

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF GLOBAL TEL*LINK CORPORATION

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Global Tel*Link Corporation ("GTL"),¹ by its undersigned counsel, hereby submits these comments in response to the Notice of Proposed Rulemaking released on December 28, 2012.²

INTRODUCTION AND SUMMARY

The Federal Communications Commission ("FCC" or "Commission") has compiled an extensive record on issues relating to inmate calling services ("ICS"). In the *2002 Order on Remand*, the FCC requested detailed comments on ICS rates, commissions, cost and revenue data, and related issues, and on proposed methods to lower ICS rates, and numerous comments regarding ICS reform were received.³ Since 2003, the FCC has sought and received comments on the First Wright Petition, in which Petitioners requested that the Commission "prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons,"⁴ and on the Alternative Wright Petition, in which Petitioners proposed, *inter alia*, that the Commission establish nationwide rate caps for all interstate, interexchange

¹ These comments are filed by GTL on behalf of itself and its wholly owned subsidiaries that also provide interstate inmate calling services: DSI-ITI, LLC, Public Communications Services, Inc., Value-Added Communications, Inc., and Conversant Technologies, Inc.

² *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶ 1 (2012) ("NPRM").

³ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, ¶¶ 73-79 (2002) ("2002 Order on Remand").

⁴ CC Docket No. 96-128, Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in a Pending Rulemaking, at 3 (filed Nov. 3, 2003) ("First Wright Petition").

inmate calling services.⁵ Noting that there has recently 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,” the FCC now seeks comment to refresh the record and consider whether rule changes are necessary to ensure just and reasonable ICS rates for interstate, long distance calling at publicly and privately administered correctional facilities.⁶ In particular, the FCC 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.”⁷

The following comments respond to many of the questions posed by the *NPRM* in an effort to answer the primary question of whether ICS rates are just and reasonable. This analysis must take into consideration the extraordinary diversity among correctional facilities across the country and the wide diversity of the security features required by individual facilities. Inmate calling services are not susceptible to one-size-fits-all federal regulation, nor are they required to be.⁸

⁵ See, generally CC Docket No. 96-128, Petitioners’ Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services (filed Mar. 1, 2007) (“Alternative Wright Petition”).

⁶ *NPRM* ¶ 1.

⁷ *NPRM* ¶ 8.

⁸ *Holloway v. Magness*, No. 5:07CV00088 JLH-BD, 2011 WL 204891 (E.D. Ark. Jan. 21, 2011) (“The courts have generally dismissed claims such as this one by saying that prisoners have no right to unlimited telephone use and no right to a specific telephone rate.”); *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) (“There is no authority for the proposition that prisoners are entitled to a specific rate for their telephone calls and the complaint alleges no facts from which one could conclude that the rate charged is so exorbitant as to deprive prisoners of phone access altogether.”); *Riley v. Doyle*, No. 06-C-574-C, 2006 WL 2947453 (W.D. Wis. Oct. 16, 2006) (“[T]elephone rates charged to institutionalized persons do not implicate the First Amendment no matter how exorbitant they may be.”); see also *Semler v. Ludeman*, No. 09-0732, 2010 WL 145275 (D. Minn. Jan. 8, 2010) (dismissing a claim that telephone rates were expensive because involuntarily committed sex offenders “do not have a First Amendment right to a specific rate for their telephone calls,” and the plaintiffs “made no allegation that they are precluded from making telephone calls given the rate charged”); *Jayne v. Bosenko*, No. 2:08-cv-02767-MSB, 2009 WL 4281995 (E.D. Cal. Nov. 23, 2009) (same); *Beaulieu v. Ludeman*, 07-CV-1535, 2008 WL 2498241 (D. Minn. June 18, 2008) (same); *Bowcut v. Idaho State Bd. of Corr.*, No. CV06-208-S-BLW, 2008 WL 2445279 (D. Idaho June 16, 2008) (same); *Thomas v. King*, No. CV F 06 0649, 2008 WL 802475 (E.D. Cal. Mar. 24, 2008) (same); *Dotson v. Calhoun Cnty. Sheriff’s Dep’t*, No. 1:07-CV-1037, 2008 WL 160622 (W.D. Mich. Jan. 15, 2008); *Boyer v. Taylor*, No. 06-694-GMS, 2007 WL 2049905 (D.Del. Jul. 16, 2007);

Among the unique features that correctional facilities require are costly and increasingly sophisticated security elements – including automated call screening, biometric caller verification, real-time recording and monitoring, fraud control features, and more. In addition, many correctional facilities require the payment of commissions by ICS providers as an essential component for the privilege to provide inmate calling services. Mandatory commissions can be a significant amount of the costs associated with the provision of the inmate calling services where they are required. The amount of commissions, how they are calculated, and the determination of which programs the funds support are all decisions within the discretion of state and local policymakers, and the FCC must continue to defer to state and local authorities with regard to such determinations.⁹

BACKGROUND

GTL is a leading provider of inmate services, software solutions, and equipment used in correctional facilities throughout the United States. GTL's customers encompass more than 1,900 correctional facilities in 47 states and over 800 counties, and the company maintains a system of over 65,000 telephones across those facilities. The GTL services made available by those correctional facilities allow more than 1.11 million incarcerated individuals to communicate with millions more family members and friends nationwide and around the globe. GTL serves correctional facilities of all types and sizes, ranging from municipal and county jails housing fewer than ten inmates to state and federal maximum-security systems housing tens of thousands of inmates. Its widely varied customers include publicly and privately managed institutions, minimum-security and maximum-security facilities, correctional mental health

⁹ 2002 Order on Remand ¶ 29 (“any solution to the problem of high rates for inmates must embrace the states”).

facilities, remote work camps, correctional facilities in urban and rural locations, facilities that hold prisoners for a short time and those that house prisoners for extended periods.

GTL has been providing services to correctional facilities since 1989. The company offers an integrated package of services, software, and equipment on a contractual basis, which is tailored to meet the unique security and public safety demands of each correctional facility. The company enters into multi-year contracts with its correctional facility customers through a competitive bidding process operated by the customer. At present, GTL has contracts with the Departments of Corrections (“DOCs”) in 30 states, including 12 of the country’s 20 largest prison systems, and the Federal Bureau of Prisons.

The FCC has previously recognized that inmate calling requires “special security measures” and that prisons have specialized security needs.¹⁰ GTL has developed a broad suite of proprietary technology products and services that are designed not only to provide inmates with fair and adequate access to telephones, but also to provide extensive controls and investigative capabilities that meet the unique security and public safety needs of correctional facilities, law enforcement, and homeland security.

GTL installs, manages and maintains a sophisticated network integrated together with a proprietary software platform that supplies a wide variety of specialized investigative and security products and services, to meet the varied needs of its diverse customer base. The company’s specialized security services include fraud control features to prevent three-way calling and call-forwarding; blocking mechanisms to prevent repetitive dialing of blocked or unaccepted phone numbers and to prevent inmates from calling judges, prosecutors, jurors or witnesses in legal proceedings; real-time recording and call monitoring capabilities; biometric

¹⁰ *Billed Party Preference for InterLATA 0+ Calls*, 16 FCC Rcd 22314, ¶ 15, n.46 (2001); *see also* 2002 Order on Remand ¶ 9.

caller verification based on voice analysis; cell phone detection investigative tools; and sophisticated tracking tools that enable law enforcement authorities to assemble data on gang structures and criminal activity by analyzing GTL's databases to determine inmate calling patterns.

GTL provides durable telephone receivers to minimize prison maintenance costs, and it employs a web portal to enable remote access to security-related information. The company also develops and administers payment and billing systems, which increasingly include prepaid or debit billing systems. The company provides human resources support, maintenance services, on-site administrators, and proactive diagnostic monitoring for software and hardware failures. Each correctional facility requires the design and implementation of an individually tailored suite of communications and security services to meet the needs of that correctional facility. These individual case basis arrangements involve a significant capital investment, and the ongoing management and maintenance of the system is often labor-intensive, including full-time staff to assist investigators and maintain the system, which is subject to harsh use.

GTL thus provides a specialized inmate calling service that serves a dual purpose, each of which must be balanced against the other: (1) providing the means for inmates to communicate with friends and family members, within the parameters defined by the particular correctional facility, and (2) assisting correctional facilities and law enforcement officials in identifying and investigating any criminal activity that may arise from, or be furthered by, the use of an inmate telephone system.¹¹

¹¹ Cf. 2002 *Order on Remand* ¶ 72 (noting that correctional facilities and service providers must “balance the laudable goal of making calling services available to inmates at reasonable rates . . . with necessary security measures and costs related to those measures”).

I. FEDERAL REGULATION OF INMATE CALLING SERVICES RATES

Both in their initial petition proposing limitations on correctional facilities' ability to contract for ICS services and again in their alternative submission proposing nationwide ICS rate caps, Petitioners ask the Commission to impose a system of nationwide federal regulation on a complex array of diverse county, local, and state prison facilities that should continue to be governed by county, local, and state authorities. These and other proposals in the record are premised on a fundamental failure to appreciate the broad range of correctional systems around the country and their widely divergent security needs, service levels, policy views, budgetary practices, and calling rates. The Commission has consistently and appropriately recognized that inmate calling services present unique issues that are best addressed by state and local governments and prison administrators.¹² The Commission should continue to defer to state and local authorities with regard to the determination of the ICS required by each individual facility and its unique inmate calling environment.¹³

A. Inmate Calling Services Present Unique Issues that Are Not Susceptible to One-Size-Fits-All Federal Regulation

The FCC seeks comment on Petitioners' proposal to have the Commission establish benchmark rates for domestic interstate interexchange calling service, including imposing per-minute rate caps for debit and collect calls and eliminating all set-up or other per-call charges or, in the alternative, eliminating per-call charges for reinstating dropped calls.¹⁴ Petitioners' desire to impose a one-size-fits-all approach in the form of nationwide rate caps is wholly at odds with

¹² See, e.g., 2002 Order on Remand ¶ 19 ("the correctional facility and its communications policy, not the market, often determine the number of prison phones"); see also *id.* ¶ 29 ("any solution to the problem of high rates for inmates must embrace the states").

¹³ There is no constitutional right on the part of an inmate to utilize a telephone on his own terms. *Gilday v. Dubois*, 124 F.3d 277, 293 (1st Cir. 1997); see also *United States v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000) ("Prisoners have no per se constitutional right to use of a telephone.").

¹⁴ NPRM ¶¶ 17-23.

the enormous variability among correctional institutions across the United States. By requesting a uniform national rate structure for all U.S. correctional facilities, without regard for their size, location, security requirements, and the types of services the facilities require and without taking account of state and local management, policy, and budgetary decisions, Petitioners dramatically oversimplify the security, budgetary, and political challenges confronting prison administrators.

The FCC has previously recognized that “inmate calling services, largely for security reasons, are quite different from the public payphone services that non-incarcerated individuals use.”¹⁵ Indeed, the FCC has stated that, “while one function of the service is to provide communications service to the inmate population, the concerns and requirements of corrections authorities are different and often in conflict with those associated with the provision of basic public payphone service.”¹⁶ Correctional facilities require complex and costly technological features for their inmate calling environments, including, among other things, special automated voice-processing systems for call screening, sophisticated blocking mechanisms, recording systems that must store terabytes of data for easy retrieval, monitoring to evade restrictions on call-forwarding or three-way calling, voice overlays identifying calls and disclosing that calls are recorded, and detailed reporting systems.¹⁷

The substantial costs associated with such security and public safety requirements cannot be reduced to a simple national rate formula as Petitioners appear to believe. The security needs of any one correctional facility vary dramatically from the needs of other facilities, depending on numerous interrelated variables, including the size and location of the facility, the level of

¹⁵ 2002 Order on Remand ¶ 9; see also *Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, ¶¶ 57-61 (1998) (“1998 Order”) (declining to impose billed party preference requirements on outgoing calls by prison inmates).

¹⁶ *Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, 11 FCC Rcd 7362, ¶ 25 (1996).

¹⁷ 2002 Order on Remand ¶ 9.

security, the length of incarceration and other characteristics of the inmate population, as well as the amount of money local administrators have and choose to spend on security features. The services chosen by prison administrators and other local administrators, and their budgetary decisions, are reflected in the contracts negotiated between ICS providers and local officials. Thus, ICS pricing is, to a large extent, determined by the terms of those individual contracts, which reflect the enormous diversity of services required by correctional facilities, and the costs of providing those services, more realistically and accurately than any oversimplified rate formula could.

Such variations necessarily affect the system design and implementation costs borne by service providers, and the demand for ever-more sophisticated technology increases the variability among correctional facilities. Providing inmate calling services to a correctional facility with thousands of inmates, for example, is vastly different from serving a small municipal or county jail. Larger facilities demand more complex systems to contend with an inmate population with varying prison terms and diverse criminal backgrounds, including organized crime and gang activity, which can be orchestrated through inmate phone conversations. For example, GTL typically places more telephones in high-security inmate cell blocks to minimize security risks associated with transporting prisoners to other locations in the facility to place a call. More complex systems require GTL to provide on-site technical support because equipment and software problems not only can compromise the institution's ability to monitor and block calls, but could even cause threats to the safety of inmates and correctional officers if telephones remain out of service for extended periods.

Individual prison administrators frequently require customized features, which further compounds the wide variety of security and public safety requirements among correctional

facilities of different types and sizes. For example, one routine feature of ICS security systems is that inmate calls are recorded and retained for investigatory use. Correctional facilities vary greatly, however, in their specific requirements for inmate call recording. One facility may choose to retain recordings for 30 days, another for 60 days, yet another for 18 months or even up to five years. These individual institutional choices have a significant impact on the audio file capacity required, location of storage (local or remote), and, consequently, on storage costs. For instance, California requires seven years of recordings to be maintained, which amounts to approximately 160 terabytes of data.¹⁸ Preferred audio formats also vary from facility to facility. One facility may choose to have recordings created and retained in a format that is accessible only by inmate name and call date, while another facility opts to install a more sophisticated system that permits biometric analysis, such as voiceprint identification, or a system that enables investigators to conduct word searches and map the information in the recordings against other data on file for a particular inmate. Each of these choices introduces a cost variable, and their collective impact demonstrates the difficulty of attempting to nationalize rate structures.

The FCC has long respected the “exceptional circumstances” that characterize the inmate calling services environment,¹⁹ appropriately rejecting prior calls for federal regulation. The Supreme Court likewise has recognized that “running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources” and has counseled restraint and deference on matters related to correctional facilities.²⁰ The Commission

¹⁸ By comparison, the U.S. Library of Congress claims that it has collected “about 385 terabytes of web archive data” as of January 2013, and that its web archives grow about 5 terabytes per month, with one terabyte equaling 1,024 gigabytes. See Library of Congress, Web Archiving FAQs, available at http://www.loc.gov/webarchiving/faq.html#faqs_05.

¹⁹ *Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd 2744, ¶ 15 (1991).

²⁰ *Turner v. Safely*, 482 U.S. 78, 84-85 (1987).

should continue to heed that sound principle when considering the proposal to impose nationwide ICS rate caps.

B. The Payment of Commissions Is within the Discretion of Local Policymakers; They Are a Cost of Providing Inmate Calling Services

The *NPRM* seeks comment on the effect of commissions on ICS rates, including whether the FCC must address the effect of commissions in order to ensure just and reasonable ICS rates.²¹ The amount of commissions and how they are to be calculated vary among state, county and municipal facilities, based on the decisions of state legislatures or local policymakers. In GTL's experience, commissions can range from 0% to more than 75% of gross revenues generated from prisoners' phone calls, or commissions may be expressed as either a fixed or minimum annual guarantee plus a percentage of all revenues generated from inmates' calls over the minimum guarantee. GTL has observed, as a general trend, that the size of commissions have increased substantially since the First Wright Petition.

Petitioners make no effort to conceal their intention to use FCC regulation to drive down or eliminate site commissions,²² which would short-circuit local political decision making by imposing a rigid system of national rate caps. Petitioners' arguments ignore important public policy considerations underlying commissions. Commission amounts are often driven by how local policymakers strike the balance between relying on state appropriated funds versus revenues generated by ICS consumers. In most instances, commissions collected pursuant to state law are channeled back into correctional facilities to fund inmate health and welfare programs or for other public interest purposes, in accordance with the decisions of prison

²¹ *NPRM* ¶¶ 37-38.

²² Alternative Wright Petition at 7.

administrators and other local policymakers.²³ Many local officials have expressed the belief that commission payments have significant public benefit.²⁴ In GTL's experience, when policymakers eliminate a commission in the midst of a contract, rates have been lowered by the removal of commissions from the cost structure. State and local governments that have chosen to reduce or eliminate commissions, in an effort to lower calling rates, are required to either make up the budgetary shortfalls through other revenue generating activity or to forgo the inmate programs once funded by commissions.

Whatever may be the advantages or disadvantages of lower commission structures, this complex issue is simply not amenable to a uniform national solution. To the extent that regulation of inmate calling services is required, the Commission has recognized that any reforms "must embrace the states."²⁵ Because these choices implicate complex and important questions of local concern, any decision about the use of commissions and the amounts to be collected must be made by state and local officials who are accountable to the affected communities.²⁶ The Commission should therefore continue its policy of restraint, recognizing that the regulatory scheme Petitioners propose would encroach on quintessential state police powers and prerogatives.

The FCC also seeks comment on whether its previous finding, that "under most contracts, the commission is the single largest component affecting the rates for inmate calling service" is

²³ CC Docket No. 96-128, *Ex Parte* Presentation of Global Tel*Link, at 7 (filed Oct. 2, 2012) ("GTL 2012 *Ex Parte*") (describing how various states utilize commission payments to fund inmate programs).

²⁴ GTL 2012 *Ex Parte* at 8 (discussing how correctional facilities receive benefit from commission payments).

²⁵ 2002 *Order on Remand* ¶ 29.

²⁶ See, e.g., *United States v. Michigan*, 940 F.2d 143, 155 (6th Cir. 1990) ("The unabridged teachings of the [Supreme] Court convey the Court's own unequivocal commitment to and its adamant recognition of the state's sovereign authority to operate its penal institutions. Anchored in the sensitive principles of federalism, this sovereign authority is a prerogative of the state . . .").

still accurate.²⁷ In GTL's experience, where a commission is a requirement, it is accurate to state that "the commission is the single largest component affecting the rates for inmate calling service."²⁸ But GTL does not agree with the FCC's finding that "location rents are not a cost of payphones, but should be treated as profit."²⁹ In reviewing the payphone industry in 1999, the Commission determined that "locational rents" should be treated as a form of profit rather than a cost.³⁰ This conclusion was based, in part, on the Commission's finding that a payphone that "earns just enough revenue to warrant its placement, but not enough to pay anything to the premises owner" is "a viable payphone . . . because the payphone provides increased value to the premises."³¹ The FCC made this conclusion with respect to Section 276's requirement that payphone providers be fairly compensated.

This conclusion is not relevant to the Commission's current inquiry as it is no longer a viable analogy based on the evolution of inmate telephone technology and the near death of the payphone industry in the intervening period. Further, as the FCC notes, it is Section 201(b) of the Communications Act of 1934, as amended ("Act"), that drives the determination of whether rates are just and reasonable.³² Commissions should not be treated as profits for the purposes of determining whether rates are reasonable under Section 201(b). The analysis conducted by the FCC with respect to fair compensation for payphone providers is fundamentally different from determining whether a service provider's rates are compliant with Section 201(b). Moreover, the FCC's prior conclusion did not take into account the fact that ICS "are quite different from the

²⁷ NPRM ¶ 37 (citing 2002 Order on Remand ¶ 10).

²⁸ 2002 Order on Remand ¶ 10.

²⁹ NPRM ¶ 37 (citing 2002 Order on Remand ¶ 15).

³⁰ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545, n.72 (1999) ("1999 Payphone Order").

³¹ 1999 Payphone Order ¶ 156.

³² NPRM ¶ 37.

public payphone services that non-incarcerated individuals use” or that ICS “is economically different than other payphone services.”³³

Correctional facility commissions are a cost of providing inmate calling services; they are not “location rents.” Location rent cannot and should not be equated with commissions. To the extent that ICS contracts require payment of location rent, it is typically a *de minimis* charge in exchange for the placement of telephones. A commission, in contrast, is more akin to a concession fee, such as that paid by a restaurant operator at an airport, in exchange for the opportunity to be the exclusive vendor in a particular location.³⁴

The FCC also questions whether its prior determination that, “because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates,” remains accurate.³⁵ This is not the case in today’s ICS environment. Merely because a company charges high rates does not mean it is able to offer the highest commissions. For example, even if it charges very high rates, a smaller competitor will likely not be able to offer the highest commissions if it has higher telecommunications or maintenance costs than its competitors. In contrast, because GTL is one of the largest providers in the market, it has economies of scale and efficiency that enable it to pay high commissions, provide high-quality service, and still charge lower rates than many other ICS vendors. Nor is it necessarily the case that the competitive bidding process will result in higher rates when commissions are required. In GTL’s experience, correctional facility customers routinely refer to rates in the same breath as commissions, and even those customers that want the highest possible commissions also want the lowest possible rates along with

³³ 2002 Order on Remand ¶¶ 9, 12.

³⁴ GTL treats both location rent and commissions as cost items.

³⁵ NPRM ¶ 37 (citing 2002 Order on Remand ¶ 10).

technical solutions that provide sophisticated security and the highest degree of public safety to the facility.

Competition for inmate service contracts is robust, and service providers absolutely must compete with respect to rates. Contracts for the provision of inmate calling services are generally awarded by a public bidding process that commences with the publication of a request for proposal by the correctional facility, setting forth the relevant requirements. For larger contracts, it is typical for more than five or more service providers to submit bids. It is up to the ICS provider to find the desired balance between its cost structure and its need to make a profit, and the specific technical requirements for security and public safety spelled out in the customer's procurement request, whether or not those requirements include a commission. It is not necessarily the case that the competitive bidding process will result in higher rates. As part of the bidding process, correctional facilities often demand the submission of itemized rate-structure proposals from bidders so they can meet their revenue requirements while minimizing the rates imposed on end users. In fact, service providers compete vigorously with respect to rates, and the winning bids often include the lowest overall rate structure, inclusive of the commission. Indeed, the Commission has previously found that the contracts between ICS providers and correctional facilities provide fair compensation, as required by Section 276.³⁶

C. The Establishment of Just and Reasonable Rates for Inmate Calling Services Must Be Consistent with the Current Regulatory Framework

In this section, GTL addresses certain of the Commission's specific requests for comment that appear to be addressed to ICS providers.

³⁶ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 11 FCC Rcd 21233, ¶ 72 (1996) ("1996 Payphone Order") ("[W]henver a PSP is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied.").

1. *Rate Caps in the ICS Market*

The Commission seeks comment on various proposals for ensuring just and reasonable ICS rates, including adopting rate caps, using a “marginal location” methodology, implementing tiered pricing, relying on market forces, distinguishing between different calling methods, and establishing intrastate-interstate parity.³⁷ But, as the Commission itself notes, it “does not currently regulate interstate ICS rates.”³⁸ Thus, any decision to change the existing regulatory framework for ICS interstate rates must be reconciled with the Commission’s prior determinations regarding the appropriate regulatory regime for ICS providers and other non-dominant providers.

Since the ‘80s, the Commission has acknowledged that non-dominant carriers should be subject to less stringent regulatory burdens than dominant carriers.³⁹ The decision to eliminate certain regulatory oversight of non-dominant carriers was based on the Commission’s “conclusion that marketplace forces will operate to ensure that the rates and other tariff provisions of non-dominant carriers comply with the objectives of Sections 201 and 202 of the Act.”⁴⁰ Based on these findings, the Commission ruled the “tariffs of non-dominant carriers to be presumptively lawful.”⁴¹

³⁷ NPRM ¶¶ 17-23.

³⁸ NPRM ¶ 2.

³⁹ See, e.g., *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1 (1980) (“*Competitive Carrier Order*”). The Commission defined a “dominant carrier” as one that possesses market power, which “refers to the control a firm can exercise in setting the price of its output,” and “is able to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest.” See *id.* ¶ 56. By contrast, a non-dominant carrier lacks market power and “must take the market price as given, because if it raises price it will face an unacceptable loss of business, and if it lowers price it will face unrecoverable monetary losses in an attempt to supply the market demand at that price.” See *id.*

⁴⁰ *Competitive Carrier Order* ¶ 48.

⁴¹ *Competitive Carrier Order* ¶ 96.

In 1996, the FCC determined that tariff filings from non-dominant carriers were no longer necessary to ensure that those carriers' charges, practices, or classifications are just and reasonable, or for the protection of consumers.⁴² The FCC applied its detariffing requirements to nearly all international and interstate, domestic interexchange services, including casual calling services, which the FCC defined as "services that do not require a consumer to open an account or otherwise presubscribe to a service, including use of a third-party credit card, collect calling, or dial-around through the use of an access code."⁴³ Instead of filing tariffs, the FCC required non-dominant carriers to make their rates, terms, and conditions for the services subject to detariffing available in a public location and on their website.⁴⁴

The Commission has taken similar steps with respect to providers of inmate operator services. Under Section 226(h) of the Act, providers of interstate operator services are required to maintain an informational tariff on file with the Commission specifying the provider's rates, terms, and conditions.⁴⁵ Any changes made to the informational tariff are effective without prior notice to the public.⁴⁶ Inmate operator service providers are required to make certain oral disclosures prior to completion of the call so "the billed party can decide whether to accept the call and can limit the length of the call."⁴⁷ In light of the informational tariff requirement and the oral disclosure rules, the Commission specifically declined to impose "price benchmarks or rate

⁴² *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 20730, ¶¶ 21, 36 (1996) (subsequent history omitted) ("Detariffing Order").

⁴³ *Detariffing Order* ¶ 58, n.127; see also 47 C.F.R. § 61.19.

⁴⁴ 47 C.F.R. § 42.10.

⁴⁵ 47 U.S.C. § 226(h)(1); see also 47 C.F.R. § 64.709.

⁴⁶ *1998 Order* at n.109 ("Unlike the effective date of rates in tariffs filed pursuant to Section 203 of the Act, which the Commission may suspend, rates and surcharges in informational tariffs filed pursuant to Section 226 are effective without prior notice to the public and the Commission. See Section 226(h)(1)(A) ('changes in [informational tariff] rates, terms, or conditions shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect.'").

⁴⁷ *1998 Order* ¶ 49; see also 47 C.F.R. § 64.710.

caps” on inmate calling services as requested by some parties.⁴⁸ The Commission found that, “because rates must be filed with the Commission and must conform to the just and reasonable requirements of Section 201 of the Act . . . it is more efficient and less intrusive to proceed on a case-by-case basis, should the [disclosure] rules . . . not lead to reasonable rates for calls from inmate phones.”⁴⁹

2. *Marginal Location Methodology*

The FCC seeks comment on the potential use of “marginal location” methodology to propose just and reasonable ICS rates.⁵⁰ The Commission used this methodology nearly 20 years ago in calculating public payphone rates.⁵¹ The underlying cost and demand factors for public payphones are not sufficiently similar to those associated with ICS to justify employing a cost methodology designed for public payphones, for two principal reasons. First, the proposed methodology is shackled to an antiquated technology, which, for all intents and purposes, no longer exists in reality and thus cannot provide a meaningful analog to today’s constantly evolving ICS systems. Second, even if it could be assumed that the “marginal location” methodology was fully inclusive of the non-telephone costs of a call, any attempts to draw parallels between ICS and public payphones are inherently flawed because they fail to take into account the unique security concerns involved with operating inmate telephone systems in a correctional setting or the wide variations among correctional facilities.⁵²

⁴⁸ 1998 Order ¶ 48.

⁴⁹ 1998 Order ¶ 48.

⁵⁰ NPRM ¶¶ 24-26.

⁵¹ See, e.g., 1999 Payphone Order ¶¶ 139-153 (discussing the FCC’s use of marginal location methodology in its 1996 and 1997 decisions).

⁵² See, e.g., 2002 Order on Remand ¶ 9 (“inmate calling services, largely for security reasons, are quite different from the public payphone services that non-incarcerated individuals use”).

3. *Impact of Rate Reductions on Call Volumes*

The FCC seeks comment on whether call volumes have increased where rates have been lowered, and the resulting impact on ICS providers' revenues.⁵³ In GTL's experience, there is not a direct relationship between rate reduction and increased telephone usage. Lower rates alone are unlikely to have a significant impact on call volumes. While there is early data in some locations, *e.g.*, New York, suggesting that an increase in call volume followed the reduction or elimination of commissions, other locations, *e.g.*, California and Georgia, experienced no difference in telephone usage following the same changes. Indeed, GTL has seen the most direct impact on call volumes in situations where there have been no rate changes. For instance, when prepaid calling is made available in a correctional facility, call volumes typically increase significantly as an inmate's family and friends can more easily manage a prepaid account for budgeting purposes than postpaid billing.

Accordingly, many interrelated factors can affect telephone usage in a correctional facility - including the number of inmates per telephone, the availability of those telephones, access to prepaid or debit accounts, and general economic conditions - and each of those factors needs to be reviewed in context and in combination. Lower rates, for example, would be more likely to produce an increase in usage in a facility with 6 inmates per telephone than in a facility where more than 50 inmates share a single telephone. Moreover, other internal factors, such as restrictions imposed by elements not controlled by the correctional facility, can also have an impact on an inmate's ability to use the telephones or to use all of his or her telephone allotment.

⁵³ *NPRM* ¶ 27.

4. *Market Forces*

The FCC seeks comment on the accuracy of the Petitioners' assertions (a) that telecommunications costs in general, and long distance costs in particular, are decreasing and (b) that ICS rates should follow the market and decrease as well.⁵⁴ GTL notes that Petitioners are looking at only one cost item, the basic telecommunications cost, and extrapolating overall cost reductions from that overly narrow base. While it is accurate that certain telecommunications costs have declined over the past 10 years, the nature of ICS products and services has changed dramatically over that same time period. As a result, many of the costs associated with providing inmate calling services have increased. For example, many investigative functions that once had to be performed "manually" by trained investigators are now possible through specialized software analytics, such as voice biometrics, data IQ, and digital audio search functions. For the correctional facility, the increase in software security features often means that fewer investigators are needed, which reduces that category of labor costs and frees up funds for other uses. For the ICS provider, however, the development, installation, and maintenance of increasingly sophisticated software security features results in increased research and development costs, higher maintenance and repair costs, and increased labor costs for the personnel needed to support those security features. In addition, as noted above, the general trend in the marketplace is that commissions paid to local jurisdictions have been increasing. And, although bad debt expense is expected to decline with increased use of prepaid calling plans, it still represents a substantial cost for ICS providers. The decrease in certain traditional telecommunications service costs is thus not material to rates because it is

⁵⁴ *NPRM* ¶ 29.

subsumed by increases in numerous other costs or the creation of new costs related to enhanced features and functionality.

5. *Collect Calling, Debit Calling and Prepaid Calling*

The FCC seeks comment on the benefits of debit calling, its potential safety concerns and administrative costs, on the viability and current availability of prepaid calling, and on its authority to mandate that ICS providers offer debit calling.⁵⁵ As an initial matter, it is necessary to clarify the terminology used to discuss alternative payment methods. GTL understands there to be three alternative payment methods, depending on *who* pays for a call (the caller or the recipient) and *when* payment is made (before or after the call). First, the term “collect calling” refers to the traditional collect call that results in the local exchange carrier (“LEC”) placing a charge on the recipient’s telephone bill; thus the cost of the call is paid after the fact or postpaid by the call recipient, and the charge has the potential to become a bad debt expense. Second, the term “prepaid calling” refers to calling that is paid from an account that belongs to a family member or friend of the incarcerated individual; the account is funded in advance, *i.e.*, prepaid, by the call recipient and the prepaid minutes purchased decrease as they are used. Third, the term “debit calling” refers to calling that is paid for with an existing account, but here it is an account that belongs to the inmate; funds from the account are debited as calls are made.

In GTL’s experience, collect calling is generally more expensive for the ICS provider than prepaid calling or debit calling because of billing cost and uncollectibles.⁵⁶ The rates for

⁵⁵ *NPRM* ¶¶ 30-33, 53. Petitioners’ assertion that “debit calling is less expensive because it reduces staff responsibilities” cannot be addressed because it is not clear what is meant by “staff.” *See NPRM* ¶ 30 (citing Alternative Wright Petition at 20-21, 23-27).

⁵⁶ *2002 Order on Remand* ¶ 76 (stating that collect calling for inmate calls includes “operator services, billing and collection, and bad debt”).

non-inmate interstate collect calling also reflect these costs.⁵⁷ ICS collect call rates cannot be reviewed in isolation when many carriers are charging similar or higher rates for non-inmate interstate collect calling.⁵⁸

Debit calling, however, can actually increase some administrative costs depending on the characteristics of the inmate account. For example, a system that uses PINs (personal identification numbers) tied to inmate IDs has to be managed, and the management costs are likely to be higher in facilities with high turnover of the inmate population. As to safety concerns, a PIN can become a commodity inside a correctional facility, which can lead to PIN theft. Although those safety concerns can be addressed by the facility, the ICS provider may be asked to provide software solutions, such as voice recognition PINs (combining PIN and voice biometrics), which result in increased cost.

Debit calling also requires more detailed administration of an inmate's "allowed calls" list to validate each call being made via the debit account and ensure that calls are being made only to those persons the inmate is permitted to contact. Depending on the facility, the process of administering inmate "allowed calls" lists is done manually through human intervention or via automated software, both of which involve additional costs. Thus, while there are obvious

⁵⁷ See, e.g., CC Docket No. 96-128, Comments of Corrections Corporation of America, at 9 (filed May 2, 2007) ("The Petitioners support their request for benchmark rates by comparing their worst-case inmate calling rates to standard long distance rates, including rates for standard prepaid and debit calls. The most appropriate evaluation of inmate calling rates, however, would be to compare the rates charged for calls from correctional facilities with the rates charged for person-to-person collect calls that are available to the general public. Courts and the Commission have recognized the need of correctional facilities to identify, monitor, and block inmates calls to specific individuals, and this need, in addition to the need to establish other security measures, makes station to station calls the more comparable model.").

⁵⁸ See, e.g., Global Crossing Companies, Domestic Informational Price List No. 1, at 204 (effective February 1, 2001), available at <http://www.level3.com/en/legal/global-crossing-tariffs/~media/96EE3A0624F24E50BC1AC03CC6038617.ashx>; XO Communications, Rates for Operator and Directory Assistance, available at http://www.xo.com/SiteCollectionDocuments/information/TOS_SLA_Rates/voice/rates/XORates_ChargesOP4.5.pdf; tw telecom, Interstate Price List No. 4, at 42 (effective July 1, 2008), available at <http://www.tariffs.net/tariffs/10090ero8n/temptwtel%20Interstate%20Price%20List%20%2007%2023%2012%20%28LD%20Lang%29%20CUR%20No.%204.pdf>.

benefits to debit calling plans, there is no reason to expect that such plans will exert downward pressure on collect calling rates.

Correctional facilities are becoming more open to debit calling, but it is not yet universally accepted. Local authorities determine whether to permit inmates to direct their own calls through the use of debit calling. Some facilities still prefer not to give inmates the greater degree of latitude to direct their own calls. Prepaid and debit calling are viable options, and more than approximately 80% of consumers are using these methods to pay for their calls. Prepaid and debit calling have been the prevalent trend in the industry over the past 3-5 years, and a significant number of ICS providers now offer either prepaid calling or debit calling or both to the extent permitted by the correctional facility. Prepaid calling is popular among friends and family members of inmates, in part, because it makes it easier to manage how much is spent on telephone calls. The transition also has gained greater impetus because of the increasing difficulty ICS providers experience in billing for collect calls as many LECs are moving away from processing third-party charges for telecommunications services.⁵⁹ Given recent trends and the need for correctional facilities to determine whether debit calling is appropriate for their facility, there does not appear to be a need for regulatory intervention.

Finally, issues of billing and collection for inmate calling services likely remain outside the FCC's authority to regulate.⁶⁰ The FCC deregulated telecommunications billing and

⁵⁹ See, e.g., *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure, Truth-in-Billing and Billing Format*, 27 FCC Rcd 4436, ¶¶ 9,16 (2012) (discussing the measures LECs have taken to limit and third-party billing); see also United States Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations, Majority Staff, State Report for Chairman Rockefeller, "Unauthorized Charges on Telephone Bills," at ii (July 12, 2011) (determining that the "evidence obtained and analyzed by Committee staff suggest that third-party billing on landline telephone has largely failed to become a reliable method of payment that consumers and businesses use to conduct legitimate commerce").

⁶⁰ *NPRM* ¶ 53.

collections in 1986, stating in a 1986 order that billing and collections were not a “communication service” and thus not subject to regulation by the FCC.⁶¹

6. *Competition in the ICS Market (Exclusive Contracts and Collect-Call-Only Rules)*

The FCC seeks comment on the First Wright Petition’s proposal that the Commission should prohibit exclusive contracts and collect call-only restrictions in privately administered correctional facilities.⁶² The unique security needs of correctional facilities necessitate the use of exclusive contracts for inmate calling services.⁶³ If multiple ICS providers were operating within a single correctional facility, with each running its own systems, software, and recording procedures, no one provider would be responsible for security procedures. The facility’s staff would need to be trained on multiple systems, its management would need to learn how to interpret and integrate multiple forms of reports, and its investigators would frequently have to conduct duplicative search procedures. It is highly likely that the facilities’ overall costs, particularly its labor costs, would increase. Inmates and/or their family members and friends would need to have prepaid or debit accounts on multiple systems, and all of those accounts would need to be administered. It is unlikely that the revenue associated with the fragmented service would be sufficient to support the service for any of the vendors. In GTL’s experience, exclusive contracts do not influence ICS rates: the contracts are awarded through a competitive bid process, in which the rates are influenced principally by the facility’s requirements as set forth in the procurement specifications.

⁶¹ *Capital Network System, Inc. v. FCC*, 3 F.3d 1526, 1528 (D.C. Cir. 1993).

⁶² *NPRM* ¶ 36.

⁶³ *1998 Order* ¶¶ 56-57 (finding that inmate telephone systems are not required to provide the caller access to the carrier of its choice because inmates are limited to the carrier selected by the prison due to the special security requirements applicable to inmate calls).

7. *Offer No-Cost Calling*

The FCC seeks comment on Petitioners' suggestion that ICS providers should be required to 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.⁶⁴ While some correctional facilities may be interested in considering a no-cost calling option, it does not change the fact that every call that goes out free has to be figured into the per cost call because there is a cost associated with providing the service. Put simply, there is no free lunch. An arrangement to provide no-cost calling per inmate per month typically would be managed by providing inmates that have a PIN with free time accounts, so this proposal would impose a certain amount of administrative cost on the correctional facility. And, as with debit calling accounts as discussed above, the PIN essentially functions as currency and thus could create potential safety issues.

8. *Billing-Related Call Blocking*

The FCC seeks comment on the practice of blocking collect calls to numbers served by LECs with which the ICS providers have no billing arrangements.⁶⁵ The LECs' unwillingness to bill for collect calls is not only continuing; it is increasing.⁶⁶ As a result, ICS providers have no alternative but to block collect calls where they would otherwise be completing calls with no way to bill the consumer and thus no way to be paid for those calls. The impasse further spurs the shift to prepaid and debit calling methods. Debit calling and prepayment options will ultimately make it irrelevant whether or not the LECs are willing to bill for collect calls. At the same time, the LECs are being supplanted by local wireless or Voice over Internet Protocol ("VoIP") service providers, another change in technology that makes location irrelevant in

⁶⁴ NPRM ¶ 39.

⁶⁵ NPRM ¶ 40.

⁶⁶ See *supra* n. 60.

collect call billing because the call is tied to a person, not a place. GTL is not aware of any practical ways to deter call blocking, other than by supporting increased use of debit or prepaid calling if the correctional facility permits such calling options.

9. Non-Geographic Numbers

The FCC seeks comment on whether disparity between interstate and local calling rates creates an incentive for call recipients to obtain non-geographic telephone numbers, such as wireless or VoIP numbers, and on security concerns associated with the use of such numbers.⁶⁷ GTL has observed the trend for call recipients to obtain non-geographic telephone numbers from wireless or VoIP providers, including numbers local to the prison, which allows the call recipient to take advantage of lower local calling rates. The practice occurs more often at state facilities than at local facilities. The use of non-geographic numbers means there is no accurate record of inmates' ultimate calling destinations, which raises serious security concerns. Suppose, for example, that an investigator using voice biometrics identifies a call recipient as an intermediary communicator for a criminal gang and law enforcement officials then try to locate that individual by identifying the telephone number the inmate called. If the call was placed to a non-geographic number local to the prison, the records would lead to a local exchange and the security flow would be interrupted by a third-party switch. From a security perspective, the result is similar to automatic call forwarding, which is routinely blocked by most correctional facilities for similar security concerns.

⁶⁷ *NPRM* ¶ 41.

10. *Disabilities Access*

The FCC seeks comment on the types of ICS access provided to inmates with hearing disabilities and the rates for such access.⁶⁸ GTL's inmate calling services and the rates for those services are fully compliant with requirements under the ADA and current FCC requirements, including in most instances the availability of TTY devices in the correctional facilities.

11. *Updated Data*

The Commission seeks comment on the accuracy and reliability of an analysis of prison phone contracts by Prison Legal News ("PLN") and seeks updated data on ICS rates.⁶⁹ Because GTL has more than 1,900 correctional facility customers, each with unique procurement requirements and individualized contractual terms, it would be extraordinarily difficult and time-consuming to extract the summary information the Commission has requested for each of those correctional facility customers. In addition, referring to rate information alone, without an understanding of the underlying procurement requirements, necessarily yields misleading conclusions.

GTL, however, agrees with the Commission that the accuracy and reliability of the PLN study should be questioned. The examples the Commission found from its independent research demonstrate that the PLN study does not provide a currently accurate picture of the inmate calling market.⁷⁰ The PLN study is not reliable for a variety of reasons: its methodology is flawed, the rates reported are not reflective of reality or all of the calling options available to

⁶⁸ *NPRM* ¶ 42.

⁶⁹ *NPRM* ¶ 43.

⁷⁰ While the correct interstate rate for Texas is reflected in the PLN study, the study neglects to mention that those rates are for calls billed to a "Friends & Family Account." A call billed to an "Offender Account" maintained by the prisoner receives a discount, and would be \$5.81 for a 15-minute interstate call. *See Texas Offender Telephone, Calling Programs, Rates, Fees & Taxes, available at* <http://texasoffenderfriendsandfamily.com/rates.asp>.

inmates and their families,⁷¹ and the information is stale. While the PLN study was published in April 2011, the chart indicates that it is based on information from 2007-2008. Accurate and up-to-date information is available. Most interstate ICS rates are publicly available, either through dissemination by correctional facilities or via ICS providers' web-posted rates, terms, and conditions for interstate services. For example, in addition to the those cited by the Commission, the PLN study also reflects incorrect rates for Colorado (\$3.00 for 15-minute interstate debit call),⁷² Massachusetts (\$1.78 for 15-minute interstate prepaid debit call),⁷³ North Carolina (\$3.40 for all long distance calls up to 15 minutes),⁷⁴ Rhode Island (\$5.22 for 15-minute interstate debit call),⁷⁵ and South Carolina (\$1.53 (collect) or \$1.29 (debit) for 15-minute call to anywhere in United States).⁷⁶

12. Reliability of Data

The FCC seeks comment on whether the Alternative Wright Petition and the ICS Provider Proposal are grounded in sufficiently reliable data.⁷⁷ Neither proposal is reliable as support for setting interstate rates for interexchange long distance inmate calling services because the data are outdated and cover an insufficient portion of market.

⁷¹ For example, for Idaho, the PLN study lists only the interstate rate for collect calls, but does not include the rate for interstate debit calls (\$3.40 for a 30-minute call) or the rate for interstate prepaid collect calls (\$15.60 for a 15-minute call). See Idaho Department of Correction, Phone Services, *available at* http://www.idoc.idaho.gov/content/prisons/offender_services/phone_services.

⁷² Colorado Department of Corrections, Inmate Phone System, Debit Inmate Phone Rates (rates effective March 1, 2012), *available at* <http://www.doc.state.co.us/inmate-communications#phone>.

⁷³ Massachusetts Department of Correction, Global Tel Link (GTL) Inmate Telephone Services - Calling Rates (rates effective October 2010), *available at* <http://www.mass.gov/eopss/agencies/doc/>.

⁷⁴ North Carolina Department of Public Safety, Inmate Phone Program (rates effective July 1, 2011), *available at* <http://www.doc.state.nc.us/Communications/index.htm>.

⁷⁵ State of Rhode Island Department of Corrections, GTL Calling Rates, *available at* <http://www.doc.ri.gov/faq/telephone.php>.

⁷⁶ South Carolina Department of Corrections, Telephone Calls, Rate Structure, *available at* <http://www.doc.sc.gov/family/TelephoneCalls.jsp>.

⁷⁷ NPRM ¶ 44.

In the Alternative Wright Proposal, Petitioners propose national rate caps on the basis of rate and cost data that are incomplete and considerably more outdated now than when they were submitted more than six years ago. Petitioners' claim that "[t]ypical long distance inmate collect calling rates include a per-call charge of \$3.95 plus as much as \$0.89 per minute"⁷⁸ overstates actual market conditions.⁷⁹ The Petitioners' estimates of service providers' costs do not reflect the costs of a representative sample of service providers or the extremely broad range of institutions they serve. Petitioners' data significantly understate important costs and overlook some cost categories altogether. Service providers must continually improve their security features to remain competitive in bidding contracts – GTL, for example, has developed cell-phone detection tools, voice biometrics systems, data IQ, and other technologies to deal with emerging security threats – but Petitioners did not include any measure of research and development costs in their cost model. Petitioners also dramatically understate the costs of maintaining and supporting the hardware and software used in inmate calling systems, data storage costs, bad debt expense, and other key cost drivers, and they fail to recognize that ICS contracts often require the placement of public payphones at locations unrelated to correctional facilities, such as parks and highway rest stops, which must be operated at a loss.

⁷⁸ Alternative Wright Petition at 2.

⁷⁹ See, e.g., Massachusetts Department of Correction, Inmate Domestic Debit and Collect Calling Rates (rates effective October 2010), *available at* <http://www.mass.gov/eopss/agencies/doc/> (showing interstate rate of \$.10 per minute plus an \$.86 surcharge); North Carolina Department of Public Safety, Inmate Phone Program (rates effective July 1, 2011), *available at* <http://www.doc.state.nc.us/Communications/index.htm> (showing rates capped at \$1.25 for local calls up to 15 minutes and \$3.40 for long distance calls up to 15 minutes); Colorado Department of Corrections, Debit Inmate Phone Rates (rates effective March 1, 2012), *available at* <http://www.doc.state.co.us/inmate-communications#phone> (showing interstate rates of \$.10 a minute plus a \$1.50 surcharge); CC Docket No. 96-128, Letter from Securus Technologies (filed May 10, 2012) (listing a selection of Securus Inmate Collect Call Rates, including interstate rates in Florida of \$.06 per minute plus a \$1.20 surcharge, Maryland of \$.30 a minute plus a \$1.70 surcharge, Texas of \$.43 a minute with no surcharge, and Missouri of \$.05 a minute plus a \$1.00 surcharge); *see also* Interstate and International Rates, Terms and Conditions Provided by Global Tel*Link Corporation, *available at* <http://www.tariffs.net/tariffs/10094bvbq5/tempFCC%20RTC%2002%2019%2013%20GLOBAL%20CUR01.pdf> (listing 22 domestic contracts, the rates for 18 of which are lower than \$.89 a minute with a \$3.95 surcharge).

The ICS Provider Proposal extrapolates from data selected from only 30 correctional facilities⁸⁰ to propose a rate structure for all ICS providers and the 4575 U.S. correctional facilities they serve.⁸¹ A purported “sample” of 30 is far too small to produce reliable results. There are enormous variations among correctional facilities and the ICS products and services they request from ICS providers. In addition, the ICS Provider Proposal includes only correctional facilities that do not require commissions, which is not representative of the majority of U.S. correctional facilities. Moreover, the data provided are now well over five years old and thus incapable of providing an accurate picture of current conditions even as to the 30 correctional facilities selected.

13. *Existing Contracts*

The FCC seeks comment on how existing contracts should be treated, in the event the Commission was to implement a rate cap.⁸² GTL urges the Commission to grandfather existing ICS contracts and apply any new ICS rules only to new contracts entered into after the effective date of such new rules. Most ICS contracts run for a term of three to ten years, depending in part on the number of extensions. The contracts typically include change of law provisions, but the application of those provisions is too uncertain to relieve the ICS provider of the economic burden of any new ICS rules that are made applicable to existing contracts. GTL currently provides ICS services under the terms of thousands of contracts with correctional facilities, and the company’s business plans and its day-to-day operations are predicated on the assumptions that were considered and agreed to when those contracts were executed. If 30% to 40% of those

⁸⁰ NPRM ¶ 44 (citing to ICS Provider Proposal at 4-5).

⁸¹ Max Raskin & Ian Kolet, *U.S. Jails More People Than Any Other Country: Chart of the Day*, Bloomberg, Oct. 15, 2012, <http://www.bloomberg.com/news/2012-10-15/u-s-jails-more-people-than-any-other-country-chart-of-the-day.html>; Natasha Lennard, *US has more prisoners, prisons than any other country*, Salon, Oct. 15, 2012, http://www.salon.com/2012/10/15/us_has_more_prisoners_prisons_than_any_other_country/.

⁸² NPRM ¶ 45.

contracts were to be altered to take account of new ICS rules, the change could have a material impact on GTL's ability to do business.

14. *Dropped Calls*

Petitioners also propose that per-call charges be eliminated when a dropped call is re-initiated within a certain amount of time.⁸³ Dropped calls can result from a variety of circumstances wholly unrelated to the inmate calling platform, such as when an inmate calls a person using a wireless phone, a home portable phone, or background noise or static triggers the security system that is designed to detect and deter three-way calling. Anyone that uses a wireless phone is susceptible to dropped calls - it is not an experience unique to the inmate calling environment.⁸⁴ When any type of wireless call is dropped, the wireless user is required to use additional minutes to initiate or receive a call to re-establish the lost connection. To avoid dropped calls, GTL advises its customers that call recipients should use landline telephones and, if they must use wireless telephones, to avoid talking in areas with prevalent background noise.

Eliminating per-call charges when a dropped call is re-initiated is not reasonable because the ICS provider must go through the same validation process and incur the same costs as for a new call, including the cost of using a third-party vendor. It is no more unreasonable to require inmates and call recipients to follow instructions for making telephone calls than it is to require prison visitors to pass through a metal detector and follow the instructions of prison security guards.

⁸³ *NPRM* ¶ 19; *see also id.* ¶ 53 (seeking comment on the FCC's legal authority regarding the treatment of dropped calls).

⁸⁴ *See, e.g., Amendment of Parts 1, 2, 22, 24, 27, 90 and 95 of the Commission's Rules to Improve Wireless Coverage through the Use of Signal Boosters*, FCC 13-21, Report and Order, ¶ 1 (rel. Feb. 20, 2013) ("While nearly the entire U.S. population is served by one or more wireless providers, coverage gaps that exist within and at the edge of service areas can lead to dropped calls, reduced data speeds, or complete loss of service."); *see also* FCC Guide, *Understanding Wireless Telephone Coverage Areas* (explaining how dropped calls can occur), available at <http://www.fcc.gov/guides/understanding-wireless-telephone-coverage-areas>.

II. LEGAL AUTHORITY TO REGULATE INMATE CALLING SERVICES

The FCC seeks comment on the scope of its legal authority to regulate inmate calling services, in particular its authority to address interstate interexchange ICS rates under Sections 201(b) and 276(b)(1)(A) of the Act.⁸⁵ Specifically, the FCC requests comment on whether it has jurisdiction to establish per-minute rate caps for privately- and publicly-administered facilities and whether it has the legal authority to disallow call set-up charges for re-initiation of disconnected calls, to mandate that ICS providers offer debit calling, or to address site commissions.⁸⁶

Section 201(b) gives the FCC the power to ensure that all charges for interstate communications services are “just and reasonable.”⁸⁷ This section illustrates the dual jurisdictional system regarding regulation of communications that Congress adopted when it enacted the Communications Act of 1934. Although the FCC’s power over interstate services has been construed broadly, recognizing the authority of the FCC to address certain intrastate issues in order to carry out its mandates under the Act effectively,⁸⁸ courts have also repeatedly acknowledged the limitations of this authority. In *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, for example, the United States Court of Appeals for the Third Circuit reiterated the jurisdictional divide between the FCC and the states, noting that Congress could have made preemption of state regulation complete when it enacted the Telecommunications Act of 1996 but had instead preserved a role for state utility commissions in the federal regulatory

⁸⁵ NPRM ¶¶ 49-53.

⁸⁶ See *id.*

⁸⁷ 47 U.S.C. § 201(b).

⁸⁸ See, e.g., 47 U.S.C. § 251.

scheme.⁸⁹ Section 201(b) thus gives the FCC broad license to regulate interstate calling to ensure “just and reasonable” rates, but the power is not absolute.

Section 276(b)(1)(A) requires the FCC to “establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call.”⁹⁰ Inmate calling services are specifically included in the statute’s definition of “payphone service.”⁹¹ Section 276 applies to *all* service providers for *all* payphone calls and thus directs the FCC to ensure fair compensation for both interstate *and* intrastate calls.⁹²

The FCC has repeatedly declined to impose federal surcharges or otherwise address ICS rates under Section 276.⁹³ In the *1996 Payphone Order*, the FCC concluded that the contracts negotiated between inmate calling service providers and correctional facilities satisfied the FCC’s statutory obligation to ensure “fair compensation.”⁹⁴ In the *2002 Order on Remand*, the FCC again explicitly rejected requests either to preempt state rate caps to allow higher ICS rates or to impose a federal per-call surcharge of \$.90 on inmate calls.⁹⁵ The FCC acknowledged that inmate calling services in city and county correctional facilities exist largely in a state-regulated environment, because most calls made from such facilities are local or intrastate calls that are

⁸⁹ 271 F.3d 491, 510 (3rd Cir. 2001).

⁹⁰ 47 U.S.C. § 276(b)(1)(A). Only emergency calls and telecommunications relay service calls for the hearing disabled are exempted from the “fair compensation” requirement.

⁹¹ 47 U.S.C. § 276(b)(1)(C),

⁹² Section 276 was enacted to address the concerns that payphone providers and payphone service providers were not always being compensated fairly for payphone calls, in particular where telephone service providers offered “dial-around” methods that allowed consumers using public payphones to access cheaper providers for their calls instead of paying the provider of the payphone or its service via the coin-operated system. See *Precision Pay Phones v. Qwest Communications, Corp.*, 210 F. Supp.2d 1106, 1109 (N.D. Cal. 2002).

⁹³ *1996 Payphone Order* ¶ 72 (ICS providers “tend to receive their compensation pursuant to contract, which makes them ineligible to receive a per-call compensation amount.”); *2002 Order on Remand* ¶¶ 3, 24-26.

⁹⁴ *1996 Payphone Order* ¶ 72 (“[W]henever a PSP is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied.”).

⁹⁵ *2002 Order on Remand* ¶¶ 25-26.

subject to state-imposed rate ceilings.⁹⁶ The FCC refused to preempt those state rate ceilings or impose a federally-tariffed per-call surcharge.⁹⁷

In the *2002 Order on Remand*, the FCC concluded that “any solution to the problem of high rates for inmates must embrace the states.”⁹⁸ The FCC rejected a proposal for uniform national rates for inmate calling services, reasoning that because of the great diversity in local costs and conditions, a national surcharge could result in excessive recovery in many states and confinement facilities.⁹⁹ A federal surcharge that provides excessive recovery to ICS providers in a subset of correctional facilities would not satisfy the FCC’s obligation to ensure “fair compensation” for all interstate and intrastate calls.

Taken together, Sections 201 and 276 appear to provide broad authority for the FCC to address interstate interexchange ICS rates – on the one hand, to ensure that rates are “just and reasonable” for the consumers of inmate calling services and, on the other hand, to ensure that ICS providers receive “fair compensation” for all ICS calls. FCC intervention in issues subject to state regulation – including intrastate ICS rates – would be appropriate only if there were no other way for the FCC to carry out its mandates under the Act.

While the FCC has certain obligations under the Act, the historic regulation of prisons by the states and the unique challenges presented by state prisons and ICS, place regulation of ICS more appropriately with the states. Courts have routinely ruled that the regulation of state and local corrections facilities must be left to the local authorities. For example, in *Arsberry v. Illinois*, the Seventh Circuit reviewed a challenge to the ICS system in Illinois, which granted

⁹⁶ *2002 Order on Remand* ¶ 11.

⁹⁷ *2002 Order on Remand* ¶ 24.

⁹⁸ *2002 Order on Remand* ¶ 29.

⁹⁹ *2002 Order on Remand* ¶ 26.

one phone company the exclusive right to provide telephone service to inmates in return for having 50% of the revenues generated by the service be paid to the state.¹⁰⁰ Observing that the payment to the state was functionally a tax, the court affirmed the dismissal of plaintiff's complaint, stating, in part, "By what combination of taxes and user charges the state covers the expense of prisons is hardly an issue for the federal courts to resolve."¹⁰¹ In *U.S. v. Michigan*, the Sixth Circuit expressed the general view that states should be given broad deference in their handling of correctional facilities and the penal system:

'The problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' . . . The unabridged teachings of the [Supreme] Court convey the Court's own unequivocal commitment to and its adamant recognition of the state's sovereign authority to operate its penal institutions. Anchored in the sensitive principles of federalism, this sovereign authority is a prerogative of the state.¹⁰²

As GTL explained in its comments in opposition to the Alternative Wright Petition, this well-founded policy of deference to state and local administrators extends, and should continue to extend, to inmate calling services.¹⁰³ "Inmate calling rates cannot be examined in isolation, since inmates services are inextricably bound up with pivotal aspects of prison administration, the security of inmate and the public at large, complex budgetary issues, and other inherently local concerns. The FCC has appropriately avoided one-size-fits-all federal mandates in past orders, and instead deferred to state and local officials to strike the right balance between

¹⁰⁰ *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001) (Posner, J.).

¹⁰¹ *Id.* at 564, 565.

¹⁰² *U.S. v. Michigan*, 940 F.2d 143, 154-55 (6th Cir. 1991) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (footnotes omitted)).

¹⁰³ CC Docket No. 96-128, Comments of Global Tel*Link, at 4-8 (filed May 2, 2007) ("GTL 2007 Comments").

institutional needs and calling rates.”¹⁰⁴ GTL explained, further, that because of the enormous variation in local needs and resultant costs – including the diversity of security and investigative features required by correctional facilities of different types and sizes – a nationwide rate system for ICS cannot “be squared with the statutory assurance of fair compensation” under Section 276.¹⁰⁵

ICS rates are inextricably bound up with the payment of commissions, which are also established and administered by local policymakers. At the state level, many state laws explicitly authorize commissions,¹⁰⁶ and the funds frequently are used to support inmate health and welfare programs that local policymakers deem beneficial. For example, in Alabama, all county commissions from ICS go into a “Sheriff Law Enforcement Fund” to go back into providing services at the jails, according to state statutes.¹⁰⁷ In Connecticut, revenues from the “provision of pay telephone service” to inmates go into the Department of Correction fund, to be used for expanding inmate educational services and reentry program initiatives.¹⁰⁸ In many locations, these programs could not otherwise be offered without an increased draw on local tax revenues, and many local officials have concluded that the costs of funding such programs should be borne, at least in part, by the prison population for whose benefit they are offered.

Apparently acknowledging that such decisions are appropriately committed to the sound discretion of state and local policymakers, in the *2002 Order on Remand*, the FCC recommended that the *states* should address the issue of commissions: “States are encouraged to examine the issue of the significant commissions paid by ICS providers to confinement facilities and the

¹⁰⁴ GTL 2007 Comments at 2.

¹⁰⁵ GTL 2007 Comments at 11.

¹⁰⁶ See, e.g., FLA. STAT. CH. 945.215; see also *Holloway v. Magness*, 666 F.3d 1076 (8th Cir. 2012).

¹⁰⁷ See, e.g., ALA. CODE 45-1-232.

¹⁰⁸ See, e.g., CONN. CODE § 18-81x.

downward pressure that these commissions have on ICS providers' net compensation and, more important, the upward pressure they impose on inmate calling rates."¹⁰⁹ Since the *2002 Order on Remand*, several states appear to have heeded the FCC's recommendation. New York and California, for example, eliminated commissions in its state prison system, and a number of other states, including Maryland, Missouri, New Hampshire, and Vermont have reformed their commission payment systems. Accordingly, regulation of ICS is more appropriate at the state level.

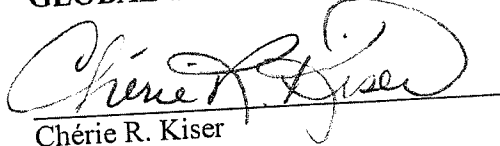
¹⁰⁹ *2002 Order on Remand* ¶ 29.

CONCLUSION

For the foregoing reasons, the Commission should reject the proposals set forth in the First Wright Petition and the Alternative Wright Petition.

Respectfully submitted,

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