

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

**Rates for Interstate Inmate Calling
Services**

WC Docket No. 12-375

**REPLY COMMENTS OF PRISON POLICY INITIATIVE, INC.
ON FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING**

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EXECUTIVE SUMMARY

As the length of the dockets in this proceeding and predecessor proceedings demonstrate, the Commission has been grappling with the details of inmate calling services (“ICS”) for quite some time. The forthcoming third mandatory data collection positions the Commission to make great strides as this rulemaking nears its second decade. Prison Policy Initiative has provided the Commission with extensive input on the data collection’s design, and we encourage the Commission to begin collecting data as soon as possible. We use these reply comments on the Fifth Further Notice of Proposed Rulemaking to discuss steps that the Commission can take immediately, without waiting for completion of the data collection.

We begin by addressing per-minute rate caps and ancillary service fees. We encourage the Commission to reduce interim rate caps for large correctional facilities based on a survey of market rate trends. We also advocate for two meaningful reforms to ancillary fees that can be implemented without delay. First, no party has persuasively defended the prominent trend of double-dipping, whereby certain carriers charge both automated transaction fees *and* a redundant “pass-through” fee to recover their alleged payment card processing costs. This practice is the result of a likely drafting error and should be ended immediately. Second, we discuss the troubled use of single-call services as a way to steer consumers into unnecessarily incurring needless transaction fees every time they receive a call. Based upon the insights provided by competitive ICS carriers, we support several interim and long-term proposals for ending abusive use of single-call services.

The heart of our comments can be found in section III, where we discuss ICS video calling, which is the proverbial elephant in the room. The record demonstrates that carriers are funneling consumers to currently unregulated services—most prominently, video calling—to evade the Commission’s careful regulation of voice calling rates. The dominant ICS carriers have repeatedly claimed that the Commission lacks jurisdiction over video calling, and they even seek to prevent the Commission from simply collecting information on video services. PPI provides a thorough review of applicable law, demonstrating that Congress has unambiguously

given the Commission the authority to regulate video calling—a conclusion that is buttressed by historical practice and the plain text of the Communications Act.

In section IV of these comments we follow up on earlier discussions of correctional facility expenses and the proper treatment of site commissions for purposes of rate setting. We discuss the inadequacies of the National Sheriffs' Association cost-data survey and encourage the Commission to discount the weight of this evidence.

The subsequent two sections discuss non-rate issues that the Commission should investigate, namely the unfair treatment (and seizure) of customer prepaid funds and anticompetitive use of patent protection.

We conclude with a section that briefly discusses six miscellaneous topics implicated by parties' opening comments: the nature of the ICS market, consumer billing requirements, terminology, universal service fund relief, Securus's request for a new rulemaking, and telecommunications relay service.

Parties have provided many proposals and arguments for the Commission's consideration in the next phase of this proceeding. Prison Policy Initiative encourages the Commission to focus on easily implemented policy changes while staff collects data for purposes of setting permanent rate caps. By unambiguously asserting jurisdiction over video calling, addressing the lack of market competition, and protecting consumers from unjust practices, the Commission can make great additional strides while it awaits the critical data analysis that will be completed in the coming months.

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Pursuant to the Commission’s Fifth Further Notice of Proposed Rulemaking (the “Fifth FNPRM”),¹ the Prison Policy Initiative (“PPI”) submits these reply comments regarding the next phase of the Commission’s inmate calling services (“ICS”) rulemaking.

I. The Commission Should Act Expeditiously to Promulgate Permanent Rate Caps

We encourage the Commission to act as swiftly as possible in issuing permanent rate caps. Although much of this work is contingent on completion of the third mandatory data collection (the “Data Collection”), preliminary evidence indicates that permanent caps should be substantially lower than the current interim caps. Indeed, the interim caps for prisons and large jails can and should be further reduced based on evidence of current market rates in those types of facilities.²

Even to the extent that the Commission does wait until completion of the Data Collection to further lower rate caps, there is absolutely no justification to “pause” this proceeding as suggested by Praeses.³ Notwithstanding the progress the Commission has made, consumers are still harmed by high rates and unfair practices in the ICS industry. The Commission should proceed with the Data Collection and the further rulemaking with the sense of urgency that this issue demands.

¹ 86 Fed. Reg. 40416 (Jul. 28, 2021).

² [Comments of PPI](#), appx. 1 and 2 (Sep. 27, 2021) (surveying current rates in prisons and large jails); [Comments of Calif. Pub. Utils. Comm.](#) at 3-4 (Sep. 27, 2021).

³ [Comments of Praeses LLC](#) at 5 (Sep. 27, 2021).

The themes that emerge from parties' opening comments on the Fifth FNPRM illustrate why the Commission's subsequent rate-setting activities must address cost allocation and cross subsidies under bundled contracts. The record contains ample evidence concerning the ubiquity of bundled service contracts,⁴ and comments from ICS carriers illustrate the need to address how bundling impacts rates. Site commissions constitute a leading cost component for carriers and bundling is unsurprisingly used to generate revenue to cover this expense. NCIC Inmate Communications ("NCIC"), for example, provides insight into the use of unregulated services as a funding source for site-commission payments.⁵ As we discuss later, facilities and carriers frequently argue that ICS rate caps must be set at levels that allow correctional facilities to completely recover amounts allegedly spent on security functions.⁶ But Securus Technologies ("Securus") admits to the fairly obvious fact that facilities will use commission revenue from other, unregulated, communications services to make up for reductions in commission revenue attributable to ICS rate caps.⁷ Accordingly, to determine whether facilities are able to cover expenses that are reasonably and directly related to the provision of telecommunications, the Commission must have a clear picture of all commission revenue collected under bundled communications contracts. PPI made exactly this point in its comments regarding the Data Collection, but Securus opposed this common-sense framework.⁸

⁴ [Comments of PPI](#) at 20 (Sep. 27, 2021), [Comments of NCIC](#) at 15 (Sep. 27, 2021) (“[A]s opposed to when the current iteration of this proceeding commenced in 2013, now almost all ICS bids include the provision of tablets to permit incarcerated persons to access ICS within their cells.”), [Comments of Global Tel*Link](#) at 16 (Sep. 27, 2021) (describing ICS contracts as “often includ[ing] a mix/bundle of both regulated and non-regulated service” (internal quotation marks omitted)).

⁵ NCIC Cmts at 8 (“Although the actual commissions paid to jails have not substantially increased, certain providers are offering higher commission by either leveraging other unregulated communications products or by abusing the single-call to be the first and easiest option for the incarcerated persons to complete a call.”).

⁶ See *below* § IV.

⁷ [Comments of Securus](#) at 15-16 (Sep. 27, 2021) (“[B]y apparently restricting funding from one sources, interstate ICS rates, the Commission’s approach puts pressure on other revenue-generating services to make up the difference.”).

⁸ [Reply Comments of Securus re Data Collection](#) at 3-5 (Nov. 19, 2021).

PPI supports permanent voice-calling rate caps at substantially lower rates than the present interim caps. We also call on the Commission to promulgate rate caps for video calling, and in section III of these comments we show that Commission has jurisdiction over video services.

II. Reform of Ancillary Service Fees Can Begin Immediately

PPI strongly supports proposals to lower current caps on ancillary service fees. There are several steps that the Commission can and should take immediately, without waiting for the results of the Data Collection.

A. Act Now to End Double Dipping

Our opening comments stressed the importance of ending the practice of ancillary-fee double dipping.⁹ Although no party has openly objected to this proposal, Securus's evasive response illustrates the need for the Commission to act quickly and firmly. Although Securus claims to support the elimination of "duplicate recovery, to the extent it occurs," its comments make clear that the company defines double recovery so narrowly as to preclude any meaningful reform. Securus wants to preserve carriers' ability to "impose an automated payment fee . . . and . . . also impose a third-party credit processing fee."¹⁰ This is precisely the practice that PPI has asked the Commission to end; and of all the ICS carriers operating today, Securus should know better.

The automated payment fee is already designed to compensate carriers for their own payment-card processing expenses. When the Commission initially proposed capping the automated payment fee at \$3, Securus objected, alleging that its payment-card processing fees exceeded \$3 per transaction. The Commission rejected this argument, finding that Securus's alleged costs were an outlier, and that other companies were able to cover their processing costs

⁹ PPI Cmts at 6-12.

¹⁰ Securus Cmts at 18-19.

under a \$3 fee cap.¹¹ The record now includes additional evidence showing that carriers are easily able to cover their costs for automated payments using the existing \$3 automated payment cap. NCIC states that “the industry average merchant agreement costs for Visa and MasterCard, including chargebacks . . . are normally 3% or less” and “NCIC’s experience is that the \$3.00 [automated payment] transaction fee is more than enough to cover all automated processing costs for charges up to \$100.”¹²

PPI agrees with NCIC that the regulations’ inclusion of “credit card processing fees” as a type of qualifying third-party pass through fee under 47 C.F.R. § 64.6000(a)(5) was a mistake.¹³ No party has come forward with evidence suggesting that carriers cannot recover their costs under the current \$3 cap (to the contrary, NCIC’s statement provides support for lowering the \$3 fee cap). PPI encourages the Commission to lower the caps on automated and live-agent fees, but we understand if the Commission prefers to take such action after analyzing the results of the forthcoming Data Collection. In any event, the record clearly supports *immediate* action to end double dipping. PPI reiterates our earlier support of Inmate Calling Solutions’ (“ICSolutions”) proposal to prohibit carriers from imposing more than one type of funding fee for any single payment transaction.¹⁴

B. Immediately Lower Transaction Fees on Single-Call Services while Working Toward a Complete Elimination of Such Fees

NCIC’s comments regarding the cost of payment processing indicate that the fees for automated and live-agent payments should be lowered from the current levels of \$3 and \$5.95 respectively.¹⁵ Once again, while PPI urges prompt action, we understand that the Commission

¹¹ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, [Second Report and Order and Third Further Notice of Proposed Rulemaking](#) [hereinafter “Second R&O”] ¶ 167, 30 FCC Rcd. 12763, 12848 (released Nov. 5, 2015).

¹² NCIC Cmts at 10.

¹³ *Id.*

¹⁴ PPI Cmts at 11.

¹⁵ PPI acknowledges that NCIC may not agree with our position, given the company’s comments that “ancillary costs have increased” since the \$3 and \$5.95 caps were set in 2015. NCIC Cmts. at 12. NCIC’s comments themselves do not provide detailed evidence showing that current caps do not allow adequate cost recovery, although PPI trusts that at the appropriate time NCIC will

may want to wait on the results of the Data Collection. The record nonetheless provides a basis to support immediate actions reining in high single-call fees.

PPI previously expressed support for NCIC’s petition for reconsideration (as it relates to single-call products) as an interim measure. NCIC’s petition proposes temporarily subjecting single-call services to the same \$3 or \$5.95 cap (depending on payment channel) that currently applies to automated and live-agent payments. But as NCIC’s opening comments on the Fifth FNPRM illustrate, this should only be viewed as a stop-gap proposal because it would still allow a \$3 transaction fee for a one-minute call, a practice for which NCIC notes there “is no cost-basis” justification.¹⁶

In light of NCIC’s opening comments, PPI stresses that the proposal in the petition for reconsideration should not be viewed as a permanent solution. We fully concur with NCIC’s suggestion that the Commission “should prohibit transaction fees on single calls, as this only leads some providers to make this the first and easiest option to place a call.”¹⁷

As part of PPI’s involvement in an Iowa Utilities Board tariff proceeding, we obtained a copy of Securus’s call script for single-call products (the document is available as part of the proceeding’s official docket¹⁸ and is attached hereto for ease of reference). As we explained in that proceeding, the most problematic aspect of the call script is the structure of the menu that the call recipient must choose from. The menu options are:

To pay for just this call using your credit or debit card, press “1.”
To decline this call, press “2.”
To block calls from this facility, press “6.”
If you do not want to connect this call but would like to fund an account for future calls, please hang up and call 800.844.6591.¹⁹

provide full and accurate data in response to the Data Collection. It is true that card-processing costs are only one component of carriers’ ancillary costs, but PPI remains confident that a fair analysis of the Data Collection results will support a reduction in the present ancillary fee caps.

¹⁶ NCIC Cmts at 10.

¹⁷ *Id.*

¹⁸ See *In re Securus Technologies*, Iowa Utils. Bd. Dkt. TF-2019-0033, [PPI Comments re Revised Tariff](#), attached Declaration of Peter Wagner (Feb. 8, 2021).

¹⁹ Wagner Decl., Exh. 1 at 2.

In at least three respects, this structure nudges consumers into making economically inefficient choices. First, it is highly probable that many call recipients will not be prepared to write down the ten-digit phone number that Securus expects them to call to establish a prepaid account. Given that Securus routinely boasts of its “superior communications services,”²⁰ it should be able to connect the caller to the 800-844-6591 number with a single-digit menu option (e.g., “If you would like to fund an account for future calls, press 4.”).

Second, by offering the single-call option as the first choice—and the prepaid account option as the last choice, paired with the rejection of the current incoming call—the call flow runs the risk of either confusing call recipients or steering them toward choosing the single call product without fully understanding the impact of that choice.

Finally, it is perplexing that call recipients who have prepaid accounts with insufficient funds hear the same message as recipients who do not have a prepaid account.²¹ The structure of the call flow indicates that Securus’s network is capable of determining whether there is a prepaid account associated with the called number, and whether such account has funds sufficient to pay for the present call. Accordingly, Securus should use this technology to provide individualized information to call recipients: customers with insufficient balances should be given instructions on how to fund that account, while customers who do not have a prepaid account should hear a more informative prompt such as: “You may pay for this call now, or if you expect to receive multiple calls from this correctional facility, you can create a prepaid account that may save you money.”

The Commission could investigate carriers’ practices to ensure that prompts and call flows do not constitute unjust or unreasonable practices (for purposes of 47 U.S.C. § 201(b)), but

²⁰ See <https://securustech.net/about-us/index.html> (“As the largest incarcerated individual communications provider, we help maintain relationships between incarcerated individuals and their family and friends *through easy to use incarcerated individual calling options*” (emphasis added)).

²¹ Wagner Decl., Exh. 1, at 2 (“Called party hears: ‘Our records show you do not have an account or enough funds to complete this call.’”).

it would be more efficient to simply remove carriers' economic incentives through elimination or sharp curtailment of single-call transaction fees. As NCIC suggests, the time has come to prohibit all transaction fees for single calls and mandate a specified number of free calls for newly incarcerated customers.²² PPI supports such an action as part of the present phase of this proceeding. If it would result in faster relief to consumers, then we support granting the NCIC petition for reconsideration as an interim measure while the Commission considers a complete prohibition on single-call transaction fees and mandatory free calls for new incarcerated customers.

III. The Commission Must Assert Jurisdiction Over Video-Calling Rates and Practices

Combing through the record from the last decade reveals a concerted campaign by Securus and Global Tel*Link (collectively, the "Dominant Carriers") to defeat regulatory oversight of video calling. These two companies have both advanced strident, if garbled, jurisdictional arguments built around the flawed assertion that advanced ICS (including video calling) is an "information service," a designation that traces its origins back to the Commission's landmark decision in the *Second Computer Inquiry* ("Computer II").²³ There is, however, a prominent deficiency in this assertion: the Commission has never actually classified any ICS product as an information service, and for good reason—based on a fair reading of applicable law, voice and video ICS qualify as telecommunications services, a designation that necessarily precludes classification as an information service. The Dominant Carriers continue to lob this argument at the wall, likely hoping that repetition of the unsupported claim will somehow make it more persuasive.

²² NCIC suggests two free calls; PPI suggests four free calls. See PPI Cmts at 2, n.32. NCIC also notes that perhaps a small fee of roughly 25¢ could be levied on single-calls to recover card processing costs (NCIC Cmts at 12-13). PPI believes that the administrative details of collecting such a fee would likely outweigh the benefits, but if the Commission is inclined to cap single-call fees at 25¢ that would still provide substantial relief by reducing transaction fees 96% from the current \$6.95 cap.

²³ *Amendment of § 64.702 of the Commission's Rules & Regulations (Second Computer Inquiry)*, Dkt. No. 20828, 77 F.C.C. 2d 384 (released May 2, 1980).

PPI takes this opportunity to provide a thorough analysis of relevant authority, with the ultimate objective of explaining why the Commission should regulate ICS video calling. We start with a brief discussion of why this issue is important to ICS consumers and then proceed to review relevant law, beginning with the Communications Act of 1934 (the “Act”)²⁴ and progressing through the Court of Appeals’ ruling in *Global Tel*Link v. FCC*.²⁵ We hope that this comprehensive overview provides the Commission with the framework to decisively overrule the Dominant Carriers’ objections and assert its authority over ICS video calling.

A. Cost Accounting and Product Substitution are at the Center of ICS Rate Setting

The record is clear that ICS is now commonly offered through facility-level contracts that bundle regulated and non-regulated services.²⁶ The rapid spread of new technologies also comes as the ICS industry is “in the midst of a fundamental reordering.”²⁷ These trends give rise to three interrelated concerns that the Commission should address: cross subsidies, product substitution, and facility cost recovery. As for cross subsidies, PPI believes that the Data Collection—if properly designed—will reveal that ICS carriers are using revenue from unregulated services (including video calling) to compensate for the excessive voice-calling profits that the Commission has attempted to control through rate-cap regulation.²⁸ Indeed, the Commission apparently had this inquiry in mind when it stated that one purpose of the Data Collection is to “[q]uantify the relative financial importance of the different products and services in each provider’s business portfolio . . . and ensure that the provider’s inmate calling services are not being used to subsidize the provider’s, or any corporate affiliate’s, other [i.e.,

²⁴ Pub. L. 73-416, 48 Stat. 1064 (1934).

²⁵ 866 F.3d 397, 415 (D.C. Cir. 2017).

²⁶ *See above*, note 4.

²⁷ GTL Cmts at 6.

²⁸ *See generally*, Stephen Raher, [*The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*](#), 17 *Hastings Race & Poverty L.J.* 3, 54-56 (2020).

unregulated] products or services.”²⁹ Both Dominant Carriers have opposed even the mere collection of data concerning currently unregulated video calling services, but Global Tel*Link (“GTL”) at least admits that the Commission may take up this issue in the current rulemaking.³⁰

Regarding product substitution, several ICS carriers predicted an industry trend of steering consumers to unregulated services (including but not limited to video calling) in order to boost profits.³¹ Not only does this scenario entail industry evasion of effective rate regulation, but it also emphasizes the limited options that ICS consumers have. It would be one thing if ICS consumers individually chose to pay more for video calling because it provides value that voice calling does not. But consumers are not the ones that choose bundled contracts—those agreements are negotiated between carriers and correctional facilities. Given that carriers and facilities have a financial interest in maximizing their own corporate profits or site-commission revenue (respectively), it is not unreasonable to assume that these parties will negotiate new contracts with an eye toward deemphasizing less-lucrative regulated services through steps as simple as reducing consumer access to the hardware necessary to make voice calls.

Finally, unregulated services like video calling play a prominent role in the current debate regarding facility cost recovery. As the Fifth FNPRM notes, the Commission is grappling with the complex issue of how much site-commission expense can appropriately be recouped from ratepayers. But if the Commission is unaware of how much revenue facilities receive from

²⁹ *Rates for Interstate Inmate Calling Services*, WC Dkt. 12-375, [Third Report and Order, Order on Reconsideration & Fifth Further Notice of Proposed Rulemaking](#) [hereinafter “Third R&O”] ¶ 226 (released May 24, 2021).

³⁰ Securus Data Collection Reply Cmts at 2-7; [Reply Comments of GTL re Data Collection](#) at 2 (Nov 19, 2021).

³¹ [Comments of ICSolutions re Draft Fifth FNPRM](#), at 8 (May 12, 2021) (“The FCC should also be aware that providers may attempt to substitute [inmate telephone services] with similar voice connections but leveraging unregulated services, in an effort to avoid regulations on rates, fees, and the payment of commissions.”); *Order Instituting Rulemaking to Consider Regulating Telecomm’ns Services Used by Incarcerated People*, Calif. Pub. Utils. Comm. Dkt. R. 20-10-002, [NCIC Application for Rehearing](#) at 9-10 (Sep. 21, 2021) (“NCIC reasonably anticipates that . . . IPCS providers will be forced to restrict the number of phones, as well as the available calling hours/minutes per day to encourage incarcerated persons to use non-regulated services, such as video calling, text messaging and email.”); *see also* Securus Cmts, *above* note 7.

commissions on unregulated services like video calling, then the Commission cannot determine an accurate cost-recovery component of voice calling rates. To illustrate through a hypothetical: assume a facility incurs annual costs of \$100 in direct and reasonable relation to providing voice and video calling. If the facility wishes to recover these costs through imposition of a site commission, then the \$100 should ideally be allocated between voice and video calling rates (based on service costs, usage, or some other measurement). But if the same facility is already receiving site commission payments of \$100 from video calling, then it should not be able to recover *any* amount through voice rates. However, if the Commission follows the Dominant Carriers' proposals for the Data Collection, it will never know how much compensation the facility derives from video calling.

The Commission should not let ICS carriers upend rate regulation by using unregulated services to achieve an end-run around current ICS rules. As technology evolves, so too must regulatory frameworks. The Commission should prioritize regulation of new ICS technologies, starting with video calling. As discussed in the following sections, Congress has already granted the Commission authority to take such steps.

B. Video Calling is a Telecommunications Service that the Commission is Authorized to Regulate

ICS carriers, likely motivated by a desire to defend their high profit margins, have launched a veritable frenzy of arguments in opposition to Commission regulation of any technology other than voice telephony. Despite having years to develop these arguments, carriers have advanced no compelling theory against regulation of video calling. A methodical review of applicable authority reveals that the Commission has statutory authority to regulate video calling. PPI sets forth our legal reasoning in this section.

1. Video Calling Has Traditionally Been Regulated as a Communication Service under the Communications Act of 1934

The framers of the Act deliberately drafted the text to encompass new technologies that arose after enactment of the statute.³² The result is an open-ended grant of power that allows the Commission to “regulat[e] interstate . . . commerce in communication by wire . . . so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide wire . . . communication service with adequate facilities at reasonable charges.”³³ Unlike the fractured regulatory regime in place prior to 1934, Congress created the Commission as a unified agency to “secur[e] a more effective execution” of the policy expressed in the Act.³⁴ The heart of the jurisdictional inquiry, then, is whether video calling is communication by wire. The answer to this question is emphatically “yes,” and is informed both by historical practice and subsequent modifications to the Act.

As a matter of history, the Commission has seen video calling before. In 1964, American Telephone & Telegraph (“AT&T”) debuted its “Picturephone” service, hailed as the first videophone and an indication of technological innovation to come.³⁵ The Picturephone was a commercial failure and sparked regulatory debate over its propriety as a Bell-System offering, but the Commission did not hesitate to regulate Picturephone and no one seriously disputed the Commission’s ability to embrace the challenge of new technologies that clearly fell under its purview.

³² Stuart N. Brotman, *Communications Law & Practice* § 1.02 (rev. 2021) (“In 1933, President Franklin D. Roosevelt called for the convening of a committee to study government regulation of electronic communications. President Roosevelt had a limited purpose: to bring telephony and broadcasting under the same jurisdiction. The committee went further, recommending that Congress establish a single agency to regulate all foreign and interstate communications, including radio, telegraph and telephone, with provisions for any new technologies that might be related.” (footnotes omitted)).

³³ 47 U.S.C. § 151.

³⁴ *Id.*

³⁵ *Structure & Practices of the Video Relay Service Program*, CG Dkts. 10-51 & 03-123, Report & Order, Notice of Inquiry, Further Notice of Proposed Rulemaking, and Order, Stmt. of Chairman Ajit Pai, 32 FCC Rcd. 2436, 2513 (Mar. 3, 2017).



Figure 1. AT&T’s Picturephone provided video calling service in the 1960s. Although the product was a commercial disappointment, the Commission regulated Picturephone as a communication service without any serious objection.

Source: Jon Gertner, *The Idea Factory: Bell Labs and the Great Age of American Innovation* (2012) (reprint courtesy of AT&T Archives and History Center).

When the Commission concluded a two-year investigation of the Bell System’s finances, Commissioner Nicholas Johnson wrote separately to demand “wholly new ways of observing, analyzing, and talking about communications behavior.”³⁶ As part of his analysis, Johnson characterized the controversial Picturephone program as an innovation that could close the “dollar-intimacy gap.”³⁷ Notwithstanding his admiration of the technological aspects of Picturephone, Commissioner Johnson was a vocal critic of Bell’s regulatory accounting of the

³⁶ *AT&T Co. and the Associated Bell Sys. Companies Charges for Interstate and Foreign Commc’ns Service*, Dkts. 16258 & 15011, Interim Decision & Order, 9 F.C.C. 2d 30, 98 (Jul. 5, 1967) (Johnson, Comm’r, concurring).

³⁷ *Id.* (describing a continuum of intimacy of personal communications, ranging from face-to-face communications (intimate, but expensive to the extent that it requires cross-country travel) to postal mail (less intimate, but inexpensive regardless of distance)).

service. Others on the Commission disagreed. When the agency grappled with another emerging technology (cable television), Commissioner Kenneth Cox reasoned that Picturephone was operationally complimentary to cable television in that Bell was developing Picturephone as a two-way video transmission service while also expanding into cable television as a one-way video distribution service.³⁸

By 1978, Picturephone's commercial failure was settled, but the service lived on for purposes of regulatory accounting. Of note here, when proposing a revised uniform system of accounts ("USOA"), the Commission classified Picturephone as a "visual telephone" service, not as part of the Bell System's growing computer operations.³⁹ Due to the rapidly changing nature of the telecommunications industry, the Commission never finalized the 1978 revisions to the USOA,⁴⁰ but the streamlined USOA in force today defines "telecommunications" as including "transmission . . . or reception of . . . *images* or sounds or intelligence of any nature by wire"⁴¹ (a definition that encompasses ICS video calling).

In the 1980s, a new iteration of Picturephone surfaced, with AT&T renaming the product Picturephone Meeting Service ("PMS"), described as "allow[ing] the holding of conferences and meetings where the conferees were located in different geographical areas"⁴² (which could describe ICS video services, although ICS calls are typically limited to two connections). When the Commission was asked to approve a limited-duration tariff for PMS, it made two important findings. First, the Commission overruled an objection from Satellite Business Systems

³⁸ *Southern Bell Tel. & Tel. Co. Application for Authority under § 214(a)*, File No. P-C-7103, 16 F.C.C. 2d 491, 494 (Nov. 26, 1968) (Cox, Comm'r, concurring).

³⁹ *Revision of the USOA & Financial Reporting Requirements for Telephone Companies*, CC Dkt. 78-196, Notice of Proposed Rulemaking, 70 F.C.C. 2d 719, 763-764, 774-776 (released Jul. 21, 1978).

⁴⁰ *Revision of the USOA & Financial Reporting Requirements for Telephone Companies*, CC Dkt. 78-196, Second Supplemental Notice of Proposed Rulemaking and Order, 88 F.C.C. 2d 83 (released Oct. 20, 1981).

⁴¹ 47 C.F.R. § 32.9000 (emphasis added).

⁴² *AT&T Picturephone(r) Meeting Serv.*, FCC 80-779, 84 F.C.C. 2d 322, 323 (released Jan. 5, 1981).

(“SBS”), which had argued that AT&T set PMS rates at artificially low levels.⁴³ In considering this challenge, the Commission applied 47 U.S.C. § 201(b)’s requirement of just and reasonable rates *for communication services*. Second, the Commission found that the original Picturephone service and the new PMS were not “like communication services” for purposes of 47 U.S.C. § 202(a)’s anti-discrimination provision—a finding that necessarily acknowledges both products’ status as communication services.⁴⁴

In what might be Picturephone’s last substantive appearance before the Commission, AT&T sought approval for the construction of new facilities to operate PMS in the early 1980s. In 1982, the Commission granted AT&T’s request in an order that recounted the evolution of Picturephone from “a station-to-station telephone service using desk-top TV viewing screens” to a system of “simultaneous two-way video and audio communications over a digital network comprised of terrestrial and satellite facilities.”⁴⁵ But the technology was not the only thing that had evolved: in the years since the Commission’s last major Picturephone proceeding, it had issued the final decision in *Computer II*, which created the mutually exclusive categories of “basic services” (subject to regulation under title II of the Act) and “enhanced services” (not subject to title II).⁴⁶ *Computer II* itself described basic service as potentially including the transmission of video as well as voice.⁴⁷ Consistent with this framework, the Commission in its 1982 Picturephone order rejected SBS’s assertion that PMS was an enhanced service under *Computer II*, instead taking the view that PMS was a basic service subject to title II.⁴⁸

⁴³ *Id.* at 326-327.

⁴⁴ *Id.* at 325.

⁴⁵ *Application of AT&T and Certain Bell System Associated Companies for Authorization Pursuant to § 214*, File No. W-P-C-3825, Mem. Opinion, Order, Certificate & Authorizations, 89 F.C.C. 2d 1017, 1020 (released Apr. 16, 1982).

⁴⁶ *Computer II* at ¶ 92, 77 F.C.C. 2d at 418-419 (describing the basic/enhanced service dichotomy).

⁴⁷ *Id.* ¶ 93, 77 F.C.C. 2d at 419 (“A basic transmission service is one that is limited to the common carrier offering of transmission capacity for the movement of information. In offering this capacity, a communications path is provided for the analog or digital transmission of voice, data, *video*, etc. information.” (emphasis added)).

⁴⁸ *Application for Auth. Pursuant to § 214 (see above, n.45)* at ¶ 23, 89 F.C.C. 2d at 1026.

The history of the Commission’s treatment of Picturephone shows clearly that the mere joinder of video and audio into a combined system of two-way communication does not remove such services from the Commission’s regulatory purview. Quite to the contrary, communication is communication whether it involves audio, video, or both. The Act was framed to adapt to new technologies and the Commission correctly determined that video calling is so conceptually similar to voice calling that it is properly regulated under title II.

2. The Telecommunications Act of 1996 Confirms Video Calling’s Proper Treatment as a “Telecommunications Service”

The Act, while still in force, was extensively amended by the sweeping Telecommunications Act of 1996 (the “1996 Act”).⁴⁹ Among other things, the 1996 Act adopted statutory definitions of the basic and enhanced service categories created by *Computer II*. The old basic service category is now referred to as telecommunications service, defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁵⁰ Enhanced service is now known as information service, defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, [including] electronic publishing, but . . . not includ[ing] any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”⁵¹

Various statutory provisions and regulatory developments affirm that video calling is properly classified as a telecommunications service. Two statutory provisions are relevant to this analysis. First, section 706 of the 1996 Act directs the Commission and state utility agencies to “encourage the deployment on a reasonable and timely basis of advanced telecommunications

⁴⁹ Pub. L. 104-104, 110 Stat. 56 (1996).

⁵⁰ 1996 Act § 3(a)(2)(48) (codified as 47 U.S.C. § 153(43)). “Telecommunications service,” in turn is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” *Id.* § 3(a)(2)(51) (codified as 47 U.S.C. § 153(46)).

⁵¹ *Id.* § 3(a)(2)(41) (codified as 47 U.S.C. § 153(20)).

capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance . . . or other regulating methods that remove barriers to infrastructure investment.”⁵² The statute provides a definition of “advanced telecommunications capability,”⁵³ more commonly referred to as broadband internet (which is generally classified as an information service). Although broadband itself is an information service,⁵⁴ it can be used to provide customers with telecommunications services including “video telecommunications using any technology.”⁵⁵ Applying section 706 to ICS offerings, the Commission should recognize video calling as a telecommunication service that typically utilizes broadband internet as a delivery mechanism.⁵⁶ Indeed, the unique nature of ICS compels this interpretation: unlike a free-world customer purchasing a broadband connection from a local exchange carrier, incarcerated callers do not have access to the internet (i.e., broadband connectivity itself) due to security restrictions. Thus, while they may use ICS offerings that rely on broadband, what the customer actually purchases is the ability to transmit their voice (and possibly image) to a loved one, while receiving their loved one’s voice (and image) in response—this is the very essence of telecommunications service.

The second statutory provision of note was added after the 1996 Act. In 2010, Congress passed the Twenty-First Century Communications and Video Accessibility Act (the “CVAA”),⁵⁷

⁵² *Id.* § 706(a) (codified as 47 U.S.C. § 1302(a)).

⁵³ *Id.* § 706(c)(1) (codified as 47 U.S.C. § 1302(d)(1)) (“The term ‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”).

⁵⁴ *Verizon v. FCC*, 740 F.3d 623, 631 (D.C. Cir. 2014).

⁵⁵ 47 U.S.C. § 1302(d)(1).

⁵⁶ See *Order Instituting Rulemaking to Update Surcharge Mechanisms to Ensure Equity & Transparency of Fees, Taxes & Surcharges Assessed on Customers of Telecomm. Services in California*, Calif. Pub. Utils. Comm. Dkt. R. 21-03-002, [Comments of Securus Technologies, LLC on Communications Division’s Staff Report – Part 2](#) at 2 (Nov. 30, 2021) (describing Securus’s ICS service as a real-time, two-way communications service using Internet protocol-enabled transport facilities).

⁵⁷ Pub. L. 111-260, 124 Stat. 2751 (2010).

which created a new statutory definition of “advanced communications services.”⁵⁸ Advanced communications services include “interoperable video conferencing service.”⁵⁹ The CVAA was enacted for the purposes of expanding communications access to disabled callers, but the statutory definition is nonetheless relevant for purposes of this discussion because Congress chose to define interoperable video conferencing service as an advanced *communications* service, not a type of information service.⁶⁰

At least three of the Commission’s rulings provide further support for classification of ICS video calling as a telecommunications service. First, the Commission determined (nearly contemporaneous with the passage of the 1996 Act) that security and call-management features do not make ICS voice service an enhanced service (that is, the *Computer II* version of information service).⁶¹ While this ruling is limited to voice telephony, it instructs that the specialized management features commonly used in connection with correctional facility communications services do not change the generally applicable analysis. This result is consistent with the 1996 Act’s definition of information services, which excludes data processing used for “management, control, or operation of a telecommunications system.”⁶²

Second, in its 2010 Open Internet Order, the Commission provided useful insight into the operation of section 706. In explaining its jurisdiction, the Commission noted that its general authority over communication by wire is supplemented by the policy directives contained in

⁵⁸ *Id.* § 101 (codified as 47 U.S.C. § 153(1)).

⁵⁹ 47 U.S.C. § 153(1)(D).

⁶⁰ *See Ratzlaf v. U.S.*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”). To be clear, PPI acknowledges that the terms “advanced communications services” and “telecommunications services” are not coterminous. The point, rather, is that advanced communications services are—as the name indicates—used for *communications* (the subject matter of title II of the Act), not to store, transport, or manipulate data (the definition of an information service).

⁶¹ *Petition for Declaratory Ruling by Inmate Comm’cns Services Providers*, Dkt. RM-8181, Declaratory Ruling ¶¶ 28-32, 11 FCC Rcd. 7362, 7374-7376 (released Feb. 20, 1996).

⁶² 47 U.S.C. § 153(20).

section 706.⁶³ The Court of Appeals largely concurred with the Commission’s analysis of section 706, although the court did vacate portions of the Open Internet Order because it found that the Commission lacked the authority to regulate broadband providers under title II (an issue not present in this proceeding).⁶⁴ Although the Open Internet Order was subsequently repealed by the Commission’s 2018 Restoring Internet Freedom Order (“RIFO”),⁶⁵ these two Commission rulings provide interpretations that are relevant here. The Open Internet Order speaks of “voice or video telephony,”⁶⁶ and states that protection of these services was one of the Commission’s goals at that time. In repealing the Open Internet Order, the RIFO reaffirms the proper treatment of telephony as a telecommunications service.⁶⁷ In stressing the difference between broadband service and telephony, the RIFO notes that broadband is an information service because it “enable[s] users to electronically create, retrieve, modify and otherwise manipulate information stored on servers around the world.”⁶⁸ Contrast this description with ICS video calling, where users are permitted only to simultaneously exchange sounds and images with one designated counterparty, but are unable to retrieve, modify, or manipulate information (indeed, ICS carriers design their security features to prevent users from doing any of these things). While the Open Internet Order and the RIFO reveal serious policy disagreements among the commissioners, there seems to be no dispute that calling service (voice or otherwise) is a telecommunications service subject to title II.

⁶³ *Preserving the Open Internet*, GN Dkt. 09-191, Report & Order [hereinafter the “Open Internet Order”] ¶¶ 115-126, 25 FCC Rcd. 17905, 17966-17974 (released Dec. 23, 2010).

⁶⁴ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). Specifically, the court noted that the Commission had classified broadband providers as information service providers (*id.* at 631)

⁶⁵ *Restoring Internet Freedom*, WC Dkt. 17-108, Declaratory Ruling, Report & Order, and Order, 33 FCC Rcd. 311 (released Jan. 4, 2018).

⁶⁶ Open Internet Order ¶ 1, 25 FCC Rcd. at 17906.

⁶⁷ RIFO ¶ 56, 33 FCC Rcd. at 346.

⁶⁸ *Id.*

Finally, the Commission’s Report and Order in the CVAA implementation proceeding⁶⁹ provides preliminary insight into the meaning of “interoperable video conferencing service.” Although the Commission ultimately found insufficient record evidence to establish a regulatory definition of interoperable video conferencing service,⁷⁰ the Report and Order does reject an industry argument that “personal computers tablets, and smartphones should not be considered equipment used for interoperable video conferencing service, because these devices are not primarily designed for two-way video conferencing.”⁷¹ In overruling this argument, the Commission notes that “[c]onsumers get their advanced communications services primarily through multipurpose devices, including smartphones, tablets, laptops and desktops,” and that applying section 716 of the Act only to devices that are exclusively used for advanced communication services would nullify the intent of the CVAA.⁷² This holding is relevant in the ICS context because some carriers now provide calling capabilities on handheld devices such as computer tablets.⁷³ The CVAA Report and Order shows that jurisdiction is determined by the type of service provided, not the type of equipment used.⁷⁴

3. The Commission Has Never Classified Any Type of ICS Technology as an Information Service

While some ICS carriers have expressed opposition to Commission regulation of video calling on policy grounds,⁷⁵ the Dominant Carriers have gone a step further by stating (in this

⁶⁹ *Implementation of Sections 716 & 717 of the Comm’cns Act of 1934, as Enacted by the CVAA, etc.*, Dkts. GC 10-213, WT 96-198, CF 10-145, Report & Order and Further Notice of Proposed Rulemaking [hereinafter “CVAA R&O”], 26 FCC Rcd. 14557 (Oct. 7, 2011).

⁷⁰ *Id.* ¶ 47, 26 FCC Rcd. at 14577.

⁷¹ *Id.* ¶ 49, 26 FCC Rcd. at 14577.

⁷² *Id.* (section 716 imposes various obligations on both manufacturers of equipment used for advanced communications services, and providers of the service itself (*see* CVAA § 104 (codified as 47 U.S.C. § 617)).

⁷³ NCIC Cmts at 15 (“[N]ow almost all ICS bids include the provision of tablets to permit incarcerated persons to access ICS within their cells.”).

⁷⁴ *See also* 47 C.F.R. § 64.6000(j) (defining ICS as “a service that allows Inmates to make calls to individuals outside the Correctional Facility . . . regardless of the technology used to deliver the service”).

⁷⁵ *E.g.*, [Reply Comments of Pay Tel Comm’cns re Data Collection](#) at 6 (Nov. 19, 2021).

proceeding and in other fora⁷⁶) that video and other advanced ICS services are classified as information services. In actuality, there is no support for this bold statement. A thoughtful examination of the Dominant Carriers' arguments reveals how precarious their reasoning is.

The last time regulation of video and other advanced services was thoroughly briefed in this proceeding was in response to the Commission's Third Further Notice of Proposed Rulemaking.⁷⁷ The Dominant Carriers both opposed regulation of advanced services by attempting to stretch Commission precedent and blur important statutory distinctions.⁷⁸ GTL and Securus submitted comments claiming that the Commission has classified video calling as an information service, yet both carriers' assertions are based on the same faulty reading of authority.⁷⁹ The carriers provide one citation in support of this statement: paragraph 107 of the Commission's 2010 Broadband NOI.⁸⁰ There are three independent reasons why the Dominant Carriers' citations to paragraph 107 are fatally flawed. First, the document cited is not an order or a rule, but rather a notice of inquiry. A proceeding on a notice of inquiry "do[es] not result in the adoption of rules."⁸¹ If the entire proceeding does not result in the adoption of a rule, then the opening notice (which poses *questions* and is released by the Commission without public input) certainly cannot be considered any type of binding precedent. Second, the text of

⁷⁶ See e.g., *Order Instituting Rulemaking to Consider Regulating Telecomm'cns Services Used by Incarcerated People*, Calif. Pub. Utils. Comm. Dkt. R. 20-10-002, [Opening Comments of GTL](#) at 14 (Nov. 9, 2020) ("Given the . . . classification of video conferencing service as . . . an information service under the Communications Act of 1934 . . . there is no lawful basis for the promulgation of [video visitation service] rate caps." (emphasis added)).

⁷⁷ Second R&O ¶¶ 291-334, 30 FCC Rcd. at 12900-12918.

⁷⁸ In addition, Telmate (which at that time had not yet been acquired by Securus) opposed regulation of advanced ICS based on a policy argument and an alleged lack of record evidence. See [Comments of Telmate, LLC re 3d FNPRM](#) at 12-14 (Jan. 19, 2016).

⁷⁹ [Comments of GTL re 3d FNPRM](#) at 4, text accompanying n.18 (Jan. 19, 2016) ("Video conferencing is an information service"); [Comments of Securus re 3d FNPRM](#) at 7, text accompanying n.32 ("Video service provided by wireline common carriers, which include ICS providers, are [*sic*] considered 'information services' which the Commission refused to regulate in 2010.").

⁸⁰ *Framework for Broadband Internet Service*, GN Dkt. 10-127, Notice of Inquiry, 25 FCC Rcd. 7866 [hereinafter "[Broadband NOI](#)"] (Jun. 17, 2010).

⁸¹ 47 C.F.R. § 1.430.

paragraph 107 does not support the Dominant Carriers’ assertions. Paragraph 107 simply notes certain services that the Commission decided not to address in the 2010 broadband proceeding—including “information services such as e-mail hosting, web-based content and applications, voicemail, interactive menu services, video conferencing, cloud computing, or any other offering aside from broadband Internet service.”⁸² This laundry list (which is the regulatory equivalent of dictum to begin with) is accompanied by a footnote that cites various Commission orders that have classified the respective services as information services—yet none of the authorities cited in the footnote mention ICS video calling specifically or video conferencing generally. Finally, “video conferencing” is not defined in the Broadband NOI (and, notably, the NOI was issued prior to the passage of the CVAA, which introduced the term “interoperable video conferencing” into the Act), so the offhand reference in paragraph 107 could refer to some type of service that is materially distinguishable from ICS video calling—for example, a one-way broadcast service such as Zoom webinar.⁸³

While both Dominant Carriers have hung their argument on the slender reed provided by the Broadband NOI, GTL has made additional (and less meritorious) claims about the classification of ICS as an information service. At least twice, GTL has made inaccurate assertions based on the statutory definition of “interoperable video conferencing” as an advanced communications service. First, in its comments on the Third FNPRM, GTL claims that “video visitation or video calling service is interoperable video conferencing service, which is subject to very limited Commission regulation and oversight.”⁸⁴ The problem with this argument is that nothing in the text of the CVAA (which created the statutory term “interoperable video conferencing service”) supports GTL’s statement. The CVAA imposes certain disability-access requirements on service providers and equipment manufacturers, but not one word of the act purports to limit the Commission’s jurisdiction under any other portion of the Communications

⁸² Broadband NOI ¶ 107, text accompanying n.280, 25 FCC Rcd. at 7909-7910.

⁸³ See Zoom Video Webinars, available at <https://explore.zoom.us/en/products/webinar/>.

⁸⁴ GTL Cmts on 3d FNPRM at 4.

Act. More recently, GTL filed comments that include the confusing statement that “[i]nteroperable video conferencing service has been classified as a non-telecommunications service or information service.”⁸⁵ The only support that GTL provides for this assertion is paragraph 50 of the CVAA Report and Order, but that paragraph says nothing of the sort. In reality, paragraph 50 discusses “webinars and webcasts,” and neither the text of the paragraph nor the accompanying footnotes once mention telecommunications services or information services.⁸⁶

The Dominant Carriers clearly hope for a Commission ruling classifying video calling as an information service. If they were to simply advocate for such action, that would be a fair part of the regulatory process. Instead, they have chosen to misrepresent the Commission’s precedent, either through poor drafting or deliberate misdirection. The Commission need not weigh in on the nature of the carriers’ motives, but it should put an end to this obfuscation. The Commission should not merely confirm that ICS is not an information service, it should remove all doubt and affirmatively classify ICS (including video calling) as a telecommunications service.

4. The D.C. Circuit’s Holding in *GTL* is Not an Impediment

Finally, the Dominant Carriers are fond of pointing to the Court of Appeals’ ruling vacating the Commission’s 2015 video-calling reporting requirement.⁸⁷ But any reasonable reading of the judicial decision arrives at the conclusion that the court was not ruling on the merits of the Commission’s jurisdiction, but rather making a factual finding that the Commission failed to adequately *explain* its authority. Indeed, the court’s ruling is best understood as a reaction to ambitious drafting on the Commission’s part. In its Second Report and Order, the Commission described the video-calling reporting requirement as follows: “for ICS providers that provided video visitation services, *either as a form of ICS or not*, during the reporting

⁸⁵ GTL Reply Cmts re Data Collection at 4, n.15.

⁸⁶ See CVAA R&O ¶ 50, n.101-104, 26 FCC Rcd. at 14578.

⁸⁷ *Global Tel*Link v. FCC*, 866 F.3d 397, 415 (D.C. Cir. 2017).

period, we require that they file the minutes of use and per-minute rates and ancillary service charges for those services.”⁸⁸ Citing this specific language, *GTL* holds as follows:

The Commission asserts that whether or not video visitation services are a form of ICS, they are still subject to the agency’s jurisdiction. We disagree. *Before it may assert its jurisdiction* to impose such a reporting requirement, the Commission must first explain how its statutory authority extends to video visitation services as a “communication[] by wire or radio” under § 201(b) for interstate calls or as an “inmate telephone service” under § 276(d) for interstate or intrastate calls. The Order under review offers no such explanation.⁸⁹

If the court had concluded that the Commission lacked jurisdiction over video calling, it certainly would not have enumerated the steps that the Commission must take in order to regulate such services. The Commission’s last attempt to regulate video calling omitted the requisite legal analysis—but this is a problem that is easily remedied.

Because the Commission’s post-remand rules have heavily (and appropriately) relied on section 201, PPI encourages the Commission to regulate video calling exclusively under section 201 (thus avoiding novel issues that could arise under section 276). As explained here, and in other filings, ICS video calling meets the statutory definition of telecommunications, and it is a service provided by wire.⁹⁰ Admittedly, the Commission has exercised its discretion to forbear from regulating other, free-world, video-calling services like Skype or Zoom. This light-touch approach rests on the theory that forbearance will encourage technological innovation and consumers can choose among various offerings in a competitive marketplace. Neither of these policy concerns applies in the ICS context—video and other advanced services are already ubiquitous in correctional facilities (a fact that the Commission can easily document if it overrules the carriers’ spurious objections and collects comprehensive revenue and usage information as part of the Data Collection) and ICS customers cannot choose their service provider. Accordingly, the Commission should cut through the noise of the carriers’ self-serving

⁸⁸ Second R&O ¶ 267, 30 FCC Rcd. at 12891-12892 (emphasis added).

⁸⁹ *Global Tel*Link*, 866 F.3d at 415 (citations omitted, emphasis added, brackets by court).

⁹⁰ [Comments of PPI re Data Collection](#) at 5, n.9 (Nov. 4, 2021).

arguments, perform a straightforward jurisdictional analysis, and create a framework for regulation of video calling rates and practices.

IV. The Commission Should Refine its Framework for Facility Recovery of Telecommunications-Related Expenses

In our opening comments, PPI set forth a reasoned and detailed framework for determining which correctional-facility costs are appropriately recovered through ICS rates.⁹¹ Nothing in the other parties' opening comments undercuts our proposal, and we urge the Commission to adopt it. The National Sheriffs' Association ("NSA") and several carriers advance some confusing or contradictory arguments in regards to facility cost recovery, which we address in turn.

A. The National Sheriffs' Association Survey is Not Credible

The Commission's Fifth FNPRM correctly casts doubt on the credibility of the NSA's cost survey that was submitted in 2015. Apparently unnerved, the NSA objects to any kind of reexamination of the survey. But instead of refreshing the record or seriously engaging on the merits of the Commission's inquiry, the NSA simply continues its years-long practice of rote repetition of the cost categories identified in its 2015 survey findings. PPI does not dispute that some facilities perform the services itemized in the 2015 NSA survey—but the mere fact that such services are sometimes performed does not end the Commission's inquiry. Rather, the question is whether such functions are directly and reasonably related to the provision of ICS. We explain here why the NSA's opening comments fail to establish the reliability of the 2015 cost survey.

The NSA begins its comments by trying to manufacture an inconsistency. It claims that the Commission cannot now question the quality of the cost survey because it previously found the survey "credible."⁹² In reality, the Commission made no such determination. The passage cited by NSA comes from the Commission's order addressing the 2016 petition for

⁹¹ PPI Cmts at 16-19.

⁹² [Comments of NSA](#) at 1 (Sep. 27, 2021).

reconsideration filed by Michael Hamdan (the “Reconsideration Order”⁹³). The Commission’s characterization of the NSA survey in the Reconsideration Order is actually quite circumspect, and for good reason. The Reconsideration Order characterizes the NSA survey data as “credible[,] though imperfect,” and goes on to specify that the *cost ranges* reported in the survey are credible because they were consistent with other evidence in the record.⁹⁴ Moreover, even if the Commission had called the survey credible, that does not prevent it from reassessing the data in a new light. Administrative agencies bear ultimate responsibility for conducting a “thorough . . . evaluation of all relevant facts” when issuing regulations.⁹⁵ While an agency may rely on data submitted by outside parties, it must “consider and analyze the factual materials” and judge their worth.⁹⁶ Discharging this responsibility here means that the Commission must have the flexibility to jettison data upon discovery of flaws, regardless of what it may have said in previous stages of the proceeding.⁹⁷

In defending the NSA cost survey, carrier NCIC provides speculation on what may have happened with the passage of time, noting that “because these costs [described in the NSA survey] were collected in late 2014/early 2015, there is a good chance that some correctional facilities have experienced higher costs” in the intervening years.⁹⁸ But this is merely

⁹³ *Rates for Interstate Inmate Calling Services*, WC Dkt. 12-375, [Order on Reconsideration](#), 31 FCC Rcd. 9300 (released Aug. 9, 2016).

⁹⁴ Reconsideration Order ¶ 29 and n.115, 31 FCC Rcd. at 9316.

⁹⁵ *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 737 F.2d 1095, 1124 (D.C. Cir. 1984).

⁹⁶ *Id.*

⁹⁷ *See Mississippi v. EPA*, 723 F.3d 246, 261 (D.C. Cir. 2013) (per curiam) (agencies have an obligation to “weigh the entire record” but “no single piece of evidence is dispositive” and agencies are responsible for determining the “convincing force of evidence” based on consideration of the record as a whole).

⁹⁸ NCIC Cmts at 7. It is worth noting that the record does not corroborate NCIC’s assertion that the NSA data was collected in late 2014 or early 2015. Contravening the most basic tenets of research design and reporting, the NSA’s summary of the survey never specifies when the questionnaire was distributed nor when responses were received. *See Comments of NSA on 2d FNPRM* (Jan. 12, 2015). It may be tempting to infer that the survey was conducted in close proximity to the NSA’s January 2015 filing, but this is nothing more than an assumption.

conjecture—there is an equally good chance that costs could have declined due to changes in jail populations,⁹⁹ labor-saving technology, or shifts in compensation practices.

NSA adds its own unsupported assumptions when it states that “[t]here is no reason to believe the Sheriffs did not accurately report salaries for their employees.”¹⁰⁰ In actuality, NSA provides no evidence to justify an assumption that the salary data *is* accurately reported. To be clear, PPI does not allege that any survey respondent intentionally misreported data. But the possibility of innocent error cannot be ruled out. Responsible survey design counsels that the researcher should publish findings that include, among other things: a copy of the survey instrument, information about when the data was collected, and what quality-assurance procedures (if any) were used to guard against respondent error.¹⁰¹ NSA provides none of these safeguards, nor does it report the actual names of the responding jurisdictions so that interested parties can independently verify the accuracy of the reported information. Accordingly, while the survey may or may not accurately report facility expenses, NSA has not taken any steps that would justify a presumption of validity in the study’s favor.

Moving from data issues to legal analysis, NSA continues to conflate the concepts of direct relation and but-for causation, insisting that any function that would not be undertaken but for the presence of ICS should be recovered from ratepayers.¹⁰² PPI opposes this Procrustean focus on but-for causation, which finds no support in the theory of rate regulation. Under rate-of-return regulatory systems, the “used and useful” and “prudent investment” principles allowed regulators to exclude expenses from utility’s rate base even if the costs would not have been incurred but for the utility’s regulated operations. This exercise required regulators to make

⁹⁹ See Alexi Jones & Wendy Sawyer, “[New data on jail populations: The good, the bad, and the ugly](#)” (Mar. 17, 2021) (discussing 25% jail population decline at the beginning of the COVID-19 pandemic).

¹⁰⁰ NSA Cmts at 6.

¹⁰¹ See Am. Statistical Ass’n., “[Ethical Guidelines for Statistical Practice](#)” §§ B(4) and (5) (Apr. 14, 2018).

¹⁰² NSA Cmts at 4.

value judgements about what types of expenses ratepayers should have to cover.¹⁰³ ICS rates are not regulated under a rate-of-return model, but a corollary principle applies: rate caps must take into account a carrier's allowable costs, which necessarily requires a determination of what facility costs should reasonably be recovered from ratepayers. PPI set forth a proposed framework for drawing these lines.¹⁰⁴ NSA continues to reflexively insist that facilities are entitled to recoup all the costs they want to, without compromise. We encourage the Commission to develop a reasoned rule to implement the reasonably-and-directly related standard that it has previously articulated.

B. Other Parties' Arguments Regarding Security Expenses are Vague and Uncompelling

Several carriers as well as Praeses filed opening comments that endorse the costs reported in the NSA's 2015 survey or otherwise attempt to build upon the survey as a key component in calculating a facility-cost component of ICS rate caps. Careful reading of these comments reveals defects in the parties' arguments.

Praeses defends the absolute legitimacy of site commissions by inaccurately characterizing the D.C. Circuit's *GTL* ruling as a "binding judicial decision . . . [that] expressly recognized that site commissions are legitimate costs of ICS providers."¹⁰⁵ While *GTL* is certainly binding law, the opinion does not contain the holding that Praeses claims it does. What the court actually did was to disagree with the Commission's *categorical* exclusion of site commissions. At the same time, the court expressly ruled the Commission could "assess on remand which portions of site commissions might be directly related to the provision of ICS and therefore legitimate, and which are not."¹⁰⁶ Even before the *GTL* opinion issued, the Commission had abandoned its categorical exclusion of site commissions, thus curing any defect

¹⁰³ See generally, James J. Hoecker, "Used and Useful": Autopsy of a Ratemaking Policy, 8 Energy L.J. 303 (1987).

¹⁰⁴ PPI Cmts at 16-19.

¹⁰⁵ Praeses Cmts at 10.

¹⁰⁶ *GTL v. FCC*, 866 F.3d 397, 414 (D.C. Cir. 2017).

identified by the court. The inquiries raised in the Fifth FNPRM regarding facility cost recovery methodology are endorsed by the reasoning of *GTL*, not prohibited by it, as Praeses would have the Commission believe.

As part of its efforts to rehabilitate the NSA survey data, NCIC theorizes that facility costs may have increased in recent years “due to . . . the . . . increase of the frequency of inmates making calls which must be monitored and managed by staff.”¹⁰⁷ This theory only holds up to the extent that facilities monitor a fixed percentage of all calls (or 100% of calls, which is implausible). Yet nothing in the record indicates that such a monitoring practice is common. Other types of monitoring frameworks are equally likely, and do not support NCIC’s hypothesis. For example, a facility may employ an investigator for 40 hours a week, whose job description is to monitor as many calls as they can during that time (in which case the monitoring cost would not vary with call volume). Alternatively, ICS monitoring may be based on predefined security triggers. NCIC has stated that the company LEO Technologies offers an “excellent” security monitoring product.¹⁰⁸ LEO Technologies’ fact sheet for its monitoring product “Verus” claims that its software is only triggered by certain terms and “all search inquiries are based on probable cause.”¹⁰⁹ To the extent that this is accurate, facilities served by Verus would presumably incur investigative expenses in proportion to the amount of suspected criminal activity identified by the software. But the record contains no evidence that the amount of such identified activity is correlated to the number of calls made in any given facility.

Pay Tel Communications, Inc. (“Pay Tel”) also defends the NSA cost figures, but does so through the use of an internally inconsistent argument. Specifically, Pay Tel focuses much of its opening comments on discussing costs associated with the higher turnover rates in jails.¹¹⁰

¹⁰⁷ NCIC Cmts at 7.

¹⁰⁸ [Comments of NCIC re Data Collection](#) at 5 (Nov. 4, 2021).

¹⁰⁹ LEO Technologies, “[Here’s what you need to know about LEO Technologies and Verus](#)” (undated).

¹¹⁰ [Comments of Pay Tel](#) at 6-9 (Sep. 27, 2021). PPI also acknowledges the impact of “jail churn.” See PPI Cmts at 3-4.

Citing the NSA survey, Pay Tel alleges that jail staff are primarily responsible for administering prepaid accounts for the people constantly arriving and departing jails.¹¹¹ But elsewhere in the same comments, Pay Tel claims that the ICS carriers are the ones responsible for maintaining these accounts.¹¹² If the latter assertion is accurate, then carriers serving small jails are already compensated for this expense through the Commission's system of tiered rate caps and facilities need not be compensated for the expense of account maintenance because they are not responsible for this function.

In conclusion, the NSA survey is flawed. The Commission may disregard the survey or it may discount the weight of the survey and consider it as just one of many data points. What the Commission should definitely *not* do is calculate permanent rate caps based primarily on this unreliable and aging survey.

V. The Commission Should Address the Use and Disposition of Prepaid Customer Funds

In our comments on the Data Collection, PPI noted the importance of investigating the use of customer prepaid funds as working capital held by ICS carriers.¹¹³ In addition to the accounting aspects, it is time for the Commission to address disposition of customer prepaid funds with the goal of ending unjust practices that violate 47 U.S.C. § 201(b).

Details illustrating unjust practices can be found in the class action *Githieya v. Global Tel Link*,¹¹⁴ where plaintiffs' motion for preliminary approval of a settlement agreement is currently pending.¹¹⁵ Plaintiffs' operative complaint targets GTL's "inactivity policy," wherein GTL seizes customer prepaid funds after 90 days of account inactivity. Under the terms of the settlement agreement, GTL agrees to extend the inactivity period to 180 days before it seizes

¹¹¹ Pay Tel Cmts, exh 2 (line 6 of table).

¹¹² *Id.* at 7 (using a hypothetical 212-bed jail, "the ICS provider will have to set up approximately 7 times as many accounts as would be required by a provider in a similarly-sized prison facility over the course of a year").

¹¹³ PPI Data Collection Cmts at 15-16; *see also* [PPI Ex parte notice](#) at 2-3 (Dec. 1, 2021).

¹¹⁴ Case No. 15-cv-986-AT (N.D. Ga.).

¹¹⁵ *Githieya v. GTL*, Unopposed Motion for Preliminary Approval of Class Action Settlement, ECF No. 326 (Dec. 6, 2021).

customer funds.¹¹⁶ This settlement is not nearly protective enough—there is no justification for seizing customer prepaid funds no matter how long the account has been inactive. To wit, at the insistence of the Iowa Utilities Board, GTL’s tariff in that state provides that customers can obtain refunds at any time, even if the account has been classified as “inactive.”¹¹⁷

Prepaid customer funds are interest-free working capital that ICS carriers may use for any purpose. Seizing funds based on account inactivity has no economic justification and serves only to evade state unclaimed-property law and deprive consumers of money that is rightfully theirs. Pay Tel presents its inactive account procedure as an example of best practices,¹¹⁸ but PPI would note that even Pay Tel allows for the seizure of funds, just in gradual fashion. Pay Tel refunds inactive account balances in the form of a prepaid calling card, but the balance of such card is gradually depleted by a “monthly maintenance fee” (of an unspecified amount).¹¹⁹ Such practices are unreasonable and contravene 47 U.S.C. § 201(b). PPI urges the Commission to issue new rules preventing forfeiture of customer prepaid accounts and requiring carriers to treat such funds in accordance with applicable state unclaimed property statutes.

VI. The Commission Should Investigate Anticompetitive Use of Patents in the ICS Industry

PPI notes in our reply comments on the Data Collection that some ICS carriers use patents as a weapon to stifle market competition.¹²⁰ In that filing, we encourage the Wireline Competition Bureau and Office of Economics and Analytics to collect data on royalty income (of patent holders) and licensing expenses (of patent licensees). We incorporate our previous comments here and encourage the Commission to address use of patents in the ICS industry.

The Dominant Carriers hold over four hundred patents.¹²¹ The CEO of one of those companies is on record saying that “You cannot operate in our industry legally without having a

¹¹⁶ *Id.* Exh. 1 (Class Action Settlement Agreement and Release) § IV(D)(iii).

¹¹⁷ *In re GTL*, Iowa Utils. Bd. Dkt. TF-2019-0039, [Telephone Tariff](#) § 3.6 (Feb. 24, 2021).

¹¹⁸ Pay Tel Cmts at 4.

¹¹⁹ *Id.*, exh. 1 § E.

¹²⁰ PPI Reply Cmts re Data Collection at 1-3.

¹²¹ *Id.* at 2, n.6

patent license agreement with us.”¹²² The potential for anticompetitive conduct is self-apparent. Federal Trade Commissioner Rebecca Kelly Slaughter recently spoke on the unfair practices that arise when patented technology is adopted as an industry standard.¹²³ An analogous concern can occur in the ICS industry: if facilities demand a certain feature that is subject to a patent, the patent holder exerts undue influence over the economic viability of its competitors. PPI reiterates that competitive carriers are unlikely to raise this issue for fear of retribution from the patent holders/licensors with whom they must do business.

The President has directed the Commission to examine antitrust issues in the broader communications sector.¹²⁴ In addition to the enumerated actions listed in the President’s executive order, PPI encourages the Commission to thoroughly examine the Dominant Carriers’ use of patents to extract rents from competitors and prevent new entrants into the marketplace.

VII. Other Issues Arising in Opening Comments

Opening comments submitted in response to the Fifth FNPRM raise many issues for the Commission’s consideration. Having already reviewed the major topics that PPI believes must urgently be addressed, we briefly discuss other topics that warrant Commission attention at this time.

A. The Lack of a Functioning Competitive Market Has Been Conclusively Established

Like the omicron variant of COVID-19, GTL is back with yet another unpersuasive attempt to argue that ICS carriers lack market power because they have to bid for the monopoly contracts from which they derive their profits. Unlike omicron, however, GTL’s argument has not evolved and the company offers little, if any, fresh spin on its tired refrain. While the Commission is not formally bound by the doctrine of issue preclusion, neither is it compelled to

¹²² *Id.* at 2 (*citing* Alabama Pub. Serv. Comm., [Ex Parte presentation in response to Second FNPRM](#) at 9 (Jan. 16, 2015)).

¹²³ Hon. Rebecca Kelly Slaughter, “[SEPs, Antitrust, and the FTC](#)” (Oct. 29, 2021).

¹²⁴ Executive Order 14036, 86 Fed. Reg. 36987, 36994-36995 (Jul. 14, 2021).

seriously entertain arguments that it has repeatedly rejected in the past.¹²⁵ The Commission has consistently, correctly, and unequivocally determined that the ICS market is not competitive.¹²⁶

The Commission need not spend time addressing GTL's protestations here, but if it wants to reject GTL's logic once again, the task is not a hard one. The present iteration of GTL's Quixotic argument consists of two parts. First, GTL launches a confusing attack against the forthcoming Data Collection, in which it repeatedly claims it is not a dominant carrier.¹²⁷ While it is true that the Commission has not formally designated GTL a dominant carrier, the company's argument against such a classification is easily disproven by the very authority it cites. GTL claims that it cannot be a dominant carrier because it does not possess "market power" as required by the Commission's First Competitive Carrier Order.¹²⁸ That order defines a dominant carrier as one that possesses "market power," which in turn is defined as "the control

¹²⁵ *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993) ("Although the agency must respond to challenges and be ready to consider the underlying validity of the policy itself, it need not repeat itself incessantly. When a party attacks a policy on grounds that the agency already has dispatched in prior proceedings, the agency can simply refer to those proceedings if their reasoning remains applicable and adequately refutes the challenge." (internal quotation marks and citations omitted)).

¹²⁶ Third R&O ¶ 31 ("The Commission has previously determined that providers of telephone services to incarcerated people have monopoly power in the facilities they serve. We reaffirm this long-established finding, one that applies equally not only to the rates and charges for calling services provided to incarcerated people, including ancillary services, but also to providers' practices associated with their provision of calling services."); Second R&O ¶ 2, 30 FCC Rcd. at 12765 ("While the Commission prefers to rely on competition and market forces to discipline prices, there is little dispute that the ICS market is a prime example of market failure. Market forces often lead to more competition, lower prices, and better services. Unfortunately, the ICS market, by contrast, is characterized by increasing rates, with no competitive pressures to reduce rates."); [Report & Order on Remand and Fourth Further Notice of Proposed Rulemaking](#) [hereinafter "[Remand R&O](#)"] ¶ 100, 35 FCC Rcd. 8485, 8520-8521 (released Aug. 7, 2020) (Correctional facilities possess "market power...created by incarcerated people's inability to choose an inmate calling services provider other than the provider the correctional facility selects, effectively creating a monopoly for inmate calling services within a prison or jail.").

¹²⁷ GTL Cmts at 11-15.

¹²⁸ *Policy & Rules Concerning Rates for Competitive Common Carrier Services & Facilities Authorizations Therefor*, CC Dkt. 79-252, First Report & Order [hereinafter the "[First Competitive Carrier Order](#)"], 85 F.C.C. 2d 1 (released Nov. 28, 1980).

a firm can exercise in setting the price of its output.”¹²⁹ GTL seems to argue that it cannot exercise market power because correctional facilities review and accept bids and therefore ICS carriers do not enjoy the *completely unfettered* ability to unilaterally set rates. But this is not a requirement of the First Competitive Carrier Order or any other applicable authority. Rather, the Commission explains that market power can manifest as “setting price above competitive costs in order to earn supranormal profits,”¹³⁰ which is precisely what ICS carriers do in the absence of rate regulation (as demonstrated by the cumulative record of this proceeding).¹³¹ Another salient portion of the First Competitive Carrier Order is the Commission’s finding that “[a]n important structural characteristic of the marketplace that confers market power upon a firm is the control of bottleneck facilities.”¹³² The Commission goes on to clarify that a firm with market power controls a bottleneck facility when the firm (or a group of firms) “has sufficient command over some essential commodity or facility in its industry or trade to be able to impede new entrants.”¹³³ A barrier to entry can be physical, economic, or institutional.¹³⁴ Reading this analysis leads to the inescapable conclusion that ICS monopoly contracts are a form of bottleneck facility: a firm that holds such a contract is not able to merely “impede” other firms from serving that facility, it can lawfully exclude competitors entirely.

The second part of GTL’s argument consists of a recycled version of the claim that the contract bidding market somehow compensates for the fact that successful bidders win a legal monopoly as their reward.¹³⁵ Again, the Commission has rejected this argument numerous

¹²⁹ *Id.* ¶ 56, 85 F.C.C. 2d at 21.

¹³⁰ *Id.*

¹³¹ *See* Remand R&O, appx G (finding that GTL’s reported costs are inflated due to treatment of goodwill attributable to the market rents it can derive as a result of the uncompetitive market).

¹³² First Competitive Carrier Order ¶ 58, 85 F.C.C. 2d at 21.

¹³³ *Id.* ¶ 59, 85 F.C.C. 2d at 21

¹³⁴ *Id.* ¶ 59, n.54, 85 F.C.C. 2d at 22.

¹³⁵ GTL Cmts at 15-17.

times.¹³⁶ As evidenced by the Commission’s decisive rejection, this argument has never been persuasive. It is even less meritorious today given the lengthening of ICS contract terms.¹³⁷

B. The Commission Should Address Information Asymmetry and the Consumer Experience Before Entertaining Proposals for Alternative Pricing Models

As stated in our opening comments, PPI believes that Securus’s petition for authority to offer subscription plans is acutely premature.¹³⁸ We will respond to the petition in full at the appropriate time, but at this moment PPI would stress the need for standardized rules regarding customer bills. Any move to create alternative rate options demands that consumers have the information necessary to make informed choices in their own economic best interest. In the case of ICS customers, this means clear and accurate billing statements that provide the following information:

- How many calls the customer has paid for during the billing period, including the duration of each call, the per-minute rate, and the total cost of the call.
- An itemization of ancillary fees paid during the billing period.
- Subtotals of calls by calling or called party (depending on who receives the bill).
- How the customer’s usage has varied over the last 6-12 billing periods.
- Individual itemization of taxes and facility-related rate components.
- Understandable and accurate information about how customers (including incarcerated callers) can inquire about their bills or contest errors

In addition, bills must be in a form that customers can store, retrieve, and examine at a time of their choosing. For non-incarcerated customers this may entail paper or downloadable copies.

¹³⁶ Third R&O ¶ 33 (specifically rejecting the theory that “the market for inmate calling services is competitive because providers of those services bid against each other to win contracts with correctional facilities”); Second R&O ¶ 62, 30 FCC Rcd. at 12794 (evidence of lack of competition in procurement); First R&O ¶ 176, 28 FCC Rcd. at 14190 (“While the Commission found that there is competition among ICS providers to provide service to correctional facilities, it concluded that there is not sufficient competition within facilities to ensure that rates are just and reasonable to end users because of exclusive contract arrangements.”).

¹³⁷ PPI Cmts at 19-20.

¹³⁸ *Id.* at 22-24.

For incarcerated customers this almost certainly means a paper bill (given the lack of internet access in prisons and jails) unless the customer has a tablet where billing statements can be downloaded and stored. It is *not* reasonable to expect an incarcerated person to conduct a meaningful review of their billing statement on a shared wall-mounted device like the one shown in Securus’s opening comments.¹³⁹

C. The Commission Should Change its Terminology from “Inmate Calling Services” to “Incarcerated Person’s Calling Services”

In its currently pending rulemaking, the California Public Utilities Commission has used the term “incarcerated person’s calling service” (or IPCS) in lieu of “inmate calling service.”¹⁴⁰ In these comments, PPI still uses the term “inmate calling service” because that is the phrase that appears in the Commission’s regulations. But the time has come to replace this outdated language.¹⁴¹

The Act charges the Commission with making communication service available “to all the people of the United States.”¹⁴² Accordingly, the Commission’s mandate is to represent the interests of “people,” not “inmates.”¹⁴³ As a matter of both style and substance, PPI suggests that the Commission change all references to “inmate calling service” in part 64, subpart FF of the Commission’s regulations to “incarcerated person’s calling service” and change the defined term “inmate”¹⁴⁴ to “incarcerated person.”

¹³⁹ See Securus Cmts at 5.

¹⁴⁰ See CPUC Cmts, attch A; see also [Comments of Worth Rises](#) at 1, n.1 (Sep. 27, 2021) (advocating for the use of “incarcerated people calling services”).

¹⁴¹ As best as PPI can determine, the Commission’s use of the phrase “inmate calling service” appears to have arisen from the former “ad hoc coalition” of ICS providers that formed to participate in the 1996 payphone proceeding, referring to themselves as the “Inmate Calling Services Providers Coalition.” See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. 96-128, Comments of Inmate Calling Services Providers Coalition (Jul. 1, 1996). An industry group such as this should not be given the power to create the label used to describe incarcerated telecommunications customers.

¹⁴² 47 U.S.C. § 151.

¹⁴³ See generally, Alexandra Cox, [“The Language of Incarceration”](#) (Jul. 23, 2020) (discussing “people first” language in the corrections context).

¹⁴⁴ 47 C.F.R. § 64.6000(i).

D. USF Reform is Needed

PPI, Worth Rises, NCIC, and ICSolutions all express support for some kind of relief for ICS consumers from universal service fund (“USF”) contributions.¹⁴⁵ Parties have proposed several avenues for achieving such relief, ranging from forbearance to a legislative fix. In our opening comments, PPI advocated for a legislative reform approach, mindful that the Commission had recently denied NCIC’s petition for forbearance.¹⁴⁶ But in the intervening time period, the Commission issued a wide-ranging notice of inquiry concerning the future of the USF.¹⁴⁷ The potential changes anticipated by the USF notice of inquiry portend numerous changes to the fund’s financing structure, a process that gives the Commission a natural opportunity to reconsider its previous refusal to exercise its forbearance authority.

PPI urges the Commission to prioritize the issue of USF relief for ICS customers. In connection with the currently pending USF proceeding, we suggest that the Commission relieve low-income ICS customers from USF contributions either through forbearance, recommended legislation, or a combination of both.

E. Securus’s Request for a § 276 Rulemaking Lacks Merit

In its opening comments, Securus seeks a new rulemaking, claiming that California has set intrastate rates too low for carriers to receive “fair compensation” for purposes of 47 U.S.C. § 276.¹⁴⁸ The Commission should deny this request for two reasons. First, Securus’s request is based on the allegation that the California Public Utilities Commission (“CPUC”) failed to make “a determination that providers were fairly compensated” under that state’s system of interim rate caps (which includes the elimination of most ancillary fees).¹⁴⁹ But it is not California’s responsibility to make such a determination when carriers are not forthcoming

¹⁴⁵ PPI Cmts at 12-13, Worth Rises Cmts at 12, NCIC Cmts at 13-14, ICSolutions Cmts re Draft 5th FNPRM at 8-9.

¹⁴⁶ PPI Cmts at 12-13.

¹⁴⁷ *Report on the Future of the Universal Service Fund*, WC Dkt. 21-476, [Notice of Inquiry](#) (Dec. 15, 2021).

¹⁴⁸ Securus Cmts at 20-23.

¹⁴⁹ *Id.* at 22.

with cost information. The CPUC gave carriers ample opportunity to produce cost information, and they did not do so.¹⁵⁰ The CPUC then made a reasoned calculation of an interim rate cap based on a thorough analysis of rate data. If Securus wishes to invoke the Commission’s preemption authority, it must do so by coming forward with affirmative evidence, which it has not done, either in California or here.

Second, the California rate caps (and ancillary fee restrictions) of which Securus complains are an interim measure. Indeed, Securus and NCIC both sought rehearing from the CPUC, and their applications are currently pending. Either through the rehearing process or the formulation of permanent intrastate rate caps, Securus will have the opportunity to press its case in front of the CPUC. The Commission should not interfere with a state proceeding unless and until the aggrieved carrier has exhausted all opportunities for relief before the state agency.

F. TRS Providers Must Be Forthcoming with Information if They Want to Participate in this Proceeding

Several commenters noted the need for telecommunications relay service (“TRS”) providers to be involved in the Commission’s further rulemaking concerning disability access. PPI agrees that this is good policy, but we are concerned by the lack of transparency on the part of the one TRS provider that filed opening comments. ZP Better Together, LLC (“ZP”) is described by NCIC as the TRS provider that ICS carriers “mainly” work with.¹⁵¹ ZP filed opening comments on September 27, 2021 that are so extensively redacted as to be meaningless.¹⁵² ZP also includes a request for confidential treatment under 47 C.F.R. § 0.459 that consists of nothing more than mechanistic recitations of the legal standard for confidentiality and conclusory statements asserting that the redacted material is confidential because ZP says it is. Some of ZP’s redactions may well be appropriate, but some clearly relate to the identity of

¹⁵⁰ *Order Instituting Rulemaking to Consider Regulating Telecomm’cns Services Used by Incarcerated People*, Calif. Pub. Utils. Comm. Dkt. R. 20-10-002, [Joint Opposition to Applications for Rehearing](#) at 12-16 (Oct. 7, 2021).

¹⁵¹ NCIC Cmts at 2.

¹⁵² Comments of ZP Better Together (Sep. 27, 2021).

the facilities where ZP operates and how consumers use ZP's services.¹⁵³ ZP provides a service that members of the public use, and nothing suggests that those users are subject to enforceable nondisclosure agreements. Accordingly, information about where ZP operates and how users interface with its technology cannot possibly be confidential.

The Commission owes a duty to the public to provide meaningful access to the information upon which its bases its policies. While some protection for bona fide confidential commercial information is appropriate, ZP's redactions appear overly zealous. PPI respectfully suggests that the Commission deny ZP's request for confidential treatment and require the refiling of a more transparent document.

VIII. Conclusion

PPI once again thanks the Commission for its work to bring fairness to the ICS industry. While much progress has been made, much work remains to be done. PPI submits these reply comments in the hopes that we can assist the Commission chart a course to further rate reduction, consumer fairness, and economic justice.

Respectfully submitted,

PRISON POLICY INTIATIVE, INC

/s/ Stephen Raher _____

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December 17, 2021

¹⁵³ *Id.*, redactions at pages 1, 8, and 13-14.

Attachment 1

Declaration of Peter Wagner

In re Securus Tech., Iowa Utilities Board Dkt. No. TF-2019-0033

STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE:

SECURUS TECHNOLOGIES, INC.

DOCKET NO. TF-2019-0033

DECLARATION OF PETER WAGNER

I, Peter Wagner, declare as follows:

1. I am employed as the executive director of the Prison Policy Initiative (“PPI”). I am over the age of eighteen, and I make the following declaration based on my own personal knowledge. If called upon to testify concerning the matters expressed herein, I could and would competently do so under oath.

2. I attended the September 3, 2020 technical conference in the above-captioned proceeding. During that hearing, Securus representative Michael Lozich and I engaged in a discussion regarding Securus’s “single call” products described in § 3.3.5 of Securus’s proposed tariff. At the conclusion of this discussion, Securus agreed to provide PPI with a sample call script for the single call product.

3. On January 29, 2021, Securus sent me a copy of the call script requested at the technical conference. A true and correct copy of that call script is attached hereto as **Exhibit 1**.

I certify under penalty of perjury and pursuant to Iowa Code § 622.1 that the preceding is true and correct.

/s/ Peter Wagner

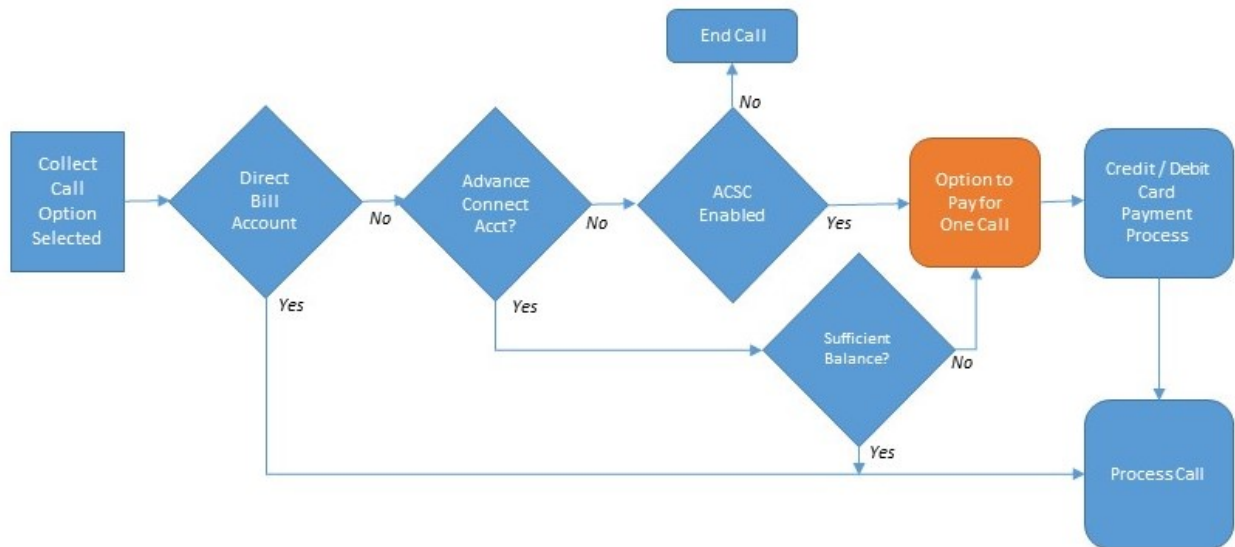
Peter Wagner

2/8/2021

Date

AdvanceConnect SingleCall Call Flow

The general path of the call flow involving an AdvanceConnect SingleCall (“ACSC”) is set forth in the following diagram, in which a caller selects the Collect Call option to connect a telephone call, and then Securus’ platform will determine whether there are any established billing arrangements (i.e., a Direct Bill arrangement or an AdvanceConnect account with sufficient funds for the call charges). If the call cannot be connected through an established billing arrangement and the facility has enabled ACSC, then a called party will have the option to connect the call using ACSC.



All calls begin with a selection of the language required and selection of the type of call service being requested. These services are site specific and dependent on the services contracted for that site:

Caller hears: For English, press “1”. [Other language selections offered will also be listed: For Spanish, press “2”; for Mandarin, press “3”; for Russian, press “4”, etc.]

After language selection:

- For a Collect Call, press “1”
- For a Debit Call, press “2”
- For Commissary, press “3”
- For a Calling Card, ‘press “4”
- For [other services], press “[_]”

The remainder of the call flow depends on the call-type selection made by the inmate.

If the caller selects a Debit Call, the call will be connected if there is sufficient funds in the account.

If the caller selects a Collect Call:

Caller hears

“Enter your PIN number now.”

[Enters PIN]

If it’s a valid PIN:

“Please enter the area code and phone number you are calling now.”

[Enters 10-digit phone number]

“Your total available talk time for this call is [XX] minutes. Additional called party restrictions may apply. This call is subject to recording and monitoring. Also note your called party might be listening to instructions about placing money into your commissary account by calling 800.844.6591 or visit correctionalbillingservice.com.”

If called number is a cell number:

“If your call is not connected, you will be offered the option to leave a voicemail.”

“You may hear silence during acceptance of your call. Please continue to hold.”

If (a) there is an AdvanceConnect Account associated with the dialed number and there is sufficient funds in the account for the call charges, or (b) there is a Direct Bill arrangement for billing the call charges to the called party, then the call will be connected with the standard prompts for acceptance of the call by the called party and acknowledgements of monitoring and recording.

If there is not an AdvanceConnect Account with sufficient funds or other established Direct Bill arrangement:

Caller and Called Party hears:

“This is a Collect Call from [name] an inmate at [site].”

Called Party hears:

“Our records show you do not have an account or enough funds to complete this call.”

Caller and Called Party hears:

“To pay for just this call using your credit or debit card, press ‘1.’”

“To decline this call, press ‘2’.”

“To block calls from this facility, press ‘6’.”

“If you do not want to connect this call but would like to fund an account for future calls, please hang up and call 800.844.6591.”

If the called party selects to connect the call:

“This call will cost [X] cents per minute plus any applicable federal, state, and local taxes, plus a one-time transaction fee of [Y]. You will only be charged the per-minute rate for the amount of time you were on the call.”

Then the call will proceed to the called party providing payment information.

Caller hears: “Please hold while the person you are calling is entering information to pay for this call.”

The called party will then be requested to enter payment information, while the Caller hears silence.

Called Party hears: If there is a credit or debit card on file:

“Our records show that you have a card on file ending in [XXXX]. If you would like to reused card on file, press ‘1’.”

If there not a credit or debit card on file:

“We currently accept Visa or MasterCard. Please enter a valid 16-digit credit or debit card number now.”

[Enters card number]

“Please enter the card expiration date using a 2-digit month and 2-digit year.”

[Enters 4-digit expiration date]

“You entered [XXXX]. If this is correct, press ‘1’, if not, press ‘2’.”

[Enters 1]

“Please enter the 3-digit CVV code printed on the back of your credit or debit card.”

[Enters CVV]

“Please enter the 5-digit billing ZIP code associated with the credit or debit card.”

[Enters ZIP code]

"You entered [XXXXX]. If this is correct, press '1', if not, press '2'."

[Enters 1]

"Your payment has been approved."

The call then proceeds to the parties consenting to recording and monitoring, and connecting the call.

Each of Caller and Called Party hear: "This call is subject to recording and monitoring. To consent to recording and monitoring, please press '1'. To disconnect, press '2'."

[Both parties must consent to connect the call.]

"You may start the conversation now."