Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rates for Interstate Inmate Calling Services	)	WC Docket No. 12-375
	)	

ORDER ON RECONSIDERATION

Adopted: August 4, 2016 **Released: August 9, 2016**

By the Commission: Chairman Wheeler and Commissioners Clyburn and Rosenworcel issuing separate statements; Commissioners Pai and O'Rielly dissenting and issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. In this Order on Reconsideration (Order), we respond to a petition filed by Michael S. Hamden,[1] and build on our reforms of inmate calling services (ICS) by amending our rate caps to better allow providers to cover costs facilities may incur that are reasonably related to the provision of ICS. The resulting rates will better allow ICS providers to recover their costs of providing ICS even while

[1] Petition of Michael S. Hamden for Partial Reconsideration, WC Docket No. 12-375 (filed Jan. 19, 2016), http://apps.fcc.gov/ecfs/document/view?id=60001408060 (Hamden Petition).

reimbursing facilities for any costs they may incur that are reasonably and directly related to the provision of the service. Although our revised rate caps are higher than those adopted in the *2015 ICS Order*, they still represent a significant constraint on ICS rates and, coupled with other reforms adopted in the *2015 ICS Order*, will provide much-needed relief to people who need ICS to remain connected to loved ones.[2] Moreover, our rate caps serve as an upper limit on ICS charges, and we expect that, in many instances, providers and facilities will agree on rates that fall far below the permitted maximums.[3] And we remind providers that we will remain vigilant in monitoring the ICS market for signs that intrastate rates may be unfairly high or that interstate rates are unjust, unreasonable, or unfair, in contravention of the Communications Act of 1934, as amended (the Act).[4]

2. As the Commission has explained, ICS rates must be sufficient to allow providers to recover all costs reasonably and directly related to the provision of ICS.[5] In the *2015 ICS Order*, we recognized the possibility that facilities might incur such costs but concluded, based on the record at the time, that any such costs were likely to be relatively low and could be recovered using rates consistent with the rate caps adopted in that order. After releasing the *2015 ICS Order*, we received the Hamden Petition. In his petition, Hamden argues, *inter alia,* that facilities "incur actual costs that are directly and incrementally attributable to increased access to inmate calling services"[6] and that "some mechanism that will permit an offset to [those] costs of providing ICS may be appropriate."[7] Specifically, Hamden proposes that the Commission adopt a "facility cost-recovery fee" as an "additive" to the existing rate caps.[8]

3. After considering the Hamden Petition, the record developed in response to that petition, the pre-existing record, arguments ICS providers made in their petitions for stay,[9] and arguments

[2] *See*, *e.g.*, http://triblive.com/news/westmoreland/10643752-74/county-inmates-jail (detailing reductions in the costs of ICS calls that occurred as a direct result of the *2015 ICS Order*); *see also* 47 CFR § 64.6020 (limiting ancillary fees). We also note that the new rate caps will result in rates that are, on average, below the interim rate caps currently in effect. *See Wireline Competition Bureau Updates Applicable Rates for Inmate Calling Services*, Public Notice, DA 16-332 (WCB Mar. 29, 2016) (citing 47 CFR § 64.6030, which states that "[n]o Provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute"). Using data submitted in response to the Mandatory Data Collection, we have determined that the weighted average for all debit and prepaid calls is approximately $0.18 per minute and the weighted average for all ICS calls – including collect – would be capped at under $0.20 per minute, well below the $0.21 per minute interim cap for interstate prepaid and debit ICS calls and the $0.25 per minute interim cap for interstate collect ICS calls.

[3] *See Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd. 12763, 12787-88, para. 49 (2015) (*2015 ICS Order*) (noting that several states, including Ohio, West Virginia, New Jersey, Pennsylvania, and New Hampshire, have undertaken ICS reforms that reduced rates below those adopted in the *2015 ICS Order*).

[4] 47 U.S.C. §§ 201, 276. Our vigilance will be facilitated by the annual reports and certifications providers will be required to submit to the Commission pursuant to the *2015 ICS Order*. *See* 47 CFR § 64.6060.

[5] *See Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14133, para. 53 (2013) (*2013 ICS Order*).

[6] Hamden Petition at 12, quoting Pai Dissent at 205.

[7] *Id*. at 13.

[8] *Id*. at 12-15. A fuller description of the Hamden Petition is provided below. *See infra* Part II.

[9] *See* Petition of Global Tel*Link for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Dec. 22, 2015), http://apps.fcc.gov/ecfs/comment/view?id=60001361606 (GTL Stay Petition); Securus Technologies, Inc. Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136), WC Docket No. 12-375 (filed Dec. 22, 2015) http://apps.fcc.gov/ecfs/comment/view?id=60001361748 (Securus Stay Petition); Petition of Telmate, LLC for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Jan. 6, 2016), http://apps.fcc.gov/ecfs/comment/view?id=60001372226 (Telmate Stay Petition).

presented in the litigation before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit),[10] we have decided, out of an abundance of caution, to take a more conservative approach and expressly account for facilities' ICS-related costs when calculating our rate caps. Accordingly, we grant the Hamden Petition in part, as described below, and increase our interstate and intrastate rate caps to expressly account for reasonable facility costs related to ICS. The revised rate caps adopted today are as follows:

Size and Type of Facility	Debit/Prepaid Calling per MOU as of effective date[11]	Collect Rate Cap per MOU as of effective date	Collect Rate Cap per MOU as of July 1, 2017	Collect Rate Cap per MOU as of July 1, 2018
0-349 Jail ADP	$0.31	$0.58	$0.45	$0.31
350-999 Jail ADP	$0.21	$0.54	$0.38	$0.21
1,000+ Jail ADP	$0.19	$0.54	$0.37	$0.19
Prisons	$0.13	$0.16	$0.15	$0.13

4. The actions we take today will ensure that all providers can earn sufficient revenues to cover their ICS-related costs while also compensating facilities for reasonable costs incurred directly as a result of providing ICS.[12] The rate caps we adopt derive from proposals in the record advocating for rate caps that would improve providers' ability to compensate facilities for their reasonable ICS-related costs.[13] These rate caps represent the views of three constituencies in the ICS market: a provider, a

[10] *See Global Tel*Link v. FCC*, No. 15-1451 (D.C. Cir. 2016).

[11] Consistent with our finding in the *2015 ICS Order*, we adopt a 90-day transition period from publication in the Federal Register for prisons and six months from publication in the Federal Register for jails. *2015 ICS Order*, 30 FCC Rcd at 12888-89, para. 259 (explaining that this length of time adequately balances the pressing need for reform and the providers' need for time to prepare the new rates). We are unpersuaded by Telmate's argument that the Commission should delay implementation of the revised rate caps we adopt today until today's order "has been subject to judicial review (or the time to seek review has passed)." Letter from Brita D. Strandberg, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed Jul. 29, 2016) (Telmate *Ex Parte* Letter). Telmate contends that such action is warranted because it has already "implemented the FCC's [2015] rate changes for jails," which "was a costly effort that diverted significant resources from Telmate's ongoing research and development." *Id.* Insofar as the "rate changes" that Telmate references are changes the company made to comply with the rule governing ancillary service charges that we adopted in the *2015 ICS Order*, today's Order does not alter that rule, and Telmate's compliance efforts are thus no basis to delay this Order's implementation. If, on the other hand, by "rate changes for jails" Telmate means that it invested resources to implement the per-minute rate caps that (at Telmate's request) were judicially stayed, its decision to do so does not alter our view that the above transition periods are reasonable.

[12] Our analysis indicates that only one small provider may not be able to recover all of its ICS-related costs under the new rates. That provider offered no explanation for its costs, which appear to be a significant outlier among our data set, and has not objected to our rate caps at any stage of this proceeding. As explained in the *2015 ICS Order,* however, our rate caps do not need to be calibrated to cover the costs of the least efficient provider(s). *See 2015 ICS Order*, 30 FCC Rcd 12809, para. 96 (explaining that "our rate caps are designed to ensure that efficient providers will recover all legitimate costs of providing ICS, including a reasonable return"); *see also id. at 12799-800,* para. 73, n.222 (explaining that "[w]e need not set our rate caps at the level of the highest cost providers, but can use the rate cap to encourage more efficient provision of ICS").

[13] Letter from Darrell Baker, Director of Utility Services Division, Alabama Public Service Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Jul. 1, 2015) (Baker/Wood Proposal); Letter from Mary J. Sisak, Attorney for National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed June 12, 2015) (NSA Proposal). As explained below, we considered – and rejected – other proposals for modifying the rate caps to facilitate providers' ability to pay facilities for their ICS-related costs.

regulatory expert, and an association of facilities. The first proposal we rely on comes from the National Sheriffs Association (NSA), an association of U.S. sheriffs, which provided data collected from its members, who are uniquely well situated to comment on both the type and amount of costs facilities incur that are directly related to the provision of ICS.[14] The second proposal comes from Don Wood, Pay Tel Communications' outside economist, and Darrell Baker, Director of the Utility Services Division of the Alabama Public Service Commission, who has been engaged in ICS reform at the state level.[15] The rate caps we adopt today represent the intersection of these two proposals, and provide us with the soundest available basis for ensuring that our rate caps permit providers to pay facilities for costs that are reasonably related to the provision of ICS.[16] We therefore rely on these proposals to adopt increases to the existing ICS rate caps, thus ensuring that ICS rates are compensatory and will allow providers and facilities to recover costs they incur in relation to ICS. We reiterate and emphasize our expectation that both providers and facilities will act in good faith to keep costs – and the rates charged to ICS end users – low, our anticipation that rates will continue to decline, and our commitment to monitoring the market for evidence of anticompetitive conduct or manipulation.

5. Hamden also asks the Commission to clarify the meaning of the terms "mandatory tax" and "mandatory fee."[17] We take this opportunity to amend our rules to mirror the definitions that were clearly stated in the text of the *2015 ICS Order*. Specifically, we amend the definitions in our rules to make clear that providers may not markup mandatory taxes or fees they pass through to consumers, unless the markup is explicitly authorized by a federal, state, or local statute, rule, or regulation.

II. BACKGROUND

6. This Order is the latest in a proceeding that began in 2012, when the Commission issued a notice of proposed rulemaking (NPRM) in response to long-standing petitions seeking relief from certain ICS rates and practices.[18] The Hamden Petition seeks partial reconsideration of the *2015 ICS Order*, in which we adopted comprehensive reforms to the ICS market, including tiered rate caps for both interstate and intrastate ICS calls, and limits on ancillary service charges.[19] In the *2015 ICS Order*, we focused on our core authority over ICS rates, adopting rate caps in fulfillment of our obligation to ensure

[14] *See* NSA Proposal.

[15] *See* Baker/Wood Proposal.

[16] The rates we adopt today are also consistent with Pay Tel's Proposal to adopt a "facility cost recovery" rate of $0.094 per minute for jails with ADP below 350 and $0.059 for jails with ADP between 350 and 2,499. *See* Letter from Timothy G. Nelson, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 7 (filed May 8, 2015) (Pay Tel Proposal).

[17] Hamden Petition at 15.

[18] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012) (*2012 ICS NPRM*) (incorporating relevant comments, reply comments, and *ex parte* filings from the prior ICS docket, CC Docket No. 96-128, into WC Docket No. 12-375); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 (filed Nov. 3, 2003) (First Wright Petition); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007) (Alternative Wright Petition); *see also 2013 ICS Order*; 28 FCC Rcd 14107; Rates *for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170 (2014) (*2014 ICS FNPRM*).

[19] *See 2015 ICS Order*, 30 FCC Rcd at 12775-76, paras. 20-23 (setting separate rate caps for jails with an ADP below 350, jails with an ADP between 350 and 999, jails with an ADP of 1,000 or more, and prisons.); *see also* 47 CFR § 64.6010. The *2015 ICS Order* provides details on the history of this proceeding through October 2015. *See 2015 ICS Order*, 30 FCC Rcd at 12771-74, paras. 12-19. We do not repeat that history here, but incorporate that description by reference.

that compensation for ICS calls is fair, just, and reasonable. We capped ICS rates at levels that we found would be just and reasonable and would ensure that providers are fairly compensated, as required by the Act.[20] In setting the rate caps, we declined to include the cost of site commissions, which are payments from facilities to providers, because we found that such payments are not a legitimate cost of providing ICS. We did not, however, prohibit providers from paying site commissions. Instead, we let providers and facilities negotiate over whether providers would make site commission payments and, if so, what payments are appropriate.[21] Our approach offered ICS providers and facilities the freedom to negotiate compensation that is fair to each, while also ensuring that ICS consumers are charged rates that are fair, just, and reasonable.

7. In addition to setting rate caps for interstate and intrastate ICS calls, we discussed what costs, if any, facilities incur that are reasonably attributable to ICS.[22] Specifically, we considered whether we should expressly provide for recovery of such costs through an additive to the per-minute rate caps limiting the prices providers may charge inmates and their families.[23] The record before us on this point was relatively limited. Moreover, the data we had was mixed regarding the costs, if any, facilities incur that are reasonably related to the provision of ICS.[24] Some commenters argued that many of the activities that facilities claim as ICS-related costs are actually performed by ICS providers.[25] Other commenters, however, asserted that correctional facilities incur a variety of costs related to ICS that providers do not.[26] These costs included expenses related to "call monitoring, responding to ICS system alerts, responding to law enforcement requests for records/recordings, call recording analysis, enrolling inmates for voice biometrics, and other duties."[27] As we noted, "[e]ven commenters asserting that facilities incur costs that are properly attributable to the provision of ICS do not agree on the extent of those costs."[28] In the *2015 ICS Order*, we declined to adopt a per-minute "additive," because of our view that the costs facilities claimed to incur in allowing ICS were "already built into our rate cap calculations and should not be recovered through an 'additive' to the ICS rates."[29]

8. Following the release of the *2015 ICS Order*, four ICS providers filed petitions for stay before the Commission, including Global Tel*Link Corporation (GTL), Securus Technologies, Inc.

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[20] *See, e.g., 2015 ICS Order*, 30 FCC Rcd at 12775, para. 21 (noting that the record demonstrated that many interstate rates were not "just and reasonable" as required by section 201 "and that many interstate and intrastate rates result in compensation that exceeds the fair compensation permitted by section 276"); *see also id*. at 12775-88, paras. 20-143 (establishing separate rates for jails of various sizes and for prisons).

[21] *Id*. at 12829-31, paras. 131-32.

[22] *Id*. at 12831-36, paras. 133-140.

[23] *Id*. at 12834-36, paras. 138-140.

[24] *Id*. at 12834, para. 138.

[25] *See id*. at 12832, para. 134.

[26] *See, e.g.*, Pay Tel Proposal at 3.

[27] *2015 ICS Order*, 30 FCC Rcd at 12831, para. 134 (citing NSA Proposal).

[28] *2015 ICS Order*, 30 FCC Rcd at 12833, para. 136.

[29] *Id*. at 12835, para. 139. In addition to capping rates, the *2015 ICS Order* also limited and capped ancillary service charges and addressed the potential for loopholes and gaming; prohibited ICS prepaid calling account funding minimums and established an ICS prepaid calling account funding maximum; established a periodic review of ICS reforms; and addressed concerns with access to ICS by consumers with communications disabilities, including requiring that the per-minute rates charged for TTY-to-TTY calls be no more than 25 percent of the rates the providers charge for traditional ICS and that no provider shall levy or collect any charge or fee for TRS-to-voice or voice-to-TTY calls. *See id.* at 12769. We also adopted a Further Notice of Proposed Rulemaking, and required providers to submit annual reports regarding their inmate calling services. *See generally id*.

(Securus), Telmate, LLC (Telmate), and CenturyLink.[30] GTL and Telmate, in particular, argued that the Commission was required to include the costs of paying site commissions in the rate caps and that it set the rate caps below the documented costs of many ICS providers.[31] The Wright Petitioners opposed the petitions, stressing the importance of the "overwhelmingly positive public interest benefits from the adoption of the [*2013 ICS Order*]" and expressing concern that a stay of the *2015 ICS Order* would delay relief to consumers and harm the public interest.[32]

9. On January 22, 2016, the Wireline Competition Bureau (WCB or Bureau) issued an order denying the stay petitions of GTL, Securus, and Telmate.[33] The Bureau found that the petitioners failed to demonstrate that they would suffer irreparable harm if the *2015 ICS Order* was not stayed.[34] The Bureau also was not persuaded that the petitioners were likely to succeed on the merits of their arguments or that a stay would be in the public interest.[35] To the contrary, the Bureau noted that other parties – particularly ICS consumers – would likely be harmed if the relevant provisions of the *2015 ICS Order* were stayed.[36]

10. After the Bureau issued its order denying the stay petitions, the providers appealed the *2015 ICS Order* to the D.C. Circuit. On March 7, 2016, the court stayed two provisions of the Commission's ICS rules: 47 CFR § 64.6010 (setting caps on ICS calling rates that vary based on the size and type of facility being served) and 47 CFR § 64.6020(b)(2) (setting caps on charges and fees for single-call services).[37] The D.C. Circuit's *March 7 Order* denied motions for stay of the Commission's ICS rules "in all other respects."[38] On March 23, 2016, the D.C. Circuit modified the stay imposed in the *March 7 Order* to provide that "47 CFR § 64.6030 (imposing interim rate caps)" be stayed as applied to "intrastate calling services.[39] Final briefs from the parties are due to the Court on October 5, 2016, and oral arguments have not yet been scheduled.[40]

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[30] *See* GTL Stay Petition; Securus Stay Petition; Telmate Stay Petition; Petition of CenturyLink for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Jan. 22, 2016), http://apps.fcc.gov/ecfs/comment/view?id=60001389462 (CenturyLink Stay Petition).

[31] GTL Stay Petition at 9-23; Telmate Stay Petition at 8-9; *see also* CenturyLink Stay Petition at 1 (arguing that the rate caps would prevent CenturyLink from recovering its reasonable costs of providing ICS to facilities in several jurisdictions). Securus focused its arguments on the Commission's regulation of ancillary fees. *See* Securus Petition at 5-12; *see also* Telmate Stay Petition at n. 4 (supporting many of the arguments Securus and GTL made in their petitions).

[32] *See* Opposition to Telmate at 7; Opposition to Securus at 7; Opposition to GTL at 8.

[33] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order Denying Stay Petitions, 31 FCC Rcd 261 (WCB 2016) (*Order Denying Stay Petitions*). CenturyLink did not file its petition until the day the Bureau released its order, and filed suit in federal court shortly thereafter. *See* CenturyLink Stay Petition (filed January 22, 2016); Motion of CenturyLink Public Communications, Inc. for Partial Stay Pending Judicial Review, USCA Case #15-1461, Document #1597573 (filed Feb. 5, 2016).

[34] *Order Denying Stay Petitions*, 31 FCC Rcd at 265, para. 11.

[35] *Id*.

[36] *Id*.

[37] *See Global Tel*Link v. FCC*, No. 15-1451 (D.C. Cir. Mar. 7, 2016) (*March 7 Order*); *see also Wireline Competition Bureau Addresses Applicable Rates for Inmate Calling Services and Effective Dates for Provisions of the Inmate Calling Services Second Report and Order*, Public Notice, DA 16-280 (WCB Mar. 16, 2016).

[38] *March 7 Order* at 2.

[39] *See Global Tel*Link v. FCC*, No. 15-1451 (D.C. Cir. Mar. 23, 2016) (*March 23 Order*); *see also Wireline Competition Bureau Updates Applicable Rates for Inmate Calling Services*, Public Notice, DA 16-332 (WCB Mar. 29, 2016).

[40] *See Global Tel*Link v. FCC*, No. 15-1451 (D.C. Cir. Apr. 18, 2016).

11. On January 19, 2016, Michael S. Hamden, an attorney who has both represented prisoners and served as a corrections consultant filed a Petition for Partial Reconsideration, seeking reconsideration of certain aspects of the *2015 ICS Order*.[41] Hamden asks the Commission to reconsider its decision not to prohibit providers from paying site commissions[42] or, in the alternative, to mandate a "modest, per-minute facility cost recovery fee that would be added to the rate caps."[43] In short, Hamden, like several of the ICS providers, asserts that at least some portion of site commissions serves to reimburse facilities for reasonable costs that *facilities* incur in providing ICS, and that excluding site commissions entirely from our rate cap calculations results in rates that are too low to allow providers to pay facilities for their reasonable ICS-related costs and still earn a profit. Hamden also asks the Commission to clarify "the meaning of the terms 'mandatory fee,' 'mandatory tax,' and 'authorized fee' as they are used in the [*2015 ICS Order*]."[44] Finally, Hamden seeks clarification that ICS providers "cannot circumvent the Second ICS Order's rule regarding charges for single-call services through the use of unregulated subsidiaries to serve as the companies that charge third-party transaction fees for such services."[45] On February 11, 2016, the Commission's Consumer and Government Affairs Bureau (CGB) issued a Public Notice seeking comment on the Hamden Petition.[46] Multiple parties submitted responses and oppositions to the Hamden Petition, including ICS providers,[47] facilities,[48] and the Wright Petitioners.[49] Hamden also submitted a reply to the responses and oppositions on April 4, 2016.[50] We now act on these filings.

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[41] *See* Michael S. Hamden Mar. 25, 2013 Comments at 1, n. 2 (identifying Hamden as an attorney with more than 25 years of experience representing prisoners in a variety of matters, including ICS, both individually and on behalf of North Carolina Prisoner Legal Services, a nonprofit inmate advocacy group). *Id*. He also has experience as a corrections consultant. *See* Letter from Michael S. Hamden to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 1 & Attach. at 1 (filed Oct. 29, 2008) (identifying Hamden as a "corrections consultant" and "private practitioner […] representing prisoners").

[42] *See, e.g.*, Hamden Petition at 2 (asking the Commission to "prohibit payments to facilities in all forms") (emphasis omitted).

[43] *Id*. at ii. Although never clearly stated, the Petition appears to seek to limit any payments to facilities to the proposed "facility cost-recovery fee" that would be added to the per-minute rate caps. *See id*. at 12 (proposing a "facility cost-recovery fee" as "an alternative to site commissions"); *id.* at 13-14 (favorably citing a proposal previously introduced by a group of ICS providers arguing that the Commission should replace the existing site commission system with a per-minute administrative support payment that would be an additive to the rates and that would cap the amount providers could pay facilities.)

[44] *Id*. at i.

[45] *Id*. at ii.

[46] *Petition for Reconsideration of Action in Rulemaking Proceeding*, WC Docket No. 12-375, Public Notice, Report No. 3038 (CGB 2016). A summary of CGB's Public Notice was published in the Federal Register on March 8, 2016. Federal Communications Commission, Petition for Reconsideration of Action in a Rulemaking Proceeding, 81 Fed. Reg. 12062 (Mar. 8, 2016).

[47] *See* CenturyLink Opposition to Petition for Partial Reconsideration, WC Docket No. 12-375 (filed Mar. 23, 2016) (CenturyLink PFR Opposition); Inmate Calling Solutions, LLC Opposition to Petition for Partial Reconsideration, WC Docket No. 12-375 (filed Feb. 26, 2016) (ICSolutions PFR Opposition); Network Communications International Corp. Opposition to Petition for Partial Reconsideration, WC Docket No. 12-375 (filed Mar. 23, 2016) (NCIC PFR Opposition); Response of Securus Technologies, Inc. to Petition for Partial Reconsideration of Michael S. Hamden, WC Docket No. 12-375 (filed Mar. 23, 2016) (Securus PFR Response); Response of Telmate, LLC to Petition for Partial Reconsideration, WC Docket No. 12-375 (filed Mar. 23, 2016) (Telmate PFR Response).

[48] *See* Opposition of the National Sheriffs' Association, WC Docket No. 12-375 (filed Mar. 23, 2016) (NSA PFR Opposition).

[49] *See* Wright Petitioners' Opposition to Petition for Partial Reconsideration, WC Docket No. 12-375 (filed Mar. 23, 2016) (Wright PFR Opposition).

III. DISCUSSION

12. After reviewing the Hamden Petition, the arguments made in response to the Petition, and other relevant evidence in the record, we find that: (1) at least some facilities likely incur costs that are directly and reasonably related to the provision of ICS, (2) it is reasonable for those facilities to expect providers to compensate them for those costs, (3) such costs are a legitimate cost of ICS that should be accounted for in our rate cap calculations, and (4) our existing rate caps do not separately account for such costs. Accordingly, out of an abundance of caution, we increase our rate caps to better ensure that ICS providers are able to receive fair compensation for their services, including the costs they may incur in reimbursing facilities for expenses reasonably and directly related to the provision of ICS. Specifically, we increase our rate caps for debit and prepaid ICS calls to $0.31 per minute for jails with an average daily population (ADP) below 350, $0.21 per minute for jails with an ADP between 350 and 999, $0.19 per minute for jails with an ADP of 1,000 or more, and $0.13 per minute for prisons. As discussed below, we also increase the rate caps for collect calls by a commensurate amount.[51]

13. We find that our revised rate caps will allow inmate calling providers to recover their costs of providing ICS even while reimbursing facilities for any costs they may incur that are reasonably and directly related to the provision of ICS.[52] We also find that these rate caps will adequately ensure that rates for ICS consumers will be fair, just, and reasonable.[53] Thus, we grant the Hamden Petition to the extent that it seeks an increase in the ICS rate caps to expressly account for reasonable facility costs.[54] We also grant the Hamden Petition to the extent that it seeks a clarification of the definitions of the terms "Mandatory Taxes" and "Mandatory Fees."[55] We deny the Hamden Petition in all other respects.

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[50] Hamden Reply to Responses and Oppositions to Petition for Partial Reconsideration, WC Docket No. 12-375 (filed April 4, 2016) (Hamden Reply).

[51] *See* section III.C *infra* (as of the effective date of this Order, the rate caps for collect calls will be $0.16 for prisons and $0.58, $0.54, and $0.54 for small, medium, and large jails, respectively); *see also* Appendix A (listing all of the revised caps).

[52] As explained below at note 151, because we do not regulate site commissions in this order (and have not done so previously), any revenues derived under these rate caps may be passed through to facilities.

[53] We remind providers that we will continue to monitor the state of the market to ensure that remains true going forward, including by collecting data and reevaluating our ICS rules, as circumstances warrant.

[54] As noted above, Hamden appears to favor an approach whereby the Commission would adopt an "additive" to our existing rate caps and prohibit providers from paying any site commissions beyond the additive. *See supra* n. 43. We maintain our view that prohibiting site commission payments is not necessary at this time. *See 2015 ICS Order*, 30 FCC Rcd at 12827, para. 128 (explaining that "we have addressed the harmful effects of outsized site commissions" on end users by excluding site commissions from our rate cap calculations, and that we expect market forces will drive adjustments in site commission payments in view of our rate caps); *accord id.* at 12830–31, para. 132. As we noted in the *2015 ICS Order*, "this approach is consistent with the Commission's general preference to rely on market forces, rather than regulatory intervention, wherever reasonably possible." *Id*. at 12827, para. 128. Correctional authorities have every incentive to accept whatever commissions providers can pay within the rate caps given the benefits ICS confers on both facilities and inmates. *See, e.g.*, *id.* at 12767–68, para. 5 (discussing the implications of ICS for inmate and staff safety); *id.* at para. 4 (explaining how phone contact can reduce recidivism). In addition, we note that our approach obviates the need to address arguments challenging our authority to regulate site commission payments. *See infra* para. 38; *id*. at 12825, para. 127. Contrary to the suggestion in one dissent, although we have not elected to adopt the precise mechanism that Hamden appears to have advocated for "offset[ting]" the facilities' claimed costs of providing access to ICS, Hamden Petition 13, our approach to ensuring that our rate caps adequately account for facilities' reasonable ICS-related costs is, at a minimum, a logical outgrowth of the Hamden Petition.

[55] *See* Hamden Petition at 15; *see also infra* at III.D. and Appendix A.

A. The Rate Caps Should Account for Costs Reasonably and Directly Related to the Provision of ICS

14. The Commission has a statutory duty to set rates that are fair, just, and reasonable and to promote access to ICS by inmates and their families and friends.[56] Accordingly, one of our goals is to ensure that inmates and their families have as much access as possible to this vital communications service. Some parties in the reconsideration proceeding have asserted that our prior decision not to include certain costs in our rate cap calculations could pose a risk to the continued deployment and development of ICS.[57] Our reforms would not achieve their purpose if they resulted in less robust services for inmates and those who wish to communicate with them. As a result, out of an abundance of caution, we are increasing the rate caps to better reflect the costs that facilities claim to incur that are directly and reasonably related to the provision of ICS. This action better enables the Commission to achieve its twin statutory mandates of promoting deployment of ICS and ensuring that ICS rates are fair to both providers and consumers.

15. As the Commission has repeatedly explained, providers should be able to recover costs that are "reasonably and directly related to the provision of ICS" through the ICS rates.[58] The Commission has also recognized that correctional facilities may incur costs that are reasonably related to the provision of ICS.[59] With both the Mandatory Data Collection and the *2014 ICS FNPRM*, the Commission took steps to determine the costs involved in providing ICS.[60] For example, in the Mandatory Data Collection, the Commission required ICS providers to submit their costs related to the provision of ICS, including costs related to telecommunications, equipment, and security.[61] In addition, in the *2014 ICS FNPRM*, the Commission sought comment on the "actual costs" that facilities may incur in the provision of ICS and the appropriate vehicle for enabling facilities to recover such costs.[62] The

[56] 47 U.S.C. §§ 201 (requiring that all charges and practices in connection with interstate common carrier services be just and reasonable), 276 (requiring the Commission to ensure fair compensation for interstate and intrastate payphone calls – including ICS calls – and to promote the widespread deployment of payphone services, including ICS).

[57] *See, e.g.*, NCIC Opposition to PFR at 4-5 (expressing concern that inmate access and continued growth in ICS could be stifled if facilities were unable to recover their costs.); *see also* 47 U.S.C. § 276(b)(1) (requiring the Commission to take certain actions to promote the widespread deployment of payphone service).

[58] *See, e.g., 2013 ICS Order,* 28 FCC Rcd at 14133, para. 53; *2015 ICS Order* at 12820, para. 122, n. 396.

[59] *See, e.g., 2013 ICS Order*, 28 FCC Rcd at 14138, para. 58; *2015 ICS Order* at 12834-35, para. 139.

[60] As explained in the *2015 ICS Order*, the Commission adopted a Mandatory Data Collection as part of the *2013 ICS Order*. *See 2013 Order*, 28 FCC Rcd at 14172-73, paras. 124-26. The Mandatory Data Collection required ICS providers to submit information regarding the costs of providing ICS. *See id*. at 14169-70, paras. 116-17. The Mandatory Data Collection enabled the Commission to obtain significant cost and operational data, including ancillary service charge cost data, from a variety of ICS providers representing well over 85 percent of the ICS market. *See 2015 ICS Order,* 30 FCC Rcd at 12772, para. 15 (noting that the Commission received cost data from fourteen ICS providers, including GTL, Securus, Telmate, CenturyLink, and Pay Tel). The Commission subsequently sought comment on the data it collected as part of the Mandatory Data Collection. *2014 ICS FNPRM,* 29 FCC Rcd at 13191, para. 47. Those comments, along with the underlying data, provided the basis of our rate cap calculations. *2015 ICS Order*, 30 FCC Rcd at 12790, para. 152.

[61] *See 2013 Order*, 28 FCC Rcd at 14172-72, paras. 124-26. The data filed in response to the Mandatory Data Collection is confidential and was filed pursuant to the Protective Order in this proceeding. See *Rates for Interstate Inmate Calling Services*, Protective Order, WC Docket No. 12-375, 28 FCC Rcd 16954 (WCB 2013) (*Protective Order*).

[62] *2014 ICS FNPRM*, 29 FCC Rcd at 13139, para. 41.

Commission also sought comment on whether any such costs should be recoverable though the per-minute rates ICS providers charge inmates and their families.[63]

16. After considering a "wide range of conflicting views" regarding facilities' costs,[64] we acknowledged, in the *2015 ICS Order*, the possibility that facilities incur some costs to provide ICS.[65] We concluded, however, that the record at that time "indicate[d] that if facilities incurred any legitimate costs in connection with ICS, those costs would likely amount to no more than one or two cents per billable minute."[66] We further concluded that the rate caps we adopted were "sufficiently generous to cover any such costs."[67] Accordingly, we declined to adopt any of the proposals seeking an "additive" to our rate caps to cover facilities' costs.

B. The Hamden Petition and Underlying Record Demonstrate That the Existing Rate Caps May Not Adequately Account for Facility Costs

17. With the benefit of the record developed since the *2015 ICS Order*, we now conclude that at least some facilities likely incur costs directly related to the provision of ICS and that those costs may in some instances amount to materially more than one or two cents a minute.[68] Providers and facilities have claimed that the current rate caps prevent them from recovering all of their reasonable costs. Similarly, some parties have argued that our 2015 rate caps may not have been "generous" or conservative enough to cover all of the ICS-related costs that we expected providers to incur.[69]

18. The Hamden Petition asks the Commission, among other things, to reconsider its decision not to "mandate a modest, per-minute facility cost-recovery fee that would be added to the rate caps."[70] Notwithstanding the debate regarding the nature and extent of the costs that correctional facilities incur,

[63] *Id*. at 13189-90, para. 43-44.

[64] *2015 ICS Order*, 30 FCC Rcd at 12834, para. 138.

[65] *See id*. at 12835, para. 139.

[66] *Id*.

[67] *Id*.; *see also id*. at 12799-12800, para. 73 (explaining various factors that led us to conclude that the rate caps we adopted were "generous"); *id.* at para. 114 (explaining that the rate caps "are conservative" and include "generous margins").

[68] We continue to hold that site commission payments should not be considered in determining fair or reasonable rates, except to the extent those payments reflect costs facilities incur that are directly related to the provision of ICS. As we explained in the *2015 ICS Order*, "[p]assing the non-ICS-related costs that comprise site commission payments…onto inmates and their families as part of the costs used to set rate caps would result in rates that exceed the fair compensation required by section 276 and that are not just and reasonable, as required by section 201." *Id*. at 12823, para. 125; *see also id.* at 12824-26, para. 127 (describing other purposes for which site commission payments are used).

[69] *See* Initial Brief of State and Local Government Petitioners at 57-58, USCA Case #15-1461, Document #1617181 (filed June 6, 2016) (Brief of State and Local Government Petitioners) (arguing that the Commission relied on the "cushion" offered by its generous rate caps to cover "not just facility-borne costs, but a whole host of other, excluded costs" such as processing and billing costs, transaction costs, costs associated with new service and technology, and inflation.) The Commission, for example, stated that the rate caps were generous enough to include the costs of paying site commissions ("ICS rates can be set at levels that are well within our rate caps while allowing for fair compensation and still leaving room for site commission payments," *2015 ICS Order*, 30 FCC Rcd at 12827, para. 128), and any costs that facilities incur to provide ICS ("if facilities incurred any legitimate costs in connection with ICS, those costs would likely amount to no more than one or two cents per billable minute. Our rate caps are sufficiently generous to recover any such costs.") *Id*. at 12835, para. 139. As the State and Local Government Petitioners note, "[t]he cushion, at some point, must disappear." Brief of State and Local Government Petitioners at 58.

[70] Hamden Petition at ii; *see also infra* Sections III.D and III.E, where we address Hamden's other arguments.

the Petition asserts that "it seems clear that facilities do incur *some* administrative and security costs that would not exist but for ICS."[71] Hamden notes that the idea of a cost recovery mechanism has gained support from a broad range of parties, including "ICS providers, law enforcement, a state regulator, and some in the inmate advocacy community."[72] Finally, Hamden concludes that "[t]he lack of perfectly accurate data…does not preclude a rational cost recovery mechanism and a legally sustainable Order."[73] As Hamden notes, "[e]ven in the absence of absolute certainty regarding . . . facility administrative costs, the Commission can make a rational decision" based on the record before us.[74]

19. In response to the Hamden Petition, we received comments from numerous parties agreeing that the existing rate caps do not adequately account for ICS costs that facilities may incur. While not all of the commenters agree with Hamden's preferred approach, many of the comments submitted assert that facilities incur costs greater than those we allowed for under our 2015 rate caps. For example, NSA states that "[i]n many cases, the duties performed by Sheriffs and jails are the same or similar in nature as the security features and duties found by the Commission as recoverable cost, including monitoring calls, determining numbers to be blocked and unblocked, enrolling inmates in voice biometrics service and maintenance and repair of ICS equipment."[75] NSA acknowledges that providers perform security and administrative tasks "in some cases," but asserts that in many other cases, those tasks fall to Sheriffs and jails, not providers.[76] This view is supported by Pay Tel, which has asserted that "jails, not ICS providers, perform the lion's share of administrative tasks associated with the provision of ICS and, more importantly . . . handle ALL of the monitoring of inmate calls."[77]

20. NSA's arguments echo claims other parties have made in their filings before the D.C. Circuit. For example, representatives of state and local governments cite "evidence that jails and prisons incur real and substantial costs in allowing access to ICS."[78] More specifically, they contend that correctional facilities can spend "over $100,000 a month to provide ICS privileges to inmates, most of which goes into the labor hours required to facilitate and monitor inmates' use of ICS."[79] Similarly,

[71] *Id* at 12. As noted above, Hamden begins by urging the Commission to prohibit site commissions and then argues that the Commission should adopt a cost-recovery mechanism as an alternative to allowing facilities to collect site commissions. *See supra* at para. 11; *id*. at 2.

[72] Hamden Petition at 13. Many of these parties also support a prohibition against site commission payments, as does Hamden. Hamden Petition at i. *See, e.g.,* HRDC Second Reply at 1 ("the time has come . . . to ban ICS site commissions . . ."); Comments of American Bar Association, WC Docket No. 12-375, at 11 (filed Jan. 26, 2015); Prison Policy Initiative Second Further Notice Reply at 2.

[73] Hamden Petition at 15; *see also* Brief of State and Local Petitioners at 56.

[74] Hamden Petition at 15. As the Supreme Court has recognized, the Commission must be free to "devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *Verizon Communications Inc. v. FCC*, 535 US 467, 501-502 (2002); *National Ass'n of Reg. Util. Com'rs v. FCC*, 737 F.2d 1095, 1141 (D.C. Cir. 1984); s*ee also 2015 ICS Order* at paras. 114-116 (discussing the Commission's "broad discretion" in establishing rates).

[75] NSA PFR Opposition at 2.

[76] NSA PFR Opposition at 2; *see also* NSA Proposal at 2 (cataloguing many of the costs law enforcement officials incur in relation to ICS); Letter from Mary J. Sisak, Counsel to National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Feb. 18, 2015) (discussing the "costs incurred by Sheriffs to allow inmate calling services."). Over 90 sheriffs filed form letters in support of NSA's earlier filings in this proceeding.

[77] Pay Tel Proposal at 3 (emphasis in original).

[78] Brief of State and Local Government Petitioners at 54.

[79] *Id*. at 13.

Telmate has argued that our 2015 rate caps are not "sufficiently generous" to cover the "costs that facilities bear in providing ICS."[80]

21. These arguments are consistent with earlier filings claiming that facilities may incur costs related to the provision of ICS that are "non-trivial."[81] Out of an abundance of caution, we now revise our rate caps to incorporate those costs more fully.

C. We Increase Our Rate Caps to Better Reflect Evidence in the Record

22. In view of the further evidence and arguments we have received, we now reconsider our earlier rate caps insofar as they did not separately account for ICS costs that facilities may incur.[82] Accordingly, we increase our rate caps to better reflect the costs that facilities incur that are reasonably related to the provision of ICS. In addition, consistent with our findings in the *2015 ICS Order* and with the evidence in the record, we recognize that the per-minute costs associated with ICS are higher in smaller facilities than in larger ones.[83] Thus, we increase our rate caps more for smaller facilities than for larger ones.[84] Specifically, we rely on the analyses submitted by NSA and by Baker/Wood to increase our rate caps by $0.02 per minute for prisons, by $0.05 per minute for larger jails, and by $0.09 per minute for the smallest jails.[85] In adopting these revisions to our rate caps, we once again rely on our core ratemaking authority.[86]

23. As noted above, in the *2015 ICS Order*, we agreed with parties that argued that facilities' reasonable ICS-related costs likely amounted to no more than one or two cents per minute and did not

[80] Motion of Telmate, LLC for Stay Pending Judicial Review at 11-12, USCA Case #15-1461, Document #1596259 (filed Jan. 29, 2016). As Telmate asserts, "it is the Commission's *rate caps*, not any single cost that providers face, that dictate whether providers' compensation is fair. The *Order's* rate caps fail to permit full cost recovery." Telmate PFR Opposition at 4.

[81] Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375. Attach at 11 (filed Sept. 19, 2014) (GTL Sept. 19, 2014 *Ex Parte* Letter) (citing Economists Inc.'s conclusion that ICS costs borne by facilities are "non-trivial"); *see also, e.g.,* CenturyLink Jan. 27, 2015 Reply at 19 (explaining that "correctional facilities incur legitimate costs in making ICS available"); Georgia DOC Jan. 12, 2015 Comments at 17; GTL Sept. 19, 2014 *Ex Parte* Letter*,* attach 2 at 3 (discussing correctional facility's staffing costs associated with ICS) *id*., attach at 6 (stating that [p]ublicly available documents suggest that the Texas DOC requested to increase their investigative staff by 30 FTEs as a direct result of the new ICS system").

[82] We do not, however, revisit the rate structure or overall methodology used in the *2015 ICS Order*. Specifically, we reject Telmate's argument that our rate caps "are based on a flawed methodology, and thus cannot be saved by the proposed rate increase[s]." Telmate *Ex Parte* Letter at 1. This argument addresses the fundamental structure of our rate caps and methodology and goes to the heart of our *2015 ICS Order*. As such, the argument appears to be an untimely – and improperly presented – request for reconsideration of that order.

[83] *See 2015 ICS Order*, 30 FCC Rcd at 12777, para. 28.

[84] Consistent with our conclusion in the *2015 ICS Order*, we find that providers will need more time to transition all of the country's jails to the new rate caps than to transition prisons. *Id*. at 12887, para. 256 (noting that there are over 2000 jails). Accordingly, we adopt a six-month transition period for jails, in order to "give providers and jails enough time to negotiate (or renegotiate) contracts to the extent necessary to comply" with our new rules. *Id.; see also infra* para. 45.

[85] As explained below, Baker/Wood and NSA provided the most credible data regarding facilities' costs and we find that a hybrid of those two proposals yields the most reliable basis for determining how much we must increase our rate caps to ensure that providers can compensate facilities for the costs the facilities incur that are reasonably related to the provision of ICS. The rate increases we adopt today are also supported by the Pay Tel Proposal. *See supra* n. 16; Pay Tel Proposal at 7.

[86] *See 2015 ICS Order*, 30 FCC Rcd at 12822, para. 124. Accordingly, and for the reasons described below, we do not prohibit or regulate site commission payments. *See infra* Section III.D; *see also 2015 ICS Order*, 30 FCC Rcd at 12822, para. 124.

require an adjustment to our rate caps.[87] Upon further consideration, and with the benefit of an expanded record, we now conclude that we should increase our rate caps in light of claims that that some facilities may incur more significant costs that are reasonably related to the provision of ICS.[88] After reviewing the Hamden Petition, and the record developed in response to the Petition, we find that facilities – particularly smaller facilities – may face costs that are considerably higher than one or two cents per minute.[89] Out of an abundance of caution, we increase our rate caps to account for this possibility and to better ensure that providers are fairly compensated for their reasonable ICS costs – including costs they may incur in reimbursing facilities for expenditures that are reasonably related to the provision of ICS – and that providers and facilities have stronger incentives to promote increased deployment of, and access to, ICS.[90]

24. The rate caps we adopted in the *2015 ICS Order* were based on 2012 and 2013 data that providers submitted in response to the Mandatory Data Collection.[91] While we still find that the cost data from Mandatory Data Collection are an appropriate basis for constructing rate caps,[92] we also recognize that due to our jurisdictional limitations, the Mandatory Data Collection only included cost information from *providers*, and not from *facilities*.[93] Providers reported their own costs, but were not obligated to submit information about costs incurred by facilities. Indeed, there is no reason to believe that providers necessarily had access to the information needed to determine facility costs. As a result, the information on facilities' ICS-related costs before the Commission came from filings received in response to the *2014 ICS FNPRM*.[94] Unlike the responses to the Mandatory Data Collection, however, which required

[87] *See supra* para. 16; *2015 ICS Order*, 30 FCC Rcd at 12835, para. 139; *see also, e.g.,* Lipman Proposal; Letter from Brian D. Oliver, Chief Executive Officer, GTL, Richard A. Smith, Chief Executive Officer, Securus, Curt Clifton, Vice President of Government Affairs and Strategic Planning, Telmate, and Vincent Townsend, President, Pay Tel, to Chairman Tom Wheeler, Chairman, FCC, WC Docket No. 12-375, at 5 (filed Oct. 16, 2016) (Joint Provider Proposal).

[88] Rate-making agencies, such as the FCC, have the authority to make adjustments in rates when called for by particular circumstances. 47 U.S.C. § 405(a); *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 776-77 (1968) (*Permian Basin*) ("[R]ate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, 'to make the pragmatic adjustments which may be called for by particular circumstances.").

[89] *See* Section III.B of this Order; *see also* Brief of State and Local Government Petitioners at 56 (arguing that there is "significant data in the record suggesting that facilities bear costs in the provision of ICS . . .").

[90] *See* 47 U.S.C. § 276. Several parties have warned that access to ICS may be reduced if our rate caps fail to account for facilities' reasonable ICS-related costs. *See, e.g.*, NCIC Opposition to PFR at 5; Letter from Timothy G. Nelson, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1-2 (filed May 8, 2015) (Pay Tel Proposal) (explaining that failure to include "meaningful facility cost recover . . . will force facilities to reduce inmate access to phone service – a result antithetical to the Commission's finding that access to ICS benefits society and reduces recidivism rates").

[91] Our rate caps were calculated using a weighted average of providers' per-minute costs. *2015 ICS Order*, 30 FCC Rcd at 12790, para. 52.

[92] *Id*. (noting that the responses to the Mandatory Data Collection "represent[ed] actual, rather than projected, data").

[93] The Commission only has jurisdiction over providers, not facilities, pursuant to sections 201 and 276. 47 U.S.C. §§ 201, 276. Therefore, the Mandatory Data Collection applied only to ICS providers, and not to correctional facilities. *See 2014 ICS FNPRM*, 29 FCC Rcd at 13189, para. 41 ("[T]he costs submitted by the providers do not include any costs that may be incurred by facilities.").

[94] Providers did submit information about total site commission payments made to facilities, but, as noted above, we did not take those payments into account in setting our rate caps. *See supra* para. 6; *2015 ICS Order*, 30 FCC Rcd at 12819, para. 118. Indeed, we still find that the bulk of site commission payments should not be considered in calculating the rate caps because most of the money providers pay to facilities is not directly related to the provision of ICS. *See, e.g.*, *id*. at 12819, para. 118 (describing a variety of non-ICS-related programs funded by site commission payments). We also note that it is likely that the costs submitted by providers include other costs that are not reasonably related to the provision of ICS. *See id*. at 12799-800, para. 73; *id*. at 12792, n.182 (asserting that (continued….)

providers to quantify various costs incurred in providing ICS, facilities' responses to the questions in the *2014 ICS FNPRM* about facility costs were purely voluntary and consisted mostly of more general, narrative descriptions.[95] The paucity of quantitative data made facility costs more difficult to measure than providers' costs, a problem exacerbated by disputes in the record regarding which of the costs involved in providing ICS could reasonably be attributed to providers, and which could reasonably be attributed to facilities.[96] This led us to discount claims that facilities faced costs that should be recovered through the ICS rates.[97]

25. Given these limitations, we relied almost completely on submissions from providers and their representatives to arrive at an estimate of facilities ICS-related costs in the *2015 ICS Order*.[98] In contrast, the approach we adopt today relies largely on proposals submitted by parties representing a much more diverse range of interests. The Baker/Wood Proposal, for example, was submitted by Darrell Baker, the Director of the Utility Services Division of the Alabama Public Service Commission, and Don Wood, an economic consultant for Pay Tel Communications who also has done work for other ICS providers.[99] And the NSA proposal is based on data the NSA collected from individual sheriffs regarding the costs they incur to provide security and perform administrative functions necessary to allow ICS in jails, including the salaries and the benefits for the officers and employees performing ICS-related

(Continued from previous page)
"non-ICS services, such as location monitoring, should not be paid for by inmates and their families and friends through ICS."). In our decision today, however, we conclude that the costs that facilities incur that are reasonably related to the provision of ICS may be more than *de minimis* and we therefore increase our rate caps to better accommodate those costs.

[95] *See, e.g.*, Georgia DOC Jan. 12, 2015 Comments at 17 (stating that "[l]ike all correctional agencies, GDC incurs substantial costs in connection with its ICS functions," but not providing a detailed analysis of those costs). Because the Commission lacks jurisdiction over correctional facilities it could not compel those facilities to respond to questions about their costs, nor could it dictate the form of the responses it received.

[96] *See 2015 ICS Order*, 30 FCC Rcd at 12831, para. 134 (citing *Second ICS FNPRM*, 29 FCC Rcd at 13189, para. 41). As we stated in the *2015 ICS Order*, "[a]lthough some commenters argue that allowing ICS creates costs for facilities, others question whether facilities incur any costs that should be passed on to consumers as part of the per-minute rates for ICS." *2015 ICS Order*, 30 FCC Rcd at 12832, para. 135**.** Even among parties arguing that facilities incurred costs that should be compensable through the ICS rates, there was significant variation in the estimates of the amount of those costs, with some parties arguing that we should add only one or two cents to our per-minute rate caps to compensate facilities for their ICS-related costs and others arguing that we should add eleven cents or more to the rate caps for services provided to the smallest facilities. *See id*. at 12833, para. 136; *see also, e.g.*, Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket. 12-375, Attach. at 11-12 **(**estimating median cost recovery rates of $0.005 per minute for prisons and $0.016 per minute for jails**)**; NSA Proposal (proposing that we add up to eleven cents a minute to the rates providers could charge to serve jails with an ADP below 350). Virtually all of the proposals favored including "additives" to the rate caps that would capture the costs to facilities and that providers could use to reimburse facilities for those costs. *See, e.g.*, Letter from Andrew D. Lipman, Attorney, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed May 1, 2015) (Lipman Proposal); Letter from Timothy G. Nelson, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed May 8, 2015) (Pay Tel Proposal).

[97] *See 2015 ICS Order*, 30 FCC Rcd at 12834, para. 138.

[98] *See id*. at 12834-35, para. 139 (citing filings by providers and from Andrew Lipman). Andrew Lipman, the one party we relied on that did not identify as representing a provider, is, in fact, aligned with one of the largest ICS providers. *See* Separate Brief of Petitioner Securus Technologies, Inc., USCA Case #15-1461, Document #1616683 (filed June 3, 2016) (Securus Brief) (identifying Lipman as an attorney for Securus).

[99] In 2008, seven ICS providers placed in the record a cost study by Don Wood that quantified their interstate ICS costs. *See Don* J. Wood, Inmate Calling Services Interstate Call Cost Study at 21 (Wood & Wood 2008), CC Docket No. 96-128 (filed Aug. 15, 2008) (quantifying the interstate ICS costs of ATN, Inc., Custom Teleconnect, Inc., Embarq, NCIC, Pay Tel, Public Communications Services, Inc., and Securus).

duties.[100] We find these two proposals provide a sounder basis for determining facilities' ICS-related costs than did the provider-generated proposals we relied on in 2015.[101]

26. The rate caps we adopt today are based on a hybrid of the Baker/Wood and NSA Proposals. The Baker/Wood proposal is premised on Baker's view that "some form of facility cost recovery is critical,"[102] and is supported by Baker's and Wood's independent reviews of cost support data.[103] The NSA Proposal is based on the NSA's cost survey, which gathered information on the costs to sheriffs of providing security and administrative functions necessary to allow ICS in jails, including the salaries and the benefits for the officers and employees performing the ICS-related duties.[104] Both of these proposals merit significant consideration, particularly given that they arrive at similar conclusions: Baker and Wood recommend adopting a cost recovery mechanism of $0.07 per minute for jails with ADP less than 349, $0.05 for jails with ADP between 350 and 999, $0.05 for jails with ADP between 1000 and 2500 ADP, and $0.03 for prisons;[105] NSA, for its part, supports the adoption of a cost recovery mechanism in the range of $0.09 to $0.11 per minute for facilities with ADP less than 349, $0.05 to $0.08 for facilities with 350 to 2499 ADP, $0.01 to $0.02 per minute for jails with ADP greater than 2500, and $0.01 to $0.02 per minute for prisons. Not only are the two proposals fairly consistent with each other, they are notably closer to each other than they are to most other proposals in the record, including those that we relied on in the *2015 ICS Order*.[106]

27. Even given the similarities between the NSA and Baker/Wood Proposals, we acknowledge that the record on what the costs facilities actually incur in relation to ICS is still imperfect.[107] Nonetheless, we find that the record is sufficient to warrant an increase in the rate caps.[108] As state and local governments have explained in their court filings, even faced with "less-than-ideal

[100] NSA Proposal at 2.

[101] We have also taken account of arguments that correctional authorities and ICS providers have raised to the D.C. Circuit concerning our decision in the 2015 Order not to separately account for potential facility costs when calculating the rate caps. *See, e.g.*, Brief of State and Local Government Petitioners at 47-60 (complaining that "[d]espite the evidence that jails and prisons incur real and substantial costs in allowing access to ICS, the Commission decided to exclude all such costs in calculating the rate caps"); Motion of Telmate, LLC for Stay Pending Judicial Review at 12, USCA Case #15-1461, Document #1596259 (filed Jan. 29, 2016) (citing the Commission's decision as a basis for staying the rate caps).

[102] Baker/Wood Proposal at 1.

[103] *Id*. at 2.

[104] NSA Proposal at 2.

[105] Baker/Wood Proposal at 2.

[106] Both proposals are also very close to the Pay Tel Proposal, which closely mirrors the rate increases we adopt in this Order.

[107] *Cf. Pub. Citizen v. Fed. Motor Carrier Safety Admin*., 374 F. 3d 1209, 1221 (D.C. Cir. 2004) (noting that a regulatory "agency's job is to exercise its expertise to make tough choices about which of the competing estimates is most plausible, and to hazard a guess as to which is correct, even if…the estimate will be imprecise. Regulators by nature work under conditions of serious uncertainty, and regulation would be at an end if uncertainty alone were an excuse to ignore…a particular regulatory issue.").

[108] The rate caps we adopt today are well within the zone of reasonableness, which allows the Commission, in its calculation of rates, to take "fully into account the various interests which Congress has required it to reconcile." *Permian Basin*, 390 U.S at 770; *see also Presubscribed Interexchange Carrier Charges*, Order, 20 FCC Rcd 3855, 3862, para. 16 (2005) (setting a safe harbor for incumbent LEC electronic and manual presubscribed interexchange carrier charges by looking at various cost studies submitted in the record of the proceeding and choosing one as the best record evidence to establish the safe harbor rates).

data," it is the Commission's obligation to "determine as best it can ICS-related facility costs."[109] Thus, based on the information in the record, including, in large part, the recommendations submitted by NSA and by Baker/Wood, we increase the rate caps by $0.02 for prisons, and $0.09, $0.05, and $0.05, respectively, for small, medium, and large jails. This translates into revised debit/prepaid rate caps of $0.13 per minute for prisons, $0.19 per minute for jails with an ADP greater than 1000, $0.21 for jails with ADP between 350 and 999, and $0.31 per minute for jails with ADP below 350. It also leads to revised collect rate caps of $0.16 per minute for prisons, $0.54 per minute for jails with ADP greater than 1000, $0.54 per minute for jails with ADP between 350 and 999, and $0.58 per minute for jails with ADP less than 350.[110] To arrive at these numbers, we compared the Baker/Wood and NSA proposals and, in order to produce a conservative rate, took the higher additive rate of the two proposals.[111] In the instance where even the low end of NSA's proposed rate range was greater than the rate proposed by Baker and Wood, we selected the lower end of the NSA rate range to better account for the suggestions of both proposals.[112]

28. The approach we use to increase the rates to the levels we adopt today has the primary advantage of being supported by two separate and independent sets of data. It has the additional advantage of being supported by credible, independent participants in this proceeding, including Baker, an objective public service employee who has participated in this proceeding and has been working on inmate calling reform at the state level,[113] and Wood, an outside economic consultant to Pay Tel whom seven ICS providers engaged to prepare a joint report that was filed with the Commission.[114] Our

[109] Brief of State and Local Petitioners at 56 (noting that "data will never be perfect or certain, especially where the Commission…hopes for consistent data between facilities with vastly different security needs and costs").

[110] As we did in the *2015 ICS Order*, we adopt a separate rate cap tier for collect calling, as well as a two-year step-down transitional period that will decrease the collect rates over time and, by 2018, will bring the collect rates down to the debit/prepaid rates we adopt today. *See* revised rule 64.6010, attached hereto as Appendix A, 47 CFR § 64.6010. This is consistent with the Commission's prior actions in adopting a separate collect calling rate tier based on data indicating that collect calls were more expensive than other types of ICS calls and on the Commission's decision to encourage correctional institutions to move away from collect calling. *2015 ICS Order*, 30 FCC Rcd at 12806, para. 87.

[111] Our decision on reconsideration rests on a desire to take a cautious approach that minimizes any concerns that our rate caps fail to allow for fair, just, and reasonable compensation. Indeed, the very decision to reconsider our earlier order is prompted by our view that it is better to err on the side of caution than to risk undercompensating providers and facilities for their reasonable costs that are directly related to ICS. Consistent with this approach, when the NSA and Baker/Wood Proposals differed, we opted for the choice that resulted in the higher rate cap. This decision is informed, in part, by the fact that NSA's proposal already reflects an effort to reduce rates below the levels that the raw data might support, absent any analysis or refinement. *See* NSA Proposal at 3 (listing per-minute costs that are significantly higher than the rates NSA ultimately proposed). As explained above, however, our rate caps provide a ceiling, and we expect that in many instances providers will charge rates far below the maximums permitted under our rate caps. *See supra* para. 1; *see also supra* para. 4 (anticipating that rates will continue to decline and that providers and facilities will act in good faith to keep rates as low as possible).

[112] NSA proposed a rate increase of $0.09-$0.11 per minute for the smallest jails, while Baker/Wood proposed adding only $0.07 per minute for those facilities. Given that the low end of NSA's proposed rate range was higher than the rate proposed by Baker/Wood, we took the lowest number proposed by NSA (*i.e.*, $0.09/minute).

[113] In the Baker/Wood Proposal, Baker and Wood state that Baker's "experience with ICS in Alabama informs his view that some form of facility cost recovery is critical. He explained that the APSC regularly inspects ICS at jails and prisons in Alabama and is therefore very familiar with the activities and responsibilities that facility personnel undertake in administering ICS and in monitoring inmate calls. He concludes that facilities incur costs associated with ICS and should be provided an opportunity to recover their costs." Baker/Wood Proposal at 1.

[114] *See 2013 ICS Order*, 28 FCC Rcd at 14112, para. 9, n. 30.

approach is also based on data provided by the NSA, which, as an organization representing sheriffs, is well situated to understand and estimate the costs that facilities face to provide ICS.[115]

29. Given that we find NSA's cost data to be credible we disagree with commenters who suggest the contrary. Andrew Lipman, in particular, denigrated NSA's cost survey for including only three months of data from only about five percent of NSA's members.[116] NSA convincingly defends its cost survey in its Opposition to the Hamden Petition, however, arguing that "[t]he Commission fails to explain . . . why these criticisms doom the NSA cost survey data even though they all equally apply to the cost recovery data and analysis performed by GTL's cost consultant, which the Commission apparently accepts."[117] NSA also argues that the Commission "fails to explain why it entirely ignores the data provided by other parties that show a much higher facility compensation fee than one or two cents per minute."[118] We agree with NSA's arguments and find that NSA's cost survey is a credible (though imperfect) source of data regarding the costs facilities incur in relation to ICS.[119] We are particularly persuaded by NSA's point that the criticisms of the NSA cost survey made by Andrew Lipman, and recited in the *2015 ICS Order*, apply with equal force to other proposals, including the analysis performed by GTL's cost consultant that supported the one to two cent estimate that informed our decision in the *2015 ICS Order*.[120] Moreover, we note that Pay Tel, which has no affiliation with NSA, has rebutted many of the arguments raised by Lipman and concluded that NSA's survey results constitute a "robust and significant data set."[121]

30. We are confident that the new rate caps we adopt today will ensure that inmates and their families have access to ICS at rates that are fair to consumers, providers, and facilities.[122] By adjusting

[115] While agreeing with our assessment that NSA is well-equipped to gauge facilities' costs, one dissenting commissioner nonetheless faults us for relying (in part) on NSA's estimates of those costs. In claiming that "the rate increases set forth in this *Order* are insufficient to cover the facility-administration costs" that jails incur in providing access to ICS, this commissioner relies on raw data from the NSA survey that NSA itself reasonably elected to discount when estimating jails' actual costs. *See* NSA Proposal at 3–5. NSA treated its survey data as "inputs" that, once "compared to and tested by" information elsewhere in the record, could be refined to generate more reliable estimated ranges of facilities' reasonable costs of providing access to ICS. *See id.* Those ranges are the cost data we find credible—particularly given that, as noted above, the NSA and Baker/Wood Proposals arrive at similar conclusions. *See supra* para. 26. Thus, contrary to the dissent's contention that our rate caps, as revised in this Order, are "confiscatory," we are confident that they fall well within the zone of reasonableness, *see supra* note 108; *see also 2015 Order*, 30 FCC Rcd at 12836-38, paras. 141-143 (discussing the high bar for demonstrating that rates are confiscatory).

[116] *See* Letter from Andrew D. Lipman, Attorney, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Apr. 8, 2015), *see also 2015 ICS Order*, 30 FCC Rcd at 12833, para. 137 (detailing these and other criticisms of the NSA survey). We note as well that Lipman did not identify his client, except as "certain clients with an interest in the regulation of inmate calling services," when filing prior to the *2015 ICS Order*. *See* Andrew D. Lipman Comments at 1 (filed Jan. 12, 2015). Lipman has subsequently acted as counsel to Securus. *See, e.g.,* Securus Brief (filed June 3, 2016).

[117] NSA PFR Opposition at 4.

[118] *Id*. at 4.

[119] *See supra* n. 85.

[120] *See* NSA PFR Opposition at 4 (noting that GTL's analysis is based on only "anecdotal" cost data and "a sample size of only seven jails"); *2015 ICS Order*, 30 FCC Rcd at 12833.

[121] Pay Tel Proposal at 4.

[122] In sum, we agree with Hamden that reconsideration of our rates will "pave the way for the comprehensive reform that the Commission has promised, that ICS consumers deserve, and that the ICS industry needs, while also ensuring that facilities will continue to facilitate ICS and that providers will earn a reasonable return on their investments." Hamden Petition at ii.

the rate caps to better account for the reasonable costs that facilities may incur in connection with ICS, we ensure that providers will be able to charge rates that cover all of their costs that are reasonably related to the provision of ICS.[123] Based on our analysis of the data providers submitted to the Mandatory Data Collection, the new rates should allow virtually all providers to recover their overall costs of providing ICS.[124] To come to this conclusion, we calculated each provider's cost per minute, by tier, based on their reported numbers. We then compared each provider's cost per minute to our new rates for each tier. The difference between these two amounts allowed us to calculate the net impact that each provider will face as a result of our new rate caps. Our analysis indicates that the new rate caps will allow all but one provider to recover its costs, on average.[125] Although we conclude that virtually all providers will be able to recover their legitimate ICS costs (including a reasonable return on capital) under the new rate caps, we reiterate that our waiver process remains available to any providers that find that the rate caps do not result in fair compensation for their services.[126]

D. We Amend the Definition of "Mandatory Tax or Mandatory Fee"

31. In the *2015 ICS Order*, we defined a Mandatory Tax or Mandatory Fee as "a fee that a Provider is required to collect directly from Consumers, and remit to federal, state, or local governments."[127] In his Petition, Hamden asks us to clarify these definitions.[128] After considering the Hamden Petition, the record developed in response to that petition, and the text of the *2015 ICS Order*, we now amend the definition of Mandatory Tax or Mandatory Fee to read: "a fee that a Provider is required to collect directly from consumers, and remit to federal, state, or local governments. A Mandatory Tax or Fee that is passed through to a Consumer may not include a markup, unless the markup

[123] Indeed, although recognizing that the revised rate caps will "ensure that ICS consumers avoid paying unjust, unreasonable and unfair ICS rates," the Wright Petitioners assert that our revised rate caps are so conservative as to be "well above" providers' costs. Letter from Lee G. Petro, Counsel for the Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 3 (filed Jul. 29, 2016).

[124] Based on Commission analysis, this is true for nearly 100 percent of the ICS market, and all of the largest ICS providers. As noted above, there is only one small provider that might not be able to cover all of its ICS-related costs under the new rate caps. *See supra* note 12.

[125] Our analysis of the data indicates that some providers may lose money on collect calls, but more than make up for any lost revenue with profits from debit and prepaid calls. In the *2015 ICS Order*, we recognized that collect calling represents a small and declining percentage of inmate calls. *See 2015 ICS Order*, 30 FCC Rcd at 12806, para. 86. The record further suggests that collect calls will continue to decline to a negligible share of ICS calls. In light of that, we are not concerned about losses that are recovered and that we predict will continue to decrease in the future. Providers will be able to recover their costs as a whole under our rate caps. Moreover, as noted above, we continue to be concerned that allowing the rate caps for collect calls to remain higher than the caps for other ICS calls on an ongoing basis would create incentives for providers to drive consumers to make collect calls. *See supra* note 110. Such a result would drive up the costs of ICS for the average consumer and, therefore, would not be in the public interest.

[126] *See* 47 U.S.C. § 276(b)(1)(A) (requiring the Commission to ensure that payphone providers are "fairly compensated."). *See also 2015 ICS Order*, 30 FCC Rcd at 12870, paras. 217-19 ("an ICS provider that believes the rate caps for interstate and intrastate ICS do not allow for fair compensation may seek a waiver pursuant to the guidance articulated in the *2013 Order*. ICS provider waiver petitions may be accorded confidential treatment to the extent consistent with rule 0.459. We direct the Bureau to endeavor to act on such waiver within 90 days of the provider submitting all information necessary to justify a waiver."). We also reiterate that "[i]f any provider believes it is being denied fair compensation . . . due, for example, to the interaction of our rate caps with the terms of the provider's existing service contracts – it may . . . seek preemption of the requirement to pay a site commission, to the extent that it believes that such a requirement is a state requirement and is inconsistent with the Commission's regulations." *Id.* at 12869, para. 215.

[127] *See 2015 ICS Order*, 30 FCC Rcd at 12921 (adopting 47 CFR § 64.6000(n)).

[128] Hamden Petition at 15-16.

is specifically authorized by a federal, state, or local statute, rule, or regulation." The amended definition more clearly captures the Commission's decision to allow carriers to collect applicable pass-through taxes, but to prohibit markups, other than those specifically authorized by law.[129]

32. In his petition, Hamden claims that there has been "confusion" regarding the Commission's definitions of the terms "authorized fee," "mandatory tax," and mandatory fee" in the *2015 ICS Order*, and regarding "what fees and taxes the Commission intended to include as permissible under those terms."[130] Although some commenters assert that the terms "Mandatory Tax" and "Mandatory Fee" were adequately defined by the *2015 ICS Order*,[131] other parties are open to further clarification from the Commission.[132] The Wright Petitioners, for example, assert that "Mr. Hamden's comments regarding the clarification of the rules associated with the definition of 'Authorized Fee,' 'Mandatory Tax,' and 'Mandatory Fee' do merit further consideration."[133]

33. After further review, we agree with Hamden that we should clarify the definition of Mandatory Tax and Mandatory Fee.[134] While the definitions of these terms were clear from the text of *2015 ICS Order*,[135] we take this opportunity to amend our rules to more clearly track the language and intent of the *2015 ICS Order*. The prohibition against markups that we adopted in the *2015 ICS Order* is an important part of our efforts to ensure that the rates and fees end users pay for ICS are fair, just, and reasonable.[136] Thus, we now amend 47 C.F.R. §64.6000 to read: "Mandatory Tax or Mandatory Fee means a fee that a Provider is required to collect directly from Consumers, and remit to federal, state, or local governments. *A Mandatory Tax or Fee that is passed through to a Consumer may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation*."[137]

E. We Deny All Other Aspects of the Hamden Petition

34. As previously noted, the Hamden Petition asks the Commission to reconsider or clarify two additional aspects of the *2015 ICS Order*.[138] First, Hamden urges the Commission to reconsider its

[129] *See 2015 ICS Order*, 30 FCC Rcd at 12859, para. 192. This rule allows providers to collect Universal Service fees, and similar government taxes and fees, from consumers and remit the funds to the relevant government entity, in keeping with existing federal and state requirements. *See id.* at 12859, para. 192 n.690. As the *2015 ICS Order* makes clear, we distinguish between such taxes and fees and site commission payments.

[130] Hamden Petition at 15; *see also id.* at 15-16, citing Letter from Robert Pickens, President, Securus Technologies, to Clients (Nov. 13, 2015). The Bureau issued a letter addressing this conduct shortly after it occurred. *See* Letter from Matthew S. DelNero, Chief, Wireline Competition Bureau, FCC, to Robert Pickens, President, Securus Technologies, Inc., WC Docket No. 12-375 (filed Dec. 3, 2015).

[131] *See* Securus PFR Comments at 4; Telmate PFR Opposition at 5

[132] Wright PFR opposition at 4; ICSolutions PFR Opposition at 15 ("ICSolutions does not oppose further clarification [of these terms] from the FCC").

[133] Wright PFR Opposition at 4.

[134] At this time, we do not see any further need to clarify the definition of Authorized Fee, which already includes the "without additional markup" language that we add to the definition of Mandatory Tax and Mandatory Fee here.

[135] For example, the Order states that "ICS providers are permitted to recover mandatory applicable pass-through taxes and regulatory fees, *but without any additional mark-up or fees*." *2015 ICS Order*, 30 FCC Rcd at 12859, para. 191 (emphasis added). Other related parts of the *2015 ICS Order* reflect a similar intent. *See id*. at 12839-40, para. 147 (stating that "for fees for single-call and related services and third-party financial transaction fees, we allow providers to pass through only the charges they incur without any additional markup").

[136] *See id*. at 12859, para. 192.

[137] *See infra*, Appendix A (new language in italics).

[138] *See generally* Hamden Petition; *supra* para. 11.

treatment of site commissions.[139] Second, Hamden asks that the Commission clarify that ICS providers cannot use unregulated subsidiaries to circumvent the rule regarding charges for single call services.[140] After considering Hamden's arguments, as well as the rest of the record, we deny both requests.

1. There Is No Need to Regulate Site Commissions at This Time.

35. In the *2015 ICS Order*, we affirmed the Commission's previous finding that "site commissions do not constitute a legitimate cost to the providers of providing ICS" and, accordingly, did not include site commission payments in the cost data we used in setting our rate caps.[141] Furthermore, although we encouraged states and correctional facilities to curtail or prohibit such payments, we concluded that "we do not need to prohibit site commissions in order to ensure that interstate rates for ICS are fair, just, and reasonable and that intrastate rates are fair."[142]

36. Hamden now seeks reconsideration of this conclusion, arguing that the Commission should "prohibit payments to facilities in all forms."[143] In the absence of such a ban, Hamden argues, "facilities will continue to demand, and ICS providers will continue to pay site commissions . . . ."[144] Hamden also expresses concern that if providers are unwilling or unable to pay site commissions, ICS services "may be curtailed, especially in smaller, less profitable facilities."[145]

37. Several commenters oppose Hamden's request.[146] ICSolutions, for example, asserts that we lack the legal authority to regulate site commissions.[147] NCIC contends that prohibiting or capping

[139] Hamden Petition at 2. As noted above, Hamden asks that the Commission consider adopting an additive to the ICS rate caps as an alternative to banning all payments to facilities. *See supra* para. 11; Hamden Petition at 12-13. We address that alternative at length in the discussion above and increase our 2015 rate caps to better accommodate facilities' ICS-related costs. We find no other changes to our rate caps are warranted. Nor do we find any need to regulate site commissions at this time. *Cf.* ICSolutions PFR Opposition at 9 (arguing that "regulating the overall rate of compensation . . . is more efficient and effective than trying to regulate the various cost components of compensation").

[140] Hamden Petition at ii.

[141] *2015 ICS Order*, 30 FCC Rcd at 12819, para. 118 (citing *2013 ICS Order*, 28 FCC Rcd at 12135 ("site commission payments are not part of the cost of providing ICS and therefore not compensable in interstate ICS rates.")).

[142] *Id*.

[143] Hamden Petition at 2.

[144] *Id*. at 5. According to Hamden, one industry group, as well as "at least one ICS provider," has interpreted the Commission's findings "as an opportunity for its members to continue seeking payments from ICS providers." *Id*.

[145] *Id*. (emphasis in original).

[146] *See, e.g.,* Wright PFR Opposition at 2-3 (arguing that the Commission "was correct to not regulate site commissions" and that Hamden's "faith in the adoption of an outright ban on site commissions…is misplaced."); CenturyLink Comments at 2; Telmate PFR Opposition at 4 (stating that "site commissions cannot be addressed without also addressing rate caps, because the two operate together"); Letter from Tim McAteer, President, ICSolutions, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1-4 (filed Jul. 28, 2016) ("ICSolutions July 28 Letter"). *But see* Letter from Richard A. Smith, CEO, Securus, and Vincent Townsend, President, Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2-3 (filed Jul. 28, 2016) (urging Commission to prohibit site commissions other than "the respective additives to correctional facilities as compensation for [ICS] costs"); Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (filed Jul. 22, 2016) (same).

[147] *See, e.g.,* ICSolutions PFR Opposition at 1-3 ("no proponent of such regulations has provided a single citation to the statute or other laws conferring the FCC with the authority to regulate how a provider uses its profits."); Letter from Glenn S. Richards, Counsel to NCIC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed Jul. 27, 2016) (arguing that Hamden's argument for a ban on site commissions is "misguided."); NSA PFR Opposition at 2. As was the case in the *2015 ICS Order*, we need not reach these arguments, given our decision to (continued….)

site commissions will result in facilities being unable to recover their ICS-related costs, which, in turn, will lead to a reduction in inmate access.[148] Finally, the Wright Petitioners argue that, even if the Commission were to ban site commissions, it is likely that providers and correctional facilities would simply "seek new and innovative ways to funnel additional funds in connection with entering into their exclusive contracts."[149]

38. After reviewing the Hamden Petition and the subsequent record, we are not persuaded to reconsider our decision to refrain from regulating site commissions. We are not convinced, based on the current record, that regulation of site commissions is necessary or in the public interest. As we noted in the *2015 ICS Order*, the "decision to establish fair and reasonable rate caps for ICS and leave providers to decide whether to pay site commissions – and if so, how much to pay – is supported by a broad cross-section of commenters . . . underscor[ing] the reasonableness of our approach."[150] Based on the record on reconsideration, as well as the record in the underlying proceeding, we find that the prudent course remains to "focus on our core ratemaking authority in reforming ICS and not prohibit or specifically regulate site commission payments."[151]

2. There Is No Need to Further Clarify the Single-Call Rule Adopted in the *2015 ICS Order*.

39. In the *2015 ICS Order*, we held that "for fees for single-call and related services and third-party financial transaction fees, we allow providers to pass through only the charges they incur without any additional markup."[152] Hamden asserts that the Commission should clarify that the rule adopted in the *2015 ICS Order* that single-call service costs must be passed through to end users with no additional markup may not be circumvented by providers using unregulated subsidiaries imposing "excessive financial transaction fees."[153]

(Continued from previous page)
let facilities and providers negotiate a reasonable approach to facility costs, subject only to providers' obligations to adhere to our rate caps. *See 2015 ICS Order*, 30 FCC Rcd at 12828-29, para. 130 ("Ultimately, however, we do not need to determine whether we have authority to ban site commission payments, given our decision to take a less heavy-handed approach"). In addition, as discussed above, we have raised the rate caps to a level that should ensure that providers are able to earn a reasonable profit even after compensating facilities for any costs they incur that are reasonably related to the provision of ICS. This should help ensure that facilities recover the costs they incur that are directly related to the provision of ICS.

[148] NCIC PFR Opposition at 4-5.

[149] Wright PFR Opposition at 3.

[150] *2015 ICS Order*, 30 FCC Rcd at 12819-20, para. 119; *see also* Wright Petitioners PFR Opposition at 4 (agreeing that "the Commission was correct to establish caps on ICS rates and fees, and leave ICS providers and correctional authorities the ability to split ICS revenues without Commission intervention or direction").

[151] *See 2015 ICS Order*, 30 FCC Rcd at 12822, para. 124. Our commitment to maintain our approach to site commission payments is further bolstered by our decision today to increase the rate caps to ensure that providers are able to compensate facilities for the reasonable costs they incur that are directly related to the provision of ICS. *Cf. id*. at 12836-37, para. 142 (finding that the rate caps "provide ample room for an economically efficient provider of ICS to earn a reasonable profit on its services."). Our decision to increase our rate caps to better account for facilities' costs does not require us to cap or limit site commission payments. *Cf.* ICSolutions PFR Opposition at 3; *see supra* n. 54 (explaining why we chose not to regulate site commission payments). In other words, nothing in our rules, as revised by this Order, restricts a provider's ability to distribute as it chooses whatever revenue it collects under the adopted rate caps.

[152] *2015 ICS Order* at 12839-40, para. 147.

[153] Hamden Petition at 16-17.

40. Most commenters disagree with Hamden's requested clarifications.[154] Several commenters assert that the rule regarding charges for single call services is adequately defined in the *2015 ICS Order*, and as a result, no clarification is needed.[155]

41. Having reviewed the arguments on both sides of the matter, we agree with the majority of commenters that there is no need to clarify the rule regarding single-call service costs. We are not persuaded, based on the current record, that the clarifications Hamden seeks are either necessary or in the public interest. Additionally, we reiterate our finding from the *2015 ICS Order* that "a major problem with single-call and related services is that customers are often unaware that other payment options are available, such as setting up an account….We encourage providers to make clear to consumers that they have other payment options available to them."[156] We find that no further action is necessary at this time, particularly given that we already have sought further comment on third-party financial transactions and potential fee-sharing.[157]

IV. PROCEDURAL MATTERS

A. Paperwork Reduction Act

42. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. Therefore, it does not contain any new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

B. Congressional Review Act

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

V. ORDERING CLAUSES

44. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 1, 2, 4(i)–(j), 201(b), 215, 218, 220, 276, 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)–(j), 201(b), 215, 218, 220, 276, 303(r), and 403, 405 and sections 1.1, 1.3. 1.427, and 1.429 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.3, 1.427, and 1.429, the Petition for Reconsideration filed by Michael S. Hamden on January 19, 2016, IS GRANTED IN PART, and is otherwise DENIED, as described above.

45. IT IS FURTHER ORDERED that Part 64 of the Commission's Rules, 47 C.F.R. Part 64, is AMENDED as set forth in Appendix A. These rules shall become effective 90 days after publication in the Federal Register, except for the rules and requirements governing the rates charged in connection with

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[154] In fact, Securus asserts that, rather than providing greater clarity, the Petition "invites a good deal of confusion." Securus PFR Comments at 5. Additionally, Telmate opposes the Petition's requests on procedural grounds, asserting that "a petition for reconsideration is not the proper means for requesting clarification of a Commission order." Telmate PFR Opposition at 6; *but see* ICSolutions July 28, 2016 Letter at 4-5.

[155] *See* ICSolutions PFR Opposition at 15; Securus PFR Comments at 4; Telmate PFR Opposition at 5; *but see* Wright Petitioners PFR Opposition at 4 (arguing that Hamden's requested clarification regarding fees and taxes "merit further consideration").

[156] *2015 ICS Order*, 30 FCC Rcd at 12858, para 189.

[157] *Id*. at 12914-15, paras. 324-26. We are carefully evaluating the comments we received in response to our questions and will take them into account in deciding whether to take any further action on this issue. Additionally, as stated in the *2015 ICS Order*, we will "continue to monitor the use of such calling arrangements." *Id.* at 12859, para. 180. At this time, however, we find that no further action is warranted.

inmates held in jails, as discussed herein, which shall become effective 6 months after publication in the Federal Register.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

The Federal Communications Commission amends 47 C.F.R. part 64, subpart FF as follows:

Subpart FF – INMATE CALLING SERVICES

1. Revise § 64.6000(n) to read as follows:

§ 64.6000 Definitions

* * * * *

(n) *Mandatory Tax or Mandatory Fee* means a fee that a Provider is required to collect directly from consumers, and remit to federal, state, or local governments. A Mandatory Tax or Fee that is passed through to a Consumer may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation;

* * * * *

2. Revise § 64.6010 to read as follows:

§ 64.6010 Inmate Calling Services Rate Caps

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

(1) $0.31 in Jails with an ADP of 0-349;
(2) $0.21 in Jails with an ADP of 350-999; or
(3) $0.19 in Jails with an ADP of 1,000 or greater.

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

(1) $0.13;

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

Size and Type of Facility	Collect Rate Cap per MOU as of effective date	Collect Rate Cap per MOU as of July 1, 2017	Collect Rate Cap per MOU as of July 1, 2018
0-349 Jail ADP	$0.58	$0.45	$0.31
350-999 Jail ADP	$0.54	$0.38	$0.21
1,000+ Jail ADP	$0.54	$0.37	$0.19

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

(1) $0.16 after the effective date of the Order;
(2) $0.15 after July 1, 2017; and
(3) $0.13 after July 1, 2018, and going forward.

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

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

APPENDIX B

List of Commenting Parties to the *Order* in WC Docket No. 12-375

Organization(s) Submitting Comments	Abbreviated Citation
CenturyLink	CenturyLink
ICSolutions	ICSolutions
Martha Wright, *et. al*. The D.C. Prisoners' Legal Services Project, Inc. Citizens United for Rehabilitation of Errants Prison Policy Initiative The Campaign for Prison Phone Justice	Wright Petitioners
National Sheriffs' Association	NSA
Network Communications International Corp.	NCIC
Securus Technologies, Inc.	Securus
Telmate, LLC	Telmate

APPENDIX C

Final Regulatory Flexibility Act Certification

1. The Regulatory Flexibility Act of 1980, as amended (RFA),[1] requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities."[2] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[3] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[4] 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).[5]

2. This *Order* modifies the *2015 ICS Order*. The modifications do not create any burdens, benefits, or requirements that were not addressed by the Final Regulatory Flexibility Analysis attached to the *2015 ICS Order*, other than increasing the rate caps to allow providers to charge higher rates for ICS. This change to the rate caps provides a benefit to small providers and should have a positive economic impact on small entities that provide ICS. We certify that the requirements of this *Order* will not have any other significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Order* including a copy of this final certification in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996; *see* 5 U.S.C. § 801(a)(1)(A). In addition, the *Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

[1] The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] 5 U.S.C. § 605(b).

[3] 5 U.S.C. § 601(6).

[4] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[5] Small Business Act, 15 U.S.C. § 632.

STATEMENT OF
CHAIRMAN TOM WHEELER

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

Almost a year has passed since the Commission adopted comprehensive Inmate Calling Services (ICS) reform in the *2015 ICS Order*, which sought to provide material relief to nearly 2 million families with loved ones behind bars. While the *2015 ICS Order* went a long way towards enacting meaningful and lasting changes in this industry, we recognize that there is still more work to be done. This Order on Reconsideration continues the Commission's important work ensuring that inmates and their families have access to robust telephone service at rates that are fair, just, and reasonable, while also allowing ICS providers and correctional facilities to recover their ICS-related costs.

Today's Order addresses several issues raised in a Petition for Reconsideration filed by Michael S. Hamden. Most significantly, it amends our rate caps to better allow providers to recover their costs while also compensating facilities for reasonable costs they incur as a direct result of ICS. The revised rate caps derive from proposals submitted by a broad, cross-section of parties, including an outside economist, a state regulator, and the facilities themselves.

After careful review of the record developed after the adoption of the *2015 ICS Order*, we find it likely that at least some facilities incur costs that should be recovered through our ICS rates. The 2015 rate caps did not separately account for these costs, and some parties have asserted that this decision could pose a risk to the continued deployment and development of ICS.

The rules adopted today address those concerns, and help promote access to ICS, by ensuring that providers receive fair compensation for their services and are able to compensate facilities for ICS-related costs.

Although the rate caps we adopt today are higher than those adopted in the *2015 ICS Order*, they still represent a significant constraint on ICS rates and will result in rates that are, on average, below the interim rate caps that are currently in effect for interstate ICS calls.

We also note that these revised rate caps serve as an upper limit on ICS charges, and we expect that, in many instances, providers and facilities will agree on rates that fall below the permitted maximums.

We continue to believe that these revised rate caps, coupled with the other reforms adopted in the *2015 ICS Order*, will provide much-needed relief to the children and families who need ICS to remain connected to loved ones.

Once again, special thanks are due to Commissioner Clyburn for her tireless work on this issue. The Commission's ICS reforms are having a direct and meaningful impact on the lives of millions of Americans, and they would not have been possible without Commissioner Clyburn's leadership.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

Forgive me if I seem somewhat subdued today. I had every intention of displaying tears of joy and emitting audible sighs of relief, as we build on our reforms and continue to act on a proceeding that sat idle at the FCC for nearly a decade. My rather gloomy disposition is not because nearly three million children will soon be able to keep in touch with their currently incarcerated parent at more fair, just, and reasonable rates; it is not because someone who is jailed but still awaiting a hearing or a trial may now speak to their counsel more affordably. I am somber today because after all this time, and all this attention, too few people really care.

Two petitions, 13 years and, for me, three wireline advisers later, we are on the cusp of taking "a more conservative approach" when calculating rate caps to moderate an industry that uses inmates as a captive profit center and bankrupts families and communities. I am melancholy this morning because our repeated attempts at measured and lawful reforms have been met with intense opposition from people and places, who would be demanding justice, fairness, and equity when it comes to costs for everyone else, except this particular class of customer.

And yes, I am downright disappointed, that too many correctional facilities do not give a second thought to using egregious profits and outrageous revenues extracted from those who are often the least able to pay, to fund operations that often have nothing to do with inmate needs, or more to the point of this Order, with the provisioning of calling services.

In my 18 years as a regulator, this regime is a glaring example of is the greatest and most distressing type of injustice I have ever seen in the communications sector.

It does not seem to matter that many of these inmates hail from impoverished communities. It does not seem to matter that only 38% of them stay in touch with loved ones on a regular basis because of these exorbitant rates. It does not even seem to matter that all credible studies show that maintaining connections with those back home reduces the potential for future criminal activity, which ultimately means that we all pay less because we will house fewer prisoners. None of this seems to matter.

You have heard the stories time and time again. Fifteen minute calls costing $17 or more. Families spending over a thousand dollars a year on inmate calling services—sometimes for a decade or more. Fathers, mothers, brothers, and sisters relocating or downsizing their homes so that they may better afford to stay in touch.

And of course, there are the grandmothers, like the lead petitioner, the late Mrs. Martha Wright, who sacrifice their healthcare by rationing medication or doing without many basic needs, in order to maintain contact with their grandchildren. I could not say it any better than now-20-year-old Wandjell Harvey-Robinson, of Champaign, Illinois, who, according to inmate advocates, was in the third grade when both her parents were incarcerated: "No one, should be told [that] their love, is too expensive."

It is because of that then-third grader and approximately 2.7 million children just like her that I, and the rest of us, must maintain hope, and do our part in fulfilling the promises for a brighter future. We must not lose sight of the benefits that human contact brings: recidivism decreases when communication increases. In fact, we have already seen the effect of real reforms: lower rates and increased interstate call volume, making it a win-win-win for providers, inmates and their families. Today's Order is not only significant because it finally ensures that the principles so clearly spelled out in the Communications Act apply to all consumers, it represents the FCC's contribution to criminal justice reform. By eliminating, in the words of a civil rights advocate, this "tax on pain", we are helping to ensure that an inmate's debt to society, is not paid again and again, by their sons and daughters, mothers and fathers.

I am hopeful that the actions we take here today, will enable a permanent national rate backstop to finally take hold. Some providers have argued throughout this proceeding and in litigation that some

facility, some locality, some slice of the ICS universe may have higher costs than our imposed caps and thus their legitimate costs are not being covered. This Order relies on the information provided by the companies, an association which represents sheriffs, and a leading regulator in state reforms, and it fully addresses and covers those providers' costs. But, if there happens to be such an outlier, the Commission's waiver process remains open for business.

Today's Order on Reconsideration adopts rate additives for facilities costs and increases rate caps for all facilities from the smallest jails to the largest prisons. This is especially difficult for me, in light of some jurisdictions that have reduced rates to as low as five cents a minute. But I am comforted that this is a national backstop, and that where costs are lower and states and localities have the ability to reform, the benefits will flow to inmates, their families, and ultimately, to all of us.

Finally, I would like to take this opportunity to address what the Commission has declined to consider as a legitimate cost of ICS: site commissions. Site commissions comprise just a small fraction of correctional budgets, but have a massively regressive economic impact on inmates and their families. To be sure, there are costs that facilities may incur in providing ICS, but there are no costs that justify the scope of most of these commissions. States and localities should act and act now, to rein in these practices, and those jurisdictions that have already undertaken reform, should be applauded.

A dedicated team, made up of staffers in the Wireline Competition Bureau and the Office of General Counsel have worked for years to get to this day and they deserve many thanks. While not a complete list, they include: Matt DelNero, Madeleine Findley, Pam Arluk, Gil Strobel, Rhonda Lien, Don Sussman, Kristin Hopkins, and Christine Sanquist in WCB; Jon Sallet, Suzanne Tetreault, Rick Mallen, Jake Lewis, Sarah Citrin in OGC; Claude Aiken in my office, and former staffer Rebekah Goodheart. Thank you as well to the many advocates, for your work on and commitment to righting this glaring injustice in the communications industry. These are difficult and complex issues, but your hard work will continue to provide much-needed relief and justice for millions.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375

Justice delayed is justice denied.

That is not yet the case with prison payphones—but we are perilously close.

Thirteen years ago, Martha Wright filed a petition calling on the Commission to do something about the exorbitant rates charged to inmates and their families. Shamefully, it took this agency nearly a decade before launching a proceeding to address their plight. But over the course of the last four years in three separate orders the Commission put in place a series of policies to reduce calling rates and limit ancillary charges. This is progress.

Still, there is something wrong that it has taken this long. There is something wrong that after all this time we are still calibrating rate caps, considering site commissions, and adjusting permissible fees. There is something wrong that today we are still picking up the pieces and stitching them together in advance of yet another visit to the courts to address the outrageous rates too many families pay just to stay in touch.

Count me as tired. Tired that we are still at this. Tired because we know that inmates are often separated from their families by hundreds of miles, and families may lack the time and means to make regular visits. Phone calls are the only way to stay connected. But when the price of a single phone call can be as much as most of us spend for unlimited monthly plans, it can be hard to stay in touch. This is not just a strain on the household budget. It harms the families and children of the incarcerated—and it harms all of us because regular contact with kin can reduce recidivism.

We should care about this—because the United States is home to the largest incarcerated population in the world, with 2.2 million people in our prisons and jails. No other country comes even close. Collectively we spend over a quarter of a trillion dollars a year to keep our criminal justice system in place. But that understates the real cost—swelling despair, destroyed potential, and diminished possibilities for rehabilitation.

More is wrong here than just the usurious cost of phone calls for the incarcerated. But this is the one thing this Commission can fix. So I support today's effort, but think we are due for some speed. Credit to my colleague Commissioner Clyburn for getting this started, but we are nowhere if we do not finish it—and justice requires that we do.

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

Twice before I have urged my colleagues to adopt reasonable regulations that would substantially reduce interstate inmate calling rates and survive judicial scrutiny.[1] Twice they have declined. And so our rules have gone to court again and again, only to be blocked again[2] and again[3] and again.[4]

This is not and should not be hard. We cannot set rate caps that are below the costs of providing inmate calling services. We cannot ignore record evidence regarding those costs. And we cannot exceed the bounds of our jurisdiction. It's really that simple.

Yet—here we go again.

At issue today is a critical piece of record evidence ignored by last year's order. As I pointed out then, "facilities incur actual costs that are directly and incrementally attributable to increased access to inmate calling services."[5] For example, some enroll inmates into a biometric voice system while others employ real-time call monitoring. The evidence submitted by sheriffs, inmate calling service providers, economists, and state commissions all demonstrated that the costs to facilities—and especially our nation's jails—are real and substantial.[6]

Today, the FCC belatedly recognizes that it made a mistake when it excluded facilities' costs of administration from its calculations entirely. The *Order* finds the National Sheriffs' Association's "cost data to be credible"[7] and purports to base its cap increases on that data.[8] The *Order* estimates facility-administration costs to be on average 2 cents a minute for prisons, 5 cents for very large jails and large jails, and 9 cents for medium and small jails.[9]

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[1] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14218 (2013) (Dissenting Statement of Commissioner Ajit Pai); *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763, 12960 (2015) (*Second Interstate Inmate Calling Order*) (Dissenting Statement of Commissioner Ajit Pai).

[2] *Securus Technologies v. FCC*, Case No. 13-1280, Order (D.C. Cir. Jan. 13, 2014) (staying rules 64.6010, 64.6020, 64.6060).

[3] *Global Tel*Link v. FCC*, Case No. 15-1461, Order (D.C. Cir. Mar. 7, 2016) (staying rules 64.6010, 64.6020(b)(2)).

[4] *Global Tel*Link v. FCC*, Case No. 15-1461, Order (D.C. Cir. Mar. 23, 2016) (staying rule 64.6030 "insofar as the FCC intends to apply that provision to intrastate calling services").

[5] *Second Interstate Inmate Calling Order*, 30 FCC Rcd at 12967 (Dissenting Statement of Commissioner Ajit Pai).

[6] *See, e.g.*, Letter from Thomas M. Dethlefs, Associate General Counsel, Regulatory for CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 & Attachment B (Sept. 19, 2014); Reply Comments of Global Tel*Link Corp., Attachment 2 at 10 (Jan. 27, 2015); Letter from Timothy G. Nelson, Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 4 (May 8, 2015); Letter from Mary J. Sisak, Attorney for National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (June 12, 2015) (National Sheriffs' Association *Ex Parte* Letter); Letter from Darrell Baker, Director of Utility Services Division, Alabama Public Service Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (July 1, 2015).

[7] *Order* at para. 29.

[8] *Order* at para. 28 ("Our approach is also based on data provided by the NSA, which, as an organization representing sheriffs, is well situated to understand and estimate the costs that facilities face to provide ICS.").

[9] *Order* at para. 27. For purposes of this proceeding, very large jails have 1,000 or more inmates, large jails have 350–999 inmates, medium jails have 100–349 inmates, and small jails have fewer than 100 inmates.

I agree with my colleagues that the National Sheriffs' Association is "well situated to understand and estimate the costs that facilities face to provide" inmate calling services.[10] And I appreciate their willingness to revisit the evidence we gathered in last year's rulemaking and to increase the FCC's caps to account for facility-administration costs.

I nonetheless cannot support the *Order* because, like its forebears, it ignores the basic principles I outlined earlier regarding costs, evidence, and legal authority—principles that are not and should not be hard to respect.

First, the very cost data that the FCC relies on shows that the rate increases set forth in this *Order* are insufficient to cover the facility-administration costs for *each and every tier of jails*. Here are the numbers. For very large jails, the average cost is 5.9 cents a minute, but the *Order* increases rates by only 5 cents. For large jails, the average cost is 8.8 cents a minute, but the *Order* again increases rates by only 5 cents. For medium jails, the average cost climbs to 20.9 cents a minute, but the *Order* increases rates by only 9 cents. And for small jails, the average cost jumps to 40.9 cents a minute, but the *Order* again increases rates by only 9 cents.[11] In total, the cost data from the National Sheriffs' Association that this *Order* says is "credible" shows annual administration costs of $244,253,292 for jails, whereas the rate increases adopted by the Commission would yield only $136,704,062 in revenue.[12] There's a word for rate caps set below costs: confiscatory.

Second, even if the *Order* has correctly estimated facility-administration costs—and the cap increases are passed through to prisons and jails to fully offset these newly recognized costs—these cap increases leave untouched many other legal flaws with last year's caps. Inmate calling service will continue to cost providers "about $61,282,358 more than expected revenues once the rates become permanent."[13] The caps will continue to be "set based on averages, [which] by definition means a significant number of facilities will face caps set at or below their costs of service."[14] The caps will continue to "fail to compensate inmate calling service providers for the average cost of serving *each and every tier of jails*."[15] And the caps will continue to "cover only about 64% of the cost of serving small

[10] *Order* at para. 28.

[11] *See* National Sheriffs' Association *Ex Parte* Letter at 3 (laying out facility-administration costs for different types of jails). The *Order* misreads the letter when it claims that "NSA treated its survey data as 'inputs' that, once 'compared to and tested by' information elsewhere in the record, could be refined to generate more reliable estimated ranges of facilities' reasonable costs of providing access to ICS." *Order* at note 115. The inputs the Association discussed were the "the hours spent on ICS related duties, the salaries and benefits for the officers and employees performing the ICS-related duties and the number of ICS minutes for the jails." National Sheriffs' Association *Ex Parte* Letter at 3. It refined those inputs "by excluding the highest cost jails (any result over $1.00), which might reasonably be considered outliers." *Id.* And its outputs are those I list in the text. To be sure, the Association offered the FCC a proposal with rates "significantly less than the results of the NSA cost survey, excluding outliers." *Id.* at 5. But it did so in the face of an FCC dead-set against including facility-administration costs in its calculations at all (a position the *Second Interstate Inmate Calling Order* actually took). As such the rates were an "acceptable compromise . . . because there is a benefit to facilities of this size of the certainty of a compensation amount, even if it is less than their total cost." *Id.* The FCC cannot lawfully set rate caps below costs now just because it threatened to (and did) entirely ignore those costs before.

[12] Our data show inmates each year using 201,694,437 minutes in small jails, 677,123,743 minutes in medium jails, 1,213,917,345 minutes in large jails, and 2,672,372,399 minutes in very large jails. To calculate annual costs, I multiplied the total number of minutes for each facility type by the facility-administration costs per minute estimated by the National Sheriffs' Association. To calculate total head room, I multiplied the total number of minutes for each facility type by the per-minute rate increases adopted in the *Order*.

[13] *Second Interstate Inmate Calling Order*, 30 FCC Rcd at 12965 (Dissenting Statement of Commissioner Ajit Pai).

[14] *Id.* at 12968.

[15] *Id.* at 12966.

jails, which according to our own data account for more than one third of all jails in the country."[16] What does the *Order* do to address these preexisting flaws? Nothing. Instead, it doubles down by refusing to "revisit the rate structure or overall methodology used" in the *Second Interstate Inmate Calling Order*.[17] And so we shouldn't be surprised to see history repeat itself in court.

Third, I cannot condone the *Order*'s attempted end-run around the Administrative Procedure Act and the federal courts. The *Order* claims to be a straightforward response to a petition for reconsideration filed by Michael S. Hamden, an attorney with more than 25 years of experience representing prisoners.[18] That's just not true. As Mr. Hamden himself explained in exasperation to the Commission just two weeks ago, his petition asked the Commission to prohibit, or at least limit, site commissions; the last thing he had in mind was an *increase* in the rate caps.[19] The record in response to his petition bears this out. Commenters focused squarely on the question of site commissions, not how much to raise caps to account for facility-administration costs. And the Commission itself struggles to identify *any* new cost data since his petition was filed. Ultimately, the *Order* relies on studies and proposals that have gathered dust in the record for over a year.

In other words, what the Commission is really doing here is reconsidering the *Second Interstate Inmate Calling Order* on its own motion. The problem is that it's doing so 199 days late; the deadline for such reconsideration was January 18, 2016.[20] By avoiding the usual notice-and-comment rulemaking that occurs after an agency loss in court—a course the FCC followed after its first court loss in this proceeding—the FCC evades the law.[21] And the agency further ignores judicial oversight by decreeing that these new caps shall be effective in 90 days, despite not one but two court stays currently in effect.[22]

None of this, I fear, is going to end well. Last October, for example, my colleagues voted for regulations they claimed would reduce phone rates for inmates across the country. But that rate reduction never came to pass. Indeed, for many inmates and their families, the situation only got worse. Consider the case of Connie Pratt, who lives in Chico, California. Ms. Pratt's son is incarcerated, and she was looking forward to her phone bill coming down as a result of the FCC's action last year. But on June 20, the date that the FCC's order was supposed to take effect, the cost of a 15-minute phone call with her son increased from $7.20 to $9.77. Even before that price increase, Ms. Pratt spent more than 20% of her total monthly income to keep in touch with her son. And after prices went up, she said that it would be

[16] *Id.* The provider-specific portion of the small-jail cap is 22 cents and the average cost to provide service to small jails is 34.4 cents. Factoring in the cap increase and associated facilities costs shows just how far off the mark these new caps still are. The cap increase is only 9 cents, but the average facility cost is 40.9 cents according to National Sheriffs' Association data. That means the new cap (31 cents) only accounts for about 41% of the total costs of service (75.3 cents) in small jails.

[17] *Order* at note 83.

[18] *Order* at para. 1; Petition of Michael S. Hamden for Partial Reconsideration, WC Docket No. 12-375 (Jan. 19, 2016).

[19] Letter from Michael S. Hamden, Attorney and Counselor at Law, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (July 22, 2016).

[20] *See* 47 C.F.R. § 1.108 ("The Commission may, on its own motion, reconsider any action made or taken by it within 30 days from the date of public notice of such action . . . .").

[21] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170 (2014) (proposing reforms after the Commission's first attempt at rules was stayed).

[22] *Order* at para. 45.

even tougher for her to speak with him on a regular basis. So for Ms. Pratt, the Commission's vote last year didn't just represent a false promise. It actually made things worse.[23]

What lessons should we learn from our past failures? First, good intentions are not enough, and we cannot substitute emotion for the law and the facts. Second, bipartisan consensus makes for good policy and good law. We wouldn't be in this position had the Commission adopted the evidence-based proposal to substantially reduce rates that I put on the table almost three years ago. Because the agency is simply repeating its mistakes in this deeply troubled rulemaking proceeding, I dissent.

[23] Eric Markowitz, Why Prison Phone Rates Keep Going Up Even Though The FCC Regulated Them, *International Business Times* (June 30, 2016), *available at* http://www.ibtimes.com/why-prison-phone-rates-keep-going-even-though-fcc-regulated-them-2388200.

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

This item is defective on so many levels. It fails to provide real and necessary relief for inmate calling providers, doesn't sufficiently address the issues that produced the current stay of our ill-fated previous inmate calling items, and raises false hope for the prisoner population and their families. Indeed, it is an attempt at political and administrative expediency when cooler heads are needed to find a sustainable, long-term solution. I can't think of a sadder, more disappointing outcome.

There is no doubt that the prison payphone industry is extremely troubled. Prisons and jails have budgetary pressures, which generate demands for site commissions and exclusive provider contracts. Forced to pay these outrageous sums, inmate calling companies charge higher per minute rates and other fees. Families of prisoners without options pay higher rates and fees than would normally be expected or warranted based on the cost of service alone. That's a horrible cycle, destined to crack over time.

For those actually interested in lasting solutions, a fundamental problem is that the Commission has gone about this entire matter in the wrong way. Our first instinct should have been to go to Congress and seek specific legislative authority to make necessary and appropriate changes, such as authority to ban or limit site commissions. And I think there would have been receptivity, especially when you see the work being done on criminal justice sentencing[1] and other related issues. Alas, the Commission generally shuns working with Congress and treats the institution as a nuisance or hindrance.

Failing to do the right thing, the Commission has tried to shoehorn flawed "remedies" into inapplicable statutory provisions. The result has become so indefensible that we're now trying to rush into place a temporary patch, as if you can tape together a balloon that has already popped or spackle a crack in a dam that has already burst. While the item refers to the small rate increases as allowing "virtually all providers to recover their overall costs," they do nothing of the sort if you actually listen to the relevant providers. In fact, the major providers oppose this item, which would seem to be counterintuitive except when you realize it actually doesn't provide the relief claimed. In addition, providers will incur additional costs to renegotiate contracts—again. Even the named petitioner, a prisoner rights advocate, has stated that the item would not address the underlying problems with the prison payphone system.

Having enacted several stays of the Commission's past work on prison payphones, the courts should be given a little more credit than the Commission is providing by attempting this weak trick, hoping it can sneak it by. I have to believe that the courts can detect this charade for what it is. Instead of providing real fixes, such as permitting real payphone competition within the prison system, we double down to install broken rate regulation, throw pennies at the per minute rates and call it a day. I guess this is the Commission's version of sorry/not sorry for past efforts to stick it to the prison payphone industry and ignore judicial review.

And if this latest slapdash prison payphone order is any indication of how the Commission approaches rate regulation, then I truly fear what will be coming on special access, as that could have a devastating impact on a much larger segment of the economy.

I can't be party to such a miscarriage of justice and fairness. I dissent.

[1] I take no position on the merits of these discussions as they are outside the Commission's purview.