

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

In the Matter of
Rates for Interstate Inmate Calling Services;
Pay Tel Communications, Inc.'s Petition for
Waiver of Interim Interstate ICS Rates
WC Docket No. 12-375

ORDER

Adopted: February 11, 2014

Released: February 11, 2014

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we find good cause to grant a limited, temporary waiver of the interim interstate inmate calling service (ICS) rate caps to Pay Tel Communications, Inc. (Pay Tel). The rate cap rule at issue was adopted by the Federal Communications Commission (FCC or Commission) in the Inmate Calling Report and Order and FNPRM and will become effective on February 11, 2014. For the reasons discussed below and with the limitations and additional commitments identified herein, we grant Pay Tel a narrow waiver of the Commission's ICS rate cap rule for nine months unless the Commission decides to take action on intrastate ICS rate caps sooner, then such Commission Order would supersede this waiver. This waiver will provide Pay Tel with sufficient time to pursue any necessary intrastate rate changes through the applicable state processes in light of the aggregate impact of Pay Tel's ability to recover its costs with the application of the interim interstate ICS rate caps.

II. BACKGROUND

2. In 2003, a group of inmates, their friends and families as well as advocacy groups (collectively Wright Petitioners) filed a rulemaking petition with the Commission to address ICS practices. The petition requested that the Commission prohibit exclusive ICS contracts and collect-call-only restrictions in correctional facilities. In 2007, the same petitioners filed an alternative rulemaking petition, requesting that the Commission reform high ICS rates by requiring a debit-calling option in

1 Pay Tel Communications, Inc.'s Petition for Waiver of Interim Interstate ICS Rates, WC Docket 12-375 at 1 (filed Jan. 8, 2014) (Petition).

2 Rates for Interstate Inmate Calling Services, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd 14107 (2013) (Inmate Calling Report and Order and FNPRM or Order); pets. for stay granted in part sub nom. Securus Techs. v. FCC, No. 13-1280 (D.C. Cir. Jan. 13, 2014) (Securus Techs. Partial Stay Order); pets. for review pending sub nom. Securus Techs. v. FCC, No. 13-1280 (D.C. Cir. Nov. 14, 2013) (and consolidated cases).

3 See generally 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 at 3 (filed Nov. 3, 2003) (First Wright Petition).

4 Id.

correctional facilities, prohibiting per-call charges, and establishing rate caps for interstate ICS.<sup>5</sup> The Commission sought and received comment on both petitions.<sup>6</sup> In December 2012, the Commission granted the two petitions for rulemaking and adopted a notice of proposed rulemaking seeking comment on their proposals.<sup>7</sup> The Commission released the *Inmate Calling Report and Order and FNPRM* on September 26, 2013.<sup>8</sup> On January 13, 2014, the United States Court of Appeals for the District of Columbia Circuit issued a partial stay of the *Inmate Calling Report and Order and FNPRM*, pending the court's resolution of petitions for review of the *Order*.<sup>9</sup> The *Partial Stay Order* did not stay the interim rate cap rule at issue in this *Order*.<sup>10</sup>

3. Section 201 of the Communications Act of 1934, as amended (Act) requires that all carriers' interstate rates be just and reasonable.<sup>11</sup> To be just and reasonable, rates must ordinarily be cost-based absent an explanation for a departure<sup>12</sup> as well as include a reasonable return.<sup>13</sup> Section 276 of the Act additionally requires that payphone rates be fair.<sup>14</sup> As part of its analysis in the *Inmate Calling Report and Order and FNPRM*, the Commission found that "the marketplace alone has not ensured that

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<sup>5</sup> See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007) (Alternative Wright Petition).

<sup>6</sup> 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, 2003 WL 23095474 (Wireline Comp. Bur. 2003); *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).

<sup>7</sup> See generally *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012) (*2012 ICS NPRM*). The *2012 ICS NPRM* incorporated relevant comments, reply comments and *ex parte* filings from the prior ICS docket, CC Docket No. 96-128, into WC Docket No. 12-375. See *2012 ICS NPRM*, 27 FCC Rcd at 16636, para. 15.

<sup>8</sup> See generally *Inmate Calling Report and Order and FNPRM*.

<sup>9</sup> See generally *Securus Techs. Partial Stay Order*. The following rules are stayed pending resolution of the appeal: 47 C.F.R. §§ 64.6010 (Cost-Based Rates for Inmate Calling Services); 64.6020 (Interim Safe Harbor); and 64.6060 (Annual Reporting and Certification Requirement).

<sup>10</sup> Specifically, the following rules are not stayed by the *Securus Techs. Partial Stay Order*: 47 C.F.R. §§ 64.6000 (Definitions); 64.6030 (Inmate Calling Services Interim Rate Cap); 64.6040 (Rates for Telecommunications Relay Service (TRS) Calling); and 64.6050 (Billing-Related Call Blocking). See generally *id.* The court also did not issue a general stay of the *Order*, leaving in place, for example, the Commission's provision for a one-time, mandatory data collection that will enable the Commission to establish permanent rules

<sup>11</sup> See 47 U.S.C. § 201(b).

<sup>12</sup> See *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14131, para. 45.

<sup>13</sup> See *id.* at 14134, para. 53.

<sup>14</sup> See 47 U.S.C. § 276(b). "The Commission has previously found the term 'fairly compensated' permits a range of compensation rates that could be considered fair, but that the interests of both the payphone service providers and the parties paying the compensation must be taken into account." *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14115, para. 14 (internal citation omitted). The Commission has previously addressed section 276 and its application to ICS, noting that "[u]nless an ICS provider can show that (i) revenue from its interstate or intrastate calls fails to recover, for each of these services, both its direct costs and some contribution to common costs, or (ii) the overall profitability of its payphone operations is deficient because the provider fails to recover its total costs from its aggregate revenues (including both revenues from interstate and intrastate calls), then we would see no reason to conclude that the provider has not been 'fairly compensated.'" *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, CC Docket No. 96-128, 17 FCC Rcd 3248, 3257-58, para. 23 (2002) (*Inmate Calling Order on Remand and NPRM*) (emphasis in original).

interstate ICS rates are just and reasonable and they are fair to consumers, as well as providers.”<sup>15</sup> For example, the record in this docket showed that “inmates, or those whom they call, pay as much as \$17.30, \$10.70 or \$7.35 for a 15-minute interstate collect call, depending upon the facility where the inmates are incarcerated.”<sup>16</sup> The Commission concluded “that the rate reforms we begin in this Order are necessary to ensure [interstate ICS rates] are just and reasonable”<sup>17</sup> and “necessary to implement section 276(b)(1)’s ‘fair compensation’ directive.”<sup>18</sup>

4. As part of interstate ICS rate reform, the Commission adopted interim interstate ICS rate caps of \$0.21 per minute for interstate debit and prepaid calling and \$0.25 per minute for collect calling “to place an upper limit on rates providers may charge for interstate ICS.”<sup>19</sup> The Commission determined that the interim rate caps established in the *Order* were “set at sufficiently conservative levels to account for all costs ICS providers will incur in providing ICS.”<sup>20</sup> The interim rate caps were set based on cost studies submitted in the proceeding, including a cost study submitted by Pay Tel.<sup>21</sup> The Commission also reaffirmed its earlier finding that site commission payments, “fees paid by ICS providers to correctional facilities or departments of corrections in order to win the exclusive right to provide inmate phone service,”<sup>22</sup> are an apportionment of profit, not a cost of providing ICS.<sup>23</sup> Waiver of the interstate ICS rate caps is available for those “extraordinary circumstances” where a particular ICS provider “believes that it has cost-based rates for ICS that exceed [the] interim rate caps.”<sup>24</sup>

5. *Pay Tel’s Petition.* Pay Tel is an ICS provider based in North Carolina that currently serves correctional facilities in thirteen states.<sup>25</sup> Pay Tel filed its Petition for waiver of the Commission’s interim interstate ICS rate caps on January 8, 2014.<sup>26</sup> The Wireline Competition Bureau (Bureau) released a Public Notice seeking comment on Pay Tel’s Petition on January 9, 2014.<sup>27</sup> As described below, interested parties commented on the Petition and Pay Tel filed supplementary information and modified its request in response to questions raised by Bureau staff.<sup>28</sup>

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<sup>15</sup> *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14131, para. 45.

<sup>16</sup> *Id.* at 14126, para. 35.

<sup>17</sup> *Id.* at 14131, para. 45.

<sup>18</sup> *Id.* at 14131-32, para. 46.

<sup>19</sup> *Id.* at 14147, para. 73.

<sup>20</sup> *Id.* at 14147, para. 74.

<sup>21</sup> *Id.* at 14148, para. 76.

<sup>22</sup> *Id.* at 14110, para. 3.

<sup>23</sup> *Id.* at 14135, n.199. *See also id.* at 14135, para. 54.

<sup>24</sup> *Id.* at 14153, paras. 82-83.

<sup>25</sup> Pay Tel’s waiver request is based on second quarter 2013 data when it operated in only ten states, including Florida, Georgia, Kansas, Missouri, North Carolina, Ohio, South Carolina, Tennessee, Virginia, and Washington. *See* Petition at 16-17. Pay Tel did not include in its shortfall analysis or its request for relief new facilities added in three states (New Mexico, California and Maryland) after the second quarter of 2013. *See* Petition at nn.4 & 43.

<sup>26</sup> In support of its Petition, Pay Tel also filed: a “Pay Tel Cost Study” (includes confidential information); its “Wood Intrastate Shortfall Analysis”; a summary of its “Revenue Shortfall by State”; a “Summary of Intrastate Local Rate Restrictions”; the specific “Intrastate Local Rate Restrictions”; “Pay Tel’s Existing Rates by Facility” and signed declarations from its President and its economic and financial consultant. *See generally* Petition.

<sup>27</sup> *Comment Sought on Pay Tel Communications, Inc. Waiver Petition*, WC Docket No. 12-375, Public Notice, DA 14-27 (Wireline Comp. Bur. rel. Jan. 9, 2014).

<sup>28</sup> *See infra* para. 9.

6. In its Petition, Pay Tel requests a waiver of the Commission's rule establishing interim interstate ICS rate caps<sup>29</sup> and approval to continue to charge its current interstate ICS rates.<sup>30</sup> Pay Tel acknowledges that the Commission relied on Pay Tel's Cost Study in setting the interim rate caps<sup>31</sup> and Pay Tel expressly bases its waiver request on the total company average per minute costs it produced.<sup>32</sup> We agree that the Pay Tel Cost Study accurately represents Pay Tel's costs of providing ICS.<sup>33</sup> Pay Tel asserts that here, however, there is good cause for a waiver because the *Order* "fails to properly consider the impact that below-cost intrastate rate restrictions will have when working in tandem with the *Order*'s interstate rate caps."<sup>34</sup> Specifically, Pay Tel asserts that it "cannot recover its costs on a holding company level if it is required to charge the *Order*'s interim interstate rates."<sup>35</sup> Pay Tel bases this assertion on rate restrictions in five of the ten states where it provided service in 2012, that are mandated by either "the applicable state regulatory requirements or by the facility provider."<sup>36</sup> Pay Tel claims such restrictions require it to provide intrastate service at below-average-cost rates.<sup>37</sup> Because of the interaction between these below-average-cost intrastate rates and the limits imposed by the interim interstate rate cap, Pay Tel asserts that it cannot meet its total company revenue requirement while complying both with our interstate rate caps and the relevant state rate requirements.<sup>38</sup> Pay Tel estimates this disparity will result in a shortfall of approximately 11 percent of its total 2012 revenue.<sup>39</sup> The shortfall, Pay Tel asserts, leaves it in an "economically unsustainable situation" that will force it either to go "out of business" or to "substantially curtail its operations," likely by terminating service in the smallest facilities it serves.<sup>40</sup>

7. In addition to its request for a waiver of the Commission's rate caps, Pay Tel further requests that the Commission allow Pay Tel "to continue charging its existing interstate rates."<sup>41</sup> The Petition states that "this relief will permit Pay Tel to remain in business as the Commission continues to investigate the appropriate regulatory environment for the ICS industry."<sup>42</sup> Pay Tel also commits that it "will not charge interstate rates any greater than its existing rates" and "will remain bound by the Ancillary Charges provisions of the *Order*'s rate requirements and commit[ ] to charging no more than its

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<sup>29</sup> See 47 C.F.R. § 64.6030; see also Petition at 1, 23-25. Pay Tel further requests the Commission either determine that its rates comply with the Commission's rule that ICS rates be cost-based or grant a waiver of such requirement. *Id.* Given the Court of Appeals' stay of this rule pending its resolution of appeals of the *Order*, the Bureau does not address this request. We further note that Pay Tel neither seeks a waiver of the other rules adopted by the *Order*, nor of the provisions of the *Order* generally. See Petition at 22-23.

<sup>30</sup> Based on Pay Tel's reported total interstate revenues and total interstate minutes of use, staff calculates that Pay Tel's interstate ICS rates average \$0.81 per minute. See Petition at Exh. B.

<sup>31</sup> See Petition at 4.

<sup>32</sup> See, e.g., Petition at 6 ("In support of its waiver request . . . Pay Tel submits . . . a company-level cost study."); Petition at 7 ("As shown in the study, Pay Tel's cost of providing ICS are [\$0.21 per minute for debit calls].").

<sup>33</sup> See *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14151, n.293.

<sup>34</sup> Petition at 12.

<sup>35</sup> *Id.* at 1.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* at 2.

<sup>39</sup> See *id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 24.

<sup>42</sup> *Id.* at 22.

current fees” in the event its waiver request is granted.<sup>43</sup> Pay Tel asserts such relief will be in the public interest in that it will ensure the viability of Pay Tel and avoid a reduction in competition among ICS providers,<sup>44</sup> it will mean that “ICS services will likely not be curtailed,”<sup>45</sup> and it will not “result in a financial windfall to Pay Tel.”<sup>46</sup> Pay Tel requests that the Commission review and approve its Petition before the rate caps adopted in the *Order* take effect on February 11, 2014.<sup>47</sup>

8. The Wright Petitioners filed comments on the Petition, stating that they “do not oppose FCC review of the Waiver Request to determine if relief is necessary.”<sup>48</sup> The Wright Petitioners request that if the Commission determines that a waiver of the rate caps for Pay Tel is necessary, that the waiver be “narrowly tailored.”<sup>49</sup> Pay Tel submitted reply comments, noting that no commenting parties opposed the relief Pay Tel requested.<sup>50</sup> The Human Rights Defense Center (HRDC) also submitted comments that address data, analyses, and claims made by Pay Tel in support of its waiver Petition.<sup>51</sup> While HRDC does not dispute Pay Tel’s financial and operational data, it questions Pay Tel’s assertion that its operations would be financially unsustainable under the provisions of the *Order*.<sup>52</sup> HRDC asserts that Pay Tel “has not addressed other options which remain available to it.”<sup>53</sup> Specifically, HRDC asserts that Pay Tel

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<sup>43</sup> *Id.* Ancillary charges are non-call-related charges imposed on ICS end users, for example, to set up or add money to prepaid or debit calling accounts, refund any outstanding money in a prepaid or debit calling account, or to deliver ICS calls to a wireless number. *See Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14156, para. 90. The Commission expressed concern over the possibility of ICS providers “circumventing our reforms by augmenting ancillary services charges beyond the costs of providing such services.” *Inmate Calling Report and Order and FNPRM* 28 FCC Rcd at 14158-59, para. 92. Specifically, the Commission required that in keeping with its action on interstate ICS rates, ancillary service charges “must be cost-based, and to be compensable costs must be reasonably and directly related to provision of ICS.” *Inmate Calling Report and Order and FNPRM* 28 FCC Rcd at 14157-58, para. 91. We note that the rule requiring “Cost-Based Rates for Inmate Calling Services” which states, “[a]ll rates charged for Inmate Calling Services and Ancillary Charges must be based only on costs that are reasonably and directly related to the provision of ICS,” was stayed in the *Securus Techs. Partial Stay Order*. *See generally Securus Techs. Partial Stay Order*.

<sup>44</sup> *See* Petition at 24.

<sup>45</sup> *Id.* at 25.

<sup>46</sup> *Id.* at 22.

<sup>47</sup> *See id.* at 2.

<sup>48</sup> Wright Petitioners Jan. 16, 2014 Waiver Comments at 2.

<sup>49</sup> *Id.* at 3. Securus also filed comments on the Petition but such comments did not address the merits of the request. *See Securus* Jan. 16, 2014 Waiver Comments at 3.

<sup>50</sup> Pay Tel Jan. 21, 2014 Waiver Reply Comments.

<sup>51</sup> HRDC’s comments were submitted as reply comments in response to the *FNPRM* in this docket. *See* HRDC *FNPRM* Reply Comments. HRDC’s comments addressed data and analyses previously submitted by Pay Tel in an *ex parte* filing. The data and analyses submitted in Pay Tel’s *ex parte* submission were consistent with the supporting material submitted by Pay Tel as part of its Petition. *See generally* Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Dec. 9, 2013).

<sup>52</sup> *See* HRDC *FNPRM* Reply Comments at 7.

<sup>53</sup> HRDC *FNPRM* Reply Comments at 2. Specifically, HRDC asserts that Pay Tel could renegotiate its contracts, seek waivers from state regulatory agencies’ rules where necessary, or reconsider doing business in states that impose below-cost rate requirements. *See id.* at 7-8. Pay Tel notes that simply ceasing operations in certain states, as HRDC suggests, could result in inmates losing service which we note would be contrary to the purposes of section 276 and the *Order*. *See* Pay Tel January 21, 2014 Waiver Reply Comments at 7. HRDC also notes that in three states that regulate intrastate ICS rates, a significant proportion of Pay Tel’s contracts generate net positive revenue. HRDC *FNPRM* Reply Comments at 2. Review of the intrastate rates charged by Pay Tel indicate that while not all of Pay Tel’s intrastate rates are set at the maximum allowed by state regulation, rates for the great majority of its intrastate call volume are at the caps set by the relevant states. The net intrastate surplus HRDC

(continued...)

could renegotiate its contracts, seek waivers from state regulatory agencies' rules where necessary, or reconsider doing business in states that impose below-cost rate requirements.<sup>54</sup> In its reply comments, Pay Tel notes that HRDC "has not identified any errors in the analysis present[ed] by Pay Tel."<sup>55</sup>

9. *Pay Tel's Supplemental Filings.* In evaluating Pay Tel's Petition, Bureau staff questioned whether allowing Pay Tel to continue to charge its existing rates following the effective date of the rules<sup>56</sup> would result in Pay Tel recovering interstate revenues that are currently used to pay site commissions that are based on interstate revenues.<sup>57</sup> The Commission confirmed in the *Order* that such site commission payments "are not part of the cost of providing ICS."<sup>58</sup> In response to staff inquiries, Pay Tel filed additional data and analyses in support of its waiver request and revised its request for relief.<sup>59</sup> Specifically, Pay Tel filed a revised shortfall analysis, information on change of law provisions in its contracts, and interstate site commission data.<sup>60</sup> Pay Tel also provided Bureau staff with its audited financial statements.<sup>61</sup> Pay Tel further supplemented its Petition to add a "commitment that Pay Tel will not assess a rate for interstate long distance calls in excess of \$0.46/minute for existing or new clients."<sup>62</sup> Additionally, Pay Tel commits not to charge interstate rates at any correctional institution any greater than its existing rates,<sup>63</sup> and to implement the "rate of \$0.46/minute as a 'postalized' rate without any additional per-call surcharges" (except in facilities with interstate rates currently below the proposed \$0.46/minute rate).<sup>64</sup> Pay Tel states that "[t]his revised commitment reflects . . . the elimination of interstate commissions from Pay Tel's interstate rates."<sup>65</sup> Pay Tel asserts that grant of the requested relief will be in the public interest since it "will, in no way, result in a financial windfall to Pay Tel,"<sup>66</sup> "will

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identifies for a number of Pay Tel's facilities in rate-capped states is relatively minor in amount and would be insufficient for Pay Tel to recover its costs.

<sup>54</sup> See HRDC *FNPRM* Reply Comments at 7-8.

<sup>55</sup> See Pay Tel Jan. 21, 2014 Waiver Reply Comments at 5.

<sup>56</sup> See Petition at 24.

<sup>57</sup> The Commission made clear in the *Order* that site commission payments are not a direct cost of providing ICS. See *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14135-38, paras. 54-58.

<sup>58</sup> *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14135, para. 54.

<sup>59</sup> Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket 12-375 (filed Jan. 23, 2014) (revised waiver request) (Pay Tel Third Supplemental Filing).

<sup>60</sup> See Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Jan. 16, 2014) (revised shortfall analysis, change in law provision information, and interstate site commission data) (Pay Tel First Supplemental Filing) (includes confidential information).

<sup>61</sup> Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Jan. 16, 2014) (financial statements) (Pay Tel Second Supplemental Filing) (includes confidential information).

<sup>62</sup> Pay Tel Third Supplemental Filing at 1-2.

<sup>63</sup> "This commitment would not apply in those facilities with rates currently below the proposed \$0.46/minute rate (as to those rates, Pay Tel does not have the contractual flexibility to unilaterally increase rates). As a result, this proposal would not result in interstate rate increases in any existing Pay Tel facility." *Id.* at n.3.

<sup>64</sup> *Id.* at 2, n.3.

<sup>65</sup> *Id.* at 2.

<sup>66</sup> *Id.*

permit Pay Tel to remain in business,”<sup>67</sup> and will “ensur[e] that consumers of interstate services receive meaningful decreases in interstate rates.”<sup>68</sup>

10. *Applicable Waiver Standard.* Pay Tel seeks a waiver under the Commission’s general waiver rule as informed by additional guidance included in the *Order*.<sup>69</sup> Section 1.3 of the Commission’s rules states that the Commission’s rules may be waived for good cause shown.<sup>70</sup> Waiver of the Commission’s rules “is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”<sup>71</sup> In the *Order*, the Commission stated that “the petitioner bears the burden of proof to show good cause exists to support the request” and identified factors to be considered in reviewing a waiver request.<sup>72</sup> It further stated that ICS providers “will have opportunities to seek waivers to the extent the framework adopted in this Order does not adequately address their legitimate costs of providing ICS.”<sup>73</sup> The Commission noted that “petitions for waiver of the interim rate caps would account for extraordinary circumstances.”<sup>74</sup> The Commission concluded that, for both substantive and administrative reasons, it would evaluate waivers at the holding company level.<sup>75</sup> It delegated authority to the Bureau to “request additional information necessary for its evaluation of waiver requests and to approve or deny all or part of requests for waiver of the interim rate caps adopted herein.”<sup>76</sup>

### III. DISCUSSION

11. We conclude that Pay Tel has met its burden of proof to establish good cause to grant a limited, temporary waiver of the Commission’s interim ICS rate cap rule. Based on a thorough review of the information provided by Pay Tel, we conclude that Pay Tel has shown that the combination of its existing below-average-cost state ICS rates and the Commission’s interim rate caps, which accurately reflect its average total company costs constitute “extraordinary circumstances”<sup>77</sup> that justify temporary waiver of the Commission’s rate caps, and that the waiver will be in the public interest.<sup>78</sup> We note that Pay Tel’s data submissions adequately address the factors relevant to the review of its Petition as

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Petition at 1, 6.

<sup>70</sup> “Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” 47 C.F.R. § 1.3.

<sup>71</sup> *Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular* 897 F.2d at 1166. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission’s rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

<sup>72</sup> *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14153, para. 82.

<sup>73</sup> *Id.* at 14164, para. 105. The factors are “costs directly related to the provision of interstate ICS and ancillary services; demand levels and trends; a reasonable allocation of common costs shared with the providers’ non-inmate calling services; and general and administrative cost data.” *Id.* at 14153, para. 82.

<sup>74</sup> *Id.* at 14153, para. 83.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 14154, para. 84.

<sup>77</sup> *Id.* at 14153, para. 83.

<sup>78</sup> Petition at 2.

identified in the waiver provisions of the *Order*.<sup>79</sup> Pay Tel does not dispute that the cost study relied upon by the Commission continues to accurately represent its average costs of providing ICS service. Instead, it maintains that it cannot recover its costs plus a reasonable return while complying both with our interim interstate rate caps and its existing intrastate rate requirements because some of these intrastate rates are below its actual costs. We therefore grant this temporary waiver to afford Pay Tel additional time to pursue appropriate changes to its intrastate requirements, which when brought to appropriate levels should permit Pay Tel to charge rates in compliance with our requirements. We therefore limit the duration of this waiver to nine months unless the Commission decides to take action on intrastate ICS rate caps sooner, then such Commission Order would supersede this waiver.

12. We review Pay Tel's request under the Commission's standard waiver analysis as informed by the additional guidance included in waiver provisions of the *Order*. This requires Pay Tel to establish good cause for a waiver by demonstrating that it faces special circumstances that warrant a waiver and by showing that a waiver would be in the public interest. Pay Tel cites as special circumstances the Commission's average-cost-based interstate rate caps and below-average-cost state rates, the combination of which precludes it from recovering its total company costs of providing ICS. We therefore must review and verify: 1) the data and analyses that establish Pay Tel's average cost and; 2) the data and analyses that support Pay Tel's quantification of its intrastate shortfall.

13. *Corporate Structure.* As an initial matter and consistent with the *Order's* waiver provisions, we review Pay Tel's request and supporting data at the holding company level.<sup>80</sup> Pay Tel's Petition states that "Pay Tel has a one-tier corporate organizational structure" and that "[a]ll of its ICS operations are conducted as Pay Tel Communications, Inc."<sup>81</sup> There is no evidence in the record of any parent company or other corporate entity having an ownership interest in Pay Tel, nor is there evidence that Pay Tel has an ownership interest in other corporate entities. Additionally, given that Pay Tel's corporate structure includes no subsidiaries or affiliates, there are no inter- or intra-company allocations, transactions or interests that might otherwise impact our analysis of Pay Tel's Petition and require the submission of additional data.

14. *Cost Showing.* To establish that it faces special circumstances warranting a waiver, Pay Tel must first demonstrate its total company average cost of providing ICS in order to provide a baseline for assessing its intrastate shortfall claims. We find that the supporting data and analyses submitted by Pay Tel, including a cost study<sup>82</sup> which we find accurately reflects the company's cost of providing ICS, audited financial statements,<sup>83</sup> and data on its average interstate site commission payments,<sup>84</sup> are sufficient to establish that its average total company per-minute cost is at the interim interstate rate cap.<sup>85</sup> The cost data in Pay Tel's Cost Study were corroborated by cost data from its audited financial statements<sup>86</sup> and we find it remains valid but note, as the Commission discussed in the *Order*, that our actions here are not a

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<sup>79</sup> *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14153, para. 83.

<sup>80</sup> *Id.*

<sup>81</sup> Petition at 1 n.2.

<sup>82</sup> See Petition at Exh. A.

<sup>83</sup> See Pay Tel Second Supplemental Filing at Attach.

<sup>84</sup> See Pay Tel Third Supplemental Filing at Attach.

<sup>85</sup> The D.C. Circuit stayed rule 64.6010 ("Cost-Based Rates for Inmate Calling Services"). See generally *Securus Techs. Partial Stay Order*. However, Pay Tel voluntarily submitted cost information in support of its Petition and we see no conflict in reviewing Pay Tel's cost information for the express purpose of evaluating and addressing its request. Also, costs are central to the analysis under the just and reasonable mandate found in section 201(b). See *supra* para. 3.

<sup>86</sup> See Pay Tel Second Supplemental Filing at Attach. (includes confidential information).



blanket endorsement of the study.<sup>87</sup> Pay Tel's interstate site commission payment data supplemented the site commission data from its cost study and identified the site commissions assessed on Pay Tel's interstate ICS.<sup>88</sup>

15. *Impact of Below-Cost Intrastate Rates.* To support its request, Pay Tel also establishes that it faces below-average-cost state rate mandates and quantifies the magnitude of the resulting revenue shortfall it incurs. Pay Tel's Petition includes a detailed analysis that concludes that it incurs a total intrastate shortfall of approximately \$2.8 million, approximately \$1.2 million of which is offset by interstate revenues.<sup>89</sup> We find the data and analyses Pay Tel submitted sufficient to verify these claims. Pay Tel's Petition included detailed rate, call volume and revenue data by facility and by type of inmate calling service, which enabled an independent assessment of its intrastate revenue shortfall assertions.<sup>90</sup> These data were corroborated by comparable data in its financial statements.<sup>91</sup> Pay Tel also provided summary descriptions of the below-cost intrastate rate mandates it claims cause its intrastate shortfall along with excerpts from the relevant mandates by state.<sup>92</sup> Given Pay Tel's average cost and its intrastate revenue shortfall, we conclude that it has demonstrated that it faces special circumstances that warrant a waiver.

16. *Public Interest Showing.* Finally, Pay Tel must also demonstrate that a waiver of the Commission's interim interstate ICS rate caps is in the public interest. We find that Pay Tel has demonstrated that a limited, temporary waiver will serve the public interest. It will ensure that Pay Tel continues to provide highly-secure ICS to inmates and their families at the facilities which it serves.<sup>93</sup> We further note that a waiver will be consistent with our statutory obligation under section 201(b) of the Act and, pursuant to section 276, will "promote competition" and "promote the widespread deployment of payphone services to the benefit of the general public."<sup>94</sup> Finally, and importantly, Pay Tel has asserted that setting a rate cap at \$0.46 per minute will ensure that the great majority of people most affected by Pay Tel's interstate ICS rates – the inmates in the facilities Pay Tel serves and their families – will see immediate and substantial rate decreases when this Order becomes effective because it will result in a reduction of over 40 percent from average existing interstate ICS rates of \$0.81 per minute.<sup>95</sup>

17. We limit the waiver we grant to the revised \$0.46 per-minute rate cap Pay Tel proposed in its Third Supplemental Filing.<sup>96</sup> This revised rate cap reflects, on a per-minute basis, the "elimination of interstate commissions from Pay Tel's interstate rates"<sup>97</sup> consistent with the *Order's* determination that

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<sup>87</sup> See *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14151, n. 293.

<sup>88</sup> Pay Tel Third Supplemental Filing at Attach.

<sup>89</sup> Following the filing of its Petition, Pay Tel supplemented its shortfall analysis with additional documentation. See Pay Tel First Supplemental Filing at 1-2, Attach.

<sup>90</sup> Petition at 13-19, Exh. B. It also included a summary of the financial impacts by state of intrastate ICS rates. See Petition at Exh. C.

<sup>91</sup> See Petition at Exh. B; Pay Tel Third Supplemental Filing at Attach.

<sup>92</sup> Petition at Exhs. D & E.

<sup>93</sup> Pay Tel Third Supplemental Filing at 2 (The limited, temporary nature of the waiver will ensure that it will not result in a financial windfall for Pay Tel, an outcome Pay Tel expressly disavowed and distanced itself from by revising downward its requested initial request for relief.).

<sup>94</sup> 47 U.S.C. § 276(b)(1).

<sup>95</sup> See Pay Tel Third Supplemental Filing at 2; *supra* n.30.

<sup>96</sup> Using the data that Pay Tel provided on its interstate site commissions, staff calculated that those commissions represent approximately \$0.35 per-minute of its average \$0.81 per-minute revenue. See Petition at Exh. B; see also Pay Tel Third Supplemental Filing at Attach.

<sup>97</sup> Pay Tel Third Supplemental Filing at 2.

site commissions are not a recoverable component of interstate ICS rates.<sup>98</sup> Granting Pay Tel's revised waiver request will, according to Pay Tel, "permit Pay Tel to remain in business."<sup>99</sup> We note that the \$0.46 per minute rate cap will enable Pay Tel to continue to recover that portion of interstate revenues that is currently available to Pay Tel to offset its intrastate shortfall. Specifically, the Bureau estimated the amount of revenue the revised \$0.46 per minute rate cap would yield Pay Tel by using the Wood Intrastate Shortfall Analysis to calculate its total interstate ICS revenue less its total interstate site commission payments and its total cost of providing interstate service.<sup>100</sup>

18. A grant is also consistent with the *Inmate Calling Order on Remand and NPRM*, which notes that:

[u]nless an ICS provider can show that (i) revenue from its interstate or intrastate calls fails to recover, for *each* of these services, both its direct costs and some contribution to common costs, or (ii) the *overall* profitability of its payphone operations is deficient because the provider fails to recover its total costs from its aggregate revenues (including both revenues from interstate and intrastate calls), then we would see no reason to conclude that the provider has not been 'fairly compensated.'<sup>101</sup>

The data submitted by Pay Tel demonstrate that it falls within the second category enumerated above, further supporting the decision to grant the waiver. Moreover, we agree with Pay Tel that reducing its interstate ICS rates to no more than \$0.46 per minute will "ensur[e] that consumers of interstate services receive meaningful decreases in interstate rates."<sup>102</sup>

19. *Duration of Waiver.* We grant Pay Tel a temporary waiver in order to provide it with an opportunity to address below-average-cost rate mandates at their source – at the state level and with the individual facilities it serves. Pay Tel explains that the intrastate revenue shortfalls it experiences result either from state regulatory mandates or contractual provisions predicated on state mandated rates. We agree with HRDC that Pay Tel nevertheless is not constrained from pursuing relief in either instance.<sup>103</sup> Specifically, Pay Tel can follow existing processes within the relevant states to seek necessary intrastate rate changes, or waivers, in light of the impact of the interim interstate ICS rate caps.<sup>104</sup> Further, as the Commission asserted in the *Order*, ICS providers, like most commercial entities, generally can renegotiate contract terms with the facilities they serve, particularly where such contracts contain change of law provisions.<sup>105</sup> The fact that certain of Pay Tel's ICS contractual rates are predicated on rates that state commissions established for local exchange service does not change our analysis of the ability of providers to seek necessary intrastate rate changes. Additionally, we recognize that the Commission has an open proceeding that is considering final interstate ICS rates and potential action on intrastate ICS

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<sup>98</sup> See *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14135, para. 54.

<sup>99</sup> Pay Tel Third Supplemental Filing at 2.

<sup>100</sup> See Petition at Exhs. A & B; see also Pay Tel Third Supplemental Filing. The Wood intrastate Shortfall Analysis includes rate and call volume data for the second quarter of 2013 for all locations in operation for the entire quarter; data is provided for post-paid collect, prepaid-collect, pre-paid calling cards, and debit calls by jurisdiction.

<sup>101</sup> *Inmate Calling Order on Remand and NPRM*, 17 FCC Rcd 3248 at 3257-58, para. 23 (emphasis in original).

<sup>102</sup> Pay Tel Third Supplemental Filing at 2.

<sup>103</sup> See *supra* n. 53.

<sup>104</sup> See HRDC *FNPRM* Reply Comments at 7.

<sup>105</sup> *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14162-63, para. 102. See also HRDC *FNPRM* Reply Comments at 7. *But cf.* Petition, Exh. G at 1 (statement of Vincent Townsend); Pay Tel First Supplemental Filing at 2; Pay Tel Jan. 21, 2014 Reply Comment at 5-6 (noting that only a small proportion of its contracts contain such a provision).

rates.<sup>106</sup> In light of these circumstances, we find it is in the public interest to grant Pay Tel temporary relief while it pursues relief in the states, and we therefore limit the duration of the waiver to nine months unless the Commission decides to take action on intrastate ICS rate caps sooner, then such Commission Order would supersede this waiver.<sup>107</sup>

20. For these reasons, we conclude that Pay Tel has demonstrated good cause for the Bureau to grant a limited, temporary waiver of the Commission's rule establishing interim interstate ICS rate caps. Furthermore, we find the following conditions to be consistent with Pay Tel's proposed commitments and in the public interest: Pay Tel (1) may not assess a rate for interstate long distance ICS calls in excess of \$0.46 per minute for existing and new clients and may not charge interstate rates any greater than its rates as of February 10, 2014 if those rates were under \$0.46 per-minute;<sup>108</sup> and Pay Tel (2) may charge no more than its current fees.<sup>109</sup> Pay Tel notes, however, that changes in circumstances may justify a change in its fee structure.<sup>110</sup> Given the spirit of the *Inmate Calling Report and Order and FNPRM*, increasing ancillary fees to offset the rate caps could thwart reforms and relief for inmates and their families. We therefore adopt Pay Tel's additional commitment that it "will assess the minimum in fees which are necessary to recover its costs."<sup>111</sup> Further, to the extent Pay Tel assesses any new or increased fees, in addition to notifying its customers,<sup>112</sup> we require it to also notify the Commission and to include an updated analysis of its cost and revenue data. Any such new or increased fees may impact the need and justification for the instant waiver.<sup>113</sup> As a result, we adopt the waiver with these conditions.

21. We authorize such rates for a period of nine months unless the Commission decides to take action on intrastate ICS rate caps sooner, then such Commission Order would supersede this waiver. This period of time will provide Pay Tel an opportunity to seek modification of the intrastate rates it cites in its Petition. States should recognize the Commission's and the Bureau's actions in this proceeding as part of a broader effort to establish a consistent framework of cost-based rate caps for ICS generally and work with the relevant parties to that end. We allow Pay Tel up to seven days from the release of this

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<sup>106</sup> While Pay Tel's Petition does not expressly limit the duration of its requested waiver, it nonetheless suggests such a limitation by requesting relief "as the Commission continues to investigate the appropriate regulatory environment for the ICS industry." Petition at 22; *see also* Pay Tel Third Supplemental Filing at 2. The Commission's investigation into ICS rates is on-going. In the *FNPRM* in this proceeding, the Commission sought and received comment on extending its interim interstate ICS rules to intrastate ICS and making its ICS rules permanent. *See Inmate Calling Report and Order and FNPRM* at Sections V.A. and V.C. The *Inmate Calling Report and Order and FNPRM* also prescribed a mandatory data request for ICS providers that will allow the Commission to assess more accurately the costs of providing ICS and therefore adopt rate caps that will more precisely reflect providers' costs. *See Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14172-73, paras. 124-26.

<sup>107</sup> Any subsequent requests from Pay Tel will require, at a minimum, a showing of its efforts to obtain relief from state-imposed regulatory mandates.

<sup>108</sup> "As a result, this proposal would not result in interstate rate increases in any existing Pay Tel facility." Pay Tel Third Supplemental Filing at 2, n.3. Rates should be calculated on a per-minute basis assuming a call duration of 15 minutes. *See Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14155-56, para. 88.

<sup>109</sup> *See* Petition at 22.

<sup>110</sup> *See* Petition at 22, n.68.

<sup>111</sup> Pay Tel Third Supplemental Filing at 2, n.5.

<sup>112</sup> *See* Pay Tel Third Supplemental Filing at 2, n.5.

<sup>113</sup> To the extent that Pay Tel assesses a fee or fees that would recover more than its reasonable costs and would result in Pay Tel obtaining a financial windfall, we reserve the right to revise the \$0.46 per minute rate cap granted in this Order.

Order to make the rate changes adopted herein.<sup>114</sup> We implement this limited, temporary waiver to ensure that Pay Tel recovers its total costs, on a holding company basis, for providing ICS.

#### IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 5(c), 201, and 276 and of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 276, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the Petition for Waiver of Interim Interstate ICS Rates filed by Pay Tel Communications, Inc. on January 8, 2014 IS GRANTED to the extent and subject to the conditions set forth above, for a duration of nine months, beginning on February 11, 2014 and ending on November 11, 2014 unless the Commission decides to take action on intrastate ICS rate caps sooner, then such Commission Order would supersede this waiver.

23. IT IS FURTHER ORDERED that the Petition for Waiver of Interim Interstate ICS Rates filed by Pay Tel Communications, Inc. on January 8, 2014, and subsequently revised on January 23, 2014, is DENIED to the extent not granted herein.

24. IT IS FURTHER ORDERED that the Petition for Partial Stay of *Rates for Interstate Inmate Calling Services* Order filed by Pay Tel Communications, Inc. on November 26, 2013 in WC Docket 12-375 is DISMISSED AS MOOT.

25. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach  
Chief  
Wireline Competition Bureau

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<sup>114</sup> Pay Tel may charge its existing interstate ICS rates in the intervening seven days until it begins charging \$0.46/minute for all interstate ICS calls.