Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS

OF

MARTHA WRIGHT, ET. AL.,

THE D.C. PRISONERS' LEGAL SERVICES PROJECT, INC.,

CITIZENS UNITED FOR REHABILITATION OF ERRANTS,

PRISON POLICY INITIATIVE, AND

THE CAMPAIGN FOR PRISON PHONE JUSTICE

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SUMMARY

In January 1984, an elderly lady made a phone call and asked the unforgettable question "Where's The Beef?!"® While she was referencing a paltry burger patty on an oversized bun when she asked the question of the "Flaky Bun" executives, she easily could have been asking the same question after reviewing the ICS providers' Comments filed in the instant proceeding.

Despite direct orders from the FCC for parties to provide specific evidence to support its proposals, the ICS providers failed to provide any support for their arguments presented in their Comments. Instead of supplying "most up-to-date information" and "specific analysis and facts" the ICS providers complained that it would be "difficult" to provide this information, and instead proffered only generalizations and inaccurate conclusions on questions of both law of fact.

In the absence of any specific evidence to support their opposition to the adoption of a benchmark rate for interstate ICS telephone calls, the FCC must accept the evidence supplied by the Petitioners and other parties, and adopt the Petitioners' proposal to impose a benchmark ICS rate of $0.07, with no set-up fees or other ancillary charges. Moreover, the FCC can and must direct all existing contracts to be reformed to integrate the proposed ICS rate within one year of the effective date of the order in this proceeding.

Finally, the FCC must reject the call by CenturyLink to establish an advisory committee. Simply put, the ICS providers have used every available option at hand to delay FCC action in this proceeding over the past 12 years, and have had every opportunity to call for consensus. Aided by the FCC's inaction, millions of inmates and their families have endured usurious rates and abusive practices while the ICS providers have reaped billions in revenue.

Further delay is no longer an option. The FCC requested specific data, and, while the Petitioners provided specific cost data in support of the Petitioners, the ICS providers declared that it would be too "time-consuming" to provide this information. In light of their failure, the ICS providers must not be permitted to delay action any further.

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REPLY COMMENTS

Martha Wright, Dorothy Wade, Annette Wade, Ethel Peoples, Mattie Lucas, Laurie Nelson, Winston Bliss, Sheila Taylor, Gaffney & Schember, M. Elizabeth Kent, Katharine Goray, Ulandis Forte, Charles Wade, Earl Peoples, Darrell Nelson, Melvin Taylor, Jackie Lucas, Peter Bliss, David Hernandez, Lisa Hernandez, Vendella F. Oura, along with The D.C. Prisoners' Legal Services Project, Inc., Citizens United for Rehabilitation of Errants, the Prison Policy Initiative, and The Campaign for Prison Phone Justice (jointly, the "Petitioners") hereby submit these Reply Comments in connection with the above-captioned proceeding.[1]

On March 25, 2013, the Petitioners submitted Comments calling for the FCC to establish a benchmark Inmate Calling Service ("ICS") rate at $0.07 per minute for debit, pre-paid, and collect calls, with no per-call rate and no other ancillary fees or taxes, from all private, public, state, county and local correctional and detention facilities.

As demonstrated in the Petitioners' Comments, the cost to provide ICS is well below the proposed rate, and the proposed rate will continue to provide the ICS providers a fair profit for their services, regardless of the size of the institution or the volume of originating calls from any given facility.

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[1] *Rates for Interstate Inmate Calling Services*, Notice of Proposed Rulemaking, 27 FCC Rcd 16,629 (2013)(the "*NPRM*"). The *NPRM* was published in the Federal Register on January 22, 2013, and established April 22, 2013, as the deadline for filing Comments in this proceeding. 78 FED REG 4369 (rel. Jan. 22, 2013).

Nothing in the comments submitted by the ICS providers undermines this proposal. In fact, despite the fact that the FCC requested specific evidence to support the ICS providers' opposition to the adoption of a benchmark ICS rate, the ICS providers declined to provide any specific data, claiming it would be "difficult" and "time-consuming."[2] In light of their election not to provide any evidence in support of their opposition to the proposed benchmark ICS rate, the Commission must grant the Petitioners' proposal, and provide immediate relief to millions of inmates and their families.

DISCUSSION

I. THERE IS OVERWHELMING SUPPORT FOR ICS REFORM.

Over the past 10 years, tens of thousands of interested parties have urged the FCC to take action on reforming the ICS rates and practices. In response to the *NPRM*, the voice for reform was even louder, with almost unanimous support for the FCC to step in and reduce the rates affecting inmates and their families. Commenters noted the high rates of recidivism, the disproportionate impact on the poor, minorities, and immigrant detainees, and the need for inmates and their families to maintain strong contact, and strongly urged the FCC to take action.

In particular, many parties focused on the positive benefits of low ICS rates to reduce the high rate of recidivism among recently released inmates. The Prisoners Legal Services of Massachusetts noted that "97% of the prison population will be released to our communities" and, with the Massachusetts recidivism rate is at 44%, "we simply cannot afford to compromise support systems that are proven to contribute to successful reentry and lower recidivism."[3] The Vera Institute of Justice agreed, stating that "[r]egular phone contact is often the only way to

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[2] *Comments of Global Tel*Link Corp.*, WC Dkt. 12-375, filed Mar. 25, 2013, pg. 26 ("*GTL Comments*").

[3] *Comments of Prisoners Legal Services of MA*, WC Dkt. 12-375, filed Mar. 25, 2013, pg. 2 (internal citations omitted).

maintain an o n-going connection with f amily members" and noted regular c ontact between inmates and t heir children has " proven b eneficial on a number of l evels i ncluding b eing associated with higher self-esteem, improved non-verbal IQ scores, better adjustment to school and f oster care, and few b ehavioral p roblems."[4] Moreover, t he M inority M edia a nd Telecommunications Council stated that "incarceration is concentrated among men, the young, and uneducated and racial and ethnic minorities – especially African Americans."[5]

Comments f iled b y the Center o n t he Ad ministration of C riminal L aw also a ddressed many of these same issues, noting:

- The country's l eading p rovider o f o ut-of-state i ncarceration se rvices, w hich houses m ore t han 8 0,000 i nmates i n 6 0 p lus f acilities, ' maintains a g eographic stronghold in Tennessee, housing inmates from as far afield as Montana, Hawaii, and Puerto Rico.' It would obviously be extremely expensive for an inmate's Hawaiian o r M ontanan f amily t o m ake t he trip t o T ennessee t o v isit t heir incarcerated loved one.[6]

- High i nmate c alling service rates incentivize t he a cquisition a nd u se o f cell phones and , b y d oing so, set i nmates u p f or f ailure. S everal sta tes e xpressly prohibit cell phone use in prison. Using such a device can result in a loss of 'good time' c redits (meaning m ore ti me se rved) o r a tra nsfer to a ' higher-security institution.' I t c an al so result in ad ditional j ail time f ollowing a conviction f or contraband possession."[7]

- Inmates t hat k eep i n t ouch w ith t heir l oved o nes are i nvolved i n f ewer disciplinary in cidents—prison i s a s afer p lace for b oth p risoners a nd prison employees. And, at least in some instances, the end result of frequent inmate-family c ontact i s t hat an i nmate s ecures a n earl y re lease t hrough "good behavior."[8]

- When rel eased i nmates ret urn t o a l ife o f c rime, ' they c ost s ociety al l o ver again' i n t he f orm of m ore a rrests, m ore prosecutions, i ncreased p rison populations, a nd m ore v ictims. To th e e xtent th at r educing in mate c alling

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[4] *Comments of t he Ve ra I nst. of J ustice*, W C D kt. 1 2-375, f iled Ma r. 14, 2 013, p g. 3 (internal citations omitted).

[5] *Comments of the Minority Media and Telecomms. Council*, WC Dkt. 12-375, filed Mar. 25, 2013, pg. 8 (internal citations omitted).

[6] *Comments of the Ctr. on the Admin. of Criminal Law*, WC Dkt. 12-375, filed Mar. 25, 2013, pg. 3.

[7] *Id.*, at pg. 12 (internal citations omitted).

[8] *Id.*, at pg. 8 (internal citations omitted).

service rates reduces recidivism, lowering rates promises to reduce these costs as well."[9]

- A child that stays in touch with an incarcerated mother or father is less likely to drop out of school or be suspended. Keeping in contact with an incarcerated parent can also reduce instances of child depression and feelings of alienation that can lead a child to engage in antisocial behavior. Moreover, maintaining the parent-child relationship during incarceration makes it more likely that the parent will be an active participant in his or her child's life upon release, which is more often than not to the child's benefit.[10]

The Human Rights Defense Center tied many of these factors in its statement that "[w]hen families cannot pay the cost of phone calls from their incarcerated loved ones, those same families and their communities pay a different kind of price: isolation, stress, decreased rehabilitation and increased recidivism rates."[11]

Based on the comments referenced herein, along with the tens of thousands of comments entered into the record from inmates and their families, there can be no question of the need for reform with respect to ICS rates and practices. Reducing ICS rates and eliminating excessive ancillary fees imposed by ICS providers will encourage contact between inmates and their families, friends and counsel, which has been shown to have direct and unquestioned social benefits.

II. THERE IS NO LEGITIMATE QUESTION THAT THE FCC HAS THE AUTHORITY TO PROVIDE THE REQUESTED RELIEF.

As explained in Petitioners' Comments, the FCC has authority to regulate ICS rates and practices under Sections 276 and 201 of the Communications Act of 1934, as amended, as well as under Title I ancillary jurisdiction.[12] Even the ICS providers agreed with the Petitioners with respect to the FCC's jurisdiction over interstate ICS rates.

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9 *Id.*, at pg. 10 (internal citations omitted).

10 *Id.*, at pg. 11 (internal citations omitted).

11 *Comments of the Human Rights Defense Ctr.*, WC Dkt. 12-375, filed Mar. 25, 2013, pg. 1.

12 *Petitioners' Comments*, pg. 5.

For example, Securus acknowledged that the FCC has jurisdiction over interstate ICS rates, and agreed that the FCC's proposed actions are not an attempt to regulate the operations of a correctional facility.[13] GTL acknowledged that Section 201(b) gives the FCC broad license to regulate interstate calling to ensure just and reasonable rates and that Section 276 applies to all service providers for all payphone calls.[14] CenturyLink conceded that the FCC has jurisdiction "with respect to the rates charged for interstate ICS provided by service providers",[15] and Pay Tel Communications, Inc., stated that the FCC has the authority to address "all aspects of the ICS environment."[16] In fact, Pay Tel went one step further, affirming that:

> [t]here is no question but that the Commission has jurisdiction over intrastate inmate calling rates. In enacting Section 276, Congress unambiguously granted the FCC authority "to establish regulations 'to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call.'" In the payphone service provider context, the Commission's authority pursuant to that statutory command has been construed such that the Section 276(b)(1)(A) "fair compensation" requirement includes the rates paid for local coin calls because they are part of the compensation that payphone service providers receive for their services; accordingly, the Commission's authority extends to regulating such rates.[17]

Thus, all interested parties in the proceeding agree that the Commission has the requisite authority to regulate the ICS industry.

Despite their acknowledgement that the FCC has the requisite authority to ensure just, reasonable and fair ICS rates and practices, certain ICS providers attempted to limit this authority. For example, GTL cited *Arsberry v. Illinois* to argue that regulation of state and local corrections facilities must be left to local authorities.[18] However, any fair reading of *Arsberry* would acknowledge that the court explicitly stated that the claim under the Communications Act

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[13] *See Comments of Securus Tech., Inc.*, WC Dkt. 12-375, filed Mar. 25, 2013, pgs. 8-10 ("*Securus Comments*").

[14] *GTL Comments*, pg. 32.

[15] *Comments of CenturyLink*, WC Dkt. 12-375, filed Mar. 25, 2013, pg. 18.

[16] *Comments of Pay Tel Communs., Inc.*, WC Dkt 12-375, filed Mar. 25, 2013, pg. 3.

[17] *Id.*, pg. 6, nt. 17 (internal citations omitted)(emphasis added).

[18] *GTL Comments*, pgs. 33-34.

that ICS providers charge unreasonably high rates and engage in rate discrimination is squarely within the FCC's jurisdiction.[19]

Moreover, Securus attempted to raise several arguments in an effort to limit the FCC's regulatory authority, but each ultimately fails. First, Securus explained that interstate long-distance calls have been detariffed since 1996, and that the adoption of a benchmark ICS rate would be a return to the pre-1996 regulatory scheme.[20] However, the Petitioners have not asked the FCC to impose new tariff filing requirements on ICS rates and practices. The Petitioners, along with an overwhelming number of other commenters in this proceeding, have requested that the FCC establish a benchmark ICS rate. There would be no need for filing a tariff relating to the benchmark ICS rate, because the ICS providers simply would be required to charge less than the proposed rate.

Securus then argued that rate regulation should be imposed only if a demonstrable market failure has occurred. Securus conceded that the FCC may establish rate regulation where there are "unjust and unreasonable rate or rates", and a "systemic, price-inflating harm to the inmate telecommunications market."[21] However, Securus concluded that there is no market failure in the ICS industry, and cites to its *Expert Report* in support of this conclusion.[22]

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[19] 244 F.3d 558, 565 (7th Cir. 2001)("A claim of discriminatory tariffed telephone rates is precisely the kind of claim that is within the primary jurisdiction of the telephone regulators. The plaintiffs are asking us to compare the rates on inmate calls with rates on comparable calls of other persons; that is what we cannot do but the regulatory agencies can.")(emphasis added).

[20] *Securus Comments,* pg. 14 (*citing Policy and Rules Concerning the Interstate Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730 (1996).

[21] *Securus Comments*, pg. 14 (*citing Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, Report and Order, 10 FCC Rcd 7842, 7851 (1995).

[22] *Securus Comments*, pg. 15 (*citing Expert Report of Stephen E. Siwek*).

As noted in the *NPRM*, while competition exists among the providers for new ICS contracts, once an ICS provider wins a contract, it becomes the sole ICS provider for that facility, and inmates only have access to the ICS options proffered by a single provider at that location.[23]

As such, the ICS industry is a text-book example of a "market failure." The Petitioners and the other parties supporting reform of the ICS industry have provided conclusive evidence that, post-RFP grant:

i. an ICS provider holds a monopoly on the ICS options at the prison or detention center;

ii. the rates charged to ICS customers (inmates and their families) are far beyond any reasonable cost to provide such services; and

iii. there is no incentive for either of the ICS contracting parties to voluntarily reduce the charges imposed on ICS customers since the contracting parties split the revenues through the payment of commissions.

Only through wishful thinking does such a regime ***not*** represent a market failure in its purest sense. While there may be competition to earn the right to be each location's monopolist, the ICS consumer is not protected from unjust and unreasonable rates once the monopolist signs the contract. As a result, the ICS consumer never benefits from the brief period of competition among ICS providers during in the RFP process.

Instead, ICS consumers are forced to pay whatever per-minute rate is charged by the ICS provider, all the while enduring repeated dropped calls, and paying all other usurious fees (i.e., $5.00 to receive a refund!). If this does not represent a "systemic, price-inflating harm," then the term has no meaning.

III. ICS PROVIDERS FAILED TO PROVIDE SPECIFIC EVIDENCE TO SUPPORT THEIR OPPOSITION TO THE ADOPTION OF BENCHMARK RATES.

In light of the substantial delay between the submission of the Alternative Proposal in 2007, and the release of the *NPRM*, the Commission sought updated information on every aspect of the ICS industry. The Commission noted that some of this information would need to

[23] *NPRM*, 16632.

come from the ICS providers,[24] and repeatedly called for the submission of detailed, specific evidence from all parties.

For example, the FCC requested specific data and evidence on the following matters, most of which could only come from the ICS providers:

- what costs are associated with the per-call charge; ¶18
- what are costs associated with call security; ¶19
- support of or disproving per-minute rate caps are arbitrary and capricious; ¶21
- provide alternate methodologies supported by sufficiently-detailed data; ¶25
- what are current ratios of debit to collect calling in correctional facilities; ¶32
- updated data on how much these site commissions are and how much they add to the per-call costs; ¶37
- provide data on the average number of calls that are blocked per month and the reason for the blocking; ¶40
- updated data from all interested parties and the public, but especially from ICS providers; ¶43 (emphasis added)
- most up-to-date information available regarding interstate ICS rates to aid us in developing a clearer understanding of the ICS market. This includes per-call and per-minute rates, information on commissions and what percentage of a rate they comprise, the number of disconnected calls, the average length of calls, and how calls break out by type, i.e. collect, prepaid and debit; ¶43
- The ICS Provider Proposal also provides no information about the geographic distribution of facilities in the sample, the distribution between state prisons and local prisons (jails), and the distribution between public and privately administrated facilities. Information about these facilities characteristics would be relevant to analyzing whether the sample is representative; ¶44, nt. 148 and
- specific analysis and facts to support any claims of significant costs or benefits associated with the proposals herein. ¶48

Despite the clarity with which the FCC made these requests, almost all of the ICS providers elected not to provide specific data and evidence, and clearly articulated their lack of interest in responding to the FCC's direct call to do so.[25]

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[24] *NPRM*, 27 FCC Rcd at 16,645.

For example, GTL responded that it would not provide updated data because "it would be extraordinarily difficult and time-consuming."[26] Incredibly, while it took issue with the April 2011 *Prison Legal News* study, claiming it was "stale" and that "accurate and up-to-date information is available,"[27] GTL then chose not to provide this accurate, up-to-date information, even though it is in the best position to do so through its contracts with 30 state-run prison systems, and 12 of the 20 largest prison systems.[28]

While Securus provided a study prepared by *Economists Incorporated*, this study did not provide the detailed information requested by the FCC. Instead, it merely disclosed the average of expenses that Securus claims to incur at a select set of facilities. However, as noted above, the FCC demanded to "see the ICS providers' math" rather than just the end result. Moreover, the attached Statement of Dr. Coleman Bazelon highlights several fundamental problems with Securus' study.[29]

Other than its flawed study, Securus' only other substantive disclosure was that the company spent over $4.5 million in research and development in 2012.[30] While it is laudable that the company is attempting to develop new products and upgrade its facilities, the amount it spent on research and development in 2012 is <u>less than one-half</u> of what it earned from serving the Florida state prison system during that same period![31] Since Securus boasted that it has

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[25] This excludes the most helpful comments of Network Communications International Corp. (NCIC), filed March 25, 2013, WC Dkt. 12-375. As shown in the attached Declaration of Dr. Coleman Bazelon, *see* Exhibit A, the information supplied by NCIC provided the only useful cost data entered into the record by the ICS providers.

[26] *GTL Comments*, pg. 26.

[27] *Id.*

[28] *Id.*, pg. 27.

[29] *See Declaration of Dr. Coleman Bazelon*, Exhibit A (failing to provide information on "how costs change with facility size", "whether there is a threshold size of a facility where costs begin to decline", and miscalculating the "gross margin.").

[30] *Securus Comments*, pg. 5.

[31] Securus is obligated to share 35% of its revenue with the State of Florida. In 2012, Securus paid Florida $5,156,269.19. Therefore, Securus earned revenue of *at least*

contracts with "1,800 correctional authorities", one can reasonably assume that this research and development budget is but a drop in the bucket compared to the revenues earned from the other 1,799 correctional authorities.[32]

Lest the Petitioners' only focus on GTL and Securus, the other ICS providers also failed to adequately respond to the FCC's marching orders. Pay Tel urged the Commission to take "a holistic view of ICS" but only provided two charts based on publicly-available information, along with a statement that, for the jails it serves, "84% were local calls, but those calls generated only 66% of that year's revenue."[33] The disproportionate contribution of interstate ICS revenue to Pay Tel's bottom line is clear evidence of the benefits arising from the FCC's adoption of the Petitioners' proposal. Finally, CenturyLink did not provide any analysis of the costs, nor did it provide updated data with respect to the ICS industry.

Thus, the ICS providers clearly declined the opportunity to supply to the FCC the information that only they would have, i.e., the actual costs to provide their service.[34] In light of this decision, and as discussed in more detail below, the FCC may rest its ultimate decision on the information provided by the Petitioners and their supporters.

$8,507,843.85 before it sent its check to Florida. As noted in the Petitioners' Comments, it is common for the ICS providers to carve out from its revenue-sharing plan with the correctional authorities classes of ancillary fees, such as adding money to a prepaid account, or requesting a refund. *Petitioners' Comments*, Exhibit H. Thus, it is likely that this $4.5 million expense is even a smaller percentage of Securus' overall revenue when these other sources are included.

[32] *Securus Comments*, Hopfinger Declaration, pg. 1.

[33] *Pay Tel Comments*, pg. 7.

[34] The ICS providers were mostly uniform in their rejection of the marginal location methodology utilized in the *Wood Study*, however. *See, e.g., GTL Comments*, pg. 17; *Pay Tel Comments*, pg. 12. Neither Securus nor CenturyLink addressed it in their Comments, which would lead one to believe that they do not support it as well.

IV. IN LIGHT OF ICS PROVIDERS' FAILURE TO SUPPORT OPPOSITION, THE FCC MUST ACCEPT THE PETITIONERS' PROPOSAL AND ESTABLISH BENCHMARK RATES.

Because the ICS providers flatly refused the FCC's request to provide specific cost data and detailed evidence of the costs associated with the imposition of a benchmark ICS rate, the FCC must accept the Petitioners' showing that the existing costs are *prima facie* unjust and unreasonable, and adopt the proposed ICS benchmark rate set forth in the Petitioners' Comments. As noted above, the FCC detailed, in no uncertain terms, the information to be provided by the ICS providers in this proceeding, and specifically directed the parties that were best positioned to provide this information to do so.

Also demonstrated above was the ICS providers' surprising decision to take a pass on the FCC's request. In light of the long-pending proceeding (caused in no small part by the ICS providers), the FCC gave the ICS providers yet another opportunity to counter the need for the benchmark ICS rate proposed in the Alternative Proposal. Instead, the ICS providers simply said, "Thanks, but no thanks." As a result, well-established precedent obligates the FCC's to use the information provided by the Petitioners to adopt a benchmark ICS rate.

For example, in *McLeodUSA Publishing Company v. Wood County Telephone Company, Inc.*, the FCC adopted the complainant's proposed rate for subscriber listing information (SLI) because "Wood County has failed to meet its burden of providing credible and verifiable cost data supporting a rate for base file SLI in excess of the presumptively reasonable rate."[35] In reaching its decision, the FCC noted that Wood County had "unique access to the information concerning its costs" and imposed the burden of proof on "the party with unique access to crucial information."[36] The FCC also noted that the "[t]he need for information

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35 Memorandum Opinion and Order, 17 FCC Rcd 6151 (2002).

36 *Id.*, pg. 6155, nt. 36.

justifying [the rate]…is particularly important" where the purported cost "dramatically exceeds" the presumptive reasonable rate.[37]

The FCC concluded by finding that "[i]t is neither fair nor reasonable" for a service provider "to earn a complete double recovery" of its costs,[38] especially where the service provider fails to explain "what specific costs [its] charges were intended to cover."[39] Thus, when a service provider fails to provide justifications for specific costs, the FCC will find that its showing is "unverifiable and unreliable", and the FCC "will decline to consider these costs" in determining the presumptively reasonable rates,[40] and grant the proponent's request that the service provider charges no more than a reasonable rate.

This decision followed a long line of cases that recognized the obligation of service providers to "come forward with relevant information or evidence determined to be in the sole possession or control of the carrier."[41] In its *Second Report and Order* relating to interconnection rates, the FCC took the local exchange carriers to task for failing to file the justification for their pricing of interconnection rates, despite being requested by the FCC to provide this information on several occasions.[42] Noting this failure, the FCC looked to the "best currently available, verifiable and reasonable surrogate" for the information that the local exchange carriers did not provide.[43] The FCC justified this action as a direct result of the local

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37 *Id.*, pg. 6157.

38 *Id.*, pg. 6162.

39 *Id.*, pg. 6163.

40 *Id.*, pg. 6164.

41 *See Implementation of the Telecommunications Act of 1996 – Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22,497, 22,615, nt. 782 (1997)(*citing Gen. Servs. Admin. v. AT&T*, 2 FCC Rcd 3574 (1987).

42 *See Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, 12 FCC Rcd 18,730 (1997).

43 *Id.*, 12 FCC Rcd at 18,892.

exchange carriers' failure "to provide adequate support" for their factors "[n]otwithstanding these clear and specific filing requirements."[44]

Thus, where the FCC requests specific information from parties uniquely able to provide the information, and the parties refuse to respond to the FCC's request, the parties may no longer protest the imposition of a benchmark ICS rate where the proposed rate is supported by "currently available, verifiable, and reasonable" cost data. In its Comments, the Petitioners demonstrated that the ICS rates are unjust and unreasonable by provide numerous examples of the widely-divergent rates among the various states, and even among the same provider. This fact also was noted in the *NPRM*, and, the FCC specifically requested that the ICS providers submit specific data to justify this wide divergence.

The ICS providers' response claiming fatigue or complexity is wholly insufficient, and effectively removes them from the decision-making process.[45] The Petitioners and the other commenters requesting relief established a *prima facie* case that the rates were unjust and unreasonable, and the FCC must move forward immediately to adopt the proposed benchmark ICS rate in light of the ICS providers' abdication of its critical role.

Finally, CenturyLink's call for the establishment of a n advisory committee must be rejected. CenturyLink proposed that a federal advisory committee be established to create a "structured discussion of a n agreed up on comprehensive framework and timeline for a resolution of the legitimate concerns raised by the petitioners and previous commenters in this proceeding."[46] In support of this proposal, CenturyLink cited a 2009 *ex parte* submission by the American Bar Association, which CenturyLink apparently understood to call for an advisory

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44 *Id.*, 12 FCC Rcd at 18,895.

45 Securus did include the helpful statement that "Costs of Service Have Decreased in Some Respects But Increased in Others." *Securus Comments*, pg. 4. GTL also offered the following guidance "While it is accurate that certain telecommunications costs have declined over the past 10 years…many of the costs associated with providing inmate calling services have increased." *GTL Comments*, pg. 19.

46 *CenturyLink Comments*, pg. 2-3.

committee.[47] However, the cited letter did nothing of the sort. Instead, it urged the Commission to adopt a fair rate based in the record that had been established over the previous eight years. Thus, the ABA did not support the creation of an advisory committee in 2005 when it adopted a Resolution urging the FCC to resolve this matter then, nor did it call for an advisory committee in 2009.

Incredibly, while CenturyLink would be interested in serving on an advisory committee to resolve this proceeding, it did not see it fit to respond to a direct call from the FCC to supply the cost data referenced above. There is simply no evidence that CenturyLink, nor any other ICS provider, would come to the table of an advisory committee with any more interest in resolving this proceeding than what the ICS providers have shown over the past 10 years. Instead, it is plainly obvious that the creation of an advisory committee would only delay this matter for many more years, all while the ICS providers and the correctional and detention authorities continue to share in the spoils earned from the inmates and their families. In sum, if the ICS providers would not respond to the direct requests from the FCC in the *NPRM*, what basis is there to believe it would do so in an advisory committee that would be dominated by the very same ICS providers?

V. THE FCC MUST MANDATE A FRESH LOOK PERIOD FOR ALL EXISTING CONTRACTS.

Many of the ICS providers ask the FCC to grandfather existing ICS contracts in the event that a benchmark ICS rate is adopted. For example, Securus stated that the United States Constitution, Article 1, Section 10 protects contracts from being abrogated or altered by new regulations.[48] Securus also relied on the application of the *Sierra-Mobile* Doctrine to argue

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[47] *Id.* (*citing Letter of Thomas M. Susman, American Bar Association*, CC Dkt. 96-128, filed Jan. 15, 2009).

[48] *Securus Comments*, pgs. 11-12.

against the adoption of FCC-mandated fresh-look period for ICS agreements.[49] Both GTL and CenturyLink requested that the FCC the proposed benchmark ICS rates only to new contracts entered into after the effective date of the new rules.[50]

First, Securus is simply incorrect that Article 1, Section 10 of the US Constitution prohibits the FCC from taking the requested action. Instead, Article 1, Section 10 of the U.S. Constitution states, "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."[51] Article 1, Section 10 prevents a *state* from passing a law impairing the obligation of contracts,[52] but does not apply to the federal government. Therefore, Securus' citation of Article 1, Section 10 in the context of FCC-mandated benchmark ICS rates is simply false.[53]

Moreover, Securus' reliance on the *Sierra-Mobile* Doctrine is also misplaced. Specifically, the *Sierra-Mobile* Doctrine was developed in the context of energy rate regulation, and establishes a presumption of just and reasonable rates between the contracting parties who have had the opportunity to freely negotiate the terms of the agreements.[54]

The presumption can be rebutted, however, where it is shown that the freely-negotiated terms "seriously harms the consuming public."[55] In a recent case, inexplicably ignored by

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49 *Id.* (*citing Fed. Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) and *United Gas Pipe Line Co. v. Mobile Gas Svc. Corp.*, 350 U.S. 332 (1956).

50 *GTL Comments*, pg. 29; *CenturyLink Comments*, pg. 15.

51 U.S. Const. Art. 1, Sec. 10 (emphasis added).

52 Securus also quoted *Arkansas Natural Gas. Co. v. Arkansas R.R. Comm'n*, 261 U.S. 379 (1923). However, that case applied Article 1, Section 10 of the Constitution to prevent a state from enacting a law that would invalidate an existing contract, not the federal government.

53 *See, e.g., Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

54 *See, e.g., Morgan Stanley Capital Group Inc., v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008).

55 *Id.*, 554 U.S.., at 545-546. *See also Verizon Communs., Inc., v. FCC*, 535 U.S. 467, 479 (2002)("When commercial parties did avail themselves of rate agreements, the principal regulatory responsibility was not to relieve a contracting party of an unreasonable rate, but to protect against potential discrimination by favorable contract rates between allied businesses to the detriment of other wholesale customers.")(internal citations omitted).

Securus, the Supreme Court stated that the presumption not only applied to the contracting parties, but it also applied to "consumers, advocacy groups, state utility commissions, [and] elected officials acting *parens patriae*."[56]

Thus, while there may be a high threshold for satisfying the public interest standard of the *Sierra-Mobile* Doctrine, it is clear that the Commission may not ignore the serious and harmful effects caused by the "allied" contractual parties on the ICS consumer. As was the case in *Verizon*, *supra*, the contracting parties to ICS agreements do not bear the ultimate burden of the terms of ICS contracts. Instead, as extensively detailed in this proceeding, ICS consumers experience serious harms from the contracts, and those harms will continue for years to come absent action by the FCC to reform existing contracts to the new proposed benchmark ICS rates.

The Commission previously acknowledged this difference in *IDB Mobile Communications, Inc. v. COMSAT Corp.*, where it stated:

> [A] carrier cannot obtain the remedy of contract reformation by showing only that the contract requires it to pay an unduly high price for communications services. Such *private* economic harm, standing alone, lacks the substantial and clear detriment to the *public* interest required by the Sierra-Mobile doctrine."[57]

In the instant proceed case, the Petitioners have shown the requisite harm to the public interest.[58] Thus, there is no legitimate question that the Commission has authority to impose the "fresh look" period when adopting the proposed ICS benchmark rate.

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[56] *NRG Power Mktg., LLC et al., v. Maine Pub. Util. Comm'n.*, 558 U.S. 165, 176 (2010).

[57] Memorandum Opinion and Order, 16 FCC Rcd 11474, 11480 (2001) (emphasis in original).

[58] Each of the cases Securus cites under the *Sierra-Mobile* Doctrine involve parties seeking to excuse themselves from performing under a contract after subsequent events rendered the terms of the contract less favorable to the party seeking to abrogation. Securus also cites *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 654 (1995) and *Ryder Communs., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 13603 (2003) in support its contention that the Commission has not amended contracts in the past. However, both cases involve private parties seeking to excuse themselves from performing under the terms of a new existing contract. The parties did not attempt to demonstrate harm to the public from the existing contract, but merely argued that the terms of the contract were unjust or unreasonable as to the contracting party. Finally, Securus cites *Echostar Communs. Corp. v. Fox/Liberty Networks LLC*, Memorandum Opinion and Order, 13

Finally, while GTL and CenturyLink have requested that the new rates only apply to new contracts, both parties note that the current term of existing contracts range from three to ten years, and often have automatic renewal periods. CenturyLink also argued that "in most cases, the ability to renegotiate rates is prohibited."[59]

However, the Petitioners previously demonstrated that the ICS agreements are regularly amended, which includes changes in the rates charged to ICS customers.[60] In fact, CenturyLink has amended its contract with the State of Kansas on three occasions in the past four years.[61] In addition, GTL has amended its contract with the State of Iowa three times, its contract with the State of Massachusetts four times, and the State of Virginia seven times.[62] Meanwhile, other well-experienced ICS providers also supported the "fresh look" period, which further undermines the position taken by Securus, CenturyLink and GTL.[63]

Thus, it is not credible that "the ability to renegotiate rates is prohibited" as CenturyLink would have the FCC believe, and instead, the Petitioners have demonstrated on numerous occasions that such reformations occur on a regular basis. In light of the long-term nature of the existing agreements, coupled with oft-used automatic renewal provisions, the ICS providers must be required to modify their existing ICS agreements.

There is simply no legitimate justification for the FCC not to adopt a one-year, fresh-look period, which would provide immediate relief from the serious public harms caused by the ICS

FCC Rcd 21,841 (1998) as an example of the Commission applying *Sierra-Mobile* in the context of a contract to buy network programming. *Securus Comments*, pg. 13. However, *EchoStar* was decided solely on procedural grounds. ("Because we are deciding this matter on procedural grounds, we find that there is no need to reach the merits of this proceeding.").

59 *CenturyLink Comments*, pg. 16.

60 *See Petitioners Comments*, pg. 29 (*citing Letter of Lee G. Petro,* CC Dkt. 96-128, dated June 28, 2012, pg. 3.) (noting that Securus had amended its contract with the State of Florida on four occasions).

61 *See* Exhibit B.

62 *See* Exhibit C.

63 *See Comments of Telmate, LLC*, WC Dkt. 12-375, filed Mar. 25, 2013, pg. 16; *See Comments of TurnKey Corrections*, WC Dkt. 12-375, filed Mar. 25, 2013, pg. 5.

agreements. Such reformation would provide ICS customers immediate relief, while permitting the current contracts to remain unamended would present an incentive for the contracting parties to attempt to extend or renew the existing contracts for their own pecuniary benefit, while ICS customers wait up to 10 years in the future for relief.

VI. THE ICS PROVIDERS' RESPONSE TO THE ISSUE OF DROPPED CALLS IS NOT CREDIBLE.

One topic bears special mention because of the remarkable claims made by the ICS providers. Specifically, the ICS providers argued that the responsibility for dropped calls is to be placed squarely on the customers.

Incredibly, the ICS providers argued that dropped calls are to be expected for anyone with a wireless phone, and that the recipients of ICS calls must obtain a landline to ensure a reliable connection.[64] Moreover, Securus' Mr. Hopfinger went so far to say that he has "first-hand knowledge that inmate calls are not 'dropped' without cause" and that the calls are dropped *only* because the Securus "system detects that the inmate or the called party is attempting to create a three-way call or to forward the call to some third party."[65]

Setting aside whether it is even credible that Mr. Hopfinger has "first-hand knowledge" of each and every dropped call experienced by Securus' customers, the unsubstantiated allegation that each and every dropped call is the result of an attempt by the caller to violate prison rules is not reflected in the extensive record in this proceeding, nor in proceedings before state public utility commissions.

For example, in addition to the thousands of letters filed in the record of this proceeding, the experiences of Massachusetts attorneys, as recorded in their testimony and affidavits from the state's recent Department of Telecommunications proceedings, provide specific accounts of

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64 *GTL Comments*, pg. 30 ("To avoid dropped calls, GTL advises its customers that call recipients should use landline telephones.").

65 *Securus Comments*, Hopfinger Declaration, pgs. 9-10.

dropped calls which undermine the ICS providers' apparent "first-hand knowledge."[66] The testimony and sworn affidavits of these attorneys is especially relevant as many of the largest ICS providers, including Securus and GTL, provide inmate phone services to various correctional facilities within the state.

In its comments, Securus averred that the issue of dropped calls were "baseless" accusations, and asserted that inmate calls are dropped only when parties are attempting to make illegal three-way calls or forward a call to a third-party.[67] The sworn affidavits of criminal defense attorneys in Massachusetts flatly contradict this claim. One attorney stated that every month, about one in every five calls to his office is dropped prematurely.[68] Despite the fact that neither the attorney, "nor anyone at [his] office has *ever* attempted to add a third party or forward a call from an incarcerated client," the disconnection is almost always preceded by a recording stating that the system detected an attempt to add a third party.[69] Another attorney notes that, while "[v]ery few calls are dropped prematurely or cut-off in the office," calls to both his cellular phone and home phone were frequently dropped, and were generally preceded by a message stating that the system detected an attempt at a three-way call.[70] Patricia Garin, testifying on behalf of the Northeastern Prisoners' Rights Project, also noted that one in every three calls to her cell phone are dropped due to a "detected" third-party call attempt.[71]

Securus also stated that calls are dropped "for cause" when inmates attempt to "thwart" technology designed to detect third-party calls.[72] Mr. Hopfinger stated that inmates try to "mask the sound of re-dialing the phone" by "scream[ing] or blow[ing] into the handset," or by

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66 MA Dep't of Telecomms., Dkt. No. 11-16 (comments and other records in the proceeding are available at: http://www.mass.gov/ocabr/government/oca-agencies/dtc-lp/dtc-11-16.html).

67 *Securus Comments*, pg. 17.

68 *See* Exhibit D (*Amendment 1 and Supplement to Petition*, Affidavit A-24, ¶ 4).

69 *Id.* (emphasis added).

70 *Id.*

71 *Id.* (Affidavit A-30, ¶ 5).

72 *Securus Comments*, pg. 18.

banging the handset against the wall.[73] Mr. Hopfinger's allegations that these practices, "developed by inmates" as a means of engaging in illegal activity, also are undermined by numerous accounts from attorneys that regularly receive inmate calls of such poor quality the inmate must yell into the phone in order to be heard.

For example, Carmen Guhn-Knight, provided sworn testimony on behalf of the firm where she is a paralegal stating that "[s]ometimes our clients sound impossibly quiet . . . . I often tell our clients to hang up and try calling again and maybe it'll be better. Sometimes it works and sometimes it doesn't."[74] Ms. Garin testified that she has talked to many fellow attorneys who have to have their clients yell into the phone, making them "very concerned about the fact that our clients have to be yelling their legal business so that we can hear them."[75] Another attorney described how during calls received on the office's main telephone line it is "frequently very difficult to hear what the prisoner is saying unless he or she shouts."[76] Further undermining Mr. Hopfinger's conclusion is the statement by CenturyLink in its Comments that, while the call detection features use "algorithms that analyze a variety of data points" and flag suspicious activities, these "algorithms are capable of mistakenly flagging benign activities and dropping calls."[77]

The last explanation Securus provided in its comments is that phone records showing a "spate" of short phone calls are not evidence that calls are dropped, but instead, reflects a "phenomenon" developed by inmates to avoid paying for phone services.[78] Mr. Hopfinger stated

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73 *Securus Comments*, Hopfinger Declaration, at pg. 10.

74 *See* Exhibit E (Testimony of Carmen Guhn-Knight, 133:11-16).

75 *Id.* (Testimony of Patricia Garin, 51:19-24).

76 *See* Exhibit D (Affidavit A-29 ¶ 3).

77 *CenturyLink Comments*, at 7 n. 16 (CenturyLink noted that "all but one of CenturyLink's customers requires flagging the call record within the database, but not disconnecting the call in progress. CenturyLink's single customer that does require immediate termination of the call is a state correctional system with per-minute-only calling rates.).

78 *Securus Comments* at 18, Hopfinger Declaration, pg. 10.

that inmates "attempt to avoid billing altogether by having multiple phone calls, one after the other, in the hopes that they billing system will not be activated by such short calls, or that they can falsely claim that the system cut off their calls."[79]

Securus' assertion is countered by common-sense logic. Why would an ICS customer, who already has difficulty affording the excessive per-call and per-minute rate, run the risk of having one's account being charged successive connection fees of $2.00 or more, simply in the hopes of having to pay connection fee only once? Further, Securus' claim is contradicted by testimony and affidavits stating that when calls from inmates have connections that are so poor that the inmate cannot be heard, the parties often disconnect the call and reinitiate in the hopes of getting a better connection.[80] Elizabeth Matos, an attorney with Prisoners' Legal Services, also testified that when the connection is so bad she can't hear the client, she tells clients to reinitiate a call in an effort to get a better connection.[81]

By far the most popular explanation proffered by ICS providers for dropped calls is that the devices the consumer uses to answer inmate calls, specifically cordless and cellular phones, are to blame. Providers are quick to "warn" consumers that calls to wireless and cordless phones are likely to cause enough static to cause a disconnect, and that calls to wireless phones are more likely to be disconnected due to a loss in signal.[82] GTL's comments state that

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79 *Id.*

80 Ms. Guhn-Knight's sworn testimony is again illustrative here. "The connection is frequently poor. Sometimes our clients sound impossibly quiet and other times there is constant static on the line. I often tell our clients to hang up and try calling again and maybe it'll be better. Sometimes it works and sometimes it doesn't." *See* Exhibit E (Testimony of Carmen Guhn-Knight, 133:9-16).

81 *See* Exhibit E (Testimony of Elizabeth Matos,14:1-7).

82 *See* Securus, *Friends and Family Telephone Service Guide*, http://www.securustech.net/downloads/guide_english.pdf (last visited April 19, 2013) (Calls may be disconnected due to the "[u]se [of] a cordless phone (static could cause a disconnect)" and "Due to the nature of cell phone service, there is no credit to on dropped calls on cell phones"); *GTL, Friends and Family Support*, http://www.gtl.net/familyandfriends/index.shtml (last visited April 19, 2013) ("The quality of telephone calls to wireless devices and cordless phones that receive voice transmission via frequencies as opposed to wires may vary" and "[a]ccordingly, the quality and integrity of calls to cell phones and cordless phones cannot be guaranteed."); Pay

"[a]nyone that uses a wireless phone is susceptible to dropped calls - it is not an experience unique to the inmate calling environment."[83] Further, while most ICS providers, invoking the "nature of cell phone service" do not reimburse, or "take responsibility for" dropped calls to cellular phones,[84] many also warn that something as simple as pauses in the conversation, even short ones, can cause a disconnection.[85]

While cell phone service can be certainly more unreliable than calls to landline phones, the testimony and sworn affidavits discussed above demonstrate that static and poor call quality, while more prevalent on wireless phones, is not an experience unique to cellular phone use. One attorney stated that, of the three hundred inmate calls her office receives every month, "[a]pproximately 15-20% of the calls have too much static to hear the other party."[86] Another attorney acknowledged that while phone calls to his home phone and cellular phone were "markedly worse: at least one call in three received at home had a terrible connection," and calls

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Tel, *Why Are Some Calls Disconnected?*, http://www.paytel.com/faq-ftc-14.html (last visited April 19, 2013) (Calls may be disconnected due to "[u]se of a cordless phone (static)," "[u]se of a wireless phone (dropped cell tower or static)" and "PAY-TEL does not accept responsibility for dropped wireless phone calls.").

[83] *Comments of Global Tel-Link Corp.*, 30 (filed March 25, 2013) (internal citations omitted). GTL also stated in its comments that "[d]ropped 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." *Id.*

[84] *See Global Tel*Link Billing Support*, (last visited April 19, 2013) ("Delivery of correctional calls to any cell phone is not guaranteed. If calls to cell phones are dropped, disconnected, or of poor quality, GTL will not issue credit for those calls.").

[85] *See* Securus, *Friends and Family Telephone Service Guide*, (Calls may be disconnected if the parties "[s]top [the] conversation for any length of time (a period of silence may cause a disconnect)"); *GTL, Friends and Family Support*, ("DON'T stop the conversation for any length of time, even short pauses may result in disconnection."); Pay Tel, *Why Are Some Calls Disconnected?* (Calls may be disconnected if the parties "[s]top talking without hanging up").

[86] *See* Exhibit D (Affidavit A-27 ¶ 3) ("there are occasions when there is feedback or an echo, when what the speaker says is echoed back after a very slight delay. This also interferes with conversations. In addition, about 10% of the calls we receive are cut off when we press "0" to answer the call."); (Affidavit A-28 ¶ 3) (In an office that receives an average of 450 calls from incarcerated individuals a month, "[w]e estimate that one call per week from the state facilities have bad connections and are hard to hear, and approximately three calls per week from county facilities have the same problem.").

to his office phone experience a terrible connection one in every six or seven calls.[87] Ms. Garin testified that when she takes calls on her cell phone because she cannot be in the office, she only uses her cellular phone "from a sitting still position in a place where reception was strong" but calls are still cut-off about one in every three times.[88]

Regardless of whether the frequency of dropped calls is unavoidable for calls made to cellular phones, the ICS provider's policies with respect to ICS calls to wireless phones have a heightened impact on the parties that are least able to afford the additional reconnection and wireless calling fees. For example, a 2012 Center for Disease Control report shows that 51.8% of poor households are wireless-only households, where "wireless-only" households are defined as "at least one wireless phone and no working landline telephones inside the household."[89] Further, 42.3% of "near poor" households were wireless-only.[90] These statistics demonstrate that the majority of families that are affected by dropped calls are of low income, and are least able to afford the reconnection fees imposed by ICS providers.[91]

Further, according to a Pew Report, the incarceration of a father lowers a family's income an average of 22% a year.[92] The data on wireless-only households as broken down by

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87 *See* Exhibit D (Affidavit A-30 ¶ 4); (Affidavit A-29 ¶ 3) (on one office line, "about one-in-ten calls have voices on the line, static or echoes.").

88 *See* Exhibit E (Testimony of Patricia Garin, 52:9-13).

89 Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January—June 2012*, Center for Disease Control, Table 2 (Dec. 2012), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.htm. The study's "Household Poverty Status" is based on household income and household size using the U.S. Census Bureau's poverty thresholds. "'Poor' persons are defined as those below the poverty threshold. 'Near poor' persons have incomes of 100% to less than 200% of the poverty threshold. 'Not poor' persons have incomes of 200% of the poverty threshold or greater." *Id.* at p. 10.

90 *Id.* at Table 2.

91 Mindy Herman-Stahl, et al., *Incarceration and the Family: A Review of Research and Promising Approaches for Serving Fathers and Families*, § 3.3 (2008), available at http://aspe.hhs.gov/hsp/08/mfs-ip/incarceration&family/index.shtml).

92 Bruce Western and Becky Pettit, Collateral Costs: Incarceration's Effect on Economic Mobility, The Pew Charitable Trusts (2010) pg.5, www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf.

racial demographics further shows that many customers of ICS providers are likely to be wireless-only households. For example, one in every thirty-six Hispanic men and one in every twelve African American men are in prison or jail.[93] The CDC's report shows that 46.5% of Hispanic or Latino households and 37.7% of African American households did not have access to a landline.[94]

As a recent New York Times article pointed out, there are many reasons for the prevalence of wireless-only homes among the poor.[95] One reason for this is that they cannot afford both a landline and a cellular phone and they are increasingly choosing to keep only their cellular phone.[96] This may be because, at least in part, cellular phones have become more affordable, because the "barrier to owning one is lower with pay-as-you-go plans."[97] Further, the FCC and some states have programs that allow subsidies to be applied to wireless bills for low-income residents.[98]

Thus, the ICS policies have a dramatic effect on the customers without landlines, which disproportionately falls on the parties that are the least-able to afford paying additional reconnection fees. The attempt by ICS providers to place the blame on its customers for an apparent deficiency in the ICS technology adds insult to injury.

Certainly, the sworn testimony by members of the bar lend significant credibility to the conclusion that (1) dropped calls happen on a regular basis; (2) the reason for the dropped calls does not rest with the ICS customers; and (3) the dropped calls are not caused by call forwarding

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93 *Id.*, at 4.

94 *Wireless Substitution*, Table 2. The exact breakdown for wireless-only households in the demographic categories as used by the CDC are as follows: Hispanic or Latino, any race(s): 46.5; Non-Hispanic black, single race: 37.7; Non-Hispanic other, single race: 43.4?; Non-Hispanic multiple race: 40.2. *Id.*

95 Sabrina Tavernise, *Youth, Mobility and Poverty Help Drive Cellphone-Only Status*, N.Y. Times, (April 20, 2011), http://www.nytimes.com/2011/04/21/us/21wireless.html?_r=0.

96 *Id.*

97 *Id.*

98 *Id.*

or other nefarious intentions. In light of this evidence, the FCC must ensure that ICS customers are not unjustly charged for reconnection fees by the ICS providers, especially when it has been shown that the problem rests squarely with the ICS providers themselves.

VII. A SIGNIFICANT AMOUNT OF REVENUE-SHARING FUNDS ARE NOT USED BY STATES AND LOCAL AUTHORITIES FOR BENEFIT OF INMATES.

Several parties filed comments discussing the beneficial nature of the revenue-sharing relationship among ICS providers, states, and local authorities. These parties point to the need of sharing of ICS revenue to provide educational services to inmates though inmate welfare funds.

For example, the California Department of Corrections stated that the benchmark ICS rates would have a "significantly negative impact" and the California State Sheriffs' Association highlighted the fact that inmates do not "pay for the costs associated with their incarceration" so the collection of revenue for the inmate welfare fund "is one of their only opportunities to directly contribute to the programs designed to assist them."[99] The California State Sheriffs' Association also stated that "the law requires any revenue received from inmate telephone contracts to be deposited in an Inmate Welfare Fund, which in turn, funds programs and services that directly benefit the inmates."[100]

Setting aside for a moment whether inmates actually desire an "opportunity" to make a contribution to the state's incarceration expenses, it bears mentioning that the full text of the "law" does not require that all funds of the Inmate Welfare Fund be used for the "benefit of the inmates." Instead, the law actually states that:

> [a]ny funds that are not needed for the welfare of the inmates may be expended for the maintenance of county jail facilities" and permits "inmate welfare funds

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99 *See Comments of California Department of Corrections and Rehabilitation*, WC Dkt. 12-375, filed Mar. 25, 2013, pg. 1. *See also Comments of California State Sheriffs' Association*, WC Dkt. 12-375, filed Mar. 22, 2013, pg. 2.

100 *See California State Sheriffs' Association Comments*, pg. 1 (emphasis in original).

> [to] be used to augment those required county expenses as determined by the sheriff to be in the best interests of inmates."[101]

Therefore, despite the fact that Los Angeles County receives a minimum guaranteed payment of $15 million under its current ICS agreement, only 51 percent of those funds are allocated for the Inmate Welfare Fund, while the other 49 percent is allocated "to jail facility maintenance."[102]

A similar arrangement exists in Orange County, California. As shown in Exhibit G, the Inmate Welfare Fund had a budget of $5,016,429 in 2010. Of that amount, an incredible 74 percent of the funds were used for staff salaries, and only 0.8 percent was used for the actual services, supplies and training for inmate educational programs, and 0.06 percent was used for services, supplies and training for inmate re-entry programs.[103]

Moreover, the Comments submitted by the Louisiana Department of Corrections highlighted the fact that only $997,000 of the more than $3.8 million received from ICS revenue-sharing goes to the benefit the inmates, with the remaining funds going towards "operations."[104] As shown in Exhibit H, other states and counties also extract revenues shared with ICS providers for non-inmate educational needs, including:

- Alabama – all profits directed to salaries, equipment and supplies for the county jail;
- Arizona – $500,000 transferred to building renewal fund on an annual basis;
- Arkansas – funds are transferred to other department funds or for disbursements in support of department operations or debt service;
- Colorado – Jefferson County – 80 percent of the inmate welfare fund in 2012 went to salaries and benefits.
- Connecticut - $350,000 set aside for inmate educational services and reentry initiatives;
- Florida – all funds transferred to state's general revenue fund;

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101 Cal. Penal Code § 4025 (2012).

102 *See* Exhibit F.

103 *See* Exhibit G, pg. 5

104 *See Comments of State of Louisiana, Dpt. of Public Safety and Corrections*, pgs. 2-3.

- Maryland – only 10 of 23 counties report that they dedicate 100% earned from revenue-sharing to county inmate welfare fund;
- Massachusetts – all funds transferred to state's general revenue fund.
- Ohio – permits funds to be used for building maintenance and employee salaries;
- Tennessee – counties use all funds for certification training of local correctional personnel;
- Texas – 50 percent of revenues deposited in state's general revenue fund;
- Virginia – spending of funds left to discretion of local Sherriff; and
- Wisconsin – Two-thirds of revenue is deposited in state's general revenue fund.

Therefore, while it may be correct that some of funds derived from the revenue-sharing arrangements between correctional and detention authorities and the ICS providers are being used for the benefit of inmates, it is obvious that a significant portion of these revenue-sharing arrangements do not directly benefit the inmates' education or rehabilitation, and instead are often used for general expenses of the governmental entity and deposited in its general fund.

VIII. BENEFITS ASSOCIATED WITH ADOPTION OF BENCHMARK RATES FAR OUTWEIGH ANY COGNIZABLE COSTS.

As discussed in the Petitioners' Comments, the FCC's interest in conducting a cost-benefit analysis before implementing the proposed benchmark ICS rate must not undermine its obligations to enforce the requirement under Section 201(b) that:

> All charges, practices…in connection with…communication service shall be just and reasonable, and any …charge, practice…that is unjust or unreasonable is hereby declared to be unlawful.[105]

Under the Act, an unjust or unreasonable rate cannot be justified through a cost-benefit analysis. The Petitioners' Comments provided overwhelming evidence that a "cost-benefit analysis" cannot replace an analysis as to whether "rates are just and reasonable in accordance

[105] *Petitioners' Comments*, at pg. 30 (*citing* 47 U.S.C. §201(b) (2012)).

with Section 201(b)."[106] However, to ensure a full record, Petitioners also submitted overwhelming evidence through its cost-benefit analysis that the proposed reforms to the ICS industry would yield significant benefits with the only cost being a reduction in the funds to be divided up between the ICS providers and the correctional and detention facilities.

As noted above, several correctional institutions argued that the reduction in their revenue-sharing regime with the ICS providers would eliminate inmate education and other beneficial programs. However, even if the state, county and local authorities actually dedicated the funds referenced in their comments for inmate education and re-entry programs, the attached Declaration from Dr. Coleman Bazelon demonstrates that it would be more efficient to reform the ICS rates.

Dr. Bazelon's Declaration demonstrates that even a slight reduction of the recidivism rates would save the states more money than they earn through the revenue-sharing programs with ICS providers.[107] For example, Dr. Bazelon notes that, for Mississippi, "a reduction in recidivism of less than 4% would offset any lost revenues from reduced commissions from prisoner calling services."[108] A similar result would occur in Louisiana if its recidivism rate is reduced by the same amount.[109]

As discussed above, the connection between recidivism and strong ties among inmates and their community has been demonstrated in many different settings. The Vera Institute noted that increased contact between prisoners and their families in Minnesota led to a 13% reduction in felony reconvictions in that state.[110] The Petitioners previously cited the significant

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106 *Petitioners' Comments*, at pg. 31 (*citing Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, 17,876 (2011)).

107 *See* Exhibit A, pg. 5 (even a one percent reduction in recidivism rates would save $250 million).

108 *Id.*

109 *Id.*, at pg. 6 ("if only 219 fewer prisoners returned to prison as a result of lower prison calling rates, there would be no net cost impact for the state.").

110 *Vera Comments*, at pg. 4.

growth in ICS calls when New York reduced its rates, supporting the conclusion that lower rates lead to increased contact between inmates and their families and friends.[111] Moreover, Telmate cited a 233% growth in ICS calls in one state when it began charging a uniform rate for all types calls, and also noted that the adoption of a uniform rate resulted in the reduction of "rate arbitrage" since there was no incentive for inmates' families to obtain local numbers to take advantage of the lower rates.[112]

In light of the direct connection between reduced ICS rates and increased contact between inmates and their community, which, in turn, has been proved conclusively to reduce recidivism and lead to better lives for the children of inmates, there should not be any question that the benefits associated with the adoption of the proposed benchmark ICS rate and practices will overwhelm any "cost" cited by the parties to the current revenue-sharing regime.

The Petitioners have proposed a rate which has been proven to provide an adequate pool of revenue to share among the parties, and have also demonstrated that the proposed benchmark ICS rate will lead to substantial savings for the state, county and local correctional and detention facilities. While the ICS providers would assuredly prefer to have a larger pool of profits to share with the correctional and detention authorities, this pecuniary interest cannot outweigh the enormous benefits arising from the proposed ICS rates and practices.[113]

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111 *Petitioners' Comments*, pg. 36

112 *Comments of Telmate, LLC*, pg. 13.

113 *Cf.* Bobby Strong, Look At the Sky, *Urinetown, The Musical*, Greg Kotis, Mark Hollmann (Macmillan 2003) ("And we keep filling moneybags, With broken lives and dreams, But what's it for? I can't ignore, These black immoral, Profit-making schemes").

CONCLUSION

There is no question that reform is needed, nor is there any question that the FCC has the requisite authority to provide the relief requested herein. The evidence supporting the need for a benchmark ICS rate is overwhelming, and the ICS providers' only justification for the exorbitant rates is that they need higher rates to properly divide up the spoils with the authorities seeking ICS services. Nothing filed by the ICS providers or their supporters alters these conclusions.

The FCC is the only agency that can provide respite from this extraordinary situation. The Communications Act provides the FCC with the requisite statutory authority, and the record in this proceeding demonstrates the urgent need for relief. ICS customers literally cannot afford to endure more delay. Therefore, the Petitioners respectfully request immediate action consistent with the evidence offered.

Respectfully submitted,

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