

REDACTED – FOR PUBLIC INSPECTION

May 8, 2023

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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: *Incarcerated People’s Communications Services; Implementation of the Martha Wright-Reed Act*, WC Docket No. 23-62; *Rules for Interstate Inmate Calling Services*, WC Docket No. 12-375.

Dear Ms. Dortch:

The Wright Petitioners herein submit a REDACTED version of comments in response to the Commission’s Notice of Proposed Rulemaking.¹ The Wright Petitioners are also submitting a CONFIDENTIAL version of these comments pursuant to the Protective Orders adopted for the above-captioned dockets.² Encrypted electronic copies of the CONFIDENTIAL filing are being sent via email to the members of the Commission staff listed below pursuant to their requests.

Please contact me if you have any questions or require any additional information.

Sincerely,
/s/ Gregory R. Capobianco
Gregory R. Capobianco
Counsel for The Wright Petitioners

¹ *In re Incarcerated People’s Communications Services; Implementation of the Martha Wright-Reed Act*, Notice of Proposed Rulemaking and Order, WC Docket Nos. 23-62, 12-375, FCC 23-19 (rel. Mar. 17, 2023).

² *In re Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Protective Order, 28 FCC Rcd 16954 (WCB 2013) (“2013 Protective Order”); *see also In re Incarcerated People’s Communications Services; Implementation of the Martha Wright-Reed Act*, Protective Order, WC Docket Nos. 23-62, 12-375, DA 23-298 (rel. Apr. 5, 2023) (“2023 Protective Order”). The 2023 Protective Order incorporates by reference into WC Docket No. 23-62 all acknowledgements filed pursuant to the 2013 Protective Order. 2023 Protective Order ¶ 6.

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Enclosures

cc: William Kehoe
Victoria Goldberg
David Zesiger

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

In the Matter of)	
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Incarcerated People’s Communications Services; Implementation of the Martha Wright-Reed Act)	WC Docket No. 23-62
)	
Rates for Interstate Inmate Calling Services)	WC Docket No. 12-375
)	

**COMMENTS OF
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PRISON POLICY INITIATIVE
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May 8, 2023

EXECUTIVE SUMMARY

The Martha Wright-Reed Just and Reasonable Communications Act of 2022 (“MWRA”) amends the Communications Act of 1934 to give the Federal Communications Commission (“Commission”) a clear mandate to wholistically reform the incarcerated people’s communications services (“IPCS”) marketplace and eliminate the excessive, unjust, and unreasonable rates and charges faced by IPCS consumers.

With the passage of the MWRA, Congress decisively responded to the D.C. Circuit’s decision in *Global Tel*Link v. FCC* (“GTL”) and made clear that the Commission has broad authority to adopt reforms to ensure that *all* rates and charges for “any audio or video communications service” are just and reasonable, including all methods used to communicate via audio or video regardless of technology used, including on-site video visitation. This authority extends to IPCS practices, classifications, and regulations, as well.

In implementing the MWRA, the Commission should find that the term “just and reasonable” in the IPCS context has the same meaning as in Section 201(b) of the Communications Act, and that Section 276’s requirement to ensure fair compensation is satisfied when there are just and reasonable rates. It should also preempt any state and local intrastate rates that would permit higher rates than the Commission’s reforms.

When adopting a methodology to reform IPCS, the Commission should use industry-wide average costs of all providers of telephone and advanced communications services to develop a model carrier approach. As part of its reforms, the Commission must “consider” safety and security costs but is free to exclude costs that are not necessary for the provision of IPCS. The Commission should prohibit the recovery of site commissions under the amendments from MWRA and preempt state and local governments from assessing site commissions under Section 253 of the Communications Act. The Commission should also ensure that IPCS

providers may not evade the rate caps it adopts through pilot programs offering alternative rate structures.

Finally, the Commission should advance digital equity for all, as well as its diversity, equity, and inclusion goals, by using more inclusive terminology throughout its regulations and by ultimately adopting broad reforms to its IPCS rules.

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

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**COMMENTS OF THE WRIGHT PETITIONERS, BENTON INSTITUTE FOR
BROADBAND & SOCIETY, PRISON POLICY INITIATIVE, AND PUBLIC
KNOWLEDGE**

The Wright Petitioners,¹ Benton Institute For Broadband & Society, Prison Policy Initiative, and Public Knowledge (the “Public Interest Parties”), submit these comments in the above-captioned proceedings to urge the Federal Communications Commission (“Commission”) to ensure that rates and charges for incarcerated people’s communications services (“IPCS”) are just and reasonable.

Nearly twenty years after Martha Wright filed a petition for rulemaking with the Commission to address “the exorbitant long distance telephone service rates imposed on inmates at privately administered prisons and persons receiving collect calls from such inmates,”² the

¹ The Wright Petitioners—the late Martha Wright, Ulandis Forte, Ethel Peoples, Laurie Lamancusa, Dedra Emmons, Charles Wade, Earl Peoples, Darrell Nelson, and Jackie Lucas—brought suit in the United States District Court for the District of Columbia against Corrections Corporation of America in 2000, seeking to set aside exclusive telephone contracts among the private prisons and certain telephone companies. The matter was subsequently referred to the Commission in August 2001. Since 2003, these petitioners have actively petitioned the Commission for regulation of inmate calling services through The D.C. Prisoners’ Legal Services Project, Inc. at the Washington Lawyers’ Committee for Civil Rights and Urban Affairs.

² See Petition for Rulemaking by Martha Wright, et al., CC Docket No. 96-128 (Oct. 31, 2003), *on referral from Wright v. Corrections Corporation of America*, CA No. 00-293 (GK) (D.D.C.), https://www.prisonlegalnews.org/media/publications/wright_petition_re_petition_for_rulemaking_by_martha_wright_et_al_2003.pdf.

Martha Wright-Reed Just and Reasonable Communications Act of 2022³ presents the Commission with an historic opportunity to finally see that justice is served to IPCS consumers—incarcerated people, their families, and loved ones—and adopt rules ensuring that they pay just and reasonable rates when communicating. The Public Interest Parties applaud the Commission for quickly adopting a notice of proposed rulemaking that will allow it to implement the MWRA on the timeline prescribed by Congress.⁴ Through the MWRA’s amendments to the Communications Act of 1934,⁵ the Commission now has a clear mandate from Congress to wholistically reform the IPCS marketplace and eliminate the excessive, unjust, and unreasonable rates and charges faced by IPCS consumers.

I. THE MARTHA WRIGHT-REED ACT AUTHORIZES THE COMMISSION TO REFORM ALL AUDIO AND VIDEO IPCS.

With the passage of the MWRA, Congress unambiguously has made clear that the Commission has broad authority to adopt reforms to ensure that *all* rates and charges for “any audio or video communications service” are just and reasonable.

The MWRA amends Section 153 of the Communication Act to define “advanced communications services” to include “*any audio or video communications service* used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held, regardless of technology used,”⁶ and amends Section 276 of the Communications Act to expand the Commission’s authority over “payphone service” to

³ Martha Wright-Reed Just and Reasonable Communications Act of 2022, Pub. L. No. 117-338, 136 Stat. 6156 (“Martha Wright-Reed Act,” “MWRA,” or the “Act”).

⁴ See *In re Incarcerated People’s Communications Services; Implementation of the Martha Wright-Reed Act*, WC Docket Nos. 23-62, 12-375, FCC 23-19 (rel. Mar. 17, 2023) (“NPRM”).

⁵ See 47 U.S.C. § 151 *et seq.* (the “Communications Act”).

⁶ MWRA, § 2(b); 47 U.S.C. § 153(1)(E) (emphasis added).

encompass advanced communications services. As described further below, Congress, in taking this action, was responding directly to the D.C. Circuit’s ruling in *GTL* and granted the Commission additional powers and responsibilities precisely to resolve the concerns forming the basis for the panel’s decision. Congress enacted the MWRA to protect incarcerated people’s ability to maintain connections with family and loved ones.⁷ The MWRA closes any perceived loopholes in the Commission’s authority, and empowers the agency to address market failures that for too long have resulted in unjust and unreasonable rates and charges for all audio and video IPCS. The Commission thus has “broad, plenary authority” to regulate the rates and charges for “any audio or video communications service” used by incarcerated people to communicate.⁸

The Commission seeks comment on several interpretive issues relating to this unequivocal expansion of the Commission’s ratemaking authority, including (1) whether “Congress intended to grant the Commission authority over all intrastate communications services between incarcerated people and non-incarcerated people with whom they wish to communicate”;⁹ (2) the types of devices that the phrase “any audio or video communications service” encompasses;¹⁰ (3) the proper scope of the “used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held”

⁷ See Martha Wright-Reed Act pmb., 168 Cong. Rec. H10027 (statement of Rep. Pallone) (daily ed. Dec. 22, 2022) (“It is my hope that this bill will help reduce financial burdens that prevent people from being able to communicate with loved ones and friends.”) (“*MWRA Dec. 22, 2022 Congressional Record*”); *MWRA Dec. 22, 2022 Congressional Record*, 168 Cong. Rec. H10027 (statement of Rep. Lee) (“What is the basis of the issue? It is family. It is family connectedness. We have heard over and over again how exorbitant the cost is for grandmothers, mothers and fathers, and sisters and brothers to keep connections to individuals who, yes, have committed a crime, have been convicted, and are incarcerated, but they should not have been left out of the circle of humanity and family and the ability to stay connected.”).

⁸ *NPRM* ¶ 11 (internal quotation marks and alteration omitted).

⁹ *NPRM* ¶ 37.

¹⁰ *NPRM* ¶ 17.

limitation as applied to the Commission’s authority;¹¹ and (4) whether the Act extends the Commission’s ratemaking authority to on-site video visitation services.¹²

A. The Martha Wright-Reed Act Gives the Commission Jurisdiction over Intrastate IPCS.

In enacting the MWRA, Congress added Section 276 to the list of exceptions to the general limitation on the Commission’s authority over intrastate communications in Section 2(b) of the Communications Act.¹³ This clarification of the Commission’s authority to adopt rules regarding intrastate IPCS was a direct response to *GTL*, in which the D.C. Circuit had found that the Commission’s pre-MWRA authority was limited to only interstate and international IPCS.¹⁴ Congress has thus decisively mooted the concerns that the D.C. Circuit raised about the Commission’s intrastate jurisdiction in *GTL*. The Commission should broadly view the MWRA as a direct, legislative response to the *GTL* decision and rejection of the limitations that decision may have articulated on the Commission’s authority, including over intrastate rates.¹⁵ There is no dispute that Congress intended to, and did, give the Commission authority over intrastate IPCS.

B. The Commission’s Authority Extends to Any and All Methods Used to Communicate via Audio or Video.

The Communications Act now explicitly permits the Commission to adopt reforms for a wide array of “advanced communications services” in correctional institutions.¹⁶ These

¹¹ *NPRM* ¶¶ 31-33.

¹² *NPRM* ¶¶ 30, 34.

¹³ Martha Wright-Reed Act § 2(c); 47 U.S.C. § 152(b).

¹⁴ *Global Tel*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017) (“*GTL*”) (amending 859 F.3d 39 (D.C. Cir. 2017)).

¹⁵ See *NPRM* ¶ 13; *infra* Secs. I.A, III.B.

¹⁶ 47 U.S.C. § 276(b)(1)(A), (d); see also *NPRM* ¶ 4.

“advanced communications services” include, but are not limited to, interconnected VoIP, non-interconnected VoIP, interoperable video conferencing service, and any audio or video communications service used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held, regardless of technology used.¹⁷ Congress chose to use expansive language covering “any technology used” to grant the Commission authority as broadly as possible, intending to cover any and all technologies that an incarcerated person may use to communicate today or in the future.

The Public Interest Parties thus support the Commission’s proposal to interpret “any audio or video communications service” broadly to “encompass all devices that incarcerated people either use presently or may use in the future to communicate with individuals not confined within the incarcerated person’s correctional institution.”¹⁸ The Commission correctly observes that the MWRA extends the Commission’s authority over communications services “to include not just incarcerated people’s audio and video communications using traditional payphones, but also their communications using ‘other calling device[s],’” and does not otherwise qualify what “‘other calling device[s]’” may encompass.¹⁹ The Commission should interpret “‘other calling device[s]’” broadly, as it has proposed, to cover all devices that incarcerated people may presently or in the future use to communicate with those not confined within the incarcerated people’s correctional institution.²⁰ Consistent with the Commission’s mandate to provide Telecommunications Relay Service (“TRS”) for incarcerated people with

¹⁷ 47 U.S.C. §§ 276(d), 153(1); *see also* NPRM ¶ 4.

¹⁸ NPRM ¶ 17.

¹⁹ *Id.*

²⁰ *Id.*

disabilities,²¹ this could include devices that enable text-to-speech, speech-to-text, relay services for deaf, deafblind, and individuals with speech or other disabilities, assisted video conferencing, and any extant or future technology that assists incarcerated people with disabilities to communicate with others outside of their facility—or incarcerated people to communicate with non-incarcerated people with disabilities.

C. The Commission Has the Authority to Adopt IPCS Reforms “Regardless of Technology Used.”

The Public Interest Parties support the Commission’s proposal to interpret the limiting phrase “used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held” to apply *only* to “any audio or video communications service.”²² There is no basis for extending this limiting phrase to any of the other advanced communications services subject to the Commission’s general ratemaking authority.

As a purely textual matter, this limiting phrase appears only in conjunction with the category of “any audio or video communications service” in the definition of “advanced communications services,” and no language in this definitional section or elsewhere in the Communications Act or the MWRA links this limiting phrase to any of the other types of advanced communications services itemized in Section 153(1)(A)-(D). Furthermore, the category of “any audio or video communications service” in Section 153(1)(E) already encompasses each of the other categories of “advanced communications services” listed in Section 153(1)(A)-(D), each of which comprises some form of audio or video communications

²¹ See *In re Rates for Interstate Inmate Calling Services*, Fourth Report and Order and Sixth Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 22-76 (rel. Sept. 30, 2022) (“*Fourth Report and Order*”).

²² NPRM ¶ 31.

service.²³ As such, interpreting the limiting phrase “used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held” as applying to the other types of advanced communications services would make the category of “audio or video communications service” added under the MWRA substantially repetitive of the other existing advanced communications services subject to the Commission’s ratemaking authority. Such an interpretation would violate the well-established canon against surplusage, and there is no indication in the statute or legislative history that Congress had intended such a result.²⁴

D. The Commission’s Authority Extends to On-Site Video Visitation.

The Commission seeks comment on interpreting the limiting phrase “used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held” as applied to “any audio or video communications service” in Section 3(1)(E) of the Communications Act.²⁵ In view of Congress’s clear intent for the MWRA to protect incarcerated people’s ability to communicate with their family and loved ones, the physical location of the called party should not be relevant. To interpret this language as suggesting that the Commission’s authority over an incarcerated person’s communications with their family

²³ 47 U.S.C. § 153(1)(E). The other categories of advanced communications services are “interconnected VoIP service,” “non-interconnected VoIP service,” “electronic messaging service,” and “interoperable video conferencing service.” 47 U.S.C. § 153(1)(A)-(D).

²⁴ See *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) (“[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”); Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 Tex. L. Rev. 163, 187 (2018) (“[T]he well-established rule against superfluity dictates that statutes should be construed to avoid redundancy, so that when there are two overlapping terms, each should be construed to have an independent meaning.”).

²⁵ *NPRM* ¶¶ 32-33. Specifically, the Commission seeks comment on whether it should interpret “individuals outside the correctional institution where the inmate is held” to mean “people who are neither confined in nor employed by the institution, even if they are temporarily located on the premise of the institution for purposes of communicating with incarcerated individuals through some form of audio or video communications service.” *NPRM* ¶ 33.

member might cease the moment the family member steps foot on the grounds of a correctional institution would contravene the goals of the MWRA, and create an arbitrary distinction in light of the overarching purpose of the Act.

The Commission should interpret the MWRA as extending the Commission’s authority over on-site video visitation services as either “any audio or video service used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held” or “interoperable video conferencing services.”²⁶ On-site video visitation service used by an incarcerated person for the purpose of communicating with those neither confined nor employed by the correctional facility fits plainly within the statutory language in Section 3(1)(E), as the service is used by incarcerated persons to communication with “individuals outside the correctional institution where the inmate is held,” *i.e.*, persons not held within the institution. Nothing in the statute requires the Commission to take a cramped reading of this definition that would exclude communications with on-site visitors; although the term “outside the correctional institution” can mean “not physically within the structure,” it can equally mean “not held within the institution.” Irrespective of whether the statutory text could permit the former reading, the latter is far more consistent with the greater statutory scheme. As the Commission notes, on-site video visitation services are often operated by IPCS providers, making them similarly vulnerable to the same type of rate abuse that Congress was concerned about.²⁷

Finally, a contrary interpretation about the Commission’s authority over on-site video visitation would create a perverse incentive for both facilities and IPCS providers to reduce the availability of other forms of IPCS as well as in-person visitation. If on-site video visitation is

²⁶ *NPRM* ¶ 34.

²⁷ *See id.*

not subject to the Commission’s oversight, IPCS providers will be able to charge unjust and unreasonable rates for the service and be motivated to shift IPCS consumers toward the more profitable service and away from those over which the Commission has authority.

II. THE COMMISSION MUST ENSURE THAT ALL RATES AND CHARGES FOR IPCS ARE JUST AND REASONABLE.

The MWRA amends the Communications Act to require the Commission to ensure that all IPCS rates and charges are just and reasonable.²⁸ The Commission seeks comment on how to implement this new statutory language.²⁹ As explained below, the Commission should follow established canons of statutory interpretation and interpret “just and reasonable” as part of the broader Section 201 context.

A. “Just and Reasonable” in the IPCS Context Should Have the Same Meaning as in Section 201(b) of the Communications Act.

The Public Interest Parties support the Commission’s proposal to interpret the term “just and reasonable” in Section 276(b)(1)(A) to have the same meaning as in Section 201(b).³⁰ Tracking the Section 201(b) meaning is the most sound reading of the statute and of congressional intent. “[I]dentical words and phrases within the same statute should normally be given the same meaning,”³¹ and it is reasonable to conclude that Congress was aware of the Section 201(b) standard—and the Commission’s decades of relevant precedent interpreting it—when it chose to add the identical term to Section 276.³² Indeed, any other approach would be

²⁸ Martha Wright-Reed Act § 2(a)(1)(B).

²⁹ *NPRM* ¶¶ 18-28.

³⁰ *NPRM* ¶ 18.

³¹ *See FCC v. AT&T Inc.*, 562 U.S. 397, 408 (2011) (internal quotation marks omitted).

³² This approach is also consistent with the presumption of consistent usage, which teaches that the Commission should interpret Congress’s addition of “just and reasonable” to Section 276 as having the same meaning as when used elsewhere in the Communications Act. *See Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts* § 25, at 171-73 (2011).

inconsistent with the well-established principle of statutory construction that identical terms should be given the same meaning when they recur within different but related sections of a statute.³³

Incorporating Section 201(b)'s just and reasonable standard into Section 276 also imports the Commission's "used and useful" framework, which excludes certain impermissible costs from any rate methodology. The Public Interest Parties ultimately urge the Commission to set rates based on broader industry costs, rather than based upon the idiosyncratic cost structure of any particular carrier.³⁴ The "used and useful" constraint remains an important equitable principle preventing ratepayers from being "forced to pay a return" on costs that are "primarily for the benefit of the carrier."³⁵ The Commission has found that "Section 201(b) of the Communications Act requires that only reasonable investments and expenses be recovered" as part of a rate paid by end users.³⁶ The Commission has enforced this prohibition against the recovery of unrelated costs through its "used and useful" standard, which serves as a protection against inefficiencies and abuse.³⁷

The Commission has identified general principles to evaluate whether investment and expenses are "used and useful," including "whether the investment and expense benefits

³³ See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 536 (2013).

³⁴ See *infra* Sec. III.

³⁵ *NPRM* ¶ 21 & n.68 (internal quotation marks omitted).

³⁶ *In re Connect America Fund*, Report and Order, Third Order on Reconsideration, and Notice of Proposed Rulemaking, 33 FCC Rcd 2990, 3011-12 ¶ 47 (2018) (citing *In re Am. Tel. & Tel. Co.*, 64 F.C.C.2d 1, 38-39, ¶¶ 111-112 (1977) ("[C]ourts have felt that the owners of public utilities must be compensated for the use of their property in providing service to the public ... [e]qually central to the used and useful concept, however, is the equitable principle that the ratepayers may not fairly be forced to pay a return except on investment which can be shown directly to benefit them.")).

³⁷ See *In re Sandwich Isles Communications, Inc.*, Order, 31 FCC Rcd 12999, 13029 ¶ 98 (2016) ("*Sandwich Isles Order*").

ratepayers and thus is necessary for the provision of interstate telecommunications services.”³⁸

In this context, the Commission’s consideration of what is necessary is dependent on whether the cost “benefits ratepayers.”³⁹ It also requires that investments be “prudent” even if otherwise “used and useful.”⁴⁰ The Public Interest Parties look forward to a more granular discussion of appropriate cost categories following the IPCS providers’ responses to the proposed 2023 Mandatory Data Collection.⁴¹

B. The Commission’s Obligation to Ensure Fair Compensation Is Satisfied Through Setting Just and Reasonable Rates That Account for Any Costs Unique to the Provision of IPCS.

The Commission seeks comment on the relationship between the legacy requirement in Section 276 that providers be “fairly compensated” and the new requirement that rates and charges be “just and reasonable.”⁴² The Public Interest Parties agree that Congress intended for the “just and reasonable” standard to be the Commission’s “central focus” moving forward.⁴³ The basic “fairness” contemplated in Section 276 naturally flows from just and reasonable rates.

As acknowledged by the concurring opinion in *GTL*, “[t]here is no question that the relevant statutory language, ‘fairly compensated,’ is ambiguous.”⁴⁴ However, in everyday language, for a service provider to be “fairly compensated” for its services would signify that it

³⁸ *In re Connect America Fund*, 33 FCC Rcd at 3012 ¶ 49.

³⁹ *See infra* Sec. III.B.

⁴⁰ *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 499 (2002) (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312 (1989)).

⁴¹ *See Wireline Competition Bureau and Office of Economics and Analytics Seek Comment on Proposed 2023 Mandatory Data Collection for Incarcerated People’s Communications Services*, Public Notice, WC Docket Nos. 23-62, 12-375, DA 23-355 (rel. Apr. 28, 2023).

⁴² *NPRM* ¶ 16 (“What independent meaning does the ‘fairly compensated’ requirement have for communications services for incarcerated people in light of the other provisions of the Martha Wright-Reed Act, including the newly-added requirement to ensure ‘just and reasonable’ rates and charges?”).

⁴³ *NPRM* ¶ 14.

⁴⁴ *GTL*, 866 F.3d at 480 (J. Silberman, concurring).

is paid an amount that reasonably reflects the value of the services that it provides. The standard focuses on the *objective* value of the services being provided, rather than on the subjective or idiosyncratic cost structure of any particular provider in provisioning them. The standard does not require every carrier to be profitable, but rather for rates to be set at a level where carriers receive compensation that would allow a well-run and prudent IPCS carrier to realize a fair rate of return.

In context, therefore, the requirement that all payphone carriers be “fairly compensated,” as applied to IPCS providers, is thus sensibly understood as requiring that any “just and reasonable” rates adopted by the Commission includes a methodology that accounts for unique costs, if any, specific to the provision of IPCS. The Commission’s just and reasonable rate precedent is broad enough to encompass the concept of fair compensation so long as it includes allowance for these considerations. Accordingly, as discussed in more detail in Section III.B below, the requirement that rates and charges be “just and reasonable” while providers are “fairly compensated” is consistent with using a price cap approach based on a model carrier, which models the reasonable costs and fair return for a hypothetical well-run provider in the industry.

Any argument that rates must be *higher* than they otherwise would be under a “just and reasonable” approach to achieve “fairness” to any specific IPCS providers is inconsistent with the underlying purpose driving enactment of the MWRA. It also ignores Congress’s deliberate qualification of “rates and charges” with “just and reasonable,” which the statute does not permit. The Commission should reject any arguments that there is independent meaning to “fairly compensated” that would lead to higher rates.

The Public Interest Parties also agree that the Commission is no longer required to ensure that the established compensation plan allows for fair compensation for each and every

completed call.⁴⁵ Congress eliminated that term from the statute, decisively addressing the *GTL* decision's contrary interpretation. To the extent there is any independent obligation to ensure fair compensation, it would apply generally, and not to individual calls.

C. The Commission Must Preempt State and Local Intrastate Rates That Are Higher Than Its Rate Caps.

The Commission should clarify that any rate methodology will act as a ceiling, not a floor and, consistent with precedent, preempt intrastate rates that are higher than a rate cap but not lower. Section 276 empowers the Commission to preempt requirements that are inconsistent with the federal rules.⁴⁶ And in contrast to other sections of the Communications Act that preserve some degree of state and local authority,⁴⁷ there is no such explicit or other preservation of any non-federal regulation of IPCS. At the same time, state and local laws that require intrastate rates to be *lower* than the Commission's rate caps are not inconsistent with the Commission's regulations.⁴⁸ That is because any intrastate rates lower than the Commission's rate cap would not violate any specific provision of the Communications Act and lower rates are consistent with the underlying purpose of the MWRA.

⁴⁵ *NPRM* ¶ 23.

⁴⁶ See 47 U.S.C. § 276(c) (“To the extent that any State requirements are inconsistent with the Commission’s regulations, the Commission’s regulations on such matters shall preempt such State requirements.”).

⁴⁷ See, e.g., 47 U.S.C. § 253(c) (“Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis.”); 47 U.S.C. § 332(c)(7)(A) (“[N]othing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”).

⁴⁸ See, e.g., *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17992 ¶ 915 n.1808 (2011) (“states are free to lower intrastate access rates more quickly than specified by our reform”), *aff’d*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

D. The Commission’s Mandate to Ensure Just and Reasonable Rates and Charges Extends to IPCS Practices, Classifications, and Regulations.

The Commission seeks comment on whether it has authority to ensure that the practices, classifications, and regulations for or in connection with IPCS services are just and reasonable.⁴⁹ It does. As the Commission observes, Section 3(b) of the MWRA amends Section 276 to require that the Commission “establish a compensation plan to ensure that . . . all rates and charges are just and reasonable.” The responsibility to ensure that rates and charges are just and reasonable necessarily encompasses a corresponding responsibility to ensure that IPCS providers do not evade those caps through their other practices, classifications, and regulations. The Commission has previously found that “the bedrock protection[] of Section[] 201” is that those subject to it “must act justly and reasonably.”⁵⁰ In applying its Section 201(b) precedent to the IPCS context,⁵¹ the Commission therefore should ensure that providers *implement* any just and reasonable rates justly and reasonably, including with respect to any other “practice, classification, or regulation” connected to offering IPCS.

In any event, even separate and apart from the “just and reasonable” standard necessarily encompassing IPCS practices, classifications, and regulations, the Commission’s ancillary jurisdiction is also broad enough to reach those matters. The Commission may exercise its ancillary jurisdiction to regulate matters beyond its immediate statutory directives when its “general jurisdictional grant under Title I covers the regulated subject” and any adopted regulations would be “reasonably ancillary to the Commission’s effective performance of its

⁴⁹ *NPRM* ¶¶ 27-28.

⁵⁰ *In re Technology Transitions*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283, 8302 ¶ 59 (2016).

⁵¹ The Supreme Court has explained that “the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act’” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

statutorily mandated responsibilities.”⁵² Both prongs of that test are easily met here. First, IPCS providers’ practices, classifications, and regulations fall within the Commission’s general grant of jurisdiction under Title I of the Communications Act, which encompasses all “interstate and foreign commerce in communication by wire or radio.”⁵³ Second, ensuring that those practices, classifications, and regulations are just and reasonable is “reasonably ancillary” to the Commission’s mandate under both Sections 201(b) and 276 to ensure just and reasonable rates and charges, since carriers could otherwise use unreasonable practices, classifications, and regulations to circumvent or undermine the Commission’s ability effectively to carry out those responsibilities.⁵⁴

Since the intrastate and interstate components of IPCS providers’ practices, classifications, and regulations are not readily separable, the Commission can also rely on the impossibility exception to ensure that it may appropriately regulate them using its ancillary authority. Application of the impossibility exception over “jurisdictionally mixed” services—where it is impossible or impracticable to separate out interstate and intrastate components—is appropriate where a failure to extend regulations to the intrastate matter would frustrate achievement of the Commission’s statutory responsibilities.⁵⁵ One key element in this analysis is whether “regulation of the interstate aspects of the matter can[] be ‘unbundled’ from regulation

⁵² See *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005); see also *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968) (“It is enough to emphasize that the authority which we recognize today . . . is restricted to that reasonably ancillary to the effective performance of the Commission’s various responsibilities . . .”).

⁵³ 47 U.S.C. § 151.

⁵⁴ Cf. *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) (“Although policy statements may illuminate that authority, it is Title II, III, or VI to which the authority must ultimately be ancillary.”).

⁵⁵ See *California v. FCC*, 905 F.2d 1217, 1242-43 (9th Cir. 1990) (recognizing the impossibility exception); *In re Vonage Holdings Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22413 ¶ 17 (2004), *aff’d sub nom. Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

of the intrastate aspects.”⁵⁶ Here, IPCS providers cannot practicably separate the general practices that may apply broadly to IPCS providers, which all offer both interstate and intrastate services, themselves into interstate and intrastate components. The Commission has reasonably applied the impossibility exception in the ancillary service charges context,⁵⁷ and should do so here as well, to the extent necessary.

III. THE COMMISSION SHOULD USE INDUSTRY-WIDE AVERAGE COSTS.

In passing the MWRA, Congress amended the statute to authorize the Commission to set just and reasonable rates based on industry-wide average costs. Understood in the context of addressing the *GTL* decision, “industry-wide” should be interpreted to mean the entire telecommunications industry, not just the provision of IPCS. This interpretation would encourage IPCS that is efficient and does not include costs unrelated to the provision of IPCS.

A. The Commission Has the Authority to Consider the Industry-Wide Costs of All Providers of Telephone and Advanced Communications Services.

The Commission seeks comment on the meaning of the term “industry-wide” as used in Section 3(b)(1) of the Act.⁵⁸ That section provides that the Commission “may use industry-wide average costs of telephone service and advanced communications services and the average costs of service of a communications service provider” in determining just and reasonable rates.⁵⁹ The

⁵⁶ *In re Rates for Interstate Inmate Calling Services*, Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking, 35 FCC Rcd 8485, 8496 ¶ 30 (2020).

⁵⁷ *Cf. In re Rates for Interstate Inmate Calling Services*, 35 FCC Rcd at 8501 ¶ 48 (“It would frustrate our efforts to ensure that charges for interstate ancillary services are just and reasonable if providers could recover, through their interstate ancillary service charges, costs that should be allocated to a parallel intrastate ancillary service, or that providers have already recovered through their intrastate ancillary service charges.”); *see also* Comments of the Wright Petitioners et al., WC Docket No. 12-375 (Mar. 20, 2020) (arguing that nearly all ancillary service fees charged to IPCS consumers are jurisdictionally mixed and subject to the impossibility exception).

⁵⁸ *NPRM* ¶ 48.

⁵⁹ Martha Wright-Reed Act § 3(b).

section does not define “industry-wide” as the costs of the *IPCS* industry. Rather, the statute generally refers to “industry-wide average costs of telephone service and advanced communications services.”⁶⁰

Although the term “industry-wide” is arguably ambiguous, any ambiguity, however, is resolved by the context in which it was added to the statute, which demonstrates that Congress was empowering the Commission to consider cost data from the telecommunications and advanced communications services industries more generally. It is clear that, in enacting the MWRA, Congress was responding to the D.C. Circuit’s decision in *GTL* that the Commission could *not* use industry-wide data to set its rates for *IPCS* by giving the Commission statutory authority to do exactly that. The *GTL* court had determined that the Commission could not use industry-wide averages because doing so would not be consistent with its statutory mandate that “each and every” call be fairly compensated.⁶¹ Congress clearly intended to alter this outcome of *GTL* by adding “industry-wide average costs” to Section 3(b)(1) of the Act and deleting the fair compensation requirement for “each and every call,” thereby authorizing the Commission to do exactly what the *GTL* court had held it could not: consider industry-wide costs when setting just and reasonable rates.

In light of both the text of the MWRA and its underlying purpose, the Commission should interpret “industry-wide” to encompass the entire communications industry. If Congress had intended to limit the Commission’s consideration of the industry to only providers of *IPCS*, it easily could have done so.⁶² Moreover, the legislative history of the Act also supports a

⁶⁰ Martha Wright-Reed Act § 3(b).

⁶¹ *GTL*, 866 F.3d at 414.

⁶² *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) (“Had Congress intended to restrict [the application of a certain statute], it presumably would have done so expressly.”).

reading of “industry-wide average costs of telephone service and advanced communications services” as meaning “the industry for telephone and advanced services generally” as opposed to the averages for IPCS providers alone.⁶³ The term “industry-wide” is thus best interpreted as referring collectively to all providers of telephone service and advanced communications service, not just the average costs of IPCS providers alone.

The Commission seeks comment on whether the statutory language allows, or even requires, the Commission “to set rates for each provider based on that provider’s average costs of service.”⁶⁴ The Act clearly does not require such a result; on its face, it uses the permissive “may,” giving the Commission discretion as to whether to use provider-specific costs in setting rates. Since the Commission already had authority to consider provider-specific costs under the pre-MWRA statutory text, the phrase “may use industry-wide average costs of telephone service and advanced communications services and the average costs of service of a communications service provider” is best understood as *adding* to the Commission’s range of permissible options in the types of data it can consider in setting rates, rather than requiring it to use any particular methodology.

The inclusion of “industry-wide” authority, moreover, reflects Congress’s clear intent to overturn the limitations of *GTL*, and to affirmatively empower the Commission to use industry-wide weighted averages to determine rate caps.⁶⁵ Nowhere does the MWRA speak in terms of

⁶³ *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 307 n.7 (1994) (noting that Congress can, “in response to a judicial decision that construed a . . . statute narrowly, amend the legislation to broaden its scope”); *Rodriguez v. Sony Computer Ent. Am., LLC*, 801 F.3d 1045, 1052 (9th Cir. 2015) (“Under the rules of statutory construction, we presume that . . . when Congress amends a statute, it is knowledgeable about judicial decisions interpreting the prior legislation.” (internal quotation marks omitted)).

⁶⁴ *NPRM* ¶ 50.

⁶⁵ *GTL*, 866 F.3d at 414.

provider-specific costs in connection with setting just and reasonable rates.⁶⁶ The goal of the Act was to remove constraints on the Commission’s authority to set just and reasonable rates—not restrict the Commission’s ability to consider average costs. Furthermore, adopting a limiting approach would not be beneficial or consistent with the goals of the Act, which is to “help reduce financial burdens that prevent people from being able to communicate with loved ones and friends.”⁶⁷

B. The Commission Should Use Industry-Wide Average Costs to Develop a Model Carrier Approach to Set Rate Caps.

In the attached report,⁶⁸ the Brattle Group recommends using industry-wide average costs to set IPCS rates, rather than the average costs of IPCS providers.⁶⁹ This approach would allow the Commission to construct an efficient provider, rather than propping up existing providers that may have inflated costs. This approach encourages efficiency and is similar to the Commission’s approach of assuming a forward-looking efficient carrier in the universal service cost model context.⁷⁰

⁶⁶ Martha Wright-Reed Act § 3(b). As the Commission rightly notes, taken as a whole, the Act addresses “the constraints imposed by the D.C. Circuit’s interpretation on the Commission’s jurisdiction in *GTL*” and expands the Commission’s jurisdiction over IPCS. See *NPRM* ¶ 11.

⁶⁷ *MWRA Dec. 22, 2022 Congressional Record*, 168 Cong. Rec. H10027 (statement of Rep. Pallone). Moreover, setting individual provider rate caps based on that IPCS provider’s average costs of service would create a perverse incentive for providers to overstate their costs even more than they already do, as the benefits of submitting inflated cost data would flow directly to the provider submitting such data.

⁶⁸ The Brattle Group report is attached hereto as Appendix A. Coleman Bazelon & Paroma Sanyal, Comments on “FCC Seeks Comment on Its Expanded Authority to Ensure Just and Reasonable Rates and Charges for Incarcerated People’s Communications Services,” Notice of Proposed Rulemaking (WC Docket Nos. 23-62, 12-375) (May 8, 2023) (the “Brattle Report”).

⁶⁹ Brattle Report, ¶¶ 3-11.

⁷⁰ See, e.g., *In re Connect America Fund*, Report and Order, Order and Order On Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3090 ¶ 4 (2016) (establishing a “new forward-looking, efficient mechanism for the distribution of support in rate-of-return areas”); *In re Connect America Fund*, Report and Order, 29 FCC Rcd 3964, 3966-67 ¶¶ 3-7 (2014) (summarizing the Commission’s efforts in implementing in the USF auction context a cost model to estimate “the forward-

Using industry-wide costs fully comports with the statute and will avoid frequent data collections and persistent concerns about misallocation and inflated costs as reported by IPCS providers. A model would implement the statutory directive that IPCS rates be “just and reasonable,” while also ensuring that providers are “fairly compensated,” by (1) identifying the reasonable and objective value of the services provided as they would be priced in a competitive market, rather than by focusing on any particular provider’s idiosyncratic cost structure disconnected from the fair value of its service offerings; and (2) including consideration of additional costs, as the Commission may determine are “necessary,” specific to the IPCS industry and uniquely associated with the provision of IPCS services.

The Brattle Report proposes adopting a model-carrier approach to calculate rates, which would use the industry-average costs for non-IPCS audio calls “and then potentially adjust[ing] for costs that may be particular to the provision of service in incarceration facilities.”⁷¹ From an economic modeling perspective, the core inputs could be 1) service costs benchmarked from the costs of providing similar services commercially; 2) facilities costs benchmarked from a combination of broader industry costs, especially for equipment, and IPCS provider costs; 3) safety and security costs, such as Communications Assistance for Law Enforcement Act (“CALEA”) costs, but otherwise exclude safety and security costs not necessary for IPCS;⁷² 4)

looking economic costs of an efficient wireline provider at a granular level – census block or smaller – in all areas of the country”).

⁷¹ Brattle Report, ¶ 8.

⁷² See Reply Comments of Worth Rises at 4, WC Docket No. 12-375 (Mar. 3, 2023) (“Accordingly, we echo our previous comments that IPCS rates should include the cost of security and surveillance that conforms to the Communications Assistance for Law Enforcement Act (CALEA), which preserves the ability of law enforcement to surveil calls and is trusted to reasonably protect public safety.” (footnote omitted)); *id.* at 2 (“Security and surveillance services are not necessary to the provision of IPCS and instead serve separate and distinct penal interests.”); see *infra* Sec. IV.

overhead costs benchmarked from a mix of IPCS and general communications industry sources; and 5) allowed return informed by industry benchmarks.⁷³

Using a model carrier approach to set just and reasonable rates is well within the Commission's wide discretion.⁷⁴ An industry-wide approach also avoids concerns about the cost data submitted by the IPCS providers, which, as the Brattle Group finds, appear to be inflated.⁷⁵ In particular, the Brattle Report finds that IPCS costs and rates appear to each be uncorrelated with the standard and expected economic drivers behind costs and rates.⁷⁶ Even when observable, differences in costs driven by facility or provider size are overwhelmed by other factors.⁷⁷ In some cases, the reported costs in the Third Mandatory Data Collection are greater than the rates charged based on the facility-level contract, which would not be expected in an efficient market.⁷⁸

By comparing the IPCS providers' submitted cost data to publicly available contracts, the Brattle Report found anomalies.⁷⁹ As a result, there is "a significant variation in costs across facilities[,] . . . even when the facilities seem generally comparable, that cannot be explained by economic rationale."⁸⁰ At bottom, "the costs reported by the IPCS industry likely include costs that either should not be included because they are not related to providing IPCS or may be

⁷³ Brattle Report, ¶ 6.

⁷⁴ *See supra* n.68.

⁷⁵ Brattle Report, ¶ 5.

⁷⁶ Brattle Report, ¶ 20.

⁷⁷ *See* Brattle Report, ¶¶ 16, 20, 29.

⁷⁸ *See* Brattle Report, ¶ 16.

⁷⁹ *See generally* Brattle Report.

⁸⁰ Brattle Report, ¶ 10.

greater than they would be if they were provided in a competitive market.”⁸¹ Using a model cost approach avoids these concerns. Under this approach, the Commission can specify the costs that “an IPCS carrier should have or would have if they operated under competitive pressures” based on “industry average costs, using a combination of non-IPCS telecom industry costs and IPCS provider costs to calculate those averages.”⁸² The Commission can also exclude costs that are not related to providing IPCS, such as certain safety and security costs as further discussed below.

IV. THE COMMISSION MUST ONLY “CONSIDER” WHETHER SAFETY AND SECURITY COSTS ARE “NECESSARY.”

The MWRA directs the Commission to “consider costs associated with any safety and security measures *necessary* to provide” IPCS,⁸³ and the Commission seeks comment on how to implement this part of the Act.⁸⁴ As Worth Rises has explained, the Commission should recognize that correctional facilities that may use certain safety and security features are fundamentally not IPCS *providers*.⁸⁵ Instead, these facilities contract *with* providers, which themselves then offer communications services to incarcerated people. Correctional facilities incur various costs in their overall operation, most of which have nothing to do with the provision of communications services. The record demonstrates that providing safety and

⁸¹ *Id.*

⁸² Brattle Report, ¶ 5.

⁸³ Martha Wright-Reed Act § 3(b)(2) (emphasis added).

⁸⁴ *NPRM* ¶ 52.

⁸⁵ *See, e.g.*, Letter from Bianca Tylek, Executive Director & Maya Ragsdale, Legal Director, Worth Rises, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1-2 (Mar. 16, 2022) (arguing that the Commission should remove security and surveillance services from its IPCS cost calculation because “agencies’ interest in procuring these services stems from their core responsibility to maintain security and safety in their facilities”); Comments of Worth Rises at 1-12, WC Docket No. 12-375 (Sept. 27, 2021) (demonstrating that security and surveillance services are “separate and distinct” from IPCS).

security services is a core function of operating a *facility*, but unrelated to the provision of communications services.⁸⁶ Indeed, safety and security are for the benefit of “investigators, correctional administrators, prosecutors, and other law enforcement officers.”⁸⁷

Congress did not say that the Commission “must include” or “shall allow for the recovery of” the safety and security costs claimed by IPCS providers. Instead, it deferred to the Commission’s expertise and discretion, requiring only that it *consider* costs associated with safety and security measures when developing rate caps.⁸⁸ While the Commission must therefore consider these costs, it is plainly not obligated to pass them through in the rate caps ultimately adopted.

The Commission seeks comment on how to interpret the word “necessary” in the MWRA, and observes the relationship between the “ordinary and fair meaning” of the term and how the D.C. Circuit has interpreted the word.⁸⁹ With respect to its plain meaning, Black’s Law Dictionary defines “necessary” to mean something “[t]hat is needed for some purpose or reason; essential,” or “[t]hat must exist or happen and cannot be avoided; inevitable.”⁹⁰ The first definition is nearly circular, using “needed” to define “necessary.” The second definition clarifies that something is necessary if it *must exist* and *cannot be avoided*.

⁸⁶ See Reply Comments of Worth Rises at 5, WC Docket No. 12-375 (Dec. 17, 2021) (“Security is a core feature of operating a correctional facility and should be paid for by the agencies themselves and not IPCS users.”); see generally Comments of Worth Rises, WC Docket No. 12-375 (Dec. 15, 2022) (“Worth Rises Sixth FNPRM Comments”).

⁸⁷ See, e.g., Worth Rises Sixth FNPRM Comments; see also Letter from Bianca Tylek, Founder and Executive Director, Worth Rises, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375 (Mar. 24, 2021).

⁸⁸ See Martha Wright-Reed Act § 3(b)(2).

⁸⁹ *NPRM* ¶ 53

⁹⁰ *Black’s Law Dictionary* (11th ed. 2019).

Courts have likewise recognized that the Commission has considerable deference in defining “necessary,” recognizing “the chameleon-like nature of the term ‘necessary,’ whose meaning depends on its statutory context.”⁹¹ The Commission’s prior efforts to interpret the term in other contexts do not mean that it must reach any particular conclusion here.⁹² Security and safety costs may be necessary for the operation of a correctional facility, but that does not mean the costs should be shifted to the incarcerated person. It should also be clear that safety and security features that are not universally used across facilities suggests that they cannot be “necessary,” as some providers do offer IPCS without needing to use such features.⁹³

V. THE COMMISSION SHOULD PREEMPT SITE COMMISSION PAYMENTS AND OTHERWISE EXCLUDE SUCH COSTS FROM RATES.

The Commission seeks comment on whether to preempt state and local laws that impose site commission payments on incarcerated people’s communications services providers.⁹⁴ The treatment of site commission has been a long-standing issue in this proceeding.⁹⁵ Following the

⁹¹ *Cellco Partnership v. FCC*, 357 F.3d 88, 90 (D.C. Cir. 2004).

⁹² *See, e.g., Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509-10 (D.C. Cir. 2003) (discussing “necessary” in the context of the forbearance statute); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391-94 (D.C. Cir. 2004) (discussing “necessary” in the context of media ownership).

⁹³ Moreover, the Commission should separately evaluate whether such costs are “necessary” pursuant to the Commission’s “used and useful” standard. *See NPRM* ¶¶ 53-54; *infra* Sec. II.A. The Commission has recognized that whether an investment and expense is “used and useful” depends on the particular facts of the case. *See In re Connect America Fund*, 33 FCC Rcd at 3012-13 ¶ 49 (*citing Sandwich Isles Order*, 31 FCC Rcd at 12999). Costs unrelated to IPCS, including safety and security measures, could be excluded as not “used and useful” for the provision of IPCS.

⁹⁴ *NPRM* ¶ 23.

⁹⁵ *See, e.g., In re Rates for Interstate Inmate Calling Services*, Second Report & Order and Third Notice of Proposed Rulemaking, 30 FCC Rcd 12763, 12818-31 ¶¶ 117-132 (2015), *vacated in part sub nom. GTL*, 866 F.3d 397 (D.C. Cir. 2017); *In re Rates for Interstate Inmate Calling Services*, Order on Reconsideration, 31 FCC Rcd 9300, 9319-20 ¶¶ 35-38 (2016); *In re Rates for Interstate Inmate Calling Services*, Third Report & Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking, 36 FCC Rcd 9519, 9561-92 ¶¶ 100-168 (2021); *GTL*, 866 F.3d at 404-06, 412-16; Petition for Reconsideration of United Church of Christ & Public Knowledge, WC Docket No. 12-375 (corrected version filed Dec. 14, 2022); Reply Comments of the Wright Petitioners et al., WC Docket No. 12-375, at 9-10, 13-14 (Jan. 15, 2021).

enactment of the MWRA and Congress's response to *GTL*, the Commission should preempt state and local laws that require or permit site commission payments.

The Commission may preempt state and local laws where it has statutory authority to regulate,⁹⁶ which is the case here.⁹⁷ First, as noted above, the broad statutory grant to ensure just and reasonable rates for IPCS in light of the MWRA encompasses the ability to ensure that IPCS providers' practices are just and reasonable as well. That power includes the ability to declare that it is an unjust and unreasonable practice for IPCS providers to enter into exclusive arrangements with correctional facilities, or governmental units operating those facilities, requiring the payment of site commissions, the cost of which causes the services provided to incarcerated persons to become unjust and unreasonable.⁹⁸

Second, separate and apart from the Commission's authority under Section 276 itself, Section 253(a) of the Communications Act prohibits state or local statutes or regulations from "prohibit[ing] or having the effect of prohibiting the ability of any entity to provide any interstate

⁹⁶ See *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority.")

⁹⁷ Earlier in this proceeding, IPCS providers sought for the Commission to prohibit or limit site commissions. See Letter from Andrew D. Lipman, Counsel for Inmate Calling Services, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Ex. A at 3-4 (Sept. 28, 2015) (proposing a rule that "No Provider may pay a Site Commission or any other form of monetary compensation except for the Facility Administrative Support established herein. Payment of a Site Commission exceeding the Facility Administrative Support established in this part shall be an unjust and unreasonable practice."); Letter from Brian D. Oliver, Chief Executive Officer, Global Tel*Link Corporation et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-2 (Oct. 15, 2015) (supporting a path "to address site commissions in the manner proposed by Andrew D. Lipman"); see also Letter from Andrew D. Lipman, Counsel for Inmate Calling Services, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Apr. 8, 2015) (explaining that the Commission has legal authority to limit or prohibit site commissions).

⁹⁸ The Commission has found that if it has jurisdiction over the carrier and the contracts it can lawfully enter, it does not need to also have jurisdiction over the counterparty. Cf. *In re Improving Competitive Broadband Access to Multiple Tenant Environment*, Report and Order and Declaratory Ruling, GN Docket No. 17-142, FCC 22-12 (rel. Feb. 15, 2022) (adopting rules that prohibit providers from entering into certain types of revenue sharing agreements with third parties).

or intrastate telecommunications service.”⁹⁹ Section 253(d) gives the Commission authority to preempt the enforcement of such state law or laws “to the extent necessary to correct such violation or inconsistency.”¹⁰⁰

The Commission has recently affirmed that in determining whether a state or local law has the effect of prohibiting the provision of telecommunications services under Section 253, it must consider “whether the ordinance *materially inhibits* or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”¹⁰¹ The Commission further explained that “a legal requirement can ‘materially inhibit’ the provision of services even if it is not an insurmountable barrier,”¹⁰² and that a state or local legal requirement could inhibit service in a number of different ways, including “by restricting the entry of a new provider in providing service in a particular area [and] by materially inhibiting the introduction of new services or the improvement of existing services.”¹⁰³ With this authority, the Commission has preempted state and local fees associated with the deployment of wireless infrastructure, permitting them only “to the extent that they represent a reasonable approximation of the local government’s objectively reasonable costs, and are non-discriminatory.”¹⁰⁴

⁹⁹ 47 U.S.C. § 253(a).

¹⁰⁰ 47 U.S.C. § 253(d).

¹⁰¹ *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, 9092-93 ¶ 10 (2018) (“*Small Cell Order*”) (quoting *California Payphone Ass’n*, 12 FCC Rcd 14191, 14206 ¶ 31 (1997)), *rev. granted, rev’d in part sub nom. City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

¹⁰² *Small Cell Order*, 33 FCC Rcd at 9102-03 ¶ 35.

¹⁰³ *Id.* at 9104-05 ¶ 37.

¹⁰⁴ *Id.* at 9100-01 ¶ 32.

The material inhibition that site commissions place on the provision of IPCS is undisputed. Site commissions, which the record shows sometimes approach 100%,¹⁰⁵ redirect funds from the IPCS provider to the facility. This, in turn, reduces the capacity of the provider to (1) introduce new services, (2) improve the quality of existing services, or (3) invest money elsewhere in other facilities. Moreover, because they operate as a gating function to access the facility, the use of site commissions has a severe anti-competitive effect during the contract bidding process, often foreclosing from participation smaller providers that are unable to make such payments.¹⁰⁶

In light of these negative effects on the IPCS marketplace, the Commission should find that Section 253(a)'s requirement that state and local laws cannot *materially inhibit* the provision of telecommunications applies to state and local governments that require IPCS providers to pay site commissions as a condition precedent to offering IPCS, or that authorize correctional institutions to impose such conditions. The Commission has found that Section 253 "makes no distinction between a state or locality's regulatory and proprietary conduct" and thus applies both to contracts or other arrangements as it would to direct regulation.¹⁰⁷ It should adopt the same approach here.

¹⁰⁵ See *In re Rates for Interstate Inmate Calling Services*, 30 FCC Rcd at 12820-21 ¶ 122 ("[Site commission] payments represent a significant portion of total [IPCS] revenues. Indeed, as the Commission has noted, site commissions can amount to as much as 96 percent of gross [IPCS] revenues."). Moreover, based on the responses to the Third Mandatory Data Collection, site commissions paid by some of the largest IPCS providers represent significant portions of their total operating expenses.

¹⁰⁶ See generally Brattle Report ¶¶ 43-47 (discussing cost distortions due to contract bidding).

¹⁰⁷ *Small Cell Order*, 33 FCC Rcd at 9135 ¶ 94.

In the alternative, to the extent that the Commission finds that Section 253 does not restrict states when they act in their proprietary capacity,¹⁰⁸ the Commission should nonetheless conclude that laws requiring mandatory site commission payments “involve states and localities fulfilling regulatory objectives,”¹⁰⁹ and are within the ambit of the Commission’s preemption authority. When a state or local government requires a facility to pay site commissions, it is acting in a regulatory capacity because operating correctional facilities is a characteristically governmental role.¹¹⁰ Moreover, site commission payments may be set by statutes and regulations,¹¹¹ rather than through individual contracting decisions by facilities, which further emphasizes their “regulatory” nature. When a state or local government requires a facility to pay site commissions, or authorizes facilities to require site commissions, it acts in a regulatory capacity.

VI. ANY ALTERNATIVE RATE STRUCTURES IN PILOT PROGRAMS MUST NOT EVADE THE COMMISSION’S RULES.

The Commission seeks comment on whether it has the authority to allow alternative pricing structures for incarcerated people’s audio or video communications, and if so, what types of pricing plans it should allow.¹¹² Following the enactment of the MWRA, Congress has

¹⁰⁸ *Cf. City of Portland v. United States*, 969 F.3d 1020, 1045 (9th Cir. 2020) (“The FCC’s regulations in the Small Cell Order were premised on the agency’s determination that municipalities, in controlling access to rights-of-way, are not acting as owners of the property; their actions are regulatory, not propriety, and therefore subject to preemption. This is a reasonable conclusion based on the record.” (citation omitted)).

¹⁰⁹ *Small Cell Order*, 33 FCC Rcd at 9137 ¶ 96.

¹¹⁰ *See Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1336 (D.C. Cir. 1996); *Beebe v. Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1287 (D.C. Cir. 1997) (“To distinguish governmental from proprietary functions, we ask whether the activity amounts to a ‘quintessential’ governmental function, like law enforcement.”); *Case v. Anderson*, No. 16 CIV. 983, 2017 WL 3701863, at *22 (S.D.N.Y. Aug. 25, 2017) (“Running a jail . . . is prototypically governmental in nature.”).

¹¹¹ *In re Rates for Interstate Inmate Calling Services*, 36 FCC Rcd at 9562 ¶ 100 & n.304.

¹¹² *NPRM* ¶¶ 45-46.

entrusted to the Commission the responsibility of ensuring that IPCS rates are just and reasonable, including the authority to consider certain alternative pricing structures to the extent such structures ensure just and reasonable rates. To that end, any pilot program must have protections to ensure they are not used to evade the Commission’s rules and regulations.

As the Public Interest Parties have explained, innovative pricing holds promise to reduce rates, but also risks opening the door to abuse and higher prices.¹¹³ If pilot programs are permitted, the Commission should ensure that IPCS consumers are protected through the adoption of certain guardrails; for example, a rule that no IPCS consumer should pay more than they otherwise would under the Commission’s adopted rate cap and related rules.¹¹⁴ The purpose of allowing alternative rate structures should be to benefit IPCS consumers, not allow IPCS providers additional ways to profit from IPCS.

In addition, IPCS consumers must be fully informed about any alternative pricing structures made available to them through a system of robust disclosures, including highlighting differences between a pilot program’s terms and conditions and the existing rates and fees. A standardized “IPCS label” could help accomplish this goal,¹¹⁵ as the Commission could require IPCS providers to include on the label a comparison between alternative pricing structures and per-minute calling. The applicable per-minute rate cap—which providers may not exceed—should be included for reference.¹¹⁶ Terms and conditions about how to participate in such plans should be written in plain language and be as concise as possible to avoid consumer confusion.

¹¹³ Comments of the Wright Petitioners et al., WC Docket No. 12-375 (Dec. 15, 2022).

¹¹⁴ *Id.* at 10.

¹¹⁵ *See id.* at 11; *see also id.* at 6-9.

¹¹⁶ *Id.* at 11 n.30.

Finally, IPCS providers should bear the burden of demonstrating compliance with the Commission’s IPCS rate caps, as they are in the best position to provide this information about usage to the Commission.

VII. THE COMMISSION SHOULD ADOPT REFORMS TO ADVANCE DIGITAL EQUITY FOR ALL.

The Public Interest Parties applaud the Commission’s efforts to advance digital equity for all, including “people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality.”¹¹⁷ This proceeding offers the Commission opportunity to continue these efforts through reforms to its IPCS rules, specifically in adopting more inclusive terminology, and more broadly by promoting fairer treatment in a carceral system that disproportionately affects members of the aforementioned groups.

A. The Commission Should Update Its Rules to Use More Inclusive Terminology.

The Public Interest Parties support the Commission’s proposal to revise its rules to refer to “incarcerated people” instead of “inmates,” and to more broadly use the terms “incarcerated people’s communications services” and “IPCS” instead of “inmate calling services” and “ICS.”¹¹⁸ As the Commission has noted, there is ample record evidence that the term “inmate” is dehumanizing and disparaging.¹¹⁹ Commenters have used more inclusive terminology in this

¹¹⁷ *Id.*

¹¹⁸ *See NPRM* ¶¶ 11 n.37, 82.

¹¹⁹ *See id.* ¶ 11 n.37 (citing to Letter from Cheryl A. Leanza, Policy Advisor, United Church of Christ, OC Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (July 19, 2020)); *see also* Reply Comments of Prison Policy Initiative, Inc. at 35 n.141, WC Docket No. 12-375 (Dec. 17, 2021) (observing that the term “inmate calling service” is outdated and the Commission’s use of the term “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 Service Providers Coalition’”).

proceeding for years.¹²⁰ As part of its implementation of the MWRA, the Commission should incorporate this more inclusive terminology throughout its existing and future rules.¹²¹

B. Reforming IPCS Would Advance the Commission’s Diversity, Equity, and Inclusion Goals.

Reforms adopted by the Commission in this proceeding will also help advance diversity, equity, and inclusion. Low-income and people of color are subject to incarceration at a much higher rate than others,¹²² and incarcerated people with disabilities must overcome special challenges to communicate with those outside of their facility’s walls. For example, unhoused people are often imprisoned for violations related to their poverty, with a quarter of unhoused people reporting having been arrested for activities related to homelessness.¹²³ Incarceration often follows a failure to pay child support or fines for other minor infractions, even if an individual cannot afford to pay their fines, a practice that continues despite being ruled unconstitutional.¹²⁴ And of the nearly two million incarcerated people in the United States,

¹²⁰ See, e.g., Letter from the Leadership Conference on Civil and Human Rights to Hon. Tom Wheeler, Chairman, FCC, WC Docket No. 12-375 (Oct. 15, 2015) (using “incarcerated people” instead of “inmates”); Letter from Bianca Tylek, Executive Director, Worth Rises, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Apr. 7, 2020) (using “incarcerated people” instead of “inmates”); Letter from Jesse Hahnel, Executive Director, National Center for Youth Law, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Apr. 21, 2021) (using “incarcerated persons calling services” and “IPCS” instead of “inmate calling services” and “ICS”).

¹²¹ See *NPRM* ¶ 82 (soliciting comments on any “equity-related considerations”).

¹²² Tara O’Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, American Action Forum (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/>.

¹²³ *Id.* The enforcement of laws related to homelessness creates a “vicious cycle,” where an unhoused individual is eleven times more likely to be incarcerated, and having been incarcerated makes a person ten times more likely to experience homelessness. *Id.*

¹²⁴ *Id.* (citing *Bearden v. Georgia*, 461 U.S. 660 (1983)).

427,000, or 22%, have not been convicted of any crime.¹²⁵ These people are being held in jail pre-trial, primarily because they cannot afford to pay bail.¹²⁶

Similarly, people of color are incarcerated at disproportionate rates. In 2020, the U.S. Census Bureau reported that 57.8% of the population identifies as White and Non-Hispanic. Hispanic and Latino Americans are the largest ethnic minority, at 18.7% of the population, while Black or African Americans make up 12.1% of the population.¹²⁷ However, Black and Hispanic/Latino identifying men are six and two-and-a-half times more likely than White men to be incarcerated, respectively.¹²⁸ Black Americans make up 33% of the national prison population, and 46% of the population that have already served at least ten years in prison.¹²⁹

Finally, the Commission has already recognized the unique and onerous barriers that people with disabilities face when subjected to the carceral system.¹³⁰ Incarcerated people with disabilities face isolation without access to their primary forms of communication.¹³¹ The Public Interest Parties commend the Commission for its recent actions to mandate TRS in many carceral facilities,¹³² and urge the Commission to take further action here to expand accessible services to people experiencing incarceration to the greatest extent possible.

¹²⁵ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, Prison Policy Initiative (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

¹²⁶ Tara O'Neill Hayes & Margaret Barnhorst, *supra*, note 117.

¹²⁷ *Racial and Ethnic Diversity in the United States: 2010 Census and 2020 Census*, U.S. Census Bureau (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/racial-and-ethnic-diversity-in-the-united-states-2010-and-2020-census.html>.

¹²⁸ Ashley Nellis, *Mass Incarceration Trends*, The Sentencing Project (Jan. 25, 2023), <https://www.sentencingproject.org/reports/mass-incarceration-trends/>.

¹²⁹ *Id.*

¹³⁰ *See, e.g.*, Comments of HEARD et al., WC Docket No. 12-375 (Sept. 27, 2021).

¹³¹ *See Fourth Report and Order*, ¶ 34.

¹³² *See generally id.*

The carceral system, rife with inequity based on economic status, race, ethnicity, and incarcerated people’s disabilities, presents an opportunity for the Commission to advance the cause of digital equity. Studies have “consistently found that prisoners who maintain close contact with their family members while incarcerated have better post-release outcomes and [a] lower recidivism rate,”¹³³ and a better reintegration rate after incarceration could be critical to addressing the inequities in the American justice and carceral systems. The Commission should not allow exceptions and carve-outs to its rules that leave traditionally marginalized, incarcerated people without access to lifeline communication links to their families and loved ones.

CONCLUSION

The Public Interest Parties urge the Commission to adopt rules consistent with these comments.

Respectfully submitted,

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¹³³ Alex Friedmann, *Lowering Recidivism through Family Communication*, Prison Legal News (Apr. 15, 2014), <https://www.prisonlegalnews.org/news/2014/apr/15/lowering-recidivism-through-family-communication/>.

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Appendix A

“REDACTED – FOR PUBLIC INSPECTION”

Brattle Report

COMMENTS ON “FCC SEEKS COMMENT ON ITS EXPANDED AUTHORITY TO ENSURE JUST AND REASONABLE RATES AND CHARGES FOR INCARCERATED PEOPLE'S COMMUNICATIONS SERVICES,” NOTICE OF PROPOSED RULEMAKING (DOCKET NO. 23-62, 12-375)

PREPARED BY

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May 8, 2023



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I. Introduction

1. On January 5, 2023, President Biden signed the Martha Wright-Reed Act.¹ This act marks a watershed event in the history of incarcerated people’s communication services (IPCS). It “removes the principal statutory limitations that have prevented the Commission from setting comprehensive and effective just and reasonable rates for incarcerated people’s communications services.”² In addition to enabling the FCC to require IPCS rates that are just and reasonable, it also “allows the Commission to ‘use industry-wide average costs,’ as well as the ‘average costs of service of a communications service provider’ in setting just and reasonable rates.”³ In this report, we discuss the notion of an appropriate industry-wide average cost, discuss the broad principles of setting rates under this new mandate and show why using these alternatives would avoid potential overstatement of costs as reported by the IPCS providers in the Third Mandatory Data Collection (Third MDC).⁴
2. This report comprises four sections in addition to the introduction and conclusion. In Section II, we propose a methodology for using average costs to set IPCS rates. In Section III, we analyze a sample of publicly available contracts and cost data from the Third MDC, and show the wide dispersion in rates and costs amongst states, providers and at the facility level.⁵ In Section IV, we examine costs reported by providers in response to the Third Mandatory Data Collection and Supplemental filings and use examples that illustrate the lack of correlation between reported costs and rates at the facility level. In Section V, we examine some of the cost drivers that can potentially explain some of the differences observed in the rates and costs data. Section VI concludes.

¹ FCC, “In the Matter of Incarcerated People’s Communications Services; Implementation of the Martha Wright-Reed Act,” WC Docket No. 23-62, Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, Notice of Proposed Rulemaking and Order, ¶3, adopted March 16, 2023, <https://docs.fcc.gov/public/attachments/FCC-23-19A1.docx>, (“2023 IPCS NPRM and Order”).

² 2023 IPCS NPRM and Order, ¶13.

³ 2023 IPCS NPRM and Order, ¶14.

⁴ FCC, “In the Matter of Rates for Interstate Inmate Calling Services,” WC Docket No. 12-375, DA 22-52, Order, adopted January 18, 2022, <https://docs.fcc.gov/public/attachments/DA-22-52A1.pdf>.

⁵ These publicly available contracts are available at the Prison Policy Initiative, Correctional Contracts Library. See, “Correctional Contracts Library,” last accessed May 5, 2022, <https://www.prisonpolicy.org/contracts/documents.html?text-search-fields=facility-and-remarks&q=mississippi&q-state=&q-document-type=&q-service=&q-vendor=&sort=state#search-form>.

II. FCC Reforms in the IPCS Industry - The FCC Should Set Rates based on Average Industry Costs

3. In a well functioning market, competitive forces police excess profits and tend to drive prices toward costs, ensuring that rates are just and reasonable. IPCS, however, are not provided in a well functioning market with competitive forces that would drive prices towards costs.⁶ Given this market failure, the FCC has required IPCS providers to submit costs to facilitate setting rates for IPCS.
4. In the IPCS market, the IPCS provider typically competes for the contract to serve a facility, or a set of facilities, and is granted exclusive rights to serve the facility if it wins the contract.⁷ Once the provider is selected, providers have exclusive access to the IPCS market in a facility or set of facilities. From the incarcerated person’s perspective, there are no alternative buyers. Furthermore, demand for calling is highly inelastic. Therefore, IPCS providers in each facility have a monopoly over all the communication services for the length of their contract period, with incarcerated persons having only one choice if they want to call their loved ones.
5. As a consequence of these market dynamics, the FCC needs to correct for this market failure by setting a regulated rate. To gather information to set a rate, the FCC has required IPCS providers to submit data on their costs.⁸ While the FCC’s methodology for collecting data is sound, particularly with improvements in the Third Mandatory Data Collection, IPCS providers have not reported data consistently.⁹ Comparisons to other publicly reported data, including contracts that these same

⁶ This is because the market forces at play are between providers and institutions, leaving the consumer who pays the prices out of the competitive dynamic.

⁷ FCC, “In the Matter of Rates for Interstate Inmate Calling Services,” WC Docket No. 12-375, Notice of Proposed Rulemaking, DA/FCC No. FCC 12-167, Docket/RM No. 12-375, ¶ 5, adopted December 24, 2012, <https://docs.fcc.gov/public/attachments/FCC-12-167A1.pdf>.

⁸ FCC, “Rates for Interstate Inmate Calling Services,” WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, adopted August 9, 2013, ¶¶ 119, 124-126, <https://docs.fcc.gov/public/attachments/FCC-13-113A1.pdf>.

⁹ Note, submissions in response to the FCC’s Third Mandatory Data Collection (“MDC”) used in our analysis include confidential versions of the data filed by the following eight providers: (1) Combined Public Communications, LLC “Proceedings: WC 12-375,” submitted July 8, 2022, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/1070865211653> (“Combined’s Third MDC”); (2) Global Tel*Link Corporation d/b/a ViaPath Technologies, “WC 12-375,” submitted July 7, 2022, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10707134489355> (“GTL”); (3) Inmate Calling Solutions, LLC, “WC 12-375,” submitted June 30, 2022, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10630720910084> (“ICSolutions”); (4) Network Communications International Corp d/b/a NCIC Inmate Communications, “Proceedings: WC 12-375,” submitted April 6, 2023, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/104060618508753>, (“NCIC’s Third MDC”); (5) Pay Tel Communications, Inc., “Proceedings: WC 12-375,” submitted July 11, 2022, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/107112614603733> (“Pay Tel”); (6) Prodigy Solutions, Inc., “WC 12-375,” submitted June 30, 2022, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/106300859414388> (“Prodigy’s Third MDC”), (7) Securus Technologies, LLC, “Proceedings: WC 12-375,” submitted June 30 2022, available at <https://www.fcc.gov/ecfs/search/search-filings/filing/107012946100914> (“Securus”);

providers have to provide IPCS, show anomalies and suggest IPCS providers may be inflating their response to the FCC’s collection. With the Martha Wright Reed Act, the FCC has new authority and flexibility to look to average industry costs to set a rate methodology that takes into account information from the broader communications industry. Given the FCC’s new authority, we propose using a model carrier approach to implement the average industry cost mandate. To implement this approach, the FCC can specify the costs that an IPCS carrier should have or would have if they operated under competitive pressures. This can be implemented based on industry average costs, using a combination of non-IPCS telecom industry costs and IPCS provider costs to calculate those averages. Such a model carrier’s cost of providing IPCS service can take into account things such as facility size, type and location, to the extent they are found to cause meaningful differences in the cost of providing IPCS service. Below, we briefly discuss this approach.

6. This approach for calculating the rates based on average industry costs is based on building up the costs of providing IPCS using a model carrier approach. The model carrier costs would be comprised of four modules, plus an allowed return. Below, each module and the data and calculations they would contain, are outlined.

- Service Costs (Voice, Video, Texting)
 - These could be benchmarked from the costs of providing similar services commercially.
- Facility Costs (Equipment, Installation, Maintenance)
 - These likely would be benchmarked from a combination of broader industry costs, especially for equipment, and IPCS provider costs.
- Safety and Security Costs (such as CALEA)
 - If the FCC finds that safety and security costs are not necessary, these would be excluded from any model.
- Overhead Costs (Contract Administration, Marketing, General and Administrative)
 - These costs would likely come from a mix of IPCS and general communications industry sources.
- Allowed Return

and (8) Talton Communications, Inc., “Proceedings: WC 12-375,” submitted June 30, 2022, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/1063093541534> (“Talton’s Third MDC”).

Note that the following providers submitted supplemental data, which we incorporate in our analysis and substitute for earlier MDC submissions: Global Tel*Link Corporation d/b/a ViaPath Technologies, “Proceedings: WC 12-375,” submitted March 10, 2023, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10311589815709> (“GTL’s Third MDC”); Inmate Calling Solutions, LLC d/b/a ICSolutions, “Proceedings: WC 12-375,” submitted March 30, 2023, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10330814028729> (“ICSolutions’ Third MDC”); Pay Tel Communications, Inc. “Proceedings: WC 12-375,” submitted March 2, 2023, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10303207825273> (“Pay Tel’s Third MDC”); and Securus Technologies, LLC, “Proceedings: WC 12-375,” submitted April 5 2023, redacted version available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10405170724179>, (“Securus’ Third MDC”). When referring to the data used in our analysis as the “Third MDC” we are collectively referring to the submissions of all providers listed above. We make specific references to contracts and facilities from the following providers’ MDC submissions: Combined (“Combined’s Third MDC”), GTL (“GTL’s Third MDC”), ICSolutions (“ICSolutions’ Third MDC”), and Securus (Securus’ Third MDC”).

- Industry benchmarks would be useful in informing an allowed return.
7. The costs that are used in the model carrier construct can vary along multiple dimensions. The degree of variation in costs will be driven by the underlying variability in the data and the FCC’s policy preference. More precise cost data on IPCS is preferable, but the model carrier approach is general enough to accommodate using multiple data sources. For example, the FCC could use the average service provision costs of non-IPCS audio-calls, and then potentially adjust for costs that may be particular to the provision of service in incarceration facilities. This approach is attractive as it does not rely on the data submitted by the providers and breaks the nexus between costs and rates and the potential associated incentives to distort reported costs. In this approach, the Commission could potentially calculate the voice calling rates based on publicly available data on the cost of VoIP calls for small, medium, and large enterprises. These reported rates already build-in profit margins for the companies that provide these calls and can serve as an initial benchmark.¹⁰ For example, we find that for an enterprise with 250 users with an assumed usage for 3,000,000 minutes – the rates are less than \$0.01 per minute.¹¹ See the Appendix for a chart on VoIP rates.
 8. IPCS provider costs can also be used when appropriate. These costs can come from two sources. First, although the Third MDC has some concerning inconsistencies in how the IPCS providers chose to report data, the data may provide benchmarks, particularly in areas where alternative data are not available. Second, provider contracts. As we describe below, there is data on the rates charged, sometimes accompanied by a detailed list of services included in the contract, and in a few cases the costs.
 9. An IPCS cost-based rate setting methodology may be a fall back option if the regulator can accurately assess costs and those costs are set at the efficient level. However, the FCC may not have a good read on actual industry costs, as we observe a significant variation in costs across facilities in the data reported in the Third MDC, even when the facilities seem generally comparable, that cannot be explained by economic rationale. The large variance in costs, and that providers are observed to charge rates that are lower than their reported costs, calls into question just how much these reported costs reflect the cost of providing IPCS service. In addition, as the analysis below shows, the costs reported by the IPCS industry likely include costs that either should not be included because they are not related to providing IPCS or may be greater than they would be if they were provided in a competitive market. For example, a significant share of the reported total capital costs for some providers include amortization of goodwill and intangible assets – if goodwill is a depreciable asset as the result of an acquisition or merger, it may not be related to the cost of providing IPCS.¹² If rates

¹⁰ For publicly available data, see, Julia Watts, “Telephone Systems Costs: The Ultimate Guide for 2023,” January 10, 2023, <https://www.expertmarket.com/phone-systems/telephone-system-cost> (“Telephone Systems Costs”). Note that these are prices/rates and not costs. As profit-maximizing enterprises, economic logic dictates that these companies’ costs are below these rates otherwise they would not be able to operate in the long-term.

¹¹ For a large enterprise, the monthly charges are between \$30 and \$140 per user. See, Telephone Systems Costs.

¹² See, Figure 6 and Figure 7. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

are set based on inflated or mis-reported costs, then the rates will not be efficient – they will not reflect the cost of providing the service.

10. The FCC should carefully consider all cost elements reported by the providers under the Third MDC, analyze the outliers, and understand the drivers of the claimed costs, because as discussed below, the IPCS industry cost sources (Third MDC or publicly available contracts) contain a mix of costs that are required to provide IPCS and other costs that go beyond this requirement. In the discussion in the sections that follow, we highlight the inconsistencies in the observed reported costs and voice rates data, to highlight the issues that the FCC will need to account for if it chooses to use some of the data reported in the Third MDC. In all cases, the FCC should be clear about what costs are allowed (or “used and useful”¹³) and only those costs should be incorporated in the model carrier construct.

III. Public Contracts and Data Submitted in Response to the Third MDC Show a Wide Dispersion in IPCS Voice Calling Rates

A. The Market Failure in the IPCS Industry has Led To Significant Variations in Rates Charged Amongst States, Providers and Facilities That Appear Unrelated to Costs

11. Based on a review of available contracts collected by Prison Policy Initiative (PPI),¹⁴ rates charged for IPCS often seem unrelated to costs as reported by providers in the Third MDC. State-level data shows that while in-state voice calling rates have declined over the years, and the statewide average rates appear to be bounded above by \$0.14 per minute in 2021, there is still a wide variation in these rates.¹⁵ Additionally as we will discuss later, these averages, while giving an overall state-level picture, mask the wide variation in rates at the facility level, where rates can vary between \$0.01 per minute and \$0.14 per minute.¹⁶ The 2018 state-level average in-state voice rates varied between \$0.01 per minute and \$0.32 per minute.¹⁷

¹³ For “used and useful” debate, see, 2023 IPCS NPRM and Order, ¶¶21-23, ¶52.

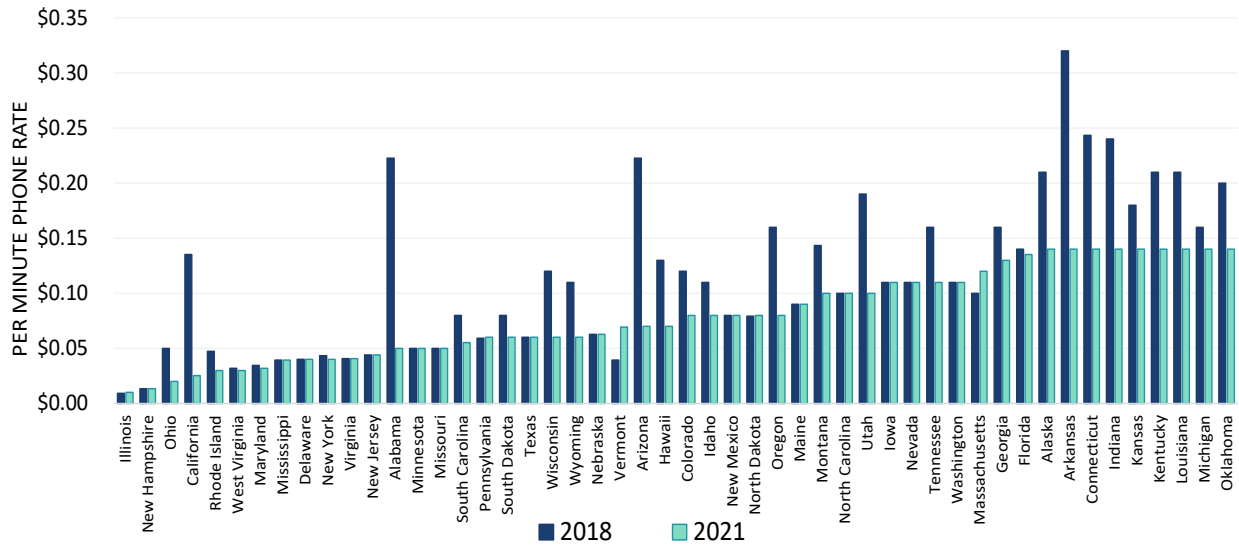
¹⁴ “Correctional Contracts Library,” Prison Policy Initiative, last accessed April 27, 2023, <https://www.prisonpolicy.org/contracts/documents.html>, (“PPI Contracts Library”).

¹⁵ Peter Wagner and Wanda Bertram, “State of Phone justice 2022: The Problem, the Progress, and What’s Next,” Prison Policy Initiative, at Appendix Table 1. Phone rates for 15-minute increments in state prisons, 2008-2021, last accessed April 25, 2023, https://www.prisonpolicy.org/phones/appendices2022_1.html (“PPI: State of Phone Justice – state prison Appendix”).

¹⁶ See, Figure 1.

¹⁷ See, Figure 1, PPI: State of Phone Justice – state prison Appendix.

FIGURE 1: AVERAGE PER MINUTE IN-STATE PRISON PHONE RATES IN STATE PRISONS, 2018 AND 2021



Source: “Rates for 15-minute increments in state prisons,” 2008-2021, Prison Policy Institute, https://www.prisonpolicy.org/phones/appendices2022_1.html.

12. The significant observed variation in the state-level rates raises questions about the drivers of these rates and the correlation between the rates and the costs underlying these rates. It is unlikely the variation is driven to any significant degree by underlying cost differences. That is, we are unaware of any arguments in the record, or elsewhere, as to why providing IPCS in Oklahoma is significantly more expensive than providing IPCS in neighboring states such as Texas and New Mexico. Additionally, the state average voice rates also mask the significant variation that exists within states. Thus, in this section of the report, we analyze the publicly available contract-level voice call rate data and the costs reported in the Third MDC to examine how, if at all, costs and rates charged are related. We first examine the variability in observed rates, and then examine how they are related to costs.

13. We also find that the rates charged for making voice calls can vary greatly between different facilities. This is true even after certain observable attributes such as facility size and type are held constant. Publicly available contracts show that the rates can range from very low, just a few cents per minute, to quite high, over \$0.20 per minute and this observation holds true even when controlling for facility size.¹⁸ Sometimes the variability in price exists for the same provider across different states, or for the same provider and same facility size, or across providers in the same state. For instance, we see from the contracts that in Larimer County, Colorado, GTL is charging \$0.15 per minute but in Montgomery County, Tennessee, GTL is charging \$0.25 per minute – while both facilities are similar in size.¹⁹ Another example of this can be seen in two contracts located in the same state: Securus

¹⁸ See, Table 1 where rates vary from less than a cent to \$0.025 per minute, and Table 5, Table 6, Table 7, and Table 8 for examples of contracts where rates exceed or equal \$0.20 per minute.

¹⁹ See, Larimer County, “Colorado Professional Services Agreement”, signed by Board of County Commissioners of Larimer County February, 3, 2021, at p. 29 of pdf,

charges \$0.086 for a minute of voice calling in Denver County, Colorado but ICSolutions charges upwards of \$0.20 in Mesa County, Colorado.²⁰ While there can be differences in the underlying costs due to geographic factors, we believe that the ultimate driver of these differences are not driven by the cost of provisioning IPCS but by the way the IPCS industry is structured.

B. Costs Reported in the Third MDC Show Significant Differences

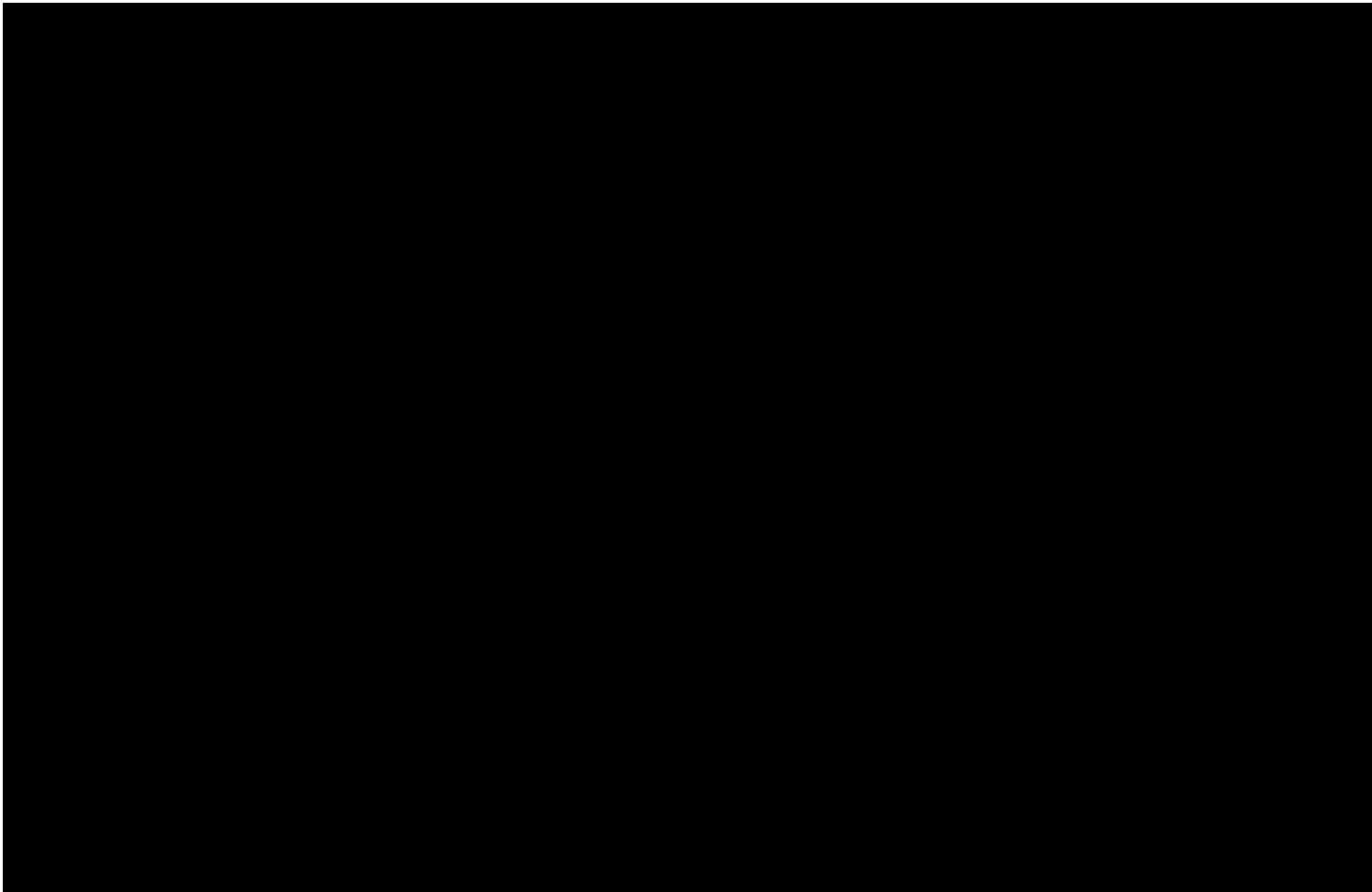
14. It is not only that rates charged seem to be driven by forces other than underlying economics, but costs as reported by Providers seem to vary, too. The FCC spent significant time revising the Third MDC to minimize the opportunities for anomalies with the prior collection and incorporated many suggestions from the Brattle Group. While the FCC’s collection itself is sound, the responses show some inconsistencies that could be addressed if providers resubmit their responses. The FCC would otherwise need to consider their anomalies if these data are used to set rates.
15. In the Third MDC and the Supplemental filings providers submitted information on costs in the Facility Specific Information tab.²¹ To calculate cost per minute for each facility, we aggregated the Total Capital Expenses and the Total Operating Expenses and divided by the sum of the total billed minutes for interstate communication and intrastate communication. Upon performing calculations for total cost per minute using the reported costs in the Third MDC, the resulting values appear untethered to underlying economic drivers such as facility size, type or location. As an example, we observe that for similarly sized facilities, there is a lot of variability in the cost per minute. For similarly sized facilities, barring differences in the services offered, we would expect the magnitude of these costs to be roughly comparable.
16. This is not what the data show. We do observe, however, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY CONFIDENTIAL] between average daily population (ADP) and costs per minute (CPM), with [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

https://www.prisonpolicy.org/contracts/file.php?document_id=379&name=GTL%20-%20Larimer%20County%2C%20Colorado.pdf, (“GTL, Larimer County, Colorado Professional Services Agreement”). Note: the ADP observation is based on data reported in the Third MDC; GTL, “Master Services Agreement,” signed by GTL December 12, 2017, at p.16 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=500&name=Montgomery%20County%20Sheriff%20-%20Global%20Tel%20Link%20video%20visit%20contract.pdf.

²⁰ County of Denver, “Second Amendatory Agreement,” signed November 27, 2018, p. 4 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=399&name=Denver%20City%20-%20County%20Jail%2C%20OCO_16012_16011_2nd%20Amendment_Redacted.pdf; Mesa County, “Inmate Telephone Services Agreement”, signed by ICSolutions March 30, 2017, p. 10 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=387&name=Mesa%20County%2C%20OCO_2017%20Contract.pdf.

²¹ GTL, Securus, ICSolutions, and Paytel have produced supplemental data in March 2023, that updates their original Third MDC submissions. For these providers when we refer to the Third MDC data, we are referring to their Supplemental submissions.

**FIGURE 2: SCATTERPLOT OF CPM VERSUS ADP BY PROVIDER (FOR FACILITIES WITH CPM LESS THAN \$10)
FOR 2021
[BEGIN HIGHLY CONFIDENTIAL]**

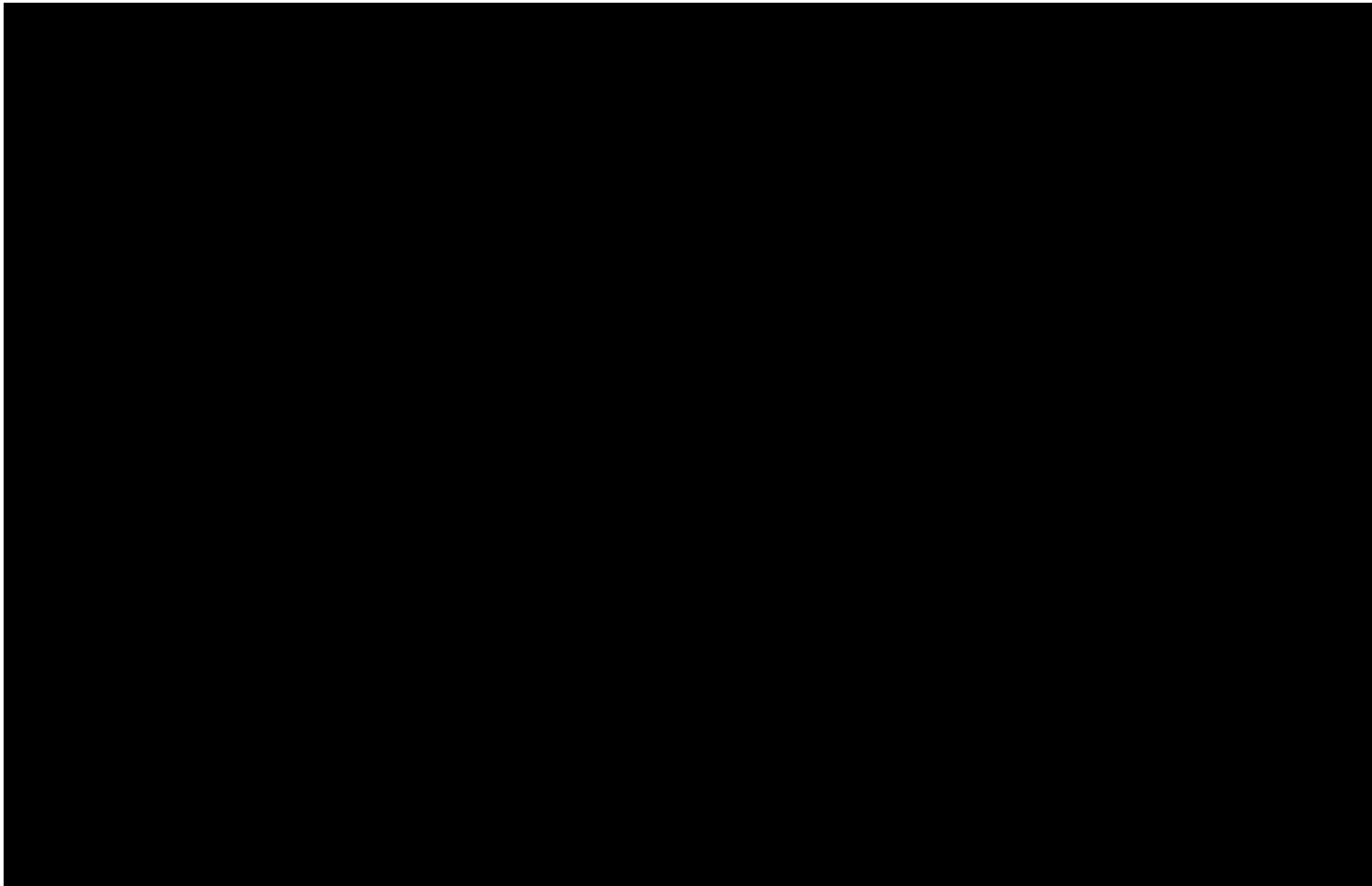


[END HIGHLY CONFIDENTIAL]

Sources and Notes:
Third MDC.

**FIGURE 3: SCATTERPLOT OF CPM VERSUS ADP BY PROVIDER FOR FACILITIES WITH CPM LESS THAN \$0.25
FOR 2021**

[BEGIN HIGHLY CONFIDENTIAL]



[END HIGHLY CONFIDENTIAL]

Sources and Notes:

Third MDC.

IV. Voice Calling Rates Charged by Providers Appear to Have Little Correlation with Reported Costs

A. Illustrative Examples from Four Largest IPCS Providers Showing the Lack of Correlation Between Reported Costs and Rates Charged

19. IPCS rates and costs appear to each be fairly uncorrelated with the usual economic drivers behind costs and rates, such as facility observable attributes like facility size. Costs and rates are also uncorrelated with each other. Our contract analysis revealed instances where there was no direct correlation between ADP and the observed rates. There were large facilities charging higher rates compared to smaller facilities, despite their economics of scale advantage.²⁶
20. Using the contracts database from the Prison Policy Initiative (PPI) website, we began by filtering on contracts that specify voice calling as a covered service. From the PPI data, we have 261 voice calling contracts, of which 107 mention Securus, 78 mention GTL, 29 mention ICSolutions and 10 mention Combined – [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and sufficient contracts in the PPI database – and the remaining 37 from 23 other providers.²⁷ For this analysis, we randomly selected six non-Department of Corrections (DOC) contracts for each of the four providers from the PPI contract database.²⁸ We then matched the contracts to those reported in the Third MDC. If there was no match, or the contract did not fall within the years covered in the third MDC or did not have sufficient information on rates, we randomly picked another contract.²⁹ This process continued until we found six matched contracts for each of the four providers.
21. We find that in general, the costs reported by the providers in the Third MDC are [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] than the rates charged in the

²⁶ See, Table 5, Table 6, Table 7, and Table 8.

²⁷ See, PPI Contracts Library. For the contract review process, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] However, NCIC only had two contracts available in the PPI database, so we excluded NCIC from our analysis. See, PPI Contracts Library.

²⁸ We used a random number generator to pick the contracts at every stage. See, “Google’s random number generator”, last accessed April 27, 2023, <https://www.google.com/search?client=firefox-b-d&q=google+random+number+generator>. After copying and pasting over the entire population of PPI voice contracts into excel, contracts were numbered in alphabetical order by provider. We used this approach to generate a random sample. Given the significant time requirements for analyzing the universe of contracts, for now, using a random sample is a good approach, and in the future, we plan to do a comprehensive analysis of all the contracts. Also, DOC contracts were selected as these contracts typically had very low rates and spanned many facilities, whereas other contracts typically covered fewer facilities.

²⁹ The third MDC includes cost data from 2019-2021.

contracts and show that the companies are able to provide voice services at a much [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. We report detailed results in the Appendix.

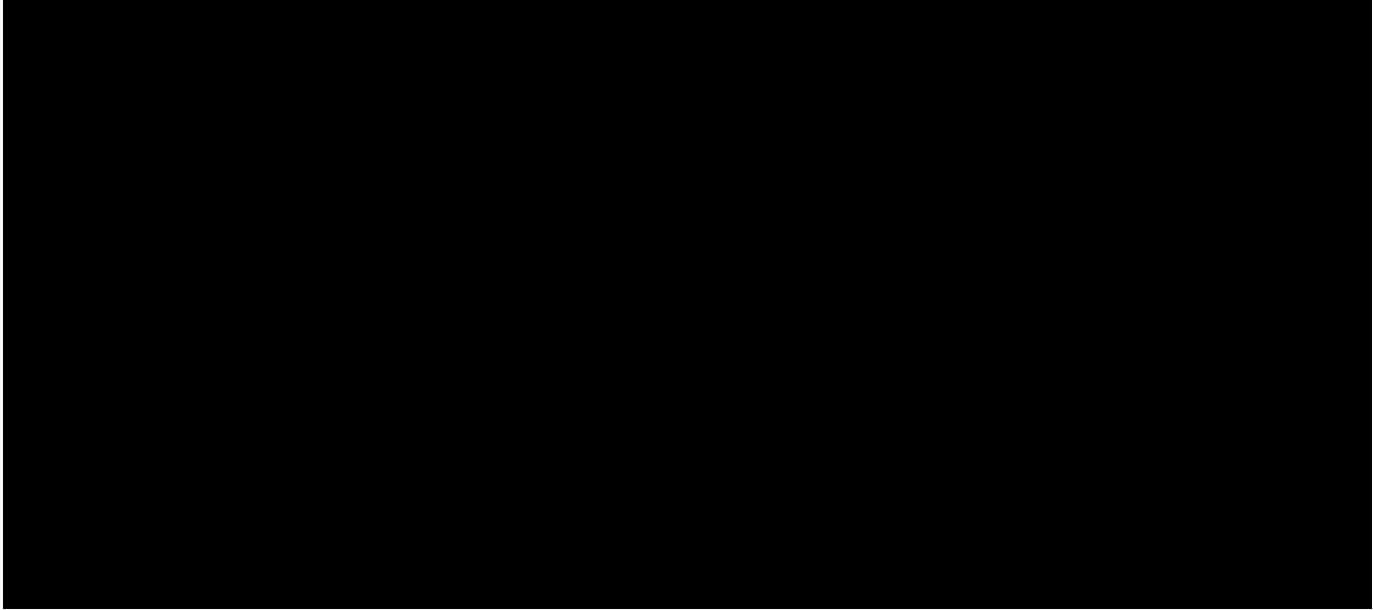
22. We also observe a fair number of instances when reported costs are [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] than the rates charged. This is obviously problematic as firms cannot stay in business charging less than it costs them to provide a service. This may also point towards cross-subsidization amongst facilities and/or a mis-allocation of costs. Below we discuss some selected contracts from Securus, GTL, and Combined where [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] the rates charged based on the facility-level contract.
23. The PPI contracts offer a window into the rates providers are charging facilities.³⁰ For GTL's contract with state Department of Corrections (DOCs), we were able to find public contracts containing voice calling rates California and New Hampshire and match them with the contracts reported in the Third MDC.³¹ From Table 1, we observe that these contracts span multiple facilities with different ADPs, and in both contracts, it reportedly costs [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] to provide services at these facilities than the rates incarcerated individuals and their families pay to make telephone calls.³²

³⁰ See, PPI Contracts Library.

³¹ GTL reports minutes of use and expenses at the contract level so we found the matching contracts for 2021.

³² "Standard Agreement: California Department of Corrections and Rehabilitation," signed by GTL December 28, 2020, at p. 124 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=317&name=CDCR_C5610009_Agreement.pdf ("California DOC and GTL Agreement"). See, Third MDC for the ADP data.

**TABLE 1: SAMPLE OF MATCHED CONTRACTS WHERE REPORTED COSTS ARE GREATER THAN RATES
CHARGED, 2021
[BEGIN HIGHLY CONFIDENTIAL]**



[END HIGHLY CONFIDENTIAL]

Sources and Notes:

MDC data is reported at the facility level, whereas PPI data is reported at the contract level. For contracts with more than one facility, we sum the costs and ADP across all facilities to get total costs and ADP for a single contract. To calculate the percentage of site commissions related to IPCS, we take the average percentage across facilities in a contract.

[1]-[9]: Third MDC. Note, all costs are taken as reported in the Third MDC, this does not guarantee such costs are reported accurately by providers.

[4]: Total billed minutes is the sum of intrastate and interstate billed communications rows in the Third MDC, see tab “D1. Revenue and Demand Data.”

[7]: [5]*[6].

[8]: [3]/[4].

[9]: ([3]+[7]) / [4].

[10]: PPI contracts.

[A][10]: “Standard Agreement: California Department of Corrections and Rehabilitation,” signed by GTL December 28, 2020. See, p. 124 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=317&name=CDCR_C5610009_Agreement.pdf.

[B][10]: “Contract Amendment #1,” signed by GTL June 3, 2021. See, pp. 3-4 of pdf https://www.prisonpolicy.org/contracts/file.php?document_id=377&name=GTL%20-%20Colorado%20DOC.pdf.

[C][10]: Note third MDC values are taken for 2019, as 2020 and 2021 included incomplete site commission data. “IL DOC, State of Illinois Contract: Illinois Department of Innovation and Technology Phone Services for Incarcerated Persons”, signed by Securus June 29, 2019. See, p. 22 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=5&name=ILDOC_Securus%207-1-18%20-%206-30-2021_Redacted.pdf.

[D][10]: “Inmate Telecommunications General Service Agreement,” signed by the Otero County Sheriff’s Office March 25, 2020. See, p. 5 of pdf,

https://www.prisonpolicy.org/contracts/file.php?document_id=371&name=Otero%20CO%20ITS%20Contract%2003262020.pdf.

24. There may be two potential explanations for this divergence between costs and rates. First, this disparity in costs could be a result of how providers chose to allocate costs to various facilities, rather than real underlying cost differences. Second, providers could also be including costs not directly associated with audio calls, such as non-telecom costs associated with peripheral services like video calling, tablet and kiosk services, and other safety and security expenses. The FCC’s mandate is to set a rate that recovers costs of providing IPCS, but not services that go beyond IPCS.

25. For example, in the GTL contract for California, we find evidence of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].³³ In the “Cost Workbook” section GTL estimates the “Annual Cost” of “Telephone Call Rates and Charges” to be around \$5.9 million and minutes of use to be around 237 million.³⁴ In the Third MDC however, for roughly [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] billed minutes, the reported operating costs alone are nearly [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] for the same contract.³⁵ This [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] in costs for similar call volumes may imply mis-allocated or mis-reported costs.

26. There is also significant disparity in [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL], which illustrates that the site commissions have little to do with the actual provision of telecom services. For example, in California, for [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]), the site commission cost is approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].³⁶ In New Hampshire however, for only [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]), GTL pays around [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] in site commissions in 2021.³⁷ The [BEGIN

³³ This inconsistency can be seen when comparing California’s publicly available DOC contract (California DOC and GTL Agreement, at p.123 of pdf) with information reported by GTL in the Third MDC. In the publicly available contract, GTL includes a “Cost Workbook (p. 123), which states that the “Telephone Call Rates and Charges” are equal to an amount of \$5,943,165.07.

³⁴ See, California DOC and GTL Agreement, at pp. 123-124 of pdf. GTL report’s “Anticipated Annual Call Volume (minutes)” to be 237,316,204.

³⁵ See, Third MDC, GTL’s reported tab “D1. Revenue and Demand Data” for the sum of interstate and intrastate communication billed calls, for facilities with contract ID “PCA01075” in 2021, and tab “D. Facility-Specific Information” for the sum of “Total Operating Expenses Excluding Termination of International Communication Expense” for facilities with contract ID “PCA01075” in 2021. In 2021, the total operating expenses for facilities covered by the California DOC-GTL contract are [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

³⁶ See, Table 1, row 7.

³⁷ See, Table 1, row 7.

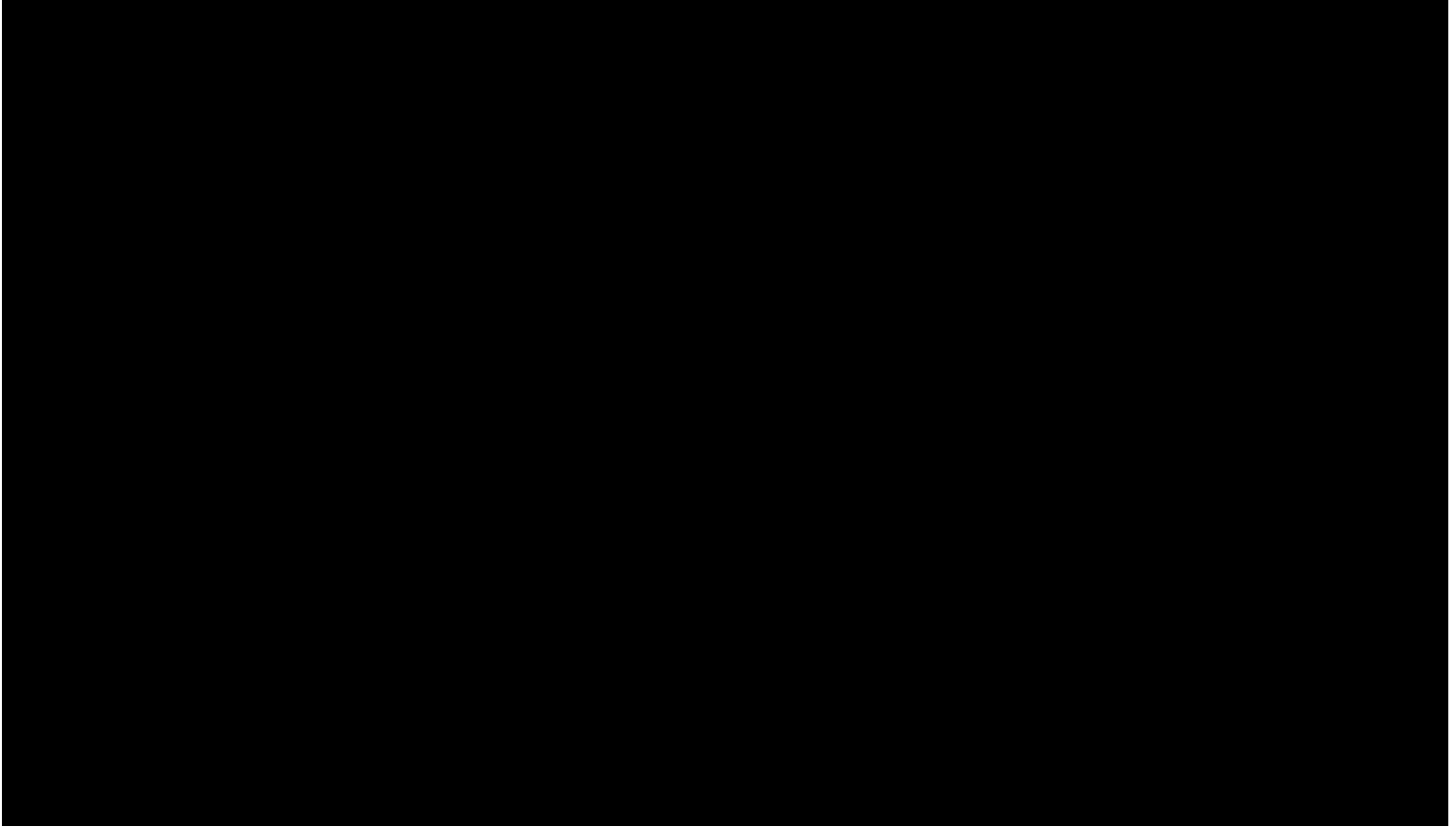
31. To better understand the differences in cost reporting, we can examine the largest five operating cost categories for the three largest providers by ADP.⁴² In Figure 4, we can see the breakdown of operating expenses for Securus, GTL and ICSolutions. Figure 5 shows the same operating expenses as a percentage of the total annual expenses for Securus, ICSolutions and GTL. These figures exclude any reported operating costs associated with site commissions.⁴³
32. The comparison between GTL and Securus is especially noteworthy. In 2021, Securus reports a total ADP in the Third MDC of around [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and GTL reports a total ADP of approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].⁴⁴ When it comes to billed minutes GTL had around, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and Securus had [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. From Figure 4, we observe that for Securus, the reported maintenance, repair and engineering costs are [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] that of GTL. However, with comparable levels of ADP, GTL spends [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].
33. From Figure 4 and Figure 5, we observe the large difference across providers in the percentage of operating and total costs allocated to the “General and Administrative” category. ICSolutions allocates [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of its total costs to this category, while both, GTL and Securus allocate [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of their total expenses to this category. Another notable difference comes in how providers allocate costs for data center, call center, network operations, safety and security services and other overheads – all of which are [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] for ICSolutions and Securus.

⁴² Note that in the Third MDC, tab “C. Company Wide Information” lists company-wide operating and capital expenses.

⁴³ The category “Termination of International Communication” is also excluded from operating expenses calculations. Note, in the tab “C. Company Wide Information”, the row “Total Operating Expenses Excluding Termination of International Communication Expense [row 84 - row 70]” is composed of 16 categories, we exclude [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] it would account for [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].

⁴⁴ Note these values are for 2021. In total, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] reports operating expenses in excess of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL], with more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] going towards the “General and Administrative” category. In contrast, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] has total operating expenses in excess of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] reports total operating expenses in excess of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL], each spending more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] respectively on G&A costs.

FIGURE 4: OPERATING EXPENSES ACROSS THE THREE LARGEST PROVIDERS (FOR 2021)
[BEGIN HIGHLY CONFIDENTIAL]



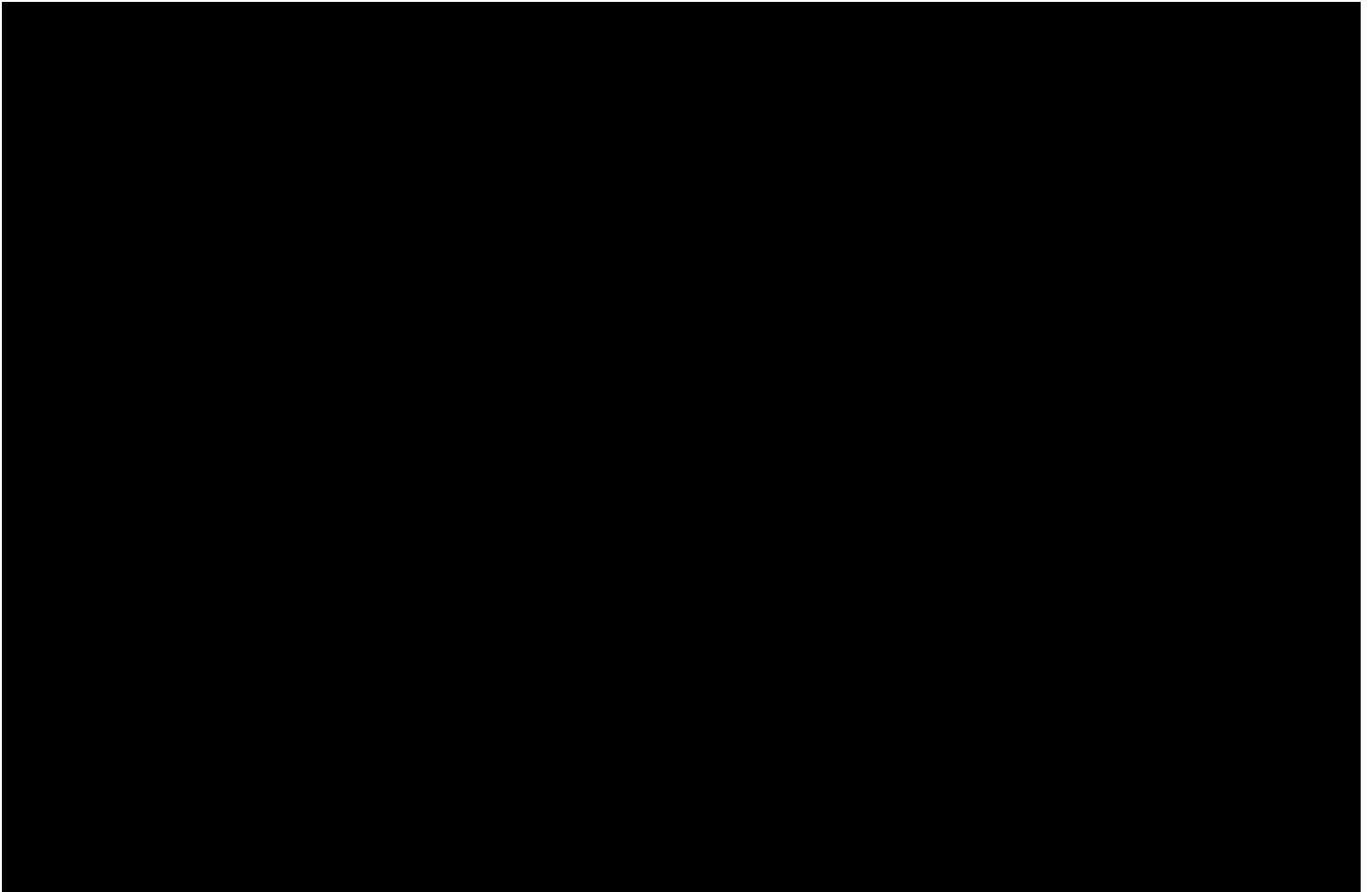
[END HIGHLY CONFIDENTIAL]

Sources and Notes:

See, ICSolutions' Third MDC, GTL's Third MDC, and Securus' Third MDC.

Data from tab "C. Company Wide Information" from the Third MDC submission, reported in the column for 2021 "Inmate Calling Services." Note we calculate operating expenses excluding two categories: "Payment of Site Commissions" and "Termination of International Communication."

FIGURE 5 OPERATING COSTS AS A PERCENTAGE OF TOTAL COSTS ACROSS PROVIDERS (FOR 2021)
[BEGIN HIGHLY CONFIDENTIAL]



[END HIGHLY CONFIDENTIAL]

Sources and Notes:

See, ICSolutions’ Third MDC, GTL’s Third MDC, and Securus’ Third MDC.

Data from tab “C. Company Wide Information” from the Third MDC submission, reported in the column for 2021 “Inmate Calling Services.” Note we calculate operating expenses excluding two categories: “Payment of Site Commissions” and “Termination of International Communication.” When referring to “total costs” we also exclude these two categories.

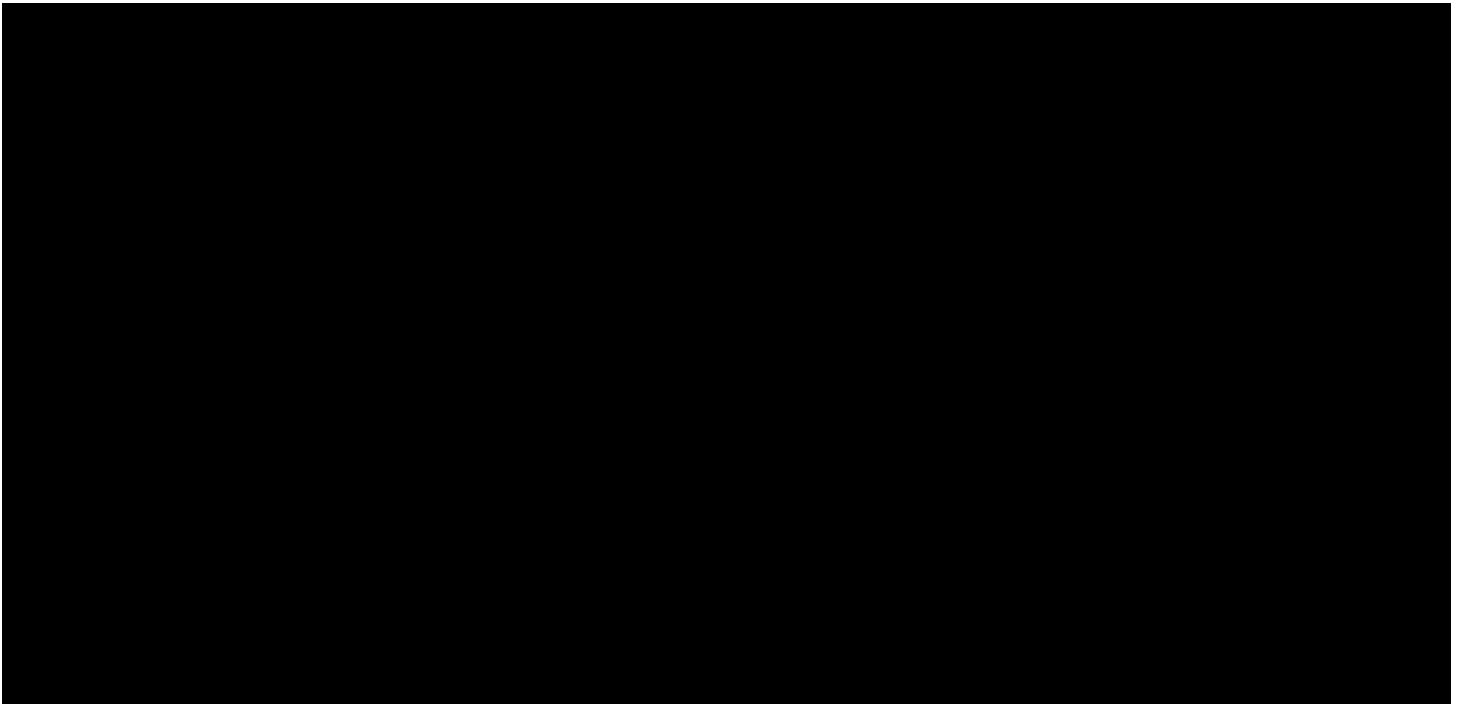
34. A similar story holds true for capital expenses when compared across the largest three providers in the MDC. Figure 6 shows the important capital expenses categories across providers excluding tax adjustments and Figure 7 shows capital expenses as a percentage of total costs as reported across providers.⁴⁵ In Figure 6, we can see that each provider reportedly allocate capital expenses in very different manners. For example, GTL’s ADP is approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] than that of Securus, but its capital expenses are [BEGIN HIGHLY

CONFIDENTIAL] ██████████ [END HIGHLY CONFIDENTIAL], with GTL spending [BEGIN HIGHLY CONFIDENTIAL] ██████████ [END HIGHLY CONFIDENTIAL] while Securus spends [BEGIN HIGHLY CONFIDENTIAL] ██████████ [END HIGHLY CONFIDENTIAL].⁴⁶

35. If we look at the same capital expense categories as a percentage of the total cost, we can see the heterogeneity across the three providers as reported in the Third MDC. We observe that for GTL, depreciation and amortization seem to be [BEGIN HIGHLY CONFIDENTIAL] ██████████ [END HIGHLY CONFIDENTIAL] compared to the other two providers. We also observe that for Securus, [BEGIN HIGHLY CONFIDENTIAL] ██████████ [END HIGHLY CONFIDENTIAL] of their total expenses. This is because Securus, [BEGIN HIGHLY CONFIDENTIAL] ██████████ [END HIGHLY CONFIDENTIAL].

FIGURE 6: CAPITAL EXPENSES FOR THE THREE LARGEST PROVIDERS (FOR 2021)

[BEGIN HIGHLY CONFIDENTIAL]



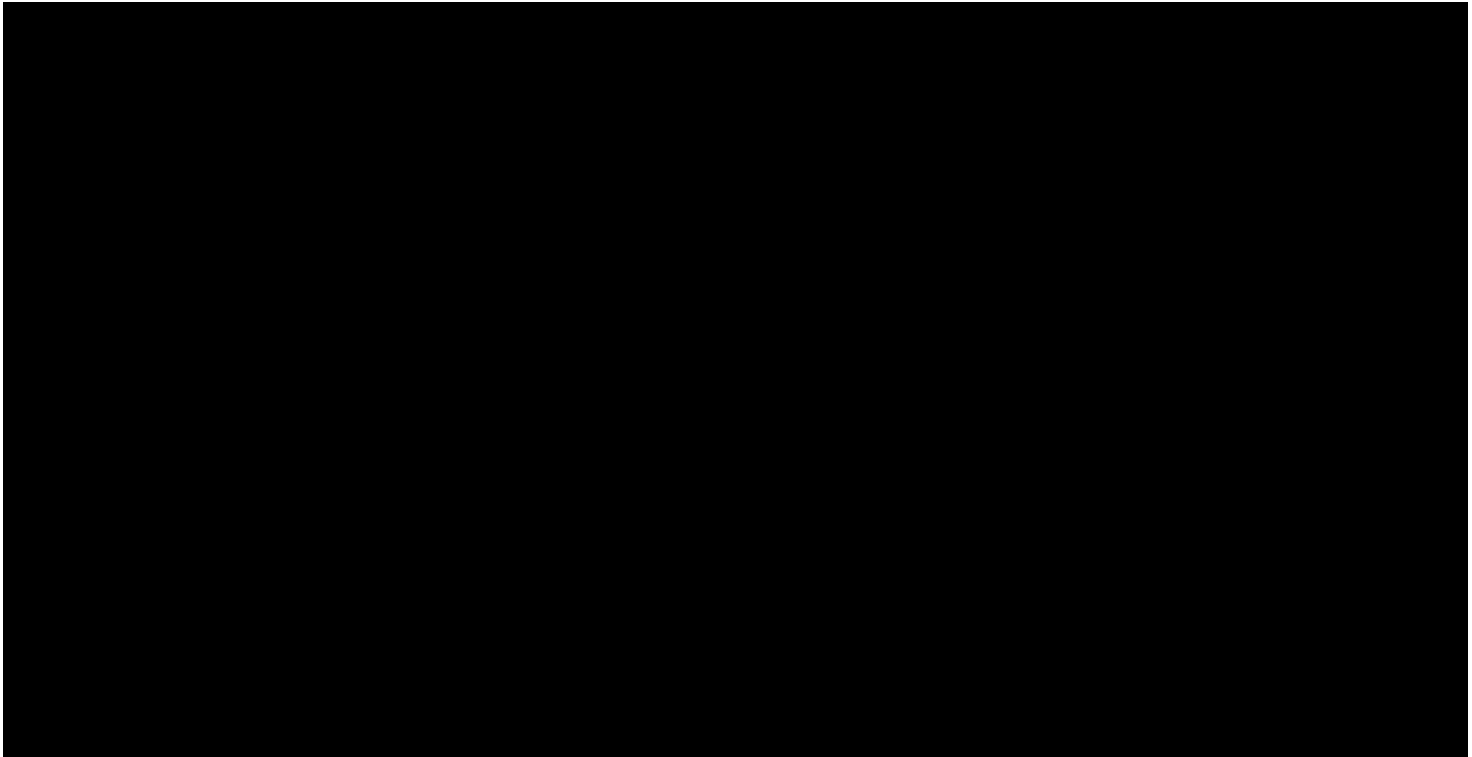
[END HIGHLY CONFIDENTIAL]

Sources and Notes:
See, ICSolutions’ Third MDC, GTL’s Third MDC, and Securus’ Third MDC.
Data from tab “C. Company Wide Information” from the Third MDC submission, reported in the column for 2021 “Inmate Calling Services.”

⁴⁶ See also, ICSolutions’ Third MDC for comparison. [BEGIN HIGHLY CONFIDENTIAL] ██████████ [END HIGHLY CONFIDENTIAL] in capital expenses.

FIGURE 7: CAPITAL COSTS AS A PERCENTAGE OF TOTAL COSTS ACROSS PROVIDERS

[BEGIN HIGHLY CONFIDENTIAL]



[END HIGHLY CONFIDENTIAL]

Sources and Notes:

See, ICSolutions’ Third MDC, GTL’s Third MDC, and Securus’ Third MDC.

Data from tab “C. Company Wide Information” from the Third MDC submission, reported in the column for 2021 “Inmate Calling Services.” Note when referring to total costs we exclude two operating expense categories, “Payment of Site Commissions” and “Termination of International Communication.”

36. Despite the observed inconsistencies, our proposed model carrier approach provides a potential path to using this data. The FCC can choose the lowest or the average percentage of a particular cost as a share of operating or total expenses (after controlling for facility attributes) and use that as the model carrier cost percentage, and then adjust the reported costs of facilities that are higher than this benchmark. If the FCC makes adjustments to various cost categories based on reasonable benchmarks (such as a similar sized facility, for instance), or excludes the cost category if it considers it unrelated to the provision of IPCS, then it can adjust cost components and arrive at a more appropriate CPM. Such an adjustment would limit the amount of various categories that would be allowed. For instance, if Inmate Calling Solution’s General and Administrative Costs, which is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] is decreased by [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] then Inmate Calling Solution’s average CPM will be

reduced by [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL].⁴⁷

V. Safety and Security Costs That May Not Be Necessary for IPCS And Cost Distortions Due to Contract Bidding Can Lead to High Observed Costs

37. Given the significant differences in the reported rates and costs between facilities, we briefly examined some different costs, focusing on those generally unrelated to the provision of IPCS, but included as a part of it in contracts or reported in the Third MDC. Below we focus on two issues that can lead to high observed costs of IPCS - safety and security costs and cost distortions from the contract bidding process.

A. Safety and Security Feature Additions Can Lead to High Costs

38. To get a better sense of the costs that are associated with providing telecommunications services in correctional facilities in the US, we reviewed state level contracts that were publicly available through the Ameelio database.⁴⁸ It is very common, in state level contracts, to have stipulations for security services. However, it is not clear to what extent, if any, some of the safety and security costs are directly related to the provision of voice calls. While state level contracts, for the most part, do not report specific cost estimates, there are certain categories of safety and security costs that are unlikely to be related to the provision of IPCS.⁴⁹ For instance, the Utah contract with Century Link lists the following safety and security features:

⁴⁷ See, ICSolutions' Third MDC, GTL's Third MDC, and Securus' Third MDC at the tab "C. Company-Wide Information." Note: Total Expenses excludes two categories: Termination of International Calling Services and Payment of Site Commissions.

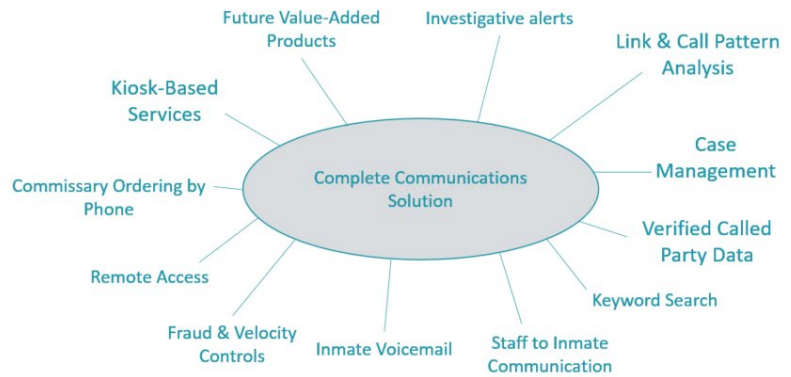
⁴⁸ See, Ameelio, "Technology for a more rehabilitative corrections system," last accessed May 2, 2023, available at <https://www.ameelio.org/>. Ameelio provides an overview of state-level contracts it has, as well as a comparison between the rates charged by Ameelio versus providers for voice calling. Note that Ameelio provides voice calling services for 15 minutes at a rate of \$0.00. See, also, Ameelio, "Competitor comparison," last accessed May 4, 2023, available at <https://www.ameelio.org/child-products/voice-calls>.

⁴⁹ See, Figure 8 for a list of security costs included in the Utah-Century Link contract.

FIGURE 8: SAFETY AND SECURITY FEATURES OUTLINED IN UTAH CONTRACT WITH CENTURY LINK

Security Features

- Full call detail search, filtering, flagging, reporting
- Data Detective link & pattern analysis
- Voice print biometric PIN verification
- Inmate-to-Inmate Call Detection (“ICER”)
- Industry-leading reverse lookup
- Phonetic key word search (optional)
- Continuous voice biometrics (optional)



Sources and Notes:

Century Link, “State of Utah ‘Best Value’ Cooperative Contract, Contract Number: PD2178,” RFP submitted August 11, 2014, at p. 69 of pdf, <https://www.prisonphonejustice.org/media/phonejustice/UT%20Contract%20with%20CenturyLink%202014-2019.pdf>.

39. In Utah, according to the state contract, pre-paid calling rates are around \$0.20 per minute for interstate and intrastate calls.⁵⁰ In addition, in Georgia, in-state calls are around \$0.13 per minute and the Georgia state contract with Securus has provisions for additional technology costs such as costs for “Forensics Lab” and “Guarded Exchange Call Monitoring.”⁵¹ Forensics lab costs include costs for data extraction from contraband cell phones/devices, MAS (Managed Access System) and computer forensics and analytics.⁵² It even includes costs for intake specialists, forensics lab technicians, intelligence analysts, MAS intelligence analysts and the intelligence operations program manager and training costs.

⁵⁰ See, Century Link, “State of Utah “Best Value” Cooperative Contract, Contract Number: PD2178,” RFP submitted August 11, 2014, at p. 17 of pdf, <https://www.prisonphonejustice.org/media/phonejustice/UT%20Contract%20with%20CenturyLink%202014-2019.pdf>, (“Utah-Century Link contract”). Note, “Local” calls cost \$0.00 per minute. “Inmate Collect” calls cost \$0.15 per minute for Intra-Lata and Intra-State calls, and \$0.25 for Inter-State calls. Meanwhile, “Inmate Debit, Pre-Paid Card or Advance Pay” calls cost \$0.15 for Intra-Lata and Intra-State calls, while Inter-State calls are \$0.19.

⁵¹ Long distance out of state calls are \$0.14 per minute, while local and long distance in-state calls (with a mileage of 0-16) are \$0.13 per minute. See, Securus, “Georgia Department of Corrections Inmate Telephone Service Provider: Securus Technologies,” last updated October 26, 2021, <https://gdc.ga.gov/sites/default/files/pdf/Securus.pdf>. See also, Securus, “Second Amendment to Inmate Telephone Services Contract,” signed by Georgia Department of Corrections March 9, 2020, at pp. 4, 6, and 9, https://global-uploads.webflow.com/62b9c090d4224b1a9394c46a/631ac63e73b68d02964327ec_GA%20x%20Securus%20Contract%20Amendment%20%20-%20202016_2020.pdf, (“Securus-Georgia DOC Second Amendment”). Forensics Lab cost are reported as \$68,000 a month, while voice-to-text transcription is \$4,000 a month, and guarded exchange call monitoring is \$0.014 per minute (p. 9).

⁵² See, Securus-Georgia DOC Second Amendment at pp. 4-5. See also, National Institute of Justice, “Managed Access Systems Can Prevent Contraband Cellphone Use,” accessed May 7, 2023, <https://nij.ojp.gov/topics/articles/managed-access-systems-can-prevent-contraband-cellphone-use>, for a definition of managed access systems.

TABLE 2: TABLE INCLUDED IN SECURUS CONTRACT AMENDMENT FOR GEORGIA

ADDITIONAL TECHNOLOGY	ASSOCIATED COST
Guarded Exchange Call Monitoring (1% of Calls/Month)	\$0.014/Minute deducted from monthly Revenue Share payments (eliminated effective with this Third Amendment)
Voice-to-Text Transcription (Up to 500 Calls/Month)	\$4,000.00/Month for English and/or Spanish, plus \$2.50 per recorded minute for all other languages; deducted from monthly Revenue Share payments <i>*Only to be applied if customer elects to utilize this service</i>
Forensics Lab	\$68,000.00/Month deducted from monthly Revenue Share payments

Sources and Notes:

Securus, “Second Amendment to Inmate Telephone Services Contract,” signed by Georgia Department of Corrections March 9, 2020, at p. 9, https://global-uploads.webflow.com/62b9c090d4224b1a9394c46a/631ac63e73b68d02964327ec_GA%20x%20Securus%20Contract%20Amendment%20-%202016_2020.pdf.

40. In the Third MDC Collection, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] acknowledges that it provides Law Enforcement Support Services.⁵³ This includes items such as unlimited reverse number lookup, investigative note attachment, case management, security threat group investigation, call detail reporting, and report building.⁵⁴ These are clear examples of costs unrelated to the provision of IPCS.
41. It is unclear if any safety and security measures are necessary components of providing IPCS, and, if so, the FCC should exclude such costs from the rate for the services. We believe that the only costs that should be recouped from voice calling rates are the fixed costs of setting up the infrastructure for calling, the costs of maintenance and repair, and necessary safety and security costs (if any).⁵⁵

B. The Current Market Structure Lacks Incentives for Lowering Costs and Creates Incentives for Higher Rates

42. Another very important factor that can lead to cost variation amongst similar types of facilities is the bidding, bid evaluation, and contract award process for incarceration facilities. More specifically,

⁵³ See, GTL, “APPENDIX A: Calling Services for Incarcerated People Third Mandatory Data Collection,” March 10, 2023, at p. 19, (“GTL-Appendix A, March 2023”).

⁵⁴ See, GTL-Appendix A, March 2023, at p. 19.

⁵⁵ We understand that some have advocated that only costs related to the fulfilment of CALEA requirement, no other safety and security costs should be included in IPCS rates. See, FCC, “Communications Assistance for Law Enforcement Act,” last accessed May 3, 2023, <https://www.fcc.gov/calea>. See also, Worth Rises, “FCC – 6th NPRM Reply Comments,” March 2, 2023, <https://www.fcc.gov/ecfs/document/10304221918581/1>.

there may be imperfections in the process of awarding telecommunication contracts, which could potentially contribute to the higher voice calling rates observed in certain states.

43. From reviewing publicly available bid evaluation forms, we find that correctional agencies use a scoring system to determine which provider gets the winning contract.⁵⁶ However, there is no universal scoring system – that is, the weighting put on each category is not consistent across facilities. In an ideal world, the highest emphasis would be put on the actual rates that end-users will have to pay for a given contract, as would happen if market forces were at work. However, from reviewing the bid evaluation forms, it is unclear whether that is the case.⁵⁷ More often than not, these bid evaluation forms include site commissions or revenue sharing percentages. If correctional agencies put a larger emphasis on revenue sharing percentages and site commissions in the scoring criteria, then they may not always pick the best possible outcome that maximizes consumer surplus.
44. Table 3 and Table 4 show graphics from bid evaluation documents from Harrison County, Mississippi and Oldham County, Kentucky. In the scoring rubric for Harrison County, we can clearly see that of the 100 total points, 25 points are attributed to “Call Rate Plan and Commission,” meaning evaluation of the rates charged counts for less than one-quarter of the overall evaluation. Similarly, in the second graphic for Oldham County, we can see that one of the categories to decide the winning bidder is “Commission Offer.” For Oldham County, the voice calling rates for end-users are not being taken into consideration when deciding which bidder to contract with. If the ultimate end-user rates are not given sufficient weight in the bid scoring rubric, correctional agencies can contract with providers that do not charge the lowest possible rate. Furthermore, deprioritization of the end-user rates in the contract awarding process can lead to a lack of incentives for providers to be cost efficient. We suggest that regulators establish a uniform scoring rubric that assigns appropriate weight to final rates.
45. With the current system in place, from a provider’s point of view, providing lower rates for voice calling services is unfortunately not always the optimal strategy for winning the contract. If a provider places a high value on commissions, they may be able to win contracts for audio and video services even if their infrastructure is more expensive than their competitors. This is because they can offer higher site commissions to decision makers who have the power to award contracts. As a result, the decision makers may prioritize the financial benefits they will receive from a provider rather than the

⁵⁶ See, e.g., “Harrison County Mississippi Selection Committee Scores Tabulation Sheet,” dated July 27, 2017, last accessed April 28, 2023, https://www.prisonpolicy.org/contracts/file.php?document_id=202&name=Harrison%20County%20Mississippi%20-%20bid%20scoring.pdf, (“Harrison County, Selection Committee Scores Tabulation Sheet”).

⁵⁷ See, Harrison County, Selection Committee Scores Tabulation Sheet. For example, Harrison County Mississippi’s evaluation criteria uses several categories including “call rate plan and commission” which can earn providers 25 points out of 100 available points. However, Dawson County’s evaluation sheet includes categories like “Company Experience & Staff Backgrounds.” In addition, their evaluation criteria, “Price Proposal” refers to commission rates and annual signing bonuses rather than telephone rates. See, Dawson County, “Inmate Telephone Systems for DCSO #249-15 RFP,” April 24, 2015, last accessed April 28, 2023, https://www.prisonpolicy.org/contracts/file.php?document_id=201&name=Dawson%20County%20Georgia%20-%20RFP%20response%20presentation.pdf.

cost and quality of the infrastructure they offer. This can result in the provider getting away with charging higher rates for their services, even if there are other providers who offer better infrastructure at a lower cost.

TABLE 3: SAMPLE BID SCORING RUBRIC

Technical Specifications – Hardware, technical, and system requirements	
Section II: Inmate Telephone System.	30 points
Company Background and References – History, market share, and experience of the company providing the required system and services, and experience/qualifications of employees assigned to the project	
Call Rate Plan and Commission	25 points
Installation - Implementation plan	10 points
Maintenance and Support - Availability and quality of on-going support and maintenance procedures and personnel. Training. Support plan, trouble ticket flow and escalation procedures	10 points

Sources and Notes:

“Harrison County Mississippi Selection Committee Scores Tabulation Sheet”, dated July 27, 2017, last accessed April 28, 2023, at p. 2,
https://www.prisonpolicy.org/contracts/file.php?document_id=202&name=Harrison%20County%20Mississippi%20-%20bid%20scoring.pdf.

TABLE 4: SAMPLE BID EVALUATION TABLE

Contractor	Combined Public Communications	ICSolutions	NCIC Inmate Communications	Securus Technologies	Telmate, LLC
Ky SOS Standing	good	good	good	good	good
Federal Exclusion	no	no	no	no	no
Insurance/Workers Comp	provided	provided	provided	provided	provided
Proposal Received	✓	✓	✓	✓	✓
Commission Offer	50%	up to 76%	60%	\$0.21 - \$0.31	16% - 32%

Source:

Oldham County Kentucky, “Bid Tabulation – Inmate Telephone System,” August 15, 2017, last accessed April 28, 2023, https://www.prisonpolicy.org/contracts/file.php?document_id=206&name=Oldham%20County%20Kentucky%20-%20bid%20tabulation.pdf.

46. Once a contract is signed, correctional facilities are locked into the contract for a pre-determined number of years. Once the terms of the contract are set in stone, the provider essentially has monopoly power since they do not have to worry about adjusting costs in order to stay competitive. This means that at any given time, the end-users are not necessarily benefiting from the lowest possible cost of the service — the suboptimal outcome.

VI. Conclusion

47. On January 5, 2023, President Biden signed the Martha Wright-Reed Act, and granted the FCC authority to require IPCS rates that are just and reasonable. The Act also allowed the Commission to use industry-wide average costs, as well as the average costs of service of other non-IPCS service providers in setting those just and reasonable rates. In this report, we discuss the notion of an appropriate industry-wide average cost, discuss the broad principles of setting rates under this new mandate and show why these alternatives are preferable to using the costs as currently reported by the IPCS providers in response to the Third Mandatory Data Collection.
48. Given the FCC’s new authority and flexibility to look to average industry costs to set a rate methodology that takes into account information from the broader communications industry, we propose using a model carrier approach to implement the average industry cost mandate. To implement this approach, the FCC can specify the costs that an IPCS carrier should have or would have if they operated under competitive pressures. This can be implemented based on industry average costs, using a combination of non-IPCS telecom industry costs and IPCS provider costs to calculate those averages.
49. We discuss the use of reported costs from the Third MDC, the inconsistencies found in data, and suggest that the FCC should carefully consider all cost elements reported by the providers, analyze the outliers, and understand the drivers of the costs, when using them to set rates. We find that the IPCS industry reported cost sources (Third MDC or publicly available contracts) contain a mix of costs that are required to provide IPCS and other costs that go beyond this requirement. We also find potential inconsistencies in the reported cost data, and compare the reported costs to publicly available rates charged to inmates in various facilities. In many cases, excess costs at the provider level can be corrected in the Third MDC by scaling individual cost elements to appropriate benchmarks. Based on our findings, we believe that the FCC should be clear about what costs are allowed (or “used and useful”), what magnitudes should be reasonable, and only those cost elements and magnitudes that are just and reasonable should be incorporated in the model carrier construct.

Appendix

A. Illustrative Examples Showing Costs and Rates Appear to be Uncorrelated

- Using the random selection process, we selected six GTL facilities contracts that include voice rates that spanned the years covered in the data reported in the Third MDC (2019-2021). Table 5 shows six publicly available contracts GTL has with jails in five different states. The facilities covered by these contracts have names and addresses that match the data reported by GTL in the Third MDC. The facilities included in Table 5 range in size and location: there are two smaller facilities in New York (with ADP ranging from [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] to [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]), one larger facility in Michigan (ADP of [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]), one facility from Colorado that is similar in size to the Michigan facility (ADP of [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]), two facilities in Tennessee (combined ADP of [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]) and [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] facilities in Texas with a combined ADP of [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]. Unlike other providers that submitted their cost data in the Third MDC at the facility level, GTL reported their data at the contract level, with the exception of total billed minutes. Thus, several facilities are covered under a single contract ID in the data reported in the Third MDC. To arrive at the “Number of Facilities Covered” count, we uniquely identify the number of facilities GTL lists in the Third MDC that are covered by the same contract ID.
- In Table 5, we observe that the maximum cost reported (excluding site commissions) is [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] per minute, and the lowest is [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] per minute. All six randomly selected contracts show that GTL’s reported costs allow them to earn a profit [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]. In Larimer County, GTL is able to make a profit of \$0.01 per minute. In contrast, GTL’s contract with Jefferson County Detention center in Texas charges \$0.16 per minute to make voice calls (at a reported CPM of [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]), while Delaware County Jail in New York charges \$0.20 per minute for all calls in the United States (at a reported CPM of [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]). The examples from our sample show that the reported rates in publicly available contracts [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL].
- To provide further support of this point, we can compare the cases of Delaware County Jail in New York and Genessee County Jail in Michigan. In this case, it becomes evident that there is little correlation between the costs a facility incurs and the rates they charge to incarcerated individuals and their loved ones. Delaware County Jail in New York has an ADP of [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY

CONFIDENTIAL] and Genessee County Jail in Michigan has an ADP of [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]. Despite the [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] in ADP, Delaware County Jail in New York is able to provide voice calling services for \$0.20 per minute while Genessee does so at \$0.21 per minute⁵⁸. To provide voice communication services, we calculate that Delaware costs are [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] while we calculate Genessee’s costs to be [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] per minute. In the case of these two contracts, it is not obvious that [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] leads to facilities offering IPCS at lower rates, in fact, it shows that incarcerated individuals at Genessee pay \$0.01 more than individuals in Delaware County Jail in New York.

TABLE 5: GTL COSTS REPORTED IN THE THIRD MDC AND NON-DOC CONTRACT RATE COMPARISON, 2021 PROFIT

[BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

Sources and Notes:

MDC data is reported at the facility level, whereas PPI data is reported at the contract level. For contracts with more than one facility, we sum the costs and ADP across all facilities to get total costs and ADP for a single contract. To calculate the percentage of site commissions related to IPCS, we take the average percentage across facilities in a contract.

[1]-[9]: Third MDC. Note, all costs are taken as reported in the Third MDC, this does not guarantee such costs are reported accurately by providers.

[4]: Total Billed minutes is reported at the facility level. Total billed minutes is the sum of intrastate and interstate billed communications rows in the Third MDC, see tab “D1. Revenue and Demand Data.

⁵⁸ See, “Amendment to Inmate Telephone Service Agreement”, signed by GTL November 18, 2020, see p. 8 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=61&name=Delaware_County_NY.pdf. See also, “Second Amendment to Master Service Agreement (dated August 17, 2018)”, signed by GTL January 21, 2022, at p. 2 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=480&name=Genessee%20County%20GTL%20Amendment%20%232%20signed.pdf.

[7]: [5]*[6]

[8]: [3]/[4].

[9]: ([3]+[7]) / [4].

[E][1]-[9]: Montgomery data from Third MDC complete for 2020 and 2019, not 2021, therefore 2020 values from Third MDC were used.

[A][10]: “Amendment to Inmate Telephone Service Agreement,” signed by GTL April 16, 2020. See, p.8 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=61&name=Delaware_County_NY.pdf

[B][10]: “Second Amendment to Master Service Agreement (dated August 17, 2018),” signed by GTL January 21, 2022. See, p. 2 of pdf,

https://www.prisonpolicy.org/contracts/file.php?document_id=480&name=Genesee%20County%20GTL%20Amendment%20%232%20signed.pdf.

[C][10]: “Amendment #06 to Inmate Telephone Service Agreement,” signed by GTL October 19, 2021. See, p. 1 of pdf,

https://www.prisonpolicy.org/contracts/file.php?document_id=13&name=Amendment%20No.%206%20-%20Global%20TelLink%20Corporation.pdf.

[D][10]: Larimer County, “Colorado Professional Services Agreement,” signed by Board of County Commissioners of Larimer County February 3, 2021. See, p. 29 of pdf,

https://www.prisonpolicy.org/contracts/file.php?document_id=379&name=GTL%20-%20Larimer%20County%20Colorado.pdf.

[E][10]: “Master Services Agreement,” signed by GTL December 12, 2017. See, p. 16 of pdf,

https://www.prisonpolicy.org/contracts/file.php?document_id=500&name=Montgomery%20County%20Sheriff%20-%20Global%20Tel%20Link%20video%20visit%20contract.pdf.

[F][10]: “Inmate Telephone Service Agreement,” signed by GTL January 31, 2020. See, p. 11 of pdf,

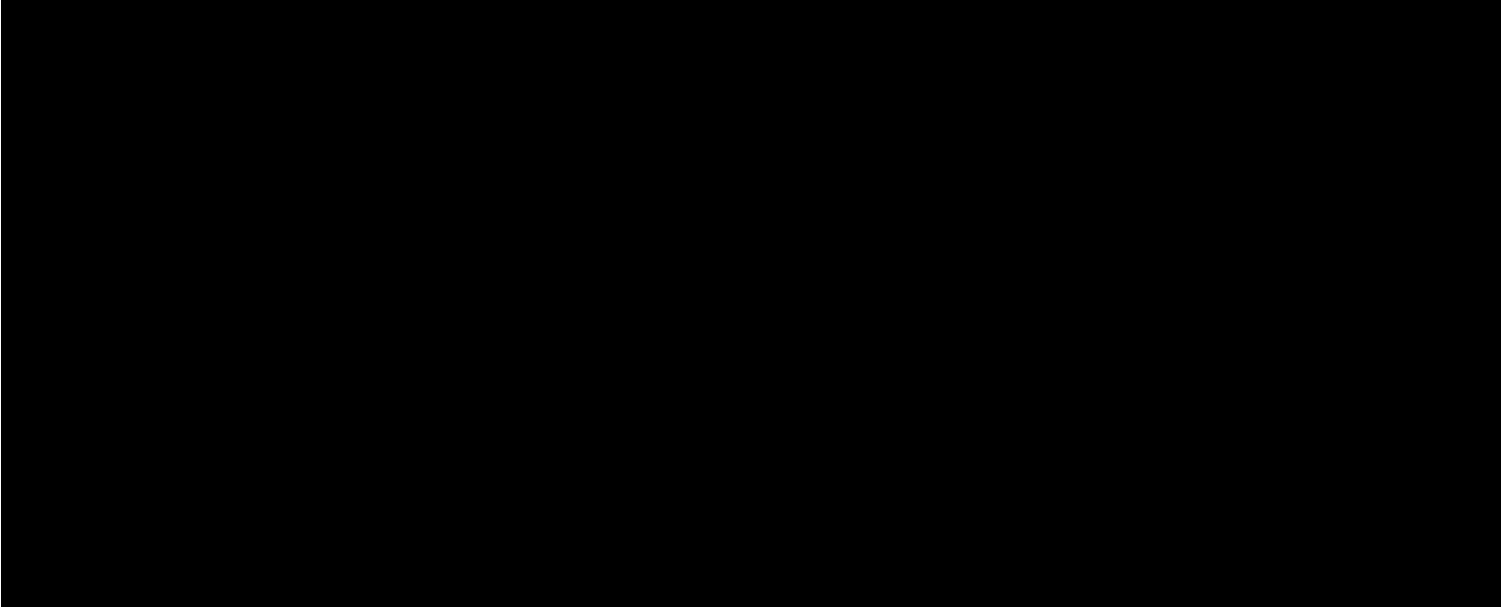
https://www.prisonpolicy.org/contracts/file.php?document_id=92&name=Oswego_County_NY.pdf.

4. When repeating the same process for [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL], we observe a [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. As Table 6 shows, overwhelmingly, the costs Securix reports in the Third MDC show that the company is able to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. Across the six contracts, the total cost per minute ranges from [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] to a maximum of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. At Sanilac County Jail in Michigan, Securix reports their total expenses to be [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] for 2021, with total billed intra and inter-state minute calling equaling [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. This means it costs Securix [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] per minute to provide voice services, while the rate they charge to place a voice call is \$0.21.⁵⁹ Although Sanilac County provides services to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL], and has the [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] ADP covered by a contract in our sample ([BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END

⁵⁹ See, Sanilac County Jail and Securix, “Securix Technologies Sanilac County Master Services Agreement,” signed by the Sanilac County Sheriff’s Office August 21, 2018, at p. 12 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=550&name=Sanilac%20County%20Telecomms%20FOIA%20Response%20Letter%20%26%20Documents%20%28dragged%29.pdf.

HIGHLY CONFIDENTIAL] incarcerated individuals), its reported costs are [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. For instance, Denver County Jail has a total ADP of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] individuals across two facilities [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL],⁶⁰ yet its cost per minute is a reported [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] per minute. This is roughly [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] than what it costs to provide services at Sanilac County. Despite the [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] between Sanilac and Denver, their reported cost per minute [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. Yet, incarcerated individuals and their families will only have to pay \$0.086 per minute to place a voice call at Denver County, which is less than a half of what it costs in Sanilac.

TABLE 6: SECURUS: COST REPORTED IN THE THIRD MDC AND DOC CONTRACT RATE COMPARISON, 2021
[BEGIN HIGHLY CONFIDENTIAL]



[END HIGHLY CONFIDENTIAL]

Sources and Notes:

MDC data is reported at the facility level, whereas PPI data is reported at the contract level. For contracts with more than one facility, we sum the costs and ADP across all facilities to get total costs and ADP for a single contract. To calculate the percentage of site commissions related to IPCS, we take the average percentage across facilities in a contract.

[1]-[9]: Third MDC. Note, all costs are taken as reported in the Third MDC, this does not guarantee such costs are reported accurately by providers.

[4]: Total billed minutes is the sum of intrastate and interstate billed communications rows in the Third MDC, see tab “D1. Revenue and Demand Data.”

⁶⁰ See, Third MDC, contract ID I-302597 for year 2021.

[7]: [5]*[6].

[8]: [3]/[4].

[9]: ([3]+[7]) / [4].

[A][10]: “Securus Technologies Berkshire County Updated Scope and Budget,” Effective as of August 1, 2021. *See*, https://www.prisonpolicy.org/contracts/file.php?document_id=320&name=berkshire_amendment_14cents_august2021.pdf.

[B][10]: “Securus Technologies Bristol County Contract (Exhibit A),” signed by the Bristol County Sheriff’s Office July 28, 2020. *See*, p. 2 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=321&name=bristol_securus_contract.pdf.

[C][10]: “Second Amendatory Agreement,” signed by the city and county of Denver November 27, 2018. *See*, p. 4 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=399&name=Denver%20City%20_%20County%20Jail%2C%20CO_16012_16011_2nd%20Amendment_Redacted.pdf.

[D][10]: “Commonwealth of Massachusetts ~ Standard Contract Form,” signed by the Essex County Sheriff’s Department August 2, 2019. *See*, p. 7 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=326&name=essex_contract_sep2019_to_mar2023.pdf.

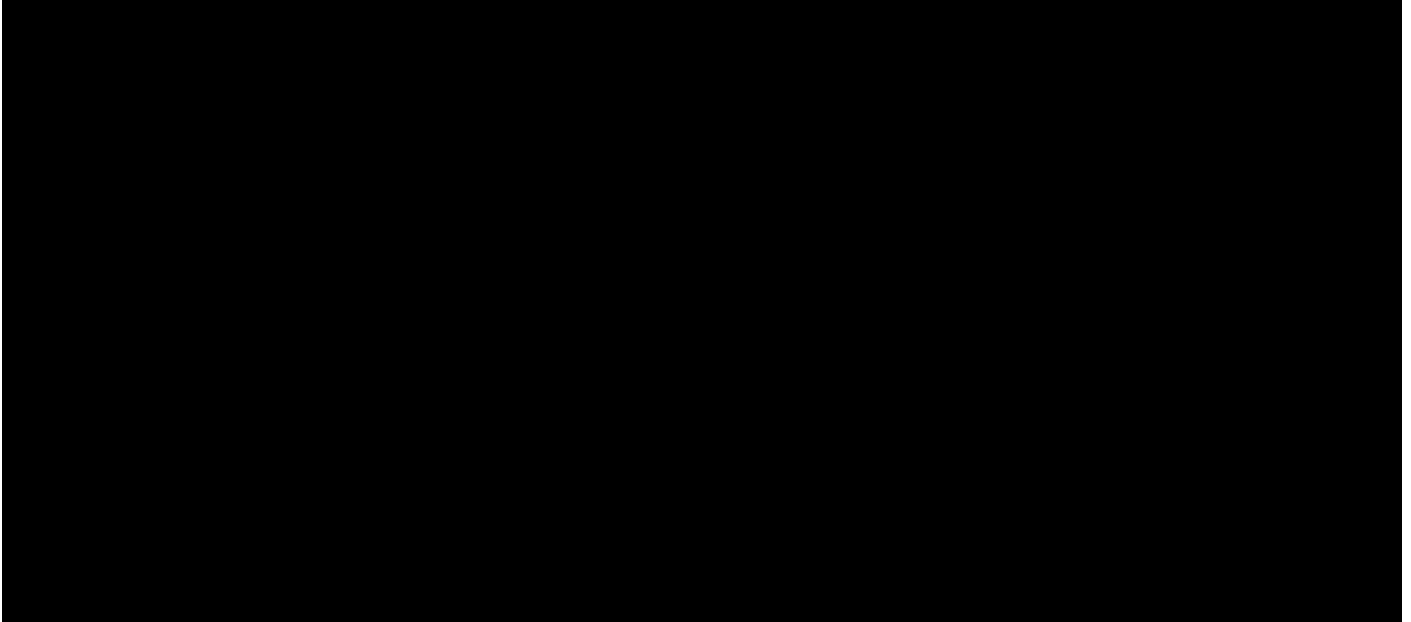
[E][10]: “County of San Diego – Department of Purchasing and Contracting – Contract No. 542145 Amendment No. 9,” signed by the County of San Diego Department of Purchasing & Contracting January 29, 2018. *See*, p. 2 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=457&name=CONTRACT_542145_Amendment_09.pdf.

[F][10]: “Securus Technologies Sanilac County Master Services Agreement,” signed by the Sanilac County Sheriff’s Office August 21, 2018. *See*, p. 12 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=550&name=Sanilac%20County%20Telecom%20FOIA%20Response%20Letter%20%26%20Documents%20%28dragged%29.pdf.

5. Compared to the Securus contracts, the sample of ICSolutions contracts we selected shown in Table 7 include facilities [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. Like the Securus contracts, however, the ICSolutions contracts include [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. In all contracts, the cost for ICSolutions to provide voice services per ranges from [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. All facilities, with the exception of Tehama County Jail in California, charge greater than \$0.15 per minute to place a voice call. There is also a clear variation in rates even in facilities of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. Calhoun in Texas reports an ADP of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and charges \$0.21 per minute, while Dunn County jail in Wisconsin with a reported ADP of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] charges \$0.16 per minute for voice calling, and Ionia County jail in Michigan charges anywhere from \$0.21 to as much as \$0.30 to make call in the United States.⁶¹

⁶¹ *See*, Third MDC. *See also*, Table 7.

**TABLE 7: ICSOLUTIONS COST REPORTED IN THE THIRD MDC AND NON-DOC CONTRACT RATE
COMPARISON, 2021
[BEGIN HIGHLY CONFIDENTIAL]**



[END HIGHLY CONFIDENTIAL]

Sources and Notes:

MDC data is reported at the facility level, whereas PPI data is reported at the contract level. For contracts with more than one facility, we sum the costs and ADP across all facilities to get total costs and ADP for a single contract. To calculate the percentage of site commissions related to IPCS, we take the average percentage across facilities in a contract.

To calculate total reported expenses for ICSolutions, we used an allocator that was calculated using the company-wide total expenses and the inmate calling services total expenses for the year 2021 from the “C. Company-Wide Information” tab. We noticed the ICSolutions applied a 90% allocator to specific line items in operating expenses but their allocation process for capital expenses was unclear and hard to follow.

[1]-[9]: Third MDC. Note, all costs are taken as reported in the Third MDC, this does not guarantee such costs are reported accurately by providers.

[4]: Total billed minutes is the sum of intrastate and interstate billed communications rows in the Third MDC, see tab “D1. Revenue and Demand Data.”

[7]: [5]*[6].

[8]: [3]/[4].

[9]: ([3]+[7]) / [4].

[A][10]: “Renewal Option for the Agreement for Inmate Telephone Services, Resident Banking Software, Commissary Services & Fiduciary Management Services,” signed by ICSolutions, February 2, 2021. See, p. 5 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=299&name=Calhoun_ICS.pdf.

[B][10]: “Inmate Telephone Services Agreement,” signed by ICSolutions, August 8, 2020. See, p. 12 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=264&name=Dunn%20county%20FOIA%20-2021-Jun-16.pdf.

[C][10]: “Inmate Telephone Services Agreement,” signed by ICSolutions, July 19, 2017. See, p. 9 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=168&name=Ionia%20County.pdf.

[D][10]: “Inmate Telephone Services Agreement,” signed by ICSolutions, March 30, 2017. See, p. 10 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=387&name=Mesa%20County%2C%20CO_2017%20Contract.pdf.

[D][1]-[9]: Mesa County data in Third MDC unavailable in 2021, values for 2020 taken.

[E][10]: “Amendment 2 To the Agreement Between The County of Tehama and ICSolutions,” signed by ICSolutions, June 23, 2022. See, p. 1 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=475&name=IC%20Solutions%20Amendmen%202%20-%20compensation%20FINAL%202022-201.pdf

[F][10]: “Inmate Telephone Services Agreement,” signed by ICSolutions, August 14, 2020. See, p. 9 https://www.prisonpolicy.org/contracts/file.php?document_id=539&name=Montcalm%20County%2C%20MI%20-%20Contract%202020.pdf.

- The final provider included in the contract sample is Combined (see Table 8). Of all the randomly selected contracts, Combined reports some of the [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. In four of the six facilities included in Table 8, Combined reports that it costs the company more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] per minute to provide services.⁶² Each of these four facilities have ADP less than

⁶² See, Table 8. At Hillsdale County Jail (Michigan), reported CPM is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] at Logan County Detention Centre (Colorado), reported CPM is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL], at Kit Carson County Jail (Colorado) CPM is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL], and charge voice calling rates of \$0.20 per minute.⁶³ In the remaining two facilities, CPM is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and the rate for voice calling is \$0.20 per minute and \$0.19 per minute. Perplexingly, the contract with the largest ADP, Saginaw County Jail in Michigan, which provides services to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] incarcerated individuals on average, charges the same reported rates in our sample as the smaller facilities. Phoning an individual at Saginaw County jail will cost an individual \$0.19 per minute, while the reported CPM for Combined to provide this service is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].⁶⁴ Meanwhile, facilities with much higher reported costs and smaller ADPs are able to charge lower per minute rates. Like the Securus, GTL, and ICSolutions contracts we have examined, Combined provides no clear, observable relationship between ADP, the rates providers are charging incarcerated persons and their loved ones to make voice calls, and the CPM reported in the Third MDC.

TABLE 8: COMBINED: COST REPORTED IN THE THIRD MDC AND NON-DOC CONTRACT RATE COMPARISON, 2021

[BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

Sources and Notes:

MDC data is reported at the facility level, whereas PPI data is reported at the contract level. For contracts with more than one facility, we sum the costs and ADP across all facilities to get total costs and ADP for a single contract. To calculate the percentage of site commissions related to IPCS, we take the average percentage across facilities in a contract.

CONFIDENTIAL], and at Otero County Jail (Colorado) CPM is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

⁶³ See, Table 8. At Newaygo County Jail (Michigan) reported CPM is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and at Saginaw County Jail (Michigan) reported CPM is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].

⁶⁴ Combined, “Inmate Telecommunications General Service Agreement,” signed by the Saginaw County Sheriff’s Office July 31, 2019, at p.5 of pdf, https://www.prisonpolicy.org/contracts/file.php?document_id=494&name=Saginaw%20County%20FOIA%203418.pdf.

[1]-[9]: Third MDC. Note, all costs are taken as reported in the Third MDC, this does not guarantee such costs are reported accurately by providers.

[4]: Total billed minutes is the sum of intrastate and interstate billed communications rows in the Third MDC, see tab “D1. Revenue and Demand Data.”

[7]: [5]*[6]

[8]: [3]/[4]

[9]: ([3]+[7]) / [4]

[A][10]: “Inmate Telecommunications General Service Agreement,” signed by the Hillsdale County Sheriff’s Office, July 11, 2018. *See*, p. 5 of pdf,

https://www.prisonpolicy.org/contracts/file.php?document_id=547&name=Hillsdale%20MI%20contract%2007112018.pdf.

[B][10]: “Inmate Telecommunications General Service Agreement,” signed by the Kit Carson Sheriff’s Office, July 15, 2019. *See*, p. 5 of pdf,

https://www.prisonpolicy.org/contracts/file.php?document_id=369&name=Kit%20Carson%20ITS%20renewal%2007152019.pdf.

[C][10]: “Inmate Telecommunications General Service Agreement,” signed by the Logan County Sheriff’s Office, December 30, 2019. *See*, p. 5 of pdf,

https://www.prisonpolicy.org/contracts/file.php?document_id=370&name=Logan%20CO%20ITS%20Contract%2012302019.pdf.

[D][10]: “Inmate Telecommunications General Service Agreement,” signed by the Newaygo County Sheriff’s Office, July 6, 2022. *See*, p. 4 of pdf,

https://www.prisonpolicy.org/contracts/file.php?document_id=545&name=Newaygo%20FOIA%20%2322-287%20%28Inmate%20telephone%20agreement%29%20response%20%28dragged%29.pdf.

[E][10]: “Inmate Telecommunications General Service Agreement,” signed by the Saginaw County Sheriff’s Office, July 31, 2019. *See*, p. 5 of pdf,

https://www.prisonpolicy.org/contracts/file.php?document_id=494&name=Saginaw%20County%20FOIA%203418.pdf.

[F][10]: “Inmate Telecommunications General Service Agreement,” signed by the Otero County Sheriff’s Office, March 25, 2020. *See*, p. 5 of pdf,

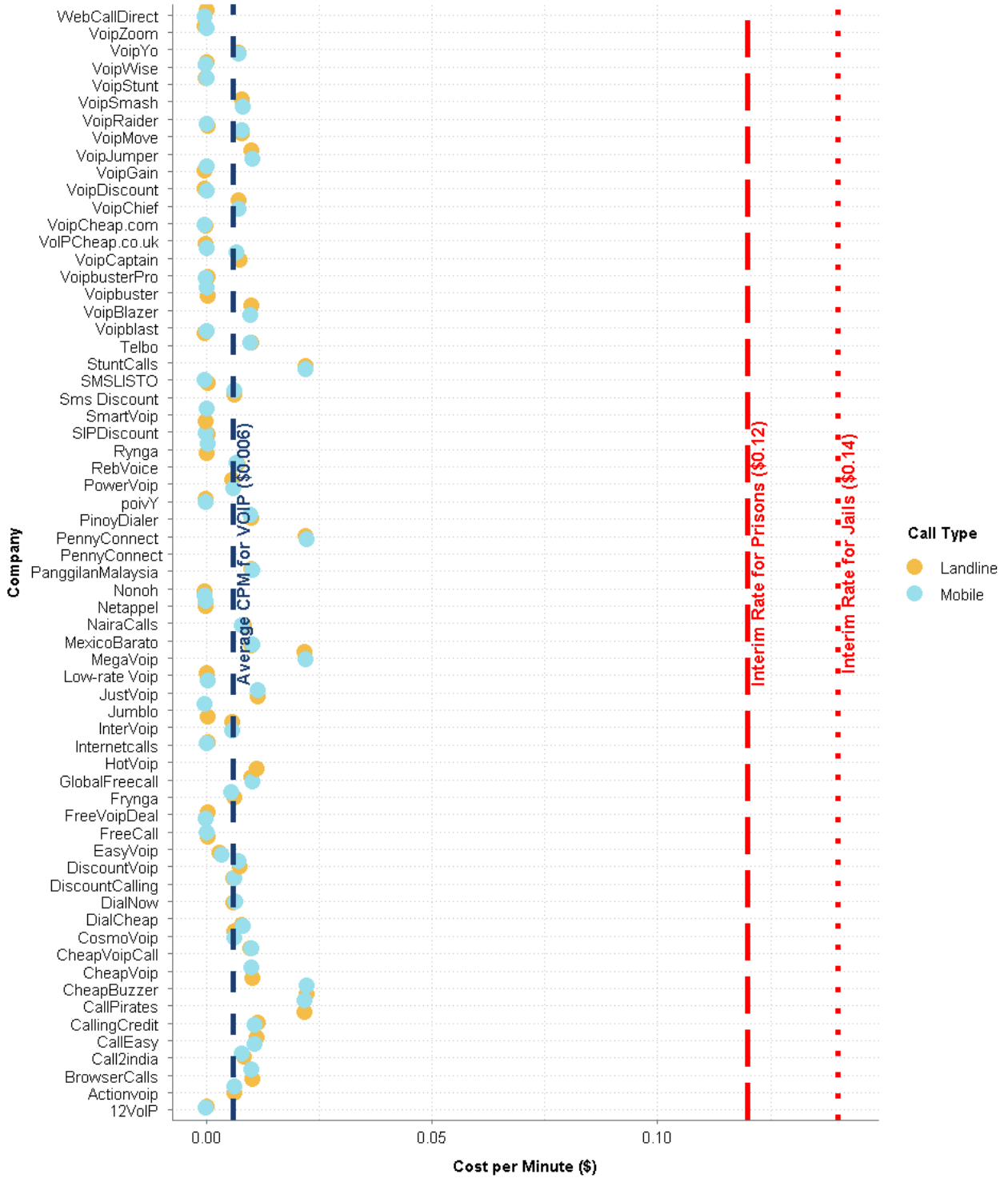
https://www.prisonpolicy.org/contracts/file.php?document_id=371&name=Otero%20CO%20ITS%20Contract%2003262020.pdf.

[B][1]-[9]: Total expenses for Kit Carson Co. Jail increased 2571% between 2020 and 2021 while maintaining the same ADP. We believe costs may have been reported incorrectly for 2021 therefore, we use data from 2020.

In the excel sheet with company-wide costs, Combined allocates a certain percentage of total costs to inmate calling services. However, it is unclear what percentage is allocated for each line item. Hence, we backed out an allocator using the total expenses for company-wide and inmate calling services and applied it to all line items.

B. VoIP Rates

FIGURE 9: VOIP RATES



Sources: "Voip Rates," last accessed May 4, 2023, <https://voiprates.info/>.