

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

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

NOTICE OF PROPOSED RULEMAKING

Adopted: December 24, 2012

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Comment Date: [60 days after date of publication in Federal Register]
Reply Comment Date: [90 days after date of publication in the Federal Register]

By the Commission: Chairman Genachowski and Commissioners McDowell, Clyburn, Rosenworcel, and Pai issuing separate statements.

I. INTRODUCTION

1. In this item we grant two longstanding petitions for rulemaking filed in the docket that seek to 'secure the 'just and reasonable' interstate rates for prisoners required by Section 201(b) of the Communications Act' by initiating this Notice of Proposed Rulemaking (NPRM or Notice) to consider changes to our rules governing rates for interstate interexchange inmate calling services (ICS). In the first petition for rulemaking, filed in 2003, (First Wright Petition), Petitioners requested that the Commission 'prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons and require such facilities to permit multiple long distance carriers to interconnect with prison telephone systems. . . .' In the second petition for rulemaking, filed in 2007, (Alternative Wright Petition), Petitioners proposed that the Commission require debit calling, prohibit per-call charges and establish rate caps for all interstate, interexchange inmate calling services. The Commission received significant comment on the two Petitions for Rulemaking. Recently, there has been substantial renewed interest and comment in this docket highlighting both the wide disparity among interstate interexchange ICS rate levels and significant public interest concerns. We believe it is appropriate to

1 See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petition of Martha Wright et al. 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); see also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128, at 4-6 (filed Mar. 1, 2007) (Alternative Wright Petition).

2 Alternative Wright Petition at 6.

3 First Wright Petition at 3.

4 See generally Alternative Wright Petition.

5 See infra nn. 49 & 51.

6 See, e.g., Letter from The Leadership Conference on Civil and Human Rights et al., to Chairman Julius Genachowski, FCC, CC Docket No. 96-128 (filed May 18, 2012) (letter from a group of religious and civic

(continued....)

seek comment to refresh the record and consider whether changes to our rules are necessary to ensure just and reasonable ICS rates for interstate, long distance calling at publicly- and privately-administered correctional facilities.

II. BACKGROUND

A. Description of Inmate Calling Services

2. Inmate calling services are typically limited to collect or debit-based calling from payphones.⁷ Collect calls from a correctional facility usually incur a two-part charge; a per-call set up charge and a per-minute charge.⁸ Debit calling (charges are deducted from an inmate's account), typically incurs a per-minute charge only.⁹ Based on the record, the per-call charge can vary significantly from \$0.50 to \$3.95 and per-minute charges can vary significantly from \$0.05 to \$0.89.¹⁰ Some commenters state that ICS rates vary based on such factors as facility size, call volume and the

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organizations representing diverse opinions on many issues but who all agree on the need to reduce ICS rates); Letter from amalia deloney, Assoc. Dir., Center for Media Justice, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Sept. 26, 2012) (attaching THE PRICE TO CALL HOME: STATE-SANCTIONED MONOPOLIZATION IN THE PRISON PHONE INDUSTRY, a publication of the Prison Policy Initiative); Letter from Alex Friedmann, Assoc. Dir., Human Rights Defense Center, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 3 (filed Oct. 8, 2012) (HRDC Oct. 8, 2012 *Ex Parte* Letter) (Commission action is necessary to reduce high ICS rates). Letter from Katherine Grincewich, Assoc. General Counsel, United States Conference of Catholic Bishops to Chairman Julius Genachowski, FCC, CC Docket No. 96-128 (filed Oct. 12, 2012) (urging the Commission to cap ICS rates and highlighting the problem of high ICS rates in immigrant detention centers); Letter from Craig DeRoche, VP, Justice Fellowship, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Oct. 22, 2012) (discussing the importance of regular family contact in reducing inmate recidivism); Letter from Paul Wright, Exec. Dir., Human Rights Defense Center, to Marlene H. Dortch, Secretary, FCC (filed Oct. 23, 2012) (letter from 60 different organizations urging Commission action to lower ICS rates); Letter from Holly S. Cooper, Assoc. Dir., UC Davis Immigration Law Clinic, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Nov. 8, 2012) (letter from 83 organizations and 25 individuals urging Commission action to lower ICS rates). See also National Association of Regulatory Utility Commissioners' TC-1 Resolution Urging the FCC to take Action to Ensure Fair and Reasonable Telephone Rates from Correctional and Detention Facilities (Nov. 14, 2012), available at <http://www.naruc.org/Resolutions/Resolution%20Urging%20the%20FCC%20to%20take%20Action%20to%20Ensure%20Fair%20and%20Reasonable%20Telephone%20Rates%20from%20Correctional%20and%20Detention%20Facilities.pdf> (last visited Dec. 17, 2012); FCC CONSUMER ADVISORY COMMITTEE's Recommendation Regarding Affordable Phone Access for Incarcerated Individuals and Families (Sept. 21, 2012), available at https://org2.democracyinaction.org/o/6220/images/FCC_CAC_recommendation_9-21-12.pdf (last visited Dec. 17, 2012).

⁷ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Remand & Notice of Proposed Rulemaking, 17 FCC Rcd 3248 at 3252, para. 9 (2002) (*Inmate Calling Order on Remand and NPRM*).

⁸ See Alternative Wright Petition, at App. B at 7-8.

⁹ *Id.* at 8.

¹⁰ See Alternative Wright Petition, App. B at 8-10. See also *Inmate Calling Services Interstate Call Cost Study*, CC Docket No. 96-128, at 4-5 (filed Aug. 15, 2008) (ICS Provider Proposal); Letter from Stephanie A. Joyce, Counsel for Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 1-2 (filed Sept. 20, 2011) (Securus Sept. 20, 2011 *Ex Parte* Letter); Letter from Stephanie A. Joyce, Counsel for Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at Attach. (filed May 10, 2012) (Securus May 10, 2012 *Ex Parte* Letter). We seek additional, more-recent, ICS rate data below. See *infra* para. 43.

jurisdiction of the call.¹¹ Local and intrastate ICS rates are generally set by the states.¹² The Commission does not currently regulate interstate ICS rates.¹³ ICS rates in federal prisons are set by the Federal Bureau of Prisons.¹⁴

3. *Public Policy Considerations.* Petitioners and some commenters argue that ICS rate reform is a public policy imperative because high ICS rates limit the ability of most inmates to maintain contact with their families. Commenters point to studies showing that regular contact with family reduces inmate recidivism.¹⁵ Commenters note that regular telephone contact with loved ones also benefits those receiving the calls, including inmates' children, as inmates may be assigned to correctional facilities far from their homes thus limiting in-person visits.¹⁶ Commenters contend that regular telephone contact between inmates and their loved ones at high rates places a heavy burden on inmates' families because families typically bear the burden of paying for the calls.¹⁷ In addition, they assert that the lack of regular telephone contact between inmates and their loved ones is a hardship on families because neither the inmates nor their families can afford the high rates.¹⁸

4. We note that the Government Accountability Office (GAO) has twice recognized the conclusions of Federal Bureau of Prison officials that contact with family "aids an inmate's success when returning to the community" and thus lowers recidivism.¹⁹ Moreover, the GAO recently found that "crowded visiting rooms make it more difficult for inmates to visit with their families" and that "[t]he infrastructure of the facility may not support the increase in visitors as a result of the growth in the prison population."²⁰ As such, we believe that regular telephone contact between inmates and their

¹¹ See Securus May 10, 2012 *Ex Parte* Letter at 1.

¹² "Typically, rates for intrastate operator services (OS) are set by state public utility commissions. It is pursuant to this authority that states place caps on local collect calling – collect calls cannot be made without OS; therefore, the power to regulate OS is the power to regulate collect calls." *Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd at 3261, para. 31 (footnotes omitted). "In the case of local (city and county) jails, ICS providers operate in a largely state-regulated environment. Most calls from city and county facilities are intraLATA toll or local calls, and most states impose rate ceilings on local calls. Some of these rate ceilings are based on the incumbent local exchange carriers' standard collect calling rates; other ceilings are set specifically for inmate calls." *Id.* at 3277, para. 75. See also Letter from Lee G. Petro, Counsel to Martha Wright et al., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Exh. A at 1-2 (filed July 27, 2011) (Petitioners July 27, 2011 *Ex Parte* Letter).

¹³ See Petitioners July 27, 2011 *Ex Parte* Letter, Exh. A at 1-2.

¹⁴ See *id.* at 11-12.

¹⁵ See *id.* at 13-14. See also Letter from Cheryl Leanza, Policy Advisor, United Church of Christ, OC Inc. and the Leadership Conference Education Fund, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 1 (filed June 18, 2012) (Leadership Conference June 18, 2012 *Ex Parte* Letter).

¹⁶ See Petitioners July 27, 2011 *Ex Parte* Letter, Exh. A at 13-14; see also HRDC Oct. 8, 2012 *Ex Parte* Letter at 4.

¹⁷ See Letter from amalia deloney, Assoc. Dir., Center for Media Justice, to Chairman Julius Genachowski, FCC, CC Docket No. 96-128 (filed Aug. 14, 2012).

¹⁸ See *id.*

¹⁹ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF PRISONS; GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE at 21 (2012 GAO Report) available at <http://www.gao.gov/assets/650/648123.pdf>; see also UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF PRISONS; IMPROVED EVALUATIONS AND INCREASED COORDINATION COULD IMPROVE CELL PHONE DETECTION, at 18 (2011 GAO Report) available at <http://www.gao.gov/assets/330/322805.pdf>.

²⁰ 2012 GAO Report at 21.

families is an important public policy matter, and that we should consider the impact that interstate ICS rates have.

5. *Unique Characteristics of ICS.* The Commission has recognized that ICS differs from traditional payphone services in a number of respects. First, although barriers to entry are low for payphone providers in most locations,²¹ a correctional facility typically grants an exclusive contract to a single ICS provider for a particular facility, essentially creating a monopoly at that facility.²² As such, competition exists for ICS contracts but once an ICS provider wins a contract it becomes the sole ICS provider in that facility.²³ Unlike non-incarcerated customers who have access to alternative calling platforms on public payphones, inmates only have access to payphones operated by a single provider for all available services at that payphone.²⁴ These contracts additionally often include a site commission or location fee paid to the correctional facility.²⁵ The Commission has previously found that “[t]o have a realistic chance of winning a contract, the bidder must include an amount to cover commissions paid to the inmate facility.”²⁶ Five years ago Petitioners estimated that “commissions add an average of 43 percent . . . to all other costs before commissions.”²⁷

6. Security considerations also differentiate ICS from public payphone services. For instance, correctional facilities typically use an automated voice-processing system to screen and process inmate collect calls rather than a pre-subscribed operator service provider.²⁸ ICS providers also employ blocking mechanisms to prevent inmates from making direct-dialed (that is calls made without using the automated voice-processing system) calls, access code calls, 800/900 number calls, or calls to restricted individuals, such as judges or witnesses.²⁹ Correctional facilities also require that payphones be monitored for frequent calls to the same number.³⁰ Moreover, correctional facilities often require periodic voice overlays that identify the call as being placed from a correctional facility, as well as listening and recording capabilities for all calls.³¹ Commenters note that the costs of these security

²¹ “Entry into the payphone business appears to be easy. The ability to purchase a payphone, secure a location contract, obtain a payphone line from the LEC, and maintain the payphone are, together, the minimal technical requirements to enter into the payphone business.” *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al.*, CC Docket Nos. 96-128; 91-35, Report and Order, 11 FCC Rcd 20541 at 20547, para. 11 (1996) (footnote omitted).

²² *See Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd at 3276, para. 73 (“[H]igh inmate calling rates may be partially attributable to the absence of market forces.”).

²³ *See id.* at 3252-53, para. 10.

²⁴ *See id.* at 3253, para. 12.

²⁵ *See id.*

²⁶ *Id.* at 3252, para. 10.

²⁷ Alternative Wright Petition, App. B at 12. *See also* Securus May 10, 2012 *Ex Parte* Letter at Attach. (citing Texas statutory requirement of “a commission of not less than 40 percent of the gross revenue”).

²⁸ *See Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd at 3252, para. 9.

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.*

features, hardware and software costs, and training for staffers make ICS more costly to provide than public payphone service.³²

7. The record to date indicates a wide disparity in ICS rates between states. These rates reflect the higher security and network costs that are inherent in ICS; the disparity thus may reflect whether the rates in question include site commissions. For instance, correctional facilities located in states that do not require commissions from ICS providers often charge lower ICS rates. For example, New York state prohibited site commissions in state prisons and interstate per-minute rates in such prisons are as low as \$0.048.³³ In contrast, in Colorado, a state that has site commissions, interstate per-minute rates can be as high as \$0.89.³⁴ However, in Montana, another state with site commissions, the interstate per-minute rate is \$0.12.³⁵ Such record evidence raises questions about whether ICS rates accurately reflect the costs of providing ICS and whether site commission payments are a reasonable cost of providing ICS that therefore should be recovered in the ICS rates inmates are charged.

8. We seek comment on the Commission's legal authority in Section III.E below to address the issues raised by the Petitioners. While we believe that we have jurisdiction to address interstate ICS calls we believe those calls may be a relatively small subset of all inmate telephone calls. However, several commenters argue that interstate calls are often the most expensive and therefore Commission action, such as establishing an interstate rate benchmark, would nevertheless be effective in helping lower the cost of contact between inmates and their families.³⁶ In the interest of developing a complete and current record, this Notice seeks comment on the reasonableness of current ICS rates and what steps the Commission can and should take to ensure reasonable ICS rates going forward.

B. *Inmate Calling Order on Remand and NPRM*

9. On February 12, 2002, the Commission adopted an order addressing whether section 276 of the Communications Act of 1934, as amended, (Act) requires the Commission either to preempt state rate caps on local collect calls or permits ICS providers to collect an additional per-call surcharge above state rate caps on local collect calls.³⁷ In the *Inmate Calling Order on Remand and NPRM*, the Commission concluded that section 276 does not require either preemption or an additional surcharge and also concluded that it was unnecessary to impose nonstructural safeguards on the Bell Operating Companies' provision of ICS services.³⁸ In making these determinations, the Commission recognized the unique nature of ICS, and concluded that the "fair compensation" requirement of section 276 did not

³² See CCA Alternative Wright Petition Comments at 14-16; GEO Group Alternative Wright Petition Reply Comments at 2-3. See also Letter from Stephanie A. Joyce, Counsel for Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128; WC Docket No. 09-144, at 1 (filed June 22, 2012) (Securus June 22, 2012 *Ex Parte* Letter).

³³ See Petitioners July 27, 2011 *Ex Parte* Letter, Exh. A at 16.

³⁴ See *id.*

³⁵ See Montana Department of Corrections; Inmate Phones, <http://cor.mt.gov/Facts/InmatePhones.mcp>x (last visited Dec. 21, 2012).

³⁶ See HRDC Oct. 8, 2012 *Ex Parte* Letter at 4.

³⁷ See generally *Inmate Calling Order on Remand and NPRM*.

³⁸ See 17 FCC Rcd. at 3257-59, paras. 23-25.

necessarily mean that payphones with higher costs should receive greater compensation than other payphones.³⁹

10. In the NPRM portion of the *Inmate Calling Order on Remand and NPRM*, the Commission asked “whether the current regulatory regime applicable to the provision of inmate calling services is responsive to the needs of correctional facilities, ICS providers, and inmates, and, if not, whether and how we might address those unmet needs.”⁴⁰ Specifically, the Commission sought detailed comments on ICS rates, commissions paid to the confinement facilities, cost and revenue data, information from states on how they handle inmate calling, alternatives to the current system, and information on call disconnections.⁴¹ The NPRM also proposed methods to lower ICS rates,⁴² including allowing the use of debit cards or commissary accounts.⁴³

C. Two Petitions for Rulemaking

1. First Wright Petition

11. In 2000, current and former inmates of Corrections Corporation of America (CCA) confinement facilities, and the individuals that receive their telephone calls, filed a class-action lawsuit against CCA seeking relief from exclusive dealing arrangements CCA had with ICS providers. The plaintiffs alleged that the exclusive dealing resulted in restricted telephone service choices for inmates and caused rates for those services to substantially increase, in violation of various constitutional and statutory provisions, including section 201(b) of the Act.⁴⁴ On August 22, 2001, the United States District Court for the District of Columbia dismissed the lawsuit.⁴⁵ Pursuant to the doctrine of primary jurisdiction, the court directed the parties to file the appropriate pleadings with the Commission to resolve the issues the plaintiffs raised.⁴⁶

12. On November 3, 2003, Petitioners filed the First Wright Petition with the Commission pursuant to the court’s directive.⁴⁷ Petitioners requested that the Commission address high ICS rates by prohibiting exclusive ICS contracts and collect-call-only restrictions at privately-administered prisons, and requiring such facilities to permit multiple long-distance carriers to interconnect with prison telephone systems.⁴⁸ The Commission sought and received comment on the First Wright Petition.⁴⁹

³⁹ See *id.* at 3258, para. 23.

⁴⁰ *Id.* at 3276, para. 72.

⁴¹ See *id.* at 3276-79, paras. 73-79.

⁴² See generally *Inmate Calling Order on Remand and NPRM*.

⁴³ See *id.* 17 FCC Rcd. at 3277-78, para. 76.

⁴⁴ See First Wright Petition at 1-4.

⁴⁵ See *Martha Wright, et al. v. Corrections Corporation of America, et al.*, Civil Action No. 00-293 (GK) (D.D.C. filed Aug. 22, 2001).

⁴⁶ See *id.* See also, *Martha Wright, et al. v. Corrections Corporation of America, et al.*, Civil Action No. 1:00CV00293 (GK) (D.D.C. Nov. 5, 2001) (in which the court granted Petitioner’s Motion to Reconsider the dismissal of the complaint and stayed the federal court action until the Commission considered the claims).

⁴⁷ See generally First Wright Petition.

⁴⁸ See *id.* at 3.

2. Alternative Wright Petition

13. On March 1, 2007, Petitioners filed an alternative rulemaking petition proposing that the Commission address high ICS rates by requiring debit calling, prohibiting per-call charges and establishing rate caps for all interstate, interexchange ICS.⁵⁰ The Commission sought and received comment on the Alternative Wright Petition.⁵¹ On August 15, 2008, a group of ICS providers filed the Inmate Calling Services Interstate Call Cost Study (ICS Provider Proposal), which included cost information to support their proposed rate methodology and rate levels for ICS.⁵²

14. As described fully below, in this Notice, we seek updated information on the ICS market and request answers to questions raised by the Petitioners. We specifically request comment from state departments of corrections and state officials responsible for prison telecommunications decision making. After the ICS Provider Proposal was filed, a consensus appeared to be forming about how best to address inmate calling; we hope to revive those discussions and consensus building through our action today.⁵³

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⁴⁹ See *Petition For Rulemaking Filed Regarding Issues Related To Inmate Calling Services Pleading Cycle Established*, CC Docket No. 96-128, Public Notice, DA 03-4027 (rel. Dec. 31, 2003) (*First Wright Petition PN*). A list of commenters is available at Appendix A.

⁵⁰ See generally *Alternative Wright Petition*.

⁵¹ *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, CC Docket No. 96-128, Public Notice, 22 FCC Rcd 4229 (Wireline Comp. Bur. 2007) (*Alternative Wright Petition PN*). The comment and reply comment deadlines on the Alternative Wright Petition were extended pursuant to order. See *Implementation of 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, Order, 22 FCC Rcd 5382 (Wireline Comp. Bur. 2007). The reply comment deadline was further extended pursuant to order. See *Implementation of 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, Order, 22 FCC Rcd 9131 (Wireline Comp. Bur. 2007); see also *Implementation of 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, Order, 22 FCC Rcd 10837 (Wireline Comp. Bur. 2007). A list of commenters is available at Appendix B.

⁵² See generally *ICS Provider Proposal*.

⁵³ We note that discussions between ICS providers and advocacy groups seem to be ongoing. See e.g., Letter from Stephanie A. Joyce, Counsel for Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 2 (filed July 2, 2012) (Securus July 2, 2012 *Ex Parte* Letter) (“Securus met with several public interest groups on April 23, 2012, to discuss the issues involved in inmate calling rates . . .”). We encourage these ongoing discussions. We note that on multiple occasions, industry has been able to form coalitions and adjust practices, bringing benefits to consumers quickly. See, e.g., CTIA – The Wireless Association®, Federal Communications Commission and Consumers Union Announce Free Alerts to Help Consumers Avoid Unexpected Overage Charges (Oct. 17, 2011) <http://www.ctia.org/media/press/body.cfm/prid/2137> (an agreement that the majority of wireless providers would send automatic usage notifications to their subscribers to help prevent unexpected overage charges); U.S. Wireless Industry Announces Steps to Help Deter Smartphone Thefts and Protect Consumer Data (April 10, 2012) <http://www.ctia.org/media/press/body.cfm/prid/2170> (an agreement with CTIA – the Wireless Association® and law enforcement officials to establish practices to deter theft of smartphones and to protect the personal information on those devices). To the extent that parties cannot resolve these issues in their discussions, we believe it is necessary for the Commission to gather up-to-date information, so that we can act to resolve the controversies presented in the docket.

15. Since the *Inmate Calling Order on Remand and NPRM* was released in 2002, the Commission has received numerous comments regarding ICS reform.⁵⁴ Responses to the NPRM and subsequent requests for comment on the First Wright Petition⁵⁵ and the Alternative Wright Petition have provided an extensive record on ICS reform.⁵⁶ We believe it is appropriate at this time to open a new docket exclusive to ICS reform in light of the lengthy record, as well as the fact that the ICS record is part of the general payphone docket (CC Docket No. 96-128) which relates to competition among payphone providers and the deployment of payphone services. As such, comments and reply comments on this Notice must be filed in WC Docket No. 12-375. We incorporate comments, reply comments and *ex parte* filings from CC Docket No. 96-128 into WC Docket No. 12-375.

III. ENSURING ICS RATES ARE JUST AND REASONABLE

16. There are multiple proposals to address ICS rates in the record. We seek to balance the goal of ensuring reasonable ICS rates for end users with the security concerns and expense inherent to ICS within the statutory guidelines of sections 201(b) and 276 of the Act. Ensuring just and reasonable ICS rates may be accomplished through incentives or regulations, or a combination of both; we seek comment on these proposals below.

A. Rate Caps in the ICS Market

17. In the Alternative Wright Petition, Petitioners requested that the Commission set rate caps for interstate long distance ICS.⁵⁷ Specifically, Petitioners requested that the Commission “establish a benchmark rate for domestic interstate interexchange inmate debit calling service of \$0.20 per minute and a benchmark rate for domestic interstate interexchange inmate collect calling service of \$0.25 per minute, with no set-up or other per-call charge.”⁵⁸ The Petitioners used 15 and 20 minute call durations to calculate the rate caps⁵⁹ and based their proposed rate caps on then current Federal Bureau of Prison and several individual states’ ICS rates.⁶⁰ We seek comment on the elements of the rate cap proposal and whether the criteria used to develop the proposed caps are appropriate.

⁵⁴ “We initiate this rulemaking proceeding to explore whether the current regulatory regime applicable to the provision of inmate calling services is responsive to the needs of correctional facilities, ICS providers, and inmates, and, if not, whether and how we might address those unmet needs.” *Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd at 3276, para. 72.

⁵⁵ See generally *First Wright Petition PN*.

⁵⁶ See generally *Alternative Wright Petition PN*.

⁵⁷ See generally *Alternative Wright Petition*.

⁵⁸ *Alternative Wright Petition* at 6.

⁵⁹ See *id.* at 18-20.

⁶⁰ When they filed the Alternative Wright Petition in 2007, Petitioners noted that the debit account rate applicable to the Inmate Telephone System managed by the Federal Bureau of Prisons was \$0.23 per minute, and that \$0.17 per minute of that amount was attributable to telephone service costs. Petitioners also pointed to the Colorado Department of Corrections, which had a debit inmate calling rate of \$0.19 per minute, with a \$1.25 per call surcharge. Similarly, the Nebraska Department of Corrections inmate telephone service contract set the interstate debit rate at \$0.16 per minute plus a \$0.60 service charge. In Vermont, the debit rate for inmates was \$0.14 per minute plus a connection charge of \$0.75. In Maryland, the debit rate was \$0.30 per minute, with no per-call charge. Finally, in Missouri, the inmate prepaid calling services was \$0.10 per minute, with no per-call charge and no commission payments. See *Alternative Wright Petition*, App. B at 15-18. We note that some of these rates may have changed since the Petition was filed, and we are seeking to refresh our record on current rates.

18. *Per-Call Charge.* Each time an inmate places a payphone call there are typically two elements that make up its cost – a per-call set up charge and a per-minute charge.⁶¹ We first seek comment on the per-call charge. Petitioners propose eliminating the call set up or per-call charge, which can be as much as \$3.95, and allowing only per-minute charges.⁶² We seek comment on this proposal. What costs are associated with the per-call charge? Would the elimination of the per-call charge help ensure just and reasonable ICS rates? Would a prohibition on per-call charges result in below-cost service?⁶³

19. Petitioners note that inmates often incur multiple per-call charges when calls are dropped after a pause in conversation.⁶⁴ We seek data on the average number of dropped calls that inmates experience. We request that commenters suggest ways to prevent multiple per-call charges for a single conversation that is disconnected by security triggers and subsequently allowed to continue while maintaining appropriate security measures.⁶⁵ For example, if the per-call charge is maintained, Petitioners suggest that if a disconnected call is reinitiated within two minutes, it should not incur another per-call charge.⁶⁶ Should the Commission require such a measure? What other steps could be taken to prevent inmates from being charged multiple per-call charges for what amounts to one conversation? What are the costs associated with call security and are they incurred on a fixed or per-call basis?

20. *Per-Minute Rate Caps.* Would the per-minute rate cap approach proposed by the Petitioners ensure just and reasonable rates? Are the proposed rate caps just and reasonable consistent with sections 201 and 276 of the Act? If not, would different rate caps be appropriate? What factors should the Commission consider in determining an appropriate per-minute rate cap? Commenters advocating an alternative per-minute rate cap should provide specific, detailed cost information and other relevant data to support their proposed per-minute rate caps.⁶⁷ Should the domestic interstate interexchange ICS per-minute rate cap proposed above apply to both publicly- and privately-administered correctional facilities?

21. Some commenters argue that the proposed per-minute rate caps are arbitrary and capricious because they would preclude providers from recovering their legitimate costs of providing service.⁶⁸ Others argue that the Alternative Wright Petition proposal is confiscatory⁶⁹ or may otherwise put ICS providers out of business.⁷⁰ We seek evidence in support of or disproving such arguments. Commenters also argue that the adoption of per-minute rate caps would chill innovation and ultimately result in reductions in service levels because the proposed caps will not adequately compensate the

⁶¹ See Alternative Wright Petition at 2.

⁶² See *id.* at 2, 6, 11.

⁶³ See Securus June 22, 2012 *Ex Parte* Letter at 1-2.

⁶⁴ See Petitioners' Alternative Wright Petition Reply at 23.

⁶⁵ See *Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd at 3278, para. 78.

⁶⁶ See Letter from Frank W. Krogh, Counsel to Petitioners, to Kevin J. Martin, Chairman, FCC, CC Docket No. 96-128 at 16-17 (filed Nov. 19, 2008) (Petitioners' Nov. 19, 2008 *Ex Parte* Letter).

⁶⁷ Below, we seek additional data for use in this proceeding. See *infra* para. 43.

⁶⁸ See GTL Alternative Wright Petition Comments at 12-13; see also T-NETIX Alternative Wright Petition Comments at 10-12.

⁶⁹ See T-NETIX Alternative Wright Petition Comments at 8.

⁷⁰ See, e.g., SPCA Alternative Wright Petition Comments at 1, 3-4 (noting that many ICS providers are small- to medium-sized companies).

providers, thus making ICS a less attractive service to offer.⁷¹ Others note that new providers are entering the ICS market.⁷² Commenters supporting such assertions are asked to provide specific, detailed information about the ICS market to support their positions and describe how market trends influence ICS rates.

22. In the Alternative Wright Petition, Petitioners argue that several benefits would accrue from setting per-minute rate caps, such as administrative ease and the absence of jurisdictional challenges.⁷³ We seek comment on this argument. Can commenters identify any other benefits to introducing per-minute rate caps? What are the perceived problems or challenges associated with introducing per-minute rate caps? For example, parties argue that differences between correctional facilities including size, location, security levels, facility age and staffing levels will not allow a one size fits all solution, such as per-minute rate caps.⁷⁴ Is this accurate? How can the Commission establish a solution that addresses the many variations among confinement facilities?

23. If the Commission decides to implement rate caps in the ICS market how should we? What additional data, if any, does the Commission require to set rates?⁷⁵ Would a rate cap approach require the Commission to conduct rate cases, as some commenters suggest?⁷⁶ We seek comment on the best ways to determine just and reasonable caps for ICS rates.

24. *Marginal Location Methodology.* In 2008, ICS providers submitted the ICS Provider Proposal for ICS rates.⁷⁷ The ICS Provider Proposal uses the “marginal location” methodology,⁷⁸ previously adopted by the Commission to calculate public payphone rates, to calculate proposed ICS rates.⁷⁹ The ICS providers believe the “marginal location” methodology provides a “basis for rates that represent ‘fair compensation’ as set forth in § 276(b)(1)(A).”⁸⁰ The ICS Provider Proposal advocates a two-part rate structure that includes both a fixed per-call charge and a per-minute rate,⁸¹ arguing that per-call charges must be maintained to cover such expenses as equipment costs and monthly line charges.⁸²

⁷¹ See GTL Alternative Wright Petition Comments at 16-17.

⁷² See Letter from David Lindgren, President, Protocall, LLC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Dec. 1, 2008).

⁷³ See Alternative Wright Petition at 7-8.

⁷⁴ See, e.g., APCTO Alternative Wright Petition Comments at 5; CCA Alternative Wright Petition Comments at 6-7; GEO Group Alternative Wright Petition Comments at 10. See also Securus June 22, 2012 *Ex Parte* Letter at 1.

⁷⁵ See *infra* para. 43.

⁷⁶ See GEO Group Alternative Wright Petition Comments at 10-11.

⁷⁷ See generally ICS Provider Proposal.

⁷⁸ See ICS Provider Proposal at 1-2.

⁷⁹ See *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, WC Docket No. 03-225, Report and Order, 20 FCC Rcd 20231 (2004) (order accepting marginal location methodology implementation practices of various parties); see also *Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order and Order on Reconsideration, 14 FCC Rcd 2545 (1999) (order establishing the marginal location cost methodology for public payphone rates).

⁸⁰ ICS Provider Proposal at 2.

⁸¹ See *id.* at 4.

⁸² See *id.* at 5-6.

The ICS providers determined that the methodology and data yield a requisite fixed per-call charge of \$1.56 with a per-minute rate of \$0.06 for debit calls, and a fixed per-call charge of \$2.49 with a per-minute rate of \$0.07 for collect calls, applicable to all ICS providers.⁸³ In response, Petitioners point out that the ICS Provider Proposal “largely supports Petitioners’ requested benchmark rates.”⁸⁴ Petitioners calculate that the ICS Provider Proposal two-part rate structure equals rate caps of \$0.16 per minute for a 15-minute debit call and \$0.24 per minute for a 15-minute collect call.⁸⁵

25. We seek comment on whether the ICS Provider Proposal methodology would result in a just and reasonable rate. We also encourage commenting parties that disagree with the ICS Provider Proposal or proposed methodology to provide alternative methodologies supported by sufficiently-detailed data.⁸⁶ We seek comment on whether the ICS Provider Proposal has provided sufficient cost, demand, and revenue detail to allow the Commission to determine whether the proposed rates are just and reasonable.

26. We also seek comment on whether the underlying cost and demand factors for public payphones and ICS are similar enough to justify using a cost methodology designed for public payphones to set ICS rates. In particular, we seek comment on the extent to which ICS rates and call volumes vary among prisons across the country, and how the rates and call volumes compare with the variation that occurs with public payphones. We seek comment on whether an additional justification exists for adopting this cost methodology.

27. *Impact of Rate Reductions on Call Volumes.* We seek comment on whether call volumes have increased where rates have been lowered, and the resulting impact on ICS providers’ revenues. We note that the 2011 GAO Report found that only approximately 25 percent of inmates in the Federal Bureau of Prisons use their entire monthly allotted minutes for calls and that if rates were lowered it would encourage greater communications with families, which the Bureau of Prisons “has stated facilitates the reintegration of inmates into society upon release from prison.”⁸⁷ Do other correctional facilities find that incarcerated individuals are not using all their allotted time to make calls? How much time is allotted, and what is the percentage of individuals who use all their time?

28. *Tiered Pricing.* A recent *ex parte* filing by Petitioners attached a transcript from a New Mexico Public Service Commission hearing that described the possible use of a tiered, by monthly

⁸³ See *id.* at 4. The ICS Provider Proposal does not include site commissions in the proposed rates and the providers supporting this proposal contend this makes the proposed rates conservatively low. See *id.* at 9-10, 15-16. However, the proposed rates do include ICS-related costs such as additional security precautions which Petitioners suggest shows that their proposed rate caps are a viable option. See Petitioners’ Nov. 19, 2008 *Ex Parte* Letter at 2-6. The ICS Provider Proposal also contained an additional estimate that included three high-cost facilities. According to the ICS Provider Proposal, those data would yield a fixed per-call charge of \$2.09 with a per-minute rate of \$0.06 for debit calls, and a fixed per-call charge of \$3.19 with a per-minute rate of \$0.07 for collect calls. See ICS Provider Proposal at 5.

⁸⁴ Petitioners’ Nov. 19, 2008 *Ex Parte* Letter at 2-6.

⁸⁵ See *id.* If the Commission maintains a per-call set up charge, the Petitioners request that the per-call and per-minute charges are calculated to stay under the proposed rate caps. See *id.* at 17.

⁸⁶ For example, Petitioners challenge the selected facilities used in the calculation, claiming that the ICS Providers cherry-picked high-cost facilities. See Petitioners’ Nov. 19, 2008 *Ex Parte* Letter at 2-3.

⁸⁷ 2011 GAO Report, at 18 & n.39. The Report also notes the disadvantages of lowering rates, including the revenues generated for the Trust Fund which is used for inmate amenities. See *id.*

volume of minutes, pricing structure in the state.⁸⁸ Do commenters believe a per-minute rate set by usage volume is a viable option?⁸⁹ Would tiered pricing address concerns over a one size fits all reform approach such as rate caps? What factors should the Commission consider in establishing pricing tiers? What are potential problems with tiered pricing?

29. *Market Forces*. Petitioners note that telecommunications costs in general, and long distance costs in particular, are decreasing⁹⁰ and therefore, they believe, ICS rates should follow the market and decrease as well.⁹¹ Some participants in this proceeding note that “rates in the largest majority of correctional facilities are moving in a downward trend.”⁹² Is this accurate? Can commenters provide concrete examples of decreases in ICS rates?

30. *Collect Calling v. Debit Calling*. The Alternative Wright Petition suggests two different rate caps: one for collect calling and one for debit calling.⁹³ A collect call is a call in which the called person pays for the call and a debit call deducts the cost of the call from a prepaid account. Petitioners argue that collect calling is more expensive because its costs include billing costs and uncollectibles, while debit calling is less expensive because it reduces staff responsibilities and uncollectibles.⁹⁴ Do commenters agree that there should be different per-minute rate caps for collect and debit calling? What are the benefits of debit calling? For example, do commenters believe that debit calling will exert downward pressure on collect calling rates?⁹⁵

31. Some commenters have expressed concern about the expense and difficulty of implementing debit calling. Specifically, they cite difficulty in blocking restricted telephone numbers, the expense of purchasing new equipment and the challenges of establishing new processes and procedures and verifying calling party identities.⁹⁶ Parties have also expressed safety concerns related to debit calling.⁹⁷ Some prisons already allow for debit calling. For example, the Federal Bureau of Prisons allows debit calling in some of its facilities⁹⁸ and the state of Iowa offers debit calling only.⁹⁹ What safety concerns are raised by debit calling service, and how have those concerns been addressed where debit calling already is permitted? Commenters also note the increased administrative workload and cost

⁸⁸ See Letter from Lee G. Petro, Counsel for Martha Wright, et al., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Exh. B at 82-88 (filed June 28, 2012).

⁸⁹ Inmate calling service provider Securus, which participated in the New Mexico proceeding supported the adoption of a tiered rate system in the state with a rate variance option. See Securus July 2, 2012 *Ex Parte* Letter at 1-2.

⁹⁰ See, e.g., Alternative Wright Petition App. B, at 5-7.

⁹¹ See *id.* at 7.

⁹² CCA Alternative Wright Petition Comments at 10.

⁹³ See Alternative Wright Petition at 6. (We note that, in this context, we take debit calling to mean a debit account with a unique PIN for each inmate, not a physical debit card.)

⁹⁴ See *id.* at 20-21, 23-27.

⁹⁵ See CURE Alternative Wright Petition Comments at 9.

⁹⁶ See CCPS Alternative Wright Petition Comments at 9-11; CCA Alternative Wright Petition Comments at 16-18.

⁹⁷ See PCS Alternative Wright Petition Comments at 6-7; T-NETIX Alternative Wright Petition Reply Comments at 13-14.

⁹⁸ See U.S. Department of Justice; Federal Bureau of Prisons; Program Statement 5264.07 (Jan. 31, 2002) available at http://www.bop.gov/policy/progstat/5264_007.pdf.

⁹⁹ See Petitioners' July 27, 2011 *Ex Parte* Letter, Exh. A at 16.

associated with debit calling caused by such tasks as issuing PINs to each inmate in facilities with high turnover.¹⁰⁰ Have commenters experienced such challenges, and how have they been overcome? What are the other pros or cons of debit calling? We seek comment on ICS providers' overall experiences with offering debit calling.

32. How many correctional facilities currently offer debit calling? Has debit calling become more common? What are the current ratios of debit to collect calling in correctional facilities? Should the Commission mandate debit calling in privately and publicly-administered correctional facilities?¹⁰¹ One commenter says it offers debit calling to all of the facilities it serves, but it is not practical to mandate debit calling because not all correctional facilities want the service.¹⁰² What are other challenges to mandating debit calling?

33. *Prepaid Calling.* Commenters suggest prepaid calling as an alternative to collect and debit calling.¹⁰³ Prepaid calling allows inmates or their family members to prepay for minutes, usually at a discount.¹⁰⁴ This is different from debit calls, in which money is deducted from an account, but the minutes are not purchased in advance. Commenters argue that the benefits of this approach may include administrative ease for the providers, increased safety, controlled costs for call recipients, and eliminating the need to block calls because of a call recipients' credit standing.¹⁰⁵ However, Petitioners note that there are outstanding questions with prepaid calling such as: how to handle monthly fees; how to load an inmate's account; and minimum required account balance.¹⁰⁶ If these issues can be sufficiently addressed, is prepaid calling a viable ICS option? Do any ICS providers currently offer prepaid calling?¹⁰⁷ What are some other concerns or considerations with prepaid calling?

34. *Intrastate-Interstate Parity.* Another alternative would be to adopt an intrastate-interstate parity principle that would require that rates for interstate, long-distance calls not exceed rates for intrastate, long-distance calls. Rates for intrastate, long-distance calls are typically set by state public utility commissions,¹⁰⁸ and those commissions may set rates that take into account the varying cost of providing inmate calling services within each state given the security and other features required by state law.¹⁰⁹ To the extent that interstate rates for inmate calling services are significantly higher than intrastate rates,¹¹⁰ how would a requirement that ICS providers set interstate rates at a level no higher than intrastate, long-distance rates affect the justness and reasonableness of those rates? How many states set

¹⁰⁰ See, e.g., KY DOC Alternative Wright Petition Comments at 3; PCS Alternative Wright Petition Comments at 6-7; PayTel Alternative Wright Petition Comments at 15.

¹⁰¹ See Alternative Wright Petition at 24.

¹⁰² See PCS Alternative Wright Petition Comments at 6-7.

¹⁰³ See CCPS Alternative Wright Petition Comments at 12-13.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See Petitioners' Alternative Wright Petition Reply at 29-30.

¹⁰⁷ "The state of the industry has changed, and correctional authorities are permitting prepaid calling options with more regularity." Securus July 2, 2012 *Ex Parte* Letter at 2.

¹⁰⁸ *Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd at 3261, para. 31.

¹⁰⁹ *Id.* at 3277, para. 75 (noting that some states set rate ceilings "specifically for inmate calls").

¹¹⁰ See HRDC Oct. 8, 2012 *Ex Parte* Letter at 4 (arguing that interstate calls typically cost much more than intrastate calls).

rates specifically for ICS? What is the rate structure for ICS calls in those states, and what are the rates for intrastate, long-distance calls? How do states that set specific ICS rates ensure that ICS providers are “fairly compensated?”¹¹¹ How do intrastate, long-distance rates differ between states that establish general rate caps and those that set specific caps for ICS? If the Commission adopts a parity principle, should there be any exceptions to that principle?

C. Additional Proposals in the Record

35. There are multiple other proposals in the record that do not directly address per-call and per-minute ICS rates. We seek comment on any other proposals parties contend address the concerns raised in this proceeding, including any proposals in the record that are not addressed below.

36. *Competition in the ICS Market.* The First Wright Petition requested that the Commission mandate the opening of the ICS market to competition and prohibit collect call only restrictions in privately-administered correctional facilities.¹¹² ICS contracts are typically exclusive; competition appears to exist in winning an ICS contract but once an ICS provider wins a contract it becomes the sole provider.¹¹³ How do exclusive contracts influence ICS rates? How would competitive ICS services be provided? The First Wright Petition also argued that the collect calling-only limitations imposed by many confinement facilities increase costs to both ICS providers and inmates that are not outweighed by corresponding benefits and that such limitations should therefore be prohibited.¹¹⁴ To the extent ICS is still limited to collect calling in some correctional facilities, we seek comment on the rationale behind this restriction.

37. *Site Commissions.* ICS contracts frequently include a site commission or location rent¹¹⁵ which is paid to the facility and in some instances may go to fund inmate services at the facility.¹¹⁶ What types of inmate services or other services do site commissions fund? How do site commissions in ICS contracts vary by facility? Petitioners argue that ICS rates are inflated to cover commissions, which can be as much as 65 percent of gross revenues,¹¹⁷ causing the rates to be unreasonable in violation of section 201(b).¹¹⁸ Is this accurate? We seek updated data on how much these site commissions are and how much they add to per-call costs. The FCC has previously found that “under most contracts, the commission is the single largest component affecting the rates for inmate calling service”¹¹⁹ and “because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location

¹¹¹ 47 U.S.C. § 276(b)(1)(A).

¹¹² See First Wright Petition at 3. *But see*, RBOC Payphone Coalition First Wright Petition Comments at 1-2 (arguing that there is no need for additional regulation of the ICS market, there is robust competition already).

¹¹³ See *Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd at 3252-53, para. 10.

¹¹⁴ See First Wright Petition at 15.

¹¹⁵ “To have a realistic chance of winning a contract, the bidder must include an amount to cover commissions paid to the inmate facility.” *Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd at 3252-53, para. 10.

¹¹⁶ “[C]ompensation in the form of commission payments is an important source of the funding needed to provide the resources, including human resources, needed by the managers and operators of correctional facilities to ensure that telephone service is provided safely and securely and is not used for improper purposes.” APCTO Alternative Wright Petition Comments at 6. See also ICS Provider Proposal at 9.

¹¹⁷ See Alternative Wright Petition at 2.

¹¹⁸ See *id.* at 22-23.

¹¹⁹ *Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd at 3252-53, para. 10.

commissions, the competitive bidding process may result in higher rates.”¹²⁰ Do commenters believe this is still accurate? The Commission has also found that “location rents are not a cost of payphones, but should be treated as profit.”¹²¹ Do commenters agree with that conclusion?

38. Some site commissions are mandated by state statute,¹²² while several states have reduced or eliminated commissions in ICS contracts.¹²³ If a state has reduced or eliminated site commissions, how has any resulting rate transition been handled? How has the lowering or elimination of site commissions impacted rates? Is this evidence that site commissions are not necessary, or¹²⁴ is it evidence that the market is working and the Commission need not intervene?¹²⁵ Must the Commission address site commissions and the effect they have on ICS rates in order to ensure just and reasonable ICS rates?

39. *Offer No-Cost Calling.* In the Alternative Wright Petition, Petitioners include a suggestion they contend will advance the Commission’s universal service goals and provide all inmates valuable contact with the outside world.¹²⁶ Specifically, Petitioners suggest that ICS providers provide a certain amount of no-cost calling per inmate per month in each of the facilities they serve in exchange for the right to charge a higher per-minute rate.¹²⁷ Petitioners suggest implementing rate caps of \$0.22 per minute for debit calling and \$0.275 per minute for collect calling if ICS providers offer 20 minutes of free calling per inmate per month.¹²⁸ Can or should the Commission mandate a certain amount of free calling per inmate per month, or should this be offered at the providers’ discretion? What legal questions are raised by this proposal? What other considerations are raised by this proposal?

40. *Billing-Related Call Blocking.* Petitioners also express concern over billing-related call blocking in correctional facilities.¹²⁹ Specifically, Petitioners note that ICS providers are increasingly unable or unwilling to enter into agreements with LECs to provide for ICS providers’ billing the LECs’ customers receiving collect calls from inmates. As a result, ICS providers cannot bill for an increasing

¹²⁰ *Id.* at 3253, para. 12.

¹²¹ *Id.* at 3254-55, para. 15. *But see* Embarq Alternative Wright Petition Comments at 3.

¹²² *See* Securus May 10, 2012 *Ex Parte* Letter at 1 and Attach.

¹²³ *See* CURE Alternative Wright Petition Comments at 6-7 (some states have acted to lower or eliminate site commissions but a comprehensive approach is needed). *See also* Leadership Conference June 18, 2012 *Ex Parte* Letter at 2. *See* Alternative Wright Petition at 3-4 (citing the waiver of site commissions in New York State and the reduction of calling rates and commissions in Florida and Washington). *See also* CURE Alternative Wright Petition Comments at 6-7 (some states have acted to lower or eliminate site commissions but a comprehensive approach is needed). *But see* KY DOC Alternative Wright Petition Comments at 2 (states are responsible for state programs and their funding and administration); CCA First Wright Petition Reply at 6 (noting that the FCC should not impose on what is a state issue).

¹²⁴ *See* NASUCA Alternative Wright Petition Reply at 5.

¹²⁵ *See, e.g.,* CCA Alternative Wright Petition Comments at 10-11; SPCA Alternative Wright Petition Comments at 2-3. *But see* Leadership Conference June 18, 2012 *Ex Parte* Letter at 2 (“The market in this case does not drive down rates. Instead, companies offering telephone service in prisons compete to offer the highest commissions to prisons, driving up rates to family members . . .”).

¹²⁶ *See* Alternative Wright Petition at 27-28.

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See id.* at 23-24.

percentage of inmate calls¹³⁰ and thus “block inmate collect calls to numbers served by LECs with which the service providers have no billing arrangements.”¹³¹ Petitioners argue that in facilities where collect calling is the only option, this practice may ultimately prevent inmates from being able to make any telephone calls.¹³² Commenters note that many ICS providers have solutions to “ensure that inmates can contact customers served by these CLECs that refuse to bill for collect calls.”¹³³ Does this practice continue? Petitioners argue that debit calling, which requires pre-payment, may prevent the need to block calls when the ICS provider does not have a billing arrangement with the terminating LEC.¹³⁴ Is this accurate? Do commenters have experience with billing-related call blocking? Can commenters provide data on the average number of calls that are blocked per month and the reason for the blocking? Are there ways, other than mandating debit calling, to deter or prevent billing-related call blocking?

41. *Non-Geographic Numbers.* ICS providers have argued that lowering interstate calling rates may create an incentive for call recipients to obtain telephone numbers from other states, perhaps from wireless or VoIP providers, to take advantage of the lowered interstate rates.¹³⁵ Petitioners counter that the opposite is currently happening; call recipients are obtaining telephone numbers, from wireless or VoIP providers, that are local to the prison to take advantage of lower local calling rates.¹³⁶ Have commenters experienced either of these practices? Do these practices raise any security concerns and if so what are those concerns?

42. *Disabilities Access.* There is evidence in the record to indicate that inmates with hearing disabilities may not have access to ICS at reasonable rates using TTYs.¹³⁷ The record suggests that because the average length of a telephone conversation using a TTY is approximately four times longer than a voice telephone conversation, deaf and hard of hearing inmates who use TTYs have to pay more than their hearing counterparts.¹³⁸ The record also suggests that TTY users have had to pay additional fees for connecting to a TTY relay operator.¹³⁹ We seek comment on the types of ICS access that individuals who are deaf or hard of hearing experience during their incarceration. Where such access to ICS is provided, are the rates the same as those available to those without a disability? If the rates differ, what is that difference and what are the explanations for such difference? We note that section 276(b)(1)(A) specifically exempts “telecommunications relay service calls for hearing disabled

¹³⁰ *See id.* at 23.

¹³¹ *Id.*

¹³² *See id.* at 24.

¹³³ CCA Alternative Wright Petition Comments at 20. Providers may allow one free call to a blocked telephone number so alternative arrangements may be made for future contact. *See id.*

¹³⁴ *See* Alternative Wright Petition at 24.

¹³⁵ *See, e.g.,* CCPS Alternative Wright Petition Comments at 7-8.

¹³⁶ *See* Petitioners’ Nov. 19, 2008 *Ex Parte* Letter at 10. The Commission currently has before it a separate Petition for Declaratory Ruling seeking an order that Securus may block inmate telephone calls that are terminated via a call diversion scheme which it argues is a form of dial-around calling and therefore prohibited in the ICS market. *See* Policies and Rules Concerning Operator Service Providers, Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators, Petition for Declaratory Ruling of Securus Technologies, Inc., CC Docket Nos. 90-313, 94-158, WC Docket No. 09-144 (filed July 24, 2009).

¹³⁷ *See, e.g.,* Letter from amalia deloney, Center for Media Justice, Testimony of Pastor Mark Erlichman (filed Nov. 24, 2012);

¹³⁸ *Id.*

¹³⁹ *Id.*

individuals” from the Commission-established “per call compensation plan” ensuring that ICS providers are “fairly compensated.”¹⁴⁰ How should the Commission take this exemption into account in examining rates?

43. *Updated Data.* We seek updated data from all interested parties and the public, but especially from ICS providers. Commenters note that the record regarding nationwide interstate ICS rates is limited to an “analysis of prison phone contracts nationwide” that was conducted by Prison Legal News in April 2011.¹⁴¹ As such, we seek comment on the accuracy and reliability of the study. In addition, from independent research we have found more-current state rates, which continue to demonstrate a range of prices for ICS calls among states. For example, for a 15-minute interstate call, we found the following rates: \$6.65 in California;¹⁴² \$2.04 in Montana;¹⁴³ \$6.45 in Texas;¹⁴⁴ and \$16.55 in Idaho.¹⁴⁵ We encourage commenters to submit the most up-to-date information available regarding interstate ICS rates to aid us in developing a clearer understanding of the ICS market. This includes per-call and per-minute rates, information on commissions and what percentage of a rate they comprise, the number of disconnected calls, the average length of calls, and how calls break out by type, *i.e.*, collect, prepaid and debit.¹⁴⁶

44. We also seek comment on whether the Alternative Wright Petition and ICS Provider Proposal are grounded in sufficiently-reliable data.¹⁴⁷ For example, the ICS Provider Proposal contains data for less than 30 correctional facilities, none of which impose site commissions.¹⁴⁸ Is this too small a sample, or a non-representative sample, on which to base a nationwide solution? ICS providers argue that in calculating their proposed rate caps the Petitioners relied on data from facilities with low cost

¹⁴⁰ 47 U.S.C. § 276(b)(1)(A).

¹⁴¹ Petitioners’ July 27, 2011 *Ex Parte* Letter, Exh. A at 1.

¹⁴² See California Department of Corrections and Rehabilitation, Notice to Family and Friends (rel. June 2010), available at http://www.cdcr.ca.gov/visitors/docs/GTL_Notices/GTL_English_Notices/GTL_Notice_to_Inmate_Family_re_New_Rates_Prisons-Camps-CCF-FRCCC_English_rev_5-25-10.pdf.

¹⁴³ See Montana Dept. of Corrections; Inmate Phones, <http://cor.mt.gov/Facts/InmatePhones.mcp>x (last visited Dec. 21, 2012).

¹⁴⁴ See Texas Offender Telephone; Friends and Family Enrollment, <http://texasoffenderfriendsandfamily.com/rates.asp> (last visited Dec. 21, 2012).

¹⁴⁵ See Idaho Dept. of Correction; Phone Service, http://www.idoc.idaho.gov/content/prisons/offender_services/phone_services (last visited Dec. 21, 2012).

¹⁴⁶ The Commission previously received this information but seeks more recent data. See, *e.g.*, Letter from Marcus W. Trathen, Counsel to PayTel, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed April 20, 2007).

¹⁴⁷ “The largest flaw in the Alternative Wright Petition . . . is that much of the data the Wright Petitioners rely upon is based upon information in the record from 1999, not current data.” PayTel Alternative Wright Petition Comments at 8. See SPCA Alternative Wright Petition Comments at 3 (the data relied upon in the Alternative Wright Petition is outdated and from several companies that no longer provide ICS).

¹⁴⁸ See ICS Provider Proposal at 4-5. The ICS Provider Proposal also provides no information about the geographic distribution of facilities in the sample, the distribution between state prisons and local prisons (jails), and the distribution between public and privately administrated facilities. Information about these facility characteristics would be relevant to analyzing whether the sample is representative. See also Securus Sept. 20, 2011 *Ex Parte* Letter at 1.

calling.¹⁴⁹ We therefore invite parties to comment on whether the data supporting the First Wright Petition, the Alternative Wright Petition and the ICS Provider Proposal is representative of correctional facilities across the country.¹⁵⁰

45. *Existing Contracts.* Petitioners suggest that if the Commission implements a rate cap it should also mandate a one-year fresh look, transition period for existing ICS contracts.¹⁵¹ Petitioners envision that this transition period would allow for any necessary review and termination or renegotiation of existing ICS contracts in order to introduce rate caps which would be effective by the end of the transition period.¹⁵² Commenters argue that the Commission cannot insert itself into the procurement decisions of correctional agencies,¹⁵³ and that any new ICS-related rules should not be applied to existing contracts but only to contracts entered into after the adoption of new rules.¹⁵⁴

46. Would it be appropriate to mandate a fresh look period or should any new ICS rules apply only to contracts entered into after the adoption of new rules? With renegotiated contracts, how long should the transition period last? What are typical ICS contract terms? Do such contracts usually have change of law provisions that would be triggered by a Commission order? How does the length of existing contracts affect the implementation of any of the proposals discussed above? If commenters provide alternative proposals not discussed above, they should include information on how the contractual process will function with each specific proposal. After implementing a new ICS regime, should the Commission require a periodic rate review to ensure that the rates remain just and reasonable?

47. We encourage comment on any new issues that have arisen in the ICS market or issues that have not been addressed above. We request that commenters provide evidentiary support for their comments and suggestions in this proceeding.

D. Cost/Benefit Analysis of Proposals

48. Acknowledging the potential difficulty of quantifying costs and benefits, we seek to determine whether the proposals above will provide public benefits that outweigh their costs, and we seek to maximize the net benefits to the public from any proposals we adopt. For example, commenters have argued that inmate recidivism is decreased with regular family contact.¹⁵⁵ Accordingly, we seek specific comment on the costs and benefits of the proposals above and any additional proposals received in response to this Notice. We also seek any information or analysis that would help us to quantify these costs or benefits. Further, we seek comment on any considerations regarding the manner in which the

¹⁴⁹ See Letter from Stephanie A. Joyce, Counsel for Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 1 (filed Dec. 17, 2008).

¹⁵⁰ We acknowledge that Securus recently has filed a piece of updated cost information. See Letter from Stephanie A. Joyce, Counsel for Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 1 (filed Oct. 11, 2011).

¹⁵¹ See Alternative Wright Petition at 28.

¹⁵² See *id.*

¹⁵³ See GEO Group Alternative Wright Petition Comments at 17.

¹⁵⁴ See CCA Alternative Wright Petition Comments at 21.

¹⁵⁵ “Communication with families will combat recidivism, which is extremely expensive. A report by the Pew Center on the States found that more than four in ten offenders return to state prisons within three years of being released and reducing recidivism by just ten percent could save the states more than \$653 million in one year. While communication is not a silver bullet, evidence shows it helps to reduce recidivism.” Leadership Conference June 18, 2012 *Ex Parte* Letter at 1.

proposals could be implemented that would increase the number of people who benefit from them, or otherwise increase their net public benefit. We request that interested parties discuss whether, how and by how much they will be impacted in terms of costs and benefits of the proposals included herein. We recognize that the costs and benefits may vary based on such things as the correctional facility served and ICS provider. We request that parties file specific analysis and facts to support any claims of significant costs or benefits associated with the proposals herein.

E. Legal Authority

49. We seek comment on the scope of the Commission's legal authority to regulate ICS.¹⁵⁶ Section 276 of the Communications Act of 1934 (Act) requires that all payphone providers, including ICS providers,¹⁵⁷ be "fairly compensated."¹⁵⁸ We seek comment on our authority to address interstate interexchange ICS rates under section 276(b)(1)(A), which directs the Commission to "establish a per call compensation plan to ensure that all payphone service providers [(PSPs)] are fairly compensated for each and every completed intrastate and interstate call."¹⁵⁹ We also seek comment on our authority to address interstate interexchange ICS rates under section 201(b) of the Act, which requires common carriers to provide service at "just and reasonable" rates and authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."¹⁶⁰ Does the Commission have the jurisdiction to establish per-minute rate caps for privately- and publicly-administered facilities? We encourage commenters to discuss additional sources of legal authority for the Commission to address ICS rates.

50. We note that only a portion of the telephone calls inmates make from correctional facilities are interstate, interexchange ICS.¹⁶¹ Many calls made from correctional facilities are intrastate local or long distance calls, which are regulated by the states.¹⁶² We therefore seek comment on how the Commission can encourage states to reevaluate their policies regarding intrastate ICS rates.

51. We also seek comment on how and whether use of VoIP technologies by ICS providers impacts our analysis under section 276 of the Act. To what extent are providers currently utilizing VoIP technology to provide ICS? Would the use of VoIP technology affect the authority of state regulators to address intrastate ICS rates? What authority regarding ICS rates would control in that circumstance?

¹⁵⁶ See NASUCA Alternative Wright Petition Comments at 3 (maintaining that the Commission "has the authority to impose benchmark rates on interstate interexchange inmate collect and debit card calling."). See also ABA Alternative Wright Petition Comments at 5 (section 201 gives the Commission authority to act). But see Embarq Alternative Wright Petition Comments at 6. See also CCA Alternative Wright Petition Comments at 15 ("[R]equirements for fair compensation under Section 276(b)(1)(A) flow to the *carrier*, and do not establish rights for the end user, in this case the inmates or the parties they call.") (emphasis in original).

¹⁵⁷ 47 U.S.C. § 276(d).

¹⁵⁸ See 47 U.S.C. § 276(b)(1)(A). The questions raised in this NPRM do not relate to the Commission's legal authority to regulate payphone compensation between providers, which is well-established under Section 276 and the Commission's implementing rules. See 47 U.S.C. §§ 276(b), 201(b).

¹⁵⁹ 47 U.S.C. § 276(b)(1)(A). In the *Inmate Calling Order on Remand and NPRM*, the Commission acknowledged the difficulty of determining what constitutes fair compensation for each and every payphone call since the cost of a call depends on how many calls are made from that payphone. See *Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd at 3254-59, paras. 14-26.

¹⁶⁰ See 47 U.S.C. § 201(b).

¹⁶¹ See *supra* para. 8.

¹⁶² See *supra* para. 2.

52. We recognize the important role that states play in managing correctional facilities and in contracting with private correctional management companies. Some parties believe ICS is exclusively a state issue¹⁶³ because it involves management of correctional facilities and therefore its regulation should be left to state correctional officials.¹⁶⁴ How would such a conclusion be reconciled with the Commission's obligations under sections 201 and 276 and the fact that the question of the reasonableness of ICS rates was referred to the Commission under the doctrine of primary jurisdiction?¹⁶⁵ Would the Commission's fulfillment of its obligations under sections 201 and 276 potentially result in preemption of states' exercise of regulatory or police power authority?¹⁶⁶

53. We also seek comment specific to the proposals discussed above. Does the Commission have the authority to disallow an additional call set up charge when inmates' calls are disconnected? Does the Commission have the legal authority to mandate that ICS providers offer debit calling? What legal authority does the Commission have to address the site commissions common in ICS contracts?

IV. PROCEDURAL MATTERS

A. Filing Instructions

54. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). Comments and reply comments on this NPRM must be filed in WC Docket No. 12-375.

- Electronic Filers: Direct cases and other pleadings may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325,

¹⁶³ "Only [state and local government bodies] can comprehensively consider, and are fully empowered to address, the full range of interrelated issues. These issues include not only inmate calling rates but also security requirements, appropriate service levels, and budgetary prerogatives, among other considerations." GTL Alternative Wright Petition Comments at 10. *See also* APCTO Alternative Wright Petition Comments at 3-4.

¹⁶⁴ Embarq Alternative Wright Petition Comments at 1. *See also* GEO Group Alternative Wright Petition Comments at 2, 14.

¹⁶⁵ *See supra* para. 11.

¹⁶⁶ According to one commenter, "[u]nder Petitioners' own legal theory, the FCC would have to rule that commissions paid by CCPS and other providers of inmate calling services are invalid or unlawful in order to grant the relief requested. That puts the FCC in the position of ruling directly upon the validity and lawfulness of states' exercise of their police power." CCPS Alternative Wright Petition Comments at 2. *See also* Embarq Alternative Wright Petition Comments at 5; KY DOC Alternative Wright Petition Comments at 2.

Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

B. Ex Parte Requirements

55. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁶⁷ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

C. Initial Regulatory Flexibility Analysis

56. As required by the Regulatory Flexibility Act of 1980 (RFA),¹⁶⁸ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this Notice, of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth as Appendix C. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided on or before the dates indicated on the first page of this Notice. The Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Notice of

¹⁶⁷ 47 C.F.R. §§ 1.1200 et seq.

¹⁶⁸ See 5 U.S.C. § 603.

Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).¹⁶⁹

V. ORDERING CLAUSES

57. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 1, 2, 4(i)–(j), 201(b) and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)–(j), 201(b) and 276, this Notice of Proposed Rulemaking IS ADOPTED.

58. IT IS FURTHER ORDERED, that the Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking is GRANTED IN PART.

59. IT IS FURTHER ORDERED, that the Petitioners' Alternative Rulemaking Proposal is GRANTED IN PART.

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

61. IT IS FURTHER ORDERED, that pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 C.F.R. §§ 1.4(b)(1) and 1.103(a), that this Notice of Proposed Rulemaking SHALL BE EFFECTIVE on the date of publication of a summary thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁶⁹ See 5 U.S.C. § 603(a).

Appendix A**List of First Wright Petition Commenters and Reply Commenters****Commenters**

American Civil Liberties Union and Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC)
Ad Hoc Coalition for Right to Communicate
Association of Private Correctional and Treatment Organizations (APCTO)
AT&T
Corrections Corporation of America (CCA)
Citizens United for Rehabilitation of Errants (CURE)
Evercom
National Association of State Utility Consumer Advocates (NASUCA)
New York State Dept. of Corrections
Ohio Dept. of Corrections
RBOC Payphone Coalition
T-NETIX
Worldcom

Reply Commenters

American Jail Association
Association of Private Correctional and Treatment Organizations (APCTO)
Corrections Corporation of America (CCA)
Evercom
Martha Wright et al.
MCI
National Association of State Utility Consumer Advocates (NASUCA)
Our Place DC
Qwest
T-NETIX

APPENDIX B**List of Alternative Wright Petition Commenters and Reply Commenters****Commenters**

American Bar Association
Association of Private Correctional and Treatment Organizations (APCTO)
Citizens United for Rehabilitation of Errants (CURE)
(Ad Hoc) Coalition for the Right to Communicate
Consolidated Communications Public Services, Inc. (CCPS)
Corrections Corporation of America (CCA)
Embarq
GEO Group, Inc. (GEO Group)
Global Tel*Link (GTL)
Idaho Dept. of Correction
Innocence Project and the Incarcerated Mothers Program
Kentucky Dept. of Corrections (Kentucky DOC)
Legal Services for Prisoners with Children
National Association of State Utility Consumer Advocates (NASUCA)
North Carolina Prisoner Legal Services, Inc.
Office of the People's Counsel, District of Columbia
Our Place, DC and Hope House, DC
Pay Tel Communications, Inc.
Prison Legal News (PLN)
Public Communications Services, Inc. (PCS)
Sentencing Project, et al.
Southern Public Communications Association (SPCA)
T-NETIX, Inc. and Evercom Systems, Inc. (T-NETIX)
Virginia Dept. of Corrections (Virginia DOC)

Reply Commenters

Consolidated Communications Public Services, Inc. (CCPS)
GEO Group, Inc. (GEO Group)
Martha Wright, et al.
National Association of State Utility Consumer Advocates (NASUCA)
T-NETIX, Inc. and Evercom Systems, Inc. (T-NETIX)

APPENDIX C

Initial Regulatory Flexibility Analysis (IRFA)

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (NPRM or Notice).² Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).³ In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.⁴

A. Need for, and Objectives of, the Notice

2. This NPRM seeks comment on a variety of issues relating to inmate calling service (ICS). As discussed in the Notice, the NPRM is the result of two Petitions for Rulemaking. In the NPRM the Commission seeks information on such things as the ICS market, ICS rates and ICS options. To allow informed decision making, the NPRM seeks comment on a number of specific topics.

B. Legal Basis

3. The legal basis for any action that may be taken pursuant to the NPRM is contained in sections 1, 2, 4(i)-(j), 201(b) and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b) and 276.

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

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁵ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁶ In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.⁷ A “small-business

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² We note that an Initial Regulatory Flexibility Analysis was conducted in the *Inmate Order on Remand and NPRM*. See *Inmate Order on Remand and NPRM*, 17 FCC Rcd at 3279-83, paras. 80-89.

³ See 5 U.S.C. § 603(a).

⁴ See *id.*

⁵ See 5 U.S.C. § 603(b)(3).

⁶ See 5 U.S.C. § 601(6).

⁷ See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the 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.”

concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁸

5. **Small Businesses.** Nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.⁹

6. **Wired Telecommunications Carriers.** The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.¹⁰ According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.¹¹ Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1,000 employees or more.¹² Thus, under this size standard, the majority of firms can be considered small.

7. **Local Exchange Carriers (LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹³ According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.¹⁴ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹⁵ Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by our action.

8. **Incumbent Local Exchange Carriers (incumbent LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁶ According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.¹⁷ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.¹⁸ Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

⁸ See 15 U.S.C. § 632.

⁹ See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://www.sba.gov/sites/default/files/sbfaq.pdf> (last visited July 11, 2012).

¹⁰ 13 C.F.R. § 121.201, NAICS code 517110.

¹¹ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

¹² See *id.*

¹³ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁴ See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

¹⁵ See *id.*

¹⁶ See 13 C.F.R. § 121.201, NAICS code 517110.

¹⁷ See *Trends in Telephone Service* at Table 5.3.

¹⁸ See *id.*

9. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”¹⁹ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.²⁰ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

10. **Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²¹ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.²² Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.²³ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.²⁴ In addition, 72 carriers have reported that they are Other Local Service Providers.²⁵ Of the 72, 70 have 1,500 or fewer employees and two have more than 1,500 employees.²⁶ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by our action.

11. **Interexchange Carriers (IXCs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁷ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.²⁸ Of these 359 companies, an estimated 317 have 1,500 or fewer employees and

¹⁹ 5 U.S.C. § 601(3).

²⁰ See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a); see also 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

²¹ See 13 C.F.R. § 121.201, NAICS code 517110.

²² See *Trends in Telephone Service* at Table 5.3.

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ See 13 C.F.R. § 121.201, NAICS code 517110.

²⁸ See *Trends in Telephone Service* at Table 5.3.

42 have more than 1,500 employees.²⁹ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by our action.

12. **Local Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁰ According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.³¹ Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.³² Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our action.

13. **Toll Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³³ According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.³⁴ Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.³⁵ Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

14. **Other Toll Carriers.** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁶ According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.³⁷ Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.³⁸ Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by our action.

15. **Payphone Service Providers (PSPs).** Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁹ According to Commission data,⁴⁰ 535 carriers have reported that they are engaged in the provision of payphone services. Of these, an

²⁹ *See id.*

³⁰ *See* 13 C.F.R. § 121.201, NAICS code 517911.

³¹ *See Trends in Telephone Service* at Table 5.3.

³² *See id.*

³³ *See* 13 C.F.R. § 121.201, NAICS code 517911.

³⁴ *See Trends in Telephone Service* at Table 5.3.

³⁵ *See id.*

³⁶ *See* 13 C.F.R. § 121.201, NAICS code 517110.

³⁷ *See Trends in Telephone Service* at Table 5.3.

³⁸ *See id.*

³⁹ *See* 13 C.F.R. § 121.201, NAICS code 517110.

⁴⁰ *See Trends in Telephone Service* at Table 5.3.

estimated 531 have 1,500 or fewer employees and four have more than 1,500 employees.⁴¹ Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

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

16. In this Notice, the Commission seeks public comment on options to reform the inmate calling service market. Possible new rules could affect all ICS providers, including small entities. In proposing these reforms, the Commission seeks comment on various options discussed and additional options for reforming the ICS market.

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

17. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”⁴²

18. The NPRM seeks comment from all interested parties. The Commission is aware that some of the proposals under consideration may impact small entities. Small entities are encouraged to bring to the Commission’s attention any specific concerns they may have with the proposals outlined in the NPRM. In addition, the Commission seeks updated data, as described in the NPRM, from small entities that may be impacted by Commission action on ICS.

19. The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the NPRM, in reaching its final conclusions and taking action in this proceeding. Specifically, the Commission will conduct a cost/benefit analysis as part of this NPRM and consider the public benefits of any such requirements it might adopt, to ensure that they outweigh their impacts on small businesses. Further, these requirements are necessary to ensure that the statutory goals of Section 276 of the Act are met.

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

20. None.

⁴¹ See *id.*

⁴² 5 U.S.C. § 603(c)(1)–(c)(4).

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

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

I'm pleased that we're moving forward with today's Notice of Proposed Rulemaking on interstate prison phone rules and rates. I want to particularly thank Commissioner Clyburn for her leadership on this important issue, which affects the families of inmates, prisoner rehabilitation, and prison security. I look forward to working with my colleagues and all stakeholders as we move forward.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

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

I am pleased to support this interstate prison phone rulemaking which will refresh the record and allow the Commission to evaluate these issues with updated data. I commend Commissioner Clyburn for her diligence on these issues, and I look forward to working with all of my colleagues and the full range of stakeholders. As the record develops, I will focus, in particular, on the Commission's legal authority.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

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

Today, we officially answer the call from tens of thousands of consumers who have written, emailed, and yes, phoned the Commission, pleading for relief on interstate long distance rates from correctional facilities. As discussed in the Notice, the nearly ten year old "Wright Petition," was filed on behalf of friends and family of the incarcerated, who generally pay significantly higher toll rates than those offered for the typical interstate, long distance call. This NPRM requests information from providers of inmate calling services in order for the Commission to determine whether those rates are just and reasonable. It also seeks comment on various options submitted in the record, to limit those rates. I encourage providers to file detailed cost information and to work with the Commission, as well as the interested consumer and public interest groups, to find workable solutions to this important issue.

The telephone is a crucial instrument for the incarcerated, and those who care about them, because voice calling is often the only communications option available. Most inmates along with their families and friends are low-income, so in-person visits due to distance and expense are infrequent. It is not uncommon for state prisons to be located hundreds of miles away from urban centers, but even in places where the facility is nearby, the engagement often requires a significant amount of time to clear security. And because many of these complexes are frequently overcrowded and ill-equipped to handle the volume of visitors, the wait (not even to mention the economic burden of missing work, etc.) is quite severe.

So why should the rest of us care? Maintaining contact with family and friends during incarceration not only helps the inmate, but it is beneficial to our society as a whole. There are well over two million children with at least one parent behind bars and regardless of their circumstances, both children and parents gain from regular contact with one another. Studies also show that those released are less likely to reoffend if they are able to maintain relationships with their loved ones while they are in prison. With seven hundred thousand individuals released every year from these institutions, it is crucial that we do whatever we can to strengthen family ties before these individuals return home. One sure way to realize this is through the provisioning of affordable phone service. The overall costs of not doing so are too great, for those who re-offend place a substantially higher economic burden on taxpayers than any lost proceeds that would result from lower prison phone rates.

It is important, however, that any steps taken do not jeopardize quality phone service to and from correctional facilities, and that the security features needed by law enforcement remain intact. But the time is now for us to have an honest discussion about the use of site commissions and their impact on low-income families. We are seeking that information in this Notice.

I want to thank the Chairman and my colleagues for their work on and their support for this Notice, as well as our staff who spent many hours sifting through the thousands of pages of this decade old proceeding. It also is important to recognize the hard work of the community-based social, media justice, religious, legal and immigration organizations, the FCC's own Consumer Advisory Committee and the National Association of Regulatory Utility Commissioners. All have been bringing significant attention to this issue and have urged this Commission and our state counterparts to review these rates and act, where necessary, to protect consumers. As a result, we have seen several states take action to lower their rates and today, I am pleased that this Commission is gathering the information it needs to ensure that all consumers have access to just and reasonable interstate rates.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

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

With this rulemaking, the Commission takes a step toward addressing the high cost that prison inmates and their families must pay for phone service. This is not just an issue of markets and rates; it is a broader issue of social justice. Consider that across the country roughly 2.7 million children have at least one parent in prison. In many cases, inmates are 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 these families can stay connected. But when a single call may cost as much as a month of unlimited phone service, the financial burden of staying in touch may be too much for inmates' families to bear. This harms the families and children of the incarcerated. But it goes beyond that. It harms all of us because we know that regular contact between prisoners and family members reduces recidivism.

This rulemaking presents an opportunity to ask questions and refresh the record on interstate inmate payphone rates. The record this proceeding has generated so far has shown that inmate rates can vary tremendously based on the state law involved, the type of prison facility, and the specific contract for services. Since site commission fees paid by inmate telephone service providers to prisons may be used to cover the costs of inmate security, as we move forward we must ensure that our efforts to reduce interstate rates do not compromise prison safety.

Finally, I want to thank Chairman Genachowski for initiating this proceeding, and Commissioner Clyburn for her advocacy on this issue on behalf of prisoners and their families. I look forward to reviewing the record, and working with my colleagues to help find a way to lower these rates—and in turn, help inmates and their families stay connected.

**STATEMENT OF
COMMISSIONER AJIT PAI**

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

Today we launch a proceeding to consider new rules for interstate inmate calling services pursuant to our duty under the Communications Act to ensure that rates for interstate telecommunications services are just and reasonable.¹ We do so in response to calls to action from hundreds of inmates and their families, Members of Congress,² the National Association of Regulatory Utility Commissioners,³ numerous civil rights organizations, the FCC's own Consumer Advisory Committee,⁴ and my colleague, Commissioner Mignon Clyburn.⁵

But it should not take a letter from Congress, it should not take manifold resolutions, it should not take hundreds of individual signatures to get the FCC to act on a *nine-year-old* petition for rulemaking. Martha Wright came to the Commission nine years ago, seeking redress for the high rates she paid to speak with her then-incarcerated grandson. When she did so, she could not have expected to wait longer for action on her petition than it took the prison system to release her grandson. Ms. Wright expected—and deserved—better. And although our response is late, I am nonetheless pleased to support today's action.

As a general matter, I believe that prices should be set by the free market rather than by government fiat. At the same time, however, we must recognize that choice and competition are not hallmarks of life behind bars. Inmates cannot choose among multiple carriers for lower rates. Instead, prison administrators select the service provider, and their incentives do not necessarily align with those who are incarcerated. Accordingly, I am open to exploring whether there is action we can and should take, consistent with our legal authority, to address the issues identified in Martha Wright's petition for rulemaking.

¹ 47 U.S.C. § 201(b).

² Letter from Representatives Henry A. Waxman and Bobby L. Rush to Julius Genachowski, Chairman, FCC (Sept. 12, 2012), available at <http://go.usa.gov/gAU9>.

³ NARUC, *TC-1 Resolution Urging the FCC to take Action to Ensure Fair and Reasonable Telephone Rates from Correctional and Detention Facilities* (adopted Nov. 14, 2012), available at <http://bit.ly/VWFVFB>.

⁴ FCC Consumer Advisory Committee, Recommendation Regarding Affordable Phone Access for Incarcerated Individuals and Families (adopted Sept. 21, 2012).

⁵ Statement of FCC Commissioner Mignon L. Clyburn on Meeting Petitioners Martha Wright and Ulandis Forte and Screening the Award-Winning Film *Middle Of Nowhere* (Sept. 24, 2012), available at <http://go.usa.gov/gARH>.