

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 64

[WC Docket No. 12–375, FCC 21–60; FRS 35683]

#### Rates for Interstate Inmate Calling Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission) reforms its rules for inmate calling services by taking the following steps. The Commission eliminates a separate rate cap for collect calling. The Commission lowers the interim interstate rate caps to \$0.12 for prisons and \$0.14 for jails with an average daily population of 1,000 or more incarcerated people. The Commission reforms the current treatment of site commission payments to permit recovery only of the portions of such payments related specifically to calling services and requires them to be separately listed on bills. Site commission payments that are legally mandated may be passed through to consumers, without any markup, and site commission payments that result from contractual obligations between facilities and providers are recoverable only up to \$0.02 per minute for both prisons and jails with average daily populations of 1,000 incarcerated people or more. The Commission caps, for the first time, international calling rates at the applicable total interstate rate cap, plus the amount paid by the calling services provider to its underlying wholesale carriers for completing international calls. The Commission adopts a process for providers to follow when seeking waivers of the rate caps for interstate and international calling services; reforms the ancillary service third-party transaction fee caps for calls that are billed on a single per-call basis and charges for transferring or processing third-party financial transactions; adopts a new mandatory data collection; and reaffirms providers' obligations regarding functionally equivalent access for incarcerated people with hearing and speech disabilities, delegating authority to its Consumer and Governmental Affairs Bureau (CGB) to undertake a separate data collection to help the Commission resolve critically important disability access issues.

**DATES:** This rule is effective October 26, 2021. Amendatory instructions 5 and 6, concerning §§ 64.6110 and 64.6120,

respectively, are delayed indefinitely. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date for the amendment to § 64.6110 and the addition of § 64.6120.

The delegations of authority to the Wireline Competition Bureau (WCB), the Office of Economics and Analytics (OEA), and CGB (see section III.H.3 of **SUPPLEMENTARY INFORMATION**) are effective on July 28, 2021.

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

**FOR FURTHER INFORMATION CONTACT:** Michael Scott, Disability Rights Office of the Consumer and Governmental Affairs Bureau, at (202) 418–1264 or via email at [michael.scott@fcc.gov](mailto:michael.scott@fcc.gov) regarding portions of the Third Report and Order relating specifically to the provision of communications services to incarcerated people with hearing and speech disabilities and Simon Solemani, Pricing Policy Division of the Wireline Competition Bureau, at (202) 418–2270, or via email at [Simon.Solemani@fcc.gov](mailto:Simon.Solemani@fcc.gov) regarding other portions of the Report and Order.

**SUPPLEMENTARY INFORMATION:** The amendment to § 64.6110 and the addition of § 64.6120 are delayed pending OMB approval. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date for these amendments.

This is a summary of the Commission's Third Report and Order, FCC 21–60, released May 24, 2021. This summary is based on the public redacted version of the document, the full text of which can be obtained from the following internet address: <https://docs.fcc.gov/public/attachments/FCC-21-60A1.pdf>.

#### Synopsis

##### I. Introduction

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

connections been as vital as they are now, as many correctional facilities have eliminated in-person visitation in response to the COVID–19 pandemic.

2. In August 2020, the Commission unanimously adopted the Fourth Further Notice of Proposed Rulemaking (*2020 ICS FNPRM*) proposing to reduce interstate rates and, for the first time, to cap international rates. Today, the Commission moves forward as proposed, lowering interstate rates and charges for the vast majority of incarcerated people, limiting international rates for the first time, and making other reforms to its rules.

3. Specifically, the Report and Order:

- Lowers the interstate interim rate caps of \$0.21 per minute for debit and prepaid calls from prisons and jails with 1,000 or more incarcerated people to new lower interim caps of \$0.12 per minute for prisons and \$0.14 per minute for larger jails.

- Reforms the current treatment of site commission payments to permit recovery only of the portions of such payments related specifically to calling services and requires them to be separately listed on bills.

- Where site commission payments are mandated by federal, state, or local law, providers may pass these payments through to consumers, without any markup, as an additional component of the new interim interstate per-minute rate caps.

- Where site commission payments result from contractual obligations or negotiations with providers, providers may recover from consumers no more than the \$0.02 per minute for prisons and \$0.02 per minute for larger jails, as proposed in the *2020 ICS FNPRM*.

- Therefore, consistent with the proposal in the *2020 ICS FNPRM*, the maximum total interstate rate caps are \$0.14 per minute for prisons and \$0.16 per minute for jails with 1,000 or more incarcerated people.

- Eliminates the current interim interstate collect calling rate cap of \$0.25 per minute resulting in a single uniform interim interstate maximum rate cap of \$0.21 per minute for all calls for all facilities, consistent with the proposal in the *2020 ICS FNPRM*.

- Caps, for the first time, international calling rates at the applicable total interstate rate cap, plus the amount paid by the calling services provider to its underlying wholesale carriers for completing international calls, consistent with the *2020 ICS FNPRM*.

- Reforms the ancillary service third-party transaction fee caps for (1) calls that are billed on a single per-call basis, and (2) charges for transferring or

processing third-party financial transactions, as proposed in the *2020 ICS FNPRM*.

- Adopts a new mandatory data collection to obtain more uniform cost data based on consistent prescribed allocation methodologies to determine reasonable permanent cost-based rate caps for facilities of all sizes, as suggested in the *2020 ICS FNPRM*.

- Reaffirms providers' obligations regarding functionally equivalent access for incarcerated people with hearing and speech disabilities, consistent with the *2020 ICS FNPRM* and federal law.

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

## II. Background

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

### A. Statutory Background

6. The Communications Act of 1934, as amended (Communications Act or Act) divides regulatory authority over interstate, intrastate, and international communications services between the Commission and the states. Section 2(a) of the Act empowers the Commission to regulate "interstate and foreign communication by wire or radio." This regulatory authority includes ensuring that "[a]ll charges, practices, classifications, and regulations for and in connection with" interstate or international communications services are "just and reasonable" in accordance with section 201(b) of the Act. Section 201(b) also provides that "[t]he

Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out" these provisions.

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

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

### B. History of Commission Proceedings Prior to 2020

9. In 2003, Martha Wright and her fellow petitioners, current and former incarcerated people and their relatives and legal counsel (Wright Petitioners), filed a petition seeking a rulemaking to address "excessive" inmate calling services rates. The petition sought to prohibit exclusive inmate calling services contracts and collect-call-only restrictions in correctional facilities. In 2007, the Wright Petitioners filed an alternative petition for rulemaking in which they emphasized the urgency of the need for Commission action due to "exorbitant" inmate calling services rates. The Wright Petitioners proposed benchmark rates for interstate long distance inmate calling services calls and reiterated their request that providers offer debit calling as an alternative option to collect calling. The

Commission sought and received comment on both petitions.

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

11. In the *2013 ICS Order*, in light of record evidence that rates for calling services used by incarcerated people greatly exceeded the reasonable costs of providing those services, the Commission adopted interim interstate rate caps of \$0.21 per minute for debit and prepaid calls and \$0.25 per minute for collect calls. Under the Commission's rules, "Debit Calling" means "a presubscription or comparable service which allows an Inmate, or someone acting on an Inmate's behalf, to fund an account set up [through] a Provider that can be used to pay for Inmate Calling Services calls originated by the Inmate." "Prepaid Calling" means "a presubscription or comparable service in which a Consumer, other than an Inmate, funds an account set up [through] a Provider of Inmate Calling Services. Funds from the account can then be used to pay for Inmate Calling Services, including calls that originate with an Inmate." "Collect Calling" means "an arrangement whereby the called party takes affirmative action clearly indicating that it will pay the charges associated with a call originating from an Inmate Telephone." In the First Mandatory Data Collection, the Commission required all inmate calling services providers to submit data on their underlying costs so that the agency could develop permanent rate caps. In *2014*, the Commission sought comment on reforming charges for services ancillary to the provision of inmate calling services and on establishing rate caps for both interstate and intrastate calls. Ancillary service charges are fees that providers assess on calling services used by incarcerated people that are not included in the per-minute rates assessed for individual calls.

12. The Commission adopted a comprehensive framework for interstate and intrastate inmate calling services in the *2015 ICS Order*, including limits on ancillary service charges and permanent rate caps for interstate and intrastate inmate calling services calls in light of "egregiously high" rates for inmate calling services calls. Because of continued growth in the number and dollar amount of ancillary service charges that inflated the effective price paid for inmate calling services, the

Commission limited permissible ancillary service charges to only five types and capped the charges for each: (1) Fees for Single-Call and Related Services—billing arrangements whereby an incarcerated person's collect calls are billed through a third party on a per-call basis, where the called party does not have an account with the inmate calling services provider or does not want to establish an account; (2) Automated Payment Fees—credit card payment, debit card payment, and bill processing fees, including fees for payments made by interactive voice response, web, or kiosk; (3) Third-Party Financial Transaction Fees—the exact fees, with no markup, that providers of calling services used by incarcerated people are charged by third parties to transfer money or process financial transactions to facilitate a consumer's ability to make account payments via a third party; (4) Live Agent Fees—fees associated with the optional use of a live operator to complete inmate calling services transactions; and (5) Paper Bill/Statement Fees—fees associated with providing customers of inmate calling services an optional paper billing statement. The Commission relied on sections 201(b) and 276 of the Act to adopt rate caps for both interstate and intrastate inmate calling services. The Commission relied on sections 201(b) and 276 of the Act to adopt rate caps for both interstate and intrastate inmate calling services. The Commission set tiered rate caps of \$0.11 per minute for prisons; \$0.14 per minute for jails with average daily populations of 1,000 or more; \$0.16 per minute for jails with average daily populations of 350 to 999; and \$0.22 per minute for jails having average daily populations of less than 350. The Commission calculated these rate caps using industry-wide average costs based on data from the First Mandatory Data Collection and stated that this approach would allow providers to “recover average costs at each and every tier.” The Commission did not include site commission payments in its permanent rate caps, finding these payments were not costs reasonably related to the provision of inmate calling services. The Commission also readopted the interim interstate rate caps it had adopted in 2013, and extended them to intrastate calls, pending the effectiveness of the new rate caps, and sought comment on whether and how to reform rates for international inmate calling services calls. At the same time, the Commission adopted a Second Mandatory Data Collection to identify trends in the market and form the basis for further

reform as well as an annual filing obligation requiring providers to report information on their current operations, including their interstate, intrastate, and international rates as well as their ancillary service charges.

13. In the *2016 ICS Reconsideration Order*, the Commission reconsidered its decision to entirely exclude site commission payments from its 2015 permanent rate caps. The Commission increased those permanent rate caps to account for claims that certain correctional facility costs reflected in site commission payments are directly and reasonably related to the provision of inmate calling services. The Commission set the revised rate caps at \$0.13 per minute for prisons; \$0.19 per minute for jails with average daily populations of 1,000 or more; \$0.21 per minute for jails with average daily populations of 350 to 999; and \$0.31 per minute for jails with average daily populations of less than 350.

#### C. Judicial Actions

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

15. In 2017, in *GTL v. FCC*, the D.C. Circuit vacated the permanent rate caps adopted in the *2015 ICS Order*. First, the panel majority held that the Commission lacked the statutory authority to cap intrastate calling services rates. The court explained that the Commission's authority over intrastate calls is, except as otherwise provided by Congress, limited by

section 2(b) of the Act and nothing in section 276 of the Act overcomes this limitation. In particular, section 276 “merely directs the Commission to ‘ensure that all providers [of calling services to incarcerated people] are fairly compensated’ for their inter- and intrastate calls,” and it “is not a ‘general grant of jurisdiction’ over intrastate ratemaking.” The court noted that it “need not decide the precise parameters of the Commission's authority under § 276.”

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

17. Third, the D.C. Circuit held that the Commission's use of industry-wide averages in setting rate caps was arbitrary and capricious because it lacked justification in the record and was not supported by reasoned decision making. Judge Pillard also dissented on this point, noting that the Commission has “wide discretion” under section 201 of the Act to decide “which costs to take into account and to use industry-wide averages that do not necessarily compensate ‘each and every’ call.” More specifically, the court found the Commission's use of a weighted average per-minute cost to be “patently unreasonable” given that such an approach made calls with above-average costs unprofitable and thus did “not fulfill the mandate of § 276 that ‘each and every’ call be fairly compensated.

Additionally, the court found that the *2015 ICS Order* “advance[d] an efficiency argument—that the larger providers can become profitable under the rate caps if they operate more efficiently—based on data from the two smallest firms,” which “represent[ed] less than one percent of the industry,” and that the *Order* did not account for conflicting record data. The court therefore vacated this portion of the *2015 ICS Order*.

18. Finally, the court remanded the ancillary service charge caps. The D.C. Circuit held that “the Order’s imposition of ancillary fee caps in connection with interstate calls is justified” given the Commission’s “plenary authority to regulate interstate rates under § 201(b), including ‘practices . . . for and in connection with’ interstate calls.” The court held that the Commission “had no authority to impose ancillary fee caps with respect to intrastate calls.” Because the court could not “discern from the record whether ancillary fees can be segregated between interstate and intrastate calls,” it remanded the issue so the Commission could determine whether it could segregate ancillary fee caps on interstate calls (which are permissible) and on intrastate calls (which are impermissible). The court also vacated the video visitation annual reporting requirements adopted in the *2015 ICS Order*.

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

#### D. 2020 Rates and Charges Reform Efforts

20. *2020 ICS Order on Remand and FNPRM*. In February 2020, the Wireline Competition Bureau (Bureau or WCB) issued a public notice seeking to refresh the record on ancillary service charges in light of the D.C. Circuit’s remand in

*GTL v. FCC*. This Public Notice was published in the **Federal Register**. In the *Ancillary Services Refresh Public Notice*, the Bureau sought comment on “whether each permitted [inmate calling services] ancillary service charge may be segregated between interstate and intrastate calls and, if so, how.” The Bureau also sought comment on any steps the Commission should take to ensure, consistent with the D.C. Circuit’s opinion, that providers of interstate inmate calling services do not circumvent or frustrate the Commission’s ancillary service charge rules. The Bureau also defined jurisdictionally mixed services as “[s]ervices that are capable of communications both between intrastate end points and between interstate end points” and sought comment on, among other issues, how the Commission should proceed if any permitted ancillary service is “jurisdictionally mixed” and cannot be segregated between interstate and intrastate calls.

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

22. Second, the Commission proposed rate reform of the inmate calling services within its jurisdiction. As a result of the D.C. Circuit’s decisions, the interim interstate rate caps of \$0.21 per minute for debit and prepaid calls and

\$0.25 per minute for collect calls that the Commission adopted in 2013 remain in effect today. Commission staff performed extensive analyses of the data it collected in the Second Mandatory Data Collection as well as the data in the April 1, 2020, annual reports. In the *2015 ICS Order*, the Commission directed that the Second Mandatory Data Collection be conducted “two years from publication of Office of Management and Budget (OMB) approval of the information collection.” The Commission received OMB approval in January 2017, and **Federal Register** publication occurred on March 1, 2017. Accordingly, on March 1, 2019, inmate calling services providers submitted their responses to the Second Mandatory Data Collection. WCB and the Office of Economics and Analytics (OEA) undertook a comprehensive analysis of the Second Mandatory Data Collection responses, and conducted multiple follow-up discussions with providers to supplement and clarify their responses, in order to conduct the data analysis upon which the proposals in the August 2020 *ICS FNPRM* are based. Based on that analysis, the Commission proposed to lower the interstate rate caps to \$0.14 per minute for debit, prepaid, and collect calls from prisons and \$0.16 per minute for debit, prepaid, and collect calls from jails. In so doing, the Commission used a methodology that addresses the flaws underlying the Commission’s 2015 and 2016 rate caps (which used industry-wide averages to set rate caps) and that is consistent with the mandate in section 276 of the Act that inmate calling services providers be fairly compensated for each and every completed interstate call. The Commission’s methodology included a proposed 10% reduction in *GTL*’s costs to account, in part, for seemingly substantially overstated costs. The Commission also proposed to adopt a waiver process that would permit providers to seek waivers of the proposed rate caps on a facility-by-facility or contract basis if the rate caps would prevent a provider from recovering the costs of providing interstate inmate calling services at a facility or facilities covered by a contract. The *2020 ICS FNPRM* also proposed “to adopt a rate cap formula for international inmate calling services calls that permits a provider to charge a rate up to the sum of the inmate calling services provider’s per-minute interstate rate cap for that correctional facility plus the amount that the provider must pay its underlying international service provider for that

call on a per-minute basis (without a markup).” The Commission explained that this cap “would enable inmate calling services providers to account for widely varying costs,” be consistent with the “just and reasonable” standard in section 201(b) of the Act, and comport with the “fair compensation” provision of section 276 of the Act.

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

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

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

rates and fees, at least one state commenced a regulatory proceeding aimed at reducing intrastate inmate calling services rates and fees, and several states are considering legislation.

### III. Third Report and Order

26. In this Third Report and Order, the Commission takes several important steps to provide significant financial relief to incarcerated people and their families, all substantially consistent with the *August 2020 ICS FNPRM*, except where the record evidence requires the Commission to take a more conservative approach. The Commission takes these actions now in light of the exigent circumstances facing incarcerated people as they continue to deal with hardships related to the COVID-19 pandemic. First, the Commission reforms per-minute inmate calling services rates on an interim basis, capping interstate rates at \$0.12 per minute for prisons and \$0.14 per minute for larger jails. Second, the Commission reforms the current treatment of site commissions by adopting two distinct interim site commission-related rate components reflecting the different types of site commissions: Site commission payments that providers are obligated to pay under formally codified laws or regulations; and payments that providers agree, by contract, to make. Third, the Commission caps international calling rates for the first time. These and other reforms adopted here will enable consumers—incarcerated people and their families—to obtain essential communications capability at just and reasonable rates while the Commission remains faithful to its obligations under section 276 of the Act.

27. The reforms the Commission adopts today reflect its findings, as detailed below, regarding the monopoly power that each calling service provider has over the individual correctional facilities it serves; the numerous negative impacts the providers’ exercise of that market power has had on incarcerated people, their families and communities, and society as a whole; and the substantial record evidence of the need for at least interim reforms to the Commission’s rate caps and related regulations. In these circumstances, to the extent the record permits, the Commission exercises its authority under section 201(b) of the Act to “prescribe such rules and regulations as may be necessary” to ensure that “[a]ll charges [and] practices . . . for and in connection with [interstate and international] communication service”

by wire or radio are ‘just and reasonable.’” This provision provides the Commission with ample authority to regulate the interstate and international rates and the practices of providers of calling services for incarcerated people, including setting interim rate caps for interstate and international calls given that providers have monopoly power in the facilities they serve. The Commission has previously exerted jurisdiction over rates where it found it necessary to constrain monopoly power exercised by competitive LECs.

28. Although the record makes clear that the current interim rate caps for calling service to prisons and larger jails are unreasonably high, limitations in the reported data—arising in significant part from shortcomings in certain providers’ responses to the Second Mandatory Data Collection—make the Commission wary of establishing permanent rate caps based on the current record. The Commission also declines to consider IC Solutions’ proposal that the Commission forbear from the requirement that calling services providers contribute to the Universal Service Fund. The Commission has already addressed forbearance from universal service contribution obligations in the inmate calling services context in a separate proceeding, and the Commission declines to revisit that matter in this proceeding. Nor does the record allow the Commission to reasonably set permanent or even new interim interstate rate caps for jails with less than 1,000 average daily population, adjust its caps on ancillary service fees beyond the new cap on fees for single-call services and third-party financial transaction fees, or ensure that incarcerated people with disabilities have any greater access to functionally equivalent communications capabilities than they have today. The Commission therefore institutes a Mandatory Data Collection to provide the Commission and interested parties with more complete and accurate data regarding the costs of providing inmate calling services. The Commission anticipates that those data, in combination with the record developed in response to the attached Fifth Further Notice of Proposed Rulemaking (Fifth FNPRM), will enable the Commission to take these important steps in the near future. The Commission also delegates authority to the Consumer and Governmental Affairs Bureau (CGB) to undertake a separate data collection related to service providers’ costs and other key aspects of their provision of telecommunications relay services

(TRS) and other assistive technologies if necessary to help the Commission resolve the critically important disability access issues the Commission explores in the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**.

#### *A. Unique Marketplace for Telephone Services Provided to Incarcerated People*

29. The Commission has previously determined that providers of telephone services to incarcerated people have monopoly power in the facilities they serve. The Commission reaffirms this long-established finding, one that applies equally not only to the rates and charges for calling services provided to incarcerated people, including ancillary services, but also to providers' practices associated with their provision of calling services. Indeed, ICSolutions requests that the Commission investigate providers' compliance with the interim rate caps, in addition to other instances of asserted noncompliance. While this rulemaking proceeding is the wrong vehicle to address ICSolution's first two concerns, the Commission welcomes suggestions on how to revise its rules to better detect noncompliance, which the Commission seeks as part of the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**.

30. The record demonstrates, as the Commission previously found and reiterated in the *August 2020 ICS FNPRM*, that incarcerated people have no choice in the selection of their calling services provider. For these consumers, the relevant market is the incarcerating facility. The authorities responsible for prisons or jails typically negotiate with the providers of inmate calling services and make their selection without input from the incarcerated people who will use the service. Once the facility makes its choice—often resulting in contracts with providers lasting several years into the future—incarcerated people in such facilities have no means to switch to another provider, even if the chosen provider raises rates, imposes additional fees, adopts unreasonable terms and conditions for use of the service, or offers inferior service. On the contrary, correctional authorities exercise near total control over how incarcerated people are able to communicate with the outside world. This control extends to control over visitation rights, the use of traditional mail and courier services, and the ability to use any form of electronic communication. Indeed, the only way an incarcerated person may legally communicate with the outside

world is with the explicit permission of the correctional authority. Therefore, no competitive forces within the facility constrain providers from charging rates that far exceed the costs such providers incur in offering service.

31. Some commenters argue the market for inmate calling services is competitive because providers of those services bid against each other to win contracts with correctional facilities. GTL, in particular, makes much of this claim. Because correctional officials typically allow only one provider to serve any given facility, however, there are no competitive constraints on a provider's rates once it has entered into a contract to serve a particular facility. Some experts representing inmate calling services providers recognize this to be the case. The Commission has observed that "because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates." Thus, even if there is "competition" in the bidding market as some providers assert, it is not the type of competition the Commission recognizes as having an ability to "exert downward pressure on rates for consumers."

#### *B. Impact on Consumers and Society*

32. The Commission has long recognized the far-ranging consequences that high calling rates inflict on incarcerated people, their families, and society as a whole. The record in this proceeding confirms that excessive telephone rates continue to impose an unreasonable burden on the ability of incarcerated people—one of the most economically disadvantaged segments of our population—to maintain vital connections with the outside world. And reduced prison visitation as a result of the COVID-19 pandemic has made these consequences even more dire, exacerbating the urgent need for inmate calling rate reform.

33. A national survey identified the cost of phone calls as the primary barrier preventing incarcerated people from keeping in touch with loved ones. As one commenter sums it up: "A sentence to jail or prison should not include the additional punishment of being cut off from family, friends, legal assistance, and community resources." Studies confirm that incarcerated people who have regular contact with family members are more likely to succeed after release and have lower recidivism rates because they are able to maintain vital support networks.

34. The high cost of calling services causes damaging consequences not only

for incarcerated people but also for their families. The record suggests that as many as 34% of families go into debt to keep in touch with an incarcerated family member. Some low-income families are forced "to choose between calling an incarcerated family member and buying essential food and medicines." Rate reform will reduce these financial burdens and also promote increased communication which preserves essential family ties, allowing incarcerated people "to parent their children and connect with their spouses, helping families stay intact," and decreasing the trauma suffered by children whose parents have been incarcerated.

35. The benefits of lowering inmate calling services rates also ripple throughout communities and society in other tangible and intangible ways. For example, making communications less costly and easier to use for incarcerated people promotes their ability to plan for housing, employment, and successful integration into communities once released from prison. In financial terms, increased communication helps reduce repeated incarceration, which benefits society by saving millions of dollars in incarceration-related costs annually. Additionally, the record shows that the ability to communicate regularly with families "reduces foster placement of children of incarcerated people, which result[s] in measurable savings to society of tens of millions of dollars per year."

36. The COVID-19 pandemic has intensified the need to reform inmate calling services rates. Even before the pandemic, it could be impractical, costly, and time-prohibitive for family members to make regular visits to those in prisons often located hundreds of miles away. But as a result of the pandemic, most jails and prisons have prohibited or severely limited in-person visitation. Thus, telephone calls have become even more of "an essential lifeline for connection"—adding to the exigency and importance of the reforms that the Commission adopts today.

#### *C. Interim Interstate Rate Cap Components*

37. In the *2020 ICS FNPRM*, the Commission proposed to adopt permanent interstate rate caps of \$0.14 per minute for all calls from prisons and \$0.16 per minute for all calls from jails. These proposed caps included an allowance of \$0.02 per minute added to provider-related rate caps of \$0.12 and \$0.14 per minute, respectively, to account for the costs correctional facilities incur that are reasonably related to the provision of inmate

calling services. The proposed rate caps generated extensive debate in the record, with providers contending that the available data do not justify any reduction in the existing interstate rate caps of \$0.21 per minute for debit and prepaid calls, and public interest groups suggesting even lower rates than those the Commission proposed. Although collect calls are subject to a separate rate cap of \$0.25 per minute under the existing interim interstate caps, as discussed below, the Commission and the parties on record agree that there is no longer a need to maintain this distinction.

38. After carefully considering the record, including data from the Second Mandatory Data Collection and commenting parties' analyses of those data, and refining its analysis based on record feedback, the Commission takes the following actions. First, as proposed in the *2020 ICS FNPRM*, the Commission eliminates a separate rate cap for all collect calls. Second, the Commission adopts new interim provider-related interstate rate caps of \$0.12 per minute for calling services provided to incarcerated people in prisons and \$0.14 per minute for calling services provided to incarcerated people in larger jails, as proposed in the *2020 ICS FNPRM*. As the Commission explains below, and in recognition of the concerns raised by various commenters, the Commission does not establish new interim rate caps for jails having average daily populations below 1,000. Those facilities remain subject to the maximum total per-minute rate cap of \$0.21. The Commission refrains from adopting new interim rate caps for jails with average daily populations below 1,000, which remain subject to the interstate total per-minute rate cap of \$0.21. Next, the Commission adopts new interim facility-related rate caps associated with site commission payments. Together, these rate cap components result in new lower total interstate rate caps that will remain interim in status, pending a further data collection which the Commission also adopts today in order to facilitate the Commission's adoption of permanent interstate rate caps.

39. Consistent with the *2020 ICS FNPRM*, the new interim interstate rate cap components will apply to all calls that a provider identifies as interstate as well as to all calls that the provider cannot definitively identify as intrastate, as determined through the application of the Commission's traditional end-to-end jurisdictional analysis. Securus asks that the Commission forbear from enforcing the end-to-end analysis reflected in the Enforcement Bureau's

November 2020 Enforcement Advisory to per-minute interstate rates. The Commission declines to do so at this time. As the Commission explains in the Order on Reconsideration published elsewhere in this issue of the **Federal Register**, the end-to-end analysis is, and has been, the generally applicable jurisdictional standard for determining the jurisdiction of a telephone call in the absence of an express Commission determination that some other method is permissible. As the Commission has never expressly permitted another method of jurisdictional classification for inmate calling services calls, the end-to-end analysis continues to apply to those calls. Under this analysis, the jurisdictional nature of a call "depends on the physical location of the endpoints of the call and not on whether the area code or NXX prefix of the telephone number, or the billing address of the credit card associated with the account, are associated with a particular state." Thus, to the extent that a provider cannot determine that the physical endpoints of a call are within the same state, that provider must not exceed the Commission's new interim interstate rate caps for that call. The use of physical endpoints for determining the appropriate rate cap for a call, including related ancillary services charges, does not, however, preclude the use of telephone number or other proxies, where permitted by the Commission or state or local authorities, in determining the appropriate taxing jurisdiction for such calls. It similarly has no bearing on the use of permissible proxies or other good faith estimates for federal or state Universal Service Fund contributions or similar regulatory fees or assessments for jurisdictionally indeterminate calling services.

#### 1. Eliminating Separate Rate Caps for Collect Calls

40. Consistent with the proposal in the *2020 ICS FNPRM*, the Commission eliminates the separate interim rate cap that has applied to interstate collect calls since 2013. The record overwhelmingly supports this action, which recognizes the limited role that collect calls play in today's inmate calling services marketplace and the relatively small, if any, difference in cost between collect and non-collect inmate calling services calls.

41. Under the interim rate caps the Commission first adopted in 2013, interstate debit and prepaid calls are capped at \$0.21 per minute, while interstate collect calls are capped at \$0.25 per minute. In the *2015 ICS Order*, the Commission adopted a two-year phasedown for collect calls, after which

rate caps for those calls were to be the same as those of debit and prepaid calls. The Commission found that the number of collect calls had dropped significantly over the preceding few years and predicted that the number of collect calls "will most likely be at a nominal level in two years." Although this phasedown was vacated by the D.C. Circuit in *GTL* as part of that court's larger vacatur of the *2015 ICS Order*, the court did not criticize the Commission's phasedown of collect calls.

42. In the *2020 ICS FNPRM*, the Commission proposed to eliminate the distinct rate cap for collect calls, given "the absence of any data demonstrating a material difference in the costs of providing these different types of calls." Commenters overwhelmingly support this proposal, with both providers and public interest groups agreeing that there is no longer any need for a separate rate cap for collect calls. Both Securus and *GTL* point out that collect call volumes continue to decline. And commenters agree that there are no longer significant cost differences between collect calls and debit or prepaid calls. Indeed, the record provides no support for a separate rate cap for collect calls, and comments make clear that eliminating the "collect-only" rate cap will benefit all stakeholders by making it easier for providers to administer, and for consumers to understand, rate caps for interstate and international calls.

43. The Commission finds that the lack of cost disparity in providing prepaid, debit, or collect calling services, coupled with the low and ever-diminishing demand for collect calls and the benefits to all stakeholders from having a single cap for all calls from a facility, support ending the distinction between prepaid, debit, and collect calling rates. The Commission therefore eliminates the separate interim cap for interstate collect calls for jails with average daily populations below 1,000 that remain subject to the 2013 interim rate caps. As a result of this change, all interstate calls from jails with average daily populations below 1,000 will be subject to a single, uniform, interim rate cap of \$0.21 per minute. All interstate calls from prisons and larger jails will be subject to the new uniform interim rate caps the Commission adopts today for each type of facility, without regard to whether the interstate calls are collect, debit, or prepaid, as those terms are defined in its rules.

#### 2. Setting a Threshold of 1,000 Average Daily Population for Larger Jails

44. The Commission adopts an average daily population threshold of

1,000 or greater to differentiate larger jails from smaller jails and apply its new interim provider-related and facility-related rate caps to larger jails, while leaving jails with average daily populations below 1,000 subject to the existing total interim rate cap of \$0.21 per minute for all interstate calls. This larger jail threshold is aligned with the approach the Commission adopted in 2015, when it likewise used an average daily population of 1,000 to distinguish between rate cap tiers. In the 2015 ICS Order, the Commission adopted 1,000 average daily population as the larger jail size threshold. As one commenter points out, many of the cost analyses in the record segment jails by reference to the same 1,000 average daily population figure, a fact that supports the Commission's decision to set the average daily population threshold at 1,000 here. Numerous commenters have advanced the 1,000 average daily population figure to segment their own data analyses and resultant proposals, and none have criticized this cutoff as irrational or unduly difficult to administer. Although some commenters have argued that turnover may provide a more accurate indicator of costs, the Commission has not received turnover rate data in the record and must work with the data provided. However, the Commission finds that the cost data available from jails with average daily populations less than 1,000, including turnover and admission rates, deserves further investigation, and specifically seek such data in the Fifth FNPRM the Commission issues today accompanying this Report and Order. Providers shall calculate average daily population in accordance with section 64.6000 of the Commission's rules, which specifies that average daily population 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."

45. The Commission's decision to exclude jails having average daily populations below 1,000 from the new interim caps is based on record evidence suggesting that providers incur higher costs per minute for jails with average daily populations below 1,000 than for larger jails. Securus asserts that "small jails are more expensive to serve than larger jails." Securus points to its cost study showing "a strong and consistent relationship between cost and facility size." Pay Tel also broadly argues that inmate calling services "costs vary substantially based on facility size." More specifically, Pay Tel explains that its "experiences regarding its costs of providing ICS" demonstrate

that costs increase "in terms of jail" average daily population, providing further evidence that providers incur greater costs to serve smaller jails. The Commission agrees with these commenters that, based on the current record, providers appear to incur somewhat higher costs in serving jails with average daily populations less than 1,000 than larger jails and the Commission finds this evidence credible and sufficient to support a cutoff of 1,000 average daily population for distinguishing larger jails from those with average daily populations below 1,000 for purposes of applying the Commission's new interim rate caps.

46. The data before the Commission preclude any specific determination of the extent to which the costs of providing calling services vary with jail size, and the Commission therefore disagrees with the Public Interest Parties' assertion that "size does not impact costs," at least on the basis of this record. For example, the Second Mandatory Data Collection did not collect data on turnover rates so the Commission cannot determine how that variable affects providers' or facilities' costs. Given this, the Commission takes a bifurcated approach with regard to its new interim rate caps for jails. First, because the Commission is convinced that providers' costs of serving larger jails are likely below the industry average for all jails, the Commission uses the available data to set interim provider-related rate caps for larger jails. These interim caps are separate from those the Commission sets for prisons. Second, because the available data do not allow the Commission to quantify the extent to which providers' cost of serving jails with average daily populations below 1,000 exceed the industry average, the Commission defers further rate cap setting with respect to these jails until such time as the Commission is able to gather and analyze additional cost information. In the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**, the Commission seeks detailed information on provider costs associated with serving jails with average daily populations below 1,000. On the record before the Commission, the Commission finds it reasonable and appropriate to exclude these jails from the new interim rate caps it adopts today for interstate calls. As explained in Part III.C.2 above, the Commission also uses the 1,000 average daily population threshold to distinguish larger jails for purposes of the facility-related rate component.

### 3. Accounting for Provider Costs

47. *Deciding to Adopt Separate Interim Interstate Provider-Related Rate Caps for Prisons and Larger Jails.* In the 2020 ICS FNPRM, the Commission found that the reported data showed greater variations from mean costs for jails than for prisons (and therefore a greater standard deviation from the mean for jails than for prisons). A mean is the arithmetic average of numbers in a distribution. A standard deviation is a measure of dispersion calculated as the square root of the average of the squared differences from the mean. These greater variations from mean costs were one reason that led the Commission to propose a higher interstate rate cap for jails than for prisons. After analyzing the record, consistent with the proposal in the 2020 ICS FNPRM, the Commission adopts separate interim interstate provider-related rate caps for prisons and larger jails.

48. As set forth in Appendix B, the Commission's refined analysis suggests that it costs service providers approximately 22% more to provide calling services in jails than in prisons. That analysis also shows greater variations from mean costs for jails. At least one commenter provides credible evidence that providers generally incur higher costs to serve jails than prisons and therefore "support[s] the Commission's proposal to establish separate rate ceilings for prisons and jails." Pay Tel agrees that the evidence demonstrates greater costs per minute for jails than prisons, and explains that its examination of the reported costs of three of the six providers that serve both types of facilities shows that the costs of serving jails are roughly 40% higher. Securus also concludes that, for jails, costs per minute decrease as facility size increases, and that costs per minute for prisons are lower than for jails.

49. Not all commenters agree with drawing a distinction between prisons and jails. The Public Interest Parties point out that some providers have argued that there are no real cost differences between serving prisons and jails and therefore there is no basis for a separate, higher cap for jails. They urge that the Commission moves towards a unitary rate structure that would "eliminate the multi-tier rate structure for jails" and create a "unified rate cap for prisons and jails." Although the record indicates that some jails bear the characteristics the Commission otherwise associates with prisons, on this record the Commission is not persuaded that these situations are the norm, and it finds that, overall, the evidence suggests higher provider costs

at jails than prisons. At the same time, the Commission rejects the notion that it should delay any action until the Commission collects more detailed cost data. The Commission has sufficient record evidence now to set interim rate caps for prisons and larger jails, consistent with its obligations and authority under the Act. The Commission therefore finds it appropriate to set different interstate provider-related rate caps for prisons than for jails on an interim basis. The Commission does not, however, distinguish between prisons and larger jails for purposes of its facility-related rate component designed to recover portions of contractually prescribed site commission payments. As explained in Part III.C.4 below, there is record support that the same facility-related allowance for prisons and larger jails is appropriate, and the Commission proceeds that way on an interim basis. To the extent that the record developed in response to the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**, reveals that the Commission should distinguish between prisons and larger jails, the Commission will revisit that at such time as it develops permanent rate caps.

50. *Methodology.* As with any exercise in cost-based ratemaking, setting reasonable interim interstate provider-related rate caps for inmate calling services requires a determination of the costs providers incur in providing those services. Traditionally, agencies have set regulated rates through company-specific cost-of-service studies that measure the regulated firms' total cost of providing the regulated service using the firms' accounting data. The costs of service include operating expenses (e.g., operating, maintenance and repair, and administrative expenses), depreciation expenses (the loss of value of the firm's assets over time due to wear and tear and obsolescence), cost of capital (the cost incurred to finance the firm's assets with debt and equity), and income and other tax expenses. Regulators often establish rules that specify how costs, including those arising from affiliate transactions, are to be accounted for, apportioned between the firms' regulated operations and nonregulated operations, and assigned to, or allocated among, different jurisdictions and services.

51. The Commission's approach toward regulating inmate calling services rates has been less prescriptive. The Commission, to date, has not adopted accounting rules for calling service providers. Nor has it specified complex rules for directly assigning or

allocating a provider's and its affiliates' costs between their calling services operations and nonregulated operations, or assigning or allocating a provider's calling services costs to or among the providers' contracts or facilities. And it did not require calling service providers to submit cost of service studies requiring each provider to show in detail each step of its costing process.

52. Instead, the Commission has relied on data obtained through Mandatory Data Collections to set reasonable cost-based rate caps for inmate calling services. The Second Mandatory Data Collection, in particular, required every calling service provider to submit detailed information regarding its operations, costs, and revenues, including: (1) Lists of its inmate calling services contracts and the correctional facilities to which they apply; (2) the average daily populations, number of calls annually, and minutes of use annually at each of those facilities; (3) the direct costs of providing inmate calling services on a total company basis and at each of those facilities; and (4) the indirect costs of providing inmate calling services on a total company basis. Direct costs are costs that are "completely attributable" to a particular service such as inmate calling services. Indirect costs are all costs related to a service other than direct costs and include "overhead, depreciation, or other costs that are allocated among different products or services." Determining a company's indirect costs requires a calculation: Subtracting the company's indirect costs from its total costs. Providers were required to provide information about costs in several steps. First, providers had to identify which of their and their corporate affiliates' total costs were directly attributable to inmate calling services and which were directly attributable to other operations. Providers were then required to allocate the remainder of their costs and their affiliates' total costs—the costs identified as indirect costs or overhead—between inmate calling services and other, nonregulated, operations. Providers were then required to allocate the inmate calling services portion of their direct costs to specific facilities but were not required to allocate their indirect costs to specific facilities.

53. In the *2020 ICS FNPRM*, the Commission proposed to use data from the Second Mandatory Data Collection, as compiled into a database by Commission staff, to calculate the costs each provider incurs in providing inmate calling services under each of its contracts for prisons and jails

separately. The Commission proposed to calculate the mean (or arithmetical average) of those costs, add one standard deviation to that mean, and use the resulting sum to determine the provider cost portions of the interstate rate caps. The Commission reasoned that this "mean contract costs per minute . . . plus one standard deviation" methodology would allow the vast majority of providers to recover at least their reported costs under each of their contracts.

54. *Reliance on Data from the Second Mandatory Data Collection.* As proposed in the *2020 ICS FNPRM*, the Commission's interim rate cap methodology begins with the calculation of mean contract costs paid per minute in the provision of calling services to incarcerated people. To perform this calculation, the Commission relies on the 2018 data submitted in response to the Second Mandatory Data Collection, as supplemented and clarified by the providers in response to follow-up discussions with Commission staff, as the Commission proposed in the *2020 ICS FNPRM*. This approach reflects both the robustness and the limitations of the data submitted in response to the Second Mandatory Data Collection. On the one hand, those data provide an unprecedented wealth of information about the inmate calling services industry and individual calling service providers. The reported information allows the Commission to perform sophisticated analyses that help the Commission estimate the providers' actual costs of providing interstate inmate calling services.

55. On the other hand, as the Commission explained in the *2020 ICS FNPRM*, the collected data have certain limitations. First, although the Commission had sought facility-level data in the Second Mandatory Data Collection, in many instances, providers reported data only at the contract level, reflecting the fact that "many providers assess their inmate calling services operations on a contract-by-contract basis, although many contracts include multiple correctional facilities." Given the lack of facility-level data, the Commission proposed to analyze the information on a contract, rather than a facility, basis and sought comment on this approach. Second, the Commission recognized that some providers had interpreted different steps in the cost reporting instructions for the Second Mandatory Data Collection in different ways. The Commission sought comment on the submitted data and asked commenters to identify other data issues for consideration.

56. The Public Interest Parties argue that the 2018 data “provide more than sufficient evidence to support immediate rate reform.” The Commission agrees. As the Public Interest Parties’ expert asserts, variations in internal cost records among providers affect how costs are reported, not the overall level of costs. In other words, the lack of uniformity in cost data reporting need not result in further delay in the Commission’s rate reform efforts. Further, as explained in Appendix A, providers’ reports of call minutes and revenues are likely to be accurate down to the level of the contract. All providers bill on a per-minute basis, and revenue tracking, and thus reported revenues, are also likely to be reliable because providers are incentivized to accurately track them. Accordingly, the Commission finds the reported minutes of use and revenue data to be reliable and suitable for setting interim interstate rate caps.

57. Certain providers argue that the 2018 cost data from the Second Mandatory Data Collection are unsuitable for setting new rate caps. Securus, for example, contends that the Commission should not rely on the 2018 data because providers did not report their costs using a consistent methodology. In particular, Securus emphasizes that because providers were not required to, and did not, disclose how they calculated their direct costs or how they allocated indirect costs between regulated and nonregulated services, “each company’s measure of ‘costs’ is unique to itself and inconsistent with that of every other company.” Pay Tel and its outside consultant highlight “numerous inconsistencies in the manner in which costs were reported” which, they argue, make the data unsuitable for cost-based ratemaking. Pay Tel’s outside consultant points to providers’ differing understandings of how to report direct and indirect costs and the accuracy of reported direct costs based on the chosen allocator for those costs. For its part, GTL finds it unsurprising that “there are differences in the data among [inmate calling services] providers given the different reporting methodolog[ies] because no uniform accounting is required or necessary.” GTL also notes that calling service providers are not subject to Part 32 accounting rules or any other uniform system of accounts. The Commission does not find these concerns sufficient to justify abandoning any reforms at this time, and find that “variations in internal cost records and lack of a common methodology” do not preclude the

Commission from lowering egregiously high interstate rates now on an interim basis while waiting to obtain more reliable and consistent cost data. In sum, the 2018 data from the Second Mandatory Data Collection are the best data available upon which the Commission may, and does, reasonably rely here.

58. The limitations in the cost data identified in the record do, however, warrant a departure from the approach the Commission proposed in the 2020 *ICS FNPRM*. That approach was premised on the Commission’s ability to calculate providers’ collective mean contract costs of providing inmate calling services to prisons and jails with a high degree of accuracy. Based on that premise, the Commission proposed relying on single measures of the industry-mean costs of providing calling services to permanently cap the interstate rates for prisons and jails, respectively.

59. After carefully considering the record, including providers’ criticisms of the approach proposed in the 2020 *ICS FNPRM*, the Commission takes a different approach than the one the Commission originally proposed and rely on the costs providers reported in response to the Second Mandatory Data Collection to develop separate zones, or ranges, of cost-based rates for prisons and larger jails from which the Commission selects the respective interim interstate provider-related rate caps. First, the costs, as reported in response to the Second Mandatory Data Collection, allow the Commission to calculate ceilings—or upper bounds—above which any interstate rate caps for prisons and larger jails would be unreasonably high. Second, the Commission adjusts the reported data to correct for outliers and contracts with reported costs that are significantly higher than other providers. These adjusted data allow the Commission to calculate floors—or lower bounds—below which any interstate rate caps for prisons and larger jails could be perceived as unreasonably low on the current record. These upper and lower bounds thus establish zones of reasonableness from which the Commission selects the interim interstate provider-related rate caps.

60. The approach the Commission takes here is fully consistent with judicial precedent and a logical outgrowth from the approach proposed in the 2020 *ICS FNPRM*. Courts widely recognize that an agency may reasonably rely on the best available data where perfect information is unavailable. Indeed, the Supreme Court has recognized that the available data

may not always settle a particular issue and that in such cases an agency must use its judgment to move from the facts in the record to a policy conclusion. Here, the Commission applies its judgment to the record before it and reach results that rationally connect “the facts found and the choice[s] made.” Importantly, by setting lower bounds that adjust for anomalies in the reported data, the Commission minimizes its reliance on data that the Commission finds inaccurate or unreliable.

61. The Commission recognizes, of course, that its reliance on imperfect data is not ideal, but a lack of perfect data is not fatal to agency action. The D.C. Circuit has held that an agency’s decision should be upheld when from “among alternatives all of which are to some extent infirm because of a lack of concrete data, [the agency] has gone to great lengths to assemble the available facts, reveal its own doubts, refine its approach, and reach a temporary conclusion.” Here, the Commission has undertaken a robust analysis of all the data in the record and fully accounted for why the rate methodology it employs is reasonable, despite some providers’ failure to meaningfully respond to Commission data requests and inaccuracies in their reported data. In the process, the Commission explains its misgivings about reliance on certain data and lays out its rationale for adopting these rate caps as an interim step, with a commitment going forward to collect further data to be used to set permanent rate caps.

62. GTL and Pay Tel claim that the absence of the Commission’s underlying work papers limits their “ability to comment on the methodology” proposed in the 2020 *ICS FNPRM* and prevents them from determining whether the adjustments to the data proposed in that *FNPRM* are appropriate. The Commission finds these assertions to be meritless. The record in this proceeding contradicts these views, as do the comments GTL and Pay Tel themselves offer concerning the Commission’s methodology and treatment of data. Contrary to these providers’ claims, the database on which the calculations in the 2020 *ICS FNPRM* relied was made available to interested parties in this proceeding, subject to the terms of a protective order; and the record reflects that at least two parties have been able to replicate the Commission’s rate cap analysis on their own, on the basis of the data available to them. The Commission also refers to this inmate calling services database as the “dataset.” The Commission made the

underlying data available and specified its analytical approach. The Commission is not required to do more.

63. *Allocation of Indirect Costs Based on Minutes of Use.* Consistent with the approach proposed in the 2020 ICS FNPRM, the Commission's rate cap methodology relies on providers' collective mean contract costs per paid minute of use, plus one standard deviation. Because the instructions for the Second Mandatory Data Collection did not require providers to allocate their indirect costs (including their overhead costs) of providing inmate calling services among contracts, the Commission needs to adopt a mechanism for allocating those costs. These overheads include costs attributable to inmate calling services and to particular contracts, but not reported as such by the provider. In the 2020 ICS FNPRM, the Commission proposed allocating the providers' indirect costs of providing inmate calling services among contracts based solely on relative minutes of use, a method that apportions a provider's indirect costs among its individual calling services contracts in proportion with each contract's share of the total minutes of use reported by that provider. The Commission sought comment on this proposal and on whether a different allocator would more effectively capture how costs are caused. The Commission adopts the proposed minute of use method of allocation for its new interim rate caps as one of only two reasonable allocation methods based on the current record.

64. Parties disagree whether minutes of use provides an appropriate method for allocating indirect costs, with some comments pointing out its shortcomings and others supporting its use. Although several parties argue that minutes of use does not provide an appropriate allocation method, its independent analysis shows that, while imperfect, minutes of use provides the most reasonable allocator given the data before the Commission. Specifically, after examining seven potential allocators—minutes of use, average daily population, number of calls, revenue, contracts, facilities, and direct costs—for allocating providers' indirect costs among contracts, the Commission finds minutes of use both reasonable and preferable to each potential alternative. Although none of these allocators fully capture the reasons for which providers incur inmate calling services costs, minutes of use constitutes the best available allocator under the circumstances because it produces plausible per-minute rates while ensuring that most calling

services contracts would remain commercially viable, even assuming the accuracy of providers' reported costs.

65. The Commission calculated the per-minute caps that would apply under each potential allocator to compare the allocators. The Commission refers to these per-minute caps as "implied rate caps." The Commission's calculations employed the mean contract costs per minute plus one standard deviation methodology proposed in the 2020 ICS FNPRM. For simplicity, the Commission performed these calculations collectively for all facilities, rather than separately for different types or sizes of facilities. The Commission finds that only minutes of use (\$0.149) and number of calls (\$0.208) produce results below the current cap for prepaid and debit calls. In contrast, the implied per-minute rate caps for the revenue (\$0.333), direct costs (\$2.417), average daily population (\$11.114), facilities (\$303.685), and contracts (\$318.636) allocators all suggest that interstate inmate calling services rate caps are presently unreasonably low, a proposition that not even any of the providers has tried to argue. This disparity is one of the reasons the Commission finds that minutes of use and number of calls are the only plausible allocators among the available alternatives. The Commission recognizes, as Securus and Pay Tel point out, allocating indirect costs based on minutes of use results in relatively uniform costs per minute in comparison to the other allocation methods. The Commission also agrees that this relative uniformity will necessarily result in a lower standard deviation from the mean for a minutes of use allocator than for any alternative method. The standard deviation the Commission calculates for minutes of use (\$0.056) is significantly lower than those for each of the other potential allocators. But the implied rate caps for revenue ( $\$0.220 = \$0164 + \$0.056$ ) and direct costs ( $\$0.284 = \$0228 + \$0.0506$ ) would exceed current interstate rate levels if the standard deviation for those allocators were reduced to \$0.056, and the implied rate caps for average daily population (\$0.789), facilities (\$16.485), and contracts (\$18.499) would exceed those levels even without any standard deviation component.

66. Understanding that there is an element of circularity in using a minutes-based cost allocator when setting per-minute rate caps, the Commission further evaluated whether each potential allocator produces per-minute costs that are consistent with the rates currently set by providers. Specifically, the Commission calculated

the percentage of contracts for which the provider reported per-minute revenues that are greater than the per-minute costs allocated to each contract under each allocator. Minutes of use yielded a higher percentage of viable contracts than did any other cost allocator. Minutes of use yielded 87.3% of contracts with per-minute provider revenues greater than their per-minute allocated costs. The next closest allocators are direct costs at 81.6% and number of calls at 81.3%. This confirms that minutes of use is the allocator that is most consistent with provider cost recovery, as it is illogical to assume that providers are entering into a significant number of contracts that are not commercially viable (*i.e.*, that do not allow providers to recover their costs). The Commission therefore finds minutes of use preferable to number of calls and use it in its provider-related rate caps calculations. The comparison of its per-minute cap to per-minute revenues is not subject to the objection that using a per-minute allocator will produce relatively uniform costs per minute in comparison to the other allocation methods.

67. The Commission recognizes that its choice of allocator is affected, in part, by its decision to continue to require providers to charge per-minute rates for inmate calling services. The Commission also rejects most of the cost allocators for additional reasons that are not subject to the objection that using a per-minute allocator will produce relatively uniform costs per minute in comparison to the other allocation methods. For example, use of the facility and direct cost allocator would require throwing out substantial amounts of data, while the remaining data would include egregious flaws, making any resulting cost allocation arbitrary. This critique applies to a more limited extent to average daily population, but it would still be a poor choice relative to the alternatives of call minutes or number of calls. Another example is the Commission's exclusion of the revenue allocator. But changing that rate structure would likely impose significant burdens on providers, and the Commission finds no basis for requiring such a change in connection with its adoption of new interim rate caps. The Commission also cannot meaningfully assess, on the record before it, how different rate structures would affect incarcerated persons and their families. The Commission therefore defers action on alternative rate structures—under which calling services consumers might be charged a predetermined monthly fee for

unlimited calls, for example—pending the development of a more complete record in response to the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**. This reasoning again is not subject to the objection that using a per-minute allocator will produce relatively uniform costs per minute in comparison to the other allocation methods.

68. Some commenters contend that the available data preclude the Commission from allocating providers' costs with sufficient precision to support any changes in interstate rate caps. Pay Tel emphasizes that "the observed inability of many [inmate calling services] providers to track and assign direct costs" results in high levels of indirect costs to be allocated, which makes providers' costs appear more "homogenous" across locations and contracts than is actually the case. The Commission agrees there is some merit in these observations, particularly that the collected data appears to obscure cost differences between prisons and jails. Securus's outside experts are particularly critical of using minutes of use as the only allocator, arguing that "the majority of [providers'] costs, which include connectivity to the facilities, developing and implementing the call platform, on-site equipment and SG&A [(selling, general, and administrative expenses)], do not vary by the number of minutes."

69. The Commission finds that such issues do not require it to postpone reforming its interstate rate caps pending the availability of better data that might allow the Commission to allocate providers' indirect costs in a more cost-causative manner. The Commission is not required to pursue "the perfect at the expense of the achievable." The Commission finds that the better course is to adopt interim interstate provider-related rate caps for prisons and larger jails now, using the available data, while requiring that providers submit more accurate, consistent, and disaggregated data that will allow the Commission to set permanent interstate provider-related rate caps for all correctional facilities that more closely reflect providers' costs of serving individual correctional facilities. As the D.C. Circuit has explained, "[w]here existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information." Consistent with this principle, the Commission chooses "to use the best available data, and to make whatever adjustments appear [

necessary and feasible" to ensure that interstate inmate calling services rates are just and reasonable.

70. The Commission independently rejects the "use of direct costs to allocate indirect costs" and related approaches at this time. Pointing to its own cost-tracking processes, Pay Tel argues that allocating indirect costs based on directly attributable costs would be "not only reasonable and consistent with prior Commission conclusions" but also "consistent with how [inmate calling services] providers incur costs." Although the Commission agrees that allocating indirect costs based on directly attributable costs could yield reasonable results when providers have properly identified their directly attributable costs, the data from many of the providers fall far short of that mark. Indeed, allocation by direct costs would require the Commission to ignore all data submitted by the two providers that reported no direct costs. The providers that did not report direct costs are [REDACTED]. Similarly, this approach also would allocate essentially all of GTL's costs on the basis of bad debt, a measure that bears little, if any, relationship to the reasons GTL incurs costs in its provision of inmate calling services. Alone among providers, GTL reported a bad debt expense as their only identifiable direct cost. The evidence supports no relationship between bad debt expense and cost causation, and the bad debt expense amounts only to [REDACTED], making any related assumptions even more speculative. Accordingly, the Commission finds allocating indirect costs based on direct costs would provide less reliable results than allocating indirect costs based on minutes of use. The Commission likewise rejects the use of facilities to allocate costs, as providers often failed to report costs for individual facilities where multiple facilities were supplied under a single contract. In light of the drawbacks to these approaches, the Commission has a higher degree of confidence in providers' reported minutes of use by contract.

71. The Commission similarly declines at this time to divide indirect costs into "shared costs" and "common costs" and develop separate allocators for each set of costs, as Securus suggests, because the available data do not allow the Commission to make such granular distinctions. The available data do not allow the Commission to analyze or allocate costs on the basis that Securus suggests. What Securus identifies as "common costs" most closely tracks the "indirect costs" reported in the Second Mandatory Data

Collection. The Commission likewise rejects any allocation key based on percentages of total company revenue. The Commission has long disclaimed this allocation methodology because it fails to provide a reliable method for determining costs, given that "revenues measure only the ability of an activity to bear costs, and not the amount of resources used by the activity."

72. *Accurate Analysis Compels Adjustments to GTL's Reported Cost Data.* As the Commission recognized in the 2020 ICS FNPRM, the critical question posed by its reliance on the available data is how to address the various issues reflected in the cost data reported by GTL, the largest provider of inmate calling services, with an estimated market share approaching 50%. One estimate from 2017 placed GTL's market share between 46% and 52.9% before it acquired Telmate, a company whose market share was between 1.9% and 3.1%. The Commission's internal analysis suggests GTL's share is around [REDACTED]. The Commission finds that GTL's cost data does not reflect its actual costs of providing inmate calling services and may overstate those costs. Given GTL's market share, including GTL's cost data as reported in the Commission's calculations for the entire industry, significantly affects the results. The Commission concludes that it must make certain adjustments to GTL's reported data if the Commission is to arrive at a more accurate estimate of industry costs. Courts have upheld the Commission's exclusion or substitution of flawed or inadequate data when the Commission has explained the evidence and demonstrated a rational connection between the facts found and the choice made, as the Commission does here.

73. On a company-wide basis, GTL's reported unit costs, which do not rely on cost allocation, are higher than those of all but one (much smaller) provider, and are nearly [REDACTED] the average of all the other providers excluding GTL. Unit costs are measured as the quotient of reported total costs and reported minutes. This remains true for GTL's allocated costs per minute for prisons or larger jails—both are higher than nearly all other providers' allocated costs, regardless of facility type. Despite being the largest provider, and commanding a disproportionate share of the larger contracts, GTL reports an average contract per-minute cost of [REDACTED], approximately [REDACTED] times larger than its nearest peers in size, Securus and CenturyLink, and more than [REDACTED] times larger than the average contract per-minute costs of the

next largest provider, ICSolutions. These results are inconsistent with the record evidence establishing that providers are able to achieve significant economies of scale. As the largest inmate calling services provider, GTL should be better enabled to spread its fixed costs over a relatively large portfolio of contracts relative to other providers, especially because GTL serves a higher proportion of larger facilities than other providers. Instead, taking GTL's reported costs at face value would imply that it does not achieve economies of scale. The record does not provide any explanation why GTL might incur higher inmate calling services costs than the rest of the industry. GTL's unit costs are also high when compared with the providers that are most like it. GTL's unit costs are nearly [REDACTED] times those of Securus, the second-largest provider, nearly [REDACTED] times those of CenturyLink, and nearly [REDACTED] times those of ICSolutions. Securus's reported unit costs are [REDACTED]; CenturyLink's reported unit costs are [REDACTED]; and ICSolutions' reported unit costs are [REDACTED]. Of equal concern, GTL uniquely reports large losses across all inmate calling services operations, totaling nearly [REDACTED] of GTL's reported costs. GTL's total revenues are [REDACTED] less than its reported costs, suggesting that GTL operates these facilities at a cumulative loss—a result contradicted by GTL's longevity in the market and the depth of its market presence. GTL is the only provider which records making a loss.

74. GTL's accounting practices also require adjustment to its data. Unlike every other provider, GTL reported "bad debt expense" as its only cost directly related to the provision of inmate calling services, though it almost certainly incurs other costs that are causally related to providing inmate calling services. As Pay Tel's expert explains, GTL's reported direct costs "represent only 0.01% of its Total [inmate calling services] costs, effectively reporting a cost structure that is 0% direct and 100% indirect." Compounding this problem, GTL allocated its indirect costs between its inmate calling services operations and its other operations based on the percentages of total company revenue each operation generated, which fails to reflect the purposes for which GTL incurs costs.

75. Considering the impact that this cost data provided by the market's largest provider would have on its analysis, the Commission has repeatedly tried to obtain more accurate and complete data from GTL. These efforts

began with several calls between staff and GTL representatives that sought to obtain a fuller explanation of the composition of the data provided by GTL in response to the Second Mandatory Data Collection. Following from these efforts, on July 15, 2020, before the release of the *2020 ICS Order on Remand*, the Wireline Competition Bureau directed GTL to provide "additional documents and information regarding GTL's operations, costs, revenues, and cost allocation procedures" to supplement GTL's previously filed submissions, and to enable the Commission "to make a full and meaningful evaluation of GTL's cost data and methodology." This directive encompassed 14 separate categories of additional information. GTL's response, however, provided little additional information that would enable the Commission to determine the costs it actually incurs in providing calling services to incarcerated people. Instead, GTL objected to the requests on multiple grounds, routinely asserting that the Bureau sought information that GTL cannot provide and arguing that it does not maintain records that would allow it to respond. These objections included, inter alia, that the Bureau's requests lacked relevance, placed an undue burden on GTL, and were overbroad. Without the requested information, and in light of the issues the Commission describes above, the Commission is unable to take GTL's reported costs at face value in its analyses. Two commenters share its concerns and urge that the Commission adjust GTL's data. Although the Commission recognizes that GTL has not been required to keep, or indeed kept, accounting records that would enable it to isolate the costs it incurs in providing calling services to incarcerated individuals, those facts do not require that the Commission accepts GTL's reported costs at face value. The Commission therefore adjusts GTL's reported cost data with data that more accurately reflect the underlying characteristics of the prisons and larger jails that GTL serves. Specifically, as the Commission explains below, in establishing the lower bounds of its zones of reasonableness the Commission uses a generally accepted statistical tool—the *k*-nearest neighbor method—to replace the data reported for each prison and larger jail contract served by GTL with the weighted average of the data for the three most comparable (*i.e.*, nearest neighbor) contracts served by other providers. The Commission describes this method in greater detail

and show its application to GTL's data in Appendix C, below.

76. *Ancillary Service Costs*. In the *2020 ICS FNPRM*, the Commission observed that its proposed rate cap calculations did not account for revenues earned from certain ancillary services even though providers reported the costs of these services as inmate calling services costs in their responses to the Mandatory Data Collection. The Commission sought comment on whether it should exclude the costs of these services from its rate cap calculations.

77. Based on the record before it, the Commission finds that there is no reliable way to exclude ancillary service costs from its provider-related rate cap calculations at this time. Accordingly, those costs will remain as a part of the industry costs that the Commission uses in its calculations of those interim rate caps. The instructions for the Second Mandatory Data Collection required certain ancillary service revenues to be reported separately, but providers were not required to report their ancillary service costs separately from other inmate calling services costs. Further, providers were not required to separately report costs relating to any specific ancillary service, and no commenter has suggested a way of identifying the providers' ancillary service costs. The Public Interest Parties argue that the Commission should deduct all revenues from ancillary services from the costs that go into its per-minute rate cap calculations. The Commission declines to take this step because doing so would lower the rate caps equally for all providers and therefore disproportionately affect those providers having the lowest ancillary service revenues. As a result, the Commission cannot isolate with any degree of accuracy the costs providers incur in providing ancillary services from their overall cost data.

78. The Commission recognizes that this approach will result in interim interstate rate caps that allow for the recovery of costs incurred in the provision of ancillary services that calling services consumers already pay for through separate charges and fees, a result that substantially increases the likelihood that the Commission's interim caps are too high. The Commission intends to collect detailed data on ancillary services costs from each inmate calling services provider in its next data collection and to use those data to set permanent provider-related rate caps that eliminate this problem.

79. *Implementing the Zone of Reasonableness Approach*. The Commission determines the levels of the

interim interstate provider-related rate caps using a zone of reasonableness approach. In the 2020 ICS FNPRM, the Commission proposed to set separate caps for prisons and all jails at the mean contract costs per paid minute plus one standard deviation, as calculated separately for each of those two categories of facilities. After considering the record, including comments that make clear that limitations in the available data make it impossible for it to estimate true mean contract costs per paid minute with any degree of precision, the Commission finds that a zone of reasonableness approach is particularly well-suited to its task because it will allow the Commission to use different measures of mean contract costs per paid minute to establish separate ranges of rates—one for prisons and another for larger jails—from which the Commission can select just and reasonable interim provider-related rate caps. As a result of its new approach, which differs from the approach proposed in the 2020 ICS FNPRM, the Commission finds that comments critical of the data analysis, including proposed adjustments to data, underlying the rate caps proposed in the 2020 ICS FNPRM are now moot.

80. It is well-established that rates are lawful if they fall within a zone of reasonableness. Precedent also teaches that the Commission is “free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and competing interests.” A zone of reasonableness approach allows the Commission to reconcile, to the extent possible on the record before the Commission, the providers’ and their customers’ competing concerns regarding the rates incarcerated people and those they call pay to communicate. The Commission therefore relies on a zone of reasonableness approach to set rates in this instance, which helps avoid giving undue weight to the assumptions that would lead to either unduly high or unduly low per-minute rate caps.

81. Given the available data, any upper and lower bounds based on those data are necessarily estimates. The Commission finds it likely that its estimates overstate providers’ inmate calling services costs. All providers have an incentive to overstate their costs in their responses to the Commission’s data collections, as this would lead to higher interstate rate caps, thus resulting in both higher revenues and higher profits. In addition, imprecisions in the instructions for the Second Mandatory Data Collection regarding fundamental steps in the costing

process, such as how providers should make sure that their costs of providing inmate calling services exclude all costs properly assignable to their non-inmate calling services operations, enabled providers to inflate their reported costs. The Commission finds that this combination of incentives and reporting latitude almost certainly resulted in some overstatement of the providers’ costs of providing inmate calling services. Additionally, because the instructions for the Second Mandatory Data Collection did not require providers to separate the costs they incur in providing ancillary services from their total inmate calling services costs, the Commission’s bounds include ancillary services costs for which providers separately recover fees and charges under its rules. Each of these factors skews the cost data upwards, resulting in upper and lower bounds that are likely higher than any bounds based on more accurate data.

82. The Commission’s zone of reasonableness approach involves three distinct steps. The Commission begins by using data that providers submitted in response to the Second Mandatory Data Collection to establish upper bounds of potentially reasonable interstate provider-related rate caps for prisons and larger jails, respectively. Because the data the Commission uses in setting the upper bounds significantly overstate the providers’ actual mean contract costs per minute of providing inmate calling services beyond the general factors the Commission has just discussed, the Commission then makes reasonable, conservative adjustments to the reported data and use those data to establish the lower bounds of its zones of reasonableness. The Commission describes these adjustments fully in Appendix C, below. Finally, the Commission relies on its analysis of the record evidence and on its agency expertise to pick, from within those zones, reasonable interim interstate provider-related rate caps for prisons and larger jails. The Commission reiterates that while its zone of reasonableness methodology relies on contract-level data, the Commission applies its interim rate caps to individual prisons and jails having average daily populations of 1,000 or more. For these jails, the data derived from a contract-level analysis likely overestimates actual costs. This is because the analysis incorporates jails having average daily populations lower than 1,000 (which the Commission would expect to have higher per-minute costs than larger jails) when such facilities are encompassed by the same

contract. The Commission is comfortable with this approach for purposes of determining an interim rate cap for jails having average daily populations of 1,000 or more as it errs on the side of being conservative, while also being consistent with providers’ understanding that the average daily population threshold is applied on a per-facility basis.

83. *Determining Upper Bounds for the Zones of Reasonableness.* The Commission finds that the method proposed in the 2020 ICS FNPRM, taking the sum of the mean contract costs per minute plus one standard deviation relative to that mean, provides a reasonable method for determining the upper bounds of the zones of reasonableness for prisons and for larger jails. One standard deviation from the mean of a normal distribution accounts for approximately 68% of the data, with half of the remaining 32% being above the mean and half below the mean, thus creating an additional buffer that makes it more likely that a provider will be able to recover its costs for any particular contract or facility. Under this approach, using the data submitted by all 12 providers, the mean contract cost per minute for prisons is \$0.092, and the standard deviation relative to this mean is \$0.041 per minute, resulting in a mean plus one standard deviation of \$0.133 per minute. The Commission calculates these statistics for prisons after removing the cost-per-minute outlier related to GTL’s contract for [REDACTED]. By comparison, the mean cost per minute for prisons based on the data for the 12 responding providers including this outlier is \$0.149, and the standard deviation is \$0.658 per minute, resulting in the mean plus one standard deviation being \$0.807 per minute. Appendix A explains why the Commission excludes the [REDACTED] contract. Similarly, the mean contract cost per minute for larger jails is \$0.100, and the standard deviation from that mean is \$0.118 per minute, making the mean plus one standard deviation \$0.218 per minute.

84. The Commission finds that these upper bounds overstate, by a wide margin, the providers’ actual costs of providing interstate inmate calling services for two reasons beyond the general effects it recounted above. First, at least two providers, GTL and Securus, calculated the return component of their costs using the prices their current owners paid to purchase the companies, rather than the amounts that they and the prior owners had invested in property used to provide interstate inmate calling services. Under rate-of-return ratemaking, a company’s cost of

service equals a return component (*i.e.*, allowed rate of return times the company's rate base) plus the expenses the company incurs in providing the regulated service. The use of the sale prices of a company as what amounts to its rate base absent a showing specifically justifying that practice is inconsistent with fundamental ratemaking principles. Use of those purchase prices to calculate GTL's and Securus's costs is inconsistent with the well-established principle that the purchase prices of companies that possess market power "are not a reliable or reasonable basis for ratemaking." Instead, the return component of GTL's and Securus's costs is properly calculated using the original cost of the property they use to provide inmate calling services at the point that property was first dedicated to public use through its use in the provision of inmate calling services. And, contrary to GTL's argument, the Commission has long held that payphone calling providers, including inmate calling services providers, possess monopoly power when (as is the case with GTL and Securus) they have obtained the exclusive right to provide calling services to correctional facilities. The Commission reiterates that finding and, to eliminate any possible doubt, apply it to the purchase prices that GTL and Securus used in calculating the return component of their costs.

85. Second, and more significantly, these upper bounds incorporate GTL's costs as reported, even though (1) GTL admits that it lacks the accounting records that it would need to determine its actual costs of providing inmate calling services and (2) GTL's reported costs far exceed those reported by other providers serving comparable facilities. Despite these shortcomings, the data from the providers' Second Mandatory Data Collection responses provide the best available data for determining the upper bounds of the zones of reasonableness. The Commission therefore uses \$0.133 per minute as the upper bound for determining a reasonable interstate provider-related rate cap for prisons and \$0.218 per minute as the upper bound for determining a reasonable interstate provider-related rate cap for larger jails. In establishing these upper bounds, the Commission is well aware that the industry's actual mean contract costs of providing inmate calling services plus one standard deviation are significantly lower.

86. *Determining Lower Bounds for the Zones of Reasonableness.* The Commission finds the approach it uses to determine the upper bounds of the

zones of reasonableness—relying on data from the Second Mandatory Data Collection and calculating the mean cost per minute plus one standard deviation relative to that mean separately for prisons and larger jails—provides an appropriate starting point for determining the lower bounds of the zones. Because of the shortcomings in the providers' reported data, the Commission adjusts those data using generally accepted statistical tools to remove outlier contracts and to replace GTL's reported data with data derived from contracts comparable to those GTL serves. The related assumptions and adjustments are described at greater length below, and in Appendix C, below. Under this approach, the mean cost per minute for prisons is \$0.052, the standard deviation relative to that mean is \$0.012, and the mean plus one standard deviation is \$0.064 per minute. Similarly, the mean cost per minute for larger jails is \$0.065, the standard deviation from that mean is \$0.015, and the mean plus one standard deviation is \$0.080 per minute. These numbers—\$0.064 per minute and \$0.080 per minute—constitute the lower bounds of the Commission's zones of reasonableness for prisons and larger jails, respectively.

87. The construction of the lower bound begins by removing three outlying observations that skew the data and that would otherwise render the mean and standard deviation to be less precise measures of the data's central tendency. The central tendency of a distribution refers to the degree to which data is clustered around a central value, frequently measured by the mean, median, or mode. In general, the data's dispersion (as measured by the standard deviation) and central tendency are the main properties defining a distribution. These three outlier contracts report costs of [REDACTED] per minute for larger jails in Williamson, Texas, San Luis, Arizona, and West Texas, Texas, respectively. The outliers the Commission addresses here were identified using the Grubbs method, a statistical approach the Commission describes at length in Appendix C, below. To put these cost levels in context, [REDACTED] per minute is the highest cost per minute for any contract regardless of facility type or size, and [REDACTED] and [REDACTED] per minute are approximately three times and twice as large as the cost per minute for the next highest larger jail contract. Excluding these three outliers, costs per minute for larger jail contracts range from \$0.03 to \$0.17. As the Commission describes in Appendix A, a single

observation from a prison contract reports a cost per minute of [REDACTED], which the Commission concludes is clearly erroneous and omit in entirety. Nothing in the record supports using such extreme costs to set provider-related rate caps. Further, these contracts would remain outliers, even under alternative methods of outlier identification proposed in the record.

88. Next, the Commission substitutes reasonable surrogates for GTL's reported cost data to address significant and unresolved issues with those data, as identified in the 2020 ICS FNPRM and discussed more fully in this Report and Order. As recounted above, GTL's only reported direct costs for inmate calling services are bad debt costs, although it certainly incurs other direct costs that are causally related to providing inmate calling services. Additionally, GTL's reported total costs per minute are much higher than most other providers' reported total costs per minute, contrary to the Commission's expectation of economies of scale. In fact, GTL's total revenues per minute from prisons are less than its allocated costs per minute, the only provider for which this is true. These issues remain unresolved—and incurable on the record before the Commission—because GTL failed to provide meaningful cost data in its Second Mandatory Data Collection response or in its response to the Bureau's July 15, 2020, Letter, or to suggest any alternative means of assisting the Commission in its efforts to estimate GTL's costs of providing inmate calling services. The Commission finds that the best way to address this situation is to adjust GTL's reported contract-level cost data using the *k*-nearest neighbor method. The Commission describes this method in greater detail and show its application to GTL's data in Appendix C, below. Specifically, the Commission replaces the cost-per-paid-minute data reported for each prison and larger jail contract served by GTL with the weighted average of the data for the three most comparable (*i.e.*, nearest neighbor) contracts served by other providers. To determine a contract's "neighbors," the Commission compares its average daily population, total inmate calling services minutes, total commissions paid, and facility type to all other contracts in its dataset. This approach reasonably preserves the non-cost information GTL reported for the prisons and larger jails it serves, while reducing the likelihood that the cost data for those facilities are overstated to a significant extent. The Commission finds that this approach, in

combination with the removal of outlier observations as described above, provides a reasonable method for determining the lower bounds of the zones of reasonableness.

89. In the 2020 ICS FNPRM, the Commission proposed to reduce GTL's reported costs by 10% in order to address its data reporting issues, an approach the Commission now abandons in light of convincing opposition in the record. Commenters addressing this proposal were nearly unanimous in rejecting it. Some commenters observe that a 10% decrease would fail to resolve all of the issues presented by GTL's reported data, while others argue this approach suffers fundamental methodological flaws of its own. Instead, the Commission relies on the *k*-nearest neighbor method, rather than alternative methods for addressing the deficiencies in GTL's reported data, because the Commission finds it provides the best approach for setting the lower bounds of the zones of reasonableness. In particular, although the Winsor method also would provide a reasonable method for replacing GTL's data with surrogate data, that method would simply replace GTL's outlier data with the next-highest observation, as opposed to the multifactor comparison provided by the Commission's adopted approach. In other words, the Winsor method would adjust costs downward to the next-highest observation without consideration of whether the contract with the next highest costs is similar in any other dimensions, such as minutes of use or average daily population. The Commission finds the *k*-nearest neighbor method's reliance on three comparable contracts makes it a superior tool for addressing the dataset before the Commission because it identifies a greater degree of similarity between observations.

90. The Commission also considered removing all of GTL's data from its lower bound calculations, an approach on which the Commission sought comment in the 2020 ICS FNPRM. The Commission finds this approach too sweeping, however, because it would exclude all of GTL's prisons and larger jails from its analysis. GTL's Second Mandatory Data Collection response includes extensive non-cost information on these facilities, regarding matters such as average daily population and paid minutes of use, that depict the inmate calling services operations of roughly [REDACTED] of all prisons and larger jails, or roughly [REDACTED] of the reported average daily population for those facilities. Excluding this information from its analysis would create a significantly incomplete picture

of the industry, resulting in considerably less accurate estimates of industrywide mean contract costs. Additionally, the remaining contract information from GTL's data provides necessary distinguishing characteristics that informed the Commission's selection of the nearest neighboring contracts.

91. *Determining Interim Interstate Provider-Related Rate Caps for Prisons and Larger Jails.* The upper bound of the zone of reasonableness for the provider-related rate cap for prisons is \$0.133 per minute and the lower bound is \$0.0643 per minute. For larger jails, the upper bound is \$0.218 per minute and the lower bound is \$0.0802 per minute. Based on its analysis of the available information, the Commission finds that \$0.12 per minute will provide a reasonable interim interstate provider-related rate cap for prisons and that \$0.14 per minute will provide a reasonable interim interstate provider-related rate cap for larger jails. Significantly, its analysis confirms that these interim interstate rate caps will allow most, if not all, providers to recover their costs (as reported in their responses to the Second Mandatory Data Collection and allocated among their contracts as described above) of providing interstate calling services to incarcerated people. And, because those fully distributed costs likely overstate the actual costs of providing inmate calling services under any particular contract, the Commission finds it unlikely that any provider will be unable to recover its actual costs of providing interstate inmate calling services under any contract. To the extent that there are some small number of situations where a provider cannot recover its actual costs of providing interstate inmate calling services under the Commission's interim caps, the Commission adopts a waiver process that will allow it to grant relief from those caps if the Commission finds such relief is warranted based on its analysis of data that allows it to more accurately and precisely identify that provider's cost of providing interstate inmate calling services than can be achieved using the data currently before the Commission.

92. A provider-related rate cap component of \$0.12 per minute for prisons is \$0.02 above the midpoint between the upper and lower bounds of the zone of reasonableness (approximately \$0.10). The providers' incentives to overstate costs provide a compelling reason to set the rate cap significantly below that upper bound. The Commission finds that removal of outliers as reflected in the lower bound

number based on its statistical approach to be appropriate as a general matter, given the need to measure the central tendency of the data as accurately as possible. The Commission is reluctant to give this adjustment too much weight at this time, however, because the Commission does not know the precise reason why these outlier estimates are so high. Although the Commission also finds the adjustment to GTL's costs to be fully justified, the Commission is reluctant to place too much weight on this adjustment because this is an empirical approximation relying on the consistency and validity of the contract data reported by all other firms. After closely examining the imperfect data reported by providers that have an incentive to overstate their costs, and after developing the calculation of both of the upper and lower bounds, the Commission finds that an interim provider-related rate component of \$0.12 per minute for prisons will allow providers to recover their actual costs of providing inmate calling services at those facilities, a conservative choice thereby ensuring that the providers will receive reasonable compensation for their services.

93. Likewise, the Commission finds that an interim rate cap of \$0.14 per minute for larger jails will enable providers to recover their costs of providing interstate inmate calling services. In selecting this value, the Commission assigns significant weight to the result from the cost study conducted by Securus's outside consultant. This estimate, suggesting that Securus's cost of serving larger jails is at most [REDACTED] per minute, is based on highly disaggregated cost data and a relatively sophisticated set of cost allocation procedures tailored specifically to the business of providing inmate calling services and appears to be consistent with cost-causation principles. This number is the maximum per-minute cost estimate among the estimates Securus's consultant developed for Securus's larger jails, and the Commission finds that it provides a cushion large enough for providers to earn at least a normal risk-adjusted rate of return. Further, because there are relatively few providers for larger jails, as compared to the larger number of both large and small providers that serve jails with average daily populations less than 1,000, the Commission would expect a small variance in the true per-minute costs of providing inmate calling services at larger jails, relative to the overall variance. A rate cap of \$0.14 per minute provides an even larger cushion,

further ensuring that providers will have the opportunity to recover actual costs.

94. A provider-related rate cap component of \$0.14 per minute for larger jails is just below the midpoint between the upper and lower bounds of the zone of reasonableness (approximately \$0.15), but still well above the lower bound of approximately \$0.08. As with prisons, the providers' incentives to overstate their costs provide a compelling reason to set a rate cap significantly below the upper bound. The Commission again is reluctant to place too much weight on the GTL data adjustment for the reasons discussed regarding prisons. After closely examining the data, the Commission finds that an interim provider-related rate component of \$0.14 per minute for larger jails will enable the majority of providers to recover their actual costs of providing inmate calling services at those facilities. Further, the Commission notes that this \$0.02 differential between the rates the Commission selects for prisons and larger jails approximates the 22% cost differential shown in the record.

95. As the Commission describes in Appendix A, the Commission finds that setting the provider-related rate component at these levels for prisons and larger jails will allow providers at substantially all facilities to recover their reported costs. Analysis of contract revenues and underlying contract characteristics also suggests a significant majority of these contracts would be viable at the Commission's proposed caps. The responses to the Second Mandatory Data Collection provide data for 129 prisons and 182 larger jails. Following the process outlined in Appendix A, the Commission finds that 66 prisons and 15 larger jails reported per-minute costs above the respective interim provider-related rate caps. Looking at these outliers more closely, however, reveals that all but three of these facilities (66 prisons and 12 larger jails) are served by GTL, which lacked the records to accurately determine its costs of providing calling services to incarcerated people. This alone creates doubt as to whether these facilities should be viewed as legitimate outliers, rather than simply illustrations of the issues the Commission observes throughout GTL's reported data. Repeating this analysis after adjusting GTL's cost data using the *k*-nearest neighbor approach used to set the lower bound shows that all of GTL's facilities would have per-minute costs below the interim interstate provider-related rate caps. The remaining facilities (three larger jails) all exhibit per-minute costs

that exceed their per-minute revenues, suggesting that the actual costs of providing inmate calling services to them are lower than the Commission's estimates. Finally, the Commission reiterates that to the extent the actual costs of serving a facility exceed the applicable interim rate cap, a provider may request a waiver using the process set forth in this Report and Order. As indicated in the *2020 ICS FNPRM*, "the Commission has permitted inmate calling services providers to file a petition for a waiver if it believed it could not recover its costs under the Commission-adopted rate caps." The Commission refines its waiver procedure today.

96. The record supports these interim rate cap choices. The cost study presented by Securus's outside consultant estimates that Securus incurs maximum per-minute costs of [REDACTED] to serve prisons and [REDACTED] to serve larger jails, exclusive of site commissions. Although the Commission finds that these figures are overstated to the extent they calculate the return component of Securus's costs using the prices its current owners paid to purchase the company, the study's cost estimates suggest that interim provider-related rates caps of \$0.12 for prisons and \$0.14 for larger jails will provide a cushion large enough for the providers at those facilities to earn at least a normal risk-adjusted rate of return on their capital investment in providing inmate calling services. As the [REDACTED] per minute cost has been specifically developed for providers at these largest jails, and there are relatively few of these providers, the Commission would not expect there to be a big variance in the true per-minute costs of providing inmate calling services at these jails. Although the Commission does not agree with every aspect of this study, the Commission finds that a number of factors support its credibility and that it therefore provides valuable supporting evidence that the rate caps the Commission chooses here provide an adequate interim allowance for differences among providers and markets, relative to the average inmate calling services costs reflected in the data filed in response to the Second Mandatory Data Collection.

97. The Commission's analysis of the mean per-minute revenues from prisons and larger jails further corroborates its choices. As discussed in Appendix A, its revenue analysis indicates that it will be commercially viable for providers to serve the vast majority of prisons and larger jails under the provider-related rate caps the Commission adopts today.

For example, as the Appendix illustrates, approximately 74% of prisons and 65% of larger jails have reported per-minute revenues net of site commissions under those interim caps. Revenues net of site commissions are reported revenues minus reported site commission payments. Because profit-maximizing firms are unlikely to bid for contracts at which they will operate at a loss, this suggests the interim interstate caps will not undermine providers' profitability. The Commission expects these revenues to cover costs of service below \$0.12 per-minute for prisons and \$0.14 per minute for larger jails, because higher costs would make such contracts unprofitable, and providers would have no reason to voluntarily accept such terms. And a large portion of the remaining prisons and larger jails—those with per-minute revenues that are higher than \$0.12 and \$0.14 per minute, respectively—have allocated per-minute costs less than the applicable interim provider-related rate caps, which likewise suggests they will remain profitable under those caps. In total, therefore, the Commission's interim rate caps will allow approximately 81% of all prison contracts and approximately 96% of all larger jail contracts to cover the costs the providers reported in response to the Second Mandatory Data Collection. These percentages would be even higher if the Commission were to exclude the providers' costs of providing ancillary services and otherwise rely on the providers' actual, rather than reported, costs. These percentages are also higher if the Commission allows for the increased call minutes that will likely result because its new interim caps will, by lowering prices, increase call volumes. And these cost recovery figures ignore that all costs are likely overstated, such that there is further reason to believe these percentages would be even higher in practice.

#### 4. Accounting for Correctional Facility Costs

98. Based on the record, the Commission adopts additional new interim rate cap components (the facility-related rate components) reflecting two different types of site commission payments—those required under codified law or regulations and those payments prescribed under negotiated contracts—made to correctional facilities. At the outset, and as explained in greater detail in this section, the Commission emphasizes that the facility-related rate components are interim reforms reflecting the limitations of the record before the

Commission and the current regulatory backdrop. Site commission payments are payments made by calling services providers to correctional facilities and broadly encompass any form of monetary payment, in-kind payment requirement, gift, exchange of services or goods, fee, technology allowance, product or the like. They can be expressed in a variety of ways, including as per-call or per-minute charges, a percentage of revenue, or a flat fee. The 2020 ICS FNPRM proposed to permit providers to recover an additional \$0.02 per minute for all types and sizes of facilities to account for the costs correctional facilities incur that are directly related to the provision of inmate calling services. The Commission adopts a modified version of that proposal based on record evidence that \$0.02 per minute for every facility may not permit recovery of all legitimate facility costs related to inmate calling services, and may not be required at others. For the time being, the Commission declines to adopt defined facility-related rate components for jails with average daily populations below 1,000. Instead, for prisons and larger jails only, the Commission adopts two distinct interim site commission-related rate components reflecting different types of site commissions: Site commission payments that providers are obligated to pay under laws or regulations and payments that providers agree, by contract, to make. In referring to “law or regulation” the Commission means state statutes and laws and regulations that are adopted pursuant to state administrative procedure statutes where there is notice and an opportunity for public comment such as by a state public utility commission or similar regulatory body with jurisdiction to establish inmate calling rates, terms and conditions. The Commission specifically does not intend to include “regulations” for which no formal administrative process occurred prior to adoption, and the Commission also does not intend to include contractual negotiations that are merely approved or endorsed by state or local law. This approach to defining what are, by default, laws or regulations requiring site commission payments guards against the risk of abuse from a broader definition, given evidence that state and local correctional facilities might themselves be able to create so-called ‘rules’ or ‘regulations’ outside of formal process—simply by exercising their discretion regarding site commission payments in a different manner—and thereby evade the analytical differences underlying this

distinction in the Commission’s interim rules. To the extent that a scenario arises that falls outside the Commission’s definition that a provider or correctional institution believes should be treated as a qualifying law or regulation, it is free to seek a waiver where the Commission can conduct a careful case-by-case review to ensure no evasion or abuse is occurring.

99. First, with regard to the former type of site commission, the Commission adopts an interim legally mandated facility rate component that reflects payments that providers make to correctional facilities pursuant to law or regulation that operates independently of the contracting process between correctional institutions and providers. These mandatory payments take varied forms, including per-call charges or prescribed revenue percentages, and may be imposed on calling service providers by state governments through statutes or regulations. Securus argues that this statute is a “general fee provision” that should be treated as a mandatory tax or fee rather than a site commission subject to the Commission’s interim reforms here. As explained above, providers are free to seek a waiver if they believe that a law or regulation should not be treated as a legally mandated site commission but the Commission does not have sufficient information to make particular factual determinations in this Report and Order about any particular state mandated payment. The Commission confirms that its interim rate reforms do not include Mandatory Taxes or Fees as defined in the Commission’s rules. Given the “mandatory” nature of these payments, for the purpose of the interim actions the Commission takes herein and based solely on the current record, the Commission recognizes them as a cost that providers must incur to provide calling services, consistent with section 276’s fair compensation provision. For now, providers may recover the costs of these payments, without any markup, as a separate component of the total permissible interstate and international rate caps the Commission adopts today. In no event, however, can the total rate cap exceed \$0.21 per minute.

100. As with other reforms in this Report and Order, the Commission emphasizes that its adoption of a legally mandated facility rate component is an interim reform that is aimed to balance the need to achieve immediate rate relief in light of the history of this proceeding, the record before it, and the exigent circumstances presented by the COVID–19 pandemic, consistent with the strictures of the D.C. Circuit’s

decision in *GTL v. FCC*. The Commission concludes, for purposes of this interim reform, that adopting a legally mandated facility rate component is consistent with the fair compensation mandate of section 276. The Commission lacks the evidence, however, to determine on a permanent basis whether and what portion of these payments are “legitimately” related to the cost of providing the service. The Commission leaves such determinations to its forthcoming action on the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**.

101. Next, the Commission adopts a contractually prescribed facility rate component that permits providers to recover, as a component of their total per-minute interstate and international calling rates for prisons and larger jails, that portion of such site commission payments that the Commission determines for the purpose of this interim action is reasonably related to the facility’s cost of enabling inmate calling services at that facility. Site commission payments prescribed under negotiated contracts impose contractual obligations on the provider and, in the Commission’s judgment, on the current record, reflect not only correctional officials’ discretion as to whether to request site commission payments as part of requests for proposals, and if so in what form and amount, but also providers’ voluntary decisions to offer payments to facilities that are mutually beneficial in the course of the bidding and subsequent contracting process. The fact that a state law specifically permits certain correctional facilities to recover site commissions from providers but does not mandate such payments does not change the nature of these discretionary payments. Providers may recover up to \$0.02 per minute to account for these facility costs. Where a law or regulation merely allows a correctional facility to collect site commissions, requires a correctional facility to collect some amount of site commission payment but does not prescribe any specific amount, or is not subject to state administrative procedural requirements, site commissions would also fall into the category of a site commission payment prescribed by contract, because the correctional facilities and providers can negotiate, in their discretion, regarding how much the providers will pay in site commissions.

102. To promote increased transparency regarding the total rates charged to consumers of inmate calling services, the Commission requires providers to clearly label a legally mandated facility rate component or a

contractually prescribed facility rate component, as applicable, in the rates and charges portion of a calling services consumer's bill, including disclosing the source of such provider's obligation to pay that facility-related rate component. Providers that make no site commission payments (and thus are not permitted to pass any facility-related rate component on to consumers) are not required to include a facility-related rate component line item on end user bills.

103. Finally, to avoid any confusion, the Commission reiterates that nothing in this section, or any other section of this Report and Order, is intended to result in a higher permissible *total* rate cap for any interstate call from any size facility than the \$0.21 that existed for interstate debit and prepaid calls before today and that continues to apply to all providers for all types of calls from jail facilities with average daily populations below 1,000. During the eight-year period that providers have been subject to the \$0.21 rate cap for all facilities, they have had the ability to avail themselves of a waiver process if they deemed that rate cap to be insufficient to enable them to recover their inmate calling services costs. With the exception of a single temporary waiver request relating specifically to the interim rate caps dating back to 2014, no other provider has sought a waiver of the \$0.21 interstate rate cap claiming that cap fails to permit recovery of that provider's costs at any size facility. The Commission notes that Securus filed a general "me too" waiver request in 2014 asking the Commission to extend Pay Tel's limited waiver to all other providers serving the same size jails. The Commission denied Securus's waiver request without prejudice as Securus failed to make an adequate showing for a waiver to be granted, and also failed to provide sufficient, or any, cost and revenue data to support its claims. In addition, a handful of other waiver requests relating to other sections of the inmate calling services rules have also been filed but these waivers typically related to timeframes within which new regulations associated with ancillary services reforms became effective. The absence of further waiver requests over the past eight years leads the Commission to conclude that \$0.21 is sufficient for providers to recover their costs, including any costs related to site commission payments. Thus, no provider may assess a provider-related rate component and facility-related rate component that, added together, results in a total interstate rate for any interstate

call from any size facility of more than \$0.21. Operationally, providers remain free to impose the legally mandated facility rate component at the level specified by the relevant statute or rule. If the resulting cumulative total rate exceeds \$0.21 per minute, providers would need to charge a lower provider-related rate. Based on its understanding and awareness of the various state statutes or rules that underlie legally mandated facility rate components, the Commission does not expect this to occur, however. Nevertheless, providers that cannot cover their inmate calling services costs under the \$0.21 per minute total maximum rate cap may seek a waiver of the Commission's interim rate caps.

104. As with the provider-related rate caps the Commission adopts today, its decision to allow a \$0.02 additive for contractual site commissions and the full pass-through of legally mandated site commissions pursuant to section 276 up to the \$0.21 cap are interim steps that the Commission adopts in light of the history of this proceeding, the available record, and the exigent circumstances caused by the COVID-19 pandemic, including the related decision by many prisons and jails to prohibit in-person visitation. Nothing in today's decision limits its ability, on a more complete record and with sufficient notice, to reconsider this treatment of site commission payments, and indeed the Commission seeks detailed comment in the Fifth FNPRM on site commissions, including what portion of all site commission payments, if any, actually represent "legitimate costs" connected to inmate calling services.

105. *Background.* The Commission has historically described site commission payments as "a division of locational monopoly profit." Over the past five years, however, the Commission has recognized that site commissions may not always exclusively compensate correctional facilities "for the transfer of their market power over inmate calling services to the inmate calling services provider;" in some instances, site commission payments may serve in part to compensate correctional facilities for costs that the facilities "reasonably incur in the provision of inmate calling services." Although the Commission and the D.C. Circuit each have recognized the distinction between portions of these payments, the Commission agrees with commenters, particularly on this record, that it is "difficult to disentangle which part of the site commission payment goes towards reasonable costs and which

portion is due to the transfer of market power."

106. Although the Commission declined to permit the recovery of any portion of site commission payments to account for facility-related costs in the *2015 ICS Order*, the Commission explained that record evidence suggested that if "facilities incurred any legitimate costs in connection with [inmate calling services], those costs would likely amount to no more than one or two cents per billable minute." In 2016, when the Commission reconsidered its decision to categorically exclude site commissions in the *2015 ICS Order*, it concluded that some facilities likely incur costs directly related to the provision of inmate calling services that may amount to more than one or two cents a minute. The Commission therefore increased the rate caps it had adopted in the *2015 ICS Order* to "better ensure that providers are able to receive fair compensation for their services" by adopting an additive to the 2015 rate caps that differed among facility size. The data and other evidence supporting the 2016 facility-cost additives suggested that per-minute facility costs associated with inmate calling services were higher in smaller facilities than in larger ones, so the Commission adopted a tiered framework for site commission payments based on facilities' average daily populations. These rate tiers mirrored the tiers the Commission had used to establish the permanent rate caps adopted in the *2015 ICS Order*.

107. The D.C. Circuit's 2017 vacatur of the *2015 ICS Order* rate caps in *GTL v. FCC*, based in part on the finding that the Commission's decision to categorically exclude site commission payments from those rate caps was arbitrary and capricious, led the Commission to ask questions in the *2020 ICS FNPRM* aimed at determining "which portions of site commissions might be directly related to the provision of inmate calling services and therefore legitimate, and which are not." Because the revised rate caps adopted on reconsideration in 2016 to provide for the recovery of site commission costs were based on the same methodology the court had vacated in *GTL v. FCC*, the D.C. Circuit also vacated and remanded the *2016 ICS Reconsideration Order*. The *2020 ICS FNPRM* proposed a \$0.02 per minute additive based on staff "analysis of the costs correctional facilities incur that are directly related to providing inmate calling services and that the facilities recover from calling service providers as reflected by comparing provider cost data for facilities with and without site

commissions.” The Commission sought comment on its analysis, including whether it should vary the allowance for site commission payments based on a facility’s average daily population. It also sought comment on whether a \$0.02 per minute allowance would be adequate to cover the costs that jails with average daily populations less than 1,000 incur in connection with the provision of interstate and international inmate calling services. The Commission asked correctional facilities to “provide detailed information concerning the specific costs they incur in connection with the provision of inmate calling services.”

108. *Full Recovery of Site Commissions Is Not Required.* Some providers argue that the Commission must allow for full recovery of all site commission payments because inmate calling services providers “are required to pay site commissions and have no say in the elimination or substantial reduction of such commissions.” The Commission disagrees.

109. The D.C. Circuit held that, because the Commission acknowledged that some portion of some providers’ site commission payments might represent “legitimate” costs of providing inmate calling services, the Commission could not reasonably “categorically exclude[] site commissions and then set the rate caps at below cost.” “Ignoring costs that the Commission acknowledges to be legitimate,” the court explained, “is implausible.” But the court left it to the Commission to determine “which portions of site commissions might be directly related to the provision of ICS and therefore legitimate, and which are not.”

110. Under section 201(b), the Commission has a duty to ensure that “charges” and “practices” “for and in connection with” interstate and international telecommunications services—including inmate calling services—are not “unjust or unreasonable.” As explained, incarcerated people and the people they call have no choice in their telephone service provider. Instead, each correctional facility has a single provider of inmate calling services that operates as a monopolist within that facility. And very often, correctional authorities award the monopoly franchise for inmate calling services based in part on what portion of inmate calling services revenues a provider has offered to share with the facility. Without effective regulation, providers bidding for a facility’s monopoly franchise compete to offer the highest site commission payments, which they

then recover through correspondingly higher rates charged to incarcerated people and their families.

111. As discussed in greater detail below, in view of these market dynamics, and based on the record, the Commission rejects the claim that any and all site commission payments that a provider might elect to offer a correctional facility in the course of contract negotiations for the facility’s monopoly franchise are “real, required costs [forced] on [inmate calling services] providers as a condition precedent to the providers’ ability to offer [inmate calling services].” That claim is at odds with well-established principles of ratemaking. And the providers’ position has no limiting principle. Under their logic, incarcerated people and the people with whom they communicate by telephone may be forced to pay rates for the calling services they use that cover items wholly unrelated to those services. This cannot be reconciled with the Commission’s statutory duty to ensure that incarcerated people and the people with whom they speak are charged “just and reasonable” rates for inmate calling services. The claim that any and all site commission payments are costs reasonably related to the provision of interstate and international inmate calling services is particularly implausible with respect to future contracts. At least where site commissions are not required under formally codified laws or regulations, providers of inmate calling services cannot reasonably contend that they are bound to offer, or agree to pay, site commissions that are uneconomical for them on a going forward basis. The record before the Commission suggests that if, in the wake of this Report and Order, providers of inmate calling services should offer to pay site commissions at levels higher than they can recover through interstate and international inmate calling services rates, that is because they expect to profit from obtaining the franchise at a given facility in other ways (e.g., by recovering the cost of the site commission payments they offer through intrastate inmate calling services rates or through revenue generated by providing other, nonregulated services). Even with respect to existing contracts, the Commission disagrees that any and all site commissions that a provider has agreed to pay are costs reasonably related to the provision of interstate and international inmate calling services. As it discusses above, the Commission’s proceeding on how to regulate rates for

interstate inmate calling services has been underway for many years. Throughout this period, providers have understood that the Commission might seek to bar the recovery of some or all site commissions through interstate rates. Under the circumstances, whatever the providers offered to pay, they offered at their own risk.

112. Neither *GTL v. FCC* nor section 276 of the Act compels a different conclusion. As the Commission has observed, and as the court acknowledged in *GTL v. FCC*, the Commission is entitled “to assess on remand which portions of site commissions might be directly related to the provision of [inmate calling services] and therefore legitimate, and which are not.” Due to the D.C. Circuit’s remand on the issue of site commissions, the Commission declines NCIC’s recommendation that the Commission simply “not disturb site commissions.” To leave the issue of site commissions untouched by the Commission’s actions today would be contrary to the Commission’s mandate to ensure just and reasonable rates under section 201(b) of the Act. And “fair” compensation for providers of inmate calling services, under section 276, does not mean that providers must be able to recover, through rates for interstate and international inmate calling services, revenue-sharing payments that they agree voluntarily to make to encourage a correctional facility to select them as the monopoly franchise holder for inmate calling services (both interstate/international and intrastate) and often other nonregulated services, too.

113. On the present record, the Commission cannot conclude that Commission precedent requires, at least based on current law and policy, that the Commission treat all site commissions *solely* as a division of locational monopoly profits none of which are recoverable through rates, as the United Church of Christ and Public Knowledge urge. The United Church of Christ and Public Knowledge rely on the Commission’s conclusion in the *1999 Pay Telephone Order* that site commissions “should be treated as a form of profit rather than a cost.” As explained above, while the Commission has *historically* viewed site commissions as a division of monopoly profits, it took a different view in later decisions. UCC and Public Knowledge also argue that the Commission cannot “treat the costs of communications providers for incarcerated people differently from the costs of communications providers via payphones when the economic

incentives and factual circumstances are nearly identical and both are governed by the same statute.” As the Commission has recognized since 2002, however, calling services for the incarcerated are “are economically different than other payphone services.” The Commission’s actions here reflect a reasonable approach to responding to *GTL v. FCC* and Commission precedent in the inmate calling services context in light of the current record. For example, in the *1999 Pay Telephone Order* the Commission reasoned that site commission payments are not costs because the ability to offer a site commission payment occurs “only when a particular payphone location generates a number of calls that exceeds the break-even number of calls” thereby producing “additional profit” that can be paid to the location owner. The *1999 Pay Telephone Order* also expressed confidence that providers reasonably could expect there to be locations where they would be allowed to operate payphones without paying locational rent. On the current record, the Commission is not persuaded that the Commission can apply those conclusions regarding locational rents from the traditional payphone context at the time of the *1999 Pay Telephone Order* to site commission payments in the inmate calling service context today given their tension with the Commission’s views regarding the recoverability of certain correctional facility costs in the *2016 ICS Reconsideration Order*, as well as the D.C. Circuit’s rejection of the categorical exclusion of site commission payments from recovery in inmate calling service rates at issue in *GTL v. FCC*. Thus, while the Commission concludes that full recovery of site commissions is not required, the Commission cannot conclude on the current record, and in light of the current legal treatment of site commissions, that no recovery of site commissions is justified. For this reason, and on the record before it, the Commission disagrees with the Public Interest Parties insofar as they suggest that it may be reasonable to fully exclude site commission payments.

114. *Legally Mandated vs. Contractually Prescribed Site Commission Requirements*. On the record now before it and in light of section 276, the Commission sees a meaningful difference between site commission payments in an amount that is prescribed under formally codified laws or regulations and other site commission payments that ultimately are embodied in contracts with correctional facilities or systems.

115. In *GTL v. FCC*, the D.C. Circuit rejected the FCC’s categorical exclusion of site commission payments from costs to be recovered through inmate calling services rates in the regulations under review. In significant part, the D.C. Circuit reasoned:

The FCC’s suggestion that site commissions “have nothing to do with the provision of [inmate calling services],” Order, 30 FCC Rcd. at 12822 (internal quotation marks omitted), makes no sense in light of the undisputed record in this case. In some instances, commissions are mandated by state statute, Rates for Interstate Inmate Calling Services, 27 FCC Rcd. 16629, 16643 (2012), and in other instances commissions are required by state correctional institutions as a condition of doing business with [inmate calling services] providers, 17 FCC Rcd. at 3252–53. “If agreeing to pay site commissions is a condition precedent to [inmate calling services] providers offering their services, those commissions are ‘related to the provision of [inmate calling services].’” Joint Br. for Pet’rs at 21. And it does not matter that the states may use the commissions for purposes unrelated to the activities of correctional facilities. The [inmate calling services] providers who are required to pay the site commissions as a condition of doing business have no control over the funds once they are paid. None of the other reasons offered by the Commission to justify the categorical exclusion of site commissions passes muster.

As the Commission has already discussed when explaining why the Commission is not required under *GTL* to allow the full recovery of any and all site commissions, as some providers contend, the court’s statements rejecting “the categorical exclusion of site commissions” from the rate analysis in the *2015 ICS Order* must be interpreted in the context of the court’s express recognition that it is “[up] to the Commission to assess on remand which portions of site commissions might be directly related to the provision of [inmate calling services] and therefore legitimate, and which are not.” In light of that recognition, the Commission reads the analysis excerpted above as turning on the particularities of the *2015 ICS Order* and its underlying record. The Commission now revisits and revises both its understanding and expectations regarding the operation of the inmate calling services marketplace and its approach to evaluating what nexus to interstate and international inmate calling services is required for a cost to warrant recovery through the rates for those services. The predicates for the Commission’s actions regarding site commission payments in this Report and Order thus differ materially from the predicates underlying the D.C. Circuit’s analysis in *GTL v. FCC*.

116. *More Nuanced Understanding of the Inmate Calling Services Marketplace*. With respect to the inmate calling services marketplace, rather than the two basic scenarios of site commission payments identified by the D.C. Circuit in *GTL v. FCC* based on prior Commission decisions, the Commission identifies three conceptual scenarios where site commission payments can arise.

117. First, site commission payments at a specified level sometimes are mandated by state statute or regulation that operate independently of the inmate calling contracting process. As discussed above, some laws permit—but do not require—correctional institutions to collect site commissions, and others require site commission payments but do not specify any particular level. The Commission does not consider those to fall within category one—instead, they fall within category two and/or three (depending on how the correctional institution approaches the request for proposal process). Although some parties have advocated that the Commission preempt or otherwise prohibit the payment of site commissions mandated by state law, the Commission has not yet taken that step. Consequently, as the law stands today and consistent with section 276, it is reasonable to conclude that neither correctional institutions nor providers can avoid the need for site commission payments in this scenario. As explained above, on the current record and based on current law, the Commission only finds that such site commissions satisfy the requirement for fair compensation to providers under section 276 and leave for another day a complete analysis under section 201.

118. Second, there can be situations where the correctional institution’s request for proposal, or the like, asks bidders to agree to pay site commissions at a specified level. While facilities may include a site commission component in the request for proposal’s description along with other bid “requirements,” the Commission understands that most, if not all, requests for proposals include some form of an “exception” provision that enables bidding providers to explain why they are deviating from the request for proposal’s bidding specifications or requirements, and that gives the issuer the discretion to accept such bids nonetheless. In this scenario, unlike in scenario one, a correctional institution is under no legal compulsion to insist upon receiving site commission payments, or payments at a particular level. If no provider accedes to the institution’s request for such payments, the institution will be constrained to

entertain noncompliant offers if it wants the individuals in its custody to have access to interstate and international calling services. Given the well-documented benefits, for communities and correctional institutions alike, in allowing incarcerated people access to calling services, the Commission does not anticipate that correctional facilities would forgo making such calling services available merely because providers decline to pay site commissions at the facilities' desired levels. Such restrictions or denials based on a lack of site commission payments above and beyond the level needed for correctional institutions to recover any costs they incur in making inmate calling services available also could have legal implications that make them unlikely. The Commission therefore anticipates that correctional institutions will not formally insist on site commission payments above the level required to cover the institutions' own costs if the alternative is to go without inmate calling services (and all the other services typically offered by providers) at the facility. To the extent that providers nonetheless offer site commissions above that level, the Commission regards that as a marketplace choice different in kind from the scenario where site commissions at a given level are required by a statute or rule. Thus, if providers offer site commissions at levels that are not recoverable under the Commission's interstate and international rate caps, the Commission believes that they do so as a matter of their own business judgment. Consequently, the Commission does not regard site commissions under the second scenario as a condition precedent of doing business at correctional institutions.

119. Third, in other situations, no state law compels site commission payments and the correctional institution soliciting bids does not request any specific payment (even if it indicates that offers to pay site commissions will influence bid selection). On the current record, the Commission concludes that whether a provider would have "a realistic chance of winning a contract" without a site commission payment turns not on any inherent feature of the provision of inmate calling services, but on competing bidders' discretionary business decisions informed by a range of regulatory and marketplace considerations that could affect those entities' judgments about which strategies will prove more or less profitable. Indeed, it is increasingly

clear that when providers offer site commission payments as part of their bids, they do so to gain a benefit for themselves, rather than to satisfy a formal precondition of access to a correctional facility. For one, Securus reports that "it has made commission-free offers a standard offering and attempted to renegotiate contracts with many of its correctional facility partners." In addition, a number of jurisdictions have limited or entirely eliminated site commission payments. This undercuts the view that, from the correctional institution's perspective, site commission payments are inherently necessary to allow a provider access to its facilities. Indeed, in San Francisco, incarcerated people and their loved ones pay nothing for their telephone calls—including for site commissions—while the city and GTL have agreed that payment under the contract will not exceed \$1,590,616 for the initial term of three years. As one commenter has explained, the "innovative cost structure" embodied in this contract "better reflects the cost of service paid by the vendor to provide access to phones in all county jails." While the Commission does not know whether there is some portion of the overall contract that goes to facility costs, the limitation on the overall payment under the contract undercuts the notion that correctional facilities view site commissions as required in all circumstances. Further, and most importantly, the fact that incarcerated people in San Francisco still have access to calling services strongly suggests that facilities do not require these types of payments to continue to allow calling services.

120. Accordingly, with respect to scenarios two and three, the Commission rejects any claim that site commission payments are somehow 'required' or determined by the correctional institution: The Commission finds on this record that providers offer such payments voluntarily, in their own business judgment. Whereas some commenters attempt to analogize site commissions of this kind to payments that landowners demand in exchange for granting access to rights-of-way or the like, the Commission concludes that, at most, inmate calling providers appear concerned about a collective action problem that makes providers, as a group, reluctant to limit or omit site commission payments in their bids for fear that competitors fail to do so, and that correctional institutions will select competitors that do offer site commissions (or offer higher site

commissions) instead. A collective action problem of that kind is not sufficient to require that the Commission allow full recovery of site commission payments through end-user rates.

121. *Interim Revisions in the Approach to Evaluating Cost Recovery.* In light of *GTL v. FCC* and the record before it, the Commission considers which costs reflected in site commission payments are so related to the provision of inmate calling services that they should be recoverable at the present time and on the current record in light of section 276 under relevant precedent. As the Commission explains below, the section 276 requirement for fair compensation does not mean a provider is entitled to recover the total "cost" it claims it incurs in connection with each and every separate inmate calling services call. The Commission thus rejects as inapposite attempts to rely by analogy on what the Commission has done in other contexts under different statutory schemes. Modifying the Commission's approach to cost recovery in this manner on this interim basis accounts for the *GTL v. FCC* decision and the legal approach the Commission set out in the *2020 ICS FNPRM*.

122. Prior to the *GTL v. FCC* decision, the Commission evaluated cost recovery in a manner that sought to effectuate its theory of legal authority, which relied on the combination of sections 201(b) and 276(b)(1) of the Act. The Commission described its general approach to inmate calling services cost recovery in the *2013 ICS Order*, which "conclude[d] that only costs that are reasonably and directly related to the provision of [inmate calling services], including a reasonable share of common costs, are recoverable through [inmate calling services] rates consistent with sections 201(b) and 276(b)(1)." Beyond discussing illustrative examples, the Commission did not otherwise elaborate on the framework for evaluating what costs would or would not be recoverable. Applying that approach in the order under review in *GTL v. FCC*, the Commission concluded that "the site commissions [inmate calling services] providers pay to some correctional facilities are not reasonably related to the provision of [inmate calling services] and should not be considered in determining fair compensation for [inmate calling services] calls," going on to quote one party as stating "that site commissions often 'have nothing to do with the provision' of [inmate calling services]."

123. In light of the *GTL v. FCC* decision, it is necessary to update and more thoroughly explain the

Commission's approach to evaluating cost recovery for purposes of these interim reforms. In the *2020 ICS FNPRM*, the Commission did not propose revisiting whether section 276(b)(1) represented a grant of regulatory authority for the Commission to prevent excessive inmate calling services rates. Rather, the Commission properly proceeded based on its authority under section 201(b). In the specific context of whether and to what extent site commission payments should be recoverable costs in interstate and international inmate calling services rates, the Commission sought comment on whether particular approaches would "result in unjust and unreasonably high rates for incarcerated people and their loved ones to stay connected," consistent with the "just and reasonable" standard in section 201(b) of the Act.

124. Given the focus in the *2020 ICS FNPRM* on applying the Commission's section 201(b) authority, it makes sense to evaluate cost recovery—otherwise described as an evaluation of whether the costs are directly and reasonably related to the provision of inmate calling services—under the longstanding principles the Commission has relied upon when implementing section 201(b) in the past. To be clear, the Commission relies on both sections 201 and 276 for its authority to regulate site commissions. As the D.C. Circuit explained in *GTL v. FCC*, these two sections serve different purposes, with section 201 directing the Commission to ensure that interstate rates are just and reasonable and section 276 directing the Commission to ensure providers are fairly compensated. These statutory provisions, while not coterminous, permit the Commission to regulate site commission payments by examining whether such payments are prudently incurred under section 201 and whether such payments provide fair compensation. Under this framework, just and reasonable rates are focused on recovering prudently incurred investments and expenses that are "used and useful" in the provision of the regulated service for which rates are being set. In applying this framework, the Commission considers whether the investment or expense "promotes customer benefits, or is primarily for the benefit of the carrier." The Commission not only has applied this in the context of carriers operating under rate-of-return regulation, but rates set on that basis also were used as the foundation for price caps.

125. *Contractually Prescribed Site Commission Payments*. Given the regulatory backdrop and the state of the

record here, the Commission recognizes that contractually prescribed site commission payments that simply compensate a correctional institution for the costs (if any) an institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people, can, on an interim basis and in light of the current regulatory backdrop, be considered a prudent expense the provider incurs, at least as long as the Commission continues to permit providers of interstate and international inmate calling services to continue to make site commission payments. In *GTL* the court faulted the Commission's "categorical exclusion of site commissions from the calculus used to set [inmate calling services] rate caps," and even the *2016 ICS Reconsideration Order* found that "it is reasonable for [correctional] facilities to expect providers to compensate them for those costs[]" the facilities incur to enable the provision of inmate calling services. Against that backdrop, the record here does not persuade the Commission to reach a contrary conclusion in its analysis under section 201(b). In light of the regulatory backdrop and current state of the record, the Commission likewise finds that contractually prescribed site commission payments that simply compensate a correctional institution for costs an institution incurs to enable access for incarcerated people to interstate and international inmate calling services can, at least at this time, be considered used and useful in the provision of interstate and international inmate calling services. In the *2016 ICS Reconsideration Order* the Commission found that "some facilities likely incur costs that are directly related to the provision of [inmate calling services]," and determined that "it is reasonable for those facilities to expect [inmate calling services] providers to compensate them for those costs . . . [as] a legitimate cost of [inmate calling services] that should be accounted for in [the] rate cap calculations." The current record here again does not persuade the Commission to reach a contrary conclusion in its analysis under section 201(b). While a different record might persuade it to reach a different conclusion in the future, under this record the Commission will treat such payments as prudently incurred expenses used and useful in the provision of interstate and international inmate calling services.

126. By contrast, the Commission finds that contractually prescribed site commission payments do not warrant recovery insofar as they exceed the level

needed to compensate a correctional institution for the costs (if any) an institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people. First, the Commission concludes that such expenses are not prudently incurred. Under Commission precedent, expenses are imprudent if they are excessive. The Commission finds that to be the case here. As demonstrated by its marketplace analysis above, the Commission is not persuaded that a correctional institution would decline to make inmate calling services available to its incarcerated people absent contractually prescribed site commission payments above and beyond any amount necessary to recover the institution's costs to enable inmate calling services to be provided to its incarcerated people. That alone persuades the Commission that such payments are excessive. Separately, the Commission also concludes that the imprudence of such expenses is confirmed by the ongoing regulatory scrutiny and questions about recovery through interstate inmate calling services rates that have surrounded site commission payments since the *2012 ICS FNPRM*. This further bolsters the Commission's conclusion that such site commission payments are imprudent.

127. As an independent, alternative basis for rejecting recovery through interstate and international inmate calling services rates, the Commission finds that contractually prescribed site commission payments, insofar as they exceed the level needed to compensate a correctional institution for the costs (if any) an institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people, are not used and useful in the provision of interstate and international inmate calling services. The used and useful concept is designed, in part, based on the principle that regulated entities "must be compensated for the use of their property in providing service to the public." The Commission does not view site commission payments—whatever their origin—as involving the use of provider property and investment in a manner analogous to the circumstances addressed in the Commission's provider-based rate caps. As a result, even for those site commission payments that the Commission finds recoverable through interstate and international inmate calling services rate caps under its interim rules, the Commission is not persuaded that it should allow more than a pass-through

and instead should go further and provide for providers to make a profit on those site commission payments. Viewed one way, the site commission payments that the Commission finds permissible to recover are akin to exogenous costs—“costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers”—which, in the event of cost increases, result in upward adjustment of price caps without guaranteeing carriers profit on those exogenous costs. The Commission’s permitted recovery of certain site commission payments through interstate and international inmate calling services charges could be viewed as an analogous adjustment to the rate cap the Commission sets for the provider-specific costs. Independently of that precedent, the Commission separately justifies its decision as a matter of the flexibility provided by the “just and reasonable” framework of section 201(b) of the Act under the particular circumstances here. Specifically, the Commission finds it likely that setting providers’ interstate and international rates in a manner that provides for a profit on the providers’ site commission payments is likely to exacerbate the already-perverse incentives of providers and correctional institutions (as well as state or local governments mandating site commission payments at specified levels) to increase the magnitude of site commission payments to the ultimate detriment of customers of interstate and international inmate calling services. By contrast, the Commission is not persuaded that allowing more than a pass-through of the site commission expenses that the Commission finds prudently incurred and used and useful here is necessary to ensure the continued economic viability of the provision of interstate and international inmate calling services. Thus, the Commission concludes that its approach adequately accounts for the use of providers’ property in the provision of interstate and international inmate calling services balanced with the equitable interest of customers of interstate and international inmate calling services. “Equally central to the used and useful concept, however, is the equitable principle that the ratepayers may not fairly be forced to pay a return except on investment which can be shown directly to benefit them.” And it is that element of the used and useful analysis that the Commission finds dispositive here. Under the Commission’s marketplace analysis of contractually prescribed site

commission payments, the Commission is unpersuaded that site commission payments above the level needed to compensate a correctional institution for costs the institution reasonably incurs to make interstate and international inmate calling services available are required to ensure that incarcerated people have access to those services. Instead, the Commission concludes that such payments are a means (sometimes the sole or at least primary means) by which a given provider seeks to overcome its competitors to become the exclusive provider of multiple services, including nonregulated services, at a correctional facility. And the record does not reveal that correctional institutions, in contracting with providers that offer comparatively higher contractually prescribed site commission payments, are somehow benefitting customers of interstate and international inmate calling services as compared to the selection of some other provider. Rather, the Commission concludes here that given the anomalous nature of the inmate calling services marketplace, the primary benefits flow to the chosen provider—which overcame its competitors and now has the exclusive ability to serve the correctional facility—and the correctional facility itself (or the state or local government more generally), which can avail itself of the revenue stream such site commission payments provide, all to the detriment of interstate and international inmate calling services customers.

128. Where site commissions of a particular level are not required under formally codified laws or rules external to the contracting process, providers of inmate calling services cannot reasonably contend that they are bound to offer, or agree to pay, site commissions above the level for which recovery is permitted going forward under the Commission’s rules. In this way, to the extent providers’ concerns stem from a collective action problem in the marketplace, the Commission’s rules could help address that issue. The record before the Commission further suggests that if, in the wake of this Report and Order, providers of inmate calling services should offer to pay site commissions at levels higher than they can recover through interstate and international inmate calling services rates, that is because they expect to profit from obtaining the franchise at a given facility in other ways—*e.g.*, by recovering the cost of the site commission payments they offer through intrastate inmate calling services rates or through revenue

generated by providing other, nonregulated services. While the Commission’s analysis might have particular force in the case of newly entered or renewed contracts, even with respect to existing contracts the analysis above justifies the Commission’s refusal to set rates in a way designed to recover contractually prescribed site commission payments above the level needed for a correctional institution to recover its costs of making inmate calling services available to its incarcerated people.

129. *Legally Mandated Site Commission Payments.* The Commission next conducts the cost recovery analysis for scenario one (referred to for convenience as “legally mandated site commission payments”). The Commission’s analysis begins the same as for contractually prescribed site commission payments. For the same reasons explained above in that context and given the regulatory backdrop, the Commission assumes on the record here and for purposes of this interim reform that legally mandated site commission payments simply compensate a correctional institution for the actual costs (if any) an institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people and are at least plausibly a prudent expense that is used and useful in the provision of interstate and international inmate calling services.

130. The Commission’s analyses of contractually prescribed and legally mandated site commission payments part ways, on the record before the Commission, when it comes to site commission payments insofar as they exceed the level that simply compensates a correctional institution for any costs the institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people—at least up to the level of the site commission payment specified by law or rule. The Commission is not aware of situations where a statute or regulation external to the contracting process requires a specific site commission and the provider nonetheless pays a site commission even higher than such level. Should such a situation occur, the Commission would find such expenses both imprudent and not used and useful for the same reasons discussed in connection with contractually prescribed site commission payments, discussed above. The Commission assumes on this record that making legally mandated site commission payments at the level required by the relevant statute or regulation is a

prudent expense, as the Commission sees no evidence that either the provider or the correctional institution could agree to a lower amount (or no site commissions at all) based on the current record and current law. The Commission does not determine at this time to what extent this expense may impact its ability to ensure just and reasonable interstate rates under the section 201 analysis as a whole, as evaluated based on a different record in the future. And the Commission has not determined, even on this record, that this expense reflects the actual costs associated with the provision of inmate calling services, separate and apart from the legal compulsion for facilities to collect it.

131. For purposes of the interim reforms it makes today, the Commission finds legally mandated site commission payments at the level required by the relevant statute or rule to be used and useful in the provision of interstate and international inmate calling services at least as long as the Commission continues to permit providers of interstate and international inmate calling services to continue to make these site commission payments. The Commission emphasizes that this is a close question, however, and reiterates that the record the Commission develops in response to today's Fifth FNPRM may persuade it to reach a different conclusion when the Commission addresses site commissions on a permanent basis. In a state that has codified a requirement that providers of inmate calling services pay site commissions at a specified level, as allowed by current federal policy but an open question in the attached Fifth FNPRM, facilities have no immediate ability to entertain offers from providers that wish to supply a facility without paying the site commission demanded. And absent further legislative process to amend the governing statute, facilities would appear to have to forgo making interstate and international inmate calling services available if they cannot collect the legally mandated site commission payments. Additionally, by agreeing to pay site commissions that are required by statute, providers do not obtain any benefit or leverage over competing providers. For this reason, too, legally mandated site commissions do not, in the Commission's judgment, reflect the independent business judgment of service providers, based on the current treatment of site commissions. While formally distinct from the Commission's prudence and used and useful analysis, the Commission takes comfort that its

conclusion today with respect to legally mandated site commission payments is unlikely to cause long-term harm. For one, the Commission only adopts interim rules here, and if subsequent events or additional arguments or evidence come forward justifying a different outcome, the Commission can revisit its decision at that time. In addition, on balance the Commission finds legally mandated site commission payments less pernicious than contractually prescribed site commission payments. The legislative process is transparent, and laws are enacted by elected officials who are accountable to their constituents. At least as an interim matter, while the Commission collect additional information on this subject in the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**, the Commission takes comfort in the legislative process as a potential check on the ability of providers and governmental authorities to impose unjust and unreasonable rates for interstate and international inmate calling services. For these reasons, taking into account the court's vacatur in *GTL*, the Commission permits providers of inmate calling services to recover through interstate and international rates—as a line item distinct from the generally applicable interim interstate and international provider-related rate cap component—any site commissions that they pay pursuant to formally codified law or regulation so long as the total per-minute rate that users pay does not exceed the \$0.21 cap, which remains, as it has since 2013, the highest permissible rate for interstate debit and prepaid calls, and by this Report and Order, the highest permissible rate for collect calls too. Operationally, providers remain free to impose a legally mandated site commission facility charge at the level specified by the relevant statute or regulation, consistent with the analysis above. If their resulting cumulative rate otherwise would exceed the current \$0.21 per minute rate cap, they would need to charge a lower provider-related rate to stay within that rate cap under the Commission's rules. As explained above, providers have been operating under the \$0.21 per minute rate cap since 2013, and despite the opportunity to justify a waiver of that cap, no provider has done so. Consequently, the Commission declines to presume, for purposes of establishing new rules, that aggregate interstate and international inmate calling services charges above that level will be justified, although, as

before, a waiver process is available if a provider seeks to make that case.

132. *Determining the Appropriate Contractually Prescribed Facility Rate Component.* The Commission permits providers of prisons and larger jails to recover no more than \$0.02 per minute over and above the otherwise applicable provider-related rate cap to account for site commissions actually paid but not required by formally codified law or regulation. The total rate charged for interstate inmate calling services is also bound by the overall upper limit of \$0.21 per minute that has been effective since 2013.

133. The Commission reaches its decision to adopt a \$0.02 per-minute facility-related rate component for prisons and larger jails on two separate and independent bases. First, this allowance is based on estimates of the portion of site commissions that are legitimately related to inmate calling services based on the methodology first described in Appendix H of the *2020 ICS FNPRM* but since updated with corrected cost data consistent with the record. The Commission continues to rely on this methodology because it most conservatively estimates the site commission allowance by rounding up and applying the same rate to jails and prisons to “ensure [the Commission] do[es] not harm unusual prison contracts.” The Public Interest Parties' expert replicated the Commission's initial analysis and concluded the proposed \$0.02 facility-cost allowance estimate is “reasonable” given the difficulty of disaggregating the portion of site commission payments directly attributable to inmate calling services from the portion that is due to the transfer of market power. Because the Commission's initial analysis, like its updated analysis, continues to be based on imperfect cost data that are not sufficiently disaggregated so as to reflect potential differences in costs for smaller jail facilities as commenters claim, the Commission limits its actions here to only prisons and larger jails as well. As the Public Interest Parties' expert suggests, that methodology reflects the Commission's “reasonable attempt” in light of “data limitations on site commissions” to compare per-minute costs for facilities that are paid site commissions and those that are not as a way to “isolate the gap in costs that could be covered by site commission payments.” This methodology, derived from cost and site commission data that providers reported in response to the Second Mandatory Data Collection, incorporated no correctional facility-provided cost data. Thus, the Commission's proposed methodology

reflected its reasoned judgment as to the best estimation of legitimate facility costs related to inmate calling services in the absence of cost data from correctional facilities themselves. The Public Interest Parties agree that the proposed \$0.02 allowance for all facilities “strikes an appropriate balance between the statutory mandates that [inmate calling services] providers receive fair compensation and that [inmate calling services] rates are just, reasonable and promote access to [inmate calling services] by incarcerated people and their families and support networks.” They explain that the site commission allowance is not designed to necessarily compensate providers for the entirety of all site commission payments, pointing out that would be inconsistent with the *GTL* decision, which recognized as “legitimate” only those site commissions that are “directly related to the provision of [inmate calling services].”

134. The Commission’s updated site commission analysis in Appendix D reflects even lower potential estimates for legitimate facility costs related to inmate calling services. As explained above, the record convinces the Commission that adjustments and corrections to the cost data underlying the *2020 ICS FNPRM* proposals were necessary for determining the provider-related rate component, and the Commission updated its site commission analysis using these revised cost data. This updated analysis supports a facility-related rate component of less than the \$0.02 allowance the Commission originally calculated. Indeed, these updated data show that prison contracts without site commissions had per-minute allocated costs which were on average \$0.008 higher than prison contracts that required the payment of site commissions, whereas the gap for jails was \$0.004. However, the Commission is unwilling to reduce the \$0.02 allowance at this time, especially on an interim basis, given record opposition to that allowance on the basis that it is too low, was not based on facility-provided cost data, and relied on cost data aggregated for the most part at the contract level rather than facility level where size variations would likely be reflected. And, as discussed below, the Commission has independent record data that supports the \$0.02 allowance.

135. Several commenters oppose the \$0.02 allowance as too low for two primary reasons. First, providers criticize the Commission’s methodology for estimating reasonable facility costs in the *2020 ICS FNPRM* insofar as this methodology “fails to consider whether

any characteristics *other* than facility costs might affect whether a particular contract pays a site commission.” Second, the National Sheriffs’ Association and others argue that \$0.02 per minute is inappropriate for smaller jails, and claim that adopting a uniform \$0.02 per-minute allowance for all facilities conflicts with the approach the Commission took in the *2016 ICS Order*, which adopted additive amounts to the rate caps to account for site commissions based on facility size.

136. The Commission agrees that the *2020 ICS FNPRM* methodology resulted in a proposed facility-related rate component that does not distinguish between different types of site commission payments and that may not sufficiently reflect that smaller correctional facilities might face higher facility costs related to inmate calling services than the initially calculated \$0.02. The Commission therefore departs from its initial proposal to apply a specific uniform facility cost allowance cap to *all* facilities for *all* types of site commissions in two ways to address these criticisms.

137. First, the Commission distinguishes between the two distinct types of site commission payments and permit providers, when serving prisons and larger jails, to recover each in a distinct manner. For payments required under codified law or regulation, as explained above, the Commission permits recovery of the full commission amount, without markup, provided that the total interstate rate charged for interstate inmate calling services at those facilities does not exceed the \$0.21 per-minute rate that represents the highest interstate rate cap currently in effect for debit and prepaid calls for any size correctional facilities. Second, for contractually prescribed site commission payments, the Commission adopts a \$0.02 cap on recovery through interstate rates but limit its applicability solely to prisons and larger jails.

138. The Commission limits the applicability of the \$0.02 cap for recovery of contractually prescribed site commission payments to prisons and larger jails, in response to criticism that this value would not be sufficient to recover the alleged higher facility-related costs incurred by jails with average daily populations below 1,000. Likewise, the Commission does not adopt a separate legally mandated rate component for these facilities. Instead, inmate calling services for jails with average daily populations below 1,000 will remain subject only to the single, aggregate \$0.21 per-minute total rate cap. The Commission agrees that the cost data methodology underlying the

calculation of the contractually prescribed facility rate component may have masked facility size cost variations due to the aggregated nature of those data. Given that these data obscure cost differences at the level of provider contracts, it is likely to be even harder to identify the variation, among jail contracts of different sizes, in costs that are in some cases incurred by providers and in other cases incurred by incarceration authorities. Thus, the Commission’s decision to limit adopting a facility-related rate component to only prisons and larger jails on this interim basis, as the Commission does for the provider-related rate component, and to refrain from changing the current interim rate cap of \$0.21 for jails with average daily populations less than 1,000, should address the concern raised in the record about facility size variations in facility-related costs for jails with average daily populations less than 1,000.

139. In addition to comparing providers’ cost data with and without site commissions to determine a conservative estimate of facilities cost from data that was provided solely by providers and not facilities, the second and separate basis for reaching a decision to adopt \$0.02, as the contractually prescribed facility-related rate component for contractually prescribed site commissions applicable in prisons and larger jails, is record data and information reintroduced by Pay Tel and the National Sheriffs’ Association that independently supports a \$0.02 allowance for correctional facility costs at these size facilities. The Commission has previously relied on these data, and thus the Commission concludes they are largely credible insofar as they come from the National Sheriffs’ Association, “which, as an organization representing sheriffs, is well situated to understand and estimate the costs that facilities face to provide [inmate calling services].” Indeed, in the *2015 ICS Order*, while declining to establish any additional rate component to reflect facility costs related to inmate calling services, the Commission, in referring to record evidence at that time that included this same National Sheriffs’ Association data, stated “[w]e note, however, that evidence submitted . . . indicates that if facilities incurred any legitimate costs in connection with [inmate calling services], those costs would likely amount to no more than *one or two cents* per billable minute.”

140. Some commenters contend that the numbers contained in these data support a \$0.02 allowance for prisons and larger jail facilities, while also

lending support for the argument advanced by other commenters that facility-related inmate calling services costs are higher for jails with fewer incarcerated people and that such costs decrease with an increase in facility size. According to these data, facilities with average daily populations of 1,000 and more can have site commission costs as low as \$0.003 per minute, which is up to 85% less than the \$0.02 allowance the Commission adopts here. One reason commenters assert that jails with average daily populations of less than 1,000 may have higher site commission costs is that they have higher weekly inmate-turnover rates and shorter lengths of stay than larger jails. This higher turnover causes such jails to incur much greater costs, including costs related to “setting up an account, funding an account, closing an account . . . administering account funds after an inmate’s release” or “enrolling inmates for voice biometrics.” “On average, jails with an [average daily population] of 2,500 or more inmates held inmates about twice as long (34 days) as jails with an [average daily population] of less than 100 inmates (15 days).” Further, the record suggests that this trend continues as jail size falls even further; e.g., jails with average daily populations below 50 have an “average time in jail of 11.2 days.” Other commenters have found similar cost differentials between larger jails and jails with fewer incarcerated people, regardless of the data sets they rely upon. Some of this cost difference can likewise be attributed to “differences in officer, supervisor and other employee hours spent on various duties; the compensation rates for officers, supervisors and other employees; and differences in minutes of use.” In the Fifth FNPRM published elsewhere in this issue of the **Federal Register**, the Commission seeks comment on the effect of turnover on facility costs. While the Commission recognizes that the data in the National Sheriffs’ Association survey are more than five years old, they are the best data available from correctional facility representatives regarding their estimated costs related to inmate calling services that correctional facilities incur. Although the Commission asked correctional facilities to provide detailed information about their specific costs, nothing more current was submitted. Nevertheless, the Commission finds the survey results for facilities with average daily populations greater than or equal to 1,000 largely sufficient to support its interim \$0.02 allowance for prisons and larger jail

facilities in the absence of more current data.

141. The Commission is concerned, however, that some of the facilities included in the National Sheriffs’ Association survey report an exceedingly high number of hours of correctional facility officials’ time compared to most other reporting facilities. For example, one facility with an average daily population of approximately 1,500 reports approximately 694 total hours per week on inmate calling services-related activities, roughly 400 hours more than the next highest facility with an equal or lower average daily population. Given a total of 168 hours in a week (seven days per week  $\times$  24 hours per day), this equates to more than 17 full-time 40-hours-a-week correctional facility personnel (or four full-time personnel working 24 hours a day every day) devoting all their time to inmate calling services. The Commission does not find these data credible when comparing them to data of similarly sized reporting facilities *that have no incentive* to under-report their hours or costs. For example, more than 80% of the larger jails having the same or less average daily populations as the facility reporting 694 hours report total hours spent on inmate calling services at fewer than 250 total hours a week and, of those facilities, roughly half spend fewer than 100 hours a week on inmate calling services-related activities. The remaining facilities of the same or smaller average daily populations report total hours less than 300, well less than half the amount of time claimed by the facility reporting 694 hours. Indeed the majority of facilities between 1,000 and 1,500 average daily population report average total costs per minute less than \$0.02. Nevertheless, in the absence of any other facility-provided data for purposes of the Commission’s interim rate caps, the Commission concludes that reliance on these data best balances its objectives to ensure just and reasonable rates under section 201 of the Act with the requirement to ensure fair compensation under section 276 of the Act. The Commission therefore concludes that a \$0.02 allowance for the contractually prescribed facility rate component is reasonable for this interim step based on this record until more updated facility-related data are submitted into the record.

142. In adopting the \$0.02 allowance, the Commission declines the Public Interest Parties’ suggestion that the Commission round the \$0.02 figure down to \$0.01 based on the analysis done for the 2020 ICS FNPRM. The Public Interest Parties’ experts argue

that the rounding adjustment is appropriate given typical rounding conventions. In the 2020 ICS FNPRM, the Commission calculated the difference in mean costs per minute for contracts with and without site commissions, which came out to \$0.013. The Commission explained that it rounded this figure upward “to allow for individual contracts for which this matters more than the average contract.” The Commission’s revised calculations reflect even lower numbers as it has noted, yet the Commission sees no reason to adjust its proposed conservative approach here for this interim solution, particularly in light of the reintroduction of the National Sheriffs’ Association facility-related data. To the extent that there are contracts covered by the new interim rate caps that the Commission adopts today where the facility-related costs to provide inmate calling services are higher than its even lower revised calculations or the previously calculated \$0.013, particularly in light of the fact that National Sheriffs’ Association prefers a higher rate for larger jails, the Commission maintains the more conservative \$0.02 rate cap component as its interim contractually prescribed facility rate component at this time.

143. The Public Interest Parties also raise concerns about “double counting costs” in both the provider-related and facility-related rate cap components. As they explain, “[t]he base rate (*i.e.*, the mean plus one standard deviation) is calculated based on the full data set which includes observations of contracts that pay commissions and those that do not.” Facilities that do not require site commissions “already incorporate the unobserved or unreported costs that this adjustment is intended to account for.” Site commission payments have been removed from the calculation to determine the new lower provider-related interim rates the Commission adopts today. Unlike the Commission’s proposal in the 2020 ICS FNPRM where all providers would have been able to recover the \$0.02 rate component for all facilities regardless of whether site commissions were actually paid, under the Commission’s rules adopted today providers that do not pay site commission payments may not assess the separate facility-related rate components on inmate calling services customers. The Commission finds that this addresses the potential double-counting concern raised by the Public Interest Parties. The Commission also rejects the arguments of Prisoners’ Legal Services of Massachusetts that “[t]here

is no need or justification for a two cent markup on telephone rates.” These commenters highlight that “[i]n three of six recently negotiated Massachusetts county contracts, the sheriffs voluntarily eliminated their commissions.” While eliminating site commission payments related to interstate and international inmate calling services altogether may be a laudable objective, on the record before the Commission and taking into account the DC Circuit’s decision in *GTL*, the Commission declines to do so at this time.

144. The Commission also rejects the National Sheriffs’ Association’s request that the Commission establish a rate component of \$0.05 for facilities having average daily populations between 350 and 2,499. The National Sheriffs’ Association’s proposal covers a much greater range of jail facilities than the Commission has determined the Commission can reasonably address based on the current record; accordingly, the Commission declines to adopt its proposal. The Commission is not confident that the data it currently has can reasonably estimate legitimate facility-related costs for smaller facilities. And the Commission’s interim rate components will cover facilities with average daily populations of 1,000 or more—*i.e.*, facilities that the National Sheriffs’ Association’s survey data suggest can accommodate less than the \$0.02 per minute the Commission adopts as an interim measure.

145. Some providers oppose the Commission’s calculated \$0.02 number because it is lower than their average site commission payments across all their contracts. The Commission finds their arguments unpersuasive and contrary to law. For example, *GTL* argues that its site commissions average is [REDACTED] per minute and that the site commissions for [REDACTED] of its jail contracts exceed the Commission’s proposed rate cap. *Securus* explains that in 2018 and 2019, the company incurred approximately [REDACTED] million in site commission expenses, of which roughly [REDACTED] was associated with inmate calling services. *Securus* also highlights that site commissions paid over the same period increased with facility size, ranging from [REDACTED] per minute for the facilities with the fewest incarcerated people to [REDACTED] per minute for the largest facilities. *Securus*’s figures run counter to the claims of other commenters and correctional facility evidence showing that facility costs per calling minute tend to decrease as facility size increases. The problem with both *GTL*’s and *Securus*’s claims is that their figures are based on *total* site

commissions paid, and fail to isolate or otherwise account for only those portions of payments related to reasonable facility-related costs of providing inmate calling services. In other words, their calculations vastly overstate legitimate facility-related costs because they include the full site commission payments, under the mistaken view that they should be permitted to recover the entire amount of site commission payments from incarcerated people or the loved ones they call. The Commission agrees with the Public Interest Parties that such analysis “includes site commission payments that compensate correctional facilities for the transfer of market power from the facility to the [inmate calling services] provider that should not reasonably be included in the cost base.” Given the failure to isolate inmate calling services-related costs from the site commission figures provided by *GTL* and *Securus*, the Commission is not persuaded that they represent reasonable allowances for inmate calling services-related facility costs. Furthermore, these figures include site commission payments that would fall into the category of the legally mandated facility rate component that the Commission separately adopts today that permits providers to recover these site commission payments in a manner other than through the \$0.02 contractually prescribed facility-related rate component. To rely on the *Securus* or *GTL* averages to arrive at a facility-related rate component for prisons and larger jails would necessarily result in double recovery with respect to many of these payments.

146. *Security and Surveillance Costs.* The Commission cannot determine, based on the current record, whether security and surveillance costs that correctional facilities claim to incur in providing inmate calling services are “legitimate” inmate calling services costs that should be recoverable through interstate and international calling rates. The 2020 *ICS FNPRM* sought comment on this issue, and the record is mixed. Several commenters support the exclusion of security and surveillance costs from the base of recoverable inmate calling services costs under section 276, arguing that these tasks are “not related to the provision of communication service and provide no benefit to consumers.” As *Worth Rises* explains, security and surveillance services “used in a prison or jail reflect policy decisions made by administrators that differ dramatically from one state or county to another and even one facility

to another” and are “generally not responsive to any local, state, or federal law requirements, and are thus incredibly varied.” And the United Church of Christ and Public Knowledge argue that costs associated with monitoring, call blocking, and enrolling incarcerated people in voice biometrics systems are security costs not related to “communications functions.” *GTL* and the National Sheriffs’ Association argue that “correctional facilities incur administrative and security costs to provide incarcerated people with access to [inmate calling services]” and that these costs should be recovered through calling rates. The data provided by the National Sheriffs’ Association suggest that correctional facilities do include security and surveillance costs that they assert could reasonably be related to providing calling services. These data and descriptions also suggest a troubling and apparent duplication of some of the same security functions claimed by providers in their costs. The National Sheriffs’ Association also asserts that the data suggest that it is possible to arrive at a per-minute cost to perform these duties.

147. The Commission is skeptical of these data given the wide unexplained variations that appear across some of the facilities. At the same time, the Commission recognizes that the data upon which the National Sheriffs’ Association relies are self-reported costs purportedly incurred in relation to inmate calling services. Those data do not suggest a methodology that would permit the Commission to verify or otherwise isolate legitimate telephone calling-related security and surveillance costs, such as costs associated with court-ordered wiretapping activity, from general security and surveillance costs in correctional facilities that would exist regardless of inmate calling services. As *Worth Rises* emphasizes, isolating and thus being able to quantify calling-related security and surveillance costs is an important step in determining how, if at all, such costs should be recovered through rates.

148. On the present record, however, commenters have not provided the Commission with any plausible method for doing so, much less a methodology for determining recoverable security and surveillance costs, if any, versus non-recoverable costs. In the absence of an ability to distinguish or quantify security cost duplication at this time, the Commission seeks comment on this issue in the Fifth *FNPRM*, published elsewhere in this issue of the **Federal Register**, so the Commission can continue to evaluate whether and, if so, how to exclude these costs from

interstate and international inmate calling services rates.

149. *Takings*. In *GTL v. FCC*, the DC Circuit directed that the Commission address on remand whether “the exclusion of site commissions . . . violates the Takings Clause of the Constitution because it forces providers to provide services below cost.” Consistent with that directive, the 2020 *ICS FNPRM* sought comment on the takings issue with respect to site commission payment cost recovery. The Commission indicated it did not believe that there were any potential taking concerns arising from the rate cap proposals in the 2020 *ICS FNPRM*. The Commission finds that the Takings Clause is not implicated by the actions it takes today in adopting separate and distinct facility-related rate components that providers may recover.

150. As an initial matter, the interim rate cap reforms the Commission adopts in this Report and Order with respect to site commission payments are based on a cautious, data-driven approach to lowering total interstate rate caps, carefully balancing the needs of providers to receive fair compensation while ensuring just and reasonable rates and practices. The D.C. Circuit’s concern about takings due to the categorical exclusion of any portion of site commission payments in the 2015 *ICS Order* is obviated by the Commission’s two-part facility-related rate component mechanism.

151. As the Supreme Court has recognized, the “guiding principle has been that the Constitution protects utilities from being limited to a charge for their properly serving the public which is so ‘unjust’ as to be confiscatory.” As a general matter, “[r]ates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called ‘fair value’ rate base.” In making this evaluation, “it is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.” Whether a given rate is confiscatory “will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return.” In evaluating the “total effect” of a rate on a company, courts do not consider the

profitability of a company’s nonregulated lines of business. Carriers face a “heavy burden” to prevail on a takings claim and must demonstrate that a rate “threatens [the carrier’s] financial integrity or otherwise impedes [its] ability to attract capital.”

152. Considered in their totality, the Commission’s interim per-minute provider-related rate caps and allowances for site commissions do not threaten providers’ financial integrity such that they could be considered confiscatory. The rate caps and site commission allowances are based on data supplied by providers and, as applicable to site commissions, correctional facilities. Neither correctional facilities nor providers have incentives to understate their costs in the context of a rate proceeding, lest the Commission adopts rates that are below cost. Indeed, the manner in which these cost data were collected gave “providers every incentive to represent their [inmate calling services] costs fully, and possibly, in some instances, even to overstate these costs.” Thus, there is no reason to believe that the data understate the actual costs of providing interstate and international inmate calling services.

153. Further, as the Commission observed in 2015, “[t]he offering of [inmate calling services] is voluntary on the part of the [inmate calling services] providers, who are in the best position to decide whether to bid to offer service subject to the contours of the request for proposal. There is no obligation on the part of the [inmate calling services] provider to submit bids or to do so at rates that would be insufficient to meet the costs of serving the facility or that result in unfair compensation.” And unlike the rate caps adopted in 2015, the Commission’s new interim rate framework includes an explicit allowance for site commission payments. Considering these circumstances, the Commission concludes that the “total effect” of its interim rate regime is not confiscatory and reject arguments that the reforms adopted here will result in unconstitutional takings.

154. The Commission’s actions also do not constitute a *per se* taking as they do not involve the permanent condemnation of physical property. Nor do the Commission’s actions represent a regulatory taking. The Supreme Court has stated that in evaluating regulatory takings, three factors are particularly significant: (1) The economic impact of the government action on the property owner; (2) the degree of interference with the property owner’s investment-backed expectations; and (3) the

“character” of the government action. None of these factors suggest a regulatory taking here.

155. First, the interim steps the Commission takes with respect to inmate calling services rates including site commission payments are unlikely to have adverse economic impacts on providers. Providers have a waiver mechanism available to them should they find that in limited instances, the rate cap components do not cover the legitimate costs of providing inmate calling services. And, as explained above, the Supreme Court has long recognized, when a regulated entity’s rates “enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed,” the company has no valid claim to compensation under the Takings Clause, even if the current scheme of regulated rates yields “only a meager return” compared to alternative rate-setting approaches.

156. Second, these interim actions do not improperly impinge on providers’ reasonable investment-backed expectations. The Commission has long been examining how to address inmate calling services rates and charges and has taken incremental steps to address areas of concern as they arise. Various proposals, especially those targeting rate reform, have been raised and extensively debated in the record. Given this background, the Commission is not persuaded that any reasonable investment-backed expectations can be viewed as having been upset or impinged by its actions here.

157. Third, the Commission’s actions today substantially advance the legitimate governmental interest in protecting incarcerated people, and the familial and other support systems upon which they rely through telephone service, from unjust and unreasonable interstate and international inmate calling services rates and charges. This is an interest that Congress has required the Commission to protect. Thus, the Commission’s actions do not compel a physical invasion of providers’ property, but merely “adjust[] the benefits and burdens of economic life to promote the common good” by ensuring that providers are fairly compensated while also directly protecting the interests of ratepayers and, indirectly, the broader public.

158. *Recovering Facility-Related Rate Components on Consumers’ Bills*. Having adopted the two aforementioned distinct facility-related rate components today to account for payments required under codified law and the Commission’s reasonable estimate of

legitimate correctional facility costs, the Commission also finds it necessary to ensure increased transparency in the rates and charges imposed upon incarcerated people and their loved ones for interstate and international inmate calling services. Under its interim rules, the Commission adopts different caps on the facility-related rate component of interstate and international inmate calling services depending on the circumstances that led to the site commission payment. In contrast to someone's status as an inmate of a prison versus a jail, or of a jail of a particular size—for which the Commission also has differing rate caps—the Commission finds it less likely that customers of interstate and international inmate calling services will know the circumstances that led to a given provider's site commission payment. Absent information separately breaking out the facility-related rate component of the service charge, and some identifier tying the charge to the relevant category under the Commission's rules, customers will be substantially less able to evaluate their bills and monitor whether they are receiving the protections of Commission rate caps to which they are entitled. To this end, the Commission exercises its authority to require providers choosing to recover the facility-related rate components in their total interstate or international inmate calling services rates to include those rate components separately on inmate calling services bills. The Commission believes that the requirements the Commission adopts advance truthfulness and accuracy in billing, consistent with the Commission's existing Truth-In-Billing rules. To the extent that the requirements of these rules differ from the requirements of the Commission's Truth-In-Billing rules with respect to the detail and specifications required or otherwise, the Commission makes clear that these more specific billing requirements for the facility-related component of interstate and international inmate calling services charges are controlling over the more general Truth-In-Billing rules to the extent of any divergence—but only to that extent. Providers thus must treat the Commission's interstate and international inmate calling services disclosure requirements as controlling within their self-described scope and otherwise comply with the more general Truth-In-Billing rules. The facility-related rate components on such bills should contain the source of the obligation underlying that component, the amount of the component on a per

unit basis, and the total interstate or international rate component resulting from the facility-related rate component charged for interstate or international calls and reflected on bills. The Commission provides more detailed guidance on the mechanics of implementing these requirements later in this section.

159. The Commission has previously found that it has the 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 communications service.” In the *2013 ICS Order*, the Commission used this authority to address billing-related call blocking, explaining that “the Commission and the courts have routinely indicated that billing and collection services provided by a common carrier for its own customers are subject to Title II” of the Act. And, in adopting ancillary service charge rules in the *2015 ICS Order*, the Commission reaffirmed its jurisdiction to regulate the manner in which providers bill and collect charges associated with inmate calling services. Because these facility-related rate components concern the “manner” in which calling service providers bill for their interstate and international services, the Commission concludes that it has the necessary authority to require implementation as specified herein.

160. The strong public interest in facilitating greater transparency with respect to site commission payments likewise justifies the disclosure of facility-related rate component information. Given that incarcerated people and their loved ones ultimately bear the burden of these payments through the total per-minute rates charged by providers, there is a strong interest in transparency regarding the charges that incarcerated people and their families bear. Absent its requirements the Commission finds a substantial risk that billing information will lack the detail about correctional facility-related charges necessary for consumers to ensure they are receiving the protections of the Commission's rate caps in that regard.

161. Calling service providers in this proceeding have similarly encouraged the Commission to account for the effect of state law in assessing site commission payments. *GTL* explains that there are “significant variances in site commission requirements,” some of which are driven by state law. And Securus points to variations in state laws governing site commissions that “might affect whether a particular contract pays a site commission.”

Securus expressly encourages the Commission to treat site commissions “separate and distinct from the provider base rate.” Securus highlights that “[t]his would allow the Commission to set a lower rate ceiling based on non-commission costs, and would increase public transparency of [inmate calling services] provider costs.” The Commission agrees. By accounting for legally mandated and contractually prescribed site commissions separately, the Commission is better able to account for certain variances in site commission costs and increase transparency to end users with respect to what portion of their total interstate and international rates relate to site commission payments. The Commission also declines NCIC's request that rather than permit site commission allowances as an additive to the provider-related rate components, the Commission instead requires providers to make these payments “from their revenue generated at the new caps.” The Commission is unable, on the record before it and for purposes of the interim reforms the Commission makes today, to take this step.

162. The Commission's treatment of correctional facility-related costs as a separate and distinct rate component from the lower provider-related interim rate caps the Commission adopts is consistent with *GTL v. FCC*. While the D.C. Circuit rejected the “categorical exclusion” of site commission costs from “the calculation used to set [inmate calling services] rate caps,” nothing in the court's decision dictates how the Commission implements recovery of such costs. The facility-related rate components the Commission adopts herein merely disaggregate correctional facility-related costs from provider-related costs and direct providers to recover these costs through separate interim rate components.

163. *Mechanics of the Legally Mandated Facility Rate Component*. For providers subject to site commission payments required under codified laws or regulations, the Commission permits providers to pass through to consumers this cost of providing inmate calling services, without any markup, capped at the maximum total interstate rate cap currently in effect for debit and prepaid calls from any size correctional facilities. Providers may never charge a total rate for interstate calls that exceed \$0.21, the highest interstate rate cap permissible as a result of today's actions. As the Commission indicated, nothing the Commission does today increases any interstate calling rate above the \$0.21 rate cap in effect prior

to today for prepaid and debit calls from all sizes and types of facilities. The Commission agrees, for present purposes, that site commissions prescribed under formally codified laws are meaningfully distinguishable from contractually negotiated site commission payments. At least on the current record, while the Commission collects additional information through today's Fifth FNPRM, the Commission considers it prudent to regard site commissions of this type as reasonably related to the provision of inmate calling services.

164. Consistent with the Commission's transparency objectives, providers shall: (1) Specify the state statute, law, or regulation adopted pursuant to state administrative procedure statutes where there is notice and an opportunity for public comment that operates independently of the contracting process between correctional institutions and providers giving rise to the mandatory nature of the obligation to pay; (2) disclose the amount of the payment on the applicable per-unit basis, e.g., per-call or per-minute if based on a revenue percentage; and (3) identify the total amount of this facility rate component charged for the interstate and international calls on the bill. For example, a provider serving a local jail in Tennessee is required to collect \$0.10 for each completed telephone call. In issuing an inmate calling services customer bill, that provider must clearly label the legally mandated facility-related rate component, specify section 41-7-104 of the Tennessee Code as the relevant statutory code section giving rise to the obligation, specify the amount as \$0.10 per call, and include a line item indicating the total charge to the customer resulting from multiplying the \$0.10 per call charge by the number of interstate and international calls. Similarly, for a statutory obligation to remit a percentage of gross revenue, like the 40% reflected in the Texas code, the Commission requires a provider to identify the Texas code section, specify that it requires an additional 40% charge on top of the applicable per-minute interstate or international provider-related rate component, and include a line item reflecting how much of the total interstate and international rate charges are attributable to the mandatory 40% charge. The Commission recognizes the possibility that not all mandatory site commission payments may be easily expressed as a percentage of revenue or easily converted to a per-call or per-minute rate. Under these circumstances,

providers must use their best judgment to comply with the Commission's billing-related disclosure obligations to reflect the legally mandated rate component in the manner the Commission prescribes for interstate and international calls on their inmate calling services customer bills. Providers are not required to use the terms "legally mandated facility rate component" or "contractually prescribed facility rate component," but may do so if they choose. Other terms may be appropriate as long as providers clearly label the facility-related rate components. The Commission directs the Bureau staff to assist with questions that may arise on a case-by-case basis should providers encounter difficulty implementing the Commission's billing transparency requirements.

165. *Mechanics of the Contractually Prescribed Facility Rate Component.* Providers subject to contractually prescribed site commissions pursuant to contract with correctional facilities or agencies may charge up to \$0.02 per minute to recover those discretionary payments. Should a provider's total contractually prescribed site commission payment obligation result in a lower per-minute rate than \$0.02 per minute of use, that provider's contractually prescribed facility rate component would be limited to the actual amount of its per-minute site commission payment up to a maximum of \$0.02. An illustration may prove helpful. If the provider charges \$0.12 per minute for a call from a larger jail and the correctional facility imposes a 10% site commission payment obligation on all gross revenue, the provider would be required to pay the correctional facility \$0.012 (an amount lower than \$0.02). In such a case the provider is *only* able to charge a contractually prescribed facility rate component of \$0.012 rather than the full \$0.02 amount. For this reason, providers must calculate any contractually prescribed facility rate component to three decimal points for all intermediate calculations occurring before the total amount of such charges related to interstate and international calling are determined. Similar to the requirements for the Commission's legally mandated rate component, should providers decide to recover this discretionary amount from their interstate or international calling customers, they must clearly label the rate component on their bill and indicate that this rate component is required by the correctional facility per contract. They must also show this rate component charge as an additional (up to \$0.02, as

applicable) per minute rate component on top of the applicable provider-related per-minute rate component, and then compute the total amount attributable to the \$0.02 rate component charged to the end user for that call, determined by multiplying \$0.02 by the number of interstate and international minutes reflected on that bill. To the extent providers believe they are unable to recover their costs through the interstate and international rate components the Commission adopts today, they may seek waivers through the waiver process the Commission also adopts today. IC Solutions requests that the Commission require providers to list in-kind commissions on consumer bills because "differential treatment based on the form of commissions distinguishing monetary from all other forms will lead to gold-plating and limitations on competition." The Commission declines to do so. Instead, consistent with the Commission's broad definition of site commissions in section 64.6000(t), the Commission makes clear that the \$0.02 allowance for the contractually prescribed facility rate component reflects *any* type of site commission or compensation, whether monetary or in-kind, that is required to be paid in this situation. The Commission's focus on consumer transparency here means that consumers need to know what they are paying to cover any type of consideration that the provider is paying, giving, donating, or otherwise providing to the facility.

166. Finally, NCIC Inmate Communications (NCIC) asks the Commission to clarify that the Commission's \$0.02 allowance "does not prohibit the payment of additional site commissions should the inmate calling services provider and correctional facility so negotiate." The Commission confirms that the \$0.02 figure does not prevent or prohibit the payment of additional site commissions amounts to correctional facilities should the calling services provider and the facility enter into a contract resulting in the provider making per-minute payments to the facility higher than \$0.02. All the Commission does here is limit the providers' ability to recover these commissions to \$0.02. Consequently, the Commission rejects NCIC's assertion that the \$0.02 allowance could raise Tenth Amendment concerns "by infringing on a state's right to require or permit site commissions." With respect to state prescribed statutory or legal obligations, the Commission allows recovery for such mandatory site commission payments as described herein, leaving

states free to require them as they wish. As the Public Interest Parties correctly highlight, the Commission's actions do not "affect a state's ability to require or permit site commissions." The Commission's recognition here that existing site commission payment obligations may contain legitimate facility-related costs is not an invitation for correctional facilities not currently incorporating these discretionary payments into their bidding and contracting process to do so in the future. Indeed, in the Fifth FNPRM, the Commission seeks comment on whether providers should be prohibited from entering into any correctional facility contract that requires the payment of site commission payments with respect to interstate and international inmate calling services pursuant to the Commission's authority under section 201(b) of the Act.

#### 5. Waiver Process for Outliers

167. The Commission readopts and modifies the waiver process applicable to calling service providers and codify this process in its inmate calling services rules. The Commission reaffirmed its waiver process for inmate calling services providers in the *2015 ICS Order*. These portions of the *2015 ICS Order* were left unaltered by the *GTL v. FCC* court's 2017 vacatur. The *2020 ICS FNPRM* proposed to adopt a modified waiver process to better enable the Commission to understand why circumstances associated with a provider's particular facility or contract differ from those at other similar facilities it serves, and from other facilities within the same contract, if applicable. The record, while not robust on this issue, generally supports the Commission's proposed waiver process modifications. For instance, *GTL* agrees with the Commission's proposal to apply the waiver process on a facility-by-facility basis rather than at the holding company level as required under the present rules. Significantly, no commenter opposes the proposed waiver process modifications.

168. A waiver process provides an important safety valve for providers that may face unusually high costs in providing interstate or international inmate calling services at a particular facility or under a particular contract that are otherwise not recoverable through the per-minute charges for those services and through ancillary service fees associated with those services. Such a process helps the Commission ensure that providers' rates for interstate and international inmate calling services and ancillary services are not unreasonably low within the

meaning of section 201(b) of the Act and also is essential to the Commission's ability to ensure that providers are fairly compensated for each and every completed call, as section 276(b)(1)(A) of the Act requires. Accordingly, the Commission establishes a modified waiver process requiring providers of inmate calling services that seek waivers of the Commission's interstate or international rate or ancillary fee caps to do so on a facility-by-facility or contract basis, consistent with the Commission's proposal in the *2020 ICS FNPRM*. The Commission similarly modifies its waiver process to specifically permit providers to seek waivers of the international rate caps the Commission adopts in this Report and Order. The Commission has previously delegated authority to the Bureau to review and rule on petitions for waiver of its caps for inmate calling services, and the Commission reaffirms that delegation of authority today.

169. Throughout the course of this proceeding, various parties have argued that reductions in inmate calling services rates would threaten their financial viability, imperiling their ability to provide service, and risking degraded or lower quality service. The Commission finds that these claims are best handled on a case-by-case basis through a waiver process that focuses on the costs the provider incurs in providing interstate and international inmate calling services, and any associated ancillary services, at an individual facility or under a specific contract. The Commission finds these levels of analysis to be the most appropriate because they permit the evaluation of detailed information about individualized circumstances that are best measured at those disaggregated levels of operations, unlike its prior waiver process which was based at the holding company level. This approach also recognizes that in some instances the circumstances at a particular facility may prevent the provider from recovering its costs of providing interstate and international inmate calling services and associated ancillary services under the Commission's rate and ancillary service fee caps, while in other instances circumstances applicable to all facilities covered by a contract may prevent such cost recovery. To the extent any provider desires to cease serving a facility or facilities because it determines that it is no longer an economically attractive business operation, correctional facilities and incarcerated people need not fear an abrupt disruption or cessation of service, as some providers

suggest could occur. If an inmate calling services provider seeks to discontinue offering service at any facility, it would first need to obtain authority from this Commission pursuant to section 214 of the Act, a provision which serves to ensure that customers of any telecommunications services provider have alternative service options available to them prior to the carrier discontinuing its service at any facility. Moreover, based on the contractual arrangements between the relevant correctional facility and provider, the inmate calling services contract would likely be transferred to another provider to ensure continuity of service for the incarcerated people residing in the facility in question, a transfer which also would require prior approval from the Commission pursuant to section 214 of the Act.

170. As with all waiver requests, the petitioner bears the burden of proof to show that good cause exists to support the request. Any inmate calling services provider filing a petition for waiver must clearly demonstrate that good cause exists for waiving the Commission's rate or fee caps at a given facility or group of facilities, or under a particular contract, and that strict compliance with the Commission's rate or fee caps would be inconsistent with the public interest. The Commission does not expect the Bureau to grant waiver requests routinely. Rather, the Commission expects the Bureau to subject any waiver requests to a rigorous review. Relief would be granted only in those circumstances in which the petitioner can demonstrate that adhering to the Commission's rate or fee caps would prevent it from recovering its costs of providing interstate inmate calling services at a particular facility or group of facilities, or pursuant to a particular contract. Moreover, the Commission agrees with commenters that suggest that the interim rate reform adopted in this Report and Order should minimize the need for providers to avail themselves of the Commission's waiver process.

171. Petitions for waiver must include a specific explanation of why the waiver standard is met in the particular case. Conclusory assertions that reductions in interstate or international rates, or associated ancillary service fees, will harm the provider or make it difficult for the provider to expand its service offerings will not be sufficient. The Commission agrees with commenters that providers requesting a waiver of the Commission's inmate calling services rules should provide a detailed explanation of their claims, as well as a comparative analysis of the reasons the

provider cannot recover its costs when similar facilities or contracts served by the provider do. In addition, waiver petitions must include all required financial data and other information needed to verify the carrier's assertions. Failure to provide the information listed below will be grounds for dismissal without prejudice. Furthermore, the petitioner must provide any additional information requested by Commission staff needed to evaluate the waiver request during the course of its review. This requirement is consistent with prior Commission inmate calling services waiver requirements. This additional information may include information regarding the provider's facilities or contracts that have characteristics similar to those for which waiver is sought, the provider's interstate and international rates, and the provider's associated ancillary service charges, at or below the Commission's caps. Petitions for waiver must include, at a minimum, the following information:

- The provider's total company costs, including the nonrecurring costs of the assets it uses to provide inmate calling services and its recurring operating expenses for these services at the correctional facility or under the contract;

- The methods the provider used to identify its direct costs of providing interstate and international inmate calling services, to allocate its indirect costs between its inmate calling services and other operations, and to assign its direct costs to and allocate its indirect costs among its inmate calling services contracts and correctional facilities;

- The provider's demand for interstate and international inmate calling services at the correctional facility or at each correctional facility covered by the contract;

- The revenue or other compensation the provider receives from the provision of interstate and international inmate calling services, including the allowable portion of any permissible ancillary services fees attributable to interstate and international inmate calling services, at the correctional facility or at each correctional facility covered by the contract;

- A complete and unredacted copy of the contract for the correctional facility or correctional facilities, and any amendments to such contract;

- Copies of the initial request for proposals and any amendments thereto, the provider's bid in response to that request, and responses to any amendments (or a statement that the provider no longer has access to those documents because they were executed

prior to the effective date of the waiver rules adopted in this Report and Order);

- A written explanation of how and why the circumstances associated with that correctional facility or contract differ from the circumstances at similar correctional facilities the provider serves, and from other correctional facilities covered by the same contract, if applicable; and

- An attestation from a company officer with knowledge of the underlying information that all of the information the provider submits in support of its waiver request is complete and correct.

172. The Commission declines to adopt Free Press's request that a provider's waiver request should terminate upon a showing either that facility costs have declined or that its revenue has increased, and that the Commission should "require periodic updates on cost and revenue data to make these determinations." Requiring a provider to provide updated and detailed cost and revenue data and analyses on an ongoing basis, beyond its initial detailed cost and data submissions, would be unnecessarily burdensome. Any waiver request filed with the Commission will be rigorously scrutinized and, if granted, time limited as appropriate, based on the circumstances of each particular request. Additionally, the Commission views its waiver process as sufficiently narrow and rigorous to filter spurious waiver claims, and thus sufficiently addresses those commenters' requests that any potential grant of a waiver of the Commission's inmate calling services rules be as narrowly tailored as possible.

173. Consistent with its past waiver process for inmate calling services, the Commission delegates to the Bureau the authority to approve or deny all or part of any petition for waiver of the Commission's inmate calling services rules. Such petitions will be placed on public notice, and interested parties will be provided an opportunity for comments and reply comments. The Bureau will endeavor to complete its review of any such petitions within 90 days of the provider's submission of all information necessary to justify such a waiver, including any information requested by the Bureau subsequent to receiving the waiver request.

#### *D. Interim International Rate Caps*

174. Today the Commission adopts, for the first time, interim rate caps on international inmate calling services calls, as proposed in the *2020 ICS FNPRM*. In that *FNPRM*, the Commission proposed to "adopt a rate

cap formula that permits a provider to charge an international inmate calling services rate up to the sum of the provider's per-minute interstate rate cap for that correctional facility *plus* the amount that the provider must pay its underlying international service provider for that call on a per-minute basis." A diverse group of industry stakeholders strongly support the Commission's proposal to cap international calling rates.

175. The record before the Commission is replete with evidence that Commission action to address international inmate calling services rates is long overdue. Although international calling minutes from correctional facilities represent only a fraction of all calling minutes from such facilities, for those incarcerated people who rely on international calling to stay connected with their loved ones abroad, current international calling rates present a heavy financial burden. The *2020 ICS FNPRM* recognized that international rates are "exceedingly high in some correctional facilities, some as high as \$45 for a 15-minute call." Record evidence provides additional examples of extremely high international calling rates.

176. Providers and public interest advocates alike broadly support Commission adoption of international rate caps. Notably, the record explains that providers have entered into contracts that limit international rates in certain states. In 2016, New Jersey, for example, prohibited state correctional authorities from contracting for international rates higher than \$0.25 per minute. And in 2018, Illinois negotiated a contract with Securus capping international calls at \$0.23 per minute. The Commission applauds these state efforts to address excessive international calling rates through the states' contracting authority, which complements its action today setting long-overdue rate caps for international calling services.

177. *Calculating International Rate Caps*. In the *2020 ICS FNPRM*, the Commission proposed to adopt a rate cap formula for international inmate calling services calls that would allow a provider to "charge a rate up to the sum of the inmate calling services provider's per-minute interstate rate cap for that correctional facility plus the amount that the provider must pay its underlying international service provider for that call on a per-minute basis (without a markup)." Although some commenters support the proposed methodology for calculating the international rate caps, the Commission acknowledges Securus's argument

regarding the administrative difficulty of practically implementing the Commission's proposal for international rate caps.

178. According to Securus, the rate structures used by underlying international providers outside the United States can vary based on the destination. While the average cost that Securus pays for international calls is around \$0.09 a minute, in some countries the international termination rates are significantly higher than \$0.09. To handle the fluctuating costs of international calls, Securus, like many telecommunications service providers, has implemented a "least cost routing system" for completing its inmate calling services customers' international calls that relies on continually updated "rate decks" containing thousands of entries for international rates. When an international call is made, Securus will steer the call through the route having the lowest rate at that time. When rates change or the route is no longer available, Securus must find an alternative route with the next lowest rate to terminate the calls. Securus states that this constant flux of different underlying international carriers charging Securus different wholesale rates makes it impractical for Securus—and, likely, other providers—to charge customers "based on the actual cost of terminating each individual call."

179. Securus, therefore, proposes a methodology to account for this constant variation in international rates to the same overseas destination. Under Securus's proposal, the per-minute international rate cap applicable to each "international destination" would be based on the Commission's applicable total per-minute interstate rate cap for that facility, plus the average per-minute amount paid by the provider to its underlying wholesale international carriers to terminate international calls to the same "international destination" over the preceding calendar quarter. The Commission defines "international destination" as meaning the rate zone in which an international call terminates. For countries that have a single rate zone, "international destination" means the country in which an international call terminates. Under this proposal, providers would be required to determine this average per-minute amount paid for calls to each international destination for each calendar quarter, and then adjust their maximum international per-minute rate caps based on such determination within one month of the end of each calendar quarter. The record supports Securus's proposal as being more

administratively efficient than the Commission's proposal.

180. Securus presents a convincing argument that compliance with international rate caps on a call-by-call basis, where the rates charged by underlying international carriers are constantly fluctuating, would be "impractical." Moreover, this methodology takes into account not only the highest but also the lowest wholesale rate for international calls to the same destination over a reasonable period of time, benefiting incarcerated people by having a consistent, predictable international calling rate for every three-month period to the country or countries they need to call. No party has objected to this proposal, provided that the Commission makes clear that providers may not mark up any charge for international termination before passing it through to consumers. Accordingly, the Commission adopts Securus's approach for interim international rate caps, subject to a no mark-up requirement. Because the interstate rate caps adopted today are interim rate caps pending the Commission's collection of new, more uniform, cost data, and because the Commission's international rate caps include its applicable interim interstate rate cap component for each facility, these international rate caps are similarly interim in nature. This methodology will enable providers to recover the higher costs of international calling. In the unlikely scenario where an inmate calling services provider is unable to fully recover its international calling costs, such provider may avail itself of the waiver process the Commission adopts in this Report and Order. And incarcerated people will enjoy reasonable and more affordable international calling rates, allowing them to better communicate with family and friends abroad.

181. To ensure that any international call termination charges are transparent to consumers, the Commission requires that providers disclose, as a separate line item on their calling services bills, any such international charges that they pass through to consumers. The Commission has jurisdiction to regulate "the manner in which a carrier bills and collects for its own interstate offerings." Providers shall also clearly, accurately, and conspicuously disclose those charges on their websites or in another reasonable manner readily available to consumers. Providers shall retain documentation supporting any charges for international termination that they pass through to consumers and provide such documentation, including any applicable contracts, to the Commission

upon request. The Commission finds that these transparency requirements will not be particularly burdensome because providers need to calculate international termination charges to set their rates and need to retain records for financial auditing purposes. And, in any case, the strong public interest in facilitating greater transparency with respect to calling services' rates outweighs the limited burden on providers. Absent these requirements, the Commission finds a substantial risk that consumers will lack sufficient information about international calling rates, which may be subject to change every quarter given the prescribed method of determining the wholesale provider rate component.

182. *Alternative Proposals.* On the record before it, the Commission declines the Public Interest Parties' request that the Commission cap international inmate calling services rates at a level no higher than its applicable interstate rate caps. The Public Interest Parties note that some providers reported no international costs but did report international minutes and revenue from the calls, which "suggests that international costs are already included in their total costs, and thus accounted for in the interstate rates." According to the Public Interest Parties, the Commission will double count those costs if it allows providers to recover the costs of international calls separately. While some small degree of double counting may have occurred through failure to separately report international costs in response to the Second Mandatory Data Collection, the record indicates that some providers did include separate costs for international calls in their responses. Regardless, the method the Commission is adopting recognizes that international calling does cost more than domestic calling and that providers are entitled to recover these extra costs through the method the Commission adopts. The Commission will continue to monitor international calling rates in providers' annual reports and collect more uniform data on international costs at the same time the Commission undertakes its data collection for interstate costs. Should those data reflect double counting, the Commission will adjust its permanent international rate caps accordingly. The Commission also declines the proposal of the Human Rights Defense Center, which asserts that "\$.05 per minute is more than adequate compensation for companies that provide all Inmate Calling Services (ICS) services, locally, interstate, intrastate and internationally." The

Human Rights Defense center provides insufficient support and basis for this proposal, in light of the Commission's obligations under section 276 of the Act.

*E. Consistency With Section 276 of the Act*

183. Section 276(b)(1)(A) of the Act requires the Commission to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call." The Commission concludes, consistent with the Commission's proposal in the *2020 ICS FNPRM*, that the interim rate caps the Commission adopts in this Report and Order fully satisfy this mandate. In the vast majority of, if not all, cases, these rate caps will allow providers to generate sufficient revenue from each interstate and international call—including any ancillary service fees attributable to that call—(1) to recover the direct costs of that call; and (2) to make a reasonable contribution to the provider's indirect costs related to inmate calling services. To the extent there are legitimate but rare anomalous cases in which a provider cannot recoup such costs under the new rate caps, the provider may seek a waiver of those caps, to the extent necessary to ensure that it is fairly compensated, as required by the Act.

184. As the Commission observed in the *2020 ICS FNPRM*, this approach recognizes that calling services contracts often apply to multiple facilities and that providers do not expect each call to make the same contribution toward indirect costs. The record confirms that "because the industry norm is to bid for one contract for multiple facilities and then offer a single interstate rate across facilities irrespective of cost differentials that may exist among facilities under the contract, it would be impossible to reach a methodology that would allow a direct, one-to-one recovery of costs." No parties challenged this conclusion or commented otherwise. Indeed, providers acknowledge that they do not presently keep the type of accounting records that would allow them to measure the costs of individual calls. And, although the Mandatory Data Collection that the Commission adopts in this Report and Order will result in far more granular cost data than currently are available, the resulting data will necessarily rely on allocations of indirect costs among contracts and facilities and thus will fall far short of allowing a provider to directly assign all its inmate calling services costs to individual calls.

185. The Commission finds that the interim rate caps it adopts today are consistent with both section 276 of the Act and the D.C. Circuit's decision in *GTL v. FCC*. In that decision, the court rejected the Commission's "averaging calculus" in the *2015 ICS Order*, which set tiered rate caps using industry-wide average costs derived from cost data submitted by providers. The court explained that the Commission erred in setting rate caps using industry-average costs because calls with above-average costs would be "unprofitable," in contravention of the "mandate of § 276 that 'each and every' inter- and intrastate call be fairly compensated." The court found the Commission's reliance on industry-average costs unreasonable because, even disregarding site commissions, the proposed caps were "below average costs documented by numerous [inmate calling services] providers and would deny cost recovery for a substantial percentage of all inmate calls."

186. *GTL* argues that the Commission's new interim rate caps fail to address the court's criticism of the Commission's prior rate caps, because they "will not, in all cases, cover the costs of providing service." This argument ignores an important distinction between the rate cap methodology that was before the court in *GTL v. FCC* and the methodology the Commission uses in this Report and Order. Instead of setting rate caps at industry-wide average costs, the Commission's methodology begins by looking at industry-wide average costs but does not stop there. Instead, the Commission adjusts those mean costs upward by one standard deviation and use the results to establish zones of reasonableness from which the Commission selects separate provider cost components for prisons and larger jails. The Commission then adds an additional amount to account for the portion of site commission payments that the Commission conservatively estimates is related specifically to inmate calling services. As detailed in Part III.C.4, the Commission adopts a modified version of the site commission proposal in the *2020 ICS FNPRM* based on record evidence that \$0.02 per minute for every facility may not permit recovery of all legitimate facility costs related to inmate calling services and may not account for site commission payments required under codified law. The Commission permits full recovery of site commission payments required under codified law and up to \$0.02 per minute for contractually prescribed site commission payments. At the same

time, the Commission also explains above that full recovery of site commissions is not required under *GTL v. FCC* or section 276 of the Act. The Commission therefore disagrees with commenters asserting that section 276 requires full recovery of site commission payments in order to comply with section 276. The Commission's interim approach permits recovery of the portion of site commission payments that the Commission estimates are directly related to the provision of inmate calling services. Nothing more is required. The Commission's approach therefore incorporates assumptions and actions that lean toward over-recovery of costs. The Commission estimates that revenues from the capped per minute charges for individual interstate and international calls—along with the revenues from related ancillary service fees—will enable all providers to recover their actual costs of providing interstate and international inmate calling services, but provide a process for unusual cases where the Commission might be mistaken. Thus, contrary to *GTL*'s assertion, the Commission's interim rate caps, coupled with the Commission's new waiver process, "account for the real differences in costs among [inmate calling services] providers and ensure[] providers with higher costs receive fair compensation" in a manner consistent with section 276(b)(1)(A).

187. "Fair compensation" under section 276(b)(1)(A) does not mean that each and every completed call must make the same contribution to a provider's indirect costs. Nor does it mean a provider is entitled to recover the total "cost" it claims it incurs in connection with each and every separate inmate calling services call. Instead, compensation is fair if the price for each service or group of services "recovers at least its incremental costs, and no one service [e.g., interstate calling service] recovers more than its stand-alone cost." Economists generally agree that the price for each product (or group of products) is compensatory if it at least recovers its incremental costs but is an inefficiently high price if it recovers more than its standalone costs. The record indicates that, subject to one anomalous possible outlier contract, the rate cap methodology the Commission adopts today will allow every provider of calling services for incarcerated people to charge a price that recovers its direct costs (i.e., costs that are directly attributable to producing all of the inmate calls under a given contract) and contributes to recovery of its indirect

costs. The one exception is an apparent anomalous contract for which that contract's indirect costs were reported by [REDACTED] after the release of the 2020 ICS FNPRM. The per-minute cost the Commission calculates for this contract is the single highest per-minute cost of all jail contracts and more than double the per-minute cost for the second highest jail contract. To the extent this contract possesses such unusual characteristics that the provider's costs are indeed legitimately this high, this is precisely the type of contract the waiver process the Commission adopts today is meant to address. Indeed, the Commission demonstrates that virtually all contracts, except those that reflect the issues the Commission has discussed regarding GTL, impacted by the rate caps this Report and Order imposes are commercially viable under conservative assumptions. That is, the Commission expects they should be able to cover the contracts' direct charges and make a commercially sound contribution to costs shared across the contracts sufficient to ensure each provider's viability.

188. As the Commission recognized in the 2002 Pay Telephone Order, the "lion's share of payphone costs are those that are 'shared' or 'common' to all services," and there are "no logical or economic rules that assign these common costs to 'each and every call.'" As a result, "a wide range of compensation amounts may be considered 'fair.'" Here, contrary to the assertions of certain providers, the Commission adopts conservative interim rate caps that fall squarely within the zones of reasonableness, as well as an allowance for site commissions reflected by the Commission's new facility-related rate component that is supported by its analysis that reflects the variations in correctional facility costs, thus providing for fair compensation under the statute.

189. Providers fail to acknowledge that a wide range of compensation amounts may be considered fair, arguing generally that the Commission must adopt rate caps that enable them to recover their total costs "for each and every completed . . . interstate call." In effect, providers argue that a rate-setting methodology that does "not, in all cases, cover the costs of providing service" fails to satisfy section 276. The Commission disagrees. First, GTL's reliance on *Illinois Public Telecommunications Assoc. v. FCC* for support is misplaced because totally different circumstances—resulting in

made from inmate phones"—were before the court in that case. The *Illinois Public Telecommunications* court's rejection of a "no compensation" regime where providers received zero compensation for calls simply does not create a mandate that the Commission adopts any particular compensation methodology, much less the methodology the providers urge.

190. Second, the Commission's rate cap methodology here differs materially from the methodology vacated in *GTL v. FCC*. There, the court found that the record "include[d] two economic analyses, both concluding that the [2015 ICS] Order's rate caps are below cost for a substantial number of [inmate calling services] calls even after excluding site commissions" and that "[t]he [2015 ICS] Order does not challenge these studies or their conclusions." As a result, the court held that "the use of industry-average cost data as proposed in the Order" could not be upheld because "it lacks justification in the record and is not supported by reasoned decisionmaking." The Commission's methodology in this Report and Order, by contrast: (1) Is designed to ensure that the costs of the vast majority of, if not all, calls are recovered; (2) includes a site commission allowance; (3) is based on a rigorous analysis of data submitted into the record by providers responding to a Commission data collection; and (4) as a backstop, provides the opportunity for providers to obtain a waiver if they can show that one is needed to ensure that they receive fair compensation, consistent with the statute.

191. But for the extraordinary case, providers will recover their costs under the new interim rate caps the Commission adopts. Providers that continue to claim they will be unable to recover their costs of interstate or international inmate calling services under the interim rate caps the Commission adopts today will be able to seek a waiver of those caps in accordance with the procedures set forth in this Report and Order. Any such waiver requests will be analyzed and resolved based on more comprehensive, current, and disaggregated cost data regarding that provider's cost of providing inmate calling services at the particular facility or facilities at issue. The Commission rejects Securus's suggestion that, for purposes of assessing compliance with section 276 of the Act, the Commission should calculate the return component of a provider's costs using the price its current owners paid to purchase the provider. Instead, the Commission concludes that it should calculate that

component for purposes of assessing compliance with section 276 using the same rate base that the Commission uses in assessing compliance with section 201(b)—the original cost of the property used to provide inmate calling services at the particular facility or facilities. The combination of the Commission's carefully considered interim rate caps and the Commission's revised waiver process afford all providers the opportunity to recover fair compensation for each and every completed interstate and international inmate calling services call consistent with section 276(b)(1)(A).

#### F. Cost-Benefit Analysis of Revised Interstate Rate Caps

192. Although the Commission's actions in this Report and Order are not dependent on its analysis of the relative costs and benefits of the revised interim interstate rate caps, the Commission finds that the benefits of its actions far exceed the costs. The benefits of lowering inmate calling services rates sweep broadly, affecting incarcerated people, their families and loved ones, and society at large. Although important and substantial, these benefits do not lend themselves to ready quantification. As one commenter aptly explains, increased communication and ties to the outside world are important for "maintaining inmate mental health." The formerly incarcerated can face myriad obstacles on reentry, including "limited occupational and educational experience and training to prepare them for employment, drug and alcohol addictions, mental and physical health problems, strained family relations, and limited opportunities due to the stigma of a criminal record." Lower telephone rates will likely lead to increased communication by incarcerated people which, in turn, can help mitigate some of these issues by, for example, allowing incarcerated people to maintain family relationships and make plans for post-release housing or employment.

193. Lower rates, and the resulting increase in calls, can also lead to improvements in the health and well-being of the families of incarcerated people. In particular, children of incarcerated parents are much more likely to suffer from behavioral problems, poor educational attainment, physical health problems, substance abuse, and adult incarceration. Studies show that contact with incarcerated parents can help mitigate these harmful effects. One study, for example, demonstrated that a child's chances of dropping out of school or being suspended decreased if the child had increased contact with an incarcerated

parent. As Verizon explains, “[p]reserving family ties allows incarcerated people to parent their children and connect with their spouses, helping families stay intact. Supporting strong families, in turn, makes our communities safer.” The Commission agrees.

194. The Commission’s actions will benefit incarcerated people, their families, and society in ways that cannot easily be reduced to monetary values but that standing alone support its actions. That being said, an analysis of the quantifiable benefits of the Commission’s actions today shows that they far exceed the costs. In the *2020 ICS FNPRM*, the Commission estimated that implementing the proposed changes would cost \$6 million. These estimated implementation costs included one-time administrative, contract-revision, and billing-system costs. These costs included costs associated with changing the rate for debit/prepaid calls at jails with average daily populations less than 1,000. The Commission now finds that \$6 million is a reasonable estimate for the costs of implementing the changes it adopts today. These costs are only a relatively small fraction of the \$32 million in quantifiable benefits that the Commission now estimates its actions will bring and pale in comparison to the qualitative benefits today’s changes will confer on incarcerated people, their communities, and society as a whole. In the *2020 ICS FNPRM*, the Commission estimated benefits of \$30 million, including a benefit of \$7 million due to expanded call volumes plus at least \$23 million for reduced recidivism, which would reduce prison operating costs, foster care costs, and crime. The Commission’s estimate of \$32 million in benefits is the sum of: (1) A gain of \$9 million from inmate calling services users making more calls at lower rates (which is an increase of \$2 million as compared with the Commission’s previous estimate of \$7 million); and (2) \$23 million in benefits to society due to reduced recidivism, crime, and foster-child care costs that improved access to communications will bring. GTL suggests that it “*may not be the case*” that revised interstate rate caps will result in increased call volume. GTL posits that this is because interstate calls are “only a small part of all” inmate calling services calling and that “incarcerated individuals are not entitled to unfettered access to telephonic communications.” The Commission finds GTL’s arguments to be speculative and unsupported. The Commission therefore rejects these

arguments in favor of the more data-driven approach it takes here. As the Commission has explained, rate reform will promote increased communication between incarcerated persons and their loved ones. This additional communication will help preserve essential family ties, allowing children to stay in touch with an incarcerated parent, which, in turn, will make communities safer. Being able to maintain communication also will help incarcerated persons plan for successful integration back into their communities upon release by providing a vital avenue to explore housing and employment opportunities.

195. *Expected Quantitative Benefits of Expanded Call Volumes.* In the *2020 ICS FNPRM*, the Commission calculated benefits based on a forecast of the increase in the number of calls that would occur if the Commission adopted the proposed rate caps. The Commission used estimates of current call minutes at prices above the proposed rate caps, the price decline on those call minutes implied by the proposed rate caps, and the responsiveness of demand to the changes in price. Using 2018 call volume data, the Commission estimated that approximately 592 million interstate prepaid and debit minutes and 3.3 million interstate collect minutes originated from prisons at rates above the proposed caps. Those data also showed that approximately 453 million interstate prepaid and debit minutes and 2 million interstate collect minutes were made from jails at rates above the proposed caps. To determine these numbers, the Commission used rate information from the 2019 Annual Reports and call volume data (interstate minutes) from the Second Mandatory Data Collection responses. The Commission considers each of the following call types: Interstate debit and prepaid calls for prisons and larger jails only; and interstate collect calls for prisons, larger jails, and jails with average daily populations less than 1,000. For each of these call types, the Commission adjusted the reports for minutes downward by dropping the minutes recorded in nine states—Alaska, Delaware, Hawaii, Maryland, New Mexico, Texas, Vermont, Washington, and West Virginia. The Commission did this because each of these states has important contracts with rates below the caps the Commission is adopting, and the rates under those contracts will only be affected by the Commission’s actions if they are required to reduce their site commissions. This adjustment means the Commission’s benefit estimates are

likely substantially understated. In computing benefits, the Commission relied on a lower-end interstate calling estimate of demand price elasticity of 0.2, and estimated annual benefits of approximately \$1 million, or a present value over ten years of approximately \$7 million. Following common convention, the Commission expresses own-price elasticities as positive numbers. An elasticity of 0.2 means that for each percentage point drop in rates, interstate inmate calling services demand would increase by 0.2%. The Commission’s analysis is based on pre-COVID-19 data and makes no adjustments for the COVID-19 pandemic. However, if post-COVID-19, there is an increased reliance on telecommunications, and acceptance by correctional authorities of such use, the Commission’s estimates would be understated. The present value of a 10-year annuity of \$1 million at a 7% discount rate is approximately \$7 million. Erring on the side of understatement, the Commission uses the 7% rate.

196. The Commission’s estimation methodology remains essentially the same as in the *2020 ICS FNPRM*, with two exceptions. First, leaving intact the \$0.21 per minute rate for interstate debit and prepaid calls from jails with average daily populations less than 1,000 excludes some call volume from the lower cap, lowering impacted call volumes. Prior to the Commission’s actions today, the interim interstate rate caps for all interstate calls were \$0.21 per minute for debit and prepaid calls and \$0.25 per minute for collect calls. The new interim provider-related rate caps the Commission adopts today plus an allowance of \$0.02 for contractually prescribed facility rate components adopted in this Report and Order result in the following five price declines from these rates (assuming all calls include the \$0.02 allowance and no legally mandated site commission payment results in an allowance higher than \$0.02 per minute, both of which will not be the case given that some facilities charge no site commissions and thus no facility cost allowance is permitted and some legally mandated site commission payments may exceed \$0.02 per minute): For prison debit and prepaid calls, 33% ( $= (\$0.21 - \$0.14)/\$0.21$ ); for prison collect calls, 44% ( $= (\$0.25 - \$0.14)/\$0.25$ ); for jail debit and prepaid calls, for jails with average daily populations of 1,000 or more, 24% ( $= (\$0.21 - \$0.16)/\$0.21$ ), with no change for jails with average daily populations less than 1,000; and for jail collect calls, for jails with average daily populations of 1,000 or more, 36% ( $=$

(\$0.25 – \$0.16)/\$0.25), and for jails with average daily populations less than 1,000, 16% (= (\$0.25 – \$0.21)/\$0.25). The Commission cuts these price changes in half to allow for contracts with rates below the current caps. (This is equivalent to assuming prices are evenly distributed around the midpoint between current caps and the Commission's new caps.) Second, the Commission's estimate of inmate calling services price elasticity has been revised upward to 0.3. With these changes, the Commission estimates an annual welfare gain of \$1.3 million, or a present value of \$9 million from reduced inmate calling services rates. The Commission calculates the increase in surplus due to lower call prices separately for: Debit and prepaid calls from prisons; collect calls from prisons; debit and prepaid calls from jails with average daily populations of 1,000 or more; collect calls from jails with average daily populations of 1,000 or more; and collect calls from jails having average daily populations less than 1,000. The calculated surpluses equal one half of the product of three items: Minutes for each of the five call types; the demand elasticity estimate (0.3); and, respectively for each of the five call types, half the price decline from the earlier cap to the new interim cap. This is the area of the surplus triangle generated by an assumed price fall of one half the difference between the Commission's current caps and the new interim caps if demand and supply are linear and the final price represents costs. If the final price is still above costs, as is likely given the Commission's conservative assumptions, the surplus gain would be greater. Nonlinearities of both demand and supply have ambiguous impacts, so linearity is a good approximation in the absence of further information. The Commission obtains an increase in surplus of \$1.7 million, and then calculate the present value of a 10-year annuity of \$1.7 million at a 7% discount rate to be approximately \$12 million.

197. *Inmate Calling Service Demand Elasticity.* When prices fall, quantity demanded increases. Demand elasticity is a measure of the sensitivity of quantity changes to changes in prices. For small changes, demand elasticity is the ratio of the percentage change in quantity to the percentage change in price, holding other things constant. However, for larger changes, again holding other things constant, demand elasticity is better estimated by the ratio of (1) the percentage change between the original quantity and the quantity

and final quantity to (2) the percentage change between the original price and the price midway between the original price and the final price. This is because, due to the simple mathematics of percentage changes, for a large change in quantity or price, the elasticity of demand as measured by the simpler ratio can be materially different than the measure that would obtain if the change was reversed: A Change from 1 to 0.80 is a 20% decline, but a rise from a 0.80 price to 1.00 is a 25% rise. In the 2020 ICS FNPRM, the Commission relied on demand elasticity estimated for voice telecommunications generally and chose a conservative estimate from these of 0.2. However, the record provides five pieces of direct evidence of the demand elasticity for inmate calling services, three of which are quite recent. These estimates, three of which are approximately 0.4 and two of which are approximately 0.3, lead the Commission to conservatively conclude inmate calling services have a demand elasticity of at least 0.3. For the first three of the Commission's estimates the Commission does not have sufficient data to ensure it is holding all other things constant, and for the fourth, from Securus's consultant FTI, the Commission cannot verify FTI's approach. Thus, all these estimates should be viewed as approximate. To avoid overstating benefits, the Commission uses the lower bound of these estimates rounded to the first decimal place.

198. First, a 57.5% drop in calling rates in New York state in 2007 resulted in an increase in call volumes of 36%, suggesting a demand elasticity of 0.38. The 0.38 elasticity calculation is as follows. The Commission normalizes or changes the units in which quantity and price are denominated, so the initial quantity is 100 and the initial price is \$100. Using the quantity increase of 36% and price decline of 57.5%, the Commission can determine the new quantity and price in these new normalized units. Normalization works because the arc elasticity calculation depends on the change between quantities and prices and therefore yields the same measure regardless of the units used to measure quantity and price. A quantity increase of 36% implies a new quantity of 136 (= 100 \* (1 + 36%)). A price decrease of 57.5% implies a new price of 42.5 (= 100 \* (1 – 57.5%)). The quantity change using the midpoint formula is 30.5% (= (136 – 100)/((100 + 136)/2)). The price change using the midpoint formula is 80.7% (= (100 – 42.5)/((100 + 42.5)/2)). Thus, the elasticity is 0.38 (= 30.5%/

80.7%). Second, 2018 data from the New York City contract suggests a demand elasticity of 0.37. The Commission estimates the elasticity based on the price of a 15-minute phone call, the price of which dropped from \$1.20 = (\$0.50 + (14 \* \$0.05)) to \$0.45 = (15 \* \$0.03). Normalizing the initial quantity to 100 implies a new quantity of approximately 140 (= 100 \* (1 + 40%)). The quantity change in the midpoint formula is 33.3% (= (140 – 100)/((100 + 140)/2)); the price change in the midpoint formula is 90.9% (= (\$1.20 – \$0.45)/(((\$1.20 + \$0.45)/2)); therefore, the elasticity is 0.37 (= 33.3%/90.9%). Third, in 2019, in San Francisco, when calls became free, call volumes rose 81%, suggesting an elasticity of 0.29. The elasticity of 0.29 is derived as follows: Normalizing the initial San Francisco quantity to 100 and price to \$100 implies the new quantity is 181, and the new price is zero. Thus, the quantity change in the midpoint formula is 57.7% (= (181 – 100)/((100 + 181)/2)); the price change in the midpoint formula is 200% (= (100 – 0)/((100 + 0)/2)); and the elasticity is 0.29 (= 57.7%/200%). Fourth, two estimates are calculated using evidence submitted by Securus. Securus's consultant FTI estimates price and quantity movements from the rate reduction seen in 2014 due to the Commission's earlier action. FTI's estimates suggest a demand elasticity of 0.31 and evidence from a recent pilot program conducted by Securus suggests an elasticity of 0.36. FTI initially used regression analysis to estimate an elasticity of 1.25 for interstate calling for large facilities. However, FTI was concerned the regression model did not account for a range of factors, the two most important of which were substitution from intrastate/local inmate calling services to interstate inmate calling services, said to increase call volumes by 28.3%, and unexplained Securus initiatives, said to increase call volumes by 14.9%. After making adjustments to control for the impact of these factors, FTI estimates that a 38.2% fall in interstate prices increased demand by 15.5%. From these measures the elasticity calculation is as follows. Normalizing the initial quantity and price to 100 implies the price fell to 61.8 (= 100 \* (1 – 38.2%)) and the quantity rose to 115.5 (= (100 \* (1 + 15.5%))). The midpoint formulas are 47.2% (= (100 – 61.8)/((100 + 61.8)/2)) for price; and 14.4% (= (115.5 – 100)/((100 + 115.5)/2)) for quantity. Thus, the elasticity is 0.31 (= 14.4%/47.2%). Securus reported a 27% increase in call length and a 50% reduction in per-

minute costs under six pilot programs that gave incarcerated persons and their families “the option of paying a flat rate for a set number of calls per month.” From this information, the Commission estimates an elasticity of 0.36. Normalizing the initial quantity and price to 100 implies a new quantity of 127 ( $= 100 * (1 + 27\%)$ ) and a new price of 50 ( $= 100 * (1 - 50.0\%)$ ). The quantity change in the midpoint formula is 23.8% ( $= (127 - 100) / ((100 + 127) / 2)$ ); the price change in the midpoint formula is 66.7% ( $= (100 - 50) / ((100 + 50) / 2)$ ); therefore, the elasticity is 0.36 ( $= 23.8\% / 66.7\%$ ). Securus only mentions call length. If there was an additional increase in frequency of calls, not accounted for in the provided measure, then this elasticity measure is underestimated. In both the New York City and San Francisco cases, the Commission’s elasticity estimate is derived from a price decrease in which the initial price was closer to its current caps than will be the case for most of the contracts the Commission discusses. Economic theory suggests that the demand elasticity for contracts with prices above the Commission’s caps will be greater than the New York City or San Francisco estimates. In general, demand elasticity changes at different points along the good’s demand curve, generally rising with price. (This is most easily seen for a linear demand curve. For small changes, demand elasticity is defined as the product of the demand curve’s slope and the ratio of price to quantity. When demand is linear, its slope is constant, thus any change in elasticity is determined by how the ratio of price to quantity changes, and this ratio always rises with price, since a rising price implies a falling quantity. For realistic nonlinear curves, for which quantity demanded is finite at a zero price and for which a price exists at which quantity demanded is zero, this relationship will hold at low and high prices; as price approaches zero, elasticity also approaches zero, while as price approaches the point at which quantity demanded is zero, elasticity becomes large.) Both the New York City and San Francisco cases considered price changes that happened along a portion of the demand curve where price was less than the Commission’s rate caps. Therefore, these estimates were taken over a portion of the demand curve where elasticity was likely smaller than it is for the contracts with current rates above the Commission’s caps. In addition, economic theory predicts that a good has higher elasticity if it accounts for more of a consumer’s overall budget. Every estimate for

inmate calling elasticity that the Commission has seen has been below 1. This implies that incarcerated people residing in facilities with higher calling rates end up spending more on calling services overall—even after accounting for differences in minutes purchased—than incarcerated people in facilities with lower calling rates. It follows that because incarcerated people in facilities with prices above the Commission’s caps spend more on inmate calling than incarcerated people in New York City and San Francisco did, these incarcerated people will have a higher demand elasticity than incarcerated people in New York City and San Francisco.

199. The Commission also expects lower rates for calling services to yield additional benefits by reducing recidivism and crime and the need for child foster care. Several commenters point to the link between affordable inmate calling, improved mental health, and lower recidivism. According to the Episcopal Church and the United States Conference of Catholic Bishops, “studies have shown that phone communication between families and their loved ones in prison and its associated mental health benefits make incarcerated people less likely to recidivate.” Citing the California Department of Corrections, GTL also emphasizes the recidivism-reducing effect that affordable inmate calling services can have by helping incarcerated people prepare for life after confinement. In the *2020 ICS FNPRM*, the Commission estimated that the benefits from reduced recidivism would exceed \$23 million over ten years. That estimate and the underlying reasoning continue to apply here. Although the Commission cannot pinpoint how much increased telephone contact would reduce recidivism among incarcerated people, the Commission estimates that even if its reforms resulted in only 100 fewer people being incarcerated due to recidivism, that would yield savings of approximately \$3.3 million per year, or more than \$23 million over 10 years in present value terms. Other savings would also be realized through reduced crime, and fewer children being placed in foster homes. The potential scale of fiscal saving—in addition to the immense social benefits—is suggested by the fact that, on average, state and local governments incur administrative and maintenance costs of \$25,782 per foster placement.

200. *Costs of Reducing Rates for Interstate Inmate Calling Services Calls.* The Commission finds most credible the cost estimate used in the *2020 ICS FNPRM*, where the Commission

estimated that the costs of reducing rates for interstate inmate calling services calls would amount to approximately \$6 million. The Commission continues to assume smaller jails incur costs for all calls. Approximately 3,000 calling services contracts will need to be revised based on the rules the Commission adopts today, and a smaller number of administrative documents may need to be filed to incorporate lower interstate and international rates. The Commission uses an hourly wage of \$46 for this work. The Commission examined several potential wage costs. For example, in 2020, the median hourly wage for computer programmers was \$45.98, and for accountants and auditors, it was \$39.26. The Commission chose the higher of these because of the specialized technical nature of the work. This rate does not include non-wage compensation. To capture this, the Commission marks up wage compensation by 46%. In March 2020, hourly wages for the civilian workforce averaged \$25.91, and hourly benefits averaged \$11.82, yielding a 46% markup on wages. Using this 46% markup on the \$46 hourly wage, the Commission obtains an hourly rate of \$67.16 ( $= \$46 \times 1.46$ ), which the Commission rounds up to \$70. The Commission estimates that these changes would require approximately 25 hours of work per contract. The Commission uses a \$70 per hour labor cost to implement billing system changes, adjust contracts, and to make any necessary website changes. The estimated cost of these actions is \$5,139,750 ( $= 2,937$  (number of contracts)  $\times 25$  (hours of work per contract)  $\times \$70$  per hour), which the Commission rounds up to \$6 million to be conservative.

201. GTL argues that the Commission’s estimate that it would take 25 hours of work per contract to revise calling services contracts is unrealistically low. According to GTL, its recent experience renegotiating contracts and implementing new rates in 2013 and 2015 indicates that the costs of such renegotiations are much higher than what the Commission estimated. GTL, however, did not provide any specific data about the costs it incurred and did not explain the methodology it used to arrive at its cost estimates. Accordingly, the Commission cannot reasonably assess the merits of GTL’s objection, much less rely on its filings to provide a different estimate. As a result, the Commission finds that its earlier estimate that its reforms would cost providers approximately \$6

million continues to provide the best information for the Commission to use in conducting its cost-benefit analysis.

202. *Anticipated Effect on Inmate Calling Services Investment.* The Commission's new rate caps will give inmate calling services providers the opportunity for full cost recovery and a normal profit. This full cost recovery includes operating costs, common costs, a return on capital investment, and capital replacement. By adopting the new interim rate caps, the Commission seeks to lower the price of interstate and international inmate calling services closer to the costs companies incur in providing the services. GTL argues that the Commission risks discouraging investment by ignoring components of providers' total costs, particularly capital costs, and setting inmate calling services rates too low. Securus claims that "the proposed caps would not allow Securus to recover its costs at many jail facilities," and that the Commission has not accounted for "the potential negative outcomes of degraded or lower quality service at some facilities if providers are not able to fully recover all of their costs." The Commission disagrees with both providers. The rate caps adopted in this Report and Order will allow every provider of calling services for incarcerated people to charge a price that recovers its direct costs—namely the costs directly attributable to producing all of the calls under a given contract—and that contributes to the recovery of the provider's indirect costs. With rates set to exceed estimated per-minute costs, including an allowance for the cost of capital, a provider should generate sufficient revenue to more than cover its total operating costs, thereby avoiding any disincentive to invest. As a fail-safe, however, the Commission's Report and Order also allows providers unable to recover their costs under the interim rate caps adopted herein to seek waivers of those caps.

203. Under the Commission's new policy, lower rates will enable more frequent inmate calling at lower prices. Incarcerated people and their families will enjoy added consumer surplus, measured by the difference between the lower price and their willingness to pay for the increased call volume. Some of the producer surplus, measured by the difference between the lower price and service providers' marginal costs, will be transferred from providers to incarcerated people and their loved ones, thereby reducing provider profits. As discussed above, surplus gains may come from other sources besides provider profits. Any addition to consumer surplus that did not exist

previously as provider profit is a net economic gain. Neither gain will come at the expense of provider investment. And, as noted above, lower calling rates will facilitate increased communication between incarcerated people and their loved ones, which will benefit all incarcerated persons and their families by fostering essential family ties and also allowing incarcerated people to plan for successful reentry upon release.

#### G. Disability Access

204. The Commission is committed to using all of its authority to ensure that incarcerated people with hearing and speech disabilities have access to functionally equivalent telecommunication services to communicate with their families, loved ones, and other critical support systems. The Commission specifically "acknowledge[s] the injustice facing the scores of incarcerated people with disabilities who lack access to functionally equivalent communications." In the *2020 ICS FNPRM*, the Commission asked for comment on the needs of incarcerated people with communication disabilities. As the Commission did in the *2015 ICS Order*, the Commission uses "disabilities" to include individuals who are deaf or hard of hearing, as well as those who are deafblind or have speech disabilities who also have policy concerns that are similar to those incarcerated people who are deaf or hard of hearing. The response was voluminous. The Commission received 17 substantive responses in the comment cycle, and 68 express comments. Commenters' concerns generally fall into two categories. First, commenters allege that some providers are not following the Commission's rules for the provision of TRS and complain about egregiously high rates and the lack of necessary equipment at correctional facilities. The Commission reminds providers that they are obligated to comply with the Commission's existing inmate calling services and related rules, including rules requiring that incarcerated people be provided access to certain forms of TRS, rate caps for calls using a text telephone (TTY) device, rules prohibiting charges for TRS-to-voice or voice-to-TTY calls, and rules requiring annual reporting of the number of TTY-based calls and any complaints. In addition, like other communications service providers, inmate calling services providers must ensure that the services and equipment provided for use by incarcerated people are accessible and usable by incarcerated people with disabilities (subject to

achievability), including when legacy telephone services are discontinued and replaced with advanced services such as Voice over internet Protocol (VoIP).

205. Second, several commenters argue that TTY is an outdated mode of communication for individuals with disabilities. The Commission agrees that given the changes in telecommunications technologies in the past decades, TTYs have become little used because of the widespread transition to internet Protocol-based services. The Commission also understands that TTYs may not be suitable for individuals who, for example, use American Sign Language as their primary mode of communication. To fill the void and to better serve incarcerated people with disabilities, commenters advocate that the Commission require providers to offer other types of functionally equivalent telecommunication services. The Commission intends to address these concerns in the near future in a manner that best meets the needs of incarcerated persons who are deaf, hard of hearing, deafblind, or have a speech disability, consistent with the Commission's jurisdiction and legal authority. Accordingly, the Commission seeks detailed comment to further explore this issue in the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**.

206. Public interest groups also urge the Commission to coordinate with the Department of Justice (DOJ). Through the Federal Bureau of Prisons, DOJ administers federal correctional facilities. In addition, DOJ has authority to adopt disability access regulations applicable to federal, state, and local government entities, including correctional authorities, under section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act (ADA). The Commission agrees that such coordination would be beneficial in assisting it with addressing issues such as those raised in the record and in the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**. The Commission therefore directs CGB to make all efforts to coordinate with DOJ to ensure that incarcerated people with communications disabilities have access to communications "in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services."

#### H. Other Issues

##### 1. Ancillary Fee Cap for Single-Call Services and Third-Party Transaction Fees

207. The Commission revises its rules for single-call services and third-party financial transaction fees to establish a uniform cap for both types of ancillary service fees for or in connection with interstate or international use of inmate calling services. Providers may no longer simply pass through third-party financial transaction fees, including those related to single-call services, to calling services consumers. The Commission sought comment in the *2020 ICS FNPRM* on whether its ancillary services fee caps, generally, should be lowered or otherwise modified. It also sought comment on what limits, if any, should be placed on third-party transaction fees that providers may pass on to consumers, including those related to single-call services. Single-call services are collect calls by incarcerated people that “are billed through third-party billing entities on a call-by-call basis to parties whose carriers do not bill collect calls.” Specifically, the Commission defined single-call services as “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.” Record evidence provided by the Prison Policy Initiative explains that Western Union, one of the most prominent third-party money transfer services used in this context, charges \$6.95 to send money to GTL, the largest inmate calling services provider. The Commission therefore modifies its rules to limit the charges a provider may pass on to incarcerated people or their friends and family for third-party financial transaction fees associated with single-call services or for third-party money transfer service fees to \$6.95 per transaction on an interim basis. These modifications are warranted to close loopholes in the Commission’s rules. The Commission also clarifies that no third-party transaction fee may be charged when a third party is not involved directly in a particular transaction, *e.g.*, in the case of an automated payment where the consumer uses a credit card to fund or create an account.

208. In adopting the \$6.95 interim cap for third-party transactions fees, including those appropriately charged for single-call services, the Commission declines to adopt at this time NCIC’s proposal to cap these fees at the \$3.00

cap for automated payment fees or the \$5.95 cap for live agent fees, as applicable, pending further input on this proposal, which the Commission seeks in the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**. For the same reasons, the Commission declines the proposal of ICSolutions, at this time, to limit third-party fees to the \$5.95 live agent fee or the \$3.00 automated payment fee. The Commission does not have sufficient evidence to adopt this proposal at this time, especially considering the data provided by the Prison Policy Initiative, which supports a higher rate (\$6.95) than the highest rate NCIC’s proposal would allow (\$5.95). The Commission encourages all interested parties to comment further on the NCIC proposal. At this time, however, the Commission concludes that the number provided by the Prison Policy Initiative is a reasonable interim step that reduces excessively high third-party fees embedded in the total fees for single-call services and other third-party transactions.

209. *Single-Call Services*. In the *2015 ICS Order*, the Commission first adopted rules for single-call and related services, one of five permissible ancillary service charges that providers were allowed to assess on their customers in connection with inmate calling services. The Commission found that providers were using single-call services “in a manner to inflate charges,” and limited fees for single-call and related services to the exact transaction fee charged by the third party that bills for the call, “with no markup, plus the adopted, per-minute rate.” The “third-party transaction” referred to in section 64.6020(b)(2) of the Commission’s rules for single-call services is the same type of “third-party financial transaction” referred to in section 64.6020(b)(5) of the Commission’s rules. Because the D.C. Circuit stayed the rule on March 7, 2016, it never became effective; and the Commission reinstated it in the *2020 ICS Order on Remand* without revision.

210. In reinstating the single-call services rule, the Commission noted evidence in the record suggesting that certain providers may have entered into revenue-sharing arrangements with third parties in connection with single-call services that indirectly result in mark-up of fees charged by third-party processing companies and thus serve to circumvent the Commission’s cap on pass-through fees for single-call services. This evidence included, for example, a then recent report prepared by the Prison Policy Initiative detailing the way some providers use these revenue-sharing arrangements with

third parties, like Western Union and MoneyGram, to circumvent the caps on the fees they may charge for single-call services. The third-party financial provider charges the inmate calling services provider as much as \$12 to send it a payment in connection with a single-call service or to fund an account. The inmate calling services provider then passes this fee on to the family of the incarcerated person who placed the call, and the two companies split the \$12 fee, each getting \$6. Some providers freely admit that they engage in these revenue-sharing schemes. Other providers have asked the Commission to address this practice and preclude it.

211. These “egregiously-high third-party transaction fees” are unconnected to legitimate costs of inmate calling services. The Commission, therefore, revises the single-call service rule and limit the third-party transaction fees providers may pass on with respect to single-call services to \$6.95 per transaction. The Commission declines the suggestion of ICSolutions to delete the reference to single-call services from section 64.6020 of its rules and move it to a definition in section 64.6000. Section 64.6000 already contains a definition for this ancillary service charge. More broadly, however, ICSolutions appears to envision removing fees for single-call services from the list of permitted ancillary service charges. The Commission declines to do so at this time, but the Commission seeks comment on this proposal in the Fifth FNPRM, published elsewhere in this issue of the **Federal Register**. There is support in this record for this proposal. The Commission declines NCIC’s request to clarify that the fee cap for single call services “will continue to be \$3.00” or to prohibit transaction fees on all single calls. Nothing in the Commission’s rules today provides for a \$3.00 fee cap for single call services. And the Commission declines at this time to prohibit transaction fees for single calls pending further record development on this issue through today’s Fifth FNPRM. The Commission has previously found single-call services to be among “the most expensive ways to make a phone call.” And record evidence suggests some providers still may steer families of incarcerated people to these more expensive calls. The Commission previously noted “concerns that providers may be using consumer disclosures as an opportunity to funnel end users into more expensive service options, such as those that may require consumers to pay fees to third parties.” Revising the rule applicable to single-

call services in this way will ensure that consumers of inmate calling services, who may be unaware of or confused by other available calling options, are protected from unjust and unreasonable charges and practices when seeking to remain in contact with incarcerated friends or family, particularly when they are initially incarcerated and this immediate single-call method of communication is even more critical.

212. *Third-Party Financial Transaction Fees.* For the same reasons the Commission limits the third-party transaction fee associated with single-call services, the Commission revises the rule pertaining to third-party financial transaction fees in connection with funding accounts directly with the inmate calling services provider that may be set up on behalf of incarcerated people by their friends and family or by the incarcerated people themselves. The same revenue-sharing practices that lead the Commission to revise the single-call services rule are implicated in connection with the third-party financial transaction fees rule. Although the 2020 ICS FNPRM referred to “third-party transaction fees,” the third-party financial transaction fee described in section 64.6020(b)(5) is the same as the third-party transaction fee referred to in the rule pertaining to single-call services. Of course, as the Commission states, where no third party is involved in a call, no third-party fees may be charged.

213. The Commission sought comment in the 2015 ICS FNPRM on a variety of issues relating to revenue-sharing, including how the Commission can “ensure that these revenue sharing arrangements are not used to circumvent the Commission’s rules prohibiting markups on third-party fees.” In the 2020 ICS FNPRM, the Commission sought further comment on the use of revenue-sharing arrangements and whether the Commission should clarify the third-party financial transaction fee rule. CenturyLink previously contended that the rule governing third-party financial transaction fees already implicitly prohibits providers from recovering higher fees from consumers as a result of revenue-sharing agreements. In the 2020 ICS FNPRM, the Commission stated that “[m]arking up third-party fees, whether directly or indirectly, is prohibited.”

214. Yet the record in this proceeding continues to suggest that the same types of revenue-sharing agreements that lead to indirect markups of third-party transaction fees for single-call services similarly lead to mark-ups of third-party financial transaction fees. Such

practices serve to circumvent, either directly or indirectly, the limits placed by the Commission on ancillary service charges and lead to unjust and unreasonable charges. The Commission thus revises its rules relating to third-party financial transaction fees and limit the fees that a provider can pass through to a calling services consumer to \$6.95. The Commission clarifies that it does not prohibit providers from entering into revenue-sharing agreements with third parties, despite at least one commenter proposal to do just that. But providers may not pass on fees exceeding \$6.95 per transaction—whether or not they are associated with such agreements—to incarcerated people and their families.

## 2. Effect on State Regulation

215. As the Commission explained in the 2020 ICS Order on Remand, where the Commission has jurisdiction under section 201(b) of the Act to regulate rates, charges, and practices of interstate communications services, “the impossibility exception extends that authority to the intrastate portion of jurisdictionally mixed services ‘where it is impossible or impractical to separate the service’s intrastate from interstate components’ and state regulation of the intrastate component would interfere with valid federal rules applicable to the interstate component.” Consistent with that explanation and prior cases, the Commission exercises its authority under the Supremacy Clause of the U.S. Constitution to preempt state regulation of jurisdictionally mixed services but only to the extent that such regulation conflicts with federal law. To be clear, state regulation of jurisdictionally mixed services would not conflict with federal law if state regulation required rates at or below the federal rate caps. In such cases, the provider would need to comply with the lowest rate cap to comply with both federal and state requirements for jurisdictionally indeterminate services. Thus, state laws imposed on inmate calling services providers that do not conflict with those laws or rules adopted by the Commission are permissible. The interim reforms the Commission adopts in this Report and Order apply to interstate and international inmate calling services rates and certain ancillary services charges imposed for or in connection with interstate or international inmate calling services. To the extent that a call has interstate as well as intrastate components, the federal requirements will operate as ceilings limiting potential state action. To the extent a state allows or requires providers to impose or charge per-

minute rates or fees for the affected ancillary services higher than the caps imposed by the Commission’s rules, that state law or requirement is preempted except where a call or ancillary service fee is purely intrastate in nature, as the Commission did in the 2020 ICS FNPRM. In connection with ancillary service charges, the Commission reminds providers that “[t]o the extent a state allows or requires an inmate calling services provider to impose fees for ancillary services other than those permitted by its rules, or to charge fees higher than the caps imposed by its rules, that state law or requirement is preempted except where such ancillary services are provided only in connection with intrastate inmate calling services.” To the extent that state law allows or requires providers to impose rates or fees lower than those in the Commission’s rules, that state law or requirement is specifically not preempted by the Commission’s actions here. For example, the Commission is aware that certain states have begun efforts to examine inmate calling services rates and charges subject to their jurisdiction. The Commission applauds these state initiatives, which appear consistent with its own efforts in this proceeding. The fact that the Commission is also examining inmate calling services rates and charges involving jurisdictionally mixed services in no way precludes the states from also adopting rules governing such services so long as the states’ rules are not inconsistent with or conflict with federal law or policy.

## 3. Additional Data Collection

216. The Commission adopts a new data collection obligation to collect, in a more consistent and directed manner, the data and information necessary to respond to the various criticisms in the record about the imperfections and inconsistencies in the data from the Second Mandatory Data Collection. The 2020 ICS FNPRM sought comment on whether and how the Commission should proceed with respect to any new data collection. The Commission agrees with commenters that a new collection must state more precisely what data the Commission seeks and how a provider should approximate or derive the type of data the Commission requests if it does not keep its records in such a manner. This is an essential prerequisite to adopting permanent interstate rate caps for both provider-related and facility-related costs. Accordingly, the Commission delegates authority to WCB and the Office of Economics and Analytics (OEA) to implement a Mandatory Data Collection, including

determining and describing the types of information required related to providers' operations, costs, demand, and revenues, consistent with the directives in this section. In addition, the Commission delegates authority to CGB to undertake, if necessary, a separate data collection related to inmate calling services providers' costs and other key aspects of their provision of TRS and other assistive technologies, in conjunction with the disability access issues the Commission explores in the accompanying Fifth FNPRM, published elsewhere in this issue of the **Federal Register**.

217. *Background.* The Commission has conducted two mandatory data collections related to inmate calling services in the past eight years—the 2013 First Mandatory Data Collection and the 2015 Second Mandatory Data Collection. The 2013 collection required providers to report actual and forecasted costs, separately for jails and prisons and at a holding company level; specific categories of costs, including telecom costs, equipment costs, security costs, and other specified costs; and information on site commissions, minutes of use, number of calls, number of facilities, and information on charges for ancillary services. The data collected from the 2015 Second Mandatory Data Collection form the basis for the interim rates caps the Commission adopts herein. To allow for consistent data reporting, the Commission directed WCB in both collections to develop a template for providers to use when submitting their data and to furnish providers with further instructions to implement the collection. The Commission also directed WCB to review the providers' submissions and delegated to WCB the authority to require providers to submit additional data as necessary to perform its review. For example, staff analysis of responses to the Second Mandatory Data Collection revealed numerous deficiencies and areas requiring clarification. WCB and OEA conducted multiple follow-up discussions with providers to supplement and clarify their responses resulting in direction to several providers to amend their submissions and respond to questions from staff.

218. In response to the 2020 ICS FNPRM seeking comment on whether the Commission should collect additional data and, if so, what data it should collect, several parties support additional data collection. The Commission also sought comment on, among other things, whether providers should be required to update their responses to an additional data

collection on a periodic basis. GTL, however, suggests that the Commission should avoid the burden of an additional data collection, asserting that there is no reason to believe that providers will report their costs differently than they have in the past. GTL argues that the Commission should allow the market to adjust to any rules adopted as a result of the 2020 ICS FNPRM before imposing additional reporting requirements. GTL also suggests that relying on the Annual Reports that inmate calling services providers file pursuant to section 64.6000 of the Commission's rules would provide a less burdensome way of obtaining data and a better measure of rates in the marketplace.

219. *Mandatory Data Collection.* The Commission concludes that a Mandatory Data Collection is essential to enable it to adopt permanent interstate and international rate caps that more accurately reflect providers' costs than the interim rate caps the Commission adopts in this Report and Order. Such a data collection is also needed to enable the Commission to evaluate and, if warranted, revise the current ancillary service charge caps. Because of the adverse impact that unreasonably high rates and ancillary services charges have on incarcerated people and those family and loved ones they call, the Commission believes that the benefits of conducting a third collection far outweigh any burden on providers. Moreover, providers have long been on notice of the types of cost information the Commission intends to collect and will have ample time to consider how best to prepare to respond. The Commission delegates to WCB and OEA authority to implement this new data collection. The Commission directs them to develop a template and instructions for the collection to collect the information the Commission needs to protect consumers against unjust and unreasonable rates and ancillary services charges for interstate and international inmate calling services and to aid its continuing review of this unique inmate calling services marketplace that one provider quite aptly describes as “nuanced and multilayered.”

220. Contrary to GTL's assertion, an additional data collection is warranted, particularly considering the deficiencies of its own and other providers' responses to the Second Mandatory Data Collection. The Commission is not persuaded by GTL's concern about the timing of an additional collection, as the potential benefits from expediting further reform far outweigh any burdens the collection may place on providers.

The Commission's cost-benefit analysis shows substantial benefits are gained from lowering interstate and international inmate calling services rates towards costs. If, as appears likely, the interim price caps put in place today are still significantly above costs, then bringing rates down to costs will bring substantial further benefits. Finally, while the Annual Reports contain useful and relevant marketplace information on providers' rates and charges, the Commission disagrees with the contention that the Annual Reports provide sufficient data to establish just and reasonable interstate inmate calling services rates. As the Public Interest Parties explain, the Annual Reports only include information on rates and charges and not the type of cost data required to set cost-based rates.

221. *Details of Data Collection.* In the 2020 ICS FNPRM, the Commission sought comment on whether it should consider other types of data that would more fully capture industry costs beyond the detailed and comprehensive data it had already collected. Securus asserts that the Commission should require providers to follow a standard cost-causation modeling methodology to attribute costs to specific products, and, where that is not feasible, properly allocate costs across the products in a cost-causative manner, to the extent possible. Securus contends that cost drivers should be incorporated into the cost attribution analysis, such as time-tracking by software developers, IT support tickets, and physical inventory of computing hardware. The Public Interest Parties contend that, among other things, the Commission should collect granular data with detailed components of direct and indirect costs, operations, and revenues, in addition to collecting costs at the facility level. In addition, they assert that the Commission should standardize a methodology for allocating indirect costs. The Public Interest Parties maintain that future data collections should require the submission of the costs of ancillary services and should be audited by an independent third party prior to submission to the Commission. They also assert that the Commission should collect data on marketplace trends, such as bulk purchasing at fixed monthly rates. The Public Interest Parties further argue that the Commission should require certification of the submitted cost data by the chief executive officer, chief financial officer, or other senior executive of the provider, as required for the Annual Reports. In addition, they assert that the Commission should take enforcement

action against any parties violating the Commission's rules well in advance of any future data collection.

222. Securus asks that the Commission provide more specific instructions on how to measure direct and indirect costs and contends that each company should be required to provide detailed work papers showing how it complied with the Commission's instructions. Pay Tel supports modifications to forms, instructions, and guidance governing future data collections as necessary "to avoid the same or similar dataset issues currently presented." Pay Tel asserts that detailed instructions would guide providers when completing the data collection form, including by clearly and expressly defining terms that are crucial to the collection process. Pay Tel claims that many of the issues with the current dataset appear to have arisen due to differing provider interpretations of instructions and terms, and that the Commission should minimize the potential for such differing interpretations as much as possible.

223. The Commission directs WCB and OEA to consider all of the foregoing suggestions in designing the Mandatory Data Collection including considering whether to collect data for multiple years. They should also incorporate lessons learned from the two prior data collections to ensure that the Commission collects, to the extent possible, uniform cost, demand, and revenue data from each provider.

224. To ensure that the Commission has sufficient information to meaningfully evaluate each provider's operations, cost data, and methodology, the Commission directs WCB and OEA to collect, at a minimum, information designed to enable the Commission to:

- Quantify the relative financial importance of the different products and services in each provider's business portfolio, including revenues from products supplied by any corporate affiliates, and ensure that the provider's inmate calling services are not being used to subsidize the provider's, or any corporate affiliate's, other products or services;
- Quantify the relative financial importance of services, including revenues from each transmission service and ancillary service, included within the provider's inmate calling services operations;
- Measure the demand for the provider's inmate calling services (*e.g.*, in terms of paid and unpaid total minutes of use or completed calls);
- Calculate the provider's gross investment (gross book value of an asset, *i.e.*, prior to subtracting accumulated

depreciation or amortization), accumulated depreciation or amortization, deferred state and federal income taxes, and net investment (net book value of an asset, *i.e.*, after subtracting accumulated depreciation or amortization) in tangible assets, identifiable intangible assets, and goodwill, including, but not limited to, the extent to which such intangible assets and goodwill were created internally as opposed to being generated through company acquisitions or asset purchases;

- Calculate the provider's recurring capital costs for depreciation and amortization, state and federal income tax, and interest, each disaggregated among appropriate categories, and its weighted average cost of capital, including capital structure, cost of debt, cost of preferred stock, and cost of equity;

- Calculate the provider's recurring operating expenses, at a minimum for maintenance and repair; billing, collection, and customer care; general and administrative; other overhead; taxes other than income tax; and bad debt, each disaggregated among appropriate categories;

- Ensure that the provider has directly assigned to its inmate calling services operations, and to its other operations, the investments and expenses that are directly attributable to those operations, as may be prescribed by WCB and OEA;

- Ensure that the provider has allocated to its inmate calling services operations, and to its other operations, common investments and expenses (*i.e.*, investment and expenses that are not directly assignable to inmate calling services or to any single non-inmate calling services line of business);

- Ensure that the provider has directly assigned to specific contracts or facilities investments and expenses directly attributable to inmate calling services to the extent feasible;

- Ensure that the provider has allocated any remaining unassigned inmate calling services and common investment and expenses to specific contracts or facilities using reasonable, cost-causative methods;

- Ensure that the provider has directly assigned any site commission payments to, or allocated any such payments between, its inmate calling services and its other operations using reasonable, cost-causative methods; and
- Ensure that the provider has followed any required instructions regarding the foregoing.

225. The Commission also delegates to WCB and OEA the authority to require providers to submit any

additional information that they deem necessary to help the Commission formulate permanent rate caps or to revise its rules governing ancillary service charges. WCB and OEA shall have the authority to require each provider to fully explain and justify each step of its costing process and, where they deem it appropriate, to specify the methodology the provider shall use in any or all of those steps. WCB and OEA also shall have the authority to require any provider to clarify and supplement its response to this data collection where appropriate to enable the Commission to make a full and meaningful evaluation of the company's cost, demand, and revenue data and costing methodology. Each provider shall keep all records necessary to implement this collection, and all providers shall make such records available to the Commission upon request.

226. *Timeframes for Data Collection.* The Commission directs the template and instructions for the data collection to be completed for submission to the Office of Management and Budget (OMB) not later than 90 days after this Report and Order becomes effective. The Commission also directs WCB to require providers to respond within 120 days after WCB announces in a Public Notice that OMB has approved the new data collection, such announcement to occur no later than seven business days after receipt of OMB's approval. WCB may, however, grant an extension of the 120-day response deadline for good cause.

227. *Potential CGB Data Collection.* The Commission separately delegates authority to CGB to undertake a separate data collection related to inmate calling services providers' costs and other key aspects of their provision of TRS and other assistive technologies should CGB determine such a data collection is necessary to assist the Commission's consideration of the record obtained with respect to assistive technologies for incarcerated people pursuant to the Commission's accompanying Fifth FNPRM, published elsewhere in this issue of the **Federal Register**. To the extent CGB undertakes such data collection, the Commission delegates to it the authority to require providers to submit any additional information that it deems necessary to assist the Commission's consideration of reforms in this area. CGB shall also have the authority to require any provider to clarify and supplement its response to such data collection where appropriate.

#### 4. Effective Dates

228. The Commission's actions in this Report and Order, including its new interim interstate and international rate caps, will take effect 90 days after notice of them is published in the **Federal Register**, except that the delegations of authority in Part III.H.3 shall take effect upon such publication, and the rules and requirements that require approval from OMB under the Paperwork Reduction Act shall be effective on the date specified in a notice published in the **Federal Register** announcing OMB approval. This 90-day timeframe is the same transition timeframe the Commission proposed in the 2020 *ICS FNPRM*, and this period matches the timeframe the Commission adopted when providers first became subject to the current interim caps. The Commission received varying proposals for effective dates in response to its proposed 90-day timeframe. Certain commenters argue for an effective date of 30 days after publication in the **Federal Register**, on the basis that providers have been on notice of the pending changes for some time and that any further delay will only add to the costs that incarcerated people and their families will bear. Other commenters propose an effective date beyond 90 days or advocate for a staggered approach that would allow more transition time for jails, arguing that this additional time is necessary to make billing system changes or to renegotiate contracts among private parties.

229. The Commission concludes that a 90-day timeframe for implementing the new interim provider-related and facility-related rate caps and other changes that do not require OMB approval strikes a reasonable balance between the competing interests. On the one hand, a rapid timeframe would help alleviate the burden of unreasonably high interstate and international rates on incarcerated people and those they call, a burden that the ongoing COVID-19 global pandemic has exacerbated. On the other hand, the record shows that providers and correctional officials will need more than 30 days to execute any contractual amendments necessary to implement the new interstate and international rate caps and otherwise adapt to those caps. Parties seeking a longer transition period rely primarily on the difficulties jails with average daily populations less than 1,000 may encounter in implementing relatively sweeping changes to the rate cap structure. The only rate cap change applicable to those jails, however, will be to reduce the per-minute charges for interstate collect calls from \$0.25 per

minute to \$0.21 per minute. Further, as the Commission recognized in the 2020 *ICS FNPRM*, 90 days after publication in the **Federal Register** appears to have been sufficient for implementation of the rate cap changes adopted in the 2013 *ICS Order*. In view of the foregoing considerations, the Commission finds that a 90-day transition period after publication in the **Federal Register** appropriately balances the need for expedited reform with the difficulties of adapting to its new rules. The Commission rejects GTL's request that the Commission defer the effective date of the changes to the provider-related and facility-related rate cap components (which do not require OMB approval) until after OMB approves the new disclosure requirements affecting how providers bill consumers for calling services. GTL makes no showing as to why it cannot implement the changes to the rate caps components within 90 days after publication of notice of them in the **Federal Register** or why implementing them at a later date would be fair to calling services consumers. The Commission notes, however, any provider that wishes to avoid separate implementation dates is free to voluntarily implement the new disclosure requirements prior to their being approved by OMB.

230. The Commission finds good cause for having its delegations of authority to WCB, OEA, and CGB take effect immediately upon publication of notice of them in the **Federal Register**. Making the delegations effective at that time will enable WCB and OEA to move as expeditiously as practicable toward finalizing the Mandatory Data collection and thereby reduce the time it will take the Commission to set permanent rate caps for interstate and international inmate calling services and, if appropriate, revise the current ancillary service fee caps. Similarly, making the delegation to CGB effective upon publication in the **Federal Register** will enable CGB to move forward with any data collection as soon as practicable once it receives comments on the Fifth *FNPRM*, published elsewhere in this issue of the **Federal Register**. Given the importance of these areas to incarcerated people, including those with communication disabilities, any unnecessary delay in these initiatives would be inconsistent with the public interest.

#### 5. Rule Revisions

231. The Commission makes two non-substantive changes to its inmate calling services rules. First, the Commission amends section 64.6000(g) of its rules to fix a typographical error. Currently, this

section erroneously uses the word "though" instead of "through" in defining "Debit Calling" whereas a parallel definition for "Prepaid Calling" correctly uses "through." The Commission therefore changes "though" to "through" in section 64.6000(g). Second, the Commission removes the last sentence of section 64.6000(c) of its rules. That sentence references section 64.6010, which previously was removed and reserved for future use.

232. The Commission finds good cause to make these revisions without notice and comment. The Administrative Procedure Act permits agencies to issue rule changes without notice and comment "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The Commission finds good cause here because the rule changes are editorial and non-substantive. The rule changes correct a typographical error and conform the Commission's rules to previous rule amendments. The Commission need not seek comment on rule changes to "ensure consistency in terminology and cross references across various rules or to correct inadvertent failures to make conforming changes when prior rule amendments occurred."

#### IV. Severability

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

#### V. Procedural Matters

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

235. *Congressional Review Act*. The Commission has determined, and the Administrator of the Office of

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

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

237. *Final Paperwork Reduction Act Analysis.* The Third 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 OMB for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198; see 44 U.S.C. 3506(4), the Commission previously sought comment on how it will further reduce the information collection burden for small business concerns with fewer than 25 employees.

## VI. Supplemental Final Regulatory Flexibility Analysis

### A. Need for, and Objectives of, the 2021 Third Report and Order

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

248. The Third Report and Order adopts lower per-minute interim interstate provider-related rate caps of \$0.12 per minute for prisons and \$0.14 per minute for larger jails, respectively,

until the Commission completes its evaluation of a new mandatory data collection and adopts permanent rate caps. Next, it reforms the current treatment of site commission payments by adopting facility-related rate components to permit recovery only of the portions of such payments estimated, on the present record, to be directly related to inmate calling services and requires them to be separately listed on bills, if charged. Where site commission payments are mandated pursuant to state statute, or law or regulation and adopted pursuant to state administrative procedure statutes where there is notice and an opportunity for public comment that operate independently of the contracting process between correctional institutions and providers (the Legally Mandated facility rate component), providers may pass these payments through to consumers, without any markup, as an additional component of the new interim interstate per-minute rate cap. Where site commission payments result from contractual obligations reflecting negotiations between providers and correctional facilities arising from the bidding and subsequent contracting process (the Contractually Prescribed facility rate component), providers may recover up to \$0.02 per minute to account for these costs at prisons and larger jails. To promote increased transparency, the Third Report and Order requires providers to clearly label a Legally Mandated or Contractually Prescribed facility rate component, as applicable, in the rates and charges portion of a consumer's bill, including disclosing the source of such provider's obligation to pay that facility-related rate component. Next, the Third Report and Order eliminates the current interim interstate collect calling rate cap, resulting in a single uniform interim interstate maximum rate cap of \$0.21 per minute for calls from jails with average daily populations below 1,000. The Third Report and Order emphasizes that the sum of the provider-related and facility-related rate components for prisons and larger jails may not result in a higher permissible total rate cap for any interstate call from any size facility than the \$0.21 per minute cap that existed for interstate debit and prepaid calls before today and that continues to apply to all providers for all types of calls from jails with average daily populations below 1,000. The Third Report and Order also caps international inmate calling services rates for the first time, adopts a new mandatory data collection to obtain

more uniform cost data based on consistent allocation methodologies to determine fair permanent cost-based rates for facilities of all sizes, and reforms the ancillary service charge rules, capping third-party transaction fees related to calls that are billed on a per-call basis and related to transferring or processing financial transactions. Finally, the Third Report and Order reaffirms providers' current obligations regarding functionally equivalent access for incarcerated people with hearing and speech disabilities.

249. Regarding access to inmate calling services by people who are deaf, hard of hearing or deafblind, or have speech disabilities, the Third Report and Order reminds providers that they are obligated to comply with the existing inmate calling services and related rules, including rules requiring that incarcerated people be provided access to certain forms of telecommunications relay service (TRS), rate caps for calls using a text telephone (TTY) device, rules prohibiting charges for TRS-to-voice or voice-to-TTY calls, and rules requiring annual reporting of the number of TTY-based calls and any complaints. In addition, inmate calling services providers must ensure that the services and equipment provided for use by incarcerated people are accessible and usable by incarcerated people with communication disabilities (subject to achievability), including when legacy telephone services are discontinued and replaced with advanced services such as Voice over internet Protocol (VoIP).

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

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

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

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

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

252. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term

“small business” has the same meaning as the term “small business concern” under the Small Business Act. A “small business concern” is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

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

254. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.” The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

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

256. *Incumbent Local Exchange Carriers (incumbent LECs).* Neither the Commission nor the SBA has developed

a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated the entire year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by its actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees. Thus, using the SBA’s size standard the majority of incumbent LECs can be considered small entities.

257. 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.

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

engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities. The Commission has included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.” The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope. The Commission has therefore included small incumbent LECs in this RFA analysis, although it emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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

260. *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.

261. *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.

262. *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.

263. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers, a group that includes inmate calling services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 535 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 531

have 1,500 or fewer employees and four have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the Commission's action.

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

265. *All Other Telecommunications.* The "All Other Telecommunications" category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for All Other Telecommunications, which consists of all such firms with annual receipts of \$35 million or less. For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than \$25 million and 15 firms had annual receipts of \$25 million to \$49,999,999. Thus, the Commission estimates that the majority of "All Other Telecommunications" firms potentially affected by its actions can be considered small. Under this category and the associated small business size standard, a majority of the ten TRS providers can be considered small.

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

266. The Third Report and Order requires providers to examine site commission payments in order to recover only the portions of such payments estimated to be directly related to inmate calling services and to separately list these charges on consumers' bills. Providers must determine whether a site commission payment is either (1) mandated pursuant to state statute, law or regulation adopted pursuant to state administrative procedure statutes where there is notice and an opportunity for public comment and that operates independently of the contracting process between correctional institutions and providers (the Legally Mandated facility rate component), or (2) results from contractual obligations reflecting negotiations between providers and correctional facilities arising from the bidding and subsequent contracting process (the Contractually Prescribed facility rate component). For Legally Mandated site commission payments, providers may pass these payments through to consumers without any markup, as an additional component of the new interim interstate per-minute rate cap. For Contractually Prescribed site commission payments, providers may recover an amount up to \$0.02 per minute to account for these costs. To promote increased transparency, the Third Report and Order requires providers to clearly label a Legally Mandated or Contractually Prescribed facility rate component, as applicable, in the rates and charges portion of a consumer's bill, including disclosing the source of such provider's obligation to pay that facility-related rate component.

267. The Third Report and Order adopts a waiver process for providers if they can show that the applicable total rate per minute and ancillary service charge caps do not permit them to recover their costs of providing interstate and international calling services as well as minimum requirements for such a showing. It also adopts a new mandatory data collection to obtain more uniform cost data based on consistent prescribed allocation methodologies to determine fair permanent cost-based rates for facilities of all sizes.

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

268. 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.”

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

270. The Commission adopts new interim interstate facility-related rate components for prisons and larger jails to allow providers to recover portions of site commission payments estimated to be directly related to the provision of inmate calling services and to separately list these charges on consumers’ bills. Providers must determine whether a site commission payment is either (1) mandated pursuant to state statute, or law or regulation and adopted pursuant to state administrative procedure statutes where there is notice and an opportunity for public comment that operates independently of the contracting process between correctional institutions and providers (Legally Mandated facility rate component), or (2) results from contractual obligations reflecting negotiations between providers and correctional facilities arising from the bidding and subsequent contracting process (the Contractually Prescribed facility rate component). For Legally Mandated site commission payments,

providers may pass these payments through to consumers without any markup, as an additional component of the new interim interstate per-minute rate cap. For Contractually Prescribed site commission payments, providers may recover an amount up to \$0.02 per minute to account for these costs. To promote increased transparency, the Third Report and Order requires providers to clearly label a Legally Mandated or Contractually Prescribed facility rate component, as applicable, in the rates and charges portion of a consumer’s bill, including disclosing the source of such provider’s obligation to pay that facility-related rate component.

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

*G. Report to Congress*

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

**VII. Ordering Clauses**

273. Accordingly, *It is ordered* that, pursuant to the authority contained in sections 1, 2, 4(i)–(j), 201(b), 218, 220, 225, 255, 276, 403, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)–(j),

201(b), 218, 220, 225, 255, 276, 403, and 617, this Third Report and Order *is adopted*.

274. *It is further ordered* that, pursuant to the authority contained in sections 1, 2, 4(i)–(j), 201(b), 218, 220, 225, 255, 276, 403, and 716, of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)–(j), 201(b), 218, 220, 225, 255, 276, 403, and 617, this Third Report and Order, including the amendments to sections 64.6000, 64.6020, and 64.6030, of the Commission’s rules, *shall be effective* ninety (90) days after publication in the **Federal Register**, except that the delegations of authority to the Wireline Competition Bureau, the Office of Economics and Analytics, and the Consumer and Governmental Affairs Bureau shall be effective upon publication in the **Federal Register**. Sections 64.6110 and 64.6120 contain new or modified information collection requirements that require review by OMB under the PRA. The Commission directs the Wireline Competition Bureau to announce the effective date for those information collections in a document published in the **Federal Register** after the Commission receives OMB approval, and directs the Wireline Competition Bureau to cause sections 64.6110 and 64.6120 to be revised accordingly.

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

Federal Communications Commission.

**Marlene Dortch**,

*Secretary*.

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

Communications, Communications common carriers, Communications equipment, Computer technology, Individuals with disabilities, Prisons, Reporting and recordkeeping requirements, Security measures, Telecommunications, Telephone, Waivers.

**Final Rules**

For the reasons set forth above, the Federal Communications Commission amends part 64, subpart FF, of Title 47 of the Code of Federal Regulations as follows:

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

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

**Authority:** 47 U.S.C. 151, 152, 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 255, 262, 276, 403(b)(2)(B), (c), 616, 620, 716, 1401–1473, unless otherwise noted; Pub. L. 115–141, Div. P, sec. 503, 132 Stat. 348, 1091.

■ 2. Amend § 64.6000 by revising paragraphs (c) and (g) and adding paragraphs (v), (w), and (x) to read as follows:

**§ 64.6000 Definitions.**

\* \* \* \* \*

(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.

\* \* \* \* \*

(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 through a Provider that can be used to pay for Inmate Calling Services calls originated by the Inmate;

\* \* \* \* \*

(v) *Provider-Related Rate Component* means the interim per-minute rate specified in either § 64.6030(b) or (c) that Providers at Jails with Average Daily Populations of 1,000 or more Inmates and all Prisons may charge for interstate Collect Calling, Debit Calling, Prepaid Calling, or Prepaid Collect Calling.

(w) *Facility-Related Rate Component* means either the Legally Mandated Facility Rate Component or the Contractually Prescribed Facility Rate Component identified in § 64.6030(d).

(x) *International Destination* means the rate zone in which an international call terminates. For countries that have a single rate zone, *International Destination* means the country in which an international call terminates.

■ 3. Amend § 64.6020 by revising paragraphs (b)(2) and (5) to read as follows:

**§ 64.6020 Ancillary Service Charge.**

\* \* \* \* \*

(b) \* \* \*

(2) For Single-Call and Related Services—\$6.95 per transaction, plus the adopted, per-minute rate;

\* \* \* \* \*

(5) For Third-Party Financial Transaction Fees—\$6.95 per transaction.

■ 4. Revise § 64.6030 to read as follows:

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

(a) For all Jails with Average Daily Populations of less than 1,000 Inmates, no Provider shall charge a rate for interstate Collect Calling, Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of \$0.21 per minute.

(b) For all Jails with Average Daily Populations of Inmates of 1,000 or greater, no Provider shall charge a Provider-Related Rate Component for interstate Collect Calling, Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of \$0.14 per minute.

(c) For all Prisons, no Provider shall charge a Provider-Related Rate Component for interstate Collect Calling, Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of \$0.12 per minute.

(d) For all Jails with Average Daily Populations of Inmates of 1,000 or greater, and for all Prisons, Providers may recover the applicable Facility-Related Rate Component as follows:

(1) Providers subject to an obligation to pay Site Commissions by state statutes or laws and regulations that are adopted pursuant to state administrative procedure statutes where there is notice and an opportunity for public comment such as by a state public utility commission or similar regulatory body with jurisdiction to establish inmate calling services rates, terms, and conditions and that operate independently of the contracting process between Correctional Institutions and Providers, may recover the full amount of such payments through the Legally Mandated Facility Rate Component subject to the limitation that the total rate (Provider-Related Rate Component plus Facility-Related Rate Component) does not exceed \$0.21 per minute.

(2) Providers that pay Site Commissions pursuant to a contract with the Jail or Prison may recover up to \$0.02 per minute through the Contractually Prescribed Facility Rate Component except where the Provider's total Contractually Prescribed Facility Rate Component results in a lower per-minute rate than \$0.02 per minute of use. In that case, the Provider's Contractually Prescribed Facility Rate Component is limited to the actual amount of its per-minute Site Commission payment up to a maximum of \$0.02 per minute. Providers shall calculate their Contractually Prescribed Facility Rate Component to three decimal places.

(e) No Provider shall charge, in any Prison or Jail it serves, a per-minute rate for an International Call in excess of the applicable interstate rate cap set forth in

paragraphs (a), (b), (c), and (d) of this section plus the average amount that the provider paid its underlying international service providers for calls to the International Destination of that call, on a per-minute basis. A Provider shall determine the average amount paid for calls to each International Destination for each calendar quarter and shall adjust its maximum rates based on such determination within one month of the end of each calendar quarter.

■ 5. Delayed indefinitely, revise § 64.6110 to read as follows:

**§ 64.6110 Consumer disclosure of Inmate Calling Services rates.**

(a) Providers must clearly, accurately, and conspicuously disclose their interstate, intrastate, and international rates and Ancillary Service Charges to consumers on their websites or in another reasonable manner readily available to consumers. In connection with international rates, providers shall also separately disclose the rate component for terminating calls to each country where that provider terminates International Calls.

(b) Providers must clearly label the Facility-Related Rate Component (either the Legally Mandated Facility Rate Component or the Contractually Prescribed Facility Rate Component) identified in § 64.6030(d) as a separate line item on Consumer bills for the recovery of permissible facility-related costs contained in Site Commission payments. To be clearly labeled, the Facility-Related Rate Component shall:

(1) Identify the Provider's obligation to pay a Site Commission as either imposed by state statutes or laws or regulations that are adopted pursuant to state administrative procedure statutes where there is notice and an opportunity for public comment that operates independently of the contracting process between Correctional Institutions and Providers or subject to a contract with the Correctional Facility;

(2) Where the Site Commission is imposed by state statute, or law or regulation adopted pursuant to state administrative procedure statutes where there is notice and an opportunity for public comment and that operates independently of the contracting process between Correctional Institutions and Providers, specify the relevant statute, law, or regulation.

(3) Identify the amount of the Site Commission payment, expressed as a per-minute or per-call charge, a percentage of revenue, or a flat fee; and

(4) Identify the amount charged to the Consumer for the call or calls on the bill.

(c) Providers must clearly label all charges for International Calls in § 64.6030(e) as a separate line item on Consumer bills. To be clearly labeled, providers must identify the amount charged to the Consumer for the International Call, including the costs paid by the provider to its underlying international providers to terminate the International Call to the international destination of the call.

(d) Paragraphs (a), (b), and (c) of this section contain new or modified information collection requirements adopted in FCC 21–60. Compliance with these information collection requirements will not be required until after approval by the Office of Management and Budget. Providers will be required to comply with these information collection requirements immediately upon publication in the Commission of a document in the **Federal Register** announcing Office of Management and Budget approval and revising this paragraph accordingly.

■ 6. Delayed indefinitely, add § 64.6120 to subpart FF to read as follows:

**§ 64.6120 Waiver process.**

(a) A Provider may seek a waiver of the interim rate caps established in § 64.6030 and the Ancillary Service Charge fee caps on a Correctional Facility or contract basis if the interstate or international rate caps or Ancillary Service Charge fee caps prevent the Provider from recovering the costs of providing interstate or international Inmate Calling Services at a Correctional Facility or at the Correctional Facilities covered by a contract.

(b) At a minimum, a Provider seeking such a waiver is required to submit:

(1) The Provider's total company costs, including the nonrecurring costs of the assets it uses to provide Inmate Calling Services, and its recurring operating expenses for these services at the Correctional Facility or under the contract;

(2) The methods the provider used to identify its direct costs of providing interstate and international Inmate Calling Services, to allocate its indirect costs between its Inmate Calling Services and other operations, and to assign its direct costs to and allocate its indirect costs among its Inmate Calling Services contracts and Correctional Facilities;

(3) The Provider's demand for interstate and international Inmate Calling Services at the Correctional Facility or at each Correctional Facility covered by the contract;

(4) The revenue or other compensation the Provider receives from the provision interstate and international Inmate Calling Services, including the allowable portion of any permissible Ancillary Service Charges attributable to interstate or international inmate calling services, at the Correctional Facility or at each Correctional Facility covered by the contract;

(5) A complete and unredacted copy of the contract for the Correctional Facility or Correctional Facilities, and any amendments to such contract;

(6) Copies of the initial request for proposals and any amendments thereto, the Provider's bid in response to that request, and responses to any amendments (or a statement that the Provider no longer has access to those documents because they were executed prior to the date this section is codified).

(7) A written explanation of how and why the circumstances associated with that Correctional Facility or contract differ from the circumstances at similar Correctional Facilities the Provider serves, and from other Correctional Facilities covered by the same contract, if applicable; and

(8) An attestation from a company officer with knowledge of the underlying information that all of the information the provider submits in support of its waiver request is complete and correct.

(c) A Provider seeking a waiver pursuant to paragraph (a) of this section must provide any additional information requested by the Commission during the course of its review.

(d) Paragraphs (a), (b), and (c) of this section contain new or modified information collection requirements adopted in FCC 21–60. Compliance with these information collection requirements will not be required until after approval by the Office of Management and Budget. Providers will be required to comply with these information collection requirements immediately upon publication in the Commission of a document in the **Federal Register** announcing Office of Management and Budget approval and revising this paragraph accordingly.

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

**Appendix A**

**Analysis of Responses to the Second Mandatory Data Collection**

**A. Introduction**

1. The Commission determines the interim interstate provider-related rate caps by developing separate zones of reasonableness

based on data submitted by inmate calling services providers in response to the Second Mandatory Data Collection. In this Appendix, the Commission frequently refers to inmate calling services providers by short names or acronyms. These providers are: ATN, Inc. (ATN); CenturyLink Public Communications, Inc. (CenturyLink); Correct Solutions, LLC (Correct); Combined Public Communications (CPC); Crown Correctional Telephone, Inc. (Crown); Global Tel\*Link Corporation (GTL); ICSolutions, LLC (ICSolutions); Legacy Long Distance International, Inc. (Legacy); NCIC Inmate Communications (NCIC); Pay Tel Communications, Inc. (Pay Tel); Prodigy Solutions, Inc. (Prodigy); and Securus Technologies, LLC (Securus). The goal of the Commission's approach is to estimate the mean contract cost per paid minute while taking into account providers' costs of providing inmate calling services as reported in response to the Second Mandatory Data Collection as well as the limitations of those data and concerns raised by stakeholders. The Commission establishes the bounds of the zones using a variety of standard data and economic methods. The Commission's overall approach is described in this Introduction, with additional details and the results discussed in the remainder of this Appendix and the Appendices that follow.

2. The Commission begins by collecting certain cost and revenue data related to inmate calling services from providers through the Commission's Second Mandatory Data Collection. Next, following a standard approach to data cleaning, the Commission then reviews the responses to the Second Mandatory Data Collection to identify submissions with duplicative, missing, or anomalous data. The Commission then fixes or removes these observations as appropriate, and create new variables that will be used in its analysis. Created variables include, for example, facility size categories and rurality (based on geocoding). These new variables are based on information submitted in the Second Mandatory Data Collection and described in greater detail below. At the core of its initial analysis and creation of new variables is the selection of a suitable mechanism to allocate reported indirect costs. Allocating indirect costs is critical to ensuring that the estimates capture the providers' actual costs associated with providing inmate calling services to the greatest possible extent. These steps result in a dataset that serves as the basis for the remainder of its analyses. Data cleaning and cost allocation play a critical role in ensuring appropriate evaluation of the data and lead to results that better reflect the realities of the inmate calling services market.

3. Using this dataset, the Commission first estimates the upper bounds of the zones of reasonableness by calculating, for both prisons and larger jails, the mean per-minute contract costs plus one standard deviation. Incorporating a standard deviation into each upper bound recognizes that providers' costs vary but places a limit on how much costs may differ among providers. Under a normal distribution, 68% of providers would fall within one standard deviation of the mean. The Commission recognizes, however, that per-minute costs may be affected by the

particular characteristics of a facility or contract, such as size or location. With statistical modeling, the Commission can identify how well various reported characteristics predict the per-minute costs of a contract. The results of this analysis can inform which characteristics, if any, may influence its approach to setting interim rates.

4. To estimate the lower bound of each zone of reasonableness, the Commission compares results from standard statistical tests to identify outliers within the dataset. An outlier is a value within the data that “lies an abnormal distance from other values.” After removing the outliers, the Commission finds there are still contracts that have reported per-minute costs that are significantly higher than other providers. To bring these contracts into alignment with comparable contracts, the Commission employs a statistical method that replaces the cost information for the abnormally high-cost contracts with cost information from contracts that have similar characteristics. The Commission uses these adjusted data to calculate the mean per-minute cost plus one standard deviation. From between the upper and lower bounds, the Commission then selects interim interstate provider-related rate caps for prisons and larger jails in accord with its analysis. The Commission concludes its analysis by testing whether these interim rate caps will allow providers to recover the costs of providing calling services to incarcerated people. In the remainder of this Appendix, the Commission describes the Second Mandatory Data Collection in greater detail, specific steps taken to clean the data, and initial data analysis to allocate indirect costs and explore the data. In addition, the Commission selects an appropriate cost allocator and assess the commercial viability of contracts under the new interim interstate provider-related rate caps.

5. *Collecting Inmate Calling Services Data.* The Commission’s efforts to reform inmate calling services rates begin with collecting the cost, revenue, and other data reported by providers. The Commission initiated the Second Mandatory Data Collection in order to obtain more comprehensive and detailed data about inmate calling services providers, with the goal of setting more accurate cost-based rates. This effort included seeking cost data at the level of the contract and seeking information on cost components such as credit card processing fees, payments to affiliates, and the direct costs for collect calls. Further, the Second Mandatory Data Collection was unprecedented in how it disaggregates minutes, calls, site commissions, and revenues. Unlike past collections, providers reported both paid and unpaid minutes, and reported breakdowns of minutes and calls by payment type (debit/prepaid and collect calls) and by regulatory jurisdiction. Providers also reported site commissions in fixed and variable components, and disaggregated revenues between inmate calling services revenues and ancillary service revenues. These data, coupled with key attributes, such as average daily population (ADP), facility type (prison or jail), and facility locations, provide a detailed view of the inmate calling services industry.

6. Appropriate use of these data, however, requires awareness of the data’s flaws. Two difficulties stand out. First, different providers record and interpret costs differently. This makes it impossible to ensure an apples-to-apples comparison among providers. Second, providers have strong incentives to overstate costs because higher costs will increase any rate caps the Commission bases upon those costs, resulting in higher prices. In fact, these two difficulties may be the reason why the data do not support two widely believed stylized facts: that providers’ prison costs per minute are generally lower than their jail costs per minute; and that providers’ unit costs tend to rise as the size of a correctional institution falls. Consequently, averaging reported costs, as allocated between prison and jail contracts, shows prisons to be more expensive to serve on a per-minute basis than jails.

7. However, careful analysis can identify such biases, and correct for them (see Appendix C). A similar distortion can occur if different providers have different approaches to reporting their costs. One provider’s costs could, through the averaging process, overstate the costs of contracts of a certain type and understate the costs of others. However, averaging over all providers would reduce such distortions to the extent they were not systematic. Separately, the Commission finds other aspects of the reported data are less likely to be distorted. Providers’ reports of call minutes (*i.e.*, minutes of use) and revenues are likely to be accurate down to the level of the contract. Call minutes are almost universally billed, as are calls when the first minute is priced differently to the second, requiring auditable accounting. For roughly 72% of contracts (2,100 of 2,900), providers report paid minutes which account for 90% or more of their total reported minutes, according to staff analysis of the Second Mandatory Data Collection responses. Revenue tracking, and thus reported revenues, are also likely to be reliable. Calling service providers have strong incentives to accurately track revenues. First, they must do so in order to make revenue-based site commission payments, which occur in a large majority of contracts. For roughly 86% of contracts (2,488 of 2,900), providers report variable site commissions (both legally compelled and negotiated), according to staff analysis of the Second Mandatory Data Collection responses. Second, tracking revenues at the contract level is necessary to determine whether a contract is profitable. Revenue reports are particularly valuable for the Commission’s analysis because they provide an upper bound for contract costs that can be used to verify the accuracy of chosen cost allocation approaches. Accordingly, the Commission finds reported minutes of use and revenues to be reliable, and the Commission uses them in setting the interim interstate provider-related rate caps.

#### **B. Fundamentals of the Second Mandatory Data Collection**

8. *Description of Data Collection.* The Second Mandatory Data Collection was adopted with the goal of enabling the

Commission to identify trends in the market and provide information necessary to adopt further reforms. Providers offering inmate calling services were required to submit five years of information, covering calendar years 2014 to 2018. Providers filed their responses to the data collection in March 2019. Commission staff then “undertook a comprehensive analysis of the . . . responses and conducted multiple follow-up discussions with . . . providers to supplement and clarify their responses.” In addition, staff relied on providers’ April 1, 2020, annual reports to further inform the analysis and results set forth in the *2020 ICS FNPRM*.

9. Information requested by the Commission in the Second Mandatory Data Collection included company and affiliate information, total costs and revenues, and facility-level information. Filers were required to indicate the portion of total costs directly attributable to the provision of inmate calling services and allocate indirect costs, such as general overheads, between inmate calling services and other operations. In total, 13 providers of inmate calling services submitted data to the Commission (see Table 1). The 13th provider, Talton, is excluded from Table 1 for the reasons discussed below. The collected data included information on numerous characteristics of the providers’ contracts, such as:

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

10. *Description of Initial Data Cleaning.* In its review of the responses to the Second Mandatory Data Collection, the Commission identifies submissions with incomplete or invalid data, duplicative information, and contracts that are not comparable to others because of unique characteristics. The Commission excludes these contracts where they cannot be used (*e.g.*, where missing data would not allow the Commission to make relevant calculations) or where the contracts do not have paid minutes, and so are unaffected by changes to the interstate rate caps. As the Wright Petitioners, Prison Policy Initiative, and Public Knowledge (Public Interest Parties) recognize, “data cleaning to ensure comparability of costs” is important. In response to commenters’ emphasis on data consistency, the Commission further reviews the responses to the Second Mandatory Data

Collection and identify additional contracts that should be excluded from its analysis. Commenters express concern with instances where provider responses to the Second Mandatory Data Collection report zero values. Specifically, the Commission removes an additional 35 contracts beyond the contracts removed from the results presented in the 2020 ICS FNPRM. Commenters express concern with instances where provider responses to the Second Mandatory Data Collection report zero values. The Commission does not remove these contracts because the Commission finds it appropriate to classify them as smaller jail contracts based on the reported paid minutes of use. The contracts removed from the 2020 ICS FNPRM analysis included three contracts “not comparable to the average correctional facility” and contracts reporting zero minutes. In addition to removing these contracts, the Commission removes contracts with negative or zero total revenue. Other than the adjustments noted below, the Commission accepted the filers’ data and related information “as provided” (*i.e.*, without any modifications).

11. *Removing Contracts with Invalid or Incomplete Data.* For the calculations presented in this Appendix, the Commission excludes a total of 467 contracts from the Second Mandatory Data Collection data. First, the Commission removes 424 contracts where a provider reported either zero paid minutes or zero total minutes, 416 of which reported neither paid nor total minutes. Of the remaining eight contracts reporting either zero paid minutes or zero total minutes, two appear to be contracts for juvenile services and the provider may not charge for calls ([REDACTED] in Texas and [REDACTED] in Florida), and six report zero paid minutes, but report a range of total minutes from four to 97. As a practical matter, contracts that provide free inmate calling services will not be affected by the interim rate caps adopted in the Report and Order, and zero-minute contracts frustrate attempts to calculate per-minute rates or revenues. The Commission finds these reasons sufficient to exclude such contracts from its analysis. Second, the Commission removes 10 contracts where a provider reported direct costs less than \$0. By contrast, the Commission did not delete contracts for which no direct costs were reported. Finally, the Commission excludes 31 contracts where the total revenue net of site commissions is less than or equal to \$0. The Commission finds that contracts that report negative direct costs and/or negative revenues are implausible, and likewise indicative of some error in reporting.

12. *Excluding an Anomalous Contract.* The Commission excludes a long-standing, so presumably viable, contract between GTL and the [REDACTED], because it has an unusual preponderance of free calls, and at face value suggests GTL’s per-minute costs on this contract for both paid and unpaid minutes are as low as [REDACTED]. In 2018, GTL provided [REDACTED] free minutes, earning revenues on only [REDACTED] minutes, or [REDACTED] of all minutes on this contract. Thus, free minutes constitute [REDACTED] of all minutes on this contract. In contrast, the share of paid minutes for all

contracts excluding this one is 3.3%. Consistent with this [REDACTED] share of free minutes, it appears that the state requires the provision of at least two free 10-minute calls to each incarcerated juvenile per week. This equals the quotient of GTL’s total revenues under the contract and total minutes supplied. GTL also paid [REDACTED] on the contract, which also is somewhat unusual. In 2018, only 31% of all prison contracts were commission-free. Inclusion of this contract distorts the cost allocation procedure, raising the mean per-minute cost for prisons by approximately [REDACTED] (from [REDACTED] to [REDACTED]), and increasing the standard deviation from \$0.041 to \$0.658. This occurs because the Commission estimates the per-minute costs by dividing a contract’s allocated cost by paid minutes. Because this contract bears so few paid minutes, the Commission calculates a per-minute cost of [REDACTED]. If per-minute costs were calculated using total minutes instead of paid minutes, the per-minute costs would be [REDACTED]. This is implausible on its face, and becomes more implausible in light of the reported revenues associated with the contract. By way of comparison, this is [REDACTED] times higher than the next nearest allocated cost, [REDACTED] times higher than the average allocated cost for prisons, and [REDACTED] times higher than the [REDACTED] per-minute costs the Commission calculates for GTL’s contract with the [REDACTED]. GTL only reports earning [REDACTED] per paid minute on this contract, an amount that is less than [REDACTED] the per-minute allocated cost. This is also substantially lower than the rate GTL earned per all minutes on its contract with the [REDACTED], or [REDACTED] per minute.

13. *Eliminating Double Reporting and Excluding Federally Managed Facilities.* In discussions with calling service providers, the Commission learned that several had included site commissions as part of their total inmate calling services costs and a subset of those had also reported site commissions as part of their direct inmate calling services costs. Because the Commission is interested in the cost of providing the underlying telecommunications service, the Commission does not include site commission payments in the measures of providers’ costs. The Commission also discovered a double reporting of site commission payments for [REDACTED] contracts that both [REDACTED] and [REDACTED] reported serving. In their responses to the Second Mandatory Data Collection, it appears that [REDACTED] reported its share of the site commission while [REDACTED] reported the site commission for the entire contract. In these cases, the Commission has removed the site commission payments reported by [REDACTED] and consider [REDACTED]’s reported payment to represent the site commissions for the entire contract.

14. The Commission also excluded two contracts that are not comparable to the average correctional facility because they are managed by Immigration and Customs Enforcement (ICE) and the Federal Bureau of

Prisons (BOP). This is because significant elements of inmate calling services in these federal institutions are managed by the incarceration authority and not the reporting provider. The ICE contract was the only contract held by Talton, so dropping this contract eliminated Talton from the dataset thus resulting in reliance on data from 12 providers. Before dropping the BOP contract, the Commission allocated a share of GTL’s costs reported at the level of the firm (as opposed to the contract) to the BOP contract as described below. Excluding these contracts produces a dataset of 2,900 contracts, accounting for 2.2 million incarcerated people and 7.8 billion paid minutes.

15. The Commission’s dataset of 2,900 contracts gives an unprecedented view into providers’ costs, revenues, and call minutes. Today, CenturyLink’s former inmate calling services operations are part of ICSolutions, but the Commission kept those operations separate in the analysis. By excluding incomplete and anomalous contracts, the Commission substantially improves the comparability of the information submitted by providers. However, providers may have overstated their costs or reported costs differently than other providers. The Commission addresses these issues in Appendix C by excluding outliers and replacing the cost information for abnormally high costs with that of comparable contracts.

### C. Initial Data Analysis

16. After cleaning the reported data, the Commission makes a number of basic analytical observations to aid its analysis. First, it is important to understand the different levels of granularity in reported costs. This leads the Commission to conduct the analysis at the contract level. Next, the Commission divides the reported data into several tiers, and examine prisons, larger jails, and jails with average daily populations less than 1,000 separately. The Commission also conducts a geographic analysis to analyze the effects of rurality on reported costs. Finally, the Commission observes that disparate treatment of ancillary services costs and revenues requires some attention in order to ensure the Commission is comparing commensurate quantities. Taken together, these steps form a predicate around which may then offer further, deeper analysis of the resultant costs. The Commission reviews these steps below.

17. *Granularity of Reported Costs.* In the Second Mandatory Data Collection, costs are effectively reported at two levels, that of the inmate calling services provider—total costs—and that of the contract. Contract costs are costs that the provider attributes to a specific contract, including any proportion of overheads the provider elects to allocate. In this Appendix, unless otherwise specified, the Commission uses “overheads” to refer to costs incurred to provide a service, but which are also incurred to provide other services, and so cannot be directly attributed to any of those services. The canonical example is a chief executive officer’s salary. Another example is the cost of a provider’s platform and associated software used to provide inmate calling services across all of the

provider's contracts. That cost cannot be directly attributed to any particular contract. Instead, it is incurred whether or not one, several, or perhaps even most of the contracts are served. The difference between a provider's total costs and the sum of all costs reported at the contract level is unallocated costs, and these represent costs that have not been attributed to a particular contract. While providers generally reported at least some inmate calling services costs at the level of the contract, and more rarely at the level of the facility, each did this differently. Providers took different approaches in how they reported these costs. For example, bad debt is the only cost GTL reports at the level of the contract. Thus, for GTL, a range of other contract-specific costs are recorded at the level of the firm only. By contrast, another provider allocates some of its costs, most likely including overheads, to the contract according to the contract's share of phones installed. Still other providers allocate all of their overheads using a revenue allocator.

18. *Unit of Analysis.* The Commission's analysis is conducted primarily at the contract level. This approach is consistent with its view that the contract is the basic unit of supply for inmate calling services. That is, providers bid on contracts, rather than facilities (though in many instances the contract is for a single facility). This approach is also consistent with how the data were submitted, reflecting the underlying reality that providers are focused on contracts as a whole and not elements of the contracts. The Commission requested information to be submitted for each correctional facility where a provider offers inmate calling services, and some key variables—for example, the quantity of calls and minutes of use—were reported by facility. However, even though over 90% of contracts were reported as representing a single facility, most filers do not maintain all of the data the Commission requested by facility in the ordinary course of their business. As a result, in some instances, contracts were reported that covered multiple facilities without any breakout for those

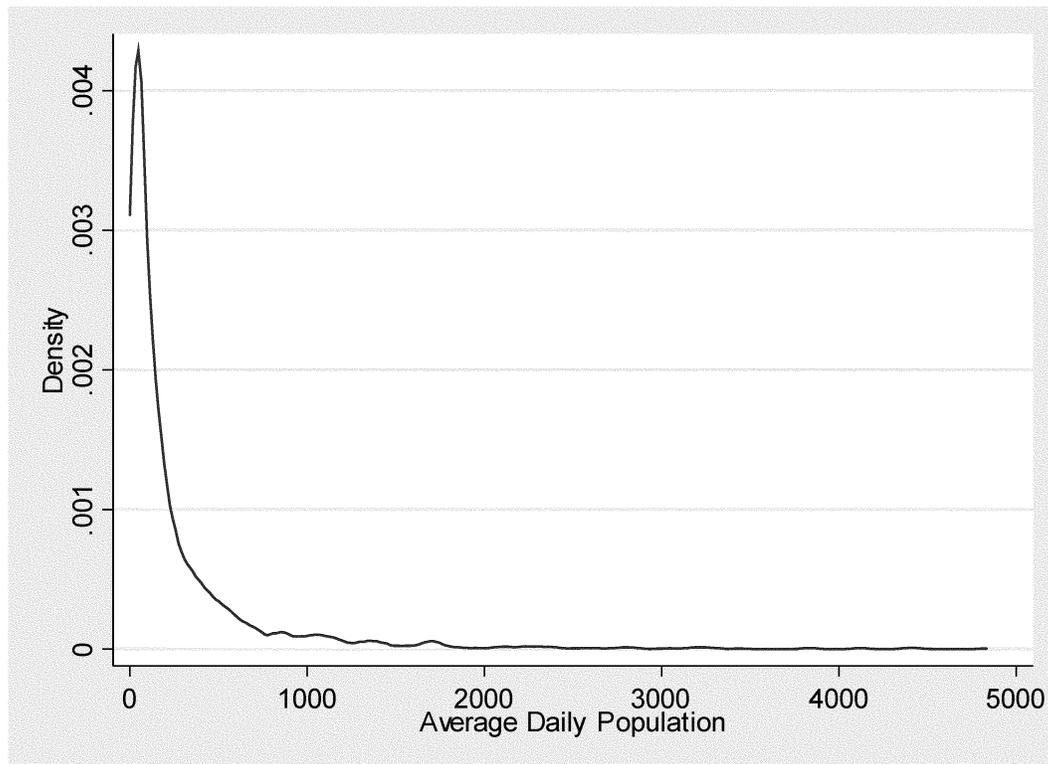
facilities. For example, contracts with the [REDACTED] and [REDACTED] were reported as single facilities, with average daily populations of [REDACTED] and [REDACTED], respectively. In other cases, some facility-level data were not reported. Examples of the latter include average daily populations and credit card processing costs. In any event, because the Second Mandatory Data Collection instructions had required providers to cross-reference their contracts with the facilities they covered, the Commission was able to group facilities by contract, which facilitated its ability to conduct its analysis at the contract level.

19. *Separation into Tiers.* The Commission separates contracts into three distinct categories for analysis: Contracts for prisons, contracts for jails with average daily populations of less than 1,000, and contracts for jails with average daily populations of 1,000 or more (larger jails). Average daily population was not reported for three of the 129 prison contracts and 81 of the 2,771 jail contracts. The average paid minutes across these 81 jail contracts is 54,895 paid minutes. Since the average paid minutes for these contracts are lower than the average paid minutes reported for jails with average daily populations less than 1,000, the Commission categorizes these 81 jail contracts as contracts for jails with fewer incarcerated people for the purposes of its analysis. Average paid minutes for a smaller jail is 634,774, and average paid minutes for a larger jail is 9,274,594.

20. Average daily population of 1,000 serves as a natural breakpoint in the data in two key respects. A natural break in a dataset is an approach to classifying data into ranges based on the similarity of the observations within a class, in this case, facility size (*i.e.*, average daily population). First, in terms of cost differentials, jails with average daily populations less than 1,000 are more likely than larger jails to exhibit higher per-minute costs. For instance, contracts for jails with fewer people exceed a cost threshold of \$0.16 per minute at more than twice the rate of contracts for larger jails. Of the 2,589 smaller jail contracts, 132 contracts have an average

per-minute cost above \$0.16, and of the 182 larger jail contracts, four have an average per-minute cost above \$0.16. Staff analysis of Second Mandatory Data Collection. Second, as shown in Figure 1 below, visualizing the distribution of the average daily population data for jails shows a shift in the shape of the data around an average daily population of 1,000, with a much more substantial density of observations below 1,000 as compared to above. Distribution of average daily population was visualized by plotting the results of a kernel density estimate. This density is driven by large numbers of contracts with low average daily populations. Specifically, approximately 48% of all jail contracts report average daily populations of less than 100, and approximately 93% of all jail contracts report average daily populations of less than 1,000. The Commission then looks at the 95th percentile value because it is often used to identify the tail of a distribution (*i.e.*, the values in the distribution that are farthest from the mean). Across all 2,771 jail contracts, the 95th percentile of average daily population is 1,165. Put differently, 95% of the jail contracts have average daily populations of less than 1,165, and 5% of jail contracts report an average daily population of 1,165 or greater. Since average daily population is an annualized estimate based on one year of data, the Commission finds it reasonable to round to the nearest order of magnitude and remain consistent with other analyses that use 1,000 or more as a category. The Commission includes jails with average daily populations less than 1,000 in the total dataset of 2,900 contracts for purposes of analyzing the various possible allocation methodologies and to ensure the analysis is sufficiently comprehensive. But, because the Commission does not adopt a new interstate interim rate cap for debit and prepaid calls from jails with average daily populations less than 1,000, the Commission does not provide summary statistics or otherwise analyze such facilities in this Appendix.

Figure 1 – Density of Average Daily Population for Jails



For the purposes of this Figure, the Commission visualizes only jail contracts with average daily populations less than 5,000.

21. *Geographic Analysis.* Rurality is an additional characteristic of correctional facilities that may affect the costs of provisioning inmate calling services. For example, jails and prisons in more rural areas of the country may be required to pay a higher rate for access to the public switched telephone network and these costs should be recoverable. Similarly, it is possible other costs, such as those for maintenance visits or installations, may be higher in rural areas. Detailed geographic information was not requested as part of the Second Mandatory Data Collection; however, the Commission did request that providers submit the street address for each facility reported. The Commission geocoded these addresses to determine the Census Block in which each facility is located. Geocoding is a process of associating longitude and latitude coordinates to a facility's address to conduct geographic analyses. This allows the Commission to test, for example, whether the costs of providing inmate calling services tend to be higher for facilities in blocks defined as rural by the U.S. Census Bureau. "Rural" encompasses all population, housing, and territory not included within an urban area." "Urban areas" are "Urbanized Areas (UAs) of 50,000 or more people"; and

"Urban Clusters (UCs) of at least 2,500 and less than 50,000 people." "Census blocks provide the 'building blocks' for measuring population density and delineating each urban area."

22. The Commission applied three processes to ultimately geocode 3,784 or 88% of the 4,319 filed facilities. The Commission first used ArcMap software version 10.8 to geocode 3,321 or 77% of the 4,319 filed facilities. The Commission then took a random sample of 170, or 17%, of the 998 addresses the Commission was unable to geocode, and where possible, corrected them manually. The Commission were able to geocode 164 of these 170 addresses. Finally, the Commission developed a Python script to clean up the remaining addresses—which the Commission then manually checked—and were able to geocode 299 additional facilities this way. In instances of contracts with multiple facilities, the Commission was unable to geocode the relevant facilities where a filer only provided a single address. In some instances, a mailing address was reported. If this was different from the facility's physical address and the address correction process did not detect this error, then the mailing address was used.

23. *Matching Ancillary Costs and Revenues.* The Second Mandatory Data Collection also collected data on the revenues generated from ancillary service charges, which are separate from inmate calling services revenues. Such charges have their own matching costs, which may be separately accounted for by providers. Providers should not have reported costs for lines of business such as video visitation services as part of inmate calling services costs, and thus the Commission does not have to account for these services. For example, ancillary services revenues from passthrough fees can be matched to separately reported costs. Thus, because revenues and costs for passthrough fees are separately reported, they can be readily compared.

24. In other cases, the costs of ancillary services may not be separately reported, but instead may be included by providers as the costs of supplying inmate calling services. In such cases, the Commission cannot be sure appropriate matching occurs. Because it is important to compare commensurate costs and revenues when assessing service profitability, the Commission must take steps to control for these circumstances. For example, for some analyses, the Commission



TABLE 2—SELECTED STATISTICS OF RESPONDING PROVIDERS—Continued

Provider	Number of contracts	ADP	ADP (% of total)	Paid minutes (millions)	Paid minutes (% of total)	Per-paid minute cost (\$)	Per-paid minute revenue (\$)
Prodigy .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Securus .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Industry .....	2,900	2,238,732	100.0	7,790	100.0	0.092	0.096
Industry (Excluding GTL) .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

**Notes:** Average daily population was reported for only 2,816 out of 2,900 contracts. Per-paid-minute costs equal reported total costs, excluding site commissions, divided by paid minutes. Per-paid minute revenues equal all reported calling revenues, including for automated payment and paper billing services, divided by paid minutes.

30. Two noteworthy observations are offered by the foregoing table. First, because of the highly concentrated nature of supply, the data submitted by a few providers have a disproportionate effect on the total revenues and costs reported by the industry. For example, exclusion of GTL—see the last row—lowers the average cost per paid minute by nearly [REDACTED]. Second, GTL uniquely reports making losses on inmate calling services (with a per-paid minute cost of [REDACTED] compared to a per-paid minute revenue of [REDACTED]), and that loss is [REDACTED], being [REDACTED] of its reported costs. However, GTL’s revenues likely represent an upper bound for its economic costs, given GTL’s long-standing operation in the industry. In that case, its per-minute costs would be no more than [REDACTED].

**E. Determining the Appropriate Cost Allocator**

31. *Introduction.* Traditionally, under cost-based regulation, regulators set rates for a regulated firm based on a cost-of-service study. A cost-of-service study measures a firm’s total cost of providing regulated services using the firm’s accounting data. The cost of doing business includes operating expenses (e.g., operating, maintenance and repair, and administrative expenses), depreciation expense (the loss of value of the firm’s assets over time due to wear and tear and obsolescence), cost of capital (the cost incurred to finance the firm’s assets with debt and equity capital), and income and other tax expenses. As part of this study, all of the firm’s costs are directly assigned to or allocated among different jurisdictions and services. The results are referred to as fully distributed, or fully allocated, costs. Regulators typically establish a uniform system of accounts (USOA) and rules that specify how costs, are to be assigned or allocated, and these costs, direct assignments, and allocations are reflected in the cost-of-service study in accordance with these accounts and rules. For example, the Commission’s USOA for rate-of-return incumbent local exchange carriers—a distinct set of carriers not at issue here—is set forth in Part 32 of the Commission’s rules. Part 32 requires rate-of-return incumbent local exchange carriers to disaggregate company-wide cost data into 80 different accounts, including 49 balance sheet accounts, eight

revenue accounts, 15 expense accounts, and eight other income accounts. The Commission’s rules for separating regulated costs from nonregulated costs are set forth in Part 64 of the Commission’s rules. Under these rules, the company-wide costs booked to Part 32 accounts are directly assigned to either regulated or nonregulated activities as feasible. The remaining costs are grouped into homogenous cost categories and then allocated based on the hierarchy of (1) direct analysis; (2) indirect, cost-causative links to another cost category for which direct assignment or attribution based on direct analysis is possible; or (3) a general allocator that reflects the ratio of all expenses directly assigned or attributed to regulated and nonregulated activities. The Commission’s Part 36 rules set forth procedures for separating between intrastate and interstate jurisdictions the costs assigned or allocated to regulated activities under Part 64. The Commission’s Part 69 rules set forth procedures for assigning to or allocating among different categories of interstate access services the costs assigned or allocated to regulated interstate services under Part 36.

32. In contrast to the traditional approach to cost-based ratemaking for industries that have a long history of rate regulation, its overall approach here is a relatively simple one that reduces the reporting burden on the industry but limits the degree to which a precise accounting of costs can be reflected in new interim provider-related rate caps. The Commission did not create a uniform system of accounts or a detailed set of cost accounting requirements for inmate calling services. Nor did it specify any complex set of rules for assigning or allocating inmate calling services costs to rate-regulated inmate calling services, nonregulated inmate calling services, and non-inmate calling services. The Commission also did not require providers to do a detailed cost-of-service study, although the FTI study of Securus’s costs demonstrates the possibility of doing such a study in a credible way even without a detailed USOA or specific set of cost allocation rules. Securus gave FTI access to a highly disaggregated and comprehensive set of accounting data. As a result, FTI was able to distinguish among many different types of costs, develop more than 90 different cost allocators, and use these allocators to assign and allocate those different types of costs to inmate calling services subject to the

rate caps or to services not subject to the rate caps, including services provided to prisons and jails (e.g., advanced and investigative services), and other non-inmate calling services to estimate Securus’s fully distributed cost of providing inmate calling services.

33. Providers, in response to the Second Mandatory Data Collection, aggregated various types of costs of supplying inmate calling services and reported a single number for each contract that reflects the aggregation of these costs. Any remaining costs not reported at the contract level were reported at the level of the firm. Costs directly attributable to the contract were not always allocated to the contract. For example, the only direct costs GTL reported at the contract level were those for bad debts, when many other costs would be contract specific. The reverse was also true. Costs that are not directly attributable to the contract level were sometimes reported as such. For example, CenturyLink allocated all of its costs down to the contract level. Costs that are not directly attributable to a contract and costs reported at the level of the provider, rather than contract, create a challenge: The Commission needs to allocate the various types of overhead costs among all of a provider’s contacts as part of developing a cost-based rate cap, but the aggregation of these costs limits the Commission to a single allocation using a single one-size-fits-all allocator. The fact that some providers have categorized inmate calling services costs that almost certainly are attributable to a contract as overhead costs, rather than direct costs, and vice versa, further complicates the cost allocation problem. Different allocators for overhead costs produce materially different allocations and the Commission must choose the one that allocates these costs the best.

34. To cap per-minute rates, the Commission seeks to identify commercially viable rates—rates which would cover the true direct costs of any contract and provide enough contribution to recover total costs across all contracts. If a provider is unable to recover its costs for a specific contract, it may seek a waiver. Given providers’ accounting systems are designed to run their businesses, and that providers bid for contracts, for the purposes of analyzing various possible allocators the Commission accepts their reports of costs, overstatement and miscategorization issues aside, as being

largely accurate. That leaves the Commission with the need to identify rates which recover costs reported at the level of the contract (“reported direct costs”) and make appropriate contributions to the difference between reported total costs and the sum of the providers’ reported direct costs (“reported overheads”). One approach to this is to allocate reported overheads to contracts using a cost allocator, and to then determine a per-minute rate that would cover most contracts’ fully allocated costs.

35. The Commission’s analysis leads it to choose total minutes as the cost allocator. The Commission begins by explaining the cost allocation problem, then show that the best cost allocator of seven considered is call minutes. Lastly, the Commission explains the record provides it with little support to cap prices on a basis other than a per-minute price cap, such as a per-call or per-person per-period price cap.

36. *Compensatory Rates and Cost Allocation.* Putting aside the difficulties of interfirm comparisons, there is no clear rule for identifying a price for inmate calling services that covers costs directly attributable to a contract and makes a contribution to the recovery of any remaining costs not directly attributable to inmate calling services supplied under the contract, such that total costs are recovered. Under broadly accepted economic principles, where a firm provides a service under multiple contracts, prices for the service provided under each contract are compensatory if three conditions are met: (1) The price at least covers the contract’s direct

costs for inmate calling services, meaning recovery of the costs attributable to supplying these services under the contract; (2) the price does not recover more than the cost of providing inmate calling services on a standalone basis under the contract (*i.e.*, the costs that would be incurred if these services alone were supplied under the contract, and no other contract were supplied); and (3) prices overall recover the firm’s total costs, meaning recovery of the direct costs for inmate calling services under each contract and the reported costs that are not attributable to any one contract but were allocated to inmate calling services. Thus, for example, any costs shared among all the contracts would be attributable to the one contract. However, since many prices are consistent with these conditions, they fail to provide full guidance for price setting.

37. Cost allocation is a standard, if imperfect, procedure used by regulators to develop cost-based prices for different services or customer groups where not all of a regulated firm’s costs are attributable to a single service or customer group. Following a similar approach here, the Commission identifies a method to allocate providers’ reported overheads to contracts, as these are the costs that providers did not attribute to contracts, and apply that method. The resulting cost allocation is then used to determine a cost-based price that would allow the provider to recover its contracts’ reported direct costs while making a sufficient contribution to reported overheads such that total costs for all the contracts

would be covered. The Commission considers seven approaches to allocating overheads, the six cost allocators analyzed in the 2020 ICS FNPRM—call minutes (*i.e.*, minutes of use), number of calls, average daily population, revenues, contracts, and facilities—and, at the suggestion of commenters, direct costs. To do this, the Commission must identify the unit of sale for the service to be regulated and choose a cost allocator.

38. In developing these allocators, the Commission allocates reported overheads to contracts, calculate the mean per-minute cost of a contract, the standard deviation relative to that mean, and then add the mean to the standard deviation following the approach in the 2020 ICS FNPRM. The Commission calculates a per-minute cost of a contract for each possible allocator by allocating reported overheads among each provider’s contracts in proportion to the contracts’ shares of the provider’s total minutes, calls, average daily population, etc., and then divide the total cost of each contract by its quantity of paid minutes. Paid minutes are used as the divisor because those are the minutes that providers rely on to recover their costs. The Commission uses total minutes to allocate reported overhead costs rather than paid minutes, because costs are incurred to build sufficient capacity to provide all minutes, regardless of whether the minutes generate revenue. These results are reported in Table 3.

TABLE 3—MEANS, STANDARD DEVIATIONS, AND IMPLIED RATE CAPS USING VARIOUS COST ALLOCATORS

Cost allocator	Total contracts	Mean	Standard deviation	Implied rate cap (mean + std. dev.)
Minutes .....	2,900	\$0.093	\$0.056	\$0.149
Number of Calls .....	2,900	0.116	0.092	0.208
ADP .....	2,804	0.789	10.325	11.114
Revenue .....	2,900	0.164	0.170	0.333
Contracts .....	2,900	18.499	300.136	318.636
Facilities .....	2,900	16.485	287.199	303.685
Direct Costs .....	2,125	0.228	2.189	2.417

39. *Choosing Minutes of Use as a Cost Allocator.* In determining the appropriate allocator, the Commission recognizes concerns that if the Commission were to prefer the per-minute cost allocator due to the low variance in the resulting per-minute costs, there would be an element of circular reasoning in its decision. The Commission selects the cost per-minute allocator over the

six other alternatives based on a range of reasons. The primary aim of a cost allocator is to find a reasonable way of attributing costs, in this case to contracts, that either cannot be directly attributed, such as true overheads, or that, while conceptually could be attributed to a specific contract, cannot be attributed based on how the providers’ accounts are kept. Such an allocator must be

likely to reflect cost causation and result in rates that demand can bear. Three primary reasons are not subject to the circularity critique: Data trustworthiness, availability of data, and consistency with reported revenues. Table 4 compares the seven cost allocators:

TABLE 4—COST ALLOCATOR RATE CAP, IMPLIED ANOMALOUS CONTRACTS, AND TOTAL CONTRACTS

Cost allocator	Implied rate cap (mean per-minute allocated cost + 1 standard deviation)	Contracts with per-minute allocated costs greater than implied rate cap		Contracts with per-minute provider revenues greater than their per-minute allocated costs		Total contracts
		Number	Percent	Number	Percent	Number
Minutes .....	\$0.149	196	6.8	2,532	87.3	2,900
Number of Calls .....	0.208	245	8.4	2,358	81.3	2,900

TABLE 4—COST ALLOCATOR RATE CAP, IMPLIED ANOMALOUS CONTRACTS, AND TOTAL CONTRACTS—Continued

Cost allocator	Implied rate cap (mean per-minute allocated cost + 1 standard deviation)	Contracts with per-minute allocated costs greater than implied rate cap		Contracts with per-minute provider revenues greater than their per-minute allocated costs		Total contracts
		Number	Percent	Number	Percent	Number
ADP .....	11.114	28	1.0	2,150	76.7	2,804
Revenue .....	0.333	254	8.8	2,290	79	2,900
Contracts .....	318.636	23	0.8	907	31.3	2,900
Facilities .....	303.685	20	0.7	1,000	34.5	2,900
Direct Costs .....	2.417	12	0.6	1,735	81.6	2,125

**Notes:** The implied rate cap for each allocator is the sum of the mean of contract costs and 1 standard deviation of the contract cost distribution, as set forth in Table 3. The number of contracts with per-minute allocated cost greater than implied rate cap is calculated for each cost allocator by counting the contracts with a cost allocation that exceeds the implied rate cap. The corresponding percent column represents this number as a share over the number of contracts for which a cost allocation could be calculated (contract totals are reported in the last column). Per-minute provider revenues equal contract revenues from calling rates, plus automated payment fees and paper billing fees, less commissions divided by paid minutes. The number of contracts with per-minute provider revenues greater than their per-minute allocated cost is calculated by counting the contracts with per-minute revenues that exceed the contract's allocated costs. The corresponding percent column represents this number as a share over the number of contracts for which a cost allocation could be calculated.

40. In Table 4, the second column reports the rate cap implied by each respective allocator. Only two of the potential allocators—minutes of use and number of calls—produce results below the current cap of \$0.021 per minute for prepaid and debit calls. In contrast, the implied rate caps for revenue, direct costs, average daily population, facilities, and contracts all suggest that interstate inmate calling services rates are presently unreasonably low. This disparity is one of the reasons the Commission finds that minutes of use and number of calls are the only plausible allocators among the available alternatives.

41. In Table 4, the third and fourth columns (under the title “Contracts with per-minute allocated costs greater than implied rate cap”) report the number and percentage of contracts that would not recover the costs allocated to them if prices were set to the implied rate cap. Lower numbers in these columns indicate that the cost allocator minimizes the number of contracts with allocated costs above the cap.

42. In Table 4, the fifth and sixth columns (under the title “Contracts with per-minute provider revenues greater than their per-minute allocated costs”) provide a measure of the extent the cost allocator is consistent with prices currently set by providers. These two columns, respectively, report the number and percentage of contracts that earn revenues that are greater than the allocated per-minute costs. If the cost allocation is consistent with commercial cost recovery in an industry found to be in need of rate regulation and otherwise thought to be in solid shape financially, then revenues from the contracts recorded in these columns would recover direct costs and contribute to the recovery of overhead costs, as these contracts are commercially viable. Thus, a cost allocator that is compensatory, if not overly so, would have numbers close to the total contract number, or 100%, in these columns. The smaller the entries in these columns are, the less plausible the cost allocator is.

43. While no allocator is likely to pass these tests perfectly, the call minute cost allocator is the standout performer. The call

minute cost allocator has the highest percentage, 87.3%, of contracts with revenues greater than their per-minute allocated cost (*i.e.*, the greatest percentage of contracts that appear to recover direct costs and contribute to overhead cost recovery) consistent with actual commercial revenue recovery in a financially solid industry. Thus, it produces results most consistent with what is required to make a contract commercially viable.

44. The call minute cost allocator also has the lower implied rate cap error rate, 6.8%, of the two plausible cost allocators, the other two being the number of calls. Simultaneously, it produces the lowest implied rate cap, \$0.149, among all allocators. Thus, it is least likely to overcompensate providers, and, among plausible allocators, most likely to allow cost recovery.

45. The only other allocator to come close to producing results consistent with what the Commission learns from observed contract revenues, and not appearing to overcompensate providers, is the number of calls allocator. There, the percentage of contracts with observed per-minute revenues greater than per-minute allocated costs is 81.3%—a percentage that is lower than that for the call minute allocator. The number of calls allocator has the second-lowest implied rate cap (behind the call minute cost allocator) at \$0.208, with 8.4% of contracts with per-minute allocated costs that would exceed this rate cap. These values indicate that the call minute cost allocator is a superior choice to the number of calls allocator.

46. Use of an average daily population allocator requires dropping 96 contracts, and providers in many instances had difficulties accurately reporting this number. While these facts alone are perhaps insufficient to eliminate average daily population as a cost allocator, they cast some doubt on its relative usefulness. Further, the average daily population allocator implies that only about three-fourths of all contracts recover their allocated cost at actual commercial rates, 10% points lower than the same number for the call minute allocator. The average daily population allocator also has an implied rate

cap of \$11.114. No credible contract in the data earns this much. There is an [REDACTED] contract [REDACTED] with per-minute revenues of \$12.20. That contract has an average daily population of zero and only one reported paid minute in 2018. If the data recorded for that contract are not in error, then the contract is too unusual to be a good comparator. The next highest is an [REDACTED] contract for the [REDACTED]. It has an average daily population of 64, paid minutes of 3,335 or 52 minutes per incarcerated person per year, and per-minute revenues of \$8.99, followed by an [REDACTED] contract [REDACTED], which has an average daily population of 754, paid minutes of 1,272, or 1.7 minutes per incarcerated person per year, and per-minute revenues of \$1.50. [REDACTED] contract has the highest per-minute revenues of larger jails, at \$1.35. Its average daily population is 1,128, with 130,781 paid minutes, for 116 minutes per incarcerated person per year. In contrast, the minutes per average daily incarcerated person for smaller jails is 3,671 and for all jails, 3,705. Thus, the [REDACTED] contracts appear peculiar with minutes per incarcerated person per year that are several orders of magnitude less than the smaller jail ratio. Further, if the allocator correctly assigns costs, then 28 or 1% of contracts earning \$11.114 in revenues per minute implausibly would fail to recover costs. Based primarily on the commercial cost recovery mistake rate and implausibly high implied rate cap, the Commission concludes that average daily population is an unreasonable allocator.

47. Although a revenue cost allocation key may be used for certain accounting purposes, a revenue key is inappropriate for regulatory purposes because revenue is not a cost driver. While costs can be expected to increase with quantity sold, revenues do not always increase with quantity sold, and this can lead to perverse effects. For example, in general quantity sold increases as price falls. Starting from a price where no sales are made, revenues also increase as prices fall. However, at some point as prices fall, revenues also begin to fall: The revenue gain from new sales made at the lower price is

smaller than the revenue loss incurred due to the lower price as applied to all purchases that would have been made at the higher price. In that circumstance, holding other things constant, a revenue cost allocator would allocate less cost to a contract with a greater sales volume, contrary to cost causation. This also means a revenue allocator might reinforce monopoly prices. The exercise of market power can result in higher revenues than would be earned in a competitive market. In that circumstance, holding other things constant, a revenue allocator would allocate more costs to monopolized services than competitive ones. The Commission does not need to determine whether “[a]llocating costs based on revenue is a commonly-used accounting tool in business.” What is relevant here is that it is inappropriate for the purpose of setting rates for the reasons the Commission gives. In addition, the revenue allocator scores worse than the call minute cost allocator on all of the performance measures. Most significantly, it produces a rate cap that is more than twice the call minute rate cap, while simultaneously indicating a higher percentage of contracts would not cover their costs at that rate cap. Given these concerns, the Commission eliminates revenue as a cost allocator.

48. The contracts cost allocator has the lowest percentage of contracts with per-minute provider revenues greater than their per-minute allocated cost, 31.3%, a percentage that is about one-third of the call minute cost allocator percentage, and that is inconsistent with actual commercial rates. In addition, the contracts cost allocator implied rate cap of \$318.63 is disconnected from reality, being an order of magnitude higher than the highest per-minute revenues earned on any contract. For both these reasons, the Commission concludes that contracts are an unreasonable cost allocator.

49. The facility data are poor with many providers failing to report the number of facilities under their contracts. In addition, a facility allocator has nearly the same problems as the contract allocator. Given these concerns, the Commission eliminates facilities as a cost allocator.

50. The Commission eliminates direct costs as an allocator due to the lack of availability of data and concerns about the trustworthiness of the data. Because direct costs were not reported for certain contracts, the Commission has to drop 775, or more than a quarter, of its observations. This artificially increases the amount of indirect costs allocated to the remaining contracts. In addition, many providers took markedly different approaches to recording direct costs, meaning the direct cost allocator treats

different providers very differently. For example, GTL only reports bad debt as direct costs, essentially rendering any allocation based on direct costs meaningless for an additional [REDACTED] of all contracts, which cover nearly [REDACTED] of incarcerated people. Further, the direct cost allocator allocates overhead costs such that 81.6% of the contracts have provider per-minute revenues from actual commercial rates that are greater than their per-minute allocated cost, a share lower than that of the per-minute allocator. The relative shares rather than absolute number of contracts must be compared because to develop the direct cost allocator requires dropping 876 observations for which no direct costs were reported. It also produces an implied rate cap of \$2,417, an implausibly high cap given only two contracts currently earn per-minute revenues greater than this. Such a rate cap would unnecessarily allow substantial margins for most contracts. The Commission eliminates this allocator based on these concerns.

51. The Commission concludes that a call-minute cost allocator remains the most reasonable choice for setting per-minute inmate calling services rate caps. A call minute cost allocator has the highest percentage of the contracts with provider per-minute revenues from actual commercial rates that are greater than their per-minute allocated cost, thus representing the allocator that most closely hews to commercial cost recovery as seen in supply. Consistent with this, its implied rate cap appears unlikely to significantly overcompensate providers on an interim basis, while ensuring commercial viability for most contracts.

52. *Subcontracts.* Some providers subcontract some or all of their contracts to a second provider. In 2018, of CenturyLink’s [REDACTED] calling services contracts, the Commission has data on [REDACTED] which were subcontracted. CenturyLink has [REDACTED] subcontracts with [REDACTED], but [REDACTED] did not report data for these contracts), and a [REDACTED] contract has no reported subcontractor. If the Commission were to remove all subcontractor overhead costs allocated to CenturyLink’s contracts, the average per-minute cost of CenturyLink’s contracts would decrease from [REDACTED]. If the Commission removed only half of the overhead, this would result in an average per-minute cost of [REDACTED]. While Crown employed NCIC as a subcontractor for all of its [REDACTED] contracts, the providers’ data descriptions and justifications suggest there was no double counting. This raises the question of how to deal with overhead costs in the case of

subcontractors. The Commission takes an approach that may double count some overhead costs, as the Commission cannot identify what fraction of the subcontractors’ overhead costs are captured in what they charge the prime contractor.

53. The reporting of costs for shared contracts varies by provider. Where the prime contractor only reported the cost of supplying the broadband connection on its contracts, while the subcontractor reported the costs of servicing the facilities (installation, maintenance, etc.), the Commission aggregated their costs. Because the reported costs represent the provision of different services, the Commission does not believe these contracts have costs that were double counted. Other providers operating as prime contractors reported all costs (including subcontractors’ costs). Where the prime contractor’s associated subcontractor did not file reports on the subcontracts, the Commission used the costs as reported by the prime contractor. However, where the associated subcontractors reported their costs, the Commission removed their direct costs to avoid counting them twice.

54. The subcontracting filers were also the main inmate calling services suppliers on other contracts, raising the question of how to avoid double counting the allocation the Commission made for overhead costs for their subcontracts. Leaning toward overstating costs, a shared contract is allocated the overhead of both providers that report the contract. The two observations were then aggregated into one and placed under the name of the firm that is the primary contract holder.

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

TABLE 5—COST ALLOCATOR RATE CAP, IMPLIED ANOMALOUS CONTRACTS, AND TOTAL CONTRACTS ADJUSTED TO AVOID DOUBLE COUNTING OF SUBCONTRACTOR OVERHEADS

Cost allocator	Implied rate cap (mean per-minute allocated cost + 1 standard deviation)	Contracts with per-minute allocated cost greater than implied rate cap		Contracts with per minute provider revenues greater than their per-minute allocated cost		Total contracts
		Number	Percent	Number	Percent	Number
Minutes .....	\$0.149	194	6.7	2,540	87.6	2,900

TABLE 5—COST ALLOCATOR RATE CAP, IMPLIED ANOMALOUS CONTRACTS, AND TOTAL CONTRACTS ADJUSTED TO AVOID DOUBLE COUNTING OF SUBCONTRACTOR OVERHEADS—Continued

Cost allocator	Implied rate cap (mean per-minute allocated cost + 1 standard deviation)	Contracts with per-minute allocated cost greater than implied rate cap		Contracts with per minute provider revenues greater than their per-minute allocated cost		Total contracts
		Number	Percent	Number	Percent	Number
Calls .....	0.208	244	8.4	2,360	81.4	2,900
ADP .....	11.114	28	1.0	2,157	76.9	2,804
Revenue .....	0.334	250	8.6	2,304	79.4	2,900
Contracts .....	318.635	23	0.8	915	31.6	2,900
Facilities .....	303.684	20	0.7	1,009	34.8	2,900
Direct Costs .....	2.417	12	0.6	1,735	81.6	2,125

56. Table 5, when compared with Table 4, shows the impact of assuming that the markup matches the overhead cost calculation on the implied rate caps of the seven possible cost allocators to be small. Specifically, for the per-minute cost allocator, the implied rate remains the same, the number of contracts with a per-minute allocated cost greater than the implied rate cap decreases from 196 to 194, and the percentage of contracts where the per-minute revenues are greater than per-minute allocated costs increases from 87.3% to 87.6%. This analysis of the adjusted data reinforces the finding above that a call minute cost allocator remains the most reasonable choice for setting per-minute inmate calling services rate caps.

57. *Rejecting Alternative Allocation Approaches Proposed in the Record.* With sufficient record evidence, the Commission would simultaneously identify the unit of sale for the service to price and choose a cost allocator. Commenters explain with some merit that when considering allocators other than costs per minute, the Commission should not rule out those allocators by considering only the implied cost-per-minute estimates those allocators produce. Instead, the Commission also should examine the costs and implied prices using the cost allocator as the unit of account. For example, if the Commission allocates costs by average daily population, the Commission should not divide these by minutes, producing a per-minute rate, to consider whether an average daily population allocator is sensible. Instead, the Commission should consider the resulting distribution of costs per incarcerated person per day. The chief line of reasoning for focusing on cost expressed in the same unit of account as the allocator is that to do otherwise mathematically favors the chosen unit of account. A per-minute cost allocator can be expected to produce per-minute costs with less variance than, for example, an average daily population allocator with costs also expressed per minute. The reverse also holds. An average daily population allocator can be expected to produce per person costs with less variance than if costs are allocated per person and then expressed per minute.

58. The Commission does not dispute the accuracy of this critique. However, the record provides no real guidance as to how the Commission would regulate prices using a call, average daily population, revenue, contract, facility cost, or direct cost allocator. For example, minimizing the variance of cost estimates for a call allocator would require estimating per-call costs, not per-minute costs. This would result in a cap on call prices of \$11.10, regardless of whether the call lasted a minute or an hour. Across all contracts, the mean per-call rate is \$2.754, with a standard deviation of \$8.341, which sum to \$11.095. A 15-minute call would cost \$ 0.74 per minute. Thus, a 30-second call, say, to reach voice mail, could be charged \$11.10, the same charge as would apply for a 30-minute call or even an hour-long call. However, there is essentially no discussion of the implications of taking such an approach in the record. Additionally, a per-call price of \$11.10 does not result in a per-minute rate of less than the current prepaid cap of \$0.21 until the 53rd minute of the call (\$11.10/53 = \$0.209 per minute). This alone is sufficient to rule out this approach.

59. Allocating costs using average daily population, and then applying a per-person cap set to the contract mean plus one standard deviation would result in a cap of \$437.38 per person per year. Across all contracts, the mean per-average daily population rate is \$281.159, with a standard deviation of \$156.220, which sum to \$437.379. Operationalizing an average daily population allocator to minimize variance would require setting per-person per-period charges for two reasons. First, it would be inequitable to charge the many people who can spend only a few hours or days incarcerated the same as what is charged someone who spends much longer. Second, since average daily population is not the same as the number of people who are admitted to a facility in a year, an annual rate applied to people who are incarcerated for shorter periods would grossly over recover costs. Consider a jail with an average daily population of 10. The \$437.38 cap is intended to bring annual revenues of \$4,373.80. But if the jail houses ten new people every two weeks, and each new group of ten also brings in annual revenues of

\$4,373.80, then the total revenues for the year will be 26 times that amount. The problem is avoided by charging each person a fraction of the \$437.38 where that fraction equals the fraction of the year they are incarcerated. Thus, a cap would have to be applied for a relatively short time period. A daily cap would be equal to \$1.20 (= \$437.38/365.25) per person, and would apply day in and day out, whether the incarcerated person made any calls that day or not. This would make calling cheaper for those with high demand, but more expensive for those with low demand. If incarcerated persons were allowed to opt out on a daily basis, the daily charge would have to be increased to ensure cost recovery for providers. For example, if everyone were to opt out for 50% of their days, then the rate would have to double. However, the record provides no basis that could be used to determine the appropriate rate if occasional opting out were allowed. The record provides almost no support for any of this.

60. The record provides even less guidance as to how the Commission would regulate prices if a revenue, contract, facility, or direct cost allocator were used, but a per-minute rate cap was not set. Price cannot be set per dollar of revenue or per contract or per facility or per dollar of direct cost without specifying some unit relevant to an incarcerated person. The only approach with a solid basis in the record is a per-minute rate.

61. *Applying the Per-Minute Allocator.* The Commission defines the upper bound as the mean plus one standard deviation of per-minute contract costs, separately for prisons and larger jails. For prisons, the upper bound is \$0.133, and for larger jails, the upper bound is \$0.218. These estimates rely on providers' reported costs in the Second Mandatory Data Collection, with minimal corrections for anomalies and indirect costs allocated among each provider's contracts using a per-minute cost allocator. Including one standard deviation in the upper bound recognizes that providers' costs vary. The Commission presents the upper bound estimates in Table 6 below.

**Table 6 – Upper Bound Estimates**

	Contracts	Mean	Std. Dev.	Mean+1 Std. Dev.	Mean+2 Std. Dev.
<b>Larger Jails</b>	182	0.100	0.118	0.218	0.336
<b>Prisons</b>	129	0.092	0.041	0.133	0.174

62. The Commission finds these upper bounds likely overstate providers' inmate calling services costs for several reasons. First, providers have some incentive to overstate their costs because higher costs would lead to higher interstate rate caps and higher profits. Second, a lack of specificity in the Instructions for the Second Mandatory Data Collection, particularly those related to how providers should account for indirect costs, permitted providers to inflate reported costs further. These factors shift costs upward, resulting in higher upper bounds than would result with more accurate data. These costs are further overstated because of the treatment of costs shared between contractors and subcontractors.

**F. Assessing and Ensuring the Commercial Viability Under the New Interim Interstate Provider-Related Rate Caps**

63. In the Report and Order, the Commission sets new interim interstate provider-related rate caps of \$0.12 per minute for prisons and \$0.14 per minute for larger jails, respectively. To help evaluate the reasonableness of those caps, the Commission considers the commercial viability of contracts under the selected interim rate caps compared to revenues reported by providers in the Second Mandatory Data Collection.

64. The Commission first compares revenues and costs by provider in 2018, and

then consider what would happen to revenues under interim provider-related rate caps of \$0.12 per minute for prisons and \$0.14 per minute for larger jails. In the first instance, the Commission takes a straightforward, but simplistic approach using minutes of use as the allocator. The Commission holds call minutes, automated payment revenues, and paper billing revenues constant and project that those new interim caps would allow providers to recover their allocated costs for 71% of their prison contracts and 99% of their contracts for larger jails. To test the robustness of this analysis, the Commission then determines the percentage of prison, and separately larger jail, contracts for which the new interim caps would allow providers to recover the revenues they earned in 2018. The Commission finds the percentages to be 74% for prisons and 65% for larger jails. The Commission's examination of the remaining contracts shows that they, on average, have lower per-minute costs than the contracts under which providers would recover their 2018 revenues, and thus all of the contracts are also likely to be viable under the new interim rate caps. Lastly, recognizing that revenues in 2018 represent an upper bound on costs, and allowing call volumes to expand because the new interim caps will lower prices to incarcerated persons (leading to more call minutes), the Commission finds that 77% of prison and 73% of larger jail

contracts are projected to recover costs consistent with the revenues earned on each contract in 2018. Each of these estimates, except for the estimate that all contracts will be viable under the new interim rate caps, are conservative.

65. *Comparing Reported Revenues and Costs.* Table 7 shows the following for each provider and for the industry as a whole: Inmate calling revenues, which include amounts collected to pay site commissions; automated payment revenues; paper billing and account revenues; the sum of the preceding three types of revenues; inmate calling services costs, which for this purpose include site commissions; and profits defined as the difference between those summed revenues and inmate calling costs. Thus, profit nets out site commissions. Again, only [REDACTED] fails to recover its reported costs, incurring a surprisingly large [REDACTED] loss of [REDACTED] million on its inmate calling services operations, even when its revenues from ancillary service charges are included in its revenue total. That [REDACTED] reports losses despite being the winning bidder on [REDACTED] contracts, the industry's largest provider by most measures, and one of the industry's most sophisticated providers, suggests [REDACTED] revenues may be a more accurate estimate of its costs than are its reported costs.

**TABLE 7—INMATE CALLING SERVICES REVENUES AND COSTS INCLUSIVE OF SITE COMMISSIONS BY PROVIDER IN 2018**  
[in \$ thousands]

Provider	ICS revenues	APF revenues	PBF revenues	Total revenues	Total costs	Profits
ATN .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
CenturyLink .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Correct .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
CPC .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Crown .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
GTL .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
ICSolutions .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Legacy .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
NCIC .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Prodigy .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Securus .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Industry .....</b>	<b>1,093,192</b>	<b>115,757</b>	<b>410</b>	<b>1,209,359</b>	<b>1,181,611</b>	<b>27,748</b>

Notes: "APF" means automated payment fee, and "PBF" means paper billing fee.

66. Table 8 shows the following for each provider, and across all providers, split by prisons and larger jails: Number of contracts; contract shares; the contract mean for total revenues per paid minute (that is, the mean for the sum of inmate calling revenues, including amounts collected to pay site commissions, plus automated payment revenues and paper billing revenues, all

divided by paid minutes for each of the 2,900 contracts); the contract mean of costs per paid minute, again including site commissions; the contract difference per paid minute between the preceding (profit), which nets out site commissions; and the contract mean of direct costs per paid minute, excluding site commissions. In 2018, for prisons, both [REDACTED] and [REDACTED]

on average incurred losses (i.e., had per-minute costs exceeding their per-minute revenues); and, for larger jails, only [REDACTED] on average incurred such losses. This may be due, in part, to these providers bidding overly aggressively for some contracts and to the cost allocation approach being unable to reliably allocate indirect costs for as many as 12.7% of

contracts, due to limitations of the reported cost data. Additionally, at least three of the direct cost per-minute entries are misleading: Two carriers, [REDACTED] and [REDACTED], report zero direct costs, while GTL only reports bad debt as a direct cost. These three providers almost certainly have substantially larger direct costs and hence substantially larger direct costs per minute.

TABLE 8—INMATE CALLING SERVICES PER-MINUTE REVENUES AND COSTS INCLUSIVE OF SITE COMMISSIONS BY PROVIDER AND FACILITY TYPE IN 2018

Firm	Type	Number of contracts	Percent share of contracts	Average per-minute revenues (\$)	Average per-minute costs (\$)	Average per-minute profits (\$)	Average per-minute direct costs (\$)
ATN	Larger Jail ..	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
CenturyLink	Larger Jail ..	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Correct	Larger Jail ..	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
CPC	Larger Jail ..	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
GTL	Larger Jail ..	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
ICSolutions	Larger Jail ..	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Legacy	Larger Jail ..	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
NCIC	Larger Jail ..	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel	Larger Jail ..	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Securus	Larger Jail ..	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Industry	Larger Jail ..	182	100	0.247	0.218	0.029	0.026
CenturyLink	Prison .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
GTL	Prison .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
ICSolutions	Prison .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Legacy	Prison .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
NCIC	Prison .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Securus	Prison .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Industry	Prison .....	129	100	0.148	0.137	0.011	0.010

NOTES: Direct costs are costs, excluding site commissions, recorded at the contract level in the Second Mandatory Data Collection responses. Averages are calculated across contracts.

67. Recovery of Allocated Costs Under the New Interim Provider-Related Rate Caps. The Commission estimates the inmate calling services revenues that providers would have earned in 2018 under the new interim caps, assuming no change in minute volumes. Table 9 presents the number and percentage of contracts for which these estimated inmate calling services revenues would exceed allocated costs or would exceed reported direct costs, first excluding automated payment and paper billing revenues, and second including these revenues (referred to as ancillary revenues in the table). The number of [REDACTED] and GTL contracts that cover direct costs as reported in the third-to-last and last columns are overstated because [REDACTED] did not record any direct costs, and GTL only recorded bad debt. On this basis, the Commission finds that providers would recover their allocated costs under 71% of prison contracts. All of the other [REDACTED] prison contracts are contracts [REDACTED] held in 2018. Based

on its reported costs, [REDACTED] would incur per-minute losses ranging from [REDACTED] to [REDACTED] with a median loss of [REDACTED] per minute. If automated payment and paper billing fees are excluded, [REDACTED] contracts would have per-minute costs above the \$0.12 interim cap, ranging from [REDACTED] to [REDACTED]. Of these contracts, all held by [REDACTED], [REDACTED] have per-minute revenues of less than \$0.12. Providers would recover their allocated costs under 99% of larger jail contracts. The other 1% (or two contracts) were contracts [REDACTED] and [REDACTED] held in 2018. Based on their reported costs, these providers would incur per-minute losses of [REDACTED] and [REDACTED], respectively. If automated payment and paper billing fees are excluded, [REDACTED] contracts would have per-minute costs above the \$0.14 interim cap, ranging from [REDACTED] to [REDACTED]. Of these [REDACTED] contracts, [REDACTED] were allocated per-minute costs

below [REDACTED]. All [REDACTED] contracts with per-minute costs above [REDACTED] reported revenues below their allocated costs. The 71% and 99% figures are likely underestimates for several reasons: many providers' reported costs may be overstated; the full range of ancillary fees that contribute toward recovering inmate calling services costs may not be reported, while some costs associated with these may be included in inmate calling services costs; some contracts where subcontracting occurs likely double count costs; and minutes of use may over-allocate costs to certain contracts. Revenues from automated payment fees and paper billing fees alone covered the costs of five, or 3%, of larger jail contracts in 2018. The importance of these revenues is shown in Table 9 when comparing total costs covered by project revenues with and without ancillary revenues, as the overall industry costs covered increases from 92% (without) to 99% (with).

**Table 9 – Number and Percentage of Contracts for Which Specified Revenue Estimates Cover Specified Costs**

Firm	Facility Type	Contracts	Allocated Costs Covered by ICS Revenues Without Ancillary Revenues		Direct Costs Covered by ICS Revenues Without Ancillary Revenues		Allocated Costs Covered by ICS Revenues and Ancillary Revenues		Direct Costs Covered by ICS Revenues and Ancillary Revenues	
			#	%	#	%	#	%	#	%
ATN	Larger Jail	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
CenturyLink	Larger Jail	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
Correct	Larger Jail	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
CPC	Larger Jail	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
GTL	Larger Jail	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
ICSolutions	Larger Jail	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
Legacy	Larger Jail	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
NCIC	Larger Jail	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
Pay Tel	Larger Jail	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
Securus	Larger Jail	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
Industry	Larger Jail	182	167	92	179	98	180	99	182	100
CenturyLink	Prison	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
GTL	Prison	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
ICSolutions	Prison	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
Legacy	Prison	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
NCIC	Prison	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
Securus	Prison	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]	[REDACTED D]
Industry	Prison	129	63	49	129	100	91	71	129	100

68. *Contracts with Per-Minute Revenues Under the New Interim Caps.* The preceding analysis relied on the cost allocation to conservatively determine the fraction of contracts that are viable under the new interim interstate provider-related rate caps. However, the cost allocation approach in some instances is not perfect. For example, the cost allocation approach suggests that

12.7% of current contracts are loss-making, implausibly implying providers in all those cases made mistaken bids. An alternative approach to determining the fraction of the contracts that are viable under the new interim caps is to examine the fraction of contracts that would recover at least the same revenues as they would in 2018. The Commission finds 74% of prison contracts

and 65% of larger jail contracts satisfy this condition. And, when the Commission examines the remaining contracts, the Commission finds they are on average likely to have lower costs than the contracts that would recover at least the same revenues, and thus are also likely to be viable. Separately, comparing revenues of the remaining contracts to allocated costs

suggests 81% of prison and 96% of larger jail contracts cover costs.

69. *Prison Contracts with Revenues Under the New Interim Caps.* Revenue analysis shows that the bulk of prisons likely would be commercially viable at rates capped at \$0.12 per minute (*i.e.*, the contracts have per-minute costs less than the cap after allowing for a possible \$0.02 per minute site commission allowance). In 2018, approximately 74% of prisons had per-minute revenues net of commissions of less than \$0.12 per minute (hereinafter “low per-minute revenue prisons”). The Commission’s new interim caps should not impact these contracts. Further, these contracts, with rare exceptions, should be commercially viable. If that were not the case, providers would not have voluntarily accepted such contracts. That result is all the more probable since providers may supplement their call revenues through automated payment and paper billing fees not accounted for in capping rates received by providers at \$0.12 per minute. While the revenue analysis includes revenues from automated payment and paper billing fees, the rate caps only apply to calling fees. Thus, providers can

earn additional revenues through automated payment and paper billing fees. The remaining 26% of prisons have revenues, net of commissions, that are greater than or equal to \$0.12 per minute (hereinafter “high per-minute revenue prisons”). Thus, the new interim caps will potentially affect cost recovery for these prisons.

70. Table 10 compares high and low per-minute revenue prison contracts. For both sets of prison contracts, the Table gives the mean value for seven contract characteristics, as well the p-value from a two-sided difference in means statistical test—with a lower p-value indicating a lower likelihood that the difference in the two means is due to random error. For example, a p-value of 0.05 says that if the two means were the result of samples from two identical populations, that outcome would only be observed in 5% of cases. Apart from the variables Total Revenue Per Minute and Revenue Minus Commission Per Minute, each of the variables included is likely to be related to a contract’s costs. The difference in means between the two groups for the five plausible cost-determining variables is not statistically significant at the 95% confidence

level, except for minutes, which should cause the low per-minute revenue contracts to have higher, not lower, costs. The similarities along cost-determinative characteristics suggest that to the extent that a \$0.12 per-minute rate cap is viable for low per-minute revenue prisons, it should also be viable for high per-minute revenue prisons. Commissions per minute may be a proxy for differences in contract regulatory environments—for example, correctional authorities that seek high site commissions may have other common characteristics that influence costs, including other services they require under an inmate calling services contract. The Commission places less weight on the facility data given that the providers acknowledged they had limited abilities to accurately report such data. Revenues per minute and revenues net of commission per minute are statistically higher for the high per-minute revenue contracts since the Commission defined the groups by whether they had lower or higher per-minute revenues. In any case, revenues do not, independent of minutes, cause costs, and the Commission controls for minutes.

TABLE 10—MEAN CHARACTERISTICS FOR PRISON CONTRACTS BY REVENUE TYPE

	High per-minute revenue contracts	Low per-minute revenue contracts	P-Value for two-sided difference in means test
Total Revenue Per Minute .....	\$0.24	\$0.12	0.00
Commission Per Minute .....	\$0.04	\$0.05	0.54
Revenue Minus Commission Per Minute .....	\$0.20	\$0.07	0.00
Facilities Per Contract .....	1.91	5.39	0.21
Average Daily Population .....	6,665	12,018	0.20
Contract Includes Urban Facilities .....	0.32	0.49	0.09
Minutes .....	15,482,499	41,681,215	0.05
Observations .....	34	95	.....

71. An alternative method to analyze whether a \$0.12 per minute cap for prisons is commercially viable is to consider the per-minute cost allocation associated with the high per-minute revenue prison contracts. As before, 74% of prisons could be expected to recover costs since their revenues are already below \$0.12. Of the remaining 26%, which the Commission labeled high per-minute revenue prisons, 27% have allocated per-minute costs below \$0.12. Of all the high per-minute revenue prisons, nine contracts had costs less than \$0.12 per minute and 25 contracts had costs greater than or equal to \$0.12 per minute. This suggests that 81% (= 74% + (26% \* 27%)) of all prison contracts could cover their costs with a rate of \$0.12. To the extent that the providers’ unaudited costs are overstated, or that unit costs will fall as reduced rates expand call volumes, this number would be higher.

72. *Contracts for Larger Jails with Revenues Under the New Interim Caps.* Revenue analysis shows the bulk of larger jail contracts are likely to have per-minute costs less than the interim cap of \$0.14 per minute and would therefore be commercially viable at that capped rate. In 2018, approximately 65% of contracts for larger jails had per-minute revenues net of commissions of less than \$0.14 per minute (hereinafter “low per-minute revenue jails”). The Commission’s new interim caps should not impact these contracts. Further, these contracts, with rare exceptions, should be commercially viable. If that were not the case, providers would not have voluntarily accepted such contracts. That result is all the more probable since providers may supplement their call revenues through automated payment and paper billing fees not accounted for in capping rates at \$0.14 per minute. The

remaining 35% of larger jails have revenues, net of commissions, which are greater than or equal to \$0.14 per minute (hereinafter “high per-minute revenue jails”).

73. The Commission finds that cost-determinative characteristics for high per-minute revenue jails are similar to those for low per-minute revenue jails. This implies a \$0.14 per minute rate cap would ensure the vast majority of contracts for larger jails are viable. Table 11 compares cost-determinative characteristics between high and low per-minute contracts. A lower p-value indicates a lower likelihood that the difference in the two means is due to random error. The difference in means between the two groups for the listed plausible cost-determinative variables are not statistically different at the 95% confidence level.

TABLE 11—MEAN CHARACTERISTICS FOR LARGER JAIL CONTRACTS BY REVENUE TYPE

	High per-minute revenue contract	Low per-minute revenue contract	P-Value for two-sided difference in means test
Total Revenue Per Minute .....	\$0.34	\$0.19	0.00
Commission Per Minute .....	\$0.13	\$0.11	0.26
Revenue Minus Commission Per Minute .....	\$0.22	\$0.08	0.00
Facilities Per Contract .....	1.88	1.85	0.94
Average Daily Population .....	2,215	2,447	0.60
Contract Includes Urban Facilities .....	0.84	0.85	0.95
Minutes .....	7,883,827	10,895,979	0.06
Observations .....	64	118	.....

74. An alternative method to analyze whether a \$0.14 per minute cap for larger jails is commercially viable is to consider the per-minute cost allocation associated with the high per-minute revenue contracts. Doing this suggests at least 96% of contracts for larger jails would likely recover their costs at a rate cap of \$0.14 per minute. As before, 65% of contracts for low per-minute revenue jails could be expected to recover costs since their revenues are already below \$0.14. Of the remaining 35%, 89% have allocated per-minute costs less than \$0.14. Of all the high per-minute revenue jails, 57 had costs less than \$0.14 per minute, and 7 had costs greater than or equal to \$0.14 per minute. This suggests that 96% ( $= 65\% + (35\% * 89\%)$ ) of all larger jail contracts could cover their costs with a rate of \$0.14. Again, to the extent that the providers' unaudited costs are overstated, or that unit costs will fall as reduced rates expand call volumes, this number would be higher. For example, 47% of the contracts for low per-minute revenue jails have allocated costs in excess of their revenues per minute, indicating that allocated costs are an imperfect measure.

75. *Contract Viability Allowing for Call Volume Adjustment.* The Commission's previous revenue analysis showed that 74% of prison and 65% of larger jail contracts are already operating under the new interim caps according to reported data. Since these contracts were likely to have been commercially viable prior to this Report and Order, they should still be so after the new interim caps take effect. Further, some of the remaining contracts would still be commercially viable under the new interim rate caps, because lower prices will lead incarcerated persons to increase time spent on the telephone, which in this industry will reduce per-minute costs. The Commission conservatively estimates that when the increase in demand due to lower end-user prices is accounted for, 77% of prison and 73% of larger jail contracts will earn per-minute revenues that cover their implied costs. These estimates take no account of the various factors discussed above that imply an even higher percentage of contracts would be commercially viable. For example, these numbers are understated to the extent that: (i) The providers' revenues are an overstatement of their costs; (ii) the elasticity estimates are understated; and (iii) estimates of the cost of an additional minute are overstated. Relatedly, GTL also argues that any reduced rates faced by incarcerated

people as a result of the Commission's proposed caps would not lead to increased call volume. The Commission is unconvinced, and the record suggests otherwise. GTL has itself refuted this position in other submissions. While incarceration authorities sometimes place tight restrictions on call frequency and length, there is ample evidence in the record that lower prices result in greater call minutes, because high prices do more to discourage calling than these restrictions do. Further, economic theory echoes the record evidence, and predicts that providers will increase output when a price cap lowers their rates as long as the additional revenue exceeds any corresponding increase in costs. Here, not only do current per-minute rates exceed per-minute costs, but they exceed the per-minute costs of supplying additional minutes by a wide margin; thus, a rational provider will find it profitable to increase its output.

76. To obtain these estimates, the Commission uses inmate calling service revenues plus revenues for automated payment and paper billing fees net of site commissions divided by paid minutes as a proxy for contract rates. The Commission then assumes that each prison and larger jail contract with rates as just defined above the new caps recovers, through those rates, its direct costs and makes any necessary contribution to overheads to account for costs associated with the provision of inmate calling services, but earns no more than that. This is conservative, as providers could earn more than that, but are unlikely to systematically earn less than that, since that would imply they are overall making losses. However, even making this "break-even" assumption, the new interim caps could still allow providers to recover their costs under these contracts. This is because the new caps will lead to increased inmate calling, allowing providers to spread relatively high fixed costs over more minutes. Inmate calling services have high fixed costs (e.g., installation of secure telephone equipment), and low additional costs for each minute of inmate telephone use.

77. For example, consider a hypothetical larger jail inmate calling services contract, voluntarily entered into, that charges incarcerated people \$0.25 per minute with a \$0.10 per minute site commission. Assume further that this results in 1,000 calling minutes. The provider would earn \$150 ( $= (\$0.25 - \$0.10) * 1,000$ ) in revenue and, given

the contract's voluntary nature, the contract would presumably be commercially viable. Now suppose the provider lowered rates to be consistent with the new interim caps, charging \$0.16, with the provider receiving \$0.14 and with \$0.02 for site commissions. Suppose further, at the lower price of \$0.16 per minute, incarcerated people increase their calling minutes from 1,000 to 1,132 total minutes. This assumes a demand elasticity of 0.3, as provided in the following paragraph. Thus, a 44% ( $= 0.25 - 0.16 / (0.25 + 0.16) / 2$ ) decline in price leads to 13.2% ( $= 44\% * 0.3$ ) increase in call minutes. This would generate revenues for the provider of \$158.48 ( $= 1,132 * \$0.14$ ) compared with the revenues of \$150 earned at a \$0.25 per minute rate with \$0.10 per minute in site commission payments. If, at the same time, each additional minute costs the provider \$0.01, and the provider was originally breaking even, then the provider's costs would rise from \$150 to \$151.32 ( $= \$150 + (132 * \$0.01)$ ), implying per-minute costs of approximately \$0.134 ( $= \$151.32 / 1,132$ ), less than the original per-minute costs of \$0.15 ( $= \$150 / 1,000$ ). Thus, the provider would earn \$7.16 ( $= \$158.48 - \$151.32$ ) more than in the original situation. If supply for this contract were competitive, then the provider winning the bid for this contract would require a price of just below \$0.154 per minute ( $= \$0.02 + (\$151.32 / 1,132)$ ).

78. In connection with the preceding example, the Commission estimated the call-minute volumes that would result for each contract that in 2018 had per-minute revenues greater than those allowed under the new caps, assuming a demand elasticity of 0.3. This is the low end of the inmate calling services elasticities found in the record. Using those projected call volumes, and assuming a generous additional or incremental per-minute cost of \$0.01, the Commission found 77% of prison and 73% of larger jail contracts would recover as much as they had at the lower 2018 volumes plus enough to cover their additional per-minute costs. Many direct costs are independent of the need to carry additional call minutes. For example, the cost of each additional telephone installed at a facility would be a direct cost of the facility and is independent of how many call minutes originate from that telephone. Thus, the cost of \$0.01 per additional minute assumed here is therefore a very conservative estimate of the cost of an additional call minute. For example, [REDACTED] operated two contracts at rates

of \$0.009 and \$0.0119—suggesting that under these rates the provider can cover the marginal cost of a minute of calling as well as cover their fixed costs. Similarly, six contracts in the Second Mandatory Data Collection report providers earning per-minute rates net of site commissions of less than \$0.01, including the [REDACTED] contract for the [REDACTED]. Indeed, the cost of an additional minute may be *de minimis*, with the cost of both originating and terminating a call being near zero. Thus, a material majority of contracts would be able to recover their costs under the new interim rate caps. Given that the estimates presented here are based on the upper bound of costs for a contract, that the Commission leaned toward understating demand responsiveness, the true share of contracts that are cost-covering is likely larger.

## Appendix B

### Sensitivity Testing: Additional Statistical Analysis of Cost Data

1. The Commission analyzes inmate calling services providers' responses to the Second Mandatory Data Collection to determine whether certain characteristics of inmate calling services contracts can be shown to have a meaningful association with contract costs on a per-minute basis, as reported by the providers. In this Appendix, the Commission frequently refers to inmate calling services providers by short names or acronyms. These providers are: ATN, Inc. (ATN); CenturyLink Public Communications, Inc. (CenturyLink); Correct Solutions, LLC (Correct); Combined Public Communications (CPC); Crown Correctional Telephone, Inc. (Crown); Global Tel\*Link Corporation (GTL); ICSolutions, LLC (ICSolutions); Legacy Long Distance International, Inc. (Legacy); NCIC Inmate Communications (NCIC); Pay Tel Communications, Inc. (Pay Tel); Prodigy Solutions, Inc. (Prodigy); and Securus Technologies, LLC (Securus). The Commission previously performed this analysis in Appendix B of the 2020 ICS FNPRM. That analysis found that provider identity and the state a facility is located in were by far the most important predictors of a contract's per-minute costs. It also found that other facility and contract variables, such as the average daily populations of the facilities covered by the contract, the type of those facilities (prison or jail), and the rurality of the facilities, had virtually no additional predictive power. In comments submitted to the Commission, the finding that per-minute costs were not significantly impacted by facility size and type was criticized. This Appendix repeats the analysis from Appendix B of the 2020 ICS FNPRM using updated data.

2. To perform the analysis, the Commission uses a recognized statistical method named least absolute shrinkage and selection operator (Lasso) to identify which, if any, variables serve as accurate predictors of per-minute contract costs for calling services. This method identifies predictors of an outcome variable—in the case the logarithm of costs per minute—by trading off the goodness of fit against the complexity of the model, as measured by the number of predictors. As used here, the Lasso model

seeks to identify factors that are predictive of an inmate calling service provider's costs per minute, balancing a number of competing considerations. Lasso is especially useful in situations like this where many variables, and interactions among those variables, can potentially predict outcomes. Given that the Commission is interested in determining the potential cost effects of many categorical variables as well as their interactions with one another, the overall number of potential variables is extremely large, and estimating the effects of all variables on costs via more traditional methods (such as linear regression) is infeasible. In the Lasso model, the Commission finds the main predictors of costs per minute to be provider identity and the state where the contract's facilities are located. The Commission also finds that facility type (whether the facility is a prison or jail) is a predictor of costs per minute, although not as strong as provider identity and state. Finally, the Commission finds that a wide range of other variables have less, or essentially no, predictive power.

3. The Commission chooses the inmate calling services contract as the unit of observation for the analysis for two reasons. First, providers bid for contracts rather than separately bidding for each individual facility, which indicates that commercial decisions are made at the contract level. Second, many contracts cover more than one facility, but several providers did not report data on those facilities separately, which precludes any meaningful analysis at the facility level. As in Appendix A, jails with average daily populations of less than 1,000 are included in the totals to ensure that the sensitivity analysis is comprehensive among the total dataset of 2,900 contracts. But, because the Commission does not address jails with average daily populations of less than 1,000 in the Report and Order for purposes of arriving at revised interim rate caps based on the Second Mandatory Data Collection, the Commission does not include any results based on such jails in this Appendix. The Commission focuses on the logarithm of costs per minute as the dependent variable—*i.e.*, the Commission seeks to evaluate what factors are predictive of an inmate calling service provider's costs per minute. The contract variables that the Commission considers in the analysis are as follows:

- The identity of the inmate calling services provider;
- The state(s) in which the correctional facilities covered by a contract are located;
- The Census division(s) and region(s) in which the facilities covered by a contract are located;
- The type of facility (prison or jail);
- An indicator for joint contracts (*i.e.*, contracts for which an inmate calling services provider subcontracts with another inmate calling services provider);
- Contract average daily population;
- Contract average daily population bins (average daily population  $\leq 25$ ; average daily population  $\leq 50$ ; average daily population  $\leq 100$ ; average daily population  $\leq 250$ ; average daily population  $\leq 500$ ; average daily population  $\leq 1,000$ ; average daily population  $\leq 5,000$ );

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

4. *Lasso and Costs per Minute.* The Lasso results indicate economically significant differences in costs per minute across different providers and states. The provider identity and state variables retained by Lasso as predictors of cost explain approximately 67% of the variation in costs across contracts. Provider identity is an especially meaningful predictor of costs; a Lasso model with it alone explains over 60% of the variation in costs across contracts. The differences in costs measured by the provider identity variable may reflect systematic differences in costs across providers, but they are more likely indicative of systematic differences in the way costs are calculated and reported to the Commission by providers. The differences in cost measured by the state variables may reflect state-wide differences in costs arising from different regulatory frameworks or other state-specific factors. Lasso results also indicate differences in costs per minute by facility type (prison or jail), rurality, and region. However, these variables are not economically significant: When retained as predictors by Lasso, these variables explain less than 1% of the variation in costs that are explained by the provider identity and state variables alone.

5. A group of contracts representing a significant fraction—about 11%—of observations contained insufficient information to ascertain the rurality of facilities included in those contracts. As a result, in the baseline model that includes all contracts, the Commission interprets the effect of the rurality variables as differences from the contracts for which the Commission does not have rurality information. To ensure that this is a sound approach, the Commission uses a sample selection model to confirm that the factors that may be associated with a contract not having sufficient rurality information are not significantly correlated with costs. The Commission estimates a Heckman sample selection model where selection is for observations that contain rurality information. The dependent variable and controls in this model were chosen to be the same as the ones in Lasso. The Commission finds that the coefficient on the inverse Mills ratio is not significant at reasonable levels of significance (p-value is 0.21), allaying potential concerns about sample selectivity. The Commission also conducts the analysis using only the contracts that contain rurality information and obtain Lasso results that are similar to the results the Commission obtains with the baseline model.

6. The Commission also explores the differences in the costs reported by the top three providers by size using a double-selection Lasso model. Double-selection Lasso is a method of statistical inference that

selects control variables in two stages: The first stage runs a Lasso regressing the dependent variable on a set of common controls; the second stage regresses the explanatory variables of interest on the same set of common controls. A simple Lasso only selects predictors, without the possibility of statistical inference afforded by double selection. The Commission focuses on GTL, ICSolutions, and Securus because these firms' costs explain the bulk of industry costs. These providers supply 58% of all inmate calling services contracts, and cover approximately 78% of all incarcerated people as measured by average daily population. These shares may in fact represent an understatement of their industry share because, for example, CenturyLink, a large provider when judged by average daily population, subcontracts almost all of its contracts to ICSolutions, and, in the case of the large Texas Department of Corrections contract, to Securus. These three firms are also more suitable for making cross-firm comparisons because they do not subcontract the provision of inmate calling services to a third party, and because they are the largest three of the five providers that serve prisons, covering 111—or 86%—of all prison contracts. Of the remaining prison providers, CenturyLink supplies [REDACTED] prison contracts, Legacy supplies [REDACTED], and NCIC supplies [REDACTED]. The results illustrate how high GTL's reported costs are relative to those of its nearest peers, showing GTL's costs to be—all other things being equal—[REDACTED] greater than the costs reported by Securus and [REDACTED] greater than the costs reported by ICSolutions. These cost differences are statistically significant at confidence levels greater than 99%. When the sample is restricted to the contracts with no missing rurality information, GTL's costs are—all other things being equal—approximately [REDACTED] greater than the costs reported by Securus, and [REDACTED] greater than the costs reported by ICSolutions.

7. The results of the double-selection Lasso model also indicate that—all other things being equal—the costs of providing inmate calling services are approximately 22% greater in jails than in prisons; this difference is statistically significant at confidence levels greater than 99%. For the sample restricted to contracts with complete rurality information, this estimate is approximately 21% and significant at the 99% level of confidence.

8. The Lasso model allows the Commission to consider how a wide array of variables affect a contract's per-minute cost. However, the limitations of the available data may cause the Lasso model to understate the impact of certain variables. For example, because reported costs vary greatly across providers, Lasso may be under-ascribing importance to other variables such as size and type of facility. Commenters criticized the Commission's analysis of reported costs in the 2020 ICS FNPRM. In addition to critiquing the shortcomings of the data used, commenters disagreed with the notion that costs were similar across facility type and size. Some commenters argued that prisons should be expected to have lower per-unit

costs than jails, and that larger jails should have lower per-unit costs than jails with average daily populations less than 1,000. Given the concerns that differences in provider data filing practices impede the Lasso's ability to capture the significance of other variables, as well as the economic rationale for the presence of economies of scale in this market, the Commission finds these arguments to be persuasive. The Commission performs additional analyses to investigate differences in cross-provider costs in Appendix C. The approach the Commission uses there attempts to address provider-level cost differences that obscure the relationship between variables such as facility size and a contract's cost.

## Appendix C

### Lower Bound Analysis

1. Given deficiencies of the cost data submitted by providers, the removal of invalid, incomplete, and otherwise anomalous contracts performed in Appendix A is a necessary step towards determining accurate per-minute costs. In this Appendix, the Commission frequently refers to inmate calling services providers by short names or acronyms. These providers are: ATN, Inc. (ATN); CenturyLink Public Communications, Inc. (CenturyLink); Correct Solutions, LLC (Correct); Combined Public Communications (CPC); Crown Correctional Telephone, Inc. (Crown); Global Tel\*Link Corporation (GTL); ICSolutions, LLC (ICSolutions); Legacy Long Distance International, Inc. (Legacy); NCIC Inmate Communications (NCIC); Pay Tel Communications, Inc. (Pay Tel); Prodigy Solutions, Inc. (Prodigy); and Securus Technologies, LLC (Securus). Using those data, the Commission then develops the upper bounds of the zones of reasonableness for the interim interstate provider-related rate caps based on a mean plus one standard deviation approach. However, the upper bounds overstate true per-minute costs by substantial margins. In addition to generally applicable grounds for overstatement, each upper bound's construction includes a number of contracts that the Commission identifies as statistical outliers, and includes all GTL contract costs as reported, despite abundant indicia that GTL's reported costs are both unreliable as a measure of GTL's actual costs of providing inmate calling services and significantly higher than its true costs.

2. In the following analysis, the Commission makes further adjustments to the submitted cost data using generally accepted statistical and econometric techniques. The Commission begins by performing an analysis of statistical outliers to determine whether certain remaining contracts in the data are well outside of the mean of per-minute costs and remove those observations revealed to be outliers by the use of these metrics. Next, the Commission performs a cost adjustment of GTL's reported per-minute contract costs, using reliable information reported for GTL's own contracts as well as the contract information of other inmate calling services providers to identify surrogate observations to use instead of GTL's reported per-minute costs. The results of this analysis allow the Commission to

derive lower bounds of per-minute contract costs for prisons and larger jails. They additionally allow the Commission to address concerns raised in the record regarding expected differences in contract costs across facilities of different types and sizes.

### 1. Analysis of Outliers

3. As the Commission reviews in detail in Appendix A, the Commission performs an initial round of data cleaning on the contract-level dataset derived from the Second Mandatory Data Collection by removing contracts with invalid or incomplete data, excluding anomalous contracts, and making additional data adjustments. The final dataset contains 2,900 contract-level observations and is the starting point for the outlier analysis presented here. The Commission now turns to outlier detection and removal. Using conservative thresholds for both parametric and non-parametric outlier detection techniques (that is, techniques that rely on normality assumptions about the distribution of the cost data versus techniques that do not), the Commission finds and removes the data points that are well outside of the central tendency of the distribution of per-minute costs as measured by the mean and standard deviation.

4. The Commission first employs two closely related parametric techniques: The Grubbs test and the modified Thompson Tau test. Both tests detect the largest absolute deviations from the mean divided by the standard deviation. For each approach, if the data point with the largest deviation is above a critical threshold then it is considered an outlier and removed. Both tests continue to iterate through the dataset, recalculating the test statistic and comparing it to the critical value until they no longer detect any outlying observations. The critical regions for the Grubbs and Thompson Tau tests are similar but are based on a different version of the Student's t test statistic. For the Grubbs test, the Student's t is based on  $N-2$  degrees of freedom and a tail value equal to  $\alpha/2N$ . For the Thompson Tau test, the Student's t is based on  $N-2$  degrees of freedom and a tail value of  $\alpha/2$ . This difference results in the Thompson Tau test always calculating a lower test statistic than the Grubbs, leading to the detection of more outliers at a given confidence level but also a higher likelihood of false positives.

5. The Commission performs this analysis on the average cost per minute for each contract, and separately for prisons, larger jails, and jails with average daily populations of less than 1,000. The contract-level cost per minute is defined as:  $(\text{contract direct costs} + \text{contract allocated overhead costs}) / (\text{contract total paid minutes})$ . Larger jails have average daily populations greater than or equal to 1,000. As in Appendix A, jails with average daily populations of less than 1,000 are included in the totals to ensure that the Commission's outlier detection and removal is comprehensive among the total dataset of 2,900 contracts. But, because the Commission does not address such jails in the Report and Order for purposes of arriving at interim provider-related rate caps based on the Second Mandatory Data Collection, the

discussion of them in this Appendix is limited. To be as conservative as possible, the Commission chooses the confidence level for the critical value to be 99%. The Thompson Tau test identifies 98 total outliers: 94 jails with average daily populations of less than 1,000, 3 larger jails, and 1 prison. The Grubbs test identifies 25 total outliers: 22 Jails with average daily populations less than 1,000 and three larger jails.

6. Both the Grubbs and Thompson Tau tests assume that each observation is drawn from a normal distribution, and that outlier observations are those that would not typically occur from the same data generating process. However, if the true data-generating process leads to a right-skewed distribution, then observations identified as outliers under an assumption of normality may in fact be legitimate data points. In a right-skewed distribution, the mean is greater than the median. To ensure the outlier results are

robust to normality assumptions, the Commission also employs a well-known non-parametric approach to outlier detection: The box plot. This approach does not rely on the assumption of normality and instead uses only the mean, median, and quartiles of the data. A box plot defines outlier observations as those that are more than 1.5 times the interquartile range from the upper or lower quartiles of the per-minute cost data (the upper and lower bounds). These bounds are referred to as “Tukey’s fences.” The procedure identifies a total of 52 observations above the upper bound: 49 Jails with average daily populations less than 1,000 and 3 larger jails.

7. The Grubbs, Thompson Tau, and box plot approaches identify the same overlapping set of contracts as outliers, but with increasing restriction based on the technique. Specifically, there is no outlier identified by Grubbs that is not also an

outlier for Thompson Tau and the box plot. Similarly, there is no outlier identified by the box plot that is not also an outlier for Thompson Tau. Though Thompson Tau appears to be least conservative and Grubbs most conservative, what is important is that all three approaches lead to the identification of the same nested set of outlier observations. To retain as much data as possible, and to be as conservative with the analysis as possible, the Commission excludes from the contracts data only those 25 observations identified by Grubbs as being outliers.

8. The results of the outlier analysis are presented in Tables 1, 2, and 3 below. Table 1 lists the outlier observations for each firm and facility type, while Table 2 presents the full list of contracts identified as outliers. Finally, Table 3 presents the summary statistics of per-minute costs for the group of outlier contracts.

TABLE 1—OUTLIER OBSERVATIONS BY FIRM AND FACILITY TYPE  
[Number of contracts]

	ATN	Correct	Crown	GTL	Pay Tel	Securus	Total
Smaller Jails .....	2	5	4	2	6	3	22
Larger Jails .....	0	3	0	0	0	0	3
Total .....	2	8	4	2	6	3	25

TABLE 2—CONTRACTS CLASSIFIED AS OUTLIERS

Firm	Contract identifier	Facility type	ADP	CPM	RPM
Correct .....	Williamson .....	Larger Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Correct .....	San Luis .....	Larger Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Correct .....	West Texas .....	Larger Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
ATN .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
ATN .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Correct .....	Morgan City .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Correct .....	Little River .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Correct .....	Rolling Plains .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Correct .....	Wise .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Correct .....	Livingston WR .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Crown .....	Graham County Jail (NCIC—Crown) .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Crown .....	Thayer County Jail (NCIC—Crown) .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Crown .....	Pawnee County Jail (NCIC—Crown) .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Crown .....	Phillips County Jail (NCIC—Crown) .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
GTL .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
GTL .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Securus .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Securus .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]
Securus .....	[REDACTED] .....	Smaller Jail .....	[REDACTED]	[REDACTED]	[REDACTED]

Notes: “ADP” is the average daily population covered by the contract; “CPM” is a contract’s average cost per minute; and “RPM” is a contract’s average revenue per minute, net of any commissions paid.

TABLE 3—OUTLIER ANALYSIS SUMMARY STATISTICS

	Number of contracts	Mean (\$)	Median (\$)	Std. dev. (\$)	Minimum (\$)	Maximum (\$)
Smaller Jails .....	22	0.410	0.359	0.128	0.283	0.734
Larger Jails .....	3	0.782	0.512	0.656	0.303	1.529
Total .....	25	0.455	0.370	0.255	0.283	1.529

9. The Commission's outlier procedure identifies and removes a total of 25 observations (22 jails with average daily populations less than 1,000, and 3 larger jails). This amounts to 1.6% of observations of larger jails and 0.8% of observations of jails with average daily populations less than 1,000. The outlier procedure removes three contracts for larger jails operated by Correct. The remaining 22 observations are all jails with average daily populations less than 1,000 whose per-minute costs also fall outside of the bounds of all three outlier detection methods.

10. It is evident that the outlier contracts have average per-minute costs that are significantly above the norm. All of the larger jails have revenues per minute below their per-minute costs, suggesting the cost data are unreliable in these cases. Of the jails with average daily populations less than 1,000, 11 have per-minute revenues that are less, and in some cases substantially less, than their per-minute costs, again suggesting that their costs are unlikely to be valid. The remaining outliers also have per-minute costs that are well outside of the central tendency of the data, adding further validity to the Grubbs procedure.

#### 1. GTL Data Adjustment

11. Though the Commission believes the contract-level cost data to be improved after removing the outlier observations, the Commission finds the costs reported by certain contracts that are not identified as outliers to be outside of what is reasonable given comparable contracts in the data. Specifically, GTL's per-minute costs for its prison contracts, as calculated using the data GTL reported, are significantly higher than per-minute costs calculated based on data submitted by providers operating similarly sized facilities. Likewise, both GTL and [REDACTED] are high-cost providers for larger jails. [REDACTED]'s average costs per minute for larger jails drop to a lower level after the removal of the three larger jail contracts in the outlier analysis. However, [REDACTED] only has two such contracts while GTL has 62. As such, while [REDACTED]'s inconsistent larger jail contracts should be explored, they do not have nearly as significant an effect on overall costs per minute as do GTL's contracts. GTL, [REDACTED], and [REDACTED] are also the highest-cost providers of inmate calling services for smaller jails, but those contracts are not the primary focus of this analysis.

12. To illustrate the large discrepancy between GTL's per-minute costs for prison and larger jail contracts and those of all other providers, the Commission presents the histograms in Figure 1 below. Rather than a normal distribution of per-minute costs across contracts, the histograms appear bimodal due to GTL's costs. GTL's average per-minute costs for prisons and larger jails are about [REDACTED] as large as those of all other providers. In fact, for prisons, GTL's least costly contract is still higher than any other provider's most costly contract.

Figure 1—Cost per Minute (CPM) Distributions for Prisons and Larger Jails [REDACTED]

Notes: "CPM" is the cost per minute. Dark red areas are where the Non-GTL and GTL bars overlap.

13. Given the large discrepancy between GTL's costs and those of all other providers, the Commission finds it implausible that GTL's actual cost of providing inmate calling services to prisons and larger jails is as high as its reported data suggest. Therefore, in order to address GTL's costs, the Commission implements a *k*-nearest neighbor matching algorithm to match each GTL contract to multiple other contracts by non-GTL providers based on similar contract characteristics. More formally, the multivariate *k*-nearest neighbor regression is a non-parametric method that uses the Euclidian distance between continuous variables to determine the "closeness" of observations. It is a well-established approach to data imputation issues, where missing or unreliable observations need to be replaced with plausible values from the same dataset. The Commission implements the *k*-nearest neighbor approach to find contracts similar to GTL's and then adjust GTL's per-minute costs based on the per-minute costs of those other contracts. In their attempt to address outliers, the report of The Brattle Group utilizes a data censoring technique known as winsorization to replace all per-minute cost observations above \$0.50 with the next highest values in the cost distribution. The Commission believes a combination of outlier removal and cost adjustment using *k*-nearest neighbor regression to be an improvement over winsorization. Whereas winsorization replaces a set percentage (or number) of observations above a predetermined threshold, the Grubbs procedure relies on the variation in the data to determine observations likely drawn from a different population distribution. Likewise, *k*-nearest neighbor relies on a multivariate measure of the "closeness" of contracts to determine the adjustment to GTL observations, making fewer assumptions and utilizing more information in the contracts.

14. The Commission performs the analysis with *k* = 3. That is, the Commission finds the three nearest neighbors to each GTL contract. The matching is done on the following variables: Average daily population, total inmate calling services minutes of use, total commissions paid, and facility type. The Commission has also performed the analysis with the addition of other variables such as revenues, geography, and rurality, and obtained similar results. In the case of encoded categorical variables such as geography, the Commission forced the algorithm to make a match to ensure that the distance measure was not attempting to minimize distance between unrelated states/regions based on how they were coded in the dataset. Though the resulting adjusted per-minute costs were largely unchanged, this is not the preferred specification as forcing a match on any given dimension will invariably weaken the match on the other covariates. Additionally, while the Lasso analysis set forth in Appendix B pointed to provider identity as the dominant predictor of a contract's per minute costs, the Commission does not match on provider

identity. The Commission finds no economic rationale for why certain providers should have higher costs than their competitors for comparable facilities, nor do comments filed with the Commission make this argument. Furthermore, as explained in Appendix B, the importance attributed to provider identity by the Lasso model is most likely the result of asymmetric provider data filing practices, rather than actual differences in costs of provision. A neighbor to a specific GTL contract is the contract that is closest to the GTL contract along these dimensions. For example, if a GTL contract had an average daily population of 100, 15,000 total minutes, and paid \$3,000 in site commissions, then another contract with an average daily population of 110, 16,000 total minutes, and paid site commissions of \$3,400 would be a nearer neighbor than a third contract with an average daily population of 600, 100,000 minutes, and paid site commissions of \$18,000. Matching was done on these four variables, as economic rationale and comments submitted to the Commission argue that each of the four is important in determining a contract's cost of provision. Numerous commentators argued that average daily population and facility type are important to a contract's per minute costs. Total minutes of use is included because inmate calling contracts have high fixed costs. As such, a contract's per minute costs will depend in part on minutes of use, as higher minutes of use allow fixed costs to be spread across more minutes, reducing a contract's per minute costs. Total commissions paid is included because, as first concluded in the 2020 ICS FNPRM, site commissions may represent negotiations between providers and facility authorities in which providers agree to incur additional costs related to the provision of inmate calling services in exchange for not having to pay site commissions. The Commission creates two adjusted per-minute costs for GTL. The first takes a weighted average cost per minute of each nearest neighbor, weighted by each neighbor's inverse distance from GTL. That is, of the three nearest neighbors, the Commission put more weight on the neighbors that are more similar to GTL according to the Euclidian distance measure. The second approach is more conservative and relies on the maximum cost per minute of all nearest neighbors. The Commission has run the matching on various values of *k* and find the results are robust to the choice of *k*. Even at *k* = 6, the Commission obtains reasonable results for the maximum per-minute cost of the six nearest neighbors. Though as expected, when adding more neighbors, the maximum per-minute cost of the new group of neighbors continues to increase. As this is not a classification analysis, there is no methodology or metric for choosing the optimal *k*. However, the Commission finds *k* = 3 to be reasonable. The Commission's choice is further supported by the use of *k* = 3 in the existing literature. Table 4 presents summary statistics for GTL's original per-minute costs for non-outlier prison and larger jail contracts, as well as the weighted and maximum costs per minute that result from the nearest neighbor matching algorithm.

TABLE 4—GTL MATCHING SUMMARY STATISTICS

	Number of contracts	Mean (\$)	Median (\$)	Std. dev. (\$)	Minimum (\$)	Maximum (\$)
<b>Pre-Matching</b>						
Larger Jails .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Prisons .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Post-Matching Weighted</b>						
Larger Jails .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Prisons .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Post-Matching Maximum</b>						
Larger Jails .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Prisons .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

15. Prior to the adjustment, GTL’s per-minute costs are both high compared to other providers and essentially flat across facility types. There is no statistically significant difference in per-minute costs between GTL’s larger jails and prisons. This is highly unusual, as the Commission would expect firms to exhibit economies of scale by spreading their fixed costs over more call

minutes, thereby reducing their per-minute costs on larger contracts. For comparison, the average larger jail contract has 9.3 million minutes of use while the average prison contract has 34.6 million minutes of use. For example, [REDACTED] After performing the *k*-nearest neighbor adjustment, GTL costs also exhibit economies of scale, and the difference in per-minute costs between GTL

prisons and larger jails is statistically significant at the 1% level.

16. The Commission can now estimate the effect that the GTL cost adjustment has on the overall distribution of per-minute costs in the contract-level data. Table 5 presents the average per-minute costs across all non-outlier prison and larger jail contracts after adjusting GTL costs.

TABLE 5—ALL CONTRACTS POST-MATCHING SUMMARY STATISTICS

	Number of contracts	Mean (\$)	Median (\$)	Std. dev. (\$)	Minimum (\$)	Maximum (\$)
<b>Post-Matching Weighted</b>						
Larger Jails .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Prisons .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Post-Matching Maximum</b>						
Larger Jails .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Prisons .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

17. Even when using the conservative approach of replacing GTL’s per-minute costs with the highest costs of the three nearest neighbors, the overall per-minute cost of prisons and larger jails drops substantially. This is unsurprising as not only are GTL’s costs high, but GTL also operates [REDACTED] prison contracts and [REDACTED] larger jail contracts. With the adjusted GTL observations, the full contracts data now indicate a decreasing per-minute cost of operating larger facilities. The reason is twofold: first, because GTL has a larger market share in the provision of inmate calling services for prisons than for larger jails, even a uniform reduction in its costs per minute across facility types would exert greater downward pressure on the average costs of prisons compared to larger jails; and second, because other firms do exhibit returns to scale, the results of the nearest neighbor matching procedure highlight this important aspect of the data. Hence the procedure adjusts GTL per-minute costs for each facility type to reflect this market reality.

18. Finally, to better visualize the GTL data adjustment, the Commission presents

overlaid histograms of GTL and non-GTL per-minute costs for prison and larger jail contracts after performing the *k*-nearest neighbor matching procedure in Figures 2 and 3. These are overlaid histograms rather than stacked bar charts. Therefore, the dark red color represents the intersection of GTL and non-GTL contracts, and the total number of contracts at any cost bin is the sum of the GTL and non-GTL bars. [REDACTED]

Figure 2—CPM Distributions for Prisons with *k*-Nearest Neighbor Matching

[REDACTED]

Notes: “CPM” is the cost per minute. Dark red areas are where the Non-GTL and GTL bars overlap.

Figure 3—CPM Distributions for Larger Jails with *k*-Nearest Neighbor Matching

[REDACTED]

Notes: “CPM” is the cost per minute. Dark red areas are where the Non-GTL and GTL bars overlap.

2. Analysis of GTL “Neighborhoods”

19. To further examine the nearest neighbor results, the Commission explores

the matches for each of GTL’s [REDACTED] non-outlier contracts. Aside from the choice of contract characteristics on which to perform the matching, the approach is non-parametric and relies only on the data to find the nearest neighbors of each observation. Nevertheless, the Commission wants to understand whether a single firm is dominant in the matches or if there is variation in the neighbors found. Even if the matches are overwhelmingly to a single firm, the legitimacy of the procedure is not in doubt as it is only a reflection of the data. However, the results would be less robust if an argument could be made for that firm also having unreliable cost data. In Table 6 below, the Commission presents the total number and percentage of time that each firm matches with a GTL contract, categorized by type of facility. The Commission notes that within the total dataset of 2,900 contract observations, GTL’s smaller jail contracts only matched with other providers’ smaller jail contracts.

TABLE 6—PROVIDER MATCHES TO GTL BY FACILITY TYPE

	Smaller Jail		Larger Jail		Prison		Overall	
	Number of matches	Percent						
Securus .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
ICSolutions .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
CPC .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
NCIC .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Legacy .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Pay Tel .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
CenturyLink .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Correct .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
ATN .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Crown .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Prodigy .....	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

20. The numbers in parentheses represent the percentage of all non-outlier and non-GTL contracts that each firm has, thereby allowing for a comparison of the frequency of nearest neighbor matches to the overall frequency in the data. Unsurprisingly, given the large market share of each, Securus is a frequent match to GTL. Of the [REDACTED] GTL contracts included in the analysis, [REDACTED] of them (19.7%) include zero Securus contracts in their neighborhood; [REDACTED] (34.8%) include one Securus contract in their neighborhood; [REDACTED] (29.4%) include two Securus contracts in their neighborhood; and [REDACTED] (16.1%) include three Securus contracts in their neighborhood. By neighborhood, the Commission refers to the set of three matched contracts for each GTL contract. On average, a GTL contract's neighborhood is comprised of [REDACTED] (47.3%) Securus contracts. As Securus comprises roughly 40% of all non-GTL contracts in the data, the results are reasonable and suggest that Securus does not

have an outsized influence on the matching relative to its size in the market. After Securus, the providers whose contracts constitute the largest number of neighbors to GTL contracts are ICSolutions, CPC, and NCIC, with the average neighborhood consisting of [REDACTED] contracts from each provider, respectively.

21. That no firm plays an outsized role in the nearest neighbor matching holds across the different types of facilities. [REDACTED] In general, the smallest firms in the market tend to be under-represented in the matching, likely because scale economies make the bigger players look more similar along multiple dimensions of a contract, even within a particular facility type.

22. The results of this analysis indicate that GTL is being matched to every other firm in the data at least some of the time. Though its nearest neighbors are usually other large providers, that is in no way surprising. The variation in the match data supports the validity of the results, while shedding

additional light on the contracts that look closest to GTL's for the purposes of the data adjustment procedure.

3. Determining Lower Bound for Interim Rate Caps

23. With confidence that the outlier and GTL data adjustment procedures are valid and robust to a variety of assumptions, the Commission can now construct the lower bounds for the zones of reasonableness. As with the upper bound approach, the Commission defines the lower bound as the mean plus one standard deviation of per-minute contract costs, separately for prisons and larger jails. These estimates rely on the full contract-level data excluding the identified outliers and replacing the original GTL cost data with the per-minute cost estimates derived from the nearest neighbor adjustment procedure. The Commission presents the lower bound estimates in Table 7 below.

Table 7 – Lower Bound Estimates

Lower Bound – Weighted GTL Adjustment					
	# of Contracts	Mean (\$)	Std. Dev. (\$)	Mean+1 Std. Dev. (\$)	Mean+2 Std. Dev. (\$)
Larger Jails	179	0.065	0.015	0.080	0.095
Prisons	129	0.052	0.012	0.064	0.076
Lower Bound – Maximum GTL Adjustment					
	# of Contracts	Mean (\$)	Std. Dev. (\$)	Mean+1 Std. Dev. (\$)	Mean+2 Std. Dev. (\$)
Larger Jails	179	0.070	0.019	0.089	0.108
Prisons	129	0.058	0.015	0.073	0.088

24. As with the previous results, the Commission presents lower bound estimates derived from a weighted average GTL adjustment as well as more conservative estimates based on the maximum of GTL's nearest neighbors. As both approaches are valid, the Commission selects the weighted average results as the estimates of the lower bound for the zone of reasonableness. For prisons, the lower bound is \$0.064, and for larger jails, the lower bound is \$0.08. These

are the most plausible, lowest estimates of per-minute interim rate caps across all contracts in the data.

4. Maximum GTL Costs Support the New Interim Provider-Related Rate Caps

25. The Commission has established the lower bounds of the zones of reasonableness as being \$0.064 for prisons and \$0.080 for larger jails based on an analysis that removes outlier observations and adjusts unreliable

GTL per-minute cost data. Given GTL's size and presence in the inmate calling services market, the Commission now determine the maximum per-minute costs that GTL could hypothetically incur that would still support the interim provider-related rate caps. That is, the Commission asks what GTL's highest average per-minute costs would need to be, separately for its prison and larger jail contacts, such that the overall per-minute cost plus one standard deviation across all

calling services contracts would be no higher than \$0.12 per minute for prisons and \$0.14 per minute for larger jails. The Commission refers to this as the critical cost threshold for GTL, as it is the cost that must be exceeded for the provider-related rate caps to no longer be supported by the analysis.

26. To determine GTL’s critical cost threshold, the Commission presents a critical cost analysis to support the new interim provider-related rate caps of \$0.12 per minute for prisons and \$0.14 per minute for larger jails. The analysis calculates GTL’s threshold per-minute costs that would bring the overall average cost per minute across all

calling services contracts, plus a buffer, to \$0.12 per minute and \$0.14 per minute for prisons and larger jails, respectively. The Commission examines a buffer of both one and two standard deviations from the mean. A buffer of one standard deviation reflects the approach to rate-setting, while a two standard deviation buffer is an even more conservative assumption because it requires per-minute costs to be even lower in order to remain under the interim rate caps. As such, GTL’s threshold per-minute cost derived from this analysis will ensure that the rate caps are set at a level that allows the majority of firms to recover their costs.

27. The Commission relies on the per-minute cost data from the contract-level dataset described in Appendix A after removing the 25 identified outliers. To determine the critical cost thresholds, the Commission optimizes over the set of GTL prison and larger jail contracts to find the cost per minute that sets the overall cost per minute plus a buffer across all prison contracts to \$0.12 and across all larger jail contracts to \$0.14. The Commission performs four constrained optimizations: Two each for prisons and larger jails with two different buffers (1 and 2 standard deviations). The Commission presents the results in Table 8.

TABLE 8—GTL CRITICAL COST THRESHOLDS  
[\$]

Facility type	Per-minute rate cap	1 Std. dev. buffer	2 Std. dev. buffer
Prison .....	0.120	0.117	0.094
Larger Jail .....	0.140	0.153	0.117

28. Even with a large buffer of two standard deviations from the mean (which would allow the vast majority of firms to recover costs with certainty), GTL’s average per-minute costs for prisons and larger jails need only be at or below \$0.094 per minute and \$0.117 per minute, respectively. These thresholds are still \$0.041 per minute and \$0.053 per minute higher than the average per-minute costs of all non-GTL prison and larger jail contracts. Furthermore, after applying a conservative *k*-nearest neighbor matching algorithm that sets GTL’s contract costs to the maximum of its three neighbors, GTL’s per-minute costs are \$0.063 and \$0.078 for prisons and larger jails, respectively. These cost estimates are well below the threshold values necessary to support the interim rate caps. As such, with reasonable high-end estimates of GTL’s costs, the analysis indicates that the interim rate caps would allow nearly all firms to recover their costs of providing inmate calling services as reported in response to the Second Mandatory Data Collection.

**Appendix D**

**Analysis of Site Commission Payments**

1. The Commission permits a \$0.02 per minute interim allowance for reasonable correctional facility costs for prisons and

larger jails where site commission payments are part of a negotiated contract. The Commission bases its decision on two separate and independent grounds. First, this allowance is based on estimates of the portion of site commission payments that are legitimately related to inmate calling services based on the approach set forth in Appendix D of the 2020 ICS FNPRM, which the Commission has updated below with corrected cost data consistent with the record. Second, this allowance is based on record evidence reintroduced by Pay Tel and the National Sheriffs’ Association supporting a \$0.02 allowance.

2. To improve comparability between contracts that do and do not involve payment of a site commission, the Commission removed invalid, incomplete, and anomalous contracts from the cost data submitted by providers in response to the Second Mandatory Data Collection using the process described in Appendix A. The resulting data do not specify the costs, if any, that correctional facilities incur that are directly related to the provision of inmate calling services. In the absence of direct information on the level of those costs, the Commission estimates the costs correctional facilities incur by comparing the relative costs per minute to providers for contracts with and without site commissions, as shown in Table

1. As the Commission concluded in the 2020 ICS FNPRM, the Commission continues to find that it is reasonable that the higher costs per minute for contracts without site commissions reflect, at least in part, give-and-take negotiations in which providers agree to incur additional costs related to the provision of inmate calling services in exchange for not having to pay site commissions. In the context of Contractually Prescribed site commission payments, facilities may seek that providers pay a site commission as part of a request for proposal. In other cases, a correctional facility may not seek a site commission payment but may indicate that offers to make such payments will be a factor in the bid evaluation process. In either case, bidders’ choices about whether to offer a site commission payment and at what level are informed by their discretionary business decisions about which strategies are more or less profitable to pursue. Consequently, it is reasonable to conclude that providers and correctional facilities have at least some give-and-take during the negotiation process, which, at least in part, contributes to higher costs for contracts that do not provide for site commission payments compared to similarly situated providers operating under contracts that do provide for such payments.

TABLE 1—SITE COMMISSIONS AND PER-MINUTE COSTS

Facility type	Site commission	Mean (\$)	Std. dev. (\$)	Mean + std. dev. (\$)	Number of contracts		
					Below	Above	Total
Larger Jails .....	No Commission Paid	0.100	0.042	0.142	11	1	12
	Commission Paid .....	0.100	0.121	0.221	167	3	170
	All Larger Jails .....	0.100	0.118	0.218	179	3	182
All Jails .....	No Commission Paid	0.097	0.061	0.158	260	13	273
	Commission Paid .....	0.093	0.056	0.150	2,325	173	2,498
	All Jails .....	0.093	0.057	0.150	2,583	188	2,771
Prisons .....	No Commission Paid	0.097	0.038	0.135	38	2	40
	Commission Paid .....	0.089	0.042	0.131	82	7	89
	All Prisons .....	0.092	0.041	0.133	120	9	129
All Facilities .....	No Commission Paid	0.097	0.059	0.155	298	15	313

TABLE 1—SITE COMMISSIONS AND PER-MINUTE COSTS—Continued

Facility type	Site commission	Mean (\$)	Std. dev. (\$)	Mean + std. dev. (\$)	Number of contracts		
					Below	Above	Total
	Commission Paid .....	0.093	0.056	0.149	2,408	179	2,587
	All Facilities .....	0.093	0.056	0.150	2,708	192	2,900

3. The bottom three rows of Table 1 (for All Facilities) show a \$0.004 difference in mean costs per minute between contracts without site commissions (\$0.097) and contracts with site commissions (\$0.093). The difference in mean costs per minute between contracts without site commissions and contracts with site commissions is \$0.008 for prisons (\$0.097 – \$0.089) and \$0.004 for jails (\$0.097 – \$0.093). For larger jails, there is no difference in mean costs per minute between

contracts without site commissions and contracts with site commissions (\$0.10 – \$0.10).

4. These differences between mean costs per minute for contracts that do and do not provide for payment of site commissions are lower than the estimates from the 2020 ICS FNPRM. However, the Second Mandatory Data Collection did not require the reporting of data on the costs, if any, that facilities incur that are directly related to the provision

of calling services for incarcerated people. Because the absence of such data prevents the Commission from more accurately determining the portion of site commissions directly related to the provision of inmate calling services, the Commission declines to reduce the \$0.02 allowance at this time.

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