prohibits a specific fee, some bidding ICS providers simply rename it or create a new fee to take its place. Other commenters contend that if ICS providers want to impose additional ancillary service charges, then they should ask for a waiver from the Commission or a rule modification.

154. This concerns us because it suggests that ICS providers are using ancillary service charges as a loophole to increase revenues and undermine the impact of the interstate rate caps adopted in the *2013 Order.* Illustrating the impact this trend has on consumers, Pay Tel explains that if a family has $100 to spend on inmate calling for the month, ancillary fees can consume up to $60, leaving only $40 for the actual phone calls. Ancillary fees often increase the average cost of a 15-minute call to as much as $8.33, more than double the price of a 15-minute call at the Commission's interim rate caps adopted in the *2013 Order.* Some commenters also raise concerns that some ICS providers may impose unfair rates by instituting minimum or maximum amounts that may be deposited for prepaid calling accounts.

155. *Proposals in the Record.* The Commission has focused on market failure with regard to unchecked and escalating ancillary service charges in this proceeding, including releasing a public notice prior to the *2013 Order* seeking additional information about this topic. Since 2012, the Commission has received several proposals detailing comprehensive ICS reform approaches, and had the benefit of observing real world models regulating ancillary service charges.

156. *Alabama PSC Reforms.* In the *Second FNPRM,* the Commission noted that the Alabama PSC had implemented an approach to ancillary service charges that both limited the kinds of allowable ancillary service charges and capped the fees for those charges. Specifically, the Alabama PSC authorized, but capped, separate ancillary service charges for particular services, including a $3.00 maximum fee for debit/credit card payment, $5.95 maximum fee for payment via live agent, $3.00 maximum cap for bill processing for collect calls billed by a call recipient's local telecommunications service provider, $5.95 maximum cap on third-party payment services, five percent cap on inmate canteen/trust fund transfers, and a $2.00 maximum cap on paper billing statements. The Commission sought comment on this approach.

157. In the *Second FNPRM,* the Commission specifically asked whether the Alabama PSC's rate caps for credit card payments ($3.00 maximum) and live operator assisted payments ($5.95) would be appropriate for the Commission to adopt. Many commenters seeking to reform ancillary service charges focused not only on reducing the kinds of ancillary service charges that may be imposed, but also on imposing caps on the fees that may be charged for the approved ancillary service charges. Some commenters expressed concern that unreasonable costs would continue to be passed through to end users if regulations only specified the ancillary service charges that may be levied, without also imposing caps on those charges.

158. *Joint Provider Proposal.* In the *Second FNPRM,* the Commission also sought comment on the Joint Provider Proposal's suggestions for ancillary service charge reform. This proposal would voluntarily eliminate a number of types of fees, including per-call fees, account set-up fees, billing statement fees, account close-out and refund fees, wireless administration fees, voice biometrics and other technology fees, and regulatory assessment fees, and cap charges for non-eliminated fees. The Joint Provider Proposal supported a $7.95 cap for three years on debit/credit card payment or deposit fees, a cap for three years at existing fees (as high as $14.99) for calls billed to a credit card and as high as $9.99 for calls billed to a mobile phone, and a cap on money transfer fees at the existing level (as high as $11.95), plus a $2.50 administrative fee cap. Joint Provider Proposal supporters claim that their proposal will ''dramatically alter the economic landscape of the ICS industry, making it possible for providers to forego many fees and cap others at current levels.''

159. Some commenters criticize the Joint Provider Proposal as retaining the most lucrative ancillary service charges, and undermining reform efforts by allowing the large providers to maintain their dominant positions. CTEL asserts that smaller ICS providers lack the market power to impose high ancillary service charges. The Alabama PSC also states that it ''cannot emphasize strongly enough that the outliers in terms of excessive ancillary fees are the providers that submitted the Proposal to the Commission.''

160. *Pay Tel Proposal.* On October 3, 2014, Pay Tel submitted an *ex parte* describing a proposal for comprehensive reform, including rate reform, a proposed approach for site commission payments, reporting requirements, and a proposal for ancillary service charge reform. The Commission sought comment on this proposal in the *Second FNPRM.* The Wright Petitioners agree with Pay Tel that there should be specific guidelines for the disclosure of rate and ancillary fee information.'' The Alabama PSC, Wright Petitioners, CenturyLink, and NCIC agree with Pay Tel's suggested ancillary service charge rate caps in a number of respects. Securus, however, argues that Pay Tel mischaracterizes the Joint Provider Proposal, and that, to justify its own proposal, Pay Tel grossly overestimates the amount of ancillary service charges that consumers will have to pay under the Joint Provider Proposal.

3. Establishing Limited List of Permitted Ancillary Service Charges

161. After careful consideration of the record, including analysis of the Mandatory Data Collection, we conclude that reform is necessary to address ever-increasing fees that are unchecked by competitive forces and unrelated to costs. ICS providers, which typically have exclusive contracts to serve a facility, have the incentive and ability to continue to extract unjust and unreasonable ancillary service charges. As a result, we conclude it is necessary to reform the ancillary service charge structure imposed on consumers by ICS providers, as shown in Table Four below. All other ancillary service charges not specifically included in Table Four are prohibited. (Thus, providers would be prohibited from imposing charges for biometric technology, for example.) We conclude that the allowable charges will facilitate communications between inmates and their loved ones and will allow ICS providers to recover the costs incurred for providing the ancillary service associated with the relevant fee. We find no other examples in the record of

ancillary services that are actually provided today and that have a cost that warrants recovery.

162. Our approach is supported by the record and will reduce the cost of service for millions of consumers. Even so, as with all reforms adopted in this Order, we will reevaluate these charges in two years to determine if adjustments are appropriate. We expect that these caps will serve as backstops as efficiencies are gained by providers, and contracts are changed, or new contracts are entered into between parties. For example, the record indicates that the recently-adopted New Jersey state correctional institutions' ICS contract specifically prohibits ''discretionary fees,'' which include bill statement fees, monthly recurring wireless account maintenance charges, account setup fees, funding fees, refund fees, and a single bill fee. Finally, we believe it is reasonable to expect that the ancillary service charge caps may encourage providers to more efficiently provide ancillary services, potentially stimulating competition among ICS providers to the added benefit of consumers and in keeping with section 276's statutory mandate. The reforms are intended to facilitate the proper functioning of the ICS market.

163. Each of the entries in Table Four focuses on the particular functions related to each type of charge listed below. (Thus, even if a provider renames one of its fees to match the terminology in this table, that will not be sufficient to make an allowable ancillary service charge. Also, each individual ancillary service charge that an ICS provider levies must serve one of the permitted functions in order to qualify as a permissible ancillary service charge, regardless of the precise terminology used. In the event of dispute, the Commission will evaluate the fee charged to a consumer on the basis of the totality of the circumstances, judged from a reasonable consumer's point of view, to determine whether the fee serves one of the permitted functions. Automated payments include payments by interactive voice response (IVR), web, and kiosk.)

TABLE FOUR

Permitted ancillary service charges and taxes	Monetary cap per use/instruction
Applicable taxes and regulatory fees	Provider shall pass these charges through to consumers directly with no markup.
Automated payment fees	$3.00.
Fees for single-call and related services, *e.g.,* direct bill to mobile phone without setting up an account.	Provider shall directly pass through third-party financial transaction fees with no markup, plus adopted, per-minute rate.
Live agent fee, *i.e.,* phone payment or account set up with optional use of a live operator.	$5.95.
Paper bill/statement fees (no charge permitted for electronic bills/statements).	$2.00.
Prepaid account funding minimums and maximums	Prohibit prepaid account funding minimums and prohibit prepaid account funding maximums under $50.
Third-party financial transaction fees, *e.g.,* MoneyGram, Western Union, credit card processing fees and transfers from third-party commissary accounts.	Provider shall pass this charge through to end user directly, with no markup.

164. *Data Analysis.* Based on our analysis of the ancillary service charge cost data submitted in response to the Mandatory Data Collection and the record, we conclude that the caps we adopt for ancillary service charges will allow ICS providers to recover their reported costs attributable to providing these services and earn fair compensation. Ten of the fourteen ICS providers that submitted data in response to the Mandatory Data Collection included cost and revenue data for ancillary service charges. One provider did not report any direct costs related to ancillary service charges and one provider reported only one ancillary service charge. The reported *rates* for ancillary service charges range from $0.08 to $10.97 per use for automated payments, from $2.49 to $5.95 per use for transactions handled by a live agent, and from $1.50 to $5.00 for paper billing fees. In comparison, ICS providers report that they incur *costs* for ancillary service charges ranging from $0.10 to $6.58 when they offer automated payments, $2.49 to $5.26 when they offer transactions handled by a live agent, and $0.08 to $2.88 when they offer paper billing. These numbers serve to illustrate the enormous difference between the charges imposed on ICS end users and the much lower costs to ICS providers of offering those services. The ancillary service charge caps we have selected fall within a reasonable range of the reported costs for the services, and are supported by the record for each fee cap as explained below.

165. We also note that some jurisdictions have banned ancillary service charges and that providers have complied with such regulations. This suggests that ancillary service costs can be recovered with reasonable ICS rates. Accordingly, our ancillary service charge caps should more than adequately compensate for the costs incurred. Moreover, we conclude that the annual reporting, certification and data collection requirements adopted herein regarding ancillary fee information will ensure compliance with the requirements. We will use this information to ensure that ICS providers are complying with the reforms adopted herein.

166. *Ancillary Services Charge Cap Methodology.* The reforms we adopt herein represent a middle ground between the various proposals in the record. First, we determined which categories of ancillary service charges should be allowed. Next, we evaluated the information obtained through our Mandatory Data Collection as discussed above, and comments in the record addressing the specific proposals in and in response to the *Second FNPRM.* We conclude that prohibiting ICS providers from recovering their costs reasonably and directly related to making available an ancillary service would not allow ICS providers to receive fair compensation for those services. We also conclude that certain proposed high ancillary service charges, such as those in the Joint Provider Proposal, would result in excessively compensatory fees and would violate our requirement to make ICS rates just, reasonable and fair to end users. Therefore, we adopt caps on fees for ancillary service charges that will allow ICS providers to recover the costs incurred for providing the ancillary service associated with the relevant fee while ensuring just, reasonable, and fair

rates to end users. Below we explain the analysis that went into determining the appropriate cap for each category of permitted ancillary service charge.

167. *Automated Payment Fee.* We permit up to a $3.00 automated payment fee for credit card, debit card, and bill processing fees, including payments made by interactive voice response (IVR), web, or kiosk. This approach is supported by the record and more than ensures that ICS providers can recoup the costs of offering these services. The Commission specifically sought comment on automated payment fees in the *Second FNPRM.* For example, the Commission asked whether a $3.00 cap for debit and credit card payment fees via the web, an IVR, or a kiosk was an appropriate charge. We find support for our approach from numerous commenters, including the Alabama PSC, which concluded, as we do, that a $3.00 cap for credit card processing and bill processing is appropriate. This $3.00 cap is also supported by Pay Tel, which charges this amount for automated payments. In addition, multiple parties support this approach in the record, including the Wright Petitioners, CenturyLink, and NCIC—all of which agree this amount is an appropriate cap for automated payments. Securus, one of the largest ICS providers in the market, asserted that allowing end users to pay with credit cards costs the company more than $3.00. The credit-card processing costs that Securus cites indicate to us that it is an outlier, especially since, as just discussed, companies that are much smaller than Securus acknowledge that they can process credit card payments at a $3.00 rate. We find that a $3.00 cap on automated payments is supported by the reported *costs* of providing the service as opposed to other *rates* for the service.

168. *Live Agent Payment Fee or Account Set Up.* We allow ICS providers to recover up to $5.95 when consumers choose to make use of an optional live operator to complete ICS transactions. We have recognized that interaction with a live operator to complete ICS transactions may add to the costs of providing ICS. Thus, we allow an ancillary service charge to compensate providers for offering this optional service. As with the other ancillary service charges we have determined are appropriate, in the *Second FNPRM,* the Commission also specifically asked commenters about the $5.95 maximum fee for live operator assisted payments. For the live agent phone payment of $5.95 that we adopt, we note that multiple ICS providers including, CenturyLink, NCIC, and Pay Tel, as well as the Wright Petitioners, and the Alabama PSC, all agree that this is the correct rate. This $5.95 fee may only be charged once per interaction with a live operator, regardless of the number of tasks completed in the call, and live operator calls may not be terminated in order to attempt to charge this fee an additional time. We will monitor any complaints we receive with regard to the live agent fee that suggest that providers are attempting to circumvent the limitations this rule sets forth.

169. *Paper Bill/Statement Fee.* We permit a cap of $2.00 for optional paper billing statements. In the *Second FNPRM,* the Commission noted that the Alabama PSC had capped the charge for a paper bill or statement, and asked commenters to explain whether this, and other approaches taken by the Alabama PSC, were reasonable and would lead to just and reasonable rates and fair ICS compensation. Multiple commenters agreed. Specifically, the $2.00 paper bill charge we adopt is supported by the Wright Petitioners, Pay Tel, and the Alabama PSC, while CenturyLink argues that the rate should be marginally higher at $2.50 per bill.

170. *Third-Party Financial Transaction Fee.* In the *Second FNPRM,* the Commission asked how it should ensure that money transfer service fees paid by ICS consumers are just and reasonable and fair. The record establishes that inmates' families frequently do not have bank accounts, and therefore rely on third-party money transfer services such as Western Union or MoneyGram to fund calls with inmates. Third-party financial transaction fees as discussed herein consist of two elements. The first element is the transfer of funds from a consumer via the third-party service, *i.e.,* Western Union or MoneyGram, to an inmate's ICS account. (We use these two services as an example but do not foreclose the possibility that there are other third-party financial transaction services. Credit card payment processing also falls under the discussion here.) The second element is the ICS provider's additional charge imposed on end users for processing the funds transferred via the third party provider for the purpose of paying for ICS calls. We find that this first aspect of third-party financial transaction, *e.g.,* the money transfers or credit card payments, does not constitute ''ancillary services'' within the meaning of section 276. The record suggests that ICS providers have limited control over the fees established by third parties, such as Western Union or credit card companies, for payment processing functions.

171. However, the record indicates that ICS providers are imposing significant additional charges, as high as $11.95, for end users to make account payments via third parties, such as Western Union or Money Gram, and sharing the resulting profit with those third-party financial institutions. We find that the ICS providers' additional fee or mark-up to the third-parties' service charges function as a billing-and-collection related charge, on top of the third-party charge, that the Commission has authority to address. Providers have offered no cost-based justification for imposing an additional fee on end users on top of the third-party money-transfer service or financial institution fee, nor have they explained what (if any) functions they must necessarily perform to ''process'' a transfer already transferred from the third-party provider. Therefore, as discussed in more detail below, we require that ICS providers pass through to their end users, with no additional markup, the money transfer or third-party financial transaction fees they are charged by such third parties. (The record indicates that no additional markup is warranted on top of the fees charged by the third-party payment providers.)

172. Our adopted approach ensures that, in transactions like these, ICS providers do not receive excessive compensation, while also protecting consumers from unreasonable additional fees that result in unjust and unreasonable ICS rates. We find support for our third-party financial transaction fee approach from parties such as CenturyLink and NCIC, and the Alabama PSC additionally urges the Commission to require ICS providers to ''eliminate the provider ancillary charge premium they assess on top of the $5.95 payment transfer fee available to their customers from Western Union and MoneyGram.''

173. *Prohibited Fees.* As explained above, our approach to fees charged for ancillary services specifically enumerates the charges permitted and bans all other ancillary service charges. We find no other examples in the record of ancillary services that are actually provided today and that have a cost that warrants recovery. While we place limits on the types of ancillary service charges we allow, we note that it is important to have payment options that permit the consumer simply to pay for service without incurring any additional charges. Many commenters, including ICS providers, agree that these basic or standard methods, such as making

payments by check or money order, must remain available without charge. Securus, for example, has assured the Commission that ''[p]ayment by check or money order always will be available and free of charge.'' In accordance with our decision to allow only the specific ancillary service charges we enumerate in this Order, we clarify that no charges are permissible for payment by check or money order.

174. At this time, we do not find it necessary to eliminate all ancillary service charges to be consistent with our statutory objectives and policy goals for ICS reform. We are mindful of and concerned about the potential for continued abuse of ancillary service charges, and we will monitor the implementation of these caps and determine if additional reforms are necessary in the future. By limiting the scope of ancillary service charges, we also resolve other problems presented in the record. We prohibit all other ancillary service charges not enumerated because the record did not demonstrate that any other ancillary services are reasonably and directly related to the provision of ICS, nor are they necessary to ensure that ICS providers receive fair compensation for providing service. Permitting any other ancillary service charges would promote unfair, unjust, and unreasonable rates to end users, and would thus be contrary to our statutory mandate. Further, we find that removing a substantial number of unjustifiable charges not only benefits consumers, but also reduces compliance costs for ICS providers by allowing them easily to identify whether a particular charge is permitted by our rules. Additionally, since we have determined that the only justifiable ancillary service charges are the ones we specifically enumerated, there are no countervailing costs that would outweigh our selected approach.

175. *Purchase Minimums and Maximums.* In the *Second FNPRM,* the Commission asked commenters whether anything should be done about policies, such as funding minimums and maximums that may restrict consumers' access to ICS. In response, some parties raise concerns that some ICS providers are engaging in unjust and unreasonable practices and imposing unfair rates by instituting minimum or maximum amounts that may be deposited for prepaid calling accounts. CenturyLink, for example, contends that ''[p]roviders might impose high purchase minimums and complex refund policies to obtain captured funds. Providers might also adopt low purchase maximums to force customers to have to repeatedly re-purchase services and generate transaction fees.'' Similarly, ICSolutions urges the Commission to regulate minimum and maximum funding requirements, arguing that high minimum funding requirements ''can preclude consumers from receiving calls from their loved ones,'' while low maximums can force consumers to ''fund their account more frequently, so that [the provider] can charge more ancillary fee payments.'' Furthermore, NCIC points out that ''payments for prepaid service by money order or check [are] available free of charge to ICS end users but this payment method is frequently impractical because of the excessive latency involved in establishing service (up to ten days for some providers).'' Thus, inmates are essentially forced into entering into more costly prepaid options, many of which require minimum payments and/or impose maximum limits on deposits.

176. We agree that high purchase minimum requirements can lead to unfair compensation by forcing consumers to deposit relatively large sums of money even if they only want to make one short call or by driving consumers to more expensive calling options. Thus, high purchase minimums can effectively allow providers to charge exorbitant amounts for single calls. Such a result would be antithetical to the Commission's goals and to the requirements of sections 201 and 276.

177. An artificial limit on maximum account deposits could also lead to gaming and loopholes. CenturyLink points out that low maximums on deposits can allow providers to increase transaction fees. A provider may refuse to permit a consumer from depositing more than a certain amount of money into an inmate calling account in a single transaction, thereby compelling the consumer to engage in additional transactions and, as a result, incur multiple ancillary service charges. Thus, providers could circumvent our reforms by placing artificially low limits on deposits and requiring consumers to incur ancillary charges every time they add additional money to an account.

178. In order to prevent ICS providers from obtaining unfair compensation by inflating costs for end users relating to maximum and minimum deposits, we prohibit ICS providers from instituting prepaid account minimums, and require that any provider that limits deposits to set the maximum purchase amount at no less than $50 per transaction. Data from the Mandatory Data Collection show that the average call length reported by respondents was approximately 13 minutes. Under our new rate structure, that means the average cost of a call from a prison would be about $1.43. Accordingly, a $50 maximum per transaction would mean that consumers will be able to make a relatively large number of calls with a single deposit (on average about 35 calls). We find that allowing a lower limit would create an unacceptable risk that providers would be able to compel consumers to incur multiple ancillary service charges, as explained above. We note, however, that the record also reflects concerns that setting the floor for maximum allowable deposits too low could create risks for ICS providers, including the potential for fraud. Allowing providers to institute maximum deposit amounts, but requiring that those maximums be no lower than $50, strikes a reasonable balance between the competing concerns expressed in the record. We also note that various providers have instituted maximum deposit policies that conform to our requirement of no less than a $50 maximum per transaction, and in some circumstances have even instituted higher maximum deposit limits. As noted below, we will continue to monitor the ICS marketplace and to investigate any attempts, such as these, to circumvent our rate caps or our rules governing ancillary charges. Due to the history of the large number and ever-changing and growing nature of ancillary service charges, as described in the record, we will be diligent in identifying any providers that violate the new rules covering ancillary service charges, third-party financial transaction fees, and minimum and maximum account funding. Accordingly, we delegate to the Bureau the authority to clarify the rule as necessary, after public notice and an opportunity to comment, where appropriate, to ensure that the reforms adopted in this Order relating to ancillary service charges and third-party financial transaction fees are properly reflected. This includes seeking comment on prohibiting additional ancillary fees if there is evidence of abuse of the permitted charges.

4. Cost-Benefit Analysis

179. After careful consideration, we find that our approach to adopt simple ancillary service charge caps provides significant and important benefits to ICS end users, outweighing any potential burdens to providers. As discussed above, we conclude that reform is necessary to address ever-increasing and multiplying fees that are unchecked by competitive forces and unrelated to costs. We find that the allowable ancillary service charges will facilitate communications between inmates and their families, while enabling ICS

providers to recover the costs incurred for providing the associated ancillary services.

180. It is clear that market failure exists with regard to ancillary service charges. Numerous parties cite specific instances of such market failure or abuse among ancillary service charge categories. Additionally, commenters request the Commission take action to curb these abuses by adopting reforms.

181. By creating simple rate caps and limiting the scope of ancillary service charges, we resolve these problems and reform ancillary charges. We prohibit all ancillary service charges not specifically allowed, not only for the foregoing reasons, but also because the record did not demonstrate that any other ancillary services are reasonably and directly related to the provision of ICS or necessary to ensure that ICS providers receive fair compensation for providing service. Further, we find that removing a substantial number of unjustifiable charges not only benefits consumers, but also reduces compliance costs for ICS providers by allowing them easily to identify whether a particular charge is permitted by our rules, thus reducing the burden on them. As noted below, however, to minimize any potential burdens associated with ancillary service charges, we will reevaluate these charges to determine if adjustments are appropriate.

5. Fees for Single-Call and Related Services

182. *Background.* The record indicates that single-call and related services are a growing part of the ICS market. These options, such as single-call services, are billing arrangements whereby an ICS provider's collect calls are billed through third-party billing entities on a call-by-call basis to parties whose carriers do not bill collect calls. A single-call service thus may be used for calls placed from the inmate facility to mobile phones or a telecom service where the called party does not have an account, does not want to establish an account, or does not know the party can establish an account with the ICS provider. Although some efficiencies may derive from single-call and related services, the record is replete with evidence that some of these services are being used in a manner to inflate charges, and may be offered at unjust, unreasonable, or unfair rates, and/or at rates above our interim rate caps or rate caps adopted in this Order. The record also highlights substantial end-user confusion regarding single-call services.

183. A significant problem with single-call and related services is that they end up being among the most expensive ways to make a phone call. In the *Second FNPRM,* the Commission sought comment on the prevalence of single-call services and whether rates for such services are just and reasonable.

184. There is a diversity of views in the record on single-call and related services. CPC believes that single-call services should be treated as ancillary services subject to rate caps and that consumers must be notified of the option to set up a prepaid account instead. Several commenters believe that all of these single-call and related services should be eliminated because they are simply an ''end run'' around the Commission's rate caps. The Wright Petitioners note that any proposed rate caps should also apply to single-call services, along with a $3.00 funding fee. PPI also argues that, in the alternative, charges for single call services should be restricted to a reasonable deposit fee, plus a reasonable capped call fee. As the Alabama PSC notes, ''[t]he regulator's duty is to set fair and reasonable rates for ICS calls.''

185. ICSolutions notes that the single-call or related service charge is often $9.99 or $14.99, regardless of whether the call lasts one minute or 10 or 15 minutes, and that these rates are 300 percent or 376 percent higher than the effective interstate rate caps. It contends that such calls pose a danger to consumers, and that providers manipulate consumers into selecting these calling options even though less costly call options may exist. Other providers share ICSolutions' concern that single-call or related services are used to ''inflate ancillary fees'' at the expense of end users. CenturyLink, ICSolutions, and NCIC, among others, expressed concern about the use of third parties, including unregulated subsidiaries, to provide single-call or related services at high fees, and about revenue-sharing arrangements that enable ICS providers to recoup all or a portion of the ancillary service charge as profit outside our rate caps. Additionally, the Alabama PSC analyzed these single-call services in a jail, and found that ''[a]lthough single payment calls account for 14% of the calls and 17% of the minutes at the facility, they are responsible for 42% of all the revenue generated.'' Conversely, GTL urges the Commission not to regulate these services, arguing the Commission does not have jurisdiction to do so. Securus similarly argues that single-call and related services should not be considered ancillary services because they are optional and are not intended to be a substitute for traditional ICS calls. Securus asserts that if the Commission regulates the rates for single-call and related services, ICS providers will be forced to stop offering them, and inmates and their friends and families will have fewer calling options by which to stay in touch.

186. *Discussion.* We agree with commenters that suggest single-call and related services are another form of ancillary service charges. The additional costs stemming from single-call and related services are ancillary to the provision of ICS because they are additional fees charged to consumers, based on the consumer's discretion and desire to make use of such a service because, for example they want to speak to the incarcerated person as quickly as possible in order to arrange their release. We therefore believe that reform is necessary and that it is appropriate to address unreasonable charges. As a result, for single call and related services, we permit ICS providers to charge the amount of the third-party financial transaction (with no markup) added to a per-minute rate no higher than the applicable rate cap. These reforms are necessary to ensure that when end users decide to take advantage of single-call and related services, the rates for such calls comply with the statute.

187. Unlike the ancillary service charge caps adopted above, we do not find that single-call and related services are reasonably and directly related to the provision of ICS, but are ancillary to ICS. We believe that charges for single-call and related services inflate the effective price end users pay for ICS and result in excessive compensation to providers. Accordingly, for single-call and related services, the Commission will allow ICS providers to charge end users for each single call in a manner consistent with our approach to third-party financial transaction fees—*i.e.,* ICS providers may charge the amount of the third-party financial transaction (with no markup) added to a per-minute rate no higher than the applicable rate cap. This approach is consistent with our overall approach to reforming both ICS per-minute rates and ancillary service charges. It will ensure just and reasonable rates for end users that are based on actual costs incurred by ICS providers.

188. The record supports our reforms to fees charged for single-call and related services. We have authority to reform ancillary service charges and we therefore disagree with ICS providers that argue we lack authority. Moreover, our approach in no way interferes with contracts between ICS providers and third-party payment processors or

mobile phone companies because our rule simply prevents ICS providers from adding additional fees to the cost of these calls. It does not dictate what fees an ICS provider itself may choose to pay or not pay these third parties for services rendered.

189. We have also heard from commenters that a major problem with single-call and related services is that customers are often unaware that other payment options are available, such as setting up an account. To help alleviate the problem of customers continually paying set up fees for single-call and related service calls, we encourage providers to make clear to consumers that they have other payment options available to them. This is consistent with our discussion and analysis regarding consumer disclosure requirements below. We will continue to monitor the use of such calling arrangements and seek specific information about them in the Further Notice of Proposed Rulemaking published elsewhere in this issue of the **Federal Register**.

6. Taxes and Regulatory Fees

190. The record in this proceeding indicates that ICS providers charge ICS end users ''fees under the guise of taxes.'' In an effort to ensure just, reasonable and fair ICS rates, in the *Second FNPRM,* the Commission asked ''whether the cost of regulatory compliance should be considered a normal cost of doing business and as such should be recovered through basic ICS rates, not additional ancillary fees.'' In response, Lattice asserts that ''ICS providers also must be permitted to continue to collect pass-through charges such as state and local taxes, universal service and numbering charges, and other federal, state and local fees.''

191. ICS providers are permitted to recover mandatory applicable pass-through taxes and regulatory fees, but without any additional mark-up or fees. The Commission has defined a government mandated charge as follows: ''amounts that a carrier is required to collect directly from customers, and remit to federal, state or local governments.'' Non-mandated charges are defined to be ''government authorized but discretionary fees, which a carrier must remit pursuant to regulatory action but over which the carrier has discretion whether and how to pass on the charge to the consumer.'' Commission precedent prohibits providers from placing a line item on a carrier's bill that implies a charge is mandated by the government when it is in fact, discretionary.

192. We agree that the ability to collect applicable pass-through taxes and regulatory fees without adding a markup is important and consistent with precedent. However, we reiterate that it is misleading ''for carriers to state or imply that a charge is required by the government when it is the carriers' business decision as to whether and how much of such costs they choose to recover directly from consumers through a separate line item charge.'' As such, we do not permit fees or charges beyond mandatory taxes and fees, and authorized fees that the carrier has the discretion to pass through to consumers without any mark up. This will help ensure, consistent with the goals of the reforms adopted in this Order, that ICS end user's rates are just, reasonable and fair because they are paying the cost of the service they have chosen and any applicable taxes or fees, and nothing more. This approach has support in the record, including from the Joint Provider Proposal and Pay Tel.

7. Legal Authority

193. We reaffirm the Commission's finding in the *2013 Order* that it has jurisdiction over interstate ICS ancillary service charges and further find that we have authority to reform *intrastate* ancillary service charges. The Commission sought comment in the *Second FNPRM* as to whether it is also authorized to regulate intrastate ancillary service charges. In response, several commenters took the position that section 276 of the Act authorizes the Commission to regulate intrastate ancillary service charges. We agree.

194. We find that the Commission has the legal authority to adopt necessary reforms to interstate, intrastate, and international ancillary service charges. In the *2013 Order,* the Commission addressed interstate charges and found that billing and collection services provided by a common carrier for its own customers are subject to section 201, and are therefore, subject to Commission regulation. The Commission explained that it has jurisdiction ''to regulate the manner in which a carrier bills and collects for its own interstate offerings, because such billing is an integral part of that carrier's communication service.'' We reaffirm that finding here. Thus, providers are on notice that efforts to circumvent our rate caps through artificially high ancillary fees will not be tolerated.

195. Although ''ancillary services'' are not defined by statute, and there is some disagreement in the record on this point, the dictionary meaning of the term ''ancillary''—''providing *necessary support* to the primary activities or operation of an organization, institution, industry, or system''—is instructive. Additionally, section 276(b)(1)(A) specifies that any compensation plan set forth by the Commission must ensure that providers ''are fairly compensated for each and every *completed intrastate and interstate call . . . .*''

196. In the discussion above, we find that we have jurisdiction over *intrastate* ICS charges, pursuant to section 276 of the Act. We also note that section 276(d) defines ''payphone service'' as ''the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any *ancillary services.''* Thus, we believe it is clear that Congress provided the Commission with authority over ICS-related ''ancillary services.'' Based upon the plain language of these statutory provisions and the common definition of the term ''ancillary,'' we find that the term ''ancillary services,'' as used in section 276(d), is reasonably interpreted to mean services that *provide necessary support for the completion of international, interstate and intrastate calls* provided via ICS. We find that section 276 authorizes the Commission to regulate charges for intrastate ancillary services, such as billing and collection services, to the extent those charges involve the completion of a call, or other communications services. Such charges are quite literally the ''necessary support'' essential for the completion of inmate phone calls. Indeed, often the only purpose for establishing ICS accounts is to fund communication with inmates; therefore, these charges are reasonably understood to be ancillary to the completion of phone calls. As such, we conclude that billing-and-collection-related ancillary services such as account set up and transaction fees fall within the Commission's jurisdictional authority and will be regulated in the manner described above.

D. Periodic Review of Reforms

197. While the *2013 Order* and today's reforms are a significant step forward, we are committing to continuing to review the ICS market, including both costs and rates, to ensure that regulation remains necessary and that the reforms we adopt herein strike the right balance. The reforms adopted in this Order may facilitate changes in the ICS market that potentially could make it function properly and enable the Commission to reduce regulations. At the same time, changes in the market, for example, may necessitate additional modifications to the reform we adopt today. We will incorporate lessons learned from the prior data collection to

improve quality and eliminate anomolies. While the policies adopted in this Order have been carefully designed based on the record before us, we remain dedicated to evaluating how changing circumstances impact the nature and scope of reform. The Commission has the authority to take steps to effectively monitor compliance with this Order going forward.

198. To enable the Commission to take further ICS reform action, identify and track trends in the ICS market, as well as monitor compliance with the reforms adopted herein, we adopt a second, one-time Mandatory Data Collection to occur two years from publication of Office of Management and Budget (OMB) approval of the information collection. We believe it is appropriate to be able to conduct a review of the ICS market including ICS costs, rates and ancillary service charges to ensure that any regulations continue to be necessary to fulfill our statutory objectives and to ensure that any such reforms and rate caps reflect current market dynamics and costs.

199. In the *Second FNPRM,* the Commission sought comment on the benefits of establishing a review process. The Commission also sought comment on the Wright Petitioners' suggestion that the Commission commit to review the interim rates adopted in the *2013 Order.* In its comments, HRDC states generally that periodic reviews by the Commission to evaluate the ways in which ICS reforms impact phone rates, ancillary service charges and competition in the industry are ''essential to ensure that the reforms create and maintain the proper incentives to drive ICS rates to competitive levels.''

200. We find that, on balance, Petitioners' proposal for a periodic review of ICS data is not necessary at this time, nor is it the best tool for monitoring compliance with the Order. Therefore, we establish a less onerous requirement, which we anticipate will provide significant benefit at minimal cost. In lieu of the Petitioners' proposal, we adopt an approach similar to the one used by the Commission in a prior payphone order establishing the per-call rate for payphones, in which the Commission determined that it would ''have to periodically review the cost-based compensation rate in order to ensure that it continues to 'fairly compensate' PSPs and promote payphone competition and widespread deployment of payphones.'' The Commission explained that, ''[e]specially when market conditions have changed significantly, it is incumbent upon us to reexamine whether the conditions resulting in the recent Commission-prescribed rate still apply.'' As with that situation, we conclude that the Commission should have the tools necessary to review the reforms that we adopt in this Order, in light of changing market conditions, to ensure that the rates continue to be just, reasonable, and fair. As explained above, ancillary service charges also significantly impact the effective rates ICS providers charge, and should therefore be part of this review.

201. To allow for consistent data reporting and to prevent duplicative filings, we direct the Bureau to develop a template for submitting the data and provide ICS providers with further instructions to implement the data collection. We direct the Bureau to complete a review of ICS costs and rates within one year from the date data is submitted, and we delegate to the Bureau authority to require an ICS provider to submit such data as the Bureau deems necessary to perform its review. Information in response to the forthcoming data collection may be filed under the *Protective Order* in this proceeding and will be treated as confidential.

202. Several commenters have expressed concern for the lack of transparency regarding ICS rates and fees. We share the concern that ICS contracts are not sufficiently transparent and we find adequate evidence, such as numerous public records lawsuits, to support HRDC's assertion that members of the public must ''unnecessarily expend time and money to obtain records'' of ICS contracts. We also recognize evidence suggesting that the information regarding ICS contracts and rates that is publically available may not be reliable. Therefore, we encourage ICS providers and facilities to make their contracts publicly available.

E. Harmonization With State ICS Rules and Requirements

203. Below, we provide guidance to ICS providers, correctional facilities and state regulatory bodies on the effect of the comprehensive reforms adopted herein on ICS requirements in the states and the Commission's authority to regulate these services pursuant to section 276 of the Communications Act.

1. Background

204. In the *2013 Order,* the Commission sought comment on its tentative conclusion that section 276 ''affords the Commission broad discretion to regulate intrastate ICS rates and practices . . . and to preempt inconsistent state requirements.'' Commenters' responses were mixed. The Commission then followed up by seeking more focused comments on issues related to preemption and harmonization of state ICS requirements. Several commenters support preemption of state laws and requirements that are inconsistent with the federal regime, while a small number of commenters oppose such preemption and question our authority to preempt state requirements related to intrastate ICS. As discussed below, we now adopt the tentative conclusion the Commission first expressed in the *2013 Order,* and hold that we have the authority to preempt state requirements that are inconsistent with the rules we adopt in this Order. More specifically, we conclude that a state requirement that ICS be provided at a particular rate that exceeds the caps we have adopted would trigger change-in-law provisions or require renegotiation. If for some reason that does not occur for any particular contract, parties can file a petition with the Commission seeking the appropriate relief. State rates below our rate caps or ancillary fee caps will not be preempted.

205. The rate caps and reforms adopted herein should operate as a ceiling in areas where states have not enacted reforms. This is consistent with Commission precedent in which it has determined that rates at or below a newly-enacted rate cap were not to be changed. We strongly encourage all states to evaluate additional measures to reduce and eliminate site commissions and ensure that rates for inmate calling services are as low as possible while still ensuring that robust security protocols are in place. Our actions today serve to ensure that a much-needed default framework is in place in areas where states have not acted to curb ICS rates.

206. In the *Second FNPRM,* the Commission sought comment on a number of issues related to the preemption of state regulation of ICS, as well as the potential to harmonize state requirements that are inconsistent with the Commission's comprehensive framework for regulation of both interstate and intrastate ICS. Among other questions, the Commission sought comment on its belief that it has ''broad discretion to find that a particular state requirement, or category of state requirements, is either consistent or inconsistent with Commission ICS regulations under section 276(c)'' and to preempt those regulations that are inconsistent.

207. Several commenters support preemption, urging the Commission to establish a uniform framework for both interstate and intrastate ICS. ICS

provider Lattice, for example, argues that ''[s]ound public policy as well as the Communications Act and FCC precedent all support FCC reform across all ICS.'' Lattice contends not only that ''[s]ection 276 grants the Commission express authority to preempt state requirements to the extent they are inconsistent with FCC regulations,'' but that ''preemption of state regulation is required to fulfill the requirements of section 276.'' Pay Tel also argues that the Commission has authority over intrastate ICS, and must ''preempt inconsistent state regulations.'' Additional commenters echo these assertions, arguing that the Commission has jurisdiction over both interstate and intrastate rates and must preempt inconsistent state requirements. Indeed, the Wright Petitioners state that ''there is no debate that the FCC has the authority to preempt those state regulations that conflict with regulations adopted in this proceeding.''

208. Other commenters contend that the Commission lacks the authority to preempt state ICS requirements. According to the Arizona Corporation Commission (ACC), for example, ''[s]ection 276 must be read in *pari materia* with 47 U.S.C. 152's reservation of authority over intrastate matters.'' The ACC further asserts that ''the primary purpose of section 276 was to prevent unfair competition by incumbent local exchange carriers against the payphone providers [and t]he other express purpose of this section was to ensure that payphone providers were fairly compensated for all calls placed using their payphones.'' In addition, the ACC claims that state regulation of intrastate ICS is part of the states' ''historic police powers'' and therefore should not be preempted unless preemption ''was the clear and manifest purpose of Congress.''

2. Discussion

209. NARUC and the ACC argue that our authority under section 276 is limited to interstate services, and that our regulations must be narrowly targeted to address concerns about anticompetitive conduct by incumbent local exchange carriers. We disagree. These arguments are contradicted by the plain language of section 276. As explained above, the statute provides the Commission with the authority to regulate both interstate and intrastate ICS. Similarly, although section 276 addresses potential discrimination by Bell operating companies, it also contains provisions related to other subjects, including compensation for ''payphone service providers,'' a group that, by definition, encompasses providers ''of inmate telephone service in correctional institutions, and any ancillary services.'' Furthermore, we believe that section 276's broad mandate stands in stark opposition to ACC's and NARUC's attempts to narrowly confine the Commission's ICS-related preemption authority.

210. Pay Tel urges the Commission to preempt state-imposed intrastate rates that are below the adopted caps, arguing that any rates that deviate from the Commission's caps are ''by definition, 'inconsistent''' and must be preempted. We disagree. The primary purpose of the rate caps we adopt today is to ensure that ICS rates are ''just and reasonable'' and do not take unfair advantage of inmates or their families. State requirements that result in rates below our caps advance that purpose and there is no credible record evidence demonstrating or indicating that any requirements that result in rates below our conservative caps are so low as to clearly deny providers fair compensation. Evidence in the record shows that ICS can be provided at rates at or below $0.05 a minute. We applaud the efforts some states have made to lower ICS rates and hope other states follow their lead. Our goal is affordable rates that provide fair compensation, and the federal framework we adopt today is meant to serve as a backstop to ensure rates are consistent with the statute in absence of state action.

211. We are mindful, however, of the fact that we also have a statutory obligation to ensure that payphone service providers, including ICS providers, are ''fairly compensated.'' If any state adopts intrastate requirements that result in providers being unable to receive fair compensation, providers may either seek appropriate relief in that state or from the Commission. We will review the relevant state requirements if they are brought to our attention in a petition and will decide at that time what, if any, remedial actions are warranted. If any party believes that a particular form of relief is called for, that party should clearly state the requested relief in a petition and set forth the legal authority for granting such relief. As noted above, section 276 explicitly grants the Commission authority to preempt state requirements to the extent they are inconsistent with FCC regulations. Accordingly, if a provider is able to demonstrate that a particular state law or requirement is inconsistent with the rules we adopt in this Order, we will, consistent with section 276, preempt the inconsistent requirement. We strongly encourage providers to seek relief from the relevant state entity before approaching the Commission, however. We also note that there is no presumption that state-mandated rates deny fair compensation simply because they are lower than our rate caps. To the contrary, as noted above, we encourage states to enact additional reforms to inmate calling service and to drive intrastate rates as low as possible, consistent with the need to ensure fair compensation, retain service quality, and maintain adequate security.

212. Consistent with the regulatory approach adopted herein, providers may be able to comply with such statutory requirements without charging rates that exceed our rate caps. Given the absence of clear evidence indicating whether there are any state laws or other requirements that, in practice, would require providers to charge rates that exceed our caps, we need not decide whether any laws currently exist that are ''inconsistent'' with our regulatory framework. To the extent there are state requirements, including possible contractual requirements, that make our rate caps onerous for a particular provider, the affected provider may file for preemption of the state requirement or seek a temporary waiver of the rate caps for the duration of any existing contract. We note that any waiver request should include a discussion of the provider's efforts to renegotiate the subject contracts and the outcome of such efforts. We delegate to the Bureau the authority to rule on such petitions and to seek additional information as needed. We also direct the Bureau to endeavor to complete review of any such petitions within 90 days of the provider submitting all information necessary to justify a waiver.

3. Existing Contracts

213. As the Commission has previously noted, ICS contracts ''typically include change of law provisions.'' We expect that the new rate caps and other requirements adopted in this Order constitute regulatory changes sufficient to trigger contractual change-in-law provisions that will allow ICS providers to void, modify or renegotiate aspects of their existing contracts to the extent necessary to comply with the new rate caps and/or to relieve the providers from site commission payments that would prove to be unduly onerous once this Order takes effect. The record regarding implementation of the 2013 interim rate caps indicates that such changes were implemented quickly. Indeed, the Commission has previously highlighted the fact that the record ''indicates that ICS contracts are amended on a regular basis.'' For

instance, the record indicates that Securus provided nine days' notice to facilities prior to implementing the rate caps adopted in the *2013 Order.* The record also indicates that GTL had a four-day transition period after executing a new contract to serve the state of Ohio.

214. Parties have further argued that invoking contractual change of law provisions and engaging in renegotiations with correctional facilities would materially affect ICS providers' ability to conduct their daily business. Yet the Commission saw little such impact regarding implementation of the 2013 interim rate caps. Those rate caps affected all interstate calls throughout the country, much like today's reforms will affect calls nationwide. Our experience with the Commission's previous reforms leads us to conclude that, for ICS providers that choose to invoke existing change of law provisions—and subsequently to engage in renegotiations with the facilities they serve—any inconvenience imposed on them in doing so will not materially affect the providers' ability to conduct their day-to-day business. Finally, the negotiations for any new or renewed contracts can and should be informed by the decisions in this Order, including our adoption of new rate caps for ICS.

215. ICS providers that have entered into contracts without change-of-law provisions did so with full knowledge that the Commission's ICS proceeding has been pending since 2012. Even so, we encourage facilities to work with those ICS providers during the transition period described below which we believe provides ample time to renegotiate contracts, if necessary, to be consistent with this Order. If any provider believes it is being denied fair compensation during the transition or implementation of the reforms adopted in this Order—due, for example, to the interaction of our rate caps with the terms of the provider's existing service contracts—it may file a petition seeking a limited waiver of our new rate caps or seek preemption of the requirement to pay a site commission, to the extent that it believes that such a requirement is a state requirement and is inconsistent with the Commission's regulations. Finally, negotiations for any new or renewed contracts can and should comply with the decisions in this Order, including our limitation on site commission payments and our adoption of new rate caps.

216. We note that the contractual provisions to which a state subjects itself, or its subdivision, may reasonably be subsumed within the ''state requirements'' addressed by section 276(c). Therefore, if a state or a political subdivision thereof uses a contractual agreement as a vehicle to impose certain requirements regarding rates or other aspects of ICS, we would consider, on a case-by-case, fact-specific basis, preempting those requirements to the extent they are ''inconsistent with the Commission's regulations'' as set forth in this Order. Without deciding whether preemption is factually or legally warranted in any particular case, we note that a contrary interpretation could leave states and localities free to undermine the Commission's implementation of section 276 by doing so via a contract, rather than a state law or regulation, which result appears to be counter to Congress's objectives in enacting section 276(c). As the Commission has noted in this very proceeding, ''agreements cannot supersede the Commission's authority to ensure that the rates paid by individuals who are not parties to those agreements are fair, just and reasonable.'' To the extent ICS providers require waiver relief, they may take advantage of the procedures described below.

F. Waivers of Rules Adopted in This Order

217. In the *2013 Order,* the Commission held that an ICS provider that ''believes that it has cost-based rates for ICS that exceed our interim rate caps'' may file a petition for waiver for good cause. The *2013 Order* also confirmed that the Commission's standard waiver process applies to ICS providers. The Commission delegated to the Bureau the authority to approve or deny waiver requests. The Commission articulated the following factors that the Bureau could consider in reviewing a waiver request: Costs directly related to the provision of interstate ICS and ancillary services; demand levels and trends; a reasonable allocation of common costs; and general and administrative cost data. The Commission also noted that, because the adopted interim interstate rate caps were set at conservative levels, it expected that petitions for waiver ''would account for extraordinary circumstances.'' Additionally, the Commission held that, for ''substantive and administrative reasons,'' waiver petitions would be evaluated at the holding company level. The Bureau processed three requests for waiver of the interim interstate rate caps following this guidance and granted a temporary waiver to one provider.

218. In the *Second FNPRM,* the Commission sought comment on the waiver process detailed in the *2013 Order.* Several commenters object to the use of this waiver process to address concerns about the sufficiency of the rate caps. Some ICS providers ask that we review waiver petitions on a facility-by-facility basis in order to review locations where the costs of service exceed the rate caps. One commenter requests an expedited waiver process to allow the adoption of products or services involving costs paid to a third party, such as those involving a software agreement or new security feature. Commenters also suggest that the Bureau issue a blanket waiver excluding juvenile detention centers, secure mental health facilities, and jails with small populations, from our rate caps.

219. We have relied on the Mandatory Data Collection in establishing the rate caps adopted above. For the reasons previously given, we believe our rate caps are more than sufficient to allow carriers to receive fair compensation. We agree with the Petitioners that a tiered rate cap approach, as adopted herein, will reduce the need for waivers. We recognize, however, that we cannot foreclose the possibility that in certain limited instances, our rate caps may not be sufficient for certain providers. For those instances, we reaffirm the waiver standard for ICS providers adopted in the *2013 Order* and delegate to the Bureau the authority to rule on such waivers. Accordingly, an ICS provider that believes the rate caps for interstate and intrastate ICS do not allow for fair compensation may seek a waiver pursuant to the guidance articulated in the *2013 Order.* ICS provider waiver petitions may be accorded confidential treatment to the extent consistent with rule 0.459. We direct the Bureau to endeavor act to on such waivers within 90 days of the provider submitting all information necessary to justify a waiver. As the Commission previously stated, waiver petitions should be filed at the holding-company level. We believe that this approach best captures the way the majority of the ICS market functions; specifically that ICS providers serve multiple facilities utilizing centralized infrastructure, thus spreading related costs across their correctional facility customer base whenever possible. Furthermore, as described in the *2013 Order,* providers will be expected to provide data showing why they are unable to meet their costs under the applicable rate caps. We reiterate that ''unless and until a waiver is granted, an ICS provider may not charge rates above the [applicable] rate cap and must comply with all aspects of this Order . . . .'' However, consistent with Commission precedent,

exigent circumstances may warrant that the Bureau provide interim relief during the pendency of its review of a waiver request.

220. We also conclude that there is insufficient evidence available at this time to support a blanket waiver to providers incurring third-party technology costs or serving high-cost facilities. The Bureau will consider waiver petitions, including those from providers claiming to serve high-cost facilities, and evaluate the details specific to such petitions on a case-by-case basis.

G. Disability Access to ICS

1. Background

221. In the *2012 NPRM,* the Commission noted that ''there is evidence in the record to indicate that inmates with hearing disabilities may not have access to ICS at reasonable rates using TTYs [text telephones].'' Specifically, the Commission cited evidence that ''deaf and hard of hearing inmates who use TTYs have to pay more than their hearing counterparts'' because ''the average length of a telephone conversation using a TTY is approximately four times longer than a voice telephone conversation.'' In light of this record, the Commission sought comment about the ICS access available to deaf and hard of hearing inmates and about the rates such inmates paid for ICS.

222. In the *2013 Order,* the Commission clarified that ICS providers may not collect additional charges for calls made through any type of telecommunications relay service (TRS). In the *Second FNPRM* that accompanied the *2013 Order,* the Commission also noted commenters' assertions that TTY calls take ''at least three to four times longer than voice-to-voice conversations to deliver the same conversational content.'' The Commission, therefore, tentatively concluded that per-minute ICS rates for TTY calls should be 25 percent of the rate for standard ICS calls, and sought comment on this proposal. In addition, the Commission sought comment on a number of other issues related to ICS for inmates who are deaf and hard of hearing, including: (1) Whether and how to discount the per-minute rate for ICS calls placed using TTY; (2) whether action is required to ensure that ICS providers do not deny access to TRS by blocking calls to 711 and/or state established TRS access numbers; (3) the need for ICS providers to receive complaints on TRS and file reports on those complaints with the Commission; and (4) actions the Commission can take to promote the availability and use of video relay service (VRS) and other assistive technologies in prisons.

223. The Commission asked additional questions about accessible ICS in the *Second FNPRM.* Specifically, the Commission sought comment on the following: (1) The actual relative length of TTY-to-TTY and TTY-to-voice calls as compared to voice-to-voice calls; (2) the claim that no ICS provider charges for voice-to-TTY or TTY-to-voice calls because ''the 'interexchange company holding the [state] TRS contract carries the call to the called party,' '' and if true, whether the final reduced ICS rates for TTY calls should only apply to TTY-to-TTY calls; (3) whether AT&T and other entities that provide TRS are providing ICS for TRS calls placed by inmates; (4) how the Commission's relay service registration requirements can be met in a correctional facility setting where the equipment is handled by several users; and (5) the availability of and security concerns relating to devices used with newer technologies, such as videophones used for VRS and point-to-point video communications, devices used for IP CTS, and devices used for IP Relay.

224. Since 2012, when the Commission first sought comment on access to ICS for inmates who are deaf or hard of hearing, the Commission has continued to receive filings expressing concern about these prisoners' lack of access to telephone services that are functionally equivalent to the services available to users of traditional voice services. The Washington Lawyers' Committee (WLC), for example, claims that correctional facilities often fail to make TRS available to inmates. Similarly, Helping Educate to Advance the Rights of the Deaf (HEARD) asserts that ''deaf prisoners in several states have had no telecommunications access for several years, while deaf detainees often spend their entire time in jail with no telecommunication.'' According to the Rosen Bien Galvan & Grunfeld (RBGG) law firm, its clients ''routinely report that their access even to outdated and disfavored [TTYs], particularly in county jail facilities, is limited to nonexistent and that their ability to communicate with loved ones and attorneys is thereby impaired.'' RBGG further asserts that, even when correctional facilities have TTYs, ''they are often not actually available to our clients because they are broken, because staff does not know they exist, or because staff does not know how to use the machines.''

225. In response to the *Second FNPRM,* Securus and GTL contend that correctional facilities, not the ICS providers, ''set correction facility policy as to the amount of access that hearing-impaired inmates (or any inmates) have to telecommunications services.'' GTL also asserts that ''disability access concerns are being addressed by the industry'' and that GTL's inmate calling services and the rates for those services are ''fully compliant with the requirements of the Americans with Disabilities Act (ADA), the Communications Act of 1934, as amended, and current Commission requirements.''

2. Discussion

226. *Functionally Equivalent Access.* We now take measures to address the various concerns and ongoing reports regarding the lack of equal telephone access by inmates. As an initial matter, we note that this proceeding has generally referred to individuals who are ''deaf and hard of hearing,'' in discussing accessibility matters. Because inmates who are deaf-blind or have speech disabilities also use TRS, they, too, have the same or similar policy concerns as inmates who are deaf or hard of hearing. Accordingly, we will now refer more generally to inmates with ''communication disabilities'' when discussing these accessibility issues. Additionally, we note that while our focus here is primarily on calls that are made *by* inmates with these disabilities, some of the policies we adopt requiring access to TRS will also benefit inmates who need to place calls *to* people with such disabilities.

227. Section 225 of the Act requires every common carrier that provides voice services to offer access to TRS within their service areas. Accordingly, all common carriers must make available, or ensure the availability, to their customers of those types of TRS that the Commission has required to be mandatory services provided to the public. At present, the Commission mandates two forms of TRS: TTY-based TRS and speech-to-speech (STS), both of which are provided over the PSTN. We remind ICS providers of their obligations to ensure the availability and provision of these forms of TRS. Consistent with these obligations, ICS providers also may not block calls to 711, a short form dialing code that is used to access TRS provided by state-run TRS programs.

228. We note that several parties have requested that the Commission require correctional facilities to provide more ''modern'' forms of TRS as well, along with the equipment needed to access those services. These parties assert that TTYs are largely outdated and that videophones and captioned telephones

are the standard modes of communication for people with communication disabilities. For example, RBGG urges the Commission's ''active intervention'' to encourage facilities to adopt modern communications technologies, such as videophones. Similarly, the National Association of the Deaf (NAD) asserts that ''correctional facilities should be required to install and provide access to the telecommunications equipment required by deaf and hard of hearing inmates—whether it's a TTY, videophone, captioned telephone, or even an amplified telephone or one that is amplified and has large buttons.''

229. The Communications Act requires TRS to be provided ''in a manner that is *functionally equivalent* to the ability of a hearing individual'' to use conventional voice telephone services. We agree with commenters that limiting all inmates with communication disabilities to one form of TRS, particularly what many view as an outdated form of TRS that relies on TTY usage, may result in communication that is not functionally equivalent to the ability of a hearing individual to communicate by telephone. However, as noted above, at this time, only two forms of TRS, TTY-based TRS and STS, are mandated services for all common carriers. While the Commission *authorizes* compensation from the Interstate TRS Fund for VRS, IP Relay, and both PSTN-based CTS and IP CTS, it does not *mandate* that these types of services be provided by any common carrier at this time. Accordingly, while we are only able to require ICS providers to make TTY-based TRS and STS available to inmates with communication disabilities, or to inmates who communicate by telephone with users of these services at this time, we strongly encourage correctional facilities to work with ICS providers to offer these other forms of TRS.

230. Several inmates with communications disabilities that have commented in the record note that in some instances, using a Telecommunication Device for the Deaf (TDD) is unsatisfactory because ''[o]ur family members and friends who are deaf, are no longer using the obsolete TDD system.'' We reaffirm our existing policy of strongly encouraging correctional facilities to provide inmates with communication disabilities with access to TTYs, as well as equipment used for advanced forms of TRS, such as videophones and captioned telephones. In addition, we strongly encourage correctional facilities to comply with obligations that may exist under other federal laws, including Title II of the ADA, which require the provision of services to inmates with disabilities that are as effective as those provided to other inmates. Access to more advanced forms of TRS, including VRS, IP Relay, CTS, and IP CTS, may be necessary to ensure equally effective telephone services for these inmates. We recognize that some facilities have already begun providing access to alternative forms of TRS, often as the result of litigation brought under these other statutes. We strongly encourage other facilities to continue this trend voluntarily, without the need for further litigation. The Commission will monitor the implementation and access to TRS in correctional institutions and may take additional action if inmates with communications disabilities continue to lack access to functionally equivalent service.

231. *Rates.* Several commenters have also expressed concern about the costs inmates with communication disabilities incur when they use TTYs. HEARD, for example, asserts that TTY calls are ''at least four times slower than voice-to-voice conversations'' and that ''this time estimation does not account for varied literacy levels of users; 'garbled' transmissions that frequently occur in loud settings or with incompatible newer telephone technology; or the time required to connect to the operator, and subsequently to the party being called, among other things.'' One commenter describes his experience as an inmate with communications disabilities:

> [a]fter you give the relay operator your name for the collect call the relay operator put[s] you back on hold once again to see if charges will be accepted by the party at the other end of your call. This process takes at least 5 to 8 minutes. This time is part of the 15-minute time limit that the Department of Corrections has on their timers for each call. Now keep in mind that a regular call costs a total of about $2 but the relay service had a $3.62 hook up fee, then so much per minute after that so you only get 5 to 7 min. and you have to call back and repeat this process.

232. Given the differences between TTY and traditional voice service, several commenters argue that TTY users should be charged a discounted rate for ICS calls. The Prison Law Office, for example, has argued that if the Commission does not take into account the relatively slow speeds of TTY-based conversations, it will be ''in effect placing a surcharge on deaf prisoners.'' The Commission itself tentatively concluded in the *2013 Order* that the per-minute ICS rate for TTY calls should be set at 25 percent of the safe harbor rate of $0.12/minute for debit/prepaid calls and $0.14/minute for collect calls.

233. Neither ICS providers, nor any other commenters, dispute arguments that TTY calls are longer, and therefore more expensive to consumers than non-TTY calls. Instead, Securus merely contends that it receives no additional compensation for this type of call above its tariffed rate. GTL, for its part, generally asserts that its ICS and associated rates are ''fully compliant with the requirements of the Americans with Disabilities Act, the Communications Act of 1934, as amended, and current Commission requirements.''

234. We find that the record overwhelmingly supports the conclusion that TTY calls take significantly longer than voice conversations, due to factors that include the longer time it takes the TTY user to type—rather than speak—his or her part of the conversation; the time delays that occur while the text is transmitted; and the technical difficulties that appear to affect TTY calls disproportionately compared to voice calls. TTY calls through TRS can take even longer than calls between two TTY users, because of the need for such calls to be set up before the communications assistant can connect the TTY user to the voice telephone user, and the need for the communications assistant to transcribe the spoken part of the call and relay it to the TTY user.

235. Given that there does not appear to be any dispute in the record over whether TTY calls take longer to transact than voice calls involving similar content, the question remains whether inmates with communication disabilities (or their families) should be required to pay more for ICS calls than their hearing counterparts simply because they need to rely on TTYs to communicate with their friends and relatives. As explained below, we find that it would be unfairly discriminatory to require TTY users to pay more per call than users of traditional voice telephone equipment.

236. In the *2013 Order,* the Commission clarified that it would be inconsistent with section 225 of the Act for ICS providers to collect ''additional charges'' (*i.e.,* charges in excess of those charged by the ICS provider for functionally equivalent voice communications service) for calls made through any type of telecommunications relay service. The *2013 Order,* however, did not address the relevance of section 276 to ICS provider charges for TRS calls. Section 276, which requires the Commission to ensure that ICS

providers ''are fairly compensated for each and every completed intrastate and interstate call,'' also states that TRS calls ''shall not be subject to such compensation.'' Thus, we believe it is reasonable for the Commission to interpret 276(b)(1)(A) to mean that TRS calls are not subject to the per-call compensation framework adopted herein. Specifically, section 276 exempts both emergency calls and TRS calls from the fair compensation mandate. The exemption of emergency calls means that providers may not charge for emergency calls. We believe it is reasonable to interpret the pairing of TRS with emergency calls as an indication that Congress also intended TRS calls be provided for no charge. Therefore, we prohibit ICS providers from assessing charges for ICS calls between a TTY device and a traditional telephone.

237. As for TTY-to-TTY calls, we find that, because such calls, by their nature, are of longer duration than voice calls, and because inmates with communication disabilities do not have the alternative of placing voice calls, it would be unfairly discriminatory to require TTY users to pay more per call than users of traditional voice telephone equipment. This finding is compelled not only by the evidence in the record, but also by the language of the relevant statutory provision. Section 276 requires the Commission to establish a ''per call compensation plan'' to ensure that payphone providers, including ICS providers, are fairly compensated for ''each and every . . . call.'' Such per-call compensation must be ''fair'' not only to the provider but also to the party paying for the call. Because of the significantly longer time that is necessarily consumed by TTY calls—as compared to the duration of voice telephone ICS calls—we conclude that, to ensure fair compensation on a per-call basis, ICS providers should offer TTY calls at lower per-minute rates than are charged for voice calls, even if such lower rates do not provide the level of *per-minute* compensation determined to be fair for voice telephone calls in the ''per call compensation plan.'' We reach this decision because of the per-call discrimination that would result were we to set the same rates for both types of calls.

238. Accordingly, for the reasons described above, we require that the rates charged by ICS providers for TTY-to-TTY calls be no more than 25 percent of the rates the providers charge for traditional inmate calling services. We recognize that this discounted rate may not represent the same level of compensation that is provided for voice telephone calls carried over the same networks, but we have considered any additional costs that might be incurred by providers in setting the rate caps for ICS and concluded that there is enough room within the general rate caps to ensure the providers are still fairly compensated. Thus, ICS providers can expect to recover the cost of the TTY discount through the rates they charge other users, who account for the vast majority of ICS calls.

239. In setting the mandatory discount for ICS calls involving TTYs, we are cognizant of Securus' claim that it cannot track TTY calls separately from other ICS calls and that any type of TRS-related billing requirement ''would be extremely time-consuming and burdensome.'' If Securus, or any other ICS provider, finds it too burdensome to track TTY calls and bill customers the discounted rate for those calls, it may opt to provide TTY-to-TTY calling for free. We expect the cost of forgoing the discounted fees for the relatively small number of TTY users of ICS will be nominal and that providers will be able to recover those costs through the ''cushion'' we have built into our rate caps. We find that the benefit to inmates that use TTY and TRS technologies outweighs any nominal costs to ICS providers. Finally, we note that facilities and ICS providers can avoid costs related to TRS calls by allowing inmates to use IP-based forms of TRS, such as VRS, IP Relay and IP CTS. However, the record indicates that ''only a handful of prisons are equipped with videophones (*e.g.,* Vermont, Virginia, and Wisconsin) and no prison or jail is known to have installed captioned telephones, many using security as an excuse for discrimination.'' These calls would not require the services of an ICS provider and would be provided free of charge to both the user and to the facility.

240. *Disability-Access Related Reporting.* In discussing ICS disability access issues in the *2013 Order,* the Commission asked whether ICS providers should be required to collect and report: ''(i) Data on TRS usage via ICS, and (ii) complaints from individuals that access TRS via ICS.'' The Commission also sought comment ''on the benefits and burdens, including on small entities, of imposing these reporting requirements.''

241. In the *Second FNPRM,* the Commission again sought comment on possible recordkeeping and reporting requirements specific to accessible ICS. Specifically, the Commission asked if ''ICS providers [should] be required to report to the Commission the number of disability-related calls they provide, the number of problems they experience with such calls, or related complaints they receive?'' In response, the NAD asserts that the Commission should require ''complaints, technical problems, how much telecommunications access is provided as compared to non-deaf or hard of hearing inmates, and whether there is access to modern telecommunications equipment.'' HEARD asserts that ''[t]he Commission can generate a genuine sense of accountability simply by requiring ICS providers to collect and report data on calls made using relay service, especially if prisoners and family members are paying for the service.'' More specifically, HEARD suggests that, pursuant to the Commission's existing consumer complaint procedures, correctional facilities should be required to report how long they have been without relay service or access, and if a recent change in the ICS provider preceded the problem.

242. Securus counters that ''tracking of TTY is not possible'' and that culling out calls would require Securus ''to write a new computer application for its billing system'' and ''establish 'separate databases at each correctional facility to identify inmates that may use a TTY device or call friends or family that require the use of a TTY or similar device.' '' Securus further asserts that this difficulty is ''compounded for any facility that does not use Prison Identification Numbers in association with its inmate telephone system.'' Securus asserts generally that any type of TRS-related billing or call recordkeeping requirement ''would be extremely time-consuming and burdensome.''

243. GTL separately asserts that the new technologies it is introducing, which are ''better categorized as advanced communications services (ACS), enhanced services, or simply new technologies'' are already subject to certain disability access requirements, including recordkeeping and reporting requirements. GTL is specifically referring to rule 14.31, which requires ACS providers discontinuing a product or service to create and keep records (for a two year period) relating to: (1) Their efforts to consult with individuals with disabilities; (2) the accessibility features of their products and services; and (3) the compatibility of their products and services with peripheral devices or specialized customer premise equipment commonly used to help individuals with disabilities achieve access. Additionally, ACS providers must file an annual compliance certificate with the Commission.

Finally, ACS providers facing formal or informal accessibility complaints must produce responsive records to the Commission upon request.

244. After reviewing the record, we adopt the reporting requirements proposed by HEARD and supported by NAD. Specifically, we require all ICS providers to include in the Annual Reporting and Certification filing described below: (1) The number of disability-related calls they provided; (2) the number of dropped disability-related calls they experienced; and (3) the number of complaints they received related to access to ICS by TTY and TRS users, *e.g.,* dropped calls, poor call quality and the number of incidences of each. We agree with HEARD that these reporting requirements will foster accountability on the part of ICS providers. We believe these reporting requirements will encourage providers to actively address problems affecting users' ability to access TRS (including TTY) via ICS. Moreover, the reports will give the Commission the information needed to assess ICS providers' compliance with the requirements adopted herein, as well as those imposed by section 225, including the statutory requirement that individuals with communications disabilities must be able to engage in communication by wire or radio ''in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability,'' as well as the requirement that TRS be provided ''in the most efficient manner.''

245. Securus' main objection to the reporting requirements appears to be related solely to the difficulty of tracking TRS calls. But the record indicates that TRS calls make up only a small portion of ICS calls. Moreover, TTY-based TRS calls require specialized equipment and/or require calling a designated number such as 711. Either scenario should facilitate tracking TTY-based TRS calls. For instance, it should not be difficult to track a relatively small number of calls made from specialized equipment located in a correctional facility. Moreover, any burdens associated with providing limited reporting on these calls are far outweighed by the benefits such reporting will offer in terms of greater transparency and heightened accountability on the part of ICS providers. For example, our reporting requirements will facilitate monitoring of issues related to TRS calls, encourage greater engagement by the advocacy community, and provide the Commission the basis to take further action, if necessary, to improve inmates' access to TRS.

246. We further address concerns regarding the burdensomeness of our reporting requirements by establishing a safe harbor that will allow ICS providers to avoid any reporting obligations if certain conditions are met. Specifically, if an ICS provider either (1) operates in a facility that allows the offering of additional forms of TRS beyond those we currently mandate or (2) has not received any complaints related to TRS calls, then it will not have to include any TRS-related reporting in the Annual Report detailed below, provided that it includes a certification from an officer of the company stating which prong(s) of the safe harbor it has met. If the facility an ICS provider serves either ceases allowing additional forms of TRS beyond those we mandate or the ICS provider begins to receive TRS-related complaints, however, it must include all required TRS reporting information in its next Annual Report. We note that a report that includes the number of TRS calls provides important context for determining whether the number of complaints or dropped calls reported by a provider is problematic. We believe that allowing these safe harbors will provide equal or superior benefits over the reporting requirements because if taken advantage of they help mitigate ICS providers' concerns over the burdens associated with reporting (although we believe these burdens are minimal), and will help drive the adoption of more modern forms of TRS by correctional facilities, which helps further the deployment of ICS as well as helps maintain or increase contact between more incarcerated persons and the outside world.

247. *Cost-Benefit Analysis.* We find that the reporting and recordkeeping requirements related to disability-access ICS calling adopted in this Order are not overly burdensome. Parties have complained that the disability access communications within correctional facilities are not priced at rates that are just, reasonable, and fair, and that Commission intervention is necessary.

248. As discussed above, we conclude that these recordkeeping requirements are necessary to foster accountability on the part of ICS providers, and will encourage providers to address problems limiting users' ability to access TRS (including TTY) via ICS. Further, the reporting requirements will give us the information we need to assess ICS providers' compliance with the requirements adopted herein, as well as those imposed by section 225.

249. We find unpersuasive the objections raised to the reporting requirements. Reporting the number of problems and complaints associated with TRS calls does not seem unduly burdensome. TRS calls make up only a small portion of ICS calls. Moreover, as noted above, TTY-based calls require specialized equipment and/or require calls to a designated number, such as 711; either scenario should allow for ease of tracking. Moreover, any burdens associated with providing limited reporting on these calls are far outweighed by the benefits such reporting will offer in terms of greater transparency and heightened accountability on the part of ICS providers. We further mitigate any potential burden from our reporting requirements by establishing safe harbors that allow ICS providers to avoid any reporting obligations if certain conditions are met, as discussed more fully above.

H. Section 276 Is Technology Neutral

250. We confirm the findings in the *2013 Order* that section 276, by its terms, is technology neutral with respect to inmate calling services. As such, our rules adopted herein apply to ICS regardless of the technology used to deliver the service. Therefore, if a particular service meets the relevant definition in our rules, then it is a form of ICS that was subject to our interim rules and that is subject to the rules we adopt today. The nomenclature used to describe a service is not dispositive of whether the service is or is not ICS. Whether any particular service meets those definitions requires a fact-specific inquiry that we may adjudicate if necessary. (We note that our definition of ''inmate telephone'' is broad and does not inherently rule out advanced services, and that the burden is on the provider in the first instance to determine whether it is providing ICS, and if it is not certain, to seek guidance from the Commission, for example in the form of a Declaratory Ruling.)

I. Transition and Existing Contracts

251. In establishing the transition, we balance the critical goal of providing necessary relief to consumers from unreasonably high ICS rates while remaining mindful of the potential impact on ICS providers and facilities to ensure a smooth transition to implement the new reforms. In designing our transition for this Order, we build on the lessons learned from implementing the 2013 ICS reforms. The record does not indicate that providers experienced difficulties implementing the rate caps within 90 days after the *2013 Order*'s publication in the **Federal Register**. For example, the record shows that one provider sent a one-page letter to its customers informing them of the rate

changes to be implemented as a result of the Commission's *2013 Order.* The letter provided nine days' notice before rates changed. While we find that a multi-year transition period for new rate caps is unnecessary, we recognize that the new rate caps and ancillary service charge framework adopted in this Order may require some adjustment time for ICS providers and facilities. Accordingly, the reforms adopted in this Order will become effective March 17, 2016 for prisons and June 20, 2016 for jails.

252. This transition period reflects a careful balancing of the important goal of expediting relief to end users while allowing the necessary time to prepare for any impact our new rules may have on ICS providers and correctional institutions. In adopting the transition, we note as a threshold matter that the issue of ICS reform has been pending for years and, with the substantial progress made in recent years through the *2013 Order* and *Second FNPRM,* ICS providers and facilities have been on notice that the Commission may reform ICS. With that consideration in mind, we transition to our new rules March 17, 2016 for prisons and June 20, 2016 for jails. Below we also discuss the effect of our adopted reforms on existing ICS contracts.

1. Transition Proposals in the Record

253. In the *Second FNPRM,* the Commission sought comment on a variety of transition paths for the new rules and encouraged commenters advocating for a transition to identify the appropriate transition framework and the justifications for doing so. For example, the ICS providers that submitted the Joint Provider Proposal suggested that ''[t]he new rate caps should become effective 90 days after adoption, along with any site commission reductions and ancillary fee changes outlined below.'' They further asserted that ''[t]his period for implementation should ensure ICS providers and correctional facilities have adequate time to implement the new rate caps and any corresponding reductions in site commissions, including any contract amendments or adjustments that may be necessary.'' Pay Tel suggested a 90-day, after final order publication transition period for transaction fees, third-party money transfer service fees, and ancillary fees and an 18-month transition period for jail and prison rate caps. In the *Second FNPRM* the Commission also specifically sought comment on the 90-day delayed effective date we implemented in the *2013 Order* as well as a two year transition.

254. In response to the *Second FNPRM,* many interested parties submitted detailed comments explaining how the Commission should structure the transition to new rules for ICS rates. Commenters advocated for a variety of transition period lengths and the responses varied depending on the type of fee being transitioned. Some commenters suggested that all of the new rate caps, ancillary service charges, and other charges should be transitioned together. For example, GTL explained that ''[i]t is unlikely that the Commission's goal of achieving market-based ICS rates will occur without simultaneous Commission action to establish backstop rate caps for all ICS rates, to transition site commissions to admin-support payments, and to define industry-wide ancillary service charges and fee caps.'' We took such arguments into consideration in designing our transition.

255. At the other end of the spectrum, commenters advocating for a longer transition contend that longer transitions are necessary to ensure that correctional authorities and ICS providers can plan for the new regulatory regime. As discussed above, facilities have received certain inducements, such as site commissions, from ICS providers for selecting them to be the sole provider of ICS in their facilities. These commissions have been used for a variety of purposes, some of which are wholly unrelated to the provision of ICS to inmates and their families. We acknowledge that our adopted rules and requirements may affect facility budgets, and we want to ensure that those facilities have time to account for disturbances to their budgets, which is why we are not adopting an immediate transition.

256. Proponents of the shorter length transitions note that ICS providers and facilities have been on notice of upcoming changes and have successfully adjusted quickly to new rules in the past. For example, NJAID and NYU IRC explain that ''[i]n New Jersey and around the country, states and localities were able to implement the 2013 Order within ninety days. Moreover, these governments have been on notice since the issuance of the First FNPRM in 2013.'' Commenters advocating for shorter length transitions expressed confidence that 90 days was sufficient time to implement caps and would be the timeliest option. Indeed, some parties argued that no more than 60 days are necessary to complete the transition. Conversely, others worry that abbreviated transitions, such as 90-day transitions, will not be feasible for facilities to implement. However, other commenters point out that ''[a]lmost every ICS contract has a provision for renegotiation due to changes in the regulatory environment, so no one year grace period should be required for implementation of rates and fees.'' CenturyLink is concerned that a 90-day transition is not ''realistic,'' and advocates for a substantially longer transition period. NSA argues that a 90-day transition is not sufficient for jails, in particular. NSA notes that the sheer number of contracts to be renegotiated would require additional time to complete, specifically noting that there are ''over 2000 jails in the country and only a ''handful of ICS providers.'' Thus, NSA explains, each ICS provider would have to renegotiate ''potentially hundreds of contracts with Sheriffs and jails in a 90-day period.'' According to NSA, 90 days is not enough time to allow providers to negotiate all of these contracts and for those contracts to be approved by the relevant authorities. These concerns are echoed by Praeses and others. We agree that these parties raise valid concerns regarding the time needed to transition all of the country's jails to the new rate regime. Accordingly, we adopt a six-month transition period for jails, in order to give providers and jails enough time to negotiate (or renegotiate) contracts to the extent necessary to comply with all of the rules adopted herein. We do not believe an extended transition is necessary for prisons to obtain new or revised contracts, however. There are far fewer prisons/departments of correction than jails (typically one per state) and providers are likely to prioritize negotiations with prisons over negotiations with jails, particularly given that prisons tend to house much larger inmate populations and generate significantly more ICS revenues than jails. Moreover, according to the record more than 10 prison systems already have rates at or below our rate caps. Therefore, we adopt a 90-day transition period for prisons.

2. Implementation of Reforms and Transition Periods

257. The record reflects commenters advocating for immediate transitions and also for transition periods ranging from 90 days to up to three or four years. We find the arguments for a shorter transition period to be the most persuasive. The immediate transition and long transition options are impractical. For example, proponents of an immediate transition generally explained that longer transition periods are not necessary and would only serve to delay relief from quickly reaching inmates and their families. Despite such

arguments, we think that the reforms adopted in this Order warrant providing some amount of time to ensure a smooth transition for end users, providers, and facilities.

258. As explained above, the record clearly shows that charges for ancillary services have increased since the *2013 Order.* This highlights that ICS providers have the incentive and ability to increase ancillary service charges absent reform, which could have the effect of frustrating the Commission's and Congress's policy goals by undermining the rate caps we adopt. While we have received substantial comment in the record about the challenges associated with transitioning for our site commission action and rate caps, the record lacks explanation as to why an immediate transition for ancillary service charges would be burdensome for ICS providers. As such, we find that transitioning ancillary service charges on March 17, 2016 for prisons and June 20, 2016 for jails is appropriate because it will provide significant relief to many ICS end users, while still giving providers ample time to adjust their systems and procedures.

259. As explained above, our goal is to ensure a reasonable transition and minimize disruption, while providing relief to end users as quickly as possible. We have the benefit of understanding how the transition to implement the interim interstate rate caps occurred. Evidence in the record about actual transition periods calls into question protestations in the record about the excessive time it will take to renegotiate contracts, particularly for prisons. We adopt here a 90-day transition from publication in the **Federal Register** for prisons and six months from publication in the **Federal Register** for jails for the adopted rate caps. We find that this length of time adequately balances the pressing need for reform, affords ICS providers enough time to prepare for the new rates, and is amply supported by the record.

260. Evidence in the record indicates that some ICS providers and their customers have been acting to modify contracts in an attempt to lock in attractive terms at the expense of the ratepayers, the end users, in anticipation of this Order. We are concerned that such activity may also occur in between the adoption and effective dates of this Order. We will be vigilant in monitoring the industry during the transition period. If we observe or are made aware of evidence of price gouging or other harmful behavior through, but not limited to, increased rates, ancillary service charges, and/or site commissions, we will not hesitate to take appropriate remedial action up to and including enforcement action pursuant to our legal authority under sections 201 and 276 or referral to another appropriate agency.

J. Anti-Gaming Provisions

261. We are concerned that parties may seek to negotiate agreements aimed at circumventing the rules we adopt in this Order, and we are particularly concerned that parties will have an incentive to do so before our new rules take effect. To minimize this type of ''gaming,'' we prohibit ICS providers from entering into new contracts (including contract renewals)—or negotiating amendments to existing contracts—that would require or permit providers to charge rates in excess of our adopted rate caps, impose ancillary service charges that are prohibited by this Order, or charge ancillary service charges that exceed the caps adopted in this Order. These prohibitions will take effect immediately upon publication of the Order in the **Federal Register**.

262. We find that there is good cause to make this requirement effective upon publication. There is evidence in the record that this type of gaming has already occurred in anticipation of the changes we enact in this Order. For example, a recent Securus contract requires the payment of a $4 million minimum annual guarantee (MAG), which advocates have called a ''signing bonus,'' and subsequent MAG payments equal to the greater of $3.5 million or 81 percent of commissionable revenues per year. In determining whether good cause exists, an agency should ''balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.'' In this case, the rule must take effect as soon as possible in order to minimize gaming of the sort already noted in the record, and the attendant harm to prisoners and their families in the form of unjust, unreasonable, and unfair rates and fees. In these circumstances, we find that the need for immediate implementation outweighs any concerns that parties may not be afforded sufficient time to prepare for the effective date of this prohibition, particularly given that parties have long been on notice that the Commission might impose new regulations governing ICS rates and ancillary fees. We are not requiring providers to take any action; instead we are merely requiring that they refrain from taking certain steps that would effectively undermine our regulations governing rates and ancillary service charges. Accordingly, providers do not need time to prepare to meet this prohibition. Therefore, on balance, we find good cause to make this requirement effective upon publication in the **Federal Register**.

K. Annual Reporting and Certification Requirement

263. In the *2013 Order,* the Commission adopted an Annual Reporting and Certification Requirement that included the submission of interstate and intrastate ICS rate and demand data, as an additional means of ensuring that each and every ICS provider's rates and practices were just, reasonable, and fair, and remain in compliance with the *2013 Order,* as well as to facilitate any future enforcement that may be needed regarding the adopted rules. Additionally, the Commission adopted a requirement that an officer or director from each ICS provider file an annual certification with the Commission as to the accuracy of the data filed and as to the provider's compliance with all portions of the adopted *Order.* These requirements were later stayed by court order.

264. *Recordkeeping and Reporting.* The Joint Provider Proposal suggests that ICS providers ''should be required to provide certain information to the Commission annually for three (3) years to ensure the caps on per-minute rates and any admin-support payments are implemented as required.'' Specifically, the Proposal suggests that such information should include four things: ''a list of the ICS provider's current interstate and intrastate per-minute ICS rates, the ICS provider's current fee amounts, the locations where the ICS provider makes admin-support payments, and the amount of those admin-support payments.'' The Commission sought comment on this proposal in the *Second FNPRM.*

265. In its comments, CPC recommends that the Commission look to the ''Alabama model,'' including the ''specific reporting requirements that will serve to monitor compliance with those [adopted] restrictions.'' In its 2014 Further Order Adopting Revised Inmate Phone Service Rules Order, the Alabama PSC adopted a number of recordkeeping and reporting requirements. Items to be recorded and reported annually include, but are not limited, to, monthly number of local, intrastate, and interstate calls; monthly local, intrastate, and interstate minutes of use; monthly local, intrastate, and interstate call revenue, divided into collect, prepaid collect, prepaid debit, prepaid inmate calling card, and direct-billed service, divided by facility; ancillary call charges;

unused prepaid collect, prepaid debit, and prepaid inmate phone card account balances; and total number of calls disconnected for suspected three-way call violations. That order was temporarily stayed by court order which expired on July 1, 2015.

266. We find that a recordkeeping and reporting requirement will best serve the Commission's stated goals of ensuring that each and every ICS provider's rates and practices are just, reasonable, and fair, and that they remain in compliance with this Order. We also believe that an annual recordkeeping and reporting requirement will help the Commission capture any trends or changes in calling patterns, will facilitate any future enforcement action, and allow other interested parties the ability to monitor ICS providers' compliance with the Order. We also believe that such a requirement is necessary because the ICS industry is modernizing and will continue to change. Consistent with the Commission's approach in the *2013 Order,* if after an investigation it is determined that ICS providers rates and/or ancillary service charges are unjust, unreasonable or unfair under sections 201 and 276 of the Act, lower rates will be prescribed and ICS providers may be ordered to pay refunds. Providers also may be found in violation of our rules and face additional forfeitures.

267. We thus require all ICS providers to provide, on an annual basis, categorized by facility and size of facility, the following information: First, we require all ICS providers to file their current interstate, international and intrastate ICS rates. Second, we require all ICS providers to file their current ancillary service charge amounts and the instances of use of each. Third, where an ICS provider makes site commission payments, we require the ICS provider to file the monthly amount of such payment. Fourth, for ICS providers that provided video visitation services, either as a form of ICS or not, during the reporting period, we require that they file the minutes of use and per-minute rates and ancillary service charges for those services. Fifth, as discussed in greater detail in the Disability Access section above, we also require that ICS providers report: (1) The number of disability-related calls they provided; (2) the number of problems they experienced with such calls, *e.g.,* dropped calls, poor call quality and the number of incidences of each; and (3) the number of complaints they received related to access to ICS by TTY and TRS users.

268. In order to facilitate compliance with this requirement, we direct the Wireline Competition Bureau to develop a template for such annual reports and provide for confidential treatment of any particular information warranting it, consistent with our rules. We believe this will help ensure that the incoming information is provided in the most straight-forward and consistent manner. The use of such a template will also be beneficial to any interested parties that want to view the information thus encouraging increased public participation in this proceeding. Each annual report shall be submitted to the Commission by April 1st of each year, regarding the providers' interstate, international and intrastate ICS. The first annual report will be due after the Commission publishes Office of Management and Budget (OMB) approval pursuant to the Ordering Clauses below. If for example, OMB approval is granted in 2016 then the first annual report and certification (as discussed below) will be due on April 1, 2017 and cover the time period from January 1, 2016 to December 31, 2016.

269. *Cost-Benefit Analysis.* We find that a recordkeeping and reporting requirement serves the Commission's goal of ensuring that ICS rates and practices are just, reasonable, and fair, and that they remain in compliance with this Order. We find, on balance, that the benefits of such recordkeeping and reporting outweigh any potential burden that may be imposed.

270. We find that such recordkeeping and reporting requirements will help monitor ICS providers' compliance with the Order, capture any trends or changes in calling patterns, and will facilitate any future enforcement action. Such a requirement is necessary because the ICS industry is modernizing and will continue to change.

271. We find very few objections raised to the reporting requirements, and none to be persuasive. Additionally, we also find no cost objections to these requirements. We have taken steps to minimize burdens on providers by adopting less burdensome recordkeeping requirements than some of those suggested by commenters. Moreover, any burdens associated with providing limited reporting on these calls are far outweighed by the benefits such reporting will offer in terms of greater transparency and heightened accountability on the part of ICS providers. Additionally, these data will guide the Commission as it evaluates next steps in the Further Notice.

272. *Annual Certification.* The participants in the Joint Provider Proposal suggest that all ICS providers should be required, in addition to their recordkeeping and reporting requirements, to submit an annual certification signed by the company Chief Executive Officer, Chief Financial Officer, and General Counsel, under penalty of perjury, certifying that the company is in compliance with the Commission's ICS rate rules and adopted payment rules. CenturyLink counters that ''there is no need for more than a single officer to certify that the company has complied with Commission rules.''

273. We agree with CenturyLink that ''there is no need for more than a single officer to certify that the company has complied with Commission rules.'' We find that, on balance, requiring more than one officer of an ICS provider to certify to compliance would be unnecessarily burdensome on some providers and is in fact, contrary to the manner in which the Commission conducts other annual certifications. Therefore we adopt CenturyLink's proposal and require one officer of each ICS provider to annually certify its companies' compliance with our adopted rules. The annual certification should be submitted at the same time as the annual report.

L. Consumer Disclosure Requirements

274. *Background.* In the *2013 Order,* the Commission reminded providers of their current and ongoing obligations to ''comply with existing Commission rules.'' Specifically, the Commission reminded providers of their obligations pursuant to section 64.710 of our rules, which requires providers of inmate operator services to disclose to the consumer the total cost of the call prior to connecting it, including any surcharges or premise-imposed fees that may apply to the call as well as methods by which to make complaints concerning the charges or collection practices. Additionally, ICS providers that are non-dominant interexchange carriers must make their current rates, terms, and conditions available to the public via their company Web sites. Any violation of such responsibilities, or failure to comply with existing rules, may subject ICS providers to enforcement action, including, among other penalties, the imposition of monetary forfeitures.

275. In the *Second FNPRM,* the Commission sought comment on ''how to ensure that rates and fees are more transparent to consumers'' and specifically on the requirement that ICS providers notify their customers regarding the ICS options available to them and the cost of those options. ICS providers that offer interstate toll

service are already required to post their rates on their Web sites, and, to the extent they offer inmate operator services, their live agents are already required to make certain notifications to customers. The Commission sought comment on whether providers' Web sites, automated IVRs, and live agents should be required to offer in a more prominent fashion no-cost or lower-cost options before offering other, higher-priced optional services. The Commission also sought comment on two reform proposals that offered suggestions for requiring the publication of ancillary service charges.

276. The Joint Provider Proposal, acknowledging existing requirements for providers to publish interstate rates, terms and conditions on their Web sites, offered a detailed proposal regarding notification requirements for so-called ''convenience or premium payment options,'' and suggested that all providers be required to ''clearly and conspicuously identify the required information . . . so that it is actually noticed and understood by the customer.'' Specifically, the Joint Provider Proposal suggests that an ICS provider ''may provide this information to consumers (1) on its Web site, (2) in its web-posted rates, terms, and conditions, (3) orally when provided in a slow and deliberate manner and in a reasonably understandable volume, or (4) in other printed materials provided to a customer.'' The providers that signed on to the Joint Provider Proposal suggest that ''clear and conspicuous'' means that ''notice would be apparent to the reasonable customer,'' and that to determine the effectiveness of the disclosure, the Commission should ''consider the prominence of the disclosure in comparison to other information, the proximity and placement of the information, the absence of distracting elements, and the clarity and understandability of the text of the disclosure.'' Pay Tel suggests that on a Web site, postings must list call rates and fees, as well as refund instructions. Pay Tel also suggests that the vendor Web site must provide a link to the FCC Enforcement Bureau Web site and the applicable state regulatory agency Web site. Pay Tel also suggests making facility-specific printed material available at each facility. The Commission explicitly sought comment on these proposals in the *Second FNPRM.*

277. In comments to the *Second FNPRM,* CenturyLink notes that especially in jails and short-term facilities, payment decisions are ''typically made in 'real-time,' as the call is received from the inmate'' and that ''there is no reasonable way for called parties to make informed decisions unless the ICS provider proactively informs them of options in clear, concise language prior to payment.'' CenturyLink further asserts that ''simple posting[s] on Web sites or reactive responses upon request are not sufficient'' when faced with time-sensitive situations such as initial incarceration. The record indicates that many consumers face the problem of uncertainty with respect to the cost of ICS. Praeses argues that in addition to disclosing their ancillary service charges in a prominent location on their Web sites, providers should be required to disclose all applicable fees at the time that a consumer seeks a service that is subject to an ancillary service charge from a provider, but prior to the inmate or call recipient incurring the fee. DC Prisoners' Project of the Washington Lawyers' Committee suggests that the Commission require all ICS providers to train their staff to disclose all rate and fee information to anyone who contacts the provider. In addition to the suggestions in the Joint Provider Proposal, GTL asserts that the Commission ''should enforce its existing requirements regarding oral disclosures and the posting of rates, terms, and conditions.'' GTL notes that ''ICS providers have 'ongoing responsibilities' to comply with these existing rules, and violations of those responsibilities or failure to comply with those existing rules could subject ICS providers to enforcement action.''

278. *Discussion.* We believe that transparency in rates, terms, and fees will facilitate compliance with the reforms and ensure that consumers are informed of their choices. We find persuasive arguments that ICS payment decisions are often made in ''real time,'' especially in short-term detention facilities, and ''there is no reasonable way for called parties to make informed decisions'' unless rates and terms are clearly available for consumers prior to the commencement of the call. For example, transparency about the rates charged for ICS will provide substantial consumer protection benefits by empowering consumers to make informed decisions about the ICS offerings they decide to use. We also applaud voluntary commitments that enhance transparency for consumers. Here, we supplement our existing rules to require ICS providers to clearly and accurately disclose their interstate, international and intrastate rates and ancillary service charges to consumers. The new rule we adopt will provide key consumer benefits with minimal burden on ICS providers. Ensuring that end users know the costs of the services they seek to use will help consumers make informed decisions about what types of services they can afford and for what amount of time.

279. We do not mandate a specific format for how consumer disclosures must be made. Rather, we find that suggestions for disclosure such as those in the Joint Provider Proposal offer a reasonable framework as to how to make these disclosures. However, we note that this would not necessarily be the only framework for compliance. We will formally evaluate the reasonableness of the Joint Provider Proposal and any other disclosure formats if and when complaints arise as to the adequacy of the disclosures. We note that each failure to disclose all charges to consumers is counted as an individual violation, which should create a significant incentive for compliance. In addition, the Commission shall evaluate disclosures of all consumer charges for reasonableness, in part, on the basis of the following factors:

- Disclosure of information regarding all material charges, such as the applicable rate, any and all ancillary service charges—whether one time or recurring—including those to initiate service, and the name, definition and cost of each rate or fee;
- Use of plain language accessible to current and prospective end users;
- Description of single call and related services and disclosures making clear that consumers have less-costly options rather than single call and related services;
- Ability of end users to easily understand the disclosure;
- Timeliness of any updates/changes to the rates and fees, prior to any updates/changes;
- Availability of the disclosure in a prominent location on the ICS provider's Web site;
- Listing of the name, address, and toll-free number of the ICS provider; and
- Listing of the toll-free number for the FCC Consumer Help Center (888–225–5322).

280. Providers should already be informing customers about the total amount on a per-call basis that they will be charged so the disclosure requirements should not be onerous or a significant new burden. Indeed, the addition to our rules with respect to ancillary service charges should in fact simplify transparency, as it greatly reduces the number and variable rates of allowable ancillary service charges, and thus charges ICS providers must disclose to consumers. This information

is relevant to consumer decision making, and the providers must also keep this information in order to comply with the Annual Reporting and Certification Requirements adopted herein.

281. The new disclosure rule discussed above falls well within the confines of the First Amendment. As explained, these disclosures serve important government purposes, ensuring that end users have accurate and accessible information about ICS providers' services. This information is central both to preventing consumer deception and to the overall deployment and operation of ICS.

282. The Supreme Court has made plain in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio* that the government has broad discretion in requiring the disclosure of information to prevent consumer deception and ensure complete information in the marketplace. Under *Zauderer,* mandatory factual disclosures will be sustained ''as long as disclosure requirements are reasonably related to the State's interest in preventing deception to consumers.'' As the Court observed, ''the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.'' The DC Circuit recently reaffirmed these principles in *American Meat Institute* v. *United States Department of Agriculture,* an en banc decision in which the Court joined the First and Second Circuit Courts of Appeals in recognizing that other government interests beyond preventing consumer deception may be invoked to sustain a disclosure mandate under *Zauderer.*

283. The new disclosure rule and disclosure language suggested in this Order clearly pass muster under these precedents. Preventing consumer deception in the ICS market lies at the heart of the disclosure rule we adopt today. The Commission has found that ICS providers have the incentive and ability to engage in harmful practices, as discussed above. Similarly, the suggested disclosure language is designed to prevent confusion to all consumers of the ICS providers' services, and serve to curb providers' incentives to engage in harmful practices by shedding light on the business practices of ICS providers. Accurate information about ICS provider offerings encourages consumer choice and the widespread deployment of ICS. In sum, the government interests supporting the disclosure rule (as well as the suggested disclosure language), in addition to the interest of preventing consumer deception, are substantial and justify our consumer disclosure suggestions.

284. In addition, the disclosure rule adopted in this Order meets the analysis the Supreme Court developed for commercial speech cases in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n. Central Hudson's* test first asks whether the expression is protected by the First Amendment, which requires that the speech concern lawful activity and not be misleading. Next, the Court asks whether the asserted governmental interest is substantial. If the first two prongs of the analysis are met, the Court then determines whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than necessary to serve that interest. Requiring ICS providers to disclose information about ICS rates meets this four-part test. First, ICS providers' rate information qualifies as an expression protected by the First Amendment, as it is speech concerning lawful activity that is not misleading. Second, as explained elsewhere in this Order, the Commission has a substantial interest in consumer protection and advancing the public interest, particularly where, as here, Congress has directed the Commission to ensure that ICS rates are just, reasonable and fair, pursuant to regulations that redound ''to the benefit of the general public.'' Third, as explained above, the regulation directly advances the public interest and consumer protection in requiring disclosure of this information, as transparency in rates and charges allows consumers to make more informed choices. Finally, this new consumer disclosure requirement is not more extensive than is necessary to protect consumers. Since ICS providers have already been operating under similar requirements, this information is readily available to them and, as explained above, we do not prescribe a particular format for how consumer disclosures must be made, thereby affording providers leeway to comply with the revised rule in a flexible, individualized manner that minimizes burden.

285. *Cost-Benefit Analysis.* We find that, on balance, requiring ICS providers to disclose information for their intrastate, interstate and international ICS rates, categorized by facility and size of facility, as well as ancillary service charges, is not overly burdensome. These requirements are necessary to ensuring that end users know the costs of the services they seek to use and helps consumers make informed decisions about what types of services they can afford and for what amount of time.

286. The Commission has found that ICS providers have the incentive and ability to engage in harmful practices, as discussed above. Commenters have asked the Commission to mandate additional disclosure and transparency regarding ICS rates and fees. Similarly, these disclosure requirements are designed to prevent confusion to all consumers of the ICS providers' services, and serve to curb providers' incentives by shedding light on the business practices of ICS providers. Numerous commenters support these reforms.

287. These requirements provide key consumer benefits with minimal burden on ICS providers. Providers currently are required to post their rates publicly on their Web sites. Additionally, providers must keep this information to comply with the Mandatory Data Collection and Annual Reporting and Certification Requirements adopted herein.

288. To minimize any potential burden on providers, the Commission does not prescribe a particular format for how consumer disclosures must be made, but suggests a framework for consideration and allows providers flexibility in adopting such disclosures, thus allowing providers with maximum flexibility and minimum burden.

M. Severability

289. All of the rules that are adopted in this Order are designed to ensure just, reasonable, and fair ICS rates. Each of the reforms we undertake in this Order serve a particular function toward this goal. Therefore, it is our intent that each of the rules and regulations adopted herein shall be severable. We believe that ICS end users will benefit from the rates caps adopted and will also benefit separately from the adopted ancillary service charge caps. If any of the rules or regulations, or portions thereof including, for example, any portion of our rate caps and ancillary service charge rules, are declared invalid or unenforceable for any reason, it is our intent that the remaining rules shall be in full force and effect.

N. Outstanding Petitions

290. After the Commission released the *2013 Order,* numerous entities petitioned the Commission for a stay of the new rules and requirements. The requests for stay generally expressed concern about one or more of the following categories of issues: (1) That a ''one-size-fits-all'' approach for ICS rate reform will be ineffective, and ignores the fact that jails incur real costs

and will face budget shortfalls under the Commission's adopted approach; (2) the continued need for site commissions, or a concern about how to manage correctional budgets built on a reliance on those site commissions; (3) a concern about the Commission seeking comment on asserting jurisdiction over intrastate ICS calls or classifying all ICS calls as interstate; (4) a potentially harmful impact on the security at facilities and the safety of citizens stemming from the Commission's rules and requirements; and (5) general requests that the Commission stay its Order with no legal analysis or justifications for the request. We dismiss the first four categories on the basis that the present order adequately addresses and answers the arguments and concerns contained within them. We adopt tiered rate caps based on population size, address site commissions and security concerns, as well as assert jurisdiction over intrastate ICS, in this Order. We dismiss the fifth category of stay requests on the basis that they do not present any legal reasoning or analysis to justify a stay of our rules and have been rendered moot by this Order.

O. Ex Parte Requirements

291. This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. Memoranda must contain a summary of the substance of the *ex parte* presentation ad not merely a list of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. If the oral presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

P. Paperwork Reduction Act Analysis

292. This Report and Order contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in the proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(4), we previously sought comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Q. Congressional Review Act

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

R. Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA). an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Second Notice of Proposed Rulemaking (Second FNPRM) in WC Docket 12–375. The Commission sought written public comment on the proposals in the Second FNPRM, including comment on the IRFA. The Commission did not receive comments directed toward the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

1. Need for, and Objectives of, the Report and Order

294. The Second Report and Order (Order) adopted rules to ensure that interstate, intrastate, and international inmate calling service (ICS) rates in correctional institutions are just, reasonable, and fair. In the initiating *Second FNPRM,* the Commission sought information on issues related to the ICS market, payments to correctional facilities, ICS interstate and intrastate rates, ancillary fees, additional ways to promote competition, harmonization of state regulations, existing contracts, transition periods, accessible ICS, advanced ICS, periodic review, enforcement, and a cost/benefit analysis of reform proposals.

295. In this Order, the Commission adopts comprehensive reform of all aspects of ICS to correct a market failure, foster market efficiencies, encourage ongoing state reforms and ensure that ICS rates and charges comply with the Communications Act. The Order does this by addressing interstate and intrastate ICS rates, payments to correctional facilities, ancillary service charges, connection and per-call charges, flat-rate charges, harmonization with state regulations, disability access, transition periods, periodic review, mandatory data collection, waivers, and consumer protection measures such as annual certification and reporting requirements. The reforms adopted in this Order apply to ICS offered in all correctional facility types and regardless of technology used to deliver the services.

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

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

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

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

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

more. Thus, under this size standard, the majority of firms can be considered small.

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

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

301. 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.

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

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

304. *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.

305. *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.

306. *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.

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

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

308. *Recordkeeping, Reporting, and Certification.* The Order requires that all ICS providers file annually data, categorized by facility and size of facility, on their current intrastate, interstate, and international ICS rates. The Commission also requires ICS providers to file their current ancillary service charge amounts and the instances of use of each. ICS providers that make site commission payments must file the monthly amount of any such payment. The Commission requires ICS providers that provided video visitation services, either as a form of ICS or not, during the reporting period, to file the minutes of use and per-minute rates for those services. As discussed in greater detail in the Disability Access section above, the Commission also requires that ICS providers report: (1) The number of disability-related calls they provided; (2) the number of problems they experienced with such calls; and (3) the number of complaints they received related to access to ICS by TTY and TRS users *e.g.,* dropped calls, poor call quality and the number of incidences of each. The adopted reporting requirements will facilitate enforcement and act as an additional means of ensuring that ICS providers' rates and practices are just, reasonable, fair and in compliance with the Order.

309. The Commission delegates to the Wireline Competition Bureau (Bureau) the authority to adopt a template for submitting the required data, information, and certifications.

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

310. 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.''

311. The Commission needs access to data that are comprehensive, reliable, sufficiently disaggregated, and reported in a standardized manner. The Order recognizes, however, that reporting obligations impose burdens on the reporting providers. Consequently, the Commission limits its collection to information that is narrowly tailored to meet its needs.

312. *Monitoring and Certification.* The Commission requires ICS providers to submit annually their data on their intrastate, interstate and international ICS rates, categorized by facility and size of facility. The Commission requires ICS providers to file their charges to consumers that are ancillary to providing the telecommunications piece of ICS. Providers are currently required to post their rates publicly on their Web sites. Thus, this additional filing requirement should entail minimal additional compliance burden, even for the largest ICS providers.

313. The information on providers' Web sites is not certified and is generally not available in a format that will provide the per-call details that the Commission requires to meet its statutory obligations. Thus, the Commission further requires each provider to annually certify its compliance with other portions of the Order. The Commission finds that without a uniform, comprehensive dataset with which to evaluate ICS providers' rates, the Commission's analyses will be incomplete. The Commission recognizes that any information collection imposes burdens, which may be most keenly felt by smaller providers, but concludes that the benefits of having comprehensive data substantially outweigh the burdens. Additionally, some of these potential burdens, such as the filing of rates currently required to be posted on an ICS provider's Web site, are minimally burdensome.

314. *Data Collection.* The Commission is cognizant of the burdens of data collections, and has therefore taken steps to minimize burdens, including directing the Bureau to adopt a template for filing the data that minimizes burdens on providers by maximizing uniformity and ease of filing, while still allowing the Commission to gather the necessary data. The Commission also finds that without a uniform, comprehensive dataset with which to evaluate ICS providers' costs, its analyses will be incomplete, and its ability to establish ICS rate caps will be severely impaired. The Commission thus concludes that requiring ICS providers to report this cost data appropriately balances any burdens of reporting with the Commission's need for the data required to carry out its statutory duties.

6. Report to Congress

315. The Commission will send a copy of the Order, including this 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, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

V. Ordering Clauses

316. *Accordingly, it is ordered* that, pursuant to sections 1, 2, 4(i)–(j), 201(b), 215, 218, 220, 276, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)–(j), 201(b), 215, 218, 220, 276, 303(r), and 403 this Second Report and Order *is adopted.*

317. *It is further ordered* that Part 64 of the Commission's Rules, 47 CFR part 64, is *amended* as set forth in Appendix A of the Second Report and Order. These rules shall become effective March 17, 2016.

318. *It is further ordered,* that the prohibition against entering into new contracts,—or negotiating amendments to existing contracts, as discussed in paragraphs 261 and 262, herein, shall take effect immediately upon publication in the **Federal Register**.

319. *It is further ordered,* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Second Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

320. *It is further ordered,* that pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR 1.4(b)(1) and 1.103(a), that the Compliance date for this Second Report and Order shall be January 19, 2016.

List of Subjects in 47 CFR Part 64

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

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer, Office of the Secretary.

Final Rules

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

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); 403(b)(2)(B), (c), Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 227, 228, 254(k), 616, 620, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96, unless otherwise noted.

■ 2. Section 64.6000 is revised to read as follows:

§ 64.6000 Definitions.

As used in this subpart:

(a) *Ancillary Service Charge* means any charge Consumers may be assess for the use of Inmate Calling services that are not included in the per-minute charges assessed for individual calls. Ancillary Service Charges that may be charged include the following. All other Ancillary Service Charges are prohibited.

(1) *Automated Payment Fees* means credit card payment, debit card payment, and bill processing fees, including fees for payments made by interactive voice response (IVR), web, or kiosk;

(2) *Fees for Single-Call and Related Services* means 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;

(3) *Live Agent Fee* means a fee associated with the optional use of a live operator to complete Inmate Calling Services transactions;

(4) *Paper Bill/Statement Fees* means fees associated with providing customers of Inmate Calling Services an optional paper billing statement;

(5) *Third-Party Financial Transaction Fees* means the exact fees, with no markup, that Providers of Inmate Calling Services 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.

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

(c) *Average Daily Population (ADP)* means the sum of all inmates in a facility for each day of the preceding calendar year, divided by the number of days in the year. ADP shall be calculated in accordance with § 64.6010(e) and (f);

(d) *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;

(e) *Consumer* means the party paying a Provider of Inmate Calling Services;

(f) *Correctional Facility or Correctional Institution* means a Jail or a Prison;

(g) *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 though a Provider that can be used to pay for Inmate Calling Services calls originated by the Inmate;

(h) *Flat Rate Calling* means a calling plan under which a Provider charges a single fee for an Inmate Calling Services call, regardless of the duration of the call;

(i) *Inmate* means a person detained at a Jail or Prison, regardless of the duration of the detention;

(j) *Inmate Calling Service* means a service that allows Inmates to make calls to individuals outside the Correctional Facility where the Inmate is being held, regardless of the technology used to deliver the service;

(k) *Inmate Telephone* means a telephone instrument, or other device capable of initiating calls, set aside by authorities of a Correctional Facility for use by Inmates;

(l) *International Calls* means calls that originate in the United States and terminate outside the United States;

(m) *Jail* means a facility of a local, state, or federal law enforcement agency that is used primarily to hold individuals who are;

(1) Awaiting adjudication of criminal charges;

(2) Post-conviction and committed to confinement for sentences of one year or less; or

(3) Post-conviction and awaiting transfer to another facility. The term also includes city, county or regional facilities that have contracted with a private company to manage day-to-day operations; privately-owned and operated facilities primarily engaged in housing city, county or regional inmates; and facilities used to detain individuals pursuant to a contract with U.S. Immigration and Customs Enforcement;

(n) *Mandatory Tax or Mandatory Fee* means a fee that a Provider is required to collect directly from Consumers, and remit to federal, state, or local governments;

(o) *Per-Call, or Per-Connection Charge* means a one-time fee charged to a Consumer at call initiation;

(p) *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;

(q) *Prepaid Collect Calling* means a calling arrangement that allows an Inmate to initiate an Inmate Calling Services call without having a pre-established billing arrangement and also provides a means, within that call, for the called party to establish an arrangement to be billed directly by the Provider of Inmate Calling Services for future calls from the same Inmate;

(r) *Prison* means a facility operated by a territorial, state, or federal agency that is used primarily to confine individuals convicted of felonies and sentenced to terms in excess of one year. The term also includes public and private facilities that provide outsource housing to other agencies such as the State Departments of Correction and the Federal Bureau of Prisons; and facilities that would otherwise fall under the definition of a Jail but in which the majority of inmates are post-conviction or are committed to confinement for sentences of longer than one year;

(s) *Provider of Inmate Calling Services, or Provider* means any communications service provider that provides Inmate Calling Services, regardless of the technology used;

(t) *Site Commission* means any form of monetary payment, in-kind payment, gift, exchange of services or goods, fee, technology allowance, or product that a Provider of Inmate Calling Services or affiliate of an Provider of Inmate Calling Services may pay, give, donate, or otherwise provide to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide ICS, a governmental agency that oversees a correctional facility, the city, county, or

state where a facility is located, or an agent of any such facility.

■ 3. Section 64.6010 is revised to read as follows:

§ 64.6010 Inmate Calling Services rate caps.

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

(1) $0.22 in Jails with an ADP of 0–349;

(2) $0.16 in Jails with an ADP of 350–999; or

(3) $0.14 in Jails with an ADP of 1,000 or greater.

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

(1) $0.11;

(2) [Reserved]

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

Size and type of facility	Debit/prepaid rate cap per MOU	Collect rate cap per MOU as of June 20, 2016	Collect rate cap per MOU as of July 1, 2017	Collect rate cap per MOU as of July 1, 2018
0–349 Jail ADP	$0.22	$0.49	$0.36	$0.22
350–999 Jail ADP	0.16	0.49	0.33	0.16
1,000+ Jail ADP	0.14	0.49	0.32	0.14

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

(1) $0.14 after March 17, 2016;

(2) $0.13 after July 1, 2017; and

(3) $0.11 after July 1, 2018, and going forward.

(e) For purposes of this section, the initial ADP shall be calculated, for all of the Correctional Facilities covered by an Inmate Calling Services contract, by summing the total number of inmates from January 1, 2015, through January 19, 2016, divided by the number of days in that time period;

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

■ 4. Section 64.6020 is revised to read as follows:

§ 64.6020 Ancillary Service Charge.

(a) No Provider shall charge an Ancillary Service Charge other than those permitted charges listed in § 64.6000.

(b) No Provider shall charge a rate for a permitted Ancillary Service Charge in excess of:

(1) For Automated Payment Fees—$3.00 per use;

(2) For Single-Call and Related Services—the exact transaction fee charged by the third-party provider, with no markup, plus the adopted, per-minute rate;

(3) For Live Agent Fee—$5.95 per use;

(4) For Paper Bill/Statement Fee—$2.00 per use;

(5) For Third-Party Financial Transaction Fees—the exact fees, with no markup that result from the transaction.

■ 5. Section 64.6030 is revised to read as follows:

§ 64.6030 Inmate Calling Services interim rate cap.

No Provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. These interim rate caps shall sunset upon the effectiveness of the rates established in § 64.6010.

■ 6. Section 64.6040 is revised to read as follows:

§ 64.6040 Rates for calls involving a TTY device.

(a) No Provider shall levy or collect any charge in excess of 25 percent of the applicable per-minute rate for TTY-to-TTY calls when such calls are associated with Inmate Calling Services.

(b) No Provider shall levy or collect any charge or fee for TRS-to-voice or voice-to-TTY calls.

■ 7. Section 64.6060 is revised to read as follows:

§ 64.6060 Annual reporting and certification requirement.

(a) Providers must submit a report to the Commission, by April 1st of each year, regarding interstate, intrastate, and international Inmate Calling Services for the prior calendar year. The report shall be categorized both by facility type and size and shall contain:

(1) Current interstate, intrastate, and international rates for Inmate Calling Services;

(2) Current Ancillary Service Charge amounts and the instances of use of each;

(3) The Monthly amount of each Site Commission paid;

(4) Minutes of use, per-minute rates and ancillary service charges for video visitation services;

(5) The number of TTY-based Inmate Calling Services calls provided per facility during the reporting period;

(6) The number of dropped calls the reporting Provider experienced with TTY-based calls; and

(7) The number of complaints that the reporting Provider received related to *e.g.,* dropped calls, poor call quality and the number of incidences of each by TTY and TRS users.

(b) An officer or director of the reporting Provider must certify that the reported information and data are accurate and complete to the best of his or her knowledge, information, and belief.

■ 8. Section 64.6070 is added to subpart FF to read as follows:

§ 64.6070 Taxes and fees.

(a) No Provider shall charge any taxes or fees to users of Inmate Calling Services, other than those permitted under § 64.6020, Mandatory Taxes, Mandatory Fees, or Authorized Fees.

■ 9. Section 64.6080 is added to subpart FF to read as follows:

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

No Provider shall impose a Per-Call or Per-Connection Charge on a Consumer.

■ 10. Section 64.6090 is added to subpart FF to read as follows:

§ 64.6090 Flat-Rate Calling.

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

■ 11. Section 64.6100 is added to subpart FF to read as follows:

§ 64.6100 Minimum and maximum Prepaid Calling account balances.

(a) No Provider shall institute a minimum balance requirement for a Consumer to use Debit or Prepaid Calling.

(b) No Provider shall prohibit a consumer from depositing at least $50

per transaction to fund a Debit or Prepaid Calling account.

■ 12. Section 64.6110 is added to subpart FF to read as follows:

§ 64.6110 Consumer disclosure of Inmate Calling Services rates.

Providers must clearly, accurately, and conspicuously disclose their interstate, intrastate, and international rates and Ancillary Service Charges to consumers on their Web sites or in another reasonable manner readily available to consumers.

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