Court File No. CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

VANESSA FAREAU and RANSOME CAPAY

Plaintiffs

and

BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

Proceeding under the *Class Proceedings Act, 1992*

MOTION RECORD
(Certification)

January 6, 2021

SOTOS LLP
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Court File No. CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

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Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF MOTION
(Certification)

The Plaintiffs will make a motion to the Honourable Justice Paul Perell on a date to be fixed at 10:00 a.m., or as soon after that time as the motion can be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

PROPOSED METHOD OF HEARING: The motion is to be heard

[ ] in writing under subrule 37.12.1(1) because it is (insert one of on consent, unopposed or made without notice);

[ ] in writing as an opposed motion under subrule 37.12.1(4);

[X] orally.

THE MOTION IS FOR

1. an order:

(a) certifying the action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended (the "*CPA*");

(b) defining the "Class" and "Class Members" as follows, with all defined terms having the same meanings as those in the Fresh as Amended Statement of Claim ("Claim"):[1]

> All persons in Canada who made a Collect Call or accepted and/or paid for a Collect Call from a person in custody or otherwise in an Ontario correctional Facility through the Offender Telephone Management System between June 1, 2013 and the certification of this lawsuit as a class action or such other time as the Court deems appropriate.

(c) appointing Vanessa Fareau and Ransome Capay as representative plaintiffs of the Class;

(d) stating the common issues to be the following:

Breach of the Ontario* Consumer Protection Act *and Equivalent Consumer Protection Legislation

(1) Does the Consumer Protection Legislation apply to the claims of the plaintiffs and Class Members?

(2) Did the defendant Bell Canada ("Bell") make, approve and/or authorize any false, misleading or deceptive representations ("Representations") within the meaning of the Consumer Protection Legislation?

(3) If the answer to common issue 2 is Yes, what are the Representations?

(4) If the answer to common issues 2-3 is Yes, are Class Members entitled to rescission or the recovery of damages and other monetary remedies, or both?

(5) Are the Class Members entitled, to the extent necessary, to a waiver of any notice requirements under the Consumer Protection Legislation?

[1] Unless otherwise specified, all terms in this Notice of Motion have the same meaning as those defined in the Claim.

Unconscionable Rates

(6) Did Bell enter into a contract with the Class Members for each Collect Call through the OTMS?

(7) If the answer to common issue 6 is Yes, were these contracts one-sided contracts of adhesion?

(8) If the answer to common issues 6-7 is Yes, did these contracts impose improvident rates and other amounts on the Class?

(9) If the answer to common issues 6-8 is Yes, were these contracts unconscionable and therefore invalid?

***Breach of the* Telecommunications Act**

(10) Did the defendants or either of them fail to disclose information regarding the rates and other amounts charged to Class Members for Collect Calls through the OTMS as directed by the CRTC, contrary to section 24 of the *Telecommunications Act*?

(11) Did the defendant Her Majesty the Queen in right of Ontario ("Crown") fail to require that Bell comply with the *Telecommunications Act*?

(12) Did Class Members suffer loss and damage as a result of the defendants' conduct contrary to the *Telecommunications Act*?

Unlawful Taxes

(13) Were the Commissions collected by the Crown on the OTMS Collect Calls an indirect tax outside the legislative authority of the Crown under s. 92(2) of the *Constitution Act, 1867*?

(14) Alternatively, were the Commissions collected by the Crown on the OTMS Collect Calls unlawful on the ground that they were imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the *Constitution Act, 1867*?

(15) If the answer to common issue 13 or 14 is Yes, should the Crown not be allowed to retain the Commissions?

Breach of Fiduciary Duty

(16) Did the Crown owe the plaintiffs and/or Class Members who were Prisoners in Ontario Facilities a fiduciary duty?

(17) If the Crown owed a fiduciary duty, did the Crown breach that duty by allowing Bell to charge the rates and other amounts on Collect Calls through the OTMS?

Remedy and Damages

(18) Are the defendants or either of them liable for damages to the Class for breach of Consumer Protection Legislation, the imposition of

unconscionable terms, breach of the *Telecommunications Act*, unlawful taxation, and/or breach of fiduciary duty?

(19) Is this an appropriate case for the defendants to disgorge profits?

(20) Are the defendants liable for punitive, exemplary, or aggravated damages?

(21) Can the court assess damages in the aggregate, in whole or in part, for the Class? If so, what is the amount of the aggregate damage assessment(s) and who should pay it to the Class?

(22) Should the defendants, or either of them, pay the costs of administering and distributing any amounts awarded under ss. 24 and 25 of the *CPA*? If so, who should pay what costs, in what amount and to whom?

(23) Should the defendants, or any of them, pay prejudgment and post-judgment interest? If so, at what annual interest rate? Should the interest be simple or compound?

(e) that notice of certification be given to the Class pursuant to the Litigation Plan attached to the affidavit of Nadine Blum affirmed December 21, 2020;

(f) specifying that:

(i) a Class Member may opt out of this proceeding by sending a written election to class counsel, by email or regular mail, before a date fixed by the court;

(ii) no person may opt out of this proceeding after the fixed date; and

(iii) by a fixed date, the court-appointed administrator shall report to the court the names of the persons who have opted out of this class proceeding.

(g) requiring the defendants to forthwith pay the costs of the notice program;

(h) requiring the defendants to identify the size of the Class, and the names and last known addresses, including email addresses, of all Class Members;

2. costs of this motion in an amount that provides full indemnity or on a substantial indemnity basis, plus any applicable taxes; and

3. such further and other relief and directions as counsel may request and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE

1. The court should certify this action as a class proceeding because the s. 5(1) criteria of the *CPA* are met;
2. The pleadings disclose rights of action against the defendants;
3. There is an identifiable Class that will be represented by the proposed representative plaintiffs;
4. The Class is objectively defined, membership being rationally bound by those who made, received and/or paid for Collect Calls through the OTMS during the Class Period;
5. The claims made in this action raise common questions of law and fact and arise out of the same series of events;
6. A class proceeding would be the preferable procedure for resolving the common issues, and would constitute the fairest, most efficient and manageable means of adjudicating the common issues;
7. The proposed representative plaintiffs:
    (a) will fairly and adequately represent the interests of the Class;
    (b) have a Litigation Plan that sets out a workable method for the advancement of the proceeding on behalf of the Class and against the defendants, including notifying Class Members; and
    (c) do not have an interest in conflict, on the common issues, with the interests of other Class Members;

8. The notice program for the certification of this action is a reasonable method of notifying members of the Class;

9. It is fair, just, and reasonable that the defendants should pay the costs of the notice program for the certification of this action and the costs associated with collecting the opt outs and reporting to the court;

10. The *CPA*;

11. The *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194, as amended, including Rules 1, 2, 6, 12, 20, 26, 37 and 57; and

12. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. the pleadings herein;

2. the Affidavit of Vanessa Fareau, sworn December 17, 2020;

3. the Affidavit of Ransome Capay, sworn December 15, 2020;

4. the Affidavit of Douglas Dawson, sworn January 5, 2021;

5. the Affidavit of Nadine Blum, affirmed December 21, 2020;

6. such further and other evidence as counsel may advise and this Honourable Court permits.

January 6, 2021

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Lawyers for the Defendant Her Majesty the Queen in right of Ontario

VANESSA FAREAU et al.
Plaintiffs

-and-

BELL CANADA et al.
Defendants

Court File No. CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

NOTICE OF MOTION
(Certification)

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Plaintiffs

- and -

BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF VANESSA FAREAU

I, Vanessa Fareau, of the City of Gatineau, Province of Quebec, **MAKE OATH AND SAY:**

1. I am one of the proposed representative plaintiffs in this action. I have direct knowledge of the matters to which I depose in this affidavit. Where the information in this affidavit is not based on my direct knowledge but is based upon information and belief from other sources, I have stated the source of that information and I believe that information to be true.

BACKGROUND

2. I am a resident of Gatineau, Quebec. I have three children aged 4, 8 and 20. My eldest daughter who would now be 23 passed away in 2016.

3. I was incarcerated at Ottawa-Carleton Detention Centre ("**OCDC**") around the fall and winter of 2015. I was not held at the OCDC as a result of a conviction, but rather, I was held because I was denied bail for approximately two months. During this time, I was pregnant with

my youngest child. While I was incarcerated, my children were living around 20 kilometres away in Gatineau.

4. While I was incarcerated at OCDC, my only option for making a phone call was through the Offender Telephone Management System **("OTMS")**. Also, when I received calls from other inmates when I was out of prison, the calls always had to go through the OTMS.

5. Due to restrictions imposed within the OTMS, I had to arrange for my home phone in Gatineau to forward calls to a friend's cellphone so I could deal with childcare and my needs.

6. While incarcerated at OCDC, I faced significant challenges maintaining contact with my family and support network in and around Gatineau due to the cost of phone calls in the OTMS. While I do not have access to my phone bills from 2015, I recall the cost of the phone calls was approximately $1 a minute for Collect Calls to landlines which were limited to 20 minutes. I recall that I regularly spent $20 per day on phone calls to my family.

7. Throughout my incarceration, I experienced significant financial and emotional hardship in making phone calls to my loved ones because of the amounts charged by the Defendants. It was necessary for me to remain in contact with my family and support network to ensure my own wellbeing while pregnant, as well as the wellbeing of my children. In particular, at the beginning of my incarceration when I was trying to arrange childcare and bail, I had to make a lot of phone calls.

8. I struggled to make arrangements to pay my own phone bills so that I could remain connected to my children.

9. In addition, I have also received Collect Calls from my nephew who has been held in OCDC since the Fall of 2019, and a friend who has been incarcerated in Toronto South Detention Centre since around the beginning of 2018.

MY PHONE BILLS

10. Since 2015, my monthly home phone package from Videotron was approximately $250-$300 for my home phone, internet and two cellphone lines. I also had a long-distance plan with Videotron at no additional cost within Canada. Not including collect call charges, my residential phone bill was usually in the range of $250 - $300.

11. Since 2018 when I was receiving collect calls from my nephew in OCDC and my friend in Toronto South Detention Centre, my total phone bills were often in the range of $1,400 to $1,700 a month, or more. I had many bills over $1500 and one bill over $2000. A summary of my total phone bill for each month from February 2018 to present is marked as **Exhibit "A"** to my affidavit. My bills have recently decreased because I stopped accepting collect calls. Some examples of my total monthly bills include:

a. $1,749.88 in February 2018;

b. $1,842.36 in August 2018;

c. $2,176.14 in October 2019; and,

d. $1,966.45 in November 2019.

12. Some of these totals may reflect amounts from previous months' bills which I was unable to pay off. While I tried most of the time to pay the majority of my phone bill, I do recall a few times for big bills when I was unable to pay a few hundred dollars of the bill.

13. I have included below examples of some of the monthly collect call charges I have been able to locate in my bills:

a. $916.06 in February 2018;

Marked as **Exhibit "B"** and attached is a copy of my February 2, 2018 bill

b. $267.83 in August 2018; and,

Marked as **Exhibit "C"** and attached is a copy of my August 3, 2018 bill

c. $693.06 in October 2019.

Marked as **Exhibit "D"** and attached is a copy of my October 4, 2019 bill

14. These bills include some Collect Calls from prisons not in Ontario. These calls are identified in the above bills as “Stannplans, PQ”.

15. As a result of being held in the OCDC in 2015 and receiving collect calls from my nephew in the OCDC and my friend in Toronto South, I have paid thousands of dollars for collect calls from 2015 onwards to maintain familial and other connections.

16. These phone bills became a source of stress, anxiety and financial difficulty for myself and my family. In addition to the cost each month, I experienced additional stress and anxiety because I had no choice over phone costs or billing, and the cost each month was unknown until I received the bill.

17. When receiving collect calls an automated recorded message would play that identified who was calling. The automated message did not say how much the call would call. The automated message was generally the same for every single collect call.

MY WILLINGNESS TO BE A REPRESENTATIVE PLAINTIFF

18. I am willing to represent others who were incarcerated at Ontario correctional facilities and made Collect Calls, as well as others who received Collect Calls from individuals incarcerated at Ontario correctional facilities. I do not believe I have a conflict with the other potential members of the lawsuit.

19. I have retained Goldblatt Partners LLP and Sotos LLP to bring this lawsuit and I am relying on my lawyers to complete this class action. I do not have any form of legal training.

20. I understand there is a litigation plan that my lawyers have written. I do not have any legal training and I am relying on my lawyers to write the litigation plan.

21. I would not be able to bring this case on my own and I believe it would be hard for others who are currently or formerly incarcerated, or who have received calls from individuals who were incarcerated in Ontario correctional facilities to bring it as well.

22. I swear this affidavit in support of a motion for certification of this action as a class proceeding and for no other or improper purpose.

SWORN BEFORE ME before me remotely by Vanessa Fareau stated as being located in the City of Gatineau, in the Province of Québec, on December 17, 2020, in accordance with O. Reg. 431/20 Administering Oath or Declaration Remotely.

A Commissioner for taking Affidavits *(or as may be)*

VANESSA FAREAU

This is Exhibit **"A"** to the
Affidavit of Vanessa Fareau sworn
before me this 17 day of December, 2020.

A Commissioner, etc.

Videotron 2:01 PM

videotron.com

Residential | Business Logout

Discover Shop Support Your services

OCTOBER 30, 2020	$308.25	Invoice
OCTOBER 2, 2020	$-61.21	Invoice
SEPTEMBER 4, 2020	$267.95	Invoice
JULY 31, 2020	$337.69	Invoice
JULY 3, 2020	$365.59	Invoice
MAY 29, 2020	$98.89	Invoice
MAY 1, 2020	$574.11	Invoice
APRIL 3, 2020	$1,052.18	Invoice
FEBRUARY 28, 2020	$1,099.81	Invoice
JANUARY 31, 2020	$963.08	Invoice
JANUARY 3, 2020	$345.06	Invoice

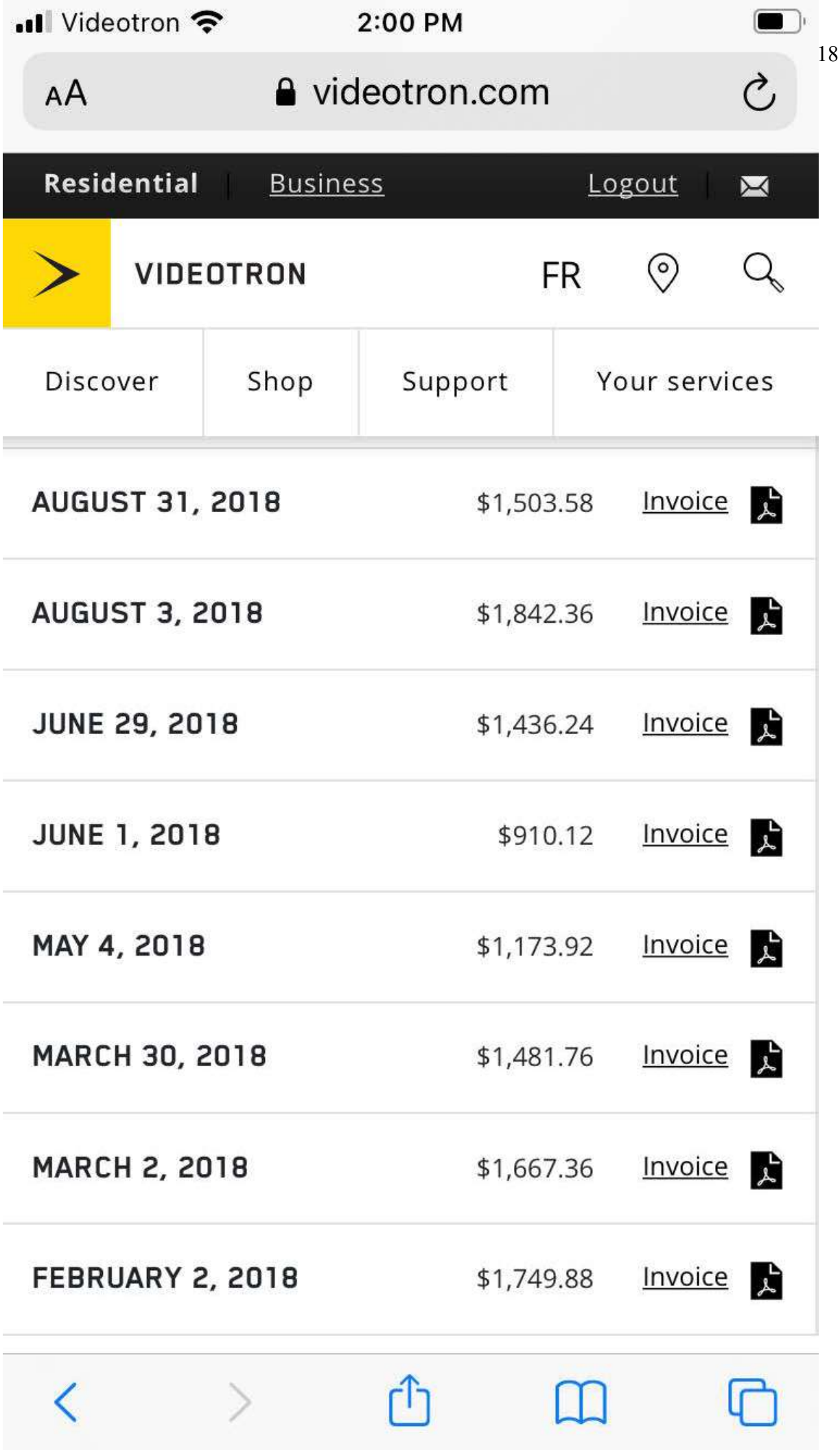
Videotron 2:00 PM

videotron.com

Residential | Business Logout

Discover Shop Support Your services

NOVEMBER 29, 2019	$1,216.71	Invoice
NOVEMBER 1, 2019	$1,966.45	Invoice
OCTOBER 4, 2019	$2,176.14	Invoice
AUGUST 30, 2019	$1,122.46	Invoice
AUGUST 2, 2019	$567.87	Invoice
JUNE 28, 2019	$542.25	Invoice
MAY 31, 2019	$565.03	Invoice
MAY 3, 2019	$570.78	Invoice
MARCH 29, 2019	$850.03	Invoice
MARCH 1, 2019	$485.73	Invoice
FEBRUARY 1, 2019	$691.25	Invoice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Residential
Business
Logout
VIDEOTRON
FR
Discover
Shop
Support
Your services
AUGUST 31, 2018
$1,503.58
Invoice
AUGUST 3, 2018
$1,842.36
Invoice
JUNE 29, 2018
$1,436.24
Invoice
JUNE 1, 2018
$910.12
Invoice
MAY 4, 2018
$1,173.92
Invoice
MARCH 30, 2018
$1,481.76
Invoice
MARCH 2, 2018
$1,667.36
Invoice
FEBRUARY 2, 2018
$1,749.88
Invoice

This is Exhibit **"B"** to the
Affidavit of Vanessa Fareau sworn
before me this 17 day of December, 2020.

A Commissioner, etc.

VIDÉOTRON
Une compagnie de Quebecor Media

Account No. 64877256-001-3

Billing date FEB 02, 2018

Invoice period From	To	Description				Amount
		PAY-PER-USE SERVICES (continued) Communications - Phone (continued)				
Date	**Time**	**Called number**	**Called location**	**Code**	**Duration HH:MM**	
JAN 13 2018	13:04	4384036590	MONTREAL,PQ	1	00:09	0.00
JAN 13 2018	14:24	4384036590	MONTREAL,PQ	1	00:01	0.00
JAN 14 2018	16:10	4384036590	MONTREAL,PQ	1	00:08	0.00
JAN 14 2018	16:19	4384036590	MONTREAL,PQ	1	00:01	0.00
JAN 14 2018	16:20	4384036590	MONTREAL,PQ	1	00:03	0.00
JAN 14 2018	16:34	4384036590	MONTREAL,PQ	1	00:01	0.00
JAN 14 2018	17:27	4384036590	MONTREAL,PQ	1	00:01	0.00
JAN 14 2018	17:28	4384036590	MONTREAL,PQ	1	00:01	0.00
JAN 15 2018	09:03	4384036590	MONTREAL,PQ	1	00:01	0.00
JAN 16 2018	15:14	4384036590	MONTREAL,PQ	1	00:21	0.00
JAN 17 2018	16:19	4384036590	MONTREAL,PQ	1	00:05	0.00
JAN 17 2018	20:34	4384036590	MONTREAL,PQ	1	00:01	0.00
JAN 18 2018	09:10	4384036590	MONTREAL,PQ	1	00:01	0.00
JAN 18 2018	15:26	4384036590	MONTREAL,PQ	1	00:03	0.00
JAN 18 2018	16:05	4384036590	MONTREAL,PQ	1	00:20	0.00
JAN 19 2018	20:17	4384036590	MONTREAL,PQ	1	00:01	0.00
JAN 21 2018	14:09	4384036590	MONTREAL,PQ	1	00:08	0.00
		Subtotal :			**07:41**	**0.00**
		Canada unlimited L.D. plan				
Date	**Time**	**Called number**	**Called location**	**Code**	**Duration HH:MM**	
DEC 23 2017	12:50	5144514909	MONTREAL,PQ	1	00:01	0.00
		Subtotal :			**00:01**	**0.00**
		Total long distance services :			**07:42**	**0.00**
		Other telecommunicators fees Bell Canada				
Date	**Time**	**Called location**	**Called number**		**Duration HH:MM**	
16 NOV 2017	15:44	Fr STANNPLANS,PQ	4504788687		00:32	9.68
16 NOV 2017	16:16	Fr STANNPLANS,PQ	4504788687		00:05	2.12
16 NOV 2017	21:12	Fr STANNPLANS,PQ	4504788555		00:32	9.68
17 NOV 2017	17:08	Fr STANNPLANS,PQ	4504788555		00:09	3.24
17 NOV 2017	17:36	Fr TORONTO,ON	4162537689		00:09	12.18
17 NOV 2017	19:35	Fr STANNPLANS,PQ	4504781520		00:09	3.24
19 NOV 2017	20:59	Fr STANNPLANS,PQ	4504781520		00:15	4.92
19 NOV 2017	21:15	Fr STANNPLANS,PQ	4504781520		00:03	1.56
19 NOV 2017	21:18	Fr STANNPLANS,PQ	4504788555		00:29	8.84
20 NOV 2017	20:56	Fr STANNPLANS,PQ	4504781520		00:12	4.08
21 NOV 2017	10:06	Fr TORONTO,ON	4162537689		00:11	14.60
22 NOV 2017	15:18	Fr TORONTO,ON	4162596293		00:11	14.60
22 NOV 2017	20:44	Fr TORONTO,ON	4162596293		00:06	7.64
23 NOV 2017	13:09	Fr TORONTO,ON	4162537689		00:03	4.92
23 NOV 2017	13:12	Fr TORONTO,ON	4162537689		00:05	7.34
23 NOV 2017	13:40	Fr TORONTO,ON	4162537689		00:19	24.28
23 NOV 2017	20:57	Fr STANNPLANS,PQ	4504781520		00:16	5.20
24 NOV 2017	11:02	Fr TORONTO,ON	4162537689		00:22	27.91
24 NOV 2017	11:59	Fr TORONTO,ON	4162537689		00:22	27.91
24 NOV 2017	15:55	Fr TORONTO,ON	4162596377		00:03	4.92
26 NOV 2017	12:31	Fr TORONTO,ON	4162537689		00:22	24.10
26 NOV 2017	12:55	Fr TORONTO,ON	4162537689		00:07	8.67
26 NOV 2017	20:10	Fr STANNPLANS,PQ	4504788555		00:10	3.52
26 NOV 2017	20:20	Fr STANNPLANS,PQ	4504788555		00:05	2.12

VIDÉOTRON
Une compagnie de Quebecor Media

6 of 69

VIDÉOTRON
Une compagnie de Quebecor Media

Account No. 64877256-001-3

Billing date FEB 02, 2018

Invoice period From	To	Description			Amount
		PAY-PER-USE SERVICES (continued) Communications - Phone (continued)			
Date	**Time**	**Called location**	**Called number**	**Duration HH:MM**	
28 NOV 2017	17:40	Fr TORONTO,ON	4162537689	00:22	27.91
29 NOV 2017	15:09	Fr TORONTO,ON	4162537689	00:21	26.70
30 NOV 2017	19:01	Fr TORONTO,ON	4162596377	00:21	23.07
30 NOV 2017	20:18	Fr STANNPLANS,PQ	4504785055	00:13	4.36
01 DEC 2017	10:50	Fr TORONTO,ON	4162537689	00:19	24.28
02 DEC 2017	20:39	Fr TORONTO,ON	4162531820	00:09	10.73
03 DEC 2017	21:23	Fr STANNPLANS,PQ	4504788687	00:26	8.00
07 DEC 2017	16:59	Fr STANNPLANS,PQ	4504788687	00:05	2.12
07 DEC 2017	20:29	Fr STANNPLANS,PQ	4504781520	00:32	9.68
08 DEC 2017	21:36	Fr STANNPLANS,PQ	4504788687	00:10	3.52
09 DEC 2017	15:22	Fr STANNPLANS,PQ	4504785055	00:03	1.56
09 DEC 2017	21:17	Fr STANNPLANS,PQ	4504788555	00:16	5.20
10 DEC 2017	17:07	Fr STANNPLANS,PQ	4504788687	00:32	9.68
11 DEC 2017	11:40	Fr TORONTO,ON	4162537689	00:08	10.97
11 DEC 2017	15:36	Fr STANNPLANS,PQ	4504788555	00:14	4.64
14 DEC 2017	14:23	Fr STANNPLANS,PQ	4504788687	00:08	2.96
14 DEC 2017	21:33	Fr STANNPLANS,PQ	4504781520	00:06	2.40
16 DEC 2017	17:24	Fr STANNPLANS,PQ	4504785055	00:04	1.84
18 DEC 2017	15:15	Fr TORONTO,ON	4162537689	00:08	10.97
18 DEC 2017	20:55	Fr STANNPLANS,PQ	4504788687	00:10	3.52
20 DEC 2017	19:58	Fr STANNPLANS,PQ	4504788687	00:31	9.40
21 DEC 2017	10:24	Fr TORONTO,ON	4162537689	00:02	3.71
21 DEC 2017	14:39	Fr STANNPLANS,PQ	4504788687	00:11	3.80
21 DEC 2017	14:50	Fr STANNPLANS,PQ	4504788687	00:06	2.40
21 DEC 2017	19:58	Fr TORONTO,ON	4162537689	00:05	6.61
22 DEC 2017	20:59	Fr STANNPLANS,PQ	4504785055	00:07	2.68
23 DEC 2017	16:50	Fr TORONTO,ON	4162537689	00:16	17.93
23 DEC 2017	17:05	Fr STANNPLANS,PQ	4504788687	00:04	1.84
24 DEC 2017	16:01	Fr STANNPLANS,PQ	4504788687	00:07	2.68
26 DEC 2017	16:30	Fr STANNPLANS,PQ	4504788687	00:02	1.28
27 DEC 2017	13:07	Fr STANNPLANS,PQ	4504788687	00:03	1.56
27 DEC 2017	16:30	Fr STANNPLANS,PQ	4504788687	00:22	6.88
27 DEC 2017	19:10	Fr STANNPLANS,PQ	4504788555	00:04	1.84
28 DEC 2017	11:05	Fr TORONTO,ON	4162537689	00:07	9.76
28 DEC 2017	11:12	Fr TORONTO,ON	4162537689	00:11	14.60
29 DEC 2017	09:20	Fr TORONTO,ON	4162537689	00:22	27.91
29 DEC 2017	09:42	Fr TORONTO,ON	4162537689	00:22	27.91
29 DEC 2017	14:48	Fr STANNPLANS,PQ	4504788687	00:02	1.28
29 DEC 2017	20:50	Fr STANNPLANS,PQ	4504788687	00:05	2.12
31 DEC 2017	15:15	Fr STANNPLANS,PQ	4504788687	00:02	1.28
01 JAN 2018	13:23	Fr STANNPLANS,PQ	4504788687	00:08	2.96
01 JAN 2018	20:45	Fr STANNPLANS,PQ	4504788687	00:15	4.92
03 JAN 2018	15:37	Fr TORONTO,ON	4162596293	00:18	23.07
05 JAN 2018	10:38	Fr TORONTO,ON	4162596293	00:12	15.81
05 JAN 2018	13:23	Fr STANNPLANS,PQ	4504788555	00:30	9.12
06 JAN 2018	15:15	Fr TORONTO,ON	4162537689	00:13	14.84
08 JAN 2018	10:42	Fr TORONTO,ON	4162537689	00:21	26.70
09 JAN 2018	16:00	Fr STANNPLANS,PQ	4504788687	00:32	9.68
09 JAN 2018	16:37	Fr TORONTO,ON	4162537689	00:19	24.28
10 JAN 2018	12:41	Fr TORONTO,ON	4162537689	00:20	25.49
10 JAN 2018	14:34	Fr TORONTO,ON	4162537689	00:02	3.71
13 JAN 2018	13:04	Fr STANNPLANS,PQ	4504788687	00:10	3.52
14 JAN 2018	16:10	Fr TORONTO,ON	4162537689	00:09	10.73
14 JAN 2018	16:20	Fr TORONTO,ON	4162537689	00:04	5.58
16 JAN 2018	15:15	Fr TORONTO,ON	4162596377	00:22	27.91

VIDÉOTRON
Une compagnie de Quebecor Media

Account No. 64877256-001-3

Billing date FEB 02, 2018

Invoice period From	To	Description	Amount
		PAY-PER-USE SERVICES (continued)	

VIDÉOTRON
Une compagnie de Quebecor Media

Account No. 64877256-001-3 | Billing date FEB 02, 2018

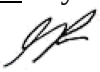
Invoice period From	To	Description				Amount
		PAY-PER-USE SERVICES (continued) **Communications - Phone (continued)**				
Date	**Time**	**Called location**	**Called number**		**Duration HH:MM**	
18 JAN 2018	16:05	Fr STANNPLANS,PQ	4504788687		00:20	6.32
21 JAN 2018	14:09	Fr STANNPLANS,PQ	4504788687		00:09	3.24
		Subtotal :				**796.73**
		Other telecommunicators GST/HST (5%/13%) :				39.88
		Other telecommunicators NST-QC (9.975%) :				79.45
		Total fees other telecommunicators			**17:39**	**916.06**
		Usage to be paid for (819) 557-3258				**916.06**
		Total uses - Telephony				**916.06**
		Call code : 1: Customer dialed call				
		Communications - Wireless Telephony				
DEC 22	JAN 21 2018	Your usage for	(819) 968-7049			
		Usage Summary	**Code**	**Your bundle**	**You used**	
		Included Minutes Canada	M:S	Unlimited	260:00	0.00
		Calls b/t customers	M:S	Unlimited	208:00	0.00
		LD calls b/t customers	M:S	Unlimited	0:00	0.00
		Option messaging	Msg	Unlimited	1176	0.00
		Premium messaging	Msg		23	0.00
		Data Canada	GB	9,0	1,07	0.00
		Total				**0.00**
DEC 22	JAN 21 2018	Your usage for	(438) 403-6590			
		Usage Summary	**Code**	**Your bundle**	**You used**	
		Included Minutes Canada	M:S	Unlimited	4 045:00	0.00
		Calls b/t customers	M:S	Unlimited	285:00	0.00
		LD calls b/t customers	M:S	Unlimited	0:00	0.00
		Long-distance minutes	M:S		4:00	1.20
		Option messaging	Msg	Unlimited	1000	0.00
		Premium messaging	Msg		2	0.00
		Data transmission	MB		989,32	49.45
		Data Canada	GB	Adjustment	11,00	0.00
		Total				**50.65**
		Wireless - Communications payable				**50.65**
		Code: M:S : Minute:Second Msg : Message GB : Gigabyte				

VIDÉOTRON
Une compagnie de Quebecor Media

Account No. 64877256-001-3 | Billing date FEB 02, 2018

Invoice period From	To	Description	Amount
		PAY-PER-USE SERVICES (continued) **Communications - Wireless Telephony (continued)**	
		MB : Megabyte	
		For more information on your Internet usage and on how the options of your Share Package are being used, log on to your Customer Center at www.videotron.com/customercentre	

This is Exhibit **"C"** to the
Affidavit of Vanessa Fareau sworn
before me this 17 day of December, 2020.



A Commissioner, etc.

26 JUN 2018	13:31	Fr TORONTO,ON	4162531820	00:04	6.49
27 JUN 2018	17:22	Fr STANNPLANS,PQ	4504788687	00:09	3.24
28 JUN 2018	14:43	Fr STANNPLANS,PQ	4504785055	00:16	5.20
[illegible] 2018	13:15	Fr TORONTO,ON	4162531820	00:04	6.49

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VIDÉOTRON
Une compagnie de Quebecor Media

Account No. 64877256-001-3

Billing date AUG 03, 2018

Invoice period From	To	Description			Amount
		PAY-PER-USE SERVICES (continued) Communications - Phone (continued)			
Date	**Time**	**Called location**	**Called number**	**Duration HH:MM**	
29 JUN 2018	13:19	Fr TORONTO,ON	4162531820	00:05	7.82
29 JUN 2018	16:31	Fr TORONTO,ON	4162531820	00:14	19.79
29 JUN 2018	16:47	Fr TORONTO,ON	4162531820	00:02	3.83
29 JUN 2018	16:49	Fr TORONTO,ON	4162531820	00:20	27.77
29 JUN 2018	19:24	Fr STANNPLANS,PQ	4504785055	00:16	5.20
02 JUL 2018	14:40	Fr TORONTO,ON	4162531820	00:04	6.49
03 JUL 2018	14:18	Fr STANNPLANS,PQ	4504781520	00:07	2.68
06 JUL 2018	13:28	Fr STANNPLANS,PQ	4504788555	00:16	5.20
08 JUL 2018	17:22	Fr STANNPLANS,PQ	4504785055	00:25	7.72
09 JUL 2018	16:52	Fr TORONTO,ON	4162531820	00:08	11.81
10 JUL 2018	12:46	Fr TORONTO,ON	4162531820	00:08	11.81
11 JUL 2018	15:09	Fr STANNPLANS,PQ	4504785055	00:19	6.04
11 JUL 2018	21:00	Fr STANNPLANS,PQ	4504788555	00:20	6.32
12 JUL 2018	14:38	Fr STANNPLANS,PQ	4504785055	00:14	4.64
14 JUL 2018	12:59	Fr STANNPLANS,PQ	4504785055	00:02	1.28
16 JUL 2018	17:28	Fr STANNPLANS,PQ	4504785055	00:11	3.80
16 JUL 2018	17:39	Fr STANNPLANS,PQ	4504785055	00:05	2.12
18 JUL 2018	17:03	Fr STANNPLANS,PQ	4504781520	00:07	2.68
19 JUL 2018	21:04	Fr STANNPLANS,PQ	4504788555	00:27	8.28
21 JUL 2018	16:09	Fr STANNPLANS,PQ	4504788687	00:14	4.64
21 JUL 2018	18:29	Fr TORONTO,ON	4162553870	00:05	7.02
		Subtotal :			**232.96**
		Other telecommunicators GST/HST (5%/13%) :			11.62
		Other telecommunicators HST-QC (9.975%) :			23.25
		Total fees other telecommunicators		**06:06**	**267.83**
		Usage to be paid for (819) 557-3258			**267.83**
		Total uses - Telephony			**267.83**
		Call code : 1: Customer dialed call			
		Communications - Wireless Telephony			
JUN 22	JUL 21 2018	Your usage for	(819) 968-7049		
		Usage Summary	**Code**	**Your bundle**	**You used**
		Included Minutes Canada	M:S	Unlimited	758:00 0.00
		Calls b/t customers	M:S	Unlimited	178:00 0.00
		LD calls b/t customers	M:S	Unlimited	0:00 0.00
		Long-distance minutes	M:S		1:00 0.30
		Option messaging	Msg	Unlimited	4246 0.00
		Data Canada	GB	9,0	4,72 0.00
		Total			**0.30**

VIDÉOTRON
Une compagnie de Quebecor Media

Account No. 64877256-001-3

Billing date AUG 03, 2018

This is Exhibit **"D"** to the
Affidavit of Vanessa Fareau sworn
before me this 17 day of December, 2020.

A Commissioner, etc.

Keep this portion.

VIDÉOTRON
Une compagnie de Quebecor Media

Account No. 64877256-001-3

Invoice date OCT 04, 2019

The pay-per-use fee for *66, *69 and *71 services is now $3 per call (maximum $21 per month). If you are not subscribed to a long-distance calling plan, the rate for long-distance calls to Canada and the US is now $0.20/minute.

The CRTC's Wireless Code establishes consumers' basic rights in terms of wireless service.
To learn more, go to:
videotron.com/your-rights

Stop postponing it.
It's time to sign up for online billing.
Sign up now.
videotron.com/onlinebilling

Invoice period From	To	Description	Amount
		INVOICE SUMMARY	
		Previous invoice	
		Previous balance	1 122.46
		Payments rec'd - thank you	1 200.00-
		Subtotal	**77.54-**
		Adjustments and one-time fees	**874.95**
		Modifications of services since your previous invoice	**91.24**
OCT 22	NOV 21 2019	**Current services**	
		Cable TV	63.82
		illico.tv	9.99
		Internet	67.44
		Phone	39.96
		Wireless	209.88
		Subtotal	**391.09**
		Pay-per-use services	
		Phone	691.26
		Wireless	1.80
		Subtotal	**693.06**
		Subtotal	1 972.80
		Taxes	203.34
		Total payable	**2 176.14**

SAVINGS
For this period, you saved 610$ on your adjustments, 116.49$ on your current fees and you spoke for 71 minutes free of charge.

PO Box 11078 Stn Centre Ville
Montreal, Qc, H3C 5B7
Fax number: 1-800-773-1877
AUTOMATED SERVICES: 1-866-380-2967
Customer Service: 819-771-7715
Technical Customer Service: 819-771-2611
For additional information see reverse

Due date of current invoice OCT 22, 2019

Amount to be paid 2 176.14

You may pay this invoice at most chartered banks and caisses populaires. Return this portion with your payment.
Any amount invoiced remaining unpaid after the due date shall bear interest at the rate specified in our terms of service.

Please do not staple

Invoice

6487725600130217614021761464877256001302176140217614

VIDÉOTRON
Une compagnie de Quebecor Media

Account No. 64877256-001-3

Amount paid

Amount to be paid 2 176.14

* 00019151 /41
VANESSA FAREAU
89 RUE PEARSON APP 6
GATINEAU QC
J9H 6G1

Allow 5 days for receipt of your payment

Due date of current invoice OCT 22, 2019

VIDÉOTRON
Une compagnie de Quebecor Media

Account No. 64877256-001-3

Billing date OCT 04, 2019

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at TORONTO

Proceeding under the *Class Proceeding Act, 1992*

AFFIDAVIT OF VANESSA FAREAU
(Sworn December 17, 2020)

SOTOS LLP
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8

David Sterns (LS#36274J)
Mohsen Seddigh (LS#707441)
Tassia K. Poynter (LS#70722F)

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Kirsten L. Mercer (LS#54077J)
Jody Brown (LS#58844D)

Lawyers for the Plaintiffs

Court File No.: CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

VANESSA FAREAU and RANSOME CAPAY

Plaintiffs

- and -

BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF RANSOME CAPAY

I, Ransome Capay, of the Lac Suel First Nation, **DO SOLEMNLY AFFIRM:**

1. I am one of the proposed representative plaintiffs in this action. I have direct knowledge of the facts in this affidavit. When I provide facts based upon information and belief from other sources, I have stated the source of that information and I believe that the information is true.

BACKGROUND

2. I am a resident of the Lac Seul First Nation and registered status member of the Lac Seul First Nation.

3. For approximately 4.5 years from June 4, 2012 to December 6, 2016, my son was held in pre-trial custody at the Thunder Bay Correctional Jail and Kenora Jail. Thunder Bay is

approximately 400 kilometers from Lac Seul and Kenora is about 250 kilometers from Lac Seul. My son was kept in solitary confinement for 4.5 years of pre-trial custody.

4. While my son was held in solitary confinement, I had to accept many collect calls to maintain basic contact with him. There was a court decision about my son's time in solitary confinement. The court decided that the government violated my son's *Charter* rights because of how he was put in solitary confinement for so long. I have attached the court decision about my son's time in solitary confinement as **Exhibit "A"** to my affidavit.

MY BELL PHONE BILLS

5. From 2012 to 2016, my monthly home phone package from Bell was approximately $55, which included several options such as 3 way calling, call waiting, call forwarding and other features. Over this time, I also had a long-distance plan with Bell that ranged from approximately 25 cents to 40 cents a minute for long distance calls in North America. Not including collect call charges, my residential phone bill was usually in the range of $57-$80, depending on how much long distance we used. I also had home internet through Bell. The internet charges were usually about $58 per month.

6. During the time when the government kept my son in solitary confinement, my monthly phone bills could be very large as a result of collect call charges. I had many bills which ranged from $250 to $500 and some bills over $1000. I do not have all of my phone bills and many of the bills I have are incomplete. I have included examples below of some of the monthly collect call charges I have been able to locate:

a. September 20, 2013 bill: **$697.02** in collect calls;

Attached as **Exhibit "B"** is a copy of my September 20, 2013 bill

b. February 17, 2016 bill: **$104.03** in collect calls;

Attached as **Exhibit "C"** is a copy of my February 17, 2016 bill

c. March 17, 2016 bill: **$209.53** in collect calls;

Attached as **Exhibit "D"** is a copy of my March 17, 2016

d. July 17, 2016 bill: **$553.22** in collect calls; and

Attached as **Exhibit "E"** is a copy of my July 17, 2016 bill

e. August 17, 2016 bill: **$642.39** in collect calls.

Attached as **Exhibit "F"** is a copy of my August 17, 2016 bill

7. In 2017 my son was held in the Kenora Jail again. Similar to the collect calls from 2012-2016, I again had large phone bills. For example, my January 17, 2017 Bill was **$1,002.52**. For a 21-minute call on the July 2017 bill, I payed between **$24.10-$27.91**, roughly **$1.15-$1.34** per minute. Attached as **Exhibit "G"** is a copy of the pages I found from my January 17, 2017 bill.

8. I believe Bell would have the complete billing records, the phone was in the name of Glenda Brisket. I am informed by Jody Brown that he requested the preservation of those records from Bell Canada in a letter dated October 16, 2020.

9. In order to pay the collect call fees on my phone bills I had to take on extra work, such as chopping firewood. The collect call fees became a source of stress, anxiety and financial difficulty for myself and my family.

10. I live on the Lac Seul reserve and my son was being held in Kenora and Thunder Bay. Phone calls were the only way to maintain basic contact with my son over the 4.5 years he was held in solitary confinement.

11. I was never told what the rates or charges associated with long-distance collect calls were prior to accepting collect calls from my son. In general, the phone would ring and when I would pick it up a pre-recorded message would play saying I had a collect call from my son. The pre-recorded collect call phone message did not say what the per-minute charges would be and the message was substantially the same every time.

MY WILLINGNESS TO BE A REPRESENTATIVE PLAINTIFF

12. I am willing to represent others who received and made collect calls from Ontario prisons I do not believe I have a conflict with the other potential members of the lawsuit.

13. I have retained Goldblatt Partners LLP and Sotos LLP to bring this lawsuit and I am relying on my lawyers to complete this class action. I do not have any form of legal training and limited formal education. I am aware my lawyers have drafted a Litigation Plan and I have entirely relied on my lawyers to draft that plan.

14. I would not be able to bring this case on my own and I believe it would be hard for others who are in jail or have family in jail to do so.

15. I do not have any precise information on the estimated size of the class.

16. I swear this affidavit in support of a motion for certification of this action as a class proceeding and for no other or improper purpose.

AFFIRMED BEFORE ME remotely by Ransome Capay stated as being located on the Lac Seul Frist Nation, in the Province of Ontario on December 15, 2020 in accordance with O. Reg. 431/20 Administering Oath or Declaration Remotely.

Ransome Capay
RANSOME CAPAY

A Commissioner for taking Affidavits *(or as may be)*

Jody Brown LSUC 58844D

This is Exhibit **"A"** to the
Affidavit of Ransome Capay affirmed before
me this 15th day of December, 2020.

A Commissioner, etc.

CITATION: R. v. Capay 2019 ONSC 535
COURT FILE NO.: CR-13-0070
DATE: 2019-01-28

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	*Mr. T. Jukes and Ms. J. A. McGill*, for the Crown
	)	
	)	*Mr. B. Whitehead* and *Ms. H. Evans* for the Ministry of Community Safety and Correctional Services
	)	
Respondent	)	
	)	
- and -	)	
	)	
	)	
ADAM MARK CAPAY	)	*K. Symes and A. Weaver*, for the Defendant
	)	
	)	
	)	
Applicant	)	
	)	
	)	**HEARD:** July 31 and August 1 and 2,
	)	2017, February 21 and 22, March 12, 13, 14, 15, 16, 21, 22, 23, May 9 and 10, 2018 in Thunder Bay, Ontario

Mr. Justice J.S. Fregeau

REASONS ON APPLICATION

Table of Contents

Introduction

[1] On June 3, 2012, Adam Capay (the "accused"), a sentenced inmate at the Thunder Bay Correctional Centre (the "TBCC") scheduled for release in August 2012, was placed in segregation following an assault on fellow inmate, Sherman Quisses. The accused is alleged to have stabbed Mr. Quisses twice in the neck.

[2] Mr. Quisses died as a result of the injuries he sustained. The accused is charged with first degree murder in relation to the death of Mr. Quisses.

[3] On June 4, 2012, the accused was transferred from the TBCC to the Thunder Bay Jail and placed in administrative segregation. Administration segregation (hereinafter "segregation") is defined by the Ministry of Community Safety and Correctional Services as the separation of an inmate from the general population where the continued presence of the inmate in the general population would pose a serious threat to the health or safety of any person, to property or to the security or orderly operation of the institution.

[4] From June 4, 2012, until December 6, 2016, a period of four years, six months, and two days (1,647 days), the accused was continuously held in segregation in a cell by himself.

[5] The accused has brought an application pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the *"Charter"*) seeking a stay of proceedings as a remedy for alleged violations of his rights under ss. 7, 9, 12, and 15 of the *Charter*.

[6] The Crown concedes that the circumstances of the accused being held continuously in segregation between June 4, 2012, and December 6, 2016, violated the accused's ss. 7 (retrospective application only) and 12 *Charter* rights. The Crown submits that ss. 9 and 15 of the *Charter* have no application in this case.

[7] The Crown submits that a stay of proceedings is not the appropriate remedy to redress these *Charter* violations.

Background of the Accused

[8] The accused is a 25 year old Indigenous man and a registered status member of the Lac Seul First Nation ("LSFN"), a First Nation community approximately 400 kilometres from Thunder Bay and 250 kilometres from Kenora. He is the oldest of seven children born to Glenda Brisket and Ransome Capay.

[9] The accused's maternal grandmother and paternal grandparents attended residential schools. All became alcoholics. The accused's parents both suffered sexual abuse and domestic physical violence while growing up. Both had very serious alcohol dependency issues with the result that the accused was exposed to parental alcoholism, marital discord, domestic violence, sexually promiscuous behaviour, and substance abuse throughout his life.

[10] The accused also suffered a number of significant traumas while growing up, including repeated childhood sexual abuse and physical assaults. When the accused was ten years old, his father attempted to solicit his assistance in committing suicide. While intoxicated, the accused's father cut him with a knife. The accused's father then put a loaded firearm either in his own mouth or to his own head and asked the accused to pull the trigger. The accused reports that he continues to have nightmares and flashbacks in relation to this incident.

[11] The accused's parents have now overcome their dependency issues, are gainfully employed, and are very supportive of their son.

[12] The accused first drank alcohol at 7 years of age. He began using marijuana and inhaling solvents at 8 years of age. At 13 years of age, he began to experiment with hard drugs and

became involved in the criminal justice system.

[13] The accused has only a Grade 7 or 8 education. His formal education ended when he was incarcerated for assaulting a teacher and police officer. He has never been employed but for a two week period at age 18 when he worked construction. He was terminated for being intoxicated on the job.

[14] The accused's involvement with the criminal justice system has always been precipitated by the excessive consumption of alcohol. The accused maintains that he became addicted to drugs, including morphine and heroin, while incarcerated.

Summary of the Evidence

[15] The institutional record for the period of time that the accused spent in segregation and the evidentiary record on this application are both voluminous. The following is a summary of the evidence necessary to address the issues raised in the application.

Segregation History

[16] Between June 4, 2012, and December 6, 2016, the accused was held in segregation for a total period of 1,647 days, primarily at the Thunder Bay Jail (1,505 days) with the exception of four periods of time totaling 142 days when he was temporarily transferred to the Kenora Jail. Both facilities are Ontario correctional facilities operated by the Ontario Ministry of Community Safety and Correctional Services (the "Ministry").

[17] During his time in segregation, the accused was housed in one of five blocks at the Thunder Bay Jail (Blocks 1, 2, 10, 11, and 12) and one of two blocks at the Kenora Jail, the isolation block (Cells "M" and "O") and the South Basement.

Thunder Bay Jail

[18] The accused spent 847 days in Block 1 of the Thunder Bay Jail. Block 1 consists of a range of seven cells with a bunk bed in each cell. The cells are separated from each other by solid walls. Each cell has bars on the front of the cell with Plexiglas over the bars. The cells are situated within a slightly larger locked area that is enclosed by bars, known as the day area. There is a shower and two telephones in Block 1. There is no television or radio, and the lights are kept on 24 hours a day. On occasions when the accused was let out of his cell into the day area, he was always alone.

[19] The accused spent 53 days in Block 2 of the Thunder Bay Jail. Block 2 is very similar to Block 1 except that there are two televisions in Block 2 and the lights are turned down at night. On occasions when the accused was let out of his cell into the day area, he was always alone.

[20] The accused spent 237 days in Block 10 of the Thunder Bay Jail. Block 10 is a single cell in the isolation area. It is adjacent to Block 11 with the cells separated by a solid wall. Block 10 is encased in Plexiglas with a solid metal door beyond the Plexiglas. There is no day area, shower, television, or radio in Block 10. The toilet cannot be flushed from inside the cell, and the lights are kept on 24 hours a day.

[21] The accused spent 274 days in Block 11. Block 11 is also part of the isolation area. Each cell in Block 11 is encased in Plexiglas with a solid metal door beyond the Plexiglas. There is no day area. There is a shower located in the area between the Plexiglas and the solid metal door. Correctional officers take the inmates out of their cells one at a time to shower or to search the inmates' cells. There is no fixed telephone in Block 11. Inmates use a telephone that is brought into their cells on wheels. There is no television or radio in Block 11. Inmates cannot flush the

toilets from inside the cells in Block 11. The inmate must ask a correctional officer to flush the toilet as required. The lights are kept on 24 hours a day.

[22] The accused spent 94 days in Block 12, which consists of three cells with a bunk bed in each cell. The cells are separated by solid walls. Each cell has bars on the front that are encased in Plexiglas. There is a day area, a shower, a telephone, and a television. The lights are turned down at night. On occasions when the accused was let out of his cell into the day area, he was always alone.

[23] There is a separate yard at the Thunder Bay jail for inmates who are in segregation. The segregation yard is an outdoor area surrounded on all sides by concrete walls. Within that area there is a "caged in" space covered by a solid roof. There is no recreational or exercise equipment in the segregation yard. On occasions when the accused was let out of his cell into the segregation yard, he was always alone.

[24] The Thunder Bay Jail also has a multi-purpose room in the basement that is used for programming. The accused was only provided access to the multi-purpose room for sessions with Dr. P. Schubert, psychiatrist.

The Kenora Jail

[25] While at the Kenora Jail, the accused was held in two different blocks: the isolation blocks (cells "M" and "O") and the South Basement.

[26] The accused spent 73 days in cells M and O, two of the four isolation cells at the Kenora Jail. The cells are separated from each other by solid walls. Each cell has double doors: the cell door and a second door that leads to the corridor. There is a shower and telephone for cells M and O, and each segregation cell has its own radio, which can only be operated by a correctional

officer. There is no day area or television, and the lights are dimmed at night.

[27] The accused spent 69 days in the South Basement of the Kenora Jail, a range with five cells. The cells are separated from each other by solid walls. Each cell has bars on the front that are not encased in Plexiglas. There is a day area, a shower, a telephone, and a television. The lights in the South Basement are dimmed at night. On occasions when the accused was let out of his cell into the day area, he was always alone.

[28] Inmates in segregation at the Kenora Jail use the same yard as all other inmates. There is no recreational or exercise equipment in the yard. On occasions when the accused was let out of his cell into the yard area, he was always alone.

Day-to Day life of the Accused in Segregation

[29] Inmates in MCSCS facilities are served three meals per day as well as coffee or tea and an evening snack. Inmates in segregation at both the Thunder Bay Jail and the Kenora Jail are served and consume all meals and snacks inside their cell unless the inmate is in an area with access to a day area. In that case, the inmate eats in the day area, but only if the timing of the meal coincides with the inmate's daily time out of his cell.

[30] While in segregation at the Thunder Bay Jail and the Kenora Jail, the accused was subject to regular searches pursuant to policy. He was generally strip-searched and subject to a cell search on a daily basis.

[31] When the accused was placed in segregation in the period immediately following June 4, 2012, his Offender Rating Sheet instructed correctional officers not to talk to the accused. During later periods of his time in segregation, the accused had lengthier and more involved discussions with correctional officers and managers.

[32] The accused had access to reading material for much of his time in segregation. When at the Thunder Bay Jail, he was generally restricted to one item of reading material at a time with limited opportunities to obtain new reading material in exchange for one he had completed. When at the Kenora Jail, the accused was allowed more than one item of reading material at a time and was allowed to exchange those materials on request.

[33] Of the 1,647 days the accused spent in segregation between June 4, 2012, and December 6, 2016, he had yard access on 108 days and was offered and declined yard access on 72 days.

[34] The accused was allowed "time outs" in various day areas, typically of one hour duration, to use the shower, phone, table and/or desk, television, or radio where available. Of the 1,647 days the accused spent in segregation, he had 794 time outs in the day areas, not including occasions he was allowed into the day areas solely for showering or cleaning the day area. The accused was always alone during these periods of time.

[35] The chaplain at the Thunder Bay Jail can meet with inmates at various locations. During the 1,505 days the accused was in segregation at the Thunder Bay Jail, he met with the chaplain eight times, all of which occurred while the accused was in his cell or cell block. The accused had no contact with the chaplains at the Kenora Jail while in segregation there.

[36] From May 2012 until May 30, 2016, the Thunder Bay Jail employed a single social worker who was also responsible for covering the duties of the classification officer. On May 30, 2016, the Thunder Bay Jail hired a second social worker.

[37] Between June 4, 2012, and December 6, 2016, the accused had contact with a social worker or classification officer on 31 occasions, 24 of which were in 2016. Of the 24 meetings in 2016, 21 occurred during October, November, and December 2016. The accused had no

contact with either a social worker or classification officer while in segregation at the Kenora Jail.

[38] The accused did not have any documented access to Indigenous programming or services at the Thunder Bay Jail or the Kenora Jail in 2012, 2013, 2014, or 2015. In 2016, the accused was visited by a Native Inmate Liason Officer ("NILO") on 13 occasions and participated in one pipe ceremony. Eleven of the NILO visits and the pipe ceremony occurred after Ms. Renu Mandhane, the Chief Commissioner of the Ontario Human Rights Commission, visited the Thunder Bay Jail and met with the accused on October 7, 2016.

[39] When the accused was placed in segregation on June 4, 2012, he had a documented history of suicide attempts, self-harm, and mental illness for which he was prescribed and received medication.

[40] Between June 4, 2012, and December 6, 2016, Dr. Michael Stambrook, a psychologist, saw the accused on three occasions. These three occasions occurred in 2012 and 2013, all at the Kenora Jail. All three meetings took place while the accused was in his cell, and over the course of the three meetings, the accused spent a total of approximately 80 minutes with Dr. Stambrook.

[41] Between June 4, 2014, and December 6, 2016, Dr. Peter Schubert, a psychiatrist, saw the accused on 31 occasions, all at the Thunder Bay Jail in the multipurpose room. The accused was handcuffed throughout these meetings. During this period of time, the accused refused to see Dr. Schubert on four occasions. During the 1,505 days the accused was in segregation in the Thunder Bay Jail, he spent a total of approximately nine hours with Dr. Schubert.

[42] As of September 24, 2015, Ministry policy required that Inmate Care Plans be created. A Care Plan was first created for the accused on September 22, 2016. It was updated once, on

October 27, 2016.

[43] Between April 12, 2015, and December 6, 2016, the accused engaged in various self-harming behaviour, including pushing a pencil through his right cheek and through his foreskin, slashing his forearm with a razor blade, and banging his head against his cell door repeatedly causing himself to bleed.

[44] Between June 4, 2012, and December 6, 2016, Ministry policy required correctional officials to conduct segregation reviews for the accused in relation to his initial placement in segregation followed by 24 hour reviews, 5 day reviews, 30 day reviews at the institutional level, 30 day reviews at the regional level, and 30 day summaries prepared by the Regional Director, which the Regional Director was then required to forward to the Minister's office.

[45] In 2012, there were 3 reviews done at the institutional level, none of which went to the regional office. In 2013, there were 30 reviews done at the institutional level, 6 of which went to the regional office. In 2014, 24 reviews were done at the institutional level, 11 of which went to the regional office. In 2015, 93 reviews were done at the institutional level, 24 of which went to the regional office. In 2016, 117 reviews were done at the institutional level, 20 of which went to the regional office.

Renu Mandhane Chief Commissioner Ontario Human Rights Commission

[46] Ms. Mandhane was appointed as the Chief Commissioner of the Ontario Human Rights Commission (the "OHRC") in October of 2015. In January 2016, the OHRC provided a formal submission to a provincial segregation review then being undertaken by the Ministry. In conjunction with the filing of its submission, the OHRC requested data from the Ministry on the use of segregation in correctional institutions in Ontario and embarked on tours of various

institutions.

[47] In an email to Yasir Naqvi, then Minister of Community Safety and Correctional Services, in advance of a March 24, 2016, meeting about the provincial segregation review, Ms. Mandhane requested the following information for the previous three months:

1. The number of prisoners admitted into segregation in each of Ontario's jails;
2. The rationale for admission; and
3. The duration of segregation.

[48] Ms. Mandhane met with Minister Naqvi on March 24, 2016. One of the two issues discussed was the provincial segregation review. Ms. Mandhane testified that the Minister had received the OHRC's submissions, was very interested in discussing them, and was very supportive of the commission continuing to do work on the issue. However, the OHRC did not receive the data it had requested from the Ministry until August of 2016 and then only after several follow up requests.

[49] On September 14, 2016, in anticipation of her tour of the Thunder Bay and North Bay correctional institutions, Ms. Mandhane sent an email to Aly Vitunski, Chief of Staff to David Orazietti. Mr. Orazietti was the successor to Yasir Naqvi as Minister of Community Safety and Correctional Services. Ms. Mandhane specifically requested that NILOs and social workers accompany her on the tours and that she be able to speak directly with prisoners in segregation.

[50] Prior to her tour of the Thunder Bay Jail, which she had publicized on social media, Ms. Mandhane was contacted by Michael Lundy, a correctional officer at the Thunder Bay Jail and the OPSUE local president at the time. Mr. Lundy asked to meet with Ms. Mandhane before her tour. Ms. Mandhane agreed to do so.

[51] At the conclusion of her meeting with Mr. Lundy, which she described as "a pretty typical conversation with a union representative," Ms. Mandhane indicated to Mr. Lundy that her jail tours to date had been "pretty sanitized." She asked him if there was anything in particular she should look into. Mr. Lundy suggested that she ask to meet with Adam Capay, an inmate who has been "in solitary" for four and one half years.

[52] Ms. Mandhane recalled that she did not believe Mr. Lundy because the data she had received from the Ministry in August of 2016 suggested that the longest period of time that an inmate had been in segregation in Ontario as of then was 939 days, approximately two and one half years. She skeptically made a note and proceeded on her tour of the Thunder Bay Jail.

[53] Ms. Mandhane was accompanied on her tour by Christine Danylchenko, Assistant Deputy Minister, Institutional Services; Douglas Houghton, Deputy Director, Northern Regional Institutional Services; Alex Sherba, Social Worker; Cathy Sky, NILO; and OHRC personnel. Following the formal tour, Ms. Mandhane met with inmates selected by the NILO, none of whom appeared to have any relevant concerns. Mr. Capay was not one of the inmates selected to speak with Ms. Mandhane, nor had he been in the segregation unit she had been taken through.

[54] Ms. Mandhane testified that when she asked to speak with the accused she was met with silence and surprise. The social worker told her that the accused did not really like to talk to people. Ms. Mandhane persisted, and the social worker left and returned, indicating that the accused was prepared to speak with Ms. Mandhane.

[55] Ms. Mandhane was taken down a set of stairs into a windowless "kind of…day room area…range" with "a kind of quiet, very quiet sort of feel to it." Ms. Mandhane had a very clear independent recollection of her meeting with the accused, describing it as "unlike anything I had

experienced before." The accused was in Block 1, cell 4.

[56] Ms. Mandhane recalls the accused speaking "in a distinctive way, a very slow, labored sort of, like … when you're struggling to find words." According to Ms. Mandhane, the accused apologized for his manner of speech, saying that he could not speak properly because he had not talked to a lot of people since he had been placed in segregation in June 2012.

[57] The accused was candid with Ms. Mandhane about his charge, discussed his transfers to and from the Kenora Jail, and further apologized about his inability to recall dates, indicating that days and nights blended into each other because the light in his cell was on all the time. Ms. Mandhane asked the accused how often he was seeing a psychiatrist and was told once every couple of months for very short periods of time.

[58] According to Ms. Mandhane, the accused told her he was not getting enough food, was unable to access his "canteen" while in segregation, and had been seriously self-harming. Ms. Mandhane testified that she recalled the meeting being a "surreal experience" after which she "was actually angry. I was pretty upset about the whole thing and sort of didn't understand how, you know we'd been working on this segregation issue for like years and that it seemed so incongruous with our conversations with the Ministry."

[59] Ms. Mandhane recalled telling the accused that she would do whatever she could to help him, which she described as "significant" because her role as Chief Commissioner is not to advance individual cases. However, she recalled feeling very strongly that she had to do something about it – "I couldn't as a human being, Chief Commissioner aside, that I couldn't sort of abide by the state's treatment of somebody like that." Ms. Mandhane was visibly upset at this point in her testimony.

[60] Upon rejoining the tour group, Ms. Mandhane, in what she described as a "tone of anger," expressed confusion, telling the group that Mr. Capay had just told her that he had been in solitary for four and one half years. She testified that "the man who was on the tour," who I infer to have been Douglas Houghton, Deputy Director, Northern Region Institutional Services, replied "without skipping a beat" that that time estimate "sounds about right."

[61] The group proceeded to a meeting room at which time Ms. Mandhane spoke directly to Ms. Danylchenko, asking her how this could have happened and whether she and the Minister had been signing off on reviews and continued segregation for the accused. Ms. Mandhane testified that Ms. Danylchenko would not answer her questions, but said that she would "try to figure that out."

[62] Upon her return to Toronto, Ms. Mandhane immediately contacted Mr. Naqvi, now Attorney General, who put her in contact with Minister Orazietti. Ms. Mandhane outlined the OHRC's concerns regarding the accused. She reiterated these concerns in a letter to the Minister on October 14, 2016.

[63] Ms. Mandhane explained that one of the reasons she sent the letter was because she had lingering concerns that her understanding of the duration and nature of the accused's confinement may not have been entirely accurate. She wanted to provide the Ministry with an opportunity to correct any inaccuracies.

[64] In Ms. Mandhane's October 14, 2016, letter to Minister Orazietti, she detailed her understanding of the conditions of the accused's confinement, including:

- That he had been held on remand in continuous segregation since June 2012
- That he was housed in what appears to be the basement of the 90 year old jail, confined

to his cell for at least 23 hours per day, with limited or no human contact

- That the lights in the cell are on 24 hours per day, 7 days a week
- That Plexiglas sheeting covers the entire perimeter of the windowless cell, with no fresh air circulation and irregular access to the yard and use of the shower
- That the accused was not being provided with regular or meaningful mental health treatment or any services responsive to his Indigenous status

[65] Ms. Mandhane further advised the Minister that many aspects of the accused's treatment raised serious *Human Rights Code* issues and may constitute cruel and inhumane treatment contrary to the *Charter*. She further suggested that the circumstances of the accused demonstrated the inadequacy of the MCSCS' internal segregation review processes and accountability mechanisms.

[66] Ms. Mandhane spoke with Deputy Minister Matt Torigan a few days after the letter was sent. According to Ms. Mandhane, the only inaccuracy in her letter noted by the Deputy Minister was that the accused was not being held in a basement, but a windowless area of the jail that is accessed by descending a staircase.

[67] When it became clear to Ms. Mandhane that the Ministry was not prepared to "do anything particularly substantive about the treatment" of the accused, after having been given "ample opportunity and advance warning," the OHRC decided to make the conditions of the accused's confinement public.

[68] On October 18, 2016, the OHRC publicly released their supplementary submission to the MCSCS's Provincial Segregation Review. Within this submission, the OHRC commented on their October 7, 2016, tour of the Thunder Bay Jail and Ms. Mandhane's meeting with "a

prisoner who seems to have been held in continuous segregation for four years." The OHRC did not release the accused's identity.

The Institutional Witnesses

Thunder Bay Jail

Michael Lundy

[69] Mr. Lundy was a Correctional Officer at the Thunder Bay Jail from 2004 until September 2016. Mr. Lundy testified that he requested a meeting with Ms. Mandhane prior to her October 7, 2016, tour of the Thunder Bay Jail because of concerns about the segregation practices at the Thunder Bay Jail in general and in regard to the accused in particular.

[70] Mr. Lundy explained that Ontario Correctional Officers are trained at the Ontario Correctional Services College. His initial training consisted of a six week course, currently extended to an eight week course for new recruits. Within this six week course, Mr. Lundy received six hours of instruction on how to address the needs of Indigenous inmates and inmates with mental health issues, one three hour period for each. It was the opinion of Mr. Lundy that he and other correctional officers had not received sufficient training to deal with mentally ill inmates.

[71] Mr. Lundy testified that he had never seen an Inmate Care Plan for any inmate at any time during his employment at the Thunder Bay Jail.

[72] Commenting on the segregation units at the Thunder Bay Jail, Mr. Lundy testified that a correctional officer located at his post covering Blocks 10, 11, and 12 at the Thunder Bay Jail would not be able to hear inmates yelling at them from cells inside those blocks. He said that it was possible that inmates banging on the Plexiglas would be heard by the correctional officers. If not, the inmates would have to wait for an officer to make his rounds and then attempt to get

his attention. According to Mr. Lundy, the Plexiglas inhibits an officer's ability to both observe and communicate with inmates.

[73] When asked how he would respond to an unresponsive inmate in these blocks, Mr. Lundy indicated that he would first yell to get the inmate's attention, call for an assisting officer, and enter the day area only when the assisting officer arrives.

[74] Mr. Lundy identified the Offender Rating Sheet for the accused with entries beginning June 4, 2012. This document indicated that the accused was transferred to the Thunder Bay Jail from the "TBCC" on June 4, 2012. At the top of the document is a handwritten entry stating, "*DO NOT ENTER INTO DISCUSSIONS WITH THIS OFFENDER*."

[75] Mr. Lundy recognized this entry to be the writing of Robert MacKenzie, a former sergeant at the Thunder Bay Jail. Mr. Lundy testified that he interpreted this entry as an order to correctional officers.

[76] Mr. Lundy testified that when the psychiatrist attends the Thunder Bay Jail to meet with inmates he does so in the multipurpose room with a correctional officer stationed outside the room. The Offender Rating Sheet is provided to the psychiatrist for the purpose of the meeting.

[77] According to Mr. Lundy, if the jail records indicate that an inmate "refused to see psychiatrist," the inmate indicated that he did not want to attend the multipurpose room to visit with the psychiatrist. Mr. Lundy testified that he had seen the psychiatrist attend the cell of an inmate who refused to see him but that it was not a frequent occurrence.

[78] Mr. Lundy was present when Mr. Naqvi, then Minister of Community Safety and Correctional Services, toured the Thunder Bay Jail on January 13, 2016. He observed Mr. Naqvi interact with the accused during this tour. Mr. Lundy explained to Mr. Naqvi why the accused

was segregated and advised him that he had been segregated for three and one half years at that point in time.

Melissa Boban

[79] Ms. Boban has been employed at the Thunder Bay Jail since 1999. She has been the Health Care Manager since 2002.

[80] Counsel referred Ms. Boban to a "Psychology Note" of Dr. M. Stambrook dated August 20, 2012. In this two page, comprehensive record of Dr. Stambrook's meeting with the accused at the Kenora Jail on that date the psychologist concluded that the accused "will require a detailed forensic assessment. I have spoken to Sara Dias (a CAMH worker in Kenora) who has seen him on this." This note was copied to the Kenora Jail Nursing/Medical Unit and Mr. S. Walker, Superintendent, Kenora Jail.

[81] Ms. Boban agreed that an inmate's medical file follows him when he is transferred to another institution and that the accused's health care records from Kenora would have gone to the Thunder Bay Jail. She did not recall seeing this particular note in regard to the accused.

[82] Ms. Boban testified that, while an inmate's health care file is confidential, she has access to these files and shares relevant information with other institutional employees as required. One such instance of this is when Ms. Boban prepares health care administrative summaries for the purpose of segregation reviews.

[83] Ms. Boban confirmed that the Administrative Summaries which she provided for the segregation review process go to the Superintendent or his designate who determines the issue of ongoing placement in segregation. She agreed that the purpose of her summary is to provide accurate and current information from an inmate's health care file to assist the superintendent in

making that determination.

[84] Ms. Boban also acknowledged being aware that her Administrative Summaries form part of the package of information provided to the regional office for segregation reviews at the regional level.

[85] Ms. Boban agreed that an administrative summary for the purpose of a segregation review should ideally include the most current information on an inmate and the information most relevant to the issue of segregation. She also agreed that she would have reviewed Dr. Schubert's notes from his meetings with Mr. Capay in order to prepare her administrative summaries.

[86] Counsel referred Ms. Boban to Dr. Schubert's note of October 16, 2013, which reads in part, "Content no (suicidal ideation and homicidal ideation) as before. + Sadistic fantasies as above and as noted previously." Counsel also referred her to Dr. Schubert's note of December 11, 2013, which states, "mood restless, agitated sometimes ok. Affect normal, appears calm. Thought process normal content normal no (suicide ideation) no (homicidal ideation) no psychosis – history chronic (homicidal ideation)/fantasies however."

[87] Ms. Boban agreed that Dr. Schubert was noting a history of chronic homicidal ideation or fantasies, not a current observation.

[88] Ms. Boban also acknowledged the following notes of Dr. Schubert in regard to the accused:

1. February 7, 2014 - "not suicidal or homicidal at this point"
2. April 4, 2014 – "he denies any (suicidal ideations/homicidal ideations or fantasies of violence/sexual nature of late"

3. May 27, 2014 – "Content. No (suicidal ideations) no (homicidal ideations) no psychosis"
4. July 23, 2014 – "low risk suicide/homicide at this time. Is segregated in Block 1"
5. September 5, 2014 – "denies any (homicidal ideations) today, not talking of any sadistic fantasies today"
6. October 28, 2014 – "normal content no (suicidal ideation) no (homicidal ideation) no talk of sadistic fantasies today. No violent fantasies reported."

[89] Ms. Boban was next referred to her Administrative Summary dated December 17, 2014, which she prepared for the purpose of the accused's December 22, 2014, 30 day segregation review. The document reads as follows:

Administrative Summary for Dec 2014

> Adam Capay
> DOB July 20/92
> Otis# 1000849399
>
> This Client remains in segregation.
> He is currently awaiting court on charges for murdering another inmate at Thunder Bay Correctional Centre.
> In July 2013 Dr. Schubert/Thunder Bay Jail Psychiatrist noted that client is a risk of harm to staff and inmates and there is a need for staff to be notified and procedures in place to protect others. This client has regular reviews and assessments with Psychiatrist. He is a low risk for suicide and very high risk for violence with sadistic paraphilia. He was last seen by Dr. Schubert on Oct 28th 2014 and is for 8 week follow-up (end of December 2014)

[90] Ms. Boban agreed that she had failed to include in this Administrative Summary that Dr. Schubert had been noting, for in excess of one year, that the accused did not have suicide ideation, homicidal ideation, or sadistic or violent fantasies. She testified that "in looking back, I should have noted it or worded it differently."

Deborah McKay

[91] Ms. McKay has been employed at the Thunder Bay Jail for 33 years. She was the Deputy of Operations from 2012 to 2014, Deputy of Administration from 2014 to 2016, and has been the acting Superintendent since February 2016.

[92] Ms. McKay explained the segregation review process in place at the Thunder Bay Jail in 2012. The Superintendent or designate conducts an initial review upon placing an inmate in segregation. The Superintendent or designate then conducts a segregation review at the institutional level every 5 days, repeated for each 5 day period of continued segregation. The Superintendent or designate also conducts a segregation review of an inmate who has been in segregation for 30 days, which is then repeated for each 30 day period of continued segregation. The institutional office then has to submit each 30 day review to the regional office.

[93] Ms. McKay did not recall there being any specific requirements in the segregation review process for mentally ill inmates in 2012 and years following.

[94] Ms. McKay identified the Segregation Decision/Review form used in 2012 and years following. This form includes sections to be completed upon an inmate's initial placement into segregation, upon the 5 day review, upon 30 days at the institutional level, and upon 30 days at the regional level.

[95] The Regional Director Review section requires the Regional Director or designate to either "support" or "not support" continued segregation by checking a box and to provide comments. Ms. McKay testified that, in her experience, continued segregation has always been supported at the regional level. She was unable to recall whether there had ever been any comments added at the regional review level, such as recommendations for enhanced privileges

or a psychiatric assessment. She acknowledged that, on occasion, regional employees would call with an informal request for more information about a particular inmate.

[96] Ms. McKay testified that, in hindsight, this had not been an effective review and tracking system.

[97] In 2014, Ministry policy in regard to the segregation review process changed such that more information was to be included for segregation reviews. Additional information concerned whether an inmate had a known or suspected mental illness, whether there was a treatment plan in place, and when the inmate had last seen a doctor or psychiatrist. The frequency of reviews and the forms used did not change at that time.

[98] The Segregation Decision/Review Form was amended in October 2015. It now includes sections to be completed upon initial placement in segregation, a 24 Hour Preliminary Review to be completed within 24 hours of the inmate being placed in segregation, a 5 Day Review section, a 30 Day Superintendent/Designate section, and a 30 Day Regional Director/Designate Review section. The amended form allows for a greater level of detail about inmates to be provided by those commenting. Ms. McKay reiterated that she could not recall an instance where the regional level refused to support a segregation review either before or after October 2015.

[99] Turning to the circumstances of the accused specifically, counsel referred Ms. McKay to an email dated February 21, 2013, which she sent to Mr. Daniel Smith, then Regional Director. She attached a Segregation Decision/Review for the accused. Ms. McKay explains in the email that this "may have slipped through the cracks" as the accused had been in segregation at the Thunder Bay Jail since August 2012. In fact, the accused had been in segregation continuously since June 4, 2012.

[100] Ms. McKay acknowledged that the reference to August 2012 is a reference to the date the accused was last transferred back to the Thunder Bay Jail from the Kenora Jail. This is an example of corrections "resetting" the segregation clock when an inmate in segregation is transferred between institutions. Ms. McKay acknowledged that this practice results in erroneous tracking of inmates' time in segregation.

[101] Ms. McKay's February 21, 2013, email to Mr. Smith confirms that the only segregation reviews conducted for the accused in 2012 occurred on August 29, September 3, and September 8, 2012. The reason stated for continued segregation was, "charged with the murder of an inmate while in custody at the TBCC."

[102] The next documented segregation review is February 21, 2013. It was included on the form with the 2012 reviews sent to Mr. Smith. This review states that the "inmate advises psychiatrist that he has homicidal thoughts about other inmates. Remains segregated for protection of other inmates."

[103] Mr. Smith replied to Ms. McKay the same day, asking whether the accused was receiving any regular mental health intervention. Ms. McKay replied that he was not because "he has refused any mental health intervention." Mr. Smith thanked Ms. McKay, indicating that he was "just curious." The accused had been in continuous segregation for approximately eight months at this point in time. Mr. Smith provided his approval of the continued segregation of the accused on February 27, 2013.

[104] Ms. McKay agreed that segregation reviews were sent to the region on a regular basis throughout 2013 with the accused's disclosures to the psychiatrist being the rationale for his continued detention in segregation.

[105] The accused's placement in segregation, and that of other segregated inmates, was the subject of a Correctional Services Oversight and Investigations ("CSOI") Compliance Review dated December 21, 2015. The compliance review involved a random sample of 143 inmates who, in July 2015, were reported to have been in segregation for a continuous period of 30 days or longer. Ms. McKay testified that the result of this review was "positive."

The Northern Region

Richard McDaniel

[106] Mr. McDaniel has been the Deputy Director, Northern Region Institutional Services, since March 2017. He has been employed in the Northern Region since 2012, performing what he described as "related, similar" duties, including participating in and tracking "segregation sign-offs."

[107] Mr. McDaniel testified that he would not support continued segregation if the review documentation did not contain a plan for releasing an inmate from segregation. He also testified that it is not acceptable for an inmate to be held in indefinite segregation.

[108] According to Mr. McDaniel, he rarely failed to support continued segregation when conducting a regional review in which the superintendent had recommended continued segregation. Mr. McDaniel explained that:

> A. Well for me to make that decision, I'm going to have to base that on something. So I would, it's a very hypothetical thing for me, 'cause I'm not going to, we're a team, we're not, like I have oversight onto them but we're part of a team and they are doing good work and I rely on the social workers and everybody else that's making these decisions to stay there. So why would I make a decision against that? So if that information's not there, yes I would probably pick up the phone and say what's going on here? But when you got social workers and psychiatrists and whoever else that's indicated that this person is in segregation, whether they're at their own will or because that's the decision they've made, then I'm going to sign off on that. I don't think it's my decision to go against a social worker or a psychiatrist. I've reviewed it, I've seen

the work was being done according to policy and I move forward with it.

Q. So in your experience, it's never happened that the superintendent has recommended continued segregation and you've not supported that decision?

A. It may have happened. I may have picked up the phone and questioned but I don't remember ever overriding the institution. I just, I don't see it, no. I would work with them to try to get somebody out of segregation but to override and say you have to take that person out of segregation seems a bit heavy-handed for a person that's sitting, could be 600 miles away or whatever. So I just go, I'm reviewing information, basing it on policy. I'm reviewing policy really and if that policy is meeting what the expectations are, you're going to sign off on it. I think that's our job.

Q. So do you know what the authority of part E is? If it's, "if not supported" is checked and that's sent back to the institution, what authority does that carry? Is that considered an order to the institution that the inmate be removed from segregation?
A. I suppose it could be.

Q. But that's just in theory? Like in your practice do you….
A. I've never heard of it. I've never heard of that before. Like why would you do that? Why wouldn't you work with the institution to find out what's going on instead of trying to, me overriding a psychiatrist and social worker. I don't think that's my role to do that. I don't think I'm authorized to do that. I can't, a psychiatrist, if a psychiatrist is making a decision, I think I have to go with that decision.

Douglas Houghton

[109] Mr. Houghton began employment with the Ministry as a correctional officer in 1991. He was Deputy Director, Northern Region Institutional Services, from January 2015 to September 2017.

[110] Speaking generally, Mr. Houghton testified that he could not recall a single occasion where he failed to support the continued segregation of an inmate when conducting a segregation review.

[111] Mr. Houghton was also unable to recall ever having suggested alternatives to the accused's continued segregation. He did recall discussing possibly transferring the accused from the Thunder Bay Jail to the Kenora Jail, "just to give him a break," although the accused would

remain in segregation there as well.

[112] Counsel referred Mr. Houghton to a 30 Day Regional Director Review for the accused, which Mr. Houghton signed on February 8, 2016. It notes the accused's total days in segregation at 985. In the review, Mr. Houghton supported the accused's continued segregation, commenting that, "the inmate poses a significant risk to himself, other inmates, staff members and the security of the institution." Mr. Houghton acknowledged that there was nothing in place at the regional level to address the situations of inmates who had been in segregation for this length of time.

[113] Counsel next referred Mr. Houghton to a 30 day Regional Director Review for the accused, which Mr. Houghton signed on March 7, 2016. It notes the accused's total days in segregation at 1,018. In response to the requirement on this review form that the Regional Director or his designate comment on any of the accused's *Human Rights Code* needs, Mr. Houghton noted that "the inmate has mental health issues but does not require any type of accommodation."

[114] The May 2, 2016, 30 Day Regional Director Review for the accused noted total days in segregation at that point in time to be 1,074 days. Mr. Houghton again supported the accused's continued segregation on this review, and his comments regarding whether the accused had any *Code* related needs of the accused are identical to those on the previous review.

[115] Mr. Houghton was aware that the Thunder Bay Jail had a social worker, a NILO, and a psychiatrist available for inmates. He never suggested the accused have increased access to any of these services, nor did he inquire about the accused's access to the yard, the canteen, educational materials, or time out of his cell.

[116] Mr. Houghton acknowledged being aware that the accused had been in continuous segregation for over 1,000 days at that point in time and that there was no plan in place to try to get him out of segregation. He agreed with the suggestion that he never recommended that the institution do anything different for the accused.

[117] In a March 21, 2016, email to Ms. McKay, Mr. Houghton sought detailed information about the accused's circumstances in segregation. Mr. Houghton requested this information in order to provide it to the Assistant Deputy Minister's office. In testimony, Mr. Houghton acknowledged that, in this email, he stated that the accused had been in segregation since June 2012. Counsel referred Mr. Houghton to a 30 Day Regional Director Review dated April 4, 2016. It notes the accused's total days in segregation at 1,046. Mr. Houghton agreed that this was an obvious error that he did not notice at the time. Mr. Houghton supported the continued segregation of the accused on this review.

[118] Ms. McKay, in her March 22, 2016, reply to Mr. Houghton, attached an Administrative Summary and specifically stated that the accused has "a serious mental health condition diagnosed by a psychiatrist." Mr. Houghton testified that this information was forwarded to Ms. Kinger, Regional Director, Northern Region, and from there to Ms. Vanessa Windgrove at the Assistant Deputy Minister's office.

[119] On March 23, 2016, Ms. McKay further advised Mr. Houghton by email that the accused "has had minimal interactions with both the Chaplain and NILO." Mr. Houghton forwarded this additional information to Ms. Windgrove the same day. Mr. Houghton did not receive a direct response from the Ministry.

[120] On October 7, 2016, immediately following Ms. Mandhane's tour of the Thunder Bay Jail, Mr. Houghton again emailed Ms. McKay, stating: "ADM (Christina Danylchenko) and I were talking following the tour. Can you prepare a summary of i/m Capay? Include Care Plans, housing placements, info about his charges and court proceedings and anything else pertinent. Need it for Wed morning."

[121] Mr. Houghton agreed that this information had never been previously requested by him when conducting regional reviews for the accused.

[122] On October 11, 2016, Ms. Danylchenko emailed Ms. Kinger asking for, among other things, "the summary regarding our management of the long-term inmate [the accused] in segregation that I will be using for my follow-up discussion with the Human Rights Commissioner this week." Ms. Kinger forwarded this email to Ms. McKay who responded the next morning, attaching the relevant information. Mr. Houghton was copied on all emails.

[123] Mr. Houghton responded directly to Ms. McKay approximately 20 minutes later, requesting more information: "We need clinical information that supports this inmate having been in seg for over 1,100 days." Mr. Houghton conceded that this email confirms that he had never before received or requested clinical information to support the accused having been in segregation for more than 1100 days.

[124] On October 13, 2016, Mr. Houghton emailed employees both at the Thunder Bay Jail and the Northern Regional office indicating that he had now confirmed that the accused "has been continuously segregated since his arrival at the TBJ on June 4, 2012. Which calculates to 1591 days. Please adjust the date … to reflect this correction."

[125] Mr. Houghton agreed that the ongoing errors as to the accused's total days in segregation resulted from "resetting" the segregation clock upon transfers between institutions, as referred to by Ms. McKay.

[126] Mr. Houghton was then referred to an email he sent to Ms. McKay dated October 20, 2016. In this email, Mr. Houghton suggested to Ms. McKay that they attempt to access additional mental health services for the accused. He concluded this email by stating, "The bottom line is we need to demonstrate we are trying to get him help."

[127] Mr. Houghton agreed that he had never before, in the course of conducting 30 Day regional reviews for the accused over the span of four and one-half years, recommended that the accused have increased access to the psychiatrist who services the Thunder Bay Jail, let alone outside mental health care providers.

Chronology of the Accused's Court Appearances

[128] The accused has not alleged a violation of his right to be tried within a reasonable time, as guaranteed by s. 11(b) of the *Charter*. However, the length of the accused's pretrial custody is extraordinary and requires an explanation.

[129] Mr. S. George Joseph, an experienced and well respected Thunder Bay lawyer, represented the accused from June 4, 2012, until November 22, 2012. He first met with Mr. Capay on June 4, 2012. He received disclosure in regard to the first degree murder charge between September 23, 2012, and October 17, 2012.

[130] Prior to that time, the only information that Mr. Joseph received from the Crown was a one and a half page case file synopsis. Mr. Joseph was never informed that on August 20, 2012, Dr. Stambrook had recommended that the accused undergo a detailed forensic assessment.

[131] Mr. R. Amy, also an experienced and well respected criminal defence counsel from Winnipeg, Manitoba, represented the accused from the end of 2012 until August 23, 2016.

[132] The preliminary inquiry was completed on August 28, 2013. The Superior Court pretrial was conducted between November 22, 2013, and August 20, 2014. During the course of the pretrial, the case was scheduled for trial beginning September 22, 2014, approximately 27 months after the accused was charged with first degree murder. At the continuation of the pretrial on August 20, 2014, the trial was adjourned at the request of the accused to allow the accused to bring a *Kokopenance* application challenging the representativeness of the Thunder Bay jury panel.

[133] On October 30, 2014, a case management meeting was held. The *Kokopenace* application was scheduled to begin June 5, 2015, and the trial was scheduled to begin November 16, 2015. In due course, the *Kokopenance* application was dismissed and the November 16, 2015, trial date was confirmed.

[134] On November 16, 2015, at the start of jury selection, the accused requested and was granted an adjournment for the purpose of obtaining a psychiatric assessment. The record indicates that the "defence waived s. 11(b)" on this date.

[135] On February 22, 2016, the case was once again scheduled for trial beginning September 12, 2016. On August 23, 2016, the accused indicated to the court that he wanted to retain new counsel. Mr. Amy therefore brought an application to be removed as counsel of record, which was granted. The accused then requested an adjournment of his September 12, 2016, trial date, which was also granted.

[136] On October 25, 2016, at the request of recently retained counsel for the accused, the case was remanded to Assignment Court on November 28, 2016. On this date, defence counsel was advised that the March 2017 jury sittings were available for this trial to proceed. On November 28, 2016, this case was scheduled for trial beginning March 20, 2017, to be spoken to at Assignment Court on January 30, 2017.

[137] On November 29, 2016, an order was made for the accused to undergo an in-patient psychiatric assessment conducted by Dr. John Bradford at the Waypoint Centre for Mental Health Care in Penetanguishene, Ontario. On December 6, 2016, the accused was transferred from the Thunder Bay Jail to the Central North Correctional Centre in Penetanguishene and then on to Waypoint for the assessment.

[138] On January 16, 2017, the accused brought an application to have a case management judge assigned and indicated their intention to bring pretrial *Charter* applications on behalf of the accused. On January 30, 2017, I was appointed as case management judge and the March 20, 2017, trial date was vacated. The accused once again waived his s. 11(b) *Charter* rights.

[139] On February 22, 2017, the first case management conference was held. At this and subsequent case management conferences, hearing dates for this pretrial application were scheduled and re-scheduled throughout 2017 and early 2018.

[140] The hearing of this application was necessarily fragmented over this period of time as Crown, Ministry, and defence counsel worked diligently and cooperatively in assembling a very large volume of institutional records, organizing these records into a coherent and comprehensive evidentiary record, and then scheduling the necessary lay and expert witnesses. Final submissions were heard on May 8 and 9, 2018.

[141] Since December 6, 2016, the accused has remained in custody. A portion of this period of time was spent undergoing the assessment at Waypoint. Once the assessment was completed, the accused was transferred to the Algoma Treatment and Remand Center in Sault Ste. Marie.

[142] In April 2018, the accused was transferred to the St. Lawrence Valley Correctional and Treatment Centre in Brockville for treatment. As of October 5, 2018, the accused had completed all available programming offered at this facility. He was then transferred to the Kenora Jail, at his request, so that he could be closer to his family.

Provincial Law and Policy

[143] *General*, R.R.O. 1990, Reg. 778 ("Regulation 778") under the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22, governs the use of segregation in provincial correctional facilities. Section 34 of Regulation 778 provides as follows:

> 34. (1) The Superintendent may place an inmate in segregation if,
>
> (a) in the opinion of the Superintendent, the inmate is in need of protection;
>
> (b) in the opinion of the Superintendent, the inmate must be segregated to protect the security of the institution or the safety of other inmates;
>
> (c) the inmate is alleged to have committed a misconduct of a serious nature; or
>
> (d) the inmate requests to be placed in segregation.
>
> (2) When an inmate is placed in segregation under clause (1)(c), the Superintendent shall conduct a preliminary review of the inmate's case within twenty-four hours after the inmate has been placed in segregation and where the Superintendent is of the opinion that the continued segregation of the inmate is not warranted, the Superintendent shall release the inmate from segregation.

(3) The Superintendent shall review the circumstances of each inmate who is placed in segregation at least once in every five-day period to determine whether the continued segregation of the inmate is warranted.

(4) An inmate who is placed in segregation under this section retains, as far as practicable, the same benefits and privileges as if the inmate were not placed in segregation.

(5) Where an inmate is placed in segregation for a continuous period of thirty days, the Superintendent shall report to the Minister the reasons for the continued segregation of the inmate.

[144] Pursuant to s. 32(2)(1) of Regulation 778, disciplinary segregation pursuant to s. 34(1)(c), referred to as "close confinement," is only available where the Superintendent has determined that the inmate has committed a misconduct of a "serious nature." Sections 32(2)(1) and (2) provide that close confinement can be imposed for a definite or indefinite period, but in either case for no more than 30 days.

[145] In contrast to the case of *disciplinary segregation*, Regulation 778 does not set any limit on the duration of *administrative segregation* imposed pursuant to ss. 34(1)(a), (b), or (d).

[146] Segregation is also subject to Ministry policy, particularly the policy on Placement of Special Management Inmates ("PMSI") found in the *Institutional Services Policies and Procedures Manual*. This policy was amended during the period of time the accused was held in segregation. The version initially in effect was dated March 2011 (the "March 2011 PMSI policy"). The amended version came into effect on September 24, 2015 (the "September 2015 PSMI policy").

[147] Pursuant to the March 2011 PSMI policy, initial and continued placement in segregation

was governed by the following procedure:

- When an inmate is placed in segregation, he or she will be advised by the superintendent or designate of the reasons, status, and duration of the segregation, of any changes in these conditions, and of the right to make a submission to the superintendent in writing or in person within five days of being segregated. A "Segregation Decision/Review" is prepared.
- Within five days of the inmate's placement in segregation, the superintendent or designate reviews the full circumstances of the case, including any submission by the inmate, to determine whether the inmate's continued segregation is warranted.
- The superintendent or designate must review the circumstances of each inmate in segregation at least once every five days to determine if continued segregation is warranted.
- When an inmate is in segregation for a continuous period of 30 days, the appropriate section of the "Segregation Decision/Review" is completed and submitted to the Regional Director within three business days of the inmate's 30th day in segregation. Before the report is completed, the inmate is provided an opportunity to make submissions either in writing or in an interview with the superintendent or designate. If the inmate makes a written submission, it is retained in the inmate's file and a copy forwarded to the Regional Director with the "Segregation Decision/Review."
- The Regional Director reviews the "Segregation Decision/Review" and discusses any concerns with the superintendent. A copy of the report, including the Regional Director's comments, is retained in the Regional Office. The original form is returned as soon as possible to the superintendent for inclusion in the inmate's file.
- At the end of each subsequent 30 days, the superintendent makes an entry on the original form in the designated space. Before the entry is made, the inmate must again be permitted to make a written or personal submission. The superintendent then forwards the form to the Regional Director for review. The Regional Director makes a corresponding entry in the designated space, retains a copy to replace the earlier one, and returns the original form for inclusion in the inmate's file.

[148] In September 2015, the provisions of the PMSI policy governing the placement of special management inmates were substantially revised. The September 2015 PSMI policy included definitions and specific requirements for both inmate Care Plans and Treatment Plans. A Care Plan was defined as a "written document that guides a consistent approach for inter-professional tram members on how to meet care goals and support needs." A Treatment Plan was defined as a "written document which outlines the medical strategies and treatment goals for a patient."

[149] The September 2015 PSMI policy required that, when an inmate suffering from mental illness was placed in segregation, a physician or psychiatrist was required to assess the inmate's mental health prior to each 5 day review to determine if changes were required to the inmate's Treatment and/or Care Plan.

[150] With respect to the review of segregation, the September 2015 PSMI policy required that an inmate in segregation be given the opportunity to make submissions, in writing or in person, at each 5 and 30 day institutional review. Any submissions made were required to be considered at each 5 day review and to be attached to or summarized in the Segregation Decision/Review Form provided to the Regional Director.

International Instruments

[151] Canada has ratified or acceded to three international treaties that set out limits on the use of segregation and the standards for the conditions to which segregated inmates may be subjected.

[152] The United Nations General Assembly adopted the *International Covenant on Civil and Political Rights 999 UNTS 171 ("ICCPR")* on December 16, 1966, which Canada acceded to on

August 19, 1976.

[153] Article 7 of the *ICCPR* provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 10 provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

[154] The United Nations General Assembly adopted the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment 1465 UNTS 85("CAT")* on December 10, 1984, which Canada ratified on July 24, 1987. CAT prohibits torture and cruel, inhuman, or degrading treatment or punishment and imposes on each state party affirmative obligations to prevent such acts in any territory under its jurisdiction.

[155] Article 2 of *CAT* requires that each state party shall "take effective legislative, administrative, judicial or other measures to prevent acts of torture" and provides that "no exceptional circumstances whatsoever … may be invoked as a justification of torture." Article 16 further provides that each State party shall "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture … when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

[156] The United Nations General Assembly adopted The *Convention on the Rights of Persons with Disabilities GA. Res. 61/106 ("CRPD")* on December 13, 2006, which Canada ratified on March 11, 2010. Article 14 of the *CRPD* provides that State parties should ensure that "the existence of a disability shall in no case justify a deprivation of liberty" and that persons with disabilities who are deprived of their liberty "shall be treated in compliance with the

objectives and principles in the present Convention, including by provision of reasonable accommodation."

[157] The General Assembly adopted the current standards of the *United Nations Standard Minimum Rules for the Treatment of Prisoners*, *GA. Res 70/175,* known as the "Mandela Rules," on December 17, 2015. The Mandela Rules are designed to provide legal guidance to decision makers in relation to the treatment of prisoners. The Ontario Superior Court of Justice has held that the Mandela Rules "represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined": *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen,* 2017 ONSC 7491, 140 O.R. (3d) 342, at para. 61.

The Expert Witnesses

Professor Michael Jackson

[158] Professor Jackson was qualified as an expert witness in the following areas:

1. International correctional law, policy, and practice;
2. Historical and current Canadian correctional law, policy, and practice, with specific expertise in the use of segregation in Canadian prisons; and
3. Aboriginal peoples within the criminal justice and correctional system.

[159] Professor Jackson has taught at the University of British Columbia since 1970 and is currently a Professor Emeritus. As part of his ongoing research into the Canadian correctional systems, with a focus on the incarceration of Aboriginal offenders, Professor Jackson estimated that he has personally visited over 50 percent of the segregation units in the Canadian federal correctional system, with regular visits to segregation units in British Columbia. He has also

toured segregation units at the Alberta and Edmonton Remand Centres and two remand centres in British Columbia for the purpose of preparing expert reports.

[160] Professor Jackson explained that historically there was no distinction in the treatment of Aboriginal inmates within the federal correctional system. Beginning in the 1980's major developments began to take place, including the passing of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, (the "*CCRA*"), declared in force November 1, 1992, which is the most comprehensive reform of the federal correctional landscape in a century and partially inspired by the enactment of the *Charter*.

[161] Federal corrections legislation was amended to include specific provisions requiring federal correctional authorities to provide special programs responsive to the needs of Aboriginal people, to recognize Aboriginal spirituality, and to recognize the role of Elders in providing services within the federal correctional system. Concurrently, it became correctional best practice to explore and place an Aboriginal inmate's personal criminal history into the larger context of their Aboriginal social history.

[162] According to Professor Jackson, the federal correctional system embraced the concept of utilizing a different approach to the administration of sentences for Aboriginal offenders before the Supreme Court of Canada interpreted the relevant remedial sentencing provisions of the *Criminal Code*, R.S.C., 1985, c. C-46 in *R. v. Gladue*, [1999] 1 S.C.R. 688. However, Professor Jackson noted that there has been considerable difficulty in the actual implementation of the relevant law and policy into federal correctional decision making.

[163] Professor Jackson was of the opinion that *Gladue* principles are particularly applicable in the context of segregation decisions involving Aboriginal inmates due to their over-

representation in the prison system generally and in segregation in particular. Professor Jackson opined that the proper application of *Gladue* in the correctional system would:

1. Take into account and accommodate the rights, interests, and needs of Aboriginal offenders;
2. Provide the necessary contextualization and understanding of an Aboriginal inmate and the behaviour that has brought them into custody through a consideration of their unique systemic and background factors; and
3. Provide greater opportunities for rehabilitation and mitigation of risk and amelioration of the most damaging effects of imprisonment through the utilization of culturally appropriate procedures or sanctions that reflect the Aboriginal perspective.

[164] Professor Jackson suggested that the Aboriginal cultural relationship to the land and the deep connections between Aboriginal people and the natural world in general resulted in segregation being a more difficult experience for Aboriginal people.

[165] Turning to the circumstances of the accused, Professor Jackson was asked to consider whether the above, or in fact any, *Gladue* analysis was applied to the accused's confinement in segregation in regard to the initial assessment process, segregation review decisions, access to Aboriginal programming and services, and mental health interventions.

[166] The Level of Service Inventory – Ontario Revision ("LSI-OR") is a tool utilized in the provincial correctional system for risk assessment, prison placement, treatment, and recidivism prediction.

[167] The LSI-OR completed for the accused on April 20, 2012, prior to his placement in segregation, contained no information addressing his Aboriginal background.

[168] Professor Jackson explained that this document comprehensively listed the accused's numerous risk and need factors, but failed entirely to contextualize these same factors into the accused's Aboriginal background. On the LSI-OR, the accused's social history, including substance abuse, family violence, sexual abuse, and community and family dysfunction, is not linked in any way to the cumulative and inter-generational impacts of colonialism and residential schools. According to Professor Jackson, under a *Gladue* analysis, contextualization of the accused's systemic and background factors was a necessary requirement to identify any Aboriginal programming that may have been available to address his needs and mitigate risk in a culturally appropriate manner.

[169] Professor Jackson was of the opinion that this initial assessment of the accused "contains no *Gladue* analysis whatsoever." According to Professor Jackson, the failure of the LSI-OR to recognize and contextualize *Gladue* factors in regard to the accused "is of great significance" because this assessment tool tracked the accused during his incarceration in the provincial correctional system and informed decision making throughout. In a *Gladue* context, this document did nothing more than state that the accused was a "19 year old native Canadian male recidivist from Lac Suel First Nation."

[170] In regard to segregation review decisions, Professor Jackson explained that the federal correctional system requires that an inmate's Aboriginal social history, mental health, and health care needs be taken into account in segregation reviews. Professor Jackson was unable to locate any provincial law or policy that mandates a *Gladue* analysis in segregation decisions for Aboriginal inmates.

[171] Professor Jackson read all of the accused's segregation review documents in preparing

his report. He testified that the initial June 4, 2012, segregation placement decision for the accused did not contain any consideration of his Aboriginal background. His reading of subsequent segregation review forms confirmed that they did not contain any consideration of the accused's Aboriginal status or any *Gladue* analysis.

[172] Pursuant to his review of the segregation documentation in this case, Professor Jackson concluded that there simply was not any *Gladue* analysis attempted for the accused throughout his four and one half years in segregation. Professor Jackson opined that some understanding of the accused's Aboriginal social history could have contextualized his anger and self-harming behaviour, part of the underlying rationale for his continued segregation.

[173] Professor Jackson suggested that, if this had been done, it logically should have been complimented by a consideration of whether there were any culturally appropriate measures - intensive interventions by the NILO or an Elder, participation in spiritual activities - that could have been utilized to mitigate the accused's perceived risk in an attempt to move him out of segregation.

[174] Professor Jackson reviewed the institutional records from the Kenora Jail and the Thunder Bay Jail for the period June 4, 2012, to October 26, 2016. It was not until March 2016 that he found any reference to visits offered or occurring with the NILO or Elders, nor any participation in Aboriginal spiritual practices or programs. He also confirmed that no Care/Treatment Plan was in place for the accused until September 2016. The Health Care Administrative Summaries were found to be "typically…very brief and make no reference to Mr. Capay's Aboriginal history."

[175] Based on his review of the evidence, Professor Jackson was of the opinion that the

accused did not have any meaningful access to the NILO until October 2016, nor was he offered any Aboriginal programming or cultural practices until that point in time. Professor Jackson suggested that the provision of "culturally appropriate supports" could have mitigated the accused's perceived risk and contributed to his removal from segregation.

[176] Professor Jackson was also asked to consider whether correctional staff involved in the treatment of the accused contextualized his mental health treatment within a *Gladue* framework and whether they considered culturally appropriate interventions in their decision making and treatment of him. He concluded that no *Gladue* analysis had ever been conducted during the course of any mental health assessments that were performed on the accused.

[177] Professor Jackson emphasized that conducting a *Gladue* analysis for the accused would not have precluded the implementation of standard mental health treatments, suggesting that they could have complimented a culturally appropriate Care/Treatment Plan.

Professor Stephen Toope

[178] Professor Toope is a Professor of International Law and Vice-Chancellor at the University of Cambridge. Between 2015 and 2017, he was a Professor of Law and Director of the Munk School of Global Affairs at the University of Toronto. From 2006 to 2014, he was the President and Vice-Chancellor at the University of British Columbia.

[179] Professor Toope was qualified as an expert witness on international law and standards relating to the use of segregation in prisons. His testimony addressed this topic generally and its application to the facts of the accused's confinement in segregation between June 2012 and December 2016.

[180] As referenced in paras. 152-155 of these reasons, two major international treaties govern

the treatment of prisoners: the *CAT* and the *ICCPR*. Canada ratified the CAT on July 24, 1987, and acceded to the ICCPR on August 19, 1976, and is therefore legally bound to the terms of both, according to Professor Toope.

[181] In general terms, the *CAT* defines "torture" as the intentional infliction of severe pain or suffering, mental or physical, on a person for a specific purpose. Parties to the *CAT* are subject to affirmative obligations to prevent acts of torture. Parties to the *CAT* are also obligated to prevent acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture when such acts are committed by or with the consent or acquiescence of a public official. Articles 7 and 10 of the *ICCPR* collectively create an obligation to ensure that prisoners are protected against torture and cruel, inhuman, or degrading treatment or punishment.

[182] Professor Toope explained that the Mandela Rules provide detailed guidance on how to interpret and apply legal obligations established by international treaty obligations. The Mandela Rules were most recently revised in 2016. According to Professor Toope, they reflect an evolution in international law and practice concerning the treatment of prisoners and in particular reflect contemporary international norms concerning the use of segregation.

[183] The Mandela Rules include specific minimum requirements concerning conditions of confinement, including access to natural light and fresh air, access to clothing and bedding, minimum provision of health care services, contact with the outside world, and access to books and news. According to Professor Toope, "strong authority exists for the proposition that anyone suffering from mental illness should not be subjected to solitary confinement. At the very least, solitary confinement should not be resorted to if the prisoner's mental illness might be exacerbated."

[184] Professor Toope testified that segregation or solitary confinement is most commonly understood as the physical and social isolation of individuals for 22 hours or more a day. Prolonged segregation is typically defined as any period of solitary confinement in excess of 15 consecutive days. The Mandela Rules explicitly prohibit indefinite and prolonged segregation.

[185] Professor Toope noted that the Mandela Rules specifically contemplate situations where it is required that prisoners be subjected to segregation from the general prison population. However, they also make clear that minimum standards relating to "light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space, shall apply to all prisoners without exception."

[186] Applying international law and standards to the accused's continuous segregation from June 4, 2012, to December 6, 2016, Professor Toope concluded that this was "prolonged" segregation and "cruel, inhuman and degrading treatment, amounting to torture." Further, the prolonged periods of confinement without access to natural light and being subject to artificial light for 24 hours a day also amounts to cruel, inhuman, and degrading treatment under international law.

[187] Professor Toope went on to consider the application of international law to other aspects of the accused's time in segregation, including:

- Irregular access, less than one hour in duration per visit, to the segregation yard, an enclosed and roofed area without an outside view and with no equipment;
- No access to recreational or educational programming, newspapers, the internet, and extremely limited access to television and radio;
- No access to meaningful human contact weeks and months on end;

- Very little ability to connect with his family, either by way of in person visits or by telephone; and
- No access to regular and meaningful mental health treatment or advice for prolonged periods of his confinement.

[188] Professor Toope's conclusion was that the length, indeterminacy, and conditions of the accused's segregation constitute cruel, inhuman, and degrading treatment amounting to torture under international law.

[189] On cross examination, Professor Toope agreed that torture, pursuant to international law, requires the intentional infliction of severe pain or suffering, physical or mental, on a person for a specific purpose. He acknowledged that his conclusion that the treatment of the accused amounted to torture was arrived at by imputing the required intent due to multiple breaches of international standards over an extended period of time.

[190] On re-examination, Professor Toope testified that absent the imputation of the necessary intent, the conditions of the accused's confinement "clearly breached the international obligation to prevent cruel and unusual treatment or punishment."

Professor Kelly Hannah-Moffat

[191] Professor Hannah-Moffat is a Vice-President at the University of Toronto and a former director of the Centre of Criminology and Sociolegal Studies. She worked as a policy advisor on the Arbour Commission and testified as an expert witness for the Office of the Ontario Coroner in the Ashley Smith inquest.

[192] Professor Hannah-Moffat was qualified as an expert in regard to human rights, corrections and penal reform, risk assessment and classification within correctional institutions, and the use of segregation and alternatives for mentally ill inmates.

[193] In the course of her professional studies, Professor Hannah-Moffat has toured a wide range of correctional facilities and segregation cells in the United States, the United Kingdom, and Canada, including federal and provincial institutions.

[194] Speaking generally, Professor Hannah-Moffat explained that, over the last two decades, academic research, inquiries, and inquests have produced a vast body of literature that consistently documents the negative effects of segregation on inmates. According to Professor Hannah-Moffat, this literature establishes that segregation exacerbates prior mental health problems and can lead to the development of previously undetected mental health problems. Inmates with a history of trauma or violence or any form of sexual or physical abuse will often experience a re-traumatization in segregation as the isolation triggers emotions from the past, resulting in a wide range of reactions.

[195] Responding to a question about the relationship between the duration of segregation and the effects on inmates' mental health, Professor Hannah-Moffat digressed and responded as follows:

> It's not particularly clear…this case [the accused] far exceeds…the definition of long term…it's much more excessive than anything I've seen and it would be akin to some of the most egregious conditions that you've seen in…undeveloped countries or in the United States in some of their super max's…it's beyond the pale of anything I've ever seen…in terms of long term segregation, I don't think I've seen anything this long and this, you know badly documented and managed context in my career and I've seen a lot of it in this country. Like this has got to be the worst case I've ever seen.

[196] Professor Hannah-Moffat was asked to comment on the physical condition and the configuration of the segregation cells in which the accused was confined between 2012 and 2016.

[197] For 2012 and 2013, the accused was held primarily in Blocks 10 and 11 at the Thunder

Bay Jail. She described these cells as "quite antiquated by comparison to a lot of the conditions of confinement that I've seen. [T]he inability to flush your (toilet) is unusual and only typically done when somebody has been plugging a toilet or flooding an area or behaving in a particular way."

[198] Asked to comment on a photograph of a cell in Block 11 at the Thunder Bay Jail, a block where the accused was segregated for 274 days, Professor Hannah-Moffat testified as follows: "I've not seen anything this bad in any of the international institutions that I've been or in any of the Canadian institutions. It's actually, it's filthy, it's disgusting, it's of ill repair, it's dirty. [T]here's a lot that could be done and like a good cleaning would be a good place to start."

[199] Professor Hannah-Moffat was asked her opinion about the information provided and considered in the reviews of the accused's continued placement in segregation. Generally speaking, she described it as inconsistent with an absence of a documented rationale or justification for the continuation of segregation and without any clear plan for how to end the accused's segregation.

[200] In 2012, officials reviewed the accused's segregation only three times (August 29 and September 3 and 8) with the reasons for continued segregation simply listed as "protective custody," "institutional security," or "charged with the murder of an inmate while in custody." Professor Hannah-Moffat was uncertain what this actually meant or how this in and of itself justified continued segregation.

[201] Commenting on the 2013 reviews, Professor Hannah-Moffat testified that there should have been approximately 70 5 day reviews and 12 30 day reviews but that these were not evident in the file. She also found that the explanations for continued segregation often consisted of just

a simple one or two line comment repeating the limited information listed at the previous review. She found that overall both the 5 and 30 day reviews did not occur in a regimented manner and contained very little information other than the reiteration of previous generic reasons for continued segregation.

[202] Professor Hannah-Moffat found similar issues with the 2014 reviews. She testified that the Health Care Administrative Summaries attached to the 2014 reviews noted mental health issues but did not provide any sort of a treatment plan. The professor found this completely inexcusable:

> It's clear to me that there's demonstrated need in this area at this point in time. [W]e're getting on to three years and again there's inconsistent documentation and if somebody's been in that long you'd think you'd have an accumulated amount of information. You'd try things. You would see alternatives. You would see evidence of alternatives.

[203] Professor Hannah-Moffat testified that there was no change in the quality of the 2015 segregation reviews:

> It just seems to … get a little bit more egregious and shocking as you're reading through it because you still keep expecting to see a discussion of alternatives and you keep expecting to see an escalation of this, beyond the institution to a higher level where someone's talking about … mitigating the circumstances of segregation, making sure that there are educational opportunities, Elders, psychiatric staff … and you don't see any evidence of that.

[204] For 2016, Professor Hannah-Moffat concluded that the accused's continued placement in segregation was reviewed regularly at 5-day and 30-day intervals and within 24 hours when transferred between institutions. However, once again, few changes appear in the information provided in these reviews.

[205] In the opinion of Professor Hannah-Moffat, the reviews of the accused's continued placement in segregation failed to provide "any meaningful oversight." Demonstrably

exasperated when testifying at this point, she once again commented on the conditions of the accused's confinement in segregation:

> They've got to be the worst that I have seen in 25 years of going in institutions and recently being in L.A. County Jail, I've seen units of individuals who are seen as the most difficult to manage in congregated spaces with therapy programs being led with a lot of security around so there are alternatives. [A]s far as I'm concerned, this does get to the level of torture, definitely cruel and unusual, completely unacceptable when you're talking about pretrial custody and by all standards inhumane and I don't know of any western democracy or in many of the countries in Europe and even South American institutions and some places that are more developed that would tolerate this for … protracted periods of time.

[206] Professor Hannah-Moffat outlined some relatively simple measures that can be taken to alleviate the negative effects of segregation, from both a procedural perspective and in terms of the physical design and condition of segregation cells.

[207] Procedurally, mandated reviews should be completed in a timely and consistent manner and audited at the institutional level and outside the institution. She explained that meaningful review outside the institution is important because officials inside an institution "can get caught up in group think when you have somebody in a particular circumstance for a long time." In her opinion, another level of review and another level of thinking about a particular case is necessary.

[208] Professor Hannah-Moffat further explained that the design and condition of segregation cells can also reduce the negative effects of segregation. Access to daylight or the ability to see a clock to provide an inmate with some concept of the time of day, reading material, radios, television, reasonable ventilation, and the ability to turn cell lights on and off were cited as examples of simple measures that can be taken to provide segregated inmates a small measure of autonomy, dignity, and self-respect in order to reduce the disorienting effects of solitary

confinement.

[209] Professor Hannah-Moffat was of the opinion that the segregation cells in which the accused was confined did not have any of the mitigating features she described. She referred to them as "quite antiquated by comparison to a lot of the conditions of confinement that I've seen…they're not anywhere near the level that you would be thinking about as mitigating."

Dr. John Bradford

[210] Dr. Bradford is currently a Professor Emeritus at the University of Ottawa, a Professor at McMaster University, and a forensic psychiatrist at St. Joseph's Healthcare in Hamilton.

[211] Dr. Bradford has testified extensively as an expert in forensic psychiatry, including approximately 100 times in dangerous offender applications and approximately 200 times in criminal responsibility hearings. He has testified in notorious cases involving extreme sexual violence against adult females, adult males, or a combination of the two.

[212] Dr. Bradford was qualified as an expert and allowed to provide opinion evidence in forensic psychiatry and the psychiatric effects of institutional segregation.

[213] On December 8, 2016, the accused was admitted to Waypoint Centre for Mental Health Care in Penetanguishene, Ontario, for a court-ordered psychiatric assessment to be conducted by Dr. Bradford. The purpose of the assessment was two-fold: first, to evaluate the mental state of the accused at the time of the alleged offence under s. 16 of the *Criminal Code*; and second, to evaluate the effects of the accused's prolonged subjection to segregation.

[214] The second prong of the assessment was to be the subject of a separate report dealing exclusively with the effects of segregation, which was to be provided to the court, the Crown, and defense counsel for the purposes of this application. As will be seen, Dr. Bradford found it

impossible to neatly separate these two issues.

[215] Dr. Bradford reviewed a very large volume of documents in the preparation of his report, including the accused's institutional health care records, psychiatric and psychological notes, his criminal record, education records, and a *Gladue* report. He personally met with the *Gladue* writer on a number of occasions, and sat in with the *Gladue* writer on at least one occasion when she was interviewing the accused.

[216] Dr. Bradford summarized the content of the accused's institutional health care records for the six month period prior to June 3, 2012. He noted repeated references to self-harming and suicidal behaviour, suggesting to him the possibility of the accused having suffered from a mood disorder, possibly depression and/or posttraumatic stress disorder at that time.

[217] Dr. Bradford reviewed the conditions of the accused's confinement at the Thunder Bay Jail during the eight week period between June 4, 2012, when the accused was placed in segregation, and July 31, 2012, when he was first transferred to the Kenora Jail. He also reviewed the conditions of the accused's confinement at the Kenora Jail between July 31, 2012, and August 20, 2012, when the accused was first seen by Dr. Michael Stambrook, a psychologist at the Kenora Jail.

[218] Dr. Bradford described the accused's confinement over this 12 week period as follows:

> Essentially it's … almost total isolation. Very little social contact or communication and we know from studies that this can have a profound effect on a person. We also know that for every day in isolation it's cumulative. [T]he effects become worse day by day, so over this period of eight weeks you've got in my opinion an accumulating problem of social isolation and the effects on this individual.

[219] Dr. Bradford explained, in general terms, that as a result of this degree of social isolation:

> People become anxious, depressed or both. They undergo cognitive disturbances. [T]hey [have] difficulties with memory and [time] orientation. [Y]ou can't tell day or night. [T]hey lose track of time. They're not sure whether they've been in this total isolation for a day, a week or weeks. So the cognitive effects can be quite profound. [Y]ou get various perceptional disturbances. [Q]uite often they are visual hallucinations. [I]t can be auditory hallucinations.

[220] Dr. Bradford summarized a substantial body of research literature documenting the effects of segregation on inmates' physical and psychological health. He explained that it has consistently been shown that the mental and physical health effects of segregation are significant and profound. Pre-existing mental disorders are aggravated. It can cause what he referred to as "segregation psychosis" or "jail psychosis" in inmates who have not been psychotic before.

[221] Dr. Bradford explained that segregation is also associated with elevated incidences of self-harming behaviour and increased risk of suicidal behaviour. The negative effects of segregation can be enhanced for individuals with personality disorders and/or attention deficit, hyperactivity disorders. Because social isolation is very stressful, individuals who have experienced previous trauma, such as being the victim of childhood sexual abuse or who suffer from PTSD, experience a compounding effect when placed in segregation.

[222] Dr. Bradford explained that the extent of psychological damage suffered by inmates in segregation depends on a number of factors, including the physical conditions, the duration of the segregation, and uncertainty as to the duration of segregation. In the case of the accused and his initial 12 week period of "just about total isolation," Dr. Bradford testified that "the effects would have been profound." Further, indefinite or indeterminate segregation, as experienced by the accused, is generally accepted to be more harmful than segregation with an identified endpoint.

[223] Moving on to the circumstances of the accused, Dr. Bradford was referred to Dr.

Stambrook's notes from his meeting with the accused on August 20, 2012. This was the accused's first interview with a mental health professional following his placement in segregation and 12 weeks of almost total isolation.

[224] Dr. Bradford noted that Dr. Stambrook had previously seen the accused as a teenager and summarized his history as including a major depressive disorder, poly substance abuse, and possible borderline traits. Dr. Bradford reviewed Dr. Stambrook's report of the accused's two year history of homicidal ideation, his thoughts of harming correctional officers, and his incongruous affect – smiling while talking about violent topics. Dr. Bradford described this as "a classic hallmark of psychosis." Dr. Bradford further noted Dr. Stambrook's opinion that the accused required a "detailed forensic assessment."

[225] Dr. Bradford emphasized that it was essential, when assessing the effects of segregation on the accused, to bear in mind that he already carried a very heavy trauma load when placed in segregation in June 2012. Significant traumatic events in his past included the incident where his father attempted to have the accused (at age ten) pull the trigger of a loaded gun, the barrel of which the accused's father had put in his own mouth or to his own head, and very serious childhood sexual abuse, the latter being so emotionally charged that the accused could not discuss it with Dr. Bradford.

[226] In Dr. Bradford's opinion, segregation, particularly the initial 12 week period of almost total isolation, was a further trauma that compounded the earlier traumas and caused the accused to relive them. Dr. Bradford believed that the accused likely had PTSD when placed in segregation. Dr. Bradford had no doubt that the accused had severe PTSD when he assessed him, either pre-existing and exacerbated by his time in segregation or triggered by it.

[227] During the assessment, the accused was tested for Fetal Alcohol Spectrum Disorder (FASD) and Attention Deficit Hyperactivity Disorder (ADHD). He exhibited manifestations of ADHD, but did not show the typical cognitive presentation of FASD. Testing also indicated the accused suffered from antisocial personality disorder. These results, together with the accused's history of trauma prior to placement in segregation, led Dr. Bradford to conclude that the accused "likely experienced more severe effects of segregation than many other inmates would have."

[228] Dr. Bradford found that the accused suffered from cognitive impairments, including memory impairment and placing events in temporal sequence, which he felt were "most likely a result of segregation." The accused had also experienced auditory and visual hallucinations, the former being most significant during the early period of more intense isolation.

[229] Dr. Bradford noted the reports of the accused experiencing sadistic, violent, and paraphilic fantasies while in segregation, first disclosed to Dr. Stambrook on August 20, 2012, at which point in time the accused had been in near total isolation for about 12 weeks. These fantasies, including fantasies of pedophilia, necrophilia, and violence to guards, continued to be reported until October 2013.

[230] Dr. Bradford explained that the period in which these fantasies were reported coincides with the period in which the accused experienced the most profound and at times near total isolation and absence of mental stimulation. After the fall of 2013, the accused was generally housed in cells with a day area and provided with daily time out of his cell and some limited interaction with other inmates.

[231] Dr. Bradford testified that in his opinion, based on this history, there is a strong

possibility that the accused was delusional between August 2012 and the fall of 2013 consistent with the documented effects of severe forms of isolation. In his report, Dr. Bradford indicates that, if he is correct in this assessment, "then the violent and sadistic fantasies that appear to have been a significant part of the rationale for continuing Mr. Capay's detention in segregation were in fact, at least in part, effects of that segregation."

[232] Dr. Bradford acknowledged that neither Dr. Stambrook nor Dr. Schubert diagnosed the accused as suffering from psychosis. However, Dr. Bradford noted that the accused was prescribed an antipsychotic – Seroquel – in November 2013 and, after the Seroquel was discontinued, another antipsychotic – Risperodone – in April 2014. Dr. Bradford observed that the accused's treatment with antipsychotics was also closely associated in time with him ceasing to endorse violent and sadistic fantasies, which in his opinion, lends additional support to the view that these fantasies were delusional.

[233] Dr. Bradford further opined that the accused was "likely experiencing multiple disturbed thought processes while in segregation." Dr. Bradford testified that explaining this opinion required him to refer to matters relevant to the assessment of criminal responsibility and the accused's mental state at the time of the offence.

[234] Dr. Bradford was fully cognizant of the requirement that his report and evidence on the effects of segregation on the accused were to be separate from his report on criminal responsibility. He endeavoured to keep the two distinct as much as possible and to avoid providing, in the former, his opinion with respect to the issue of criminal responsibility.

[235] However, in Dr. Bradford's opinion, matters relevant to and arising from the assessment of criminal responsibility were also relevant to assessing the effects of segregation, and at the

same time, the effects of segregation also have an impact on the assessment of criminal responsibility. He proceeded to review and discuss matters relevant to the assessment of criminal responsibility that he felt were also related to the effects of segregation.

[236] Dr. Bradford had read the transcripts from the accused's preliminary hearing which provided him with the observations of correctional officers and other inmates as to the accused's behaviour and demeanour prior to and at the time of the offence.

[237] Gary Mihichuk, a correctional officer, was familiar with the accused prior to June 2012. Dr. Bradford felt that his comments must be given some weight because of his experience in observing disturbed behaviour while a correctional officer.

[238] About a month prior to the incident, the accused came into Mr. Mihichuk's office after lights out. The accused told Mr. Mihichuk that he was having disturbing thoughts, including suicidal thoughts and thoughts of hurting somebody. Mr. Mihichuk placed the accused in the segregation area overnight where he would be alone and subject to 20 minute checks.

[239] Dr. Bradford noted that other inmates were consistent in their observations of the accused in the days leading up to the incident, at the time of the incident, and following the assault. Dr. Bradford explained that these were people in the dormitory with the accused who knew him over a period of time. They describe, in different ways, a change in the accused's demeanour – "it wasn't the same Adam," "his behaviour had changed."

[240] With respect to the incident itself, Mr. Bruyere, a fellow inmate, was woken up by the accused when he saw the accused under his own bed. The accused was wearing an orange rag on his head and stated that he was on a mission. Mr. Bruyere next saw the accused start hitting Mr. Quisses and heard the accused say that he was "Carlos" to the guard who broke it up. Mr.

Ross, an inmate who was sleeping in the bunk next to the accused, saw and heard the accused being taken away by the guards. He observed that "it wasn't the Adam that I remembered meeting. [H]e seemed to have been in … like a trance. [H]e seemed to be in a trance. And I remember him saying that he was Don Corleone." Mr. Harrison, another inmate sleeping two beds away from the accused, heard the accused state after the assault, "I'm Carlos Cardone and I don't give a fuck."

[241] Mr. McClendon, a correctional officer, ordered the accused away from Mr. Quisses. Asked about his observations of the accused, Mr. McClendon stated, "I noticed that he was not displaying any emotion. His face was very, very blank and emotionless. He was not breathing hard or, or anything. He was just emotionless and quiet." Mr. Ulmer, another correctional officer, escorted the accused out of the dorm. He asked the accused what was going on. The accused responded, repeatedly, "Roger Rodriguez – that's who I am," or something similar to that. Mr. Ulmer described the accused as "just calm and relaxed."

[242] Mr. Mihichuk, the correctional officer who had interacted with the accused approximately one month before, was also present that night. He stated that the accused was very compliant, but "it's just that his demeanour did not seem, it did not seem that it was normal to me. I don't know how else I can explain it. Regarding what had just transpired."

[243] Dr. Bradford explained the significance of these eyewitness reports. From his experience, in dealing with the mentally ill, it is very important to listen to and review layperson's observations because, "I think they can be very powerful." He noted that a number of people familiar with the accused noticed a change in his demeanour in the period immediately prior to the incident. The observations of his behaviour at the time of and immediately after the

assault were also consistent – that he was in a trance and using false, Spanish names.

[244] In Dr. Bradford's opinion, the accused was described as "being in an altered state of mind in layman's terms. [A]ssuming these observations are correct, they are supportive of Mr. Capay being in some form of altered state of mind at the time of the homicide, and therefore most likely suffering from a mental disorder prior to and at the material time of the alleged offence."

[245] Dr. Bradford was unable to opine more specifically on whether the altered state of mind was a psychosis (possibly drug induced), a substance induced state including perceptual disturbances, or an altered state of consciousness also possibly related to drug intoxication.

[246] The accused advised Dr. Bradford that he became addicted to opiates while incarcerated at the TBCC. Dr. Bradford testified that, if in fact the accused was abusing opiates while receiving prescribed medications, including antidepressant drugs, there would have been a significant drug interaction which could have led to an altered state of consciousness.

[247] In his report, Dr. Bradford explained that the accused's background, the presence of depression and PTSD, and the fact that he was on antidepressants for the treatment of a major depression, could have resulted in him becoming psychotic as part of a substance induced psychosis. He was of the opinion that the description of the accused's behaviour by lay witnesses supports a significantly disturbed state of mind typically seen in psychosis or a drug induced intoxicated state.

[248] Dr. Bradford further noted that the attack on the victim appeared to have been unprovoked and without a logical or consistent motivation. According to Dr. Bradford, this unprovoked attack on Mr. Quisses, "which is seen as a classic hallmark of a psychotically driven

act of violence, remains a strong possibility. If accurate, this would also be consistent with the result of a disturbed state of mind, with the behaviour being driven by internal perceptions rather than being in response to external reality."

[249] Dr. Bradford carefully considered the fact that neither Dr. Schubert, who saw the accused two weeks prior to the alleged offence and numerous times thereafter at the Thunder Bay Jail, nor Dr. Stambrook suggested that the accused suffered from a psychotic condition. He suggested that Dr. Schubert's visits with the accused were brief, consistent with the demands of an institutional setting. He further suggested that the accused felt that Dr. Schubert was largely responsible for his ongoing segregation.

[250] Dr. Bradford was of the opinion that this resulted in the accused not being fully forthcoming with Dr. Schubert, limiting Dr. Schubert's ability to fully appreciate the accused's condition and reach a complete diagnosis. Dr. Bradford, on the other hand, felt that he had been able to develop a rapport with the accused over the course of a lengthy inpatient assessment.

[251] Dr. Bradford reviewed some of his observations of the accused together with nursing observations which informed his assessment.

[252] Shortly after his December 2016 admission to Waypoint for the assessment, the accused was observed to be responding to hallucinations. He talked about hearing voices and having an alien in his head that talked to him.

[253] Dr. Bradford described an incident which occurred on March 12, 2017. While in the dining area, the accused jumped up with his tray in his hand and, entirely unprovoked, hit another patient on the head five times. Dr. Bradford noted that this was quite similar to the attack on Mr. Quisses. When Dr. Bradford later discussed this incident with the accused, the

accused explained that he had been hearing voices and that it was because of these voices that he attacked the other patient. The voices stopped when he carried out the attack.

[254] Dr. Bradford felt that these auditory/command hallucinations, common in psychotic conditions, may have been precipitated by medication adjustments made to treat the accused's adult ADHD. He suggested that this would be consistent with past experiences of some level of psychotic breakdown associated with a substance induced psychotic state.

[255] Dr. Bradford diagnosed the accused as having a psychosis NOS – not otherwise specified. He explained that "it's not typical of schizophrenia. It's not typical of schizoid effective disorder. It's not typical of bipolar disorder or any of the organic psychosis, a brain disorder leading to psychosis, but he certainly has had psychotic symptoms." Dr. Bradford was careful to explain that he "was not exactly sure because of his drug history and all the other things we talked about, but it was sufficient to make a diagnosis of psychosis."

[256] Dr. Bradford began to treat the accused with a moderate dosage of an antipsychotic drug. The accused began to respond within a few days and told Dr. Bradford that the auditory hallucinations had started to become less intense.

[257] Dr. Bradford's assessment and treatment of the accused, together with his review of the institutional record, led him to conclude that, while the accused was in segregation, he was experiencing at least three distinct but possible overlapping and/or interactive forms of disordered thinking: auditory hallucinations associated with a pre-existing condition (possibly schizoaffective); other auditory and visual hallucinations; and delusional fantasies of a sadistic and paraphilic nature. He was of the opinion that the pre-existing auditory hallucinations may well have been exacerbated by the accused's time in segregation. The latter two forms of

disordered thinking are likely due in significant measure to the effects of segregation itself, according to Dr. Bradford.

[258] Dr. Bradford testified that the challenge of assessing criminal responsibility for an offence that occurred four years previously had been "significantly increased" by the effects of segregation, in particular, on the accused's memory and as a result of the unavailability of information and observations that would ordinarily be considered in an assessment.

[259] Dr. Bradford's review of the testimony of correctional officers and other inmates present at the time of the accused's attack on Mr. Quisses suggested to him that the accused may have been in an altered state of mind at the time of the offence such that a forensic evaluation was warranted at that time.

[260] Dr. Bradford testified that, if the accused had been promptly assessed following the June 3, 2012, assault, biochemistry results would have been available to determine the level of prescribed and non-prescribed medication in his system, professional mental status observations would have been recorded, and neurological testing could have been done. In his report, Dr. Bradford explained that:

> In Mr. Capay's case, he was placed in complete isolation for several months following the offence, thus severely limiting the opportunity for observation and interaction. I am advised that during this initial period, institutional staff were specifically instructed not to engage Mr. Capay in conversation, creating a complete vacuum of evidence relating to his mental health status during that period of time. Mr. Capay was not seen by any mental health professional until more than two months after the offence, during which he was in seclusion. By the time he was seen by a mental health professional, there is a strong possibility that his presenting mental health status had been significantly altered by his total seclusion.
>
> The absence of physiological data and contemporaneous psychiatric observation and assessment, or even the opportunity for laypersons to interact with Mr. Capay and to observe his interactions with others, is a significant constraint on any assessment of criminal responsibility today.

[261] Dr. Bradford elaborated on the impact the absence of contemporaneous evidence had on his assessment of criminal responsibility: "Well, I think it's very difficult … even without some of the complexities that Mr. Capay presents whether it be difficult four years afterwards, with what he presents within segregation it's very difficult, impossible I would say."

[262] Dr. Bradford testified that the best alternative to the missing physiological data and contemporaneous psychiatric observation would be the accused's memory of the events leading up to the incident and his subjective state of mind at the time. While this would be difficult to obtain from anyone four years after the fact, Dr. Bradford testified that the difficulty is increased in the accused's case because his memory has been profoundly impaired by his time in segregation, in particular because of the intense isolation in the period immediately following the offence.

[263] Dr. Bradford noted improvements in the accused's current functioning while under his care, but he saw no evidence of improvement in his memory for past events, specifically his time in jail prior to and following the offence. Dr. Bradford was of the opinion that the memory impairment that the accused experienced as a result of the segregation is permanent.

[264] In conclusion, Dr. Bradford reiterated that the accused experienced an extremely impaired medical and social background, including exposure to alcohol in utero, most likely resulting in a level of cognitive impairment resulting in ADHD. During childhood, the accused suffered a number of significant traumas, including sexual abuse, physical assaults, repeated head injuries, parental alcoholism and marital discord, substance abuse, and violence. Dr. Bradford opined that these childhood experiences left the accused with a basis for a personality disorder and that he presented with a moderate antisocial personality disorder.

[265] Dr. Bradford further concluded that the accused's time in segregation, particularly the initial period of near-total isolation, almost certainly had a more serious effect on him than it would on many other individuals given the accused's ADHD, antisocial personality disorder, history of depression, self-injurious behaviour, and suicidality. Dr. Bradford felt that the accused's time in segregation also resulted in perceptual disturbances and violent and sadistic fantasies.

[266] Dr. Bradford was also of the opinion that the further trauma of segregation compounded the past traumas the accused had suffered and either exacerbated pre-existing PTSD or triggered its development, which is now both chronic and severe. Dr. Bradford opined that this PTSD would persist as a lasting effect of the accused's prolonged segregation.

[267] Dr. Bradford concluded that the accused's prolonged segregation has resulted in significant cognitive impairments, in particular, permanent serious impairment of the accused's memory of events leading up to his time in segregation.

[268] Dr. Bradford advised the court that all of the above has had a significant impact on the assessment of the accused's mental state at the time of the offence. Dr. Bradford reported that there is "considerable evidence" that the accused was in a "seriously altered or disturbed state of mind, which would support a finding that he was not criminally responsible, or at the very least, [would] have a substantial impact on his culpability short of that finding."

[269] Dr. Bradford concluded, in his report, that "the effects of segregation, in particular, on Mr. Capay's memory, impair the ability to determine today the etiology, nature and severity of the altered or disturbed state of mind that the evidence indicates he was in at the time the offence was committed."

[270] Dr. Bradford's opinions and conclusions were not challenged on cross examination.

The Positions of the Parties

The Accused

[271] The accused is seeking a stay of proceedings pursuant to s. 24(1) of the *Charter* as a remedy for alleged violations of his rights under ss. 7, 9, 12, and 15 of the *Charter*.

Section 7

[272] The accused submits that the circumstances of his continuous detention in segregation between June 4, 2012, and December 6, 2016, have violated his s. 7 *Charter* rights, retrospectively and prospectively.

[273] Retrospectively, the accused contends that the four and one-half years that he was held in segregation deprived him of liberty and security of the person and that this deprivation was inconsistent with the principles of fundamental justice. The Crown has conceded that the evidence on this application establishes a retrospective violation of the accused's s. 7 *Charter* rights.

[274] Prospectively, the accused submits that he faces a prolonged deprivation of liberty if convicted of first degree murder. The accused submits that the effects of segregation have prejudiced his ability to make full answer and defence and his right to a fair trial, such that the prospective deprivation of his liberty cannot be in accordance with the principles of fundamental justice.

[275] The accused submits that Dr. Bradford's unchallenged evidence is that the accused's memory of his June 3, 2012, assault on Mr. Quisses and of the events leading up to it have been permanently lost as a result of the impact of segregation on the accused. Dr. Bradford further

explained that objective information and observations of the accused's mental health status immediately following the offence, which would ordinarily be fundamental in an assessment of criminal responsibility, are not available because of the accused's detention in near total isolation in the months immediately following the assault. According to Dr. Bradford, both factors exacerbate the already significant challenge of assessing the criminal responsibility of an accused for an offence that occurred over four years earlier.

[276] The accused submits that his loss of memory and the unavailability of timely objective observations of him, both as a result of state conduct, prejudice his ability to make full answer and defence and his right to a fair trial.

[277] The accused submits that fault for the fact he was not assessed soon after the offence lies with corrections. It is suggested that the accused's psychiatric history, of which the corrections was aware, together with his bizarre behaviour at the time of the offence, should have prompted efforts to have him assessed by a mental health professional immediately following the offence. In the alternative, the accused submits that the state had an obligation to alert the court, the Crown, and/or defence counsel of the accused's mental health issues promptly following the offence.

[278] The accused submits that this was not done and that he was immediately segregated in conditions of near total isolation, which had profound psychological effects on him and altered his psychological profile from what it was at the time of the offence. The isolation of the accused following the offence also prevented any contemporaneous observations of the accused's demeanour by correctional officers or others.

[279] The accused notes that he did not see a mental health professional until his meeting with

Dr. Stambrook on August 20, 2012, more than two months after he had been placed in segregation. At this time, Dr. Stambrook directed that the accused required a "detailed forensic assessment." The accused suggests that Dr. Stambrook's direction was communicated to a mental health worker in Kenora and shared with the nursing department and the Superintendent at the Kenora Jail. It also became known to the medical staff at the Thunder Bay Jail. The accused contends that none of these parties did anything to have him forensically assessed. The accused further submits that Dr. Stambrook's direction was never shared with the court, the Crown, defence counsel or the accused himself.

[280] Counsel for the accused submits that the State's failure to act on Dr. Stambrook's direction and to take reasonable steps to have the accused assessed – or at a minimum the failure to share available information to allow the court, Crown or defence counsel to make informed decisions as to an assessment – was contrary to the duty of correctional institutions to provide treatment and living conditions to inmates that respect the inmate's right to a fair trial. It has resulted in the loss of relevant evidence, according to the accused, and the accused submits that the state has therefore prejudiced his ability to make full answer and defence.

[281] Counsel for the accused suggests that Dr. Bradford's evidence establishes that the accused's time in segregation has permanently impaired his ability to recall the events leading up to his assault on Mr. Quisses and his state of mind at the time of the offence, hindering his ability to raise a viable not criminally responsible defence.

[282] However, the accused submits that the prejudice to his right to a fair trial caused by his loss of memory is not limited to his ability to advance a not criminally responsible defence. The accused submits that this loss of memory also impairs his ability to properly instruct counsel and

to respond to evidence called by the Crown.

[283] The accused cites as an example the statement that he is alleged to have made immediately before the assault – "I'm on a mission, watch this." The accused suggests that this is vital incriminating evidence in a first degree murder case in which the only issue is his mental state at the time of the offence.

[284] According to the accused, as a result of his loss of memory, he would be unable to instruct counsel or testify in any way as to this evidence. Did he in fact make this exact statement? If so, what did he mean by it? What was the mission referred to?

[285] The accused submits that similar constraints resulting from his loss of memory would apply to all fact witnesses that would be called at trial. The accused suggests that it would also have a significant impact on his ability to testify in his own defence.

[286] The accused acknowledges that trials proceed all the time when an accused has no memory of the events in question. However, counsel for the accused submits that in this case it was state conduct in breach of the accused's *Charter* rights that caused his memory loss and which has impaired his ability to make full answer and defence.

Section 9

[287] The accused's submits that a person's s. 9 *Charter* right not to be arbitrarily detained or imprisoned encompasses both the existence of constitutionally adequate standards prescribed by law for detention or imprisonment and the application of and compliance with those standards by state actors. Included within this s. 9 *Charter* guarantee, according to the accused, is the right to prompt and regular reviews of segregation to determine whether a lawful basis for continued segregation exists. The accused submits that a remedy may be sought under s. 24(1) of the

Charter where state actors fail to meet constitutionally compliant standards.

[288] The accused submits that the evidence clearly establishes that the practice followed by correctional authorities in the ongoing reviews of the accused's segregation violated his right to procedural fairness under s. 7 of the *Charter*. The Crown has conceded this point in acknowledging the s. 7 breach. However, the accused submits that the right to prompt review of the substantive basis for continued segregation is a right guaranteed by s. 9, distinct from the right to a procedurally fair review process guaranteed by s. 7 of the *Charter*.

[289] The accused submits that two aspects of the mandated review process violated his s. 9 rights: first, the absence of prompt and timely reviews of the accused's detention during the initial period of segregation; and, second, the absence of a lawful basis for continued segregation upon review of the accused's detention in segregation thereafter.

[290] The accused submits that the specific facts as to his detention during the initial period of segregation are central to the s. 9 breach analysis.

[291] The accused was first detained in segregation on June 4, 2012. Counsel submits that the accused was detained in isolation cells at the Thunder Bay Jail and subject to near total isolation from June 4, 2012, to July 31, 2012. During this period of time, the accused's Offender Rating Sheet at the Thunder Bay Jail prohibited correctional officers from speaking with him. During this same eight week period, the accused was out of his cell for a total of eight hours.

[292] Between July 31, 2012, and August 29, 2012, the accused was segregated in isolation cells at the Kenora Jail. He was returned to segregation at the Thunder Bay Jail on August 29, 2012, and again placed in isolation cells where he remained until December 5, 2012.

[293] Subsequent to December 5, 2012, the accused was detained for 11 weeks in Block 1 of

the Thunder Bay Jail. For the balance of 2013, the accused was again detained in isolation cells in either the Thunder Bay Jail or the Kenora Jail, but for three three-day periods of time.

[294] The accused contends that correctional officials were legally required to review his detention in segregation on a regular and consistent basis - by the superintendent or designate every five days and 30 days following June 4, 2012, and by the Regional Director every 30 days. The accused contends that his segregation was not reviewed at the institutional level until August 29, 2012. Corrections conducted 5 day reviews were conducted on September 3 and 8, 2012. There was no further review of the accused's segregation at the institutional level until February 21, 2013, a period of more than five months.

[295] The accused submits that between June 4, 2012, and July 31, 2012, corrections was legally required to have reviewed his detention in segregation 13 times, 12 times at the institutional level and once at the regional level. Thirteen legally mandated reviews did not occur during the first two months of the accused's segregation, a period of time during which he was held in near total isolation, according to the accused.

[296] The accused was transferred to the Kenora Jail on July 31, 2012, and remained there until August 29, 2012. Corrections was required to conduct five 5 day reviews at the institutional level and two 30 day reviews, one at the institutional level and one at the regional level, during this period of time. None were conducted.

[297] The accused was returned to segregation at the Thunder Bay Jail on August 29, 2012. Corrections conducted two 5 day reviews on September 3 and 8, 2012, which the accused suggests indicates at least an awareness of the requirement to conduct segregation reviews. However, the accused submits that there was not a single review of his detention in segregation

between September 8, 2012, and February 21, 2013, a period of five and one-half months, and that corrections was required to conduct 33 5 day reviews at the institutional level and five 30 day reviews at both the institutional and regional levels.

[298] The accused submits that this pattern continues thereafter, with 30 day reviews being conducted at the institutional level on February 21, 2013 and at the regional level on February 27, 2013, and the next regional review not occurring until July 16, 2013.

[299] The accused submits that his detention in segregation for almost three months initially and then subsequently for in excess of five months without any of the mandated reviews at the institutional and regional levels occurring was contrary to Ministry policy, unlawful and therefore arbitrary.

[300] The accused submits that s. 9 of the *Charter* encompasses the right to prompt review of any detention by the state and that the conditions under which he was detained during the initial period following June 4, 2012, represented an extraordinary form of detention. The accused contends that the constitutional requirement of prompt review consistent with the applicable law is that much more vital and pressing in the particular circumstances of this case.

[301] The accused submits that the repeated and ongoing failure to undertake segregation reviews prescribed by law to determine the lawfulness and validity of his ongoing detention in segregation was a prolonged and repeated violation of his s. 9 *Charter* guaranteed right against arbitrary detention.

[302] The accused alleges that his s. 9 *Charter* rights were further violated as a result of his continued detention in segregation absent a lawful basis for it, beginning in 2013.

[303] The accused submits that the Ministry policy in regard to Special Management Inmates

required that decisions regarding housing special management inmates be based on "reliable information and objective criteria" and be consistent with "the principle of placing inmates in the least intrusive or lowest level of security possible…and [which] ensures the safety of all persons and the security of correctional institutions."

[304] The accused submits that s. 34(1) of Regulation 778 authorizing administrative segregation provides three grounds for that form of detention, two of which are relevant to this analysis:

> (a) in the opinion of the Superintendent, the inmate is in need of protection; or,
>
> (b) in the opinion of the Superintendent, the inmate must be segregated to protect the security of the institution or the safety of other inmates.

[305] The accused submits that the only 5 day segregation reviews performed in 2012 were two 5 day reviews conducted in September of that year by Ms. McKay, Superintendent at the Thunder Bay Jail. In these reviews, Ms. McKay identified the reason for segregation as "charged with the murder of an inmate while in custody as the TBCC." Ms. McKay testified that this meant that the accused was in segregation for his own protection because he would be targeted by other inmates.

[306] The accused suggests, however, that there was nothing in the institutional record to suggest that he had been the target of threats or retaliation from other inmates. The accused contends that the circumstances of his offence and the exercise of common sense by experienced correctional staff, in and off itself, do not meet the policy threshold of "reliable information and objective criteria." The accused submits that there was an insufficient evidentiary basis to ground Ms. McKay's opinion that the accused had to remain segregated during this time for his own protection.

[307] The accused contends that while he was segregated at the Kenora Jail in August 2012, a period of time during which there should have been five 5 day reviews and two 30 day reviews, no reviews were conducted and there was therefore a complete absence of any consideration as to whether grounds for continued segregation existed.

[308] The accused submits that, beginning in 2013, the apparent rationale for his continued segregation became the protection of other inmates and the security of the institution. According to the accused, beginning in July 2013, segregation review forms at both the institutional and regional levels indicated that the accused had expressed thoughts to the psychiatrist of harming staff and other inmates. This rationale is suggested to have been used on review forms up to and including October 2016.

[309] The accused referred the court to the review form dated October 4, 2016, which noted that "offender discloses ongoing pervasive thoughts to seriously harm or kill staff or other offenders. Segregation requested by institutional psychologist" as the reason for continued segregation.

[310] Counsel acknowledge that the accused did express sadistic fantasies and homicidal ideation to both Dr. Stambrook and Dr. Schubert between August 2012 and October 2013. The accused submits that Dr. Schubert's notes, however, indicate that he had ceased to report any homicidal ideation as of October 2013 and consistently denied such thoughts after that point in time.

[311] In conducting segregation reviews, correctional officials, due to privacy concerns, rely on health care administrative summaries to inform their segregation decisions. At the Thunder Bay Jail, these summaries were prepared by Melissa Boban, the Health Care Manager. The

accused suggests that Ms. Boban was aware of the need to provide current, accurate information on all matters relevant to a segregation review.

[312] The accused points out that Dr. Schubert's notes from his October 16, 2013, interview of the accused include the entry, "Content. No (suicide ideation) + (homicidal ideation)." The accused submits that the health care administrative summaries provided by Ms. Boban for his segregation reviews never included the information that the accused had ceased to report any homicidal ideation as of October 16, 2013. The accused further submits that essentially all of the summaries prepared by Ms. Boban concluded with the statement that the accused continued to be a high risk for violence and a low risk for suicide.

[313] The accused submits that the health care administrative summaries prepared by Ms. Boban for the purpose of segregation reviews did not provide current, accurate, reliable information with respect to Dr. Schubert's observations of the accused. As such, these summaries, which were the basis of the ongoing decision to keep the accused in segregation, were manifestly unreliable, according to the accused.

[314] The accused submits that his ongoing segregation from mid-2013 to the fall of 2016, in the absence of a proper evidentiary basis for the conclusion that he posed a risk to other inmates, staff, or the security of the institution, was unlawful, and his detention in segregation was therefore arbitrary and in breach of s. 9 of the *Charter*. The accused submits that, during this period of time, there was an insufficient and unreliable evidentiary basis to allow a decision maker to form the opinion that he was a current risk or danger to other inmates or staff.

[315] The accused submits that s. 9 of the *Charter* is in fact engaged in relation to his prolonged segregation and was breached, first, during the period of time he was detained in

segregation without review and, again, when he thereafter was held in segregation for three years without a substantive basis for such detention.

Section 12

[316] The Crown has acknowledged that the accused's s. 12 *Charter* rights have been violated as a result of the duration and conditions of his detention in continuous segregation between June 4, 2012, and December 6, 2016.

Section 15

[317] The accused submits that s. 15 of the *Charter* protects substantive equality and therefore provides protection from both direct and indirect discrimination. The accused contends that a law, regulation, or state practice that does not directly discriminate on its face may nonetheless violate the s. 15 guarantee of substantive equality if in its application it has a disproportionately negative impact on particular persons.

[318] The accused suggests that detention in segregation has a disproportionately negative impact on persons with mental illness and/or who are Indigenous. The accused suggests that inmates in Canada who are mentally ill or Indigenous or both are more likely to be placed in segregation and are also more vulnerable to the effects of segregation.

[319] The accused submits that Professor Hannah-Moffat and Professor Jackson testified as to the disproportionately negative effects of segregation on Indigenous people given that Indigenous culture and spirituality place such importance on maintaining relationships with the natural world. The accused contends that the disproportionately negative effects of segregation on mentally ill inmates is now notorious.

[320] The accused, an Indigenous inmate with mental health issues, suggests that the

disproportionate impact of segregation on mentally ill and Indigenous persons imposed a positive obligation on the state to provide him with deferential treatment, accommodation, or mitigating measures during his time in segregation to satisfy the substantive equality requirements of s. 15 of the *Charter*. The accused suggests that this duty entailed, on the facts of this case, nothing more than the consideration of alternatives to ongoing segregation or the implementation of measures directed at mitigating the effects of segregation on the accused, including adequate and appropriate supports short of undue hardship.

[321] The accused submits that the Ministry did absolutely nothing to discharge this duty during the four and one-half years that he was in segregation.

[322] The accused submits that he had no access to any form of Indigenous programming, services or spiritual activities in 2012, 2013, 2014, or 2015, but for the provision of a Christmas bag by a NILO on December 24, 2015. In 2016, there were only two occasions prior to October when the accused was allowed to speak with a NILO. Throughout this period of time, as a result of his segregation, the accused suggests that he was not permitted to engage in any communal spiritual activities. The accused submits that this establishes the lack of even an attempt on the part of the Ministry to accommodate his needs as an Indigenous person in segregation.

[323] With respect to his mental health needs, the accused submits that Dr. Schubert, the institutional psychiatrist at the Thunder Bay Jail, met with him for approximately nine hours in total between June 4, 2012, and December 6, 2016, - approximately two hours per year of segregation. During the same time period, the accused submits that he made 19 written requests to see a psychiatrist in response to which he was told he would be put on a waiting list or that he was on a waiting list. Assessments required by Ministry policy were not conducted for the

purpose of five-day reviews. The Thunder Bay Jail did not even employ a mental health nurse until June 2015; the Kenora Jail did not do so until November 2015. Ironically and more troubling, according to the accused, is that his mental illness was listed as the primary reason for his continued segregation on multiple segregation review forms.

[324] In contrast to the four and one-half years that the accused spent in segregation without any attempt on the part of the Ministry to accommodate or mitigate the disproportionate effects of the segregation, the accused submits that a number of measures intended to mitigate the effects of segregation were quickly implemented after Ms. Mandhane's October 2016 visit to the Thunder Bay Jail. These included increased yard time, more time out of his cell each day, meetings with the mental health nurse, more frequent visits with the social worker and NILOs, pipe ceremonies, and educational supports.

[325] The accused submits that all such measures could have and should have been implemented well prior to October 2016. The accused suggests that none were even considered, let alone provided. The accused submits that the Ministry's failure to consider alternatives to segregation and to provide appropriate available accommodation or to implement any measures in an attempt to mitigate the effects of segregation on him constitutes a violation of his rights under s. 15 of the *Charter*.

[326] The accused acknowledges that the statutory objective which must be balanced against his s. 15 *Charter* equality rights in this analysis is the protection of inmates' safety and institutional security. However, he contends that the severity of the interference with his *Charter* protections was exceptional and extreme. The accused suggests that there was a complete absence of any regard for the severity of the impact of prolonged and highly restrictive

segregation on his *Charter* rights, much less any attempt to balance that impact against the statutory objective. The accused submits that, throughout his time in segregation, maintenance of safety and security was the only consideration given weight by Ministry staff. The disproportionately negative impact of segregation on him never entered into the equation, according to the accused.

Remedy

[327] The accused submits that the *Charter* violations in this case have prejudiced his right to a fair trial and undermined the integrity of the justice system.

Trial Fairness

[328] The accused concedes that he caused the death of Mr. Quisses. He is to be tried by a judge and jury on the charge of first degree murder. The accused submits that the issue for the jury will be his mental state at the time of the offence. The accused submits that there has been irreparable prejudice to his right to a fair trial on this issue as a result of state misconduct.

[329] The accused submits that state misconduct has impaired his ability to present a defence of not criminally responsible. The accused further contends that state misconduct has caused the loss of his memory, both of the offence and the circumstances surrounding it, which he suggests will impact every aspect of a trial.

[330] The accused suggests that no remedy other than a stay of proceedings is capable of redressing the prejudice to his right to a fair trial.

[331] The actions of the state in violation of a number of the accused's *Charter* rights are suggested to have stripped the accused of his memory of the events of June 3, 2012. The accused submits that his memory of the offence and the period of time immediately before the

assault is such a significant source of potential evidence, given the facts of this case, that it is obvious that he could not have a fair trial.

[332] The accused submits that his memory loss is permanent and that the shortcomings in Dr. Bradford's ability to assess his mental status at the time of the offence are irreparable. The accused suggests that the prejudice to trial fairness has been compromised to such an extent that the appropriateness of a stay of proceedings is manifest at the pre-trial stage.

[333] The accused submits that Dr. Bradford's evidence establishes that the inability of the accused to remember the events of June 3, 2012, and his state of mind at the time of the offence impair the accused's ability to raise a defence of not criminally responsible, to properly instruct counsel as to his defence, to respond to evidence called by the Crown, and to testify in his own defence. The accused submits that the court is presently in a position to assess the effect this will inevitably have on trial fairness.

[334] The accused submits that, in the particular circumstances of this case, the prejudice to trial fairness is irremediable such that a stay is the only available remedy.

[335] The accused disputes that the prejudice to trial fairness in this case could be alleviated by Dr. Bradford attempting to explain to the jury the limitations on his opinion regarding the accused's mental state at the time of the offence coupled with a curative jury instruction.

[336] According to the accused, explanations as to the limitations on Dr. Bradford's opinion and the accused's memory loss would necessarily include the fact that the accused has spent years in solitary confinement. The accused submits that this is highly prejudicial information that a jury would never receive under normal circumstances. The accused submits that, in this scenario, the state misconduct would further prejudice his right to a fair trial by essentially

forcing him to introduce highly prejudicial evidence before a jury.

[337] The accused contends that, if this prosecution continues, the Crown would benefit from the frailties in Dr. Bradford's assessment and his lack of memory, both of which are said to be the direct result of the state's misconduct. The accused submits that this would result in the Crown benefitting from its own misconduct.

[338] The accused submits that this court cannot be seen to condone the mistreatment of an accused person which has the effect of prejudicing his ability to make full answer and defence. If this case was allowed to proceed, the accused submits that the Crown would benefit from the accused's lack of memory and the frailties in Dr. Bradford's assessment, both a direct result of the state's violations of the accused's *Charter* rights.

[339] The accused submits that the facts of this case are so extreme and the prejudice to trial fairness so pervasive that there should be no uncertainty over whether a stay is warranted.

The Integrity of the Justice System

[340] The accused submits that the state conduct in this case has irreparably prejudiced his right to a fair trial and is so offensive to societal notions of fair play and decency that proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system.

[341] The accused suggests that a stay of proceedings is a prospective remedy meant to prevent the perpetuation or aggravation of past conduct. The accused submits that the court must be concerned about the possibility of the state conduct in this case being repeated in the future. The accused also submits that this is an exceptional case where the state's past conduct was so egregious that allowing the prosecution to proceed in light of that conduct is offensive to society's sense of fair play and decency.

[342] The accused submits that his detention in segregation for 1,647 days – 109 times in excess of what is deemed acceptable by international standards - in conditions described as shocking and appalling by experts in the field must offend society's sense of justice.

[343] The accused notes that Professor Jackson, an expert in the field of corrections, found the particular physical conditions of the accused's segregation, including 24 hour light, no natural light, no access to radio or television, and an inability to flush the cell toilet, shocking and as bad as he has ever seen or read about. Professor Jackson compared the segregation cells used to detain the accused as comparable to segregation cells 50 years ago.

[344] The accused submits that Professor Hannah-Moffat, also an expert in the field of corrections, opined that both the physical conditions and the length of the accused's detention in segregation were as bad as she had ever seen in Canada and internationally –"akin to some of the most egregious conditions…in undeveloped countries or in the United States in some of their super max's."

[345] The accused suggests that Ms. Mandhane also testified that the conditions that were imposed on him were the worst she had ever witnessed.

[346] The accused submits that this case goes beyond simple state misconduct. The accused suggests that the state misconduct established by the evidence on this application is the worst state misconduct ever encountered by expert witnesses with decades of experience in the field. The accused submits that a stay is warranted in these circumstances even absent a consideration of whether the misconduct is likely to continue in the future.

[347] However, when considering the appropriate remedy, the accused also submits that this court should be concerned about this type of state conduct being repeated. The accused submits

that the evidence heard on this application indicates that the mistreatment he suffered is not isolated, but part of a pattern of disregard for policy and procedure endemic within the Ontario correctional system. As of January 31, 2017, there were four other inmates who had been held in segregation continuously for longer than 939 days. The accused submits that there have been no apparent consequences for any of the Ministry employees involved in the systemic failure in this case, including Superintendent McKay; Dr. Schubert, psychiatrist at the Thunder Bay Jail; Ms. Boban, Health Care Manager at the Thunder Bay Jail; Mr. McDaniel, Regional Director; and Mr. Houghton, Regional Director.

[348] The accused contends that the fact that he, an inmate with clearly diagnosed mental health issues, was in continuous segregation for four and one-half years was known at the institutional, the regional, and the provincial levels of the Ministry. In addition, according to the accused, the reviews that corrections conducted were pro forma, perfunctory, and meaningless.

[349] The accused submits that a stay of proceedings is the only remedy capable of redressing the prejudice caused by his mistreatment and the only remedy capable of adequately denouncing the state's misconduct.

[350] The accused suggests that a reduction of sentence is not an available remedy in this case for two reasons.

[351] First, a conviction for first degree murder carries with it a mandatory sentence of life imprisonment without the possibility of parole for 25 years. The accused submits that this court does not have the jurisdiction to reduce this mandatory sentence to remedy the *Charter* breaches.

[352] Second, the accused submits that no reduction in sentence could be an adequate remedy for the state misconduct in this case. The accused contends that he spent four and one-half years

in deplorable conditions and has suffered permanent psychological harm as a result. The accused submits that the segregation he endured for four and one-half years was highly punitive and much more severe than a court could sentence him to serve if convicted.

[353] The accused submits that this is one of the rare cases in which the state misconduct is so egregious and the appropriateness of a stay so compelling that they could not possibly be overtaken by society's interest in having a trial on the merits.

The Crown

[354] The Crown accepts that the circumstances of the accused being held in continuous segregation for 1,647 days between June 4, 2012, and December 6, 2016, violated his retrospective s. 7 *Charter* rights and his s. 12 *Charter* rights. The Crown further concedes that the s. 7 and s. 12 breaches are significant and systemic.

[355] The Crown submits that ss. 9 and 15 of the *Charter* are not engaged in this case and that the facts as to the alleged ss. 9 and 15 *Charter* violations are more appropriately analyzed within the ambit of s. 7 and s. 12 of the *Charter*.

Section 7– Prospective Violation and Trial Fairness

[356] The Crown agrees that the issue at trial will be the state of mind of the accused at the time of the offence. The Crown does not challenge the evidence of Dr. Bradford as to accused's loss of memory of events at the time of and leading up to the offence. The Crown accepts that the accused's memory loss was caused by the state treatment of the accused in violation of his ss. 7 and 12 *Charter* rights.

[357] The Crown concedes that the accused's loss of memory has "impeded and impaired" his ability to call evidence at trial as to his mental state at the time of the offence. However, the

Crown submits that it is speculative to now conclude that the trier of fact will ultimately reject Dr. Bradford's opinion and therefore speculative to conclude on this application that the accused cannot receive a fair trial.

[358] The Crown submits that Dr. Bradford had access to a broad range of material and observations during the course of his assessment of the accused, including a comprehensive *Gladue* report, the medical and psychiatric records of the accused, correctional log books, the preliminary hearing transcripts, and an extensive and prolonged in-person assessment. The Crown submits that, given this background, a trier of fact may very well give sufficient weight to Dr. Bradford's opinion to make the trial fair for the accused.

[359] The Crown submits that the accused is entitled to a trial which is fundamentally fair. The Crown suggests that Dr. Bradford's evidence, even given its limitations as a result of the accused's memory loss, would nevertheless enable the accused to advance all available defences at trial such that his trial would be fundamentally fair.

Section 9

[360] The Crown submits that s. 9 of the *Charter* does not address the nature or duration of detention or imprisonment, but the adequacy of standards prescribed by law for a detention or imprisonment, which are not in issue in this application. The Crown contends that any alleged *Charter* violations resulting from a deficient segregation review process are more appropriately analyzed in the context of s. 7 of the *Charter*.

Section 12

[361] The Crown accepts the opinion of Professor Toope that the conditions of the accused's confinement in segregation amount to cruel, inhuman, and degrading treatment under

international law. The Crown does not accept the opinion of Professor Toope that these same conditions amount to torture as understood in international law. The Crown submits that the evidence heard on this application does not allow the court to conclude that correctional authorities intentionally inflicted pain and suffering on the accused.

[362] The Crown submits that the treatment of the accused was the result of a "systemic failure" consisting of, in part, an insufficient segregation review process and the failure to meaningfully consider any possible accommodations or alternatives to segregation.

[363] In any event, the Crown concedes that correctional officials subjected the accused to cruel and unusual treatment or punishment between June 4, 2012, and December 6, 2016, in violation of his s. 12 *Charter* rights.

Section 15

[364] The Crown does not dispute that the accused is Indigenous and suffered from mental illness throughout his time in segregation. The Crown submits that Ministry employees acted upon information suggesting that the accused was a danger to correctional officers and other inmates when placing and retaining him in segregation. The Crown suggests that correctional actions were guided by concerns for inmate and institutional safety and not by any of the s. 15 enumerated grounds. In these circumstances, According to the Crown, s. 15 of the *Charter* is not engaged.

Remedy

[365] The Crown submits that there are compelling reasons, as set out above, for the trier of fact to accept Dr. Bradford's expert opinion as to the accused's state of mind at the time of the offence. The Crown contends that determining the true impact of the *Charter* violations on trial

fairness is speculative unless and until Dr. Bradford's opinion is rejected by the trier of fact.

[366] The Crown disputes the accused's submission that his right to a fair trial would be prejudiced as a result of Dr. Bradford having to explain that the limitations of his opinion are the result of the accused's prolonged detention in segregation. The Crown suggests that an appropriate jury instruction could alleviate any potential prejudice in this regard.

[367] In the alternative, the Crown submits that any potential prejudice to trial fairness could be mitigated by this court ordering the Attorney General to consent to a judge alone trial pursuant to s. 473(1) of the *Criminal Code*. The Crown acknowledges the significance of the accused's right to be tried by a judge and jury. However, if the Attorney General is ordered to consent to a judge alone trial, the accused would have the option of trial by judge alone or judge and jury. The availability of trial by judge alone, according to the Crown, would mitigate any potential prejudice to trial fairness.

[368] The Crown accepts that the violations of the accused's ss. 7 and 12 *Charter* rights implicate the integrity of the justice system, thus requiring this court to balance the interests in favour of granting a stay against society's interest in a trial on the merits. The Crown suggests three alternative remedies to redress the *Charter* violations in this case short of a stay of proceedings.

[369] First, the Crown submits that the court could order a sentence reduction for the accused. The Crown submits that s. 24(1) of the *Charter* provides this court with jurisdiction to reduce a sentence outside statutory limits as a remedy for state misconduct in violation of an accused's *Charter* rights. The Crown concedes that this remedy may not be, in practical terms, available if the accused is ultimately convicted of manslaughter, given that the accused has been in pretrial

custody for six years and eight months, the equivalent of 10 years for sentencing purposes.

[370] Second, the Crown submits that the court could, under s. 24(1) of the *Charter*, award damages to the accused as a remedy for any *Charter* violations. The Crown acknowledges that this has, to date, never been done. The Crown submits, however, that superior criminal courts have jurisdiction to award monetary damages under s. 24(1) of the *Charter*.

[371] The third alternative remedy proposed by the Crown is a judicial declaration denouncing abusive state conduct in violation of the *Charter.*

[372] The Crown submits that, when balancing the interests in favour of a stay against society's interest in a trial on the merits, the alternative remedies, short of a stay of proceedings, can and will serve to preserve the integrity of the justice system. The Crown reminds this court that the accused stands charged with the first degree murder of another inmate in the care of correctional authorities. The correctional authorities had a duty to protect other inmates, correctional staff, and the accused himself. The Crown submits that breaches of the accused's *Charter* rights occurred in this context, not as a result of malice toward the accused. Balancing all interests engaged in this application militates against a stay of proceedings, according to the Crown.

Analysis

[373] The accused is seeking a stay of proceedings pursuant to s. 24(1) of the *Charter* as a remedy for alleged violations of his rights under ss. 7, 9, 12, and 15.

Section 7 of the *Charter*

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[374] The Crown has properly conceded that the accused's detention in continuous

segregation for four and one-half years was in violation of the accused's s. 7 *Charter* rights retrospectively. The nature and extent of this breach has to be established for the purpose of determining an appropriate remedy.

[375] It has long been recognized that incarcerated persons retain a residual liberty interest and that placement in segregation constitutes a significant reduction of that interest. In *R. v. Miller*, [1985] 2 S.C.R. 613, at p. 641, the Supreme Court stated that:

> Confinement in…administrative segregation…is a form of detention that is distinct and separate from that imposed on the general inmate population. It involves a significant reduction in the residual liberty of the inmate.

[376] Segregation has been described as the "the most onerous and depriving experience that the state can legally administer in Canada": *Annual Report of the Office of the Correctional Investigator* 2014-2015, at p. 31, cited in *British Columbia Civil Liberties Association v. Canada (Attorney General)*, [2018] B.C.J. No. 53, at para. 1 ("*BCCLA*").

[377] It is obvious that the accused's prolonged detention in segregation severely impaired his residual liberty interests.

[378] In *New Brunswick v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 58, the Supreme Court confirmed that the right to security of the person protects both the physical and psychological integrity of the individual. The court described the nature of the protection of psychological integrity included in the right to security of the person at para. 60:

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

[379] Dr. Bradford has provided comprehensive expert evidence describing the effects of

segregation on the psychological integrity of the accused. His evidence has been summarized and need not be repeated. Dr. Bradford's opinion has not been challenged and, given his qualifications, it is entitled to considerable weight. The effects of segregation on the psychological integrity of the accused, and therefore on his personal security interests, are very serious, profound, and far exceed the established threshold.

[380] Administrative decisions which affect individual rights must be made in a procedurally fair manner. The requirements of procedural fairness are determined by context. In *Charkaoui v. Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 S.C.R., at para. 20, the Supreme Court stated that:

> Section 7 of the *Charter* requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake. The procedures required to meet the demands of fundamental justice depend on the context. Societal interests may be taken into account in elucidating the applicable principles of fundamental justice. [Citations omitted.]

[381] Factors to be considered in determining the content of procedural fairness in a particular context include the nature of the decision being made and the process to be followed in making it, the nature of the statutory scheme, and the importance of the decision to the affected individual: *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 SCC 699, [1999] 2 S.C.R. 817, at paras. 23-27.

[382] It is well established that, in the segregation context, the content of the duty of procedural fairness includes a mechanism for meaningful and independent review. The British Columbia Supreme Court addressed this requirement in *BCCLA,* at para. 391:

> There is, as well, a feature specific to administrative segregation that further demands independent adjudication: the open-ended nature of placements. In circumstances where an inmate remains in segregation until the warden determines he or she should be released, it is especially important that the statutory criteria for segregation be

> rigorously applied. An independent adjudicator is best placed to ensure that robust inquiry occurs at segregation reviews and that institutional staff and administrators make the case for segregation by demonstrating that there are no reasonable alternatives.

[383] Provincial law and Ministry policy provide a mechanism for independent and impartial review of the accused's detention in segregation, including 5 day and 30 day reviews at the institutional level and 30 day reviews external to the institution and institutional decision makers at the regional level. The requirements of the March 2011 and September 2015 PMSI policies are set out at paragraphs 147-150 of these Reasons.

[384] Segregation reviews at the regional level are obviously intended to provide independent, meaningful oversight of segregation review decisions made at the institutional level. In general terms, in conducting a 30 day segregation review the Regional Director or designate is required to review, among other things, the regulatory basis for segregation, the specific reasons for segregation, the alternatives that have been explored and rejected, what accommodations could be implemented to mitigate the negative effects of segregation and maximize integration, and whether the inmate has a mental illness.

[385] A Regional Director conducting a 30 day segregation review is required to indicate to the institution whether continued segregation is supported or not supported, which presumably empowers the Regional Director to direct the institution to more thoroughly consider alternatives, accommodations, mitigation, or removal of the inmate from segregation.

[386] The unchallenged evidence as to quality of the segregation review process during the four and one-half years the accused was detained in continuous segregation has been reviewed at length. It is obvious that the segregation review process in the case of the accused was meaningless at the institutional and regional levels.

[387] Professor Jackson and Professor Hannah-Moffat, experts in Canadian correctional law and policy, both commented on the quality of the review process in this case. Professor Jackson testified that:

> When you look at these reviews and you see from month to month, from year to year, they're exactly the same. There may be a handwritten notation a little bit different, but there's no change in the risk. There's no change in the reasons why he's there. There's no recognition that he's getting better, that he's getting worse. A few notations that he's harming himself, that he's hearing things, but you have a sense that in June 2012 until sometime in 2016, time stopped. He was kind of trapped in a place and a space that never changed and you get – you almost can kind of go like that with these seg reviews and there's nothing there. There's, you know, people are filling out forms. They're checking boxes, but it's as if Adam Capay's disappeared.

[388] Professor Hannah-Moffat found that the explanations for continued segregation set out in the reviews that were conducted consisted of only a simple one or two line comment reiterating generic reasons noted on the previous reviews. Professor Hannah-Moffat observed that there was no change in the quality of the reviews between 2013 and 2015, despite the accused having been in segregation for almost three years. She found it to be "egregious and shocking" that these reviews contained no discussion of alternatives or measures that corrections could have attempted in order to mitigate the impact of segregation, such as Indigenous programming, psychiatric treatment, or educational opportunities. Professor Hannah-Moffat opined that the reviews of the accused's segregation over a period of four and one-half years provided no "meaningful oversight" of his continued detention in segregation.

[389] The opinion of Professor Hannah-Moffat on this issue is amply supported, in my view, by the testimony of Deborah McKay, Deputy of Operations at the Thunder Bay Jail from 2012 to 2014 and Deputy of Administration from 2014 to 2016, and by the testimony of Douglas Houghton and Richard McDaniel both Deputy Directors, Northern Region Institutional Services.

[390] Ms. McKay testified that, to the best of her recollection, continued segregation had never been "not supported" at the regional level. Ms. McKay was further unable to recall the regional office even commenting on the circumstances of continued segregation they supported, such as enhanced privileges or mental health treatment.

[391] Mr. Houghton was obviously aware that there were social workers, NILOs and mental health professionals at the Thunder Bay Jail. He never considered, let alone suggested, that the accused be granted increased access to these readily available services. Mr. Houghton never inquired about the accused's access to the yard, canteen, or reading material, and he was unable to recall any specific discussions with staff at the Thunder Bay Jail about any form of mitigation or alternative placement for the accused. Mr. Houghton never recommended that the accused receive increased psychiatric services, either from inside or outside the institution.

[392] Mr. Houghton was unable to recall a single time that he failed to support the continued segregation of an inmate when conducting a segregation review.

[393] Mr. McDaniel testified that he would not support continued segregation if the review documentation did not contain a plan for moving an inmate out of segregation and that it was unacceptable for an inmate to be held in indefinite segregation. However, in later testimony, he did not appear to understand or appreciate his supervisory responsibility when conducting reviews at the regional level:

> Like I have oversight onto them but we're part of a team and they are doing good work and I rely on the social workers and everybody else that's making these decisions to stay there. So why would I make a decision against that…When you got social workers and psychiatrists and whoever else that's indicated that this person is in segregation…then I'm going to sign off on that. I don't think it's my decision to go against a social worker or psychiatrist.

[394] Mr. McDaniel testified that he did not "remember ever overriding the institution" when

conducting a segregation review at the regional level.

[395] Mr. Houghton's and Mr. McDaniel's evidence on this point was consistent with that of Ms. McKay who had never seen continued segregation not supported on a regional review.

[396] To suggest that the regional reviews of the accused's prolonged detention in segregation lacked the "robust inquiry" standard described by the British Columbia Supreme Court in *BCLA* is a gross understatement.

[397] I accept the submission of the accused that, notwithstanding that the Ministry appreciated their duty of procedural fairness in relation to segregation as reflected in the March 2011 and September 2015 versions of the PMSI policy, in practice, the accused's continuous segregation for four and one-half years was devoid of any meaningful oversight or review.

[398] I find that the accused's detention in segregation between June 4, 2012, and December 6, 2016, was a serious, prolonged, and profound violation of his retrospective s. 7 *Charter* rights.

Section 12 of the *Charter*

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[399] The Crown has conceded that the accused's s. 12 *Charter* right not to be subjected to cruel and unusual treatment or punishment has been breached. Once again, the nature and extent of the breach has to be considered for the purpose of the s. 24(1) analysis.

[400] The conditions of the accused's detention in segregation between June 4, 2012, and December 6, 2016, have been comprehensively reviewed and need only be summarized at this juncture:

- 847 days (2.3 years) alone in Block 1 of the Thunder Bay Jail, without radio or

television and with lights on 24 hours a day;

- 53 days alone in Block 2 of the Thunder Bay Jail, with two televisions in the block and lights dimmed at night;
- 237 days alone in Block 10 of the Thunder Bay Jail, a single cell encased in Plexiglas in the isolation area, without a day area, shower, television, or radio, with lights on 24 hours a day, and without the ability to flush the toilet from inside the cell;
- 274 days alone in Block 11 of the Thunder Bay Jail, in a cell encased in Plexiglas, without a day area, television, or radio, without the ability to flush the toilet from inside the cell, and with the lights on 24 hours a day;
- 94 days alone in Block 12, with a day area, a shower, and a telephone and with lights dimmed at night;
- 73 days alone in isolation cells at the Kenora Jail, with a shower, telephone, and radio controlled by the correctional officers, without a day area or television, and with lights dimmed at night;
- 69 days alone in the south basement of the Kenora Jail, with a day area, shower, telephone, and television and with lights dimmed at night;
- The accused had yard access on 108 days of the 1,647 days he was in segregation. He declined yard access on 72 days;
- The accused had "time outs," typically one hour long, 794 times of the 1,647 days he was in segregation, excluding time in day areas for showering or cleaning.

[401] The record confirms that the accused suffered from mental illness upon his admission to and throughout his detention in segregation and that correctional officials were aware of his mental health issues. Between June 4, 2012, and December 6, 2016, Dr. Stambrook spent approximately 80 minutes with the accused at the Kenora Jail and Dr. Schubert spent approximately nine hours with the accused at the Thunder Bay Jail.

[402] In my opinion, the very limited time that Dr. Stambrook and Dr. Schubert were able to devote to the accused over the four and one-half year period that he was detained in segregation

precluded them from providing the accused with any meaningful therapeutic mental health treatment.

[403] I recognize that institutional demands place significant limits on the ability of mental health professionals to provide meaningful treatment to inmates. However, when a mentally ill inmate is placed in segregation and the institutional mental health records document that the inmate's mental health is deteriorating during a prolonged detention in segregation, it is incumbent on the Ministry to provide meaningful mental health treatment and to invoke measures designed to mitigate the impact of segregation.

[404] The evidence establishes that the correctional officials did not consider any mitigating measures to alleviate the impact of segregation on this mentally ill accused. The evidence also establishes that correctional officials did not consider obtaining therapeutic mental health services for the accused from outside the institution at any point in time prior to Ms. Mandhane's October 2016 visit to the Thunder Bay Jail.

[405] One could easily conclude that correctional officials were simply oblivious to the accused's mental health condition during his time in segregation, but for the fact that it was used as a rationale to continuously detain him in segregation. The effect that prolonged segregation had on this mentally ill accused has been confirmed by the unchallenged expert evidence of Dr. Bradford.

[406] Dr. Bradford was of the opinion that the accused's time in segregation, especially the initial period of near total isolation, had a more serious effect on the accused than it would on many other individuals given his pre-existing conditions, including ADHD, antisocial personality disorder, and history of depression and anxiety.

[407] Dr. Bradford testified that segregation compounded past traumas the accused had suffered and either exacerbated pre-existing PTSD or triggered its development, resulting in the accused having "chronic and severe" PTSD that "will persist over time as a lasting effect of Mr. Capay's prolonged segregation."

[408] Dr. Bradford explained that segregation also resulted in the accused developing "significant cognitive impairments," including the permanent loss of memory with respect to the period of time prior to and during the initial period of segregation.

[409] Dr. Bradford opined that while in segregation the accused was experiencing "at least three distinct but possibly overlapping and/or interactive forms of disordered thinking," including auditory hallucinations, visual hallucinations, and delusional fantasies of a sadistic and paraphilic nature. He felt that the auditory hallucinations were pre-existing and exacerbated by the segregation and that other auditory and visual hallucinations and the delusional fantasies were "likely due in significant measure to the effects of segregation itself."

[410] Based on the prolonged and indefinite nature of the accused's segregation, his mental illness, and the conditions of confinement, Professor Toope was of the opinion that the accused had been subjected to cruel, inhuman, or degrading treatment or punishment, amounting to torture, pursuant to international standards.

[411] Professor Toope conceded that for treatment to amount to torture pursuant to international standards, there must be an intentional infliction of severe pain or suffering, physical or mental, for a specific purpose. Professor Toope agreed that he came to the conclusion that the treatment of the accused amounted to torture under international standards by imputing the necessary intent for this finding to correctional officials as a result of the length and

particular conditions of the accused's segregation. I decline to impute that intent on the facts of this case and therefore do not accept Professor Toope's opinion that the accused's detention in segregation amounted to torture according to international standards.

[412] Professor Hannah-Moffat was extremely blunt in her assessment of the treatment of the accused. That assessment is set out at paragraphs 195-205 of these Reasons. The length of time the accused was in segregation, the egregious conditions of his confinement, the lack of any meaningful oversight or review, and the lack of any attempt to mitigate the negative effects of segregation led her to conclude as follows:

> As far as I'm concerned, this does get to the level of torture, definitely cruel and unusual, completely unacceptable when you're talking about pre-trial custody and by all standards inhumane and I don't know of any western democracy or in many of the countries in Europe and even South American institutions…that would tolerate this for…protracted periods of time.

[413] The test to establish a violation of s. 12 is the same for cruel and unusual treatment as it is for cruel and unusual punishment: *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, 335 C.C.C. (3d) 41, at para. 7. The test or threshold is gross disproportionality: *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R.733, at para. 39. To be considered grossly disproportionate, the treatment must be so excessive as to outrage standards of decency and disproportionate to the extent that Canadian society would find the treatment abhorrent or intolerable: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14.

[414] The accused, a young, mentally ill, Indigenous man, was detained in continuous segregation in deplorable conditions for 1,647 days. He was confined to his cell for more than 23 hours per day for extended periods of time. He was subjected to near total isolation during the initial three month period of segregation during which time his mental health deteriorated

dramatically. The accused received no substantive mental health treatment or Indigenous programming or support during the four and one-half years that he was in segregation.

[415] The treatment of the accused was, in my opinion, outrageous, abhorrent, and inhumane. It is a shocking and intolerable violation of s. 12 of the *Charter*.

Section 7 of the *Charter* and Trial Fairness

[416] The accused stands indicted of first degree murder in the death of Mr. Quisses. If convicted he is subject to a mandatory life sentence. The liberty interests of the accused are obviously engaged in this prosecution.

[417] Section 7 of the *Charter* provides that the accused cannot be deprived of his liberty except in accordance with the principles of fundamental justice. The principles of fundamental justice include the right to make full answer and defence and the right to a fair trial.

[418] The accused submits that his right to make full answer and defence and his right to a fair trial have been breached because the psychological damage he has suffered due to the conditions and length of his detention in segregation have compromised Dr. Bradford's ability to provide a definitive opinion as to his criminal responsibility.

[419] Dr. Bradford's evidence has been extensively summarized at pages 53-65 of these Reasons. I reiterate only his conclusions relevant to the prospective application of s. 7 of the *Charter*.

[420] Dr. Bradford found that the accused's prolonged segregation has resulted in significant cognitive impairments, including permanent serious impairment of his memory of the period of time leading up to his assault on Mr. Quisses and of the assault itself.

[421] The accused was segregated in almost complete isolation for several months following

June 3, 2012. Dr. Bradford placed significant emphasis on this fact. He concluded in his report that the absence of physiological data and contemporaneous psychiatric observation and assessment, or even the opportunity for laypersons to interact with the accused and to observe his interactions with others, is a "significant constraint on any assessment of criminal responsibility today."

[422] Testifying on this point, Dr. Bradford explained that the total absence of this crucial information, compounded by the accused's memory loss, renders an assessment of criminal responsibility four years after the offence "very difficult, impossible I would say."

[423] In Dr. Bradford's opinion, there is considerable evidence that the accused was in a "seriously altered or disturbed state of mind" at the time of the offence which would support a finding that he was not criminally responsible or that would have a "substantial impact on his culpability short of that finding." Dr. Bradford further concluded that the effects of segregation, particularly on the accused's memory, have impaired his ability to now determine the "etiology, nature and severity of the altered or disturbed state of mind that the evidence indicates he was in at the time the offence was committed."

[424] If this first degree murder case proceeds to trial, the only issue will be the accused's criminal responsibility for the offence. The accused is presumed to be criminally responsible for the death of Mr. Quisses. At trial, the accused will allege that he is not criminally responsible for the death of Mr. Quisses because of mental disorder. Given the totality of Dr. Bradford's evidence, the accused may advance alternative defences, such as intoxication, which could impact his degree of responsibility for the death of Mr. Quisses short of being found not criminally responsible.

[425] The accused will be required to prove on a balance of probabilities that he is not criminally responsible for the death of Mr. Quisses. He has been extensively assessed by Dr. Bradford. We know now what Dr. Bradford's evidence at trial will be. Dr. Bradford will testify that there is considerable evidence that the accused was not criminally responsible on June 3, 2012, but that it is very difficult or impossible for him to provide a definitive opinion on the issue.

[426] In my opinion, the equivocal nature of Dr. Bradford's expert opinion on this vital issue significantly inhibits the accused's ability to advance a defence of not criminally responsible. The shortcomings in Dr. Bradford's opinion are a result of the state's treatment of the accused, which has been found to be in violation of ss. 7 (retrospectively) and 12 of the *Charter*. The accused's state of mind will be the only issue at trial.

[427] On this application, the accused is required to establish on a balance of probabilities that his constitutional guarantee of a fair trial has been compromised because of the limitations of Dr. Bradford's opinion in regard to his criminal responsibility.

[428] As recognized by McLachlin J., as she then was, in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 194, "the *Canadian Charter of Rights and Freedoms* guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair…what the law demands is not perfect justice, but fundamentally fair justice."

[429] I accept the submission of the accused that the issues of his right to make full answer and defence and of trial fairness are not limited to the issue of criminal responsibility.

[430] Dr. Bradford opined that the accused has suffered significant cognitive impairments, including the permanent loss of his memory of the events occurring within the time period

surrounding the June 3, 2012, assault on Mr. Quisses. These are a direct result of segregation, in particular, the initial period of almost complete isolation.

[431] As a result of his memory loss, the accused is unable to testify about the events of June 3, 2012, including about the comment attributed to him by a witness, "Watch this. I'm on a mission." The accused's ability to instruct counsel as to all Crown witnesses anticipated to be called at trial has been compromised by his loss of memory. The accused's ability to advance alternative defences to the charge of first degree murder, short of establishing he was not criminally responsible, has also been impaired.

[432] I am persuaded on a balance of probabilities that the accused's right to make full answer and defence and his right to a fundamentally fair trial have been breached. This breach is a result of his inability to fully and fairly advance a defence of not criminally responsible or alternative defences to the first degree murder charge.

Section 9 of the *Charter*

Everyone has the right not to be arbitrarily detained or imprisoned.

[433] Section 9 of the *Charter* guarantees freedom from arbitrary detention. The Supreme Court has described the s. 9 guarantee as one of "the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law." *Charkaoui*, at para. 88.

[434] As previously noted in paragraph 375 of these Reasons, the Supreme Court in *Miller* found the confinement of an inmate in administrative segregation to be a form of detention that is "distinct and separate" from that imposed on the general inmate population, which involves a significant reduction in the inmate's residual liberty. The Court in *Miller*, at para. 35, described

administrative segregation as a "new detention of the inmate, purporting to rest on its own foundation of legal authority."

[435] In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 54, the Supreme Court recognized the s. 9 guarantee to be a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice. The *Grant* court confirmed that a lawful detention is not arbitrary within the meaning of s. 9 unless the law authorizing the detention is itself arbitrary and that, conversely, a detention not authorized by law is arbitrary and in violation of s. 9. In *Charkaoui*, at para. 91, the Supreme Court held that the s. 9 guarantee against arbitrary detention "encompasses the right to prompt review of detention under s. 10(c) of the *Charter*."

[436] The Supreme Court has described ss. 7 to 14 of the *Charter* as a "scheme of interconnected legal rights": *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, at para. 160. Sections 8 to 14 address specific deprivations of the right to life, liberty, and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty, and security of the person set forth in s. 7: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at para. 28.

[437] I accept the submission of the accused that deficiencies in the segregation review process may amount to a distinct breach of the s. 9 guarantee against arbitrary detention while at the same time violating the s. 7 right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice.

[438] The law authorizing administrative segregation and establishing the review process for inmates in segregation in Ontario is contained within Regulation 778 under the *Ministry of*

Correctional Services Act and reflected in the Ministry PMSI. During the period of time the accused was in segregation the March 2011 and the September 2015 versions of this policy were in effect.

[439] Under s. 34(1) of Regulation 778, segregation is by law restricted to inmates:

(a) In need of protection;

(b) Who must be segregated to protect the security of the institution or the safety of other inmates;

(c) Who are alleged to have committed a misconduct of a serious nature; or

(d) Who request to be placed in segregation.

[440] Segregation is required to be reviewed on a preliminary basis by the superintendent or designate within 24 hours of an inmate being placed in segregation. Within five days of an inmate being placed in segregation, the superintendent or designate is required to "review the full circumstances of the case" to determine whether the inmate's continued segregation is warranted. The superintendent or designate is also required to ensure that a review of the reasons for continued segregation has been conducted when an inmate has been in segregation for a continuous period of 30 days, to be repeated each 30 days.

[441] Further, at each 30 day mark, the regional director or designate is required to ensure that the Segregation Decision/Review Form and related Occurrence Reports are reviewed and "any concerns are discussed with the superintendent or designate."

[442] The accused has not challenged the *Charter* compliance of the statutory framework governing the segregation review process in Ontario. The accused's position is that Ministry officials and employees failed to comply with the law in regard to segregation reviews in the

case of the accused between June 4, 2012, and October 2016, such that his detention in segregation during this period of time was unlawful and therefore arbitrary and in violation of s. 9.

[443] The Crown has acknowledged that correctional authorities breached the accused's s. 7 *Charter* rights when they failed to comply with provincial law and policy in regard to the accused's segregation reviews. The accused takes the position that the right to prompt segregation reviews based on objective and reliable information is a distinct right guaranteed by s. 9. I agree.

[444] Following his placement in segregation on June 4, 2012, the accused was held in what Dr. Bradford described as conditions of almost complete isolation for the months of June, July, and August of 2012. I accept the accused's submission that the constitutional requirement of prompt review consistent with the applicable law is heightened in the case of a mentally ill inmate being segregated in these conditions.

[445] Between June 4, 2012, and August 29, 2012, the accused's placement in segregation was legally required to have been reviewed 20 times, 18 times at the institutional level and twice at the regional level. Incomprehensibly and contrary to law, the accused's detention in segregation was not reviewed a single time between June 4, 2012, and August 29, 2012**.** A review on August 29, 2012, appears to have been an initial placement review.

[446] Corrections conducted 5 day reviews at the institutional level on September 3 and 8, 2012. Between September 8, 2012, and February 21, 2013, the accused's placement in segregation was legally required to have been reviewed 43 times, 33 5 day reviews at the institutional level and five 30 day reviews at both the institutional and regional levels. During

this five and one-half month period, the accused's detention in segregation was not reviewed on a single occasion.

[447] On February 21, 2013, Ms. McKay emailed Mr. D. Smith, Regional Director, and attached the Segregation Decision/Review form for the accused, explaining to the Regional Director that this review "may have slipped through the cracks" as the accused had been in segregation at the Thunder Bay Jail since the beginning of August 2012. Neither Ms. McKay, Deputy of Operations at the Thunder Bay Jail at the time, nor the Regional Director twigged to the fact that the accused had been in continuous segregation since June 4, 2012.

[448] This segregation review form, provided to the Regional Director for the purpose of oversight and review of the institution's position that segregation be continued, confirmed that the only segregation reviews conducted for the accused to this point in time occurred on August 29, September 3, and September 8, 2012. The Regional Director should have recognized this as an egregious and unacceptable breach of policy, both at the institutional and regional levels. Mr. Smith failed to do so. The extent of Mr. Smith's review and oversight at this point was to ask, out of "curiosity," if the accused was receiving any regular mental health services. He was advised that the accused had refused mental health intervention.

[449] Mr. Smith unconditionally approved the continued segregation of the accused on February 27, 2013. There is nothing in the record before me to suggest that Mr. Smith, in his supervisory role as Regional Director, even commented on the fact that in excess of 60 mandated segregation reviews had not been carried out at that point in time.

[450] Institutional reviews were conducted on a somewhat regular basis between February 27, 2013, and July 2013. All supported continued segregation. However, these institutional reviews

were conducted without regional oversight as no regional reviews were conducted between February 27, 2013, and July 16, 2013, a period of time during which Ministry policy mandated five reviews at the regional level.

[451] For nine months following the placement of a young, mentally ill, Indigenous man in segregation, his placement in segregation was reviewed at the institutional level only three times. Further, for in excess of one year following the accused's placement in segregation, it was not reviewed at all at the regional level in any substantive or meaningful way.

[452] The March 2011 version of the PSMI policy required that placement decisions regarding special management inmates be based on "reliable information and objective criteria" and be consistent with placing inmates in the lowest level of security possible.

[453] The 2012 segregation reviews that were completed for the accused noted "charged with the murder of an inmate while in custody at the TBCC" as the reason for continued segregation. Beginning in mid-2013, the segregation review forms at the institution and regional levels begin to note that the reason for continued segregation was the security of the institution and the safety of other inmates and that the accused had or continued to express thoughts to the psychiatrist of wanting to harm staff and other inmates.

[454] A review of the segregation review forms from 2013, 2014, 2015, and up to October 2016 indicates the same reasons were recorded to support continued segregation throughout these years. For example, the Segregation Decision/Review Form dated October 4, 2016, lists the following reasons for segregation:

> 34(1)(a) – Offender is in need of protection. Offender was self-harming and needed to be placed in restraint chair on Sept. 22;
>
> 34(1)(b) – Safety and security. Offender discloses ongoing pervasive thoughts to

> seriously harm or kill staff and other offenders. Segregation requested by Institutional psychologist.

[455] Dr. Stambrook's notes from his August 20, 2012, meeting with the accused confirm, among other things, that the accused expressed "ideation" in regard to stabbing people and harming correctional officers at that time. Dr. Stambrook properly recommended continued segregation at that time. Dr. Stambrook followed up with the accused on March 11, 2013. He diagnosed the accused as having an anti-social personality disorder with psychopathy combined with sadistic paraphilia, a "dangerous combination where there is a high risk" according to Dr. Stambrook. Dr. Stambrook recommended that the accused not be in a dorm situation at that time. In a March 25, 2013, follow-up note, Dr. Stambrook saw no change and specifically noted that the accused expressed sadistic, violent, and murderous ideation toward staff. He recommended that the accused be treated with extreme caution.

[456] Dr. Schubert's notes up to the fall of 2013 are consistent with those of Dr. Stambrook. On July 5, 2013, Dr. Schubert noted that the accused has had intermittent thoughts and dreams of killing people and that he was a "very high risk individual for violence." Dr. Schubert noted that he had talked with correctional and nursing staff about the accused's risk of harm to staff and other inmates. Dr. Schubert's September 6, 2013, note indicates that the accused "remains extreme risk of violence – jail aware precautions in place."

[457] Thereafter however, the contents of Dr. Schubert's notes changed in a material and relevant manner and included the following:

> December 11, 2013 – no suicidal ideation, no homicidal ideation, no psychosis – history chronic homicidal ideation/fantasies however
>
> February 7, 2014 – not suicidal or homicidal at this time
>
> April 4, 2014 – denies any suicidal ideation/homicidal ideation or fantasies of

violence/sexual nature

May 27, 2014 – no suicidal ideation no homicidal ideation no psychosis

July 23, 2014 – low risk suicide/homicide at this time

September 5, 2014 – denies any homicidal ideation today, no talk of any sadistic fantasies today

October 28, 2014 – no suicidal ideation no homicidal ideation no talk of sadistic fantasies today. No violent fantasies reported.

December 31, 2014 – thought process: normal content no suicidal ideation no homicidal ideation no psychosis

March 25, 2015 – thought process normal content normal no suicidal ideation no homicidal ideation no psychosis not talking of violent fantasies today

April 15, 2015 – thought process normal content no suicidal ideation no homicidal ideation no psychosis

May 20, 2015 – no suicidal ideation no homicidal ideation no psychosis

August 12, 2015 – no suicidal ideation no homicidal ideation no psychosis

September 23, 2015 – no suicidal ideation no homicidal ideation – but I suspect he still harbours thoughts of violent nature – should remain in cell by self

October 21, 2015 – no suicidal ideation no homicidal ideation

November 6, 2015 – denies any homicidal ideation or suicidal ideation – I am still of the opinion requires own cell

January 13, 2016 – denies suicidal ideations and homicidal ideations – currently in my opinion can be managed at lower levels of observation

January 20, 2016 – denies any suicidal ideation or homicidal ideation – would benefit from increased privileges, from a psychological perspective

August 31, 2016 – thought process normal content no suicide ideation no homicide ideation, stable at this time given history will recommend administrative segregation with own cell

September 28, 2016 – no suicidal ideation no homicidal ideation

October 26, 2016 – denies suicidal ideation denies homicidal ideation

[458] Dr. Stambrook's and Dr. Schubert's notes were not available to the correctional officials conducting the segregation reviews. The Health Care Manager, Ms. Boban, was required to review the accused's medical file and prepare health care administrative summaries for the purpose of the segregation reviews. Ms. Boban testified that she knew that her health care summaries formed an integral part of the segregation review process at both the institution and regional levels and that it was required that they include the most accurate and current information available about inmates undergoing segregation review.

[459] It is clear that the health care administrative summaries prepared by Ms. Boban concerning the accused were deficient and contained inaccurate information for the three year period between October 2013 and October 2016. Ms. Boban failed to include in her summaries that the accused stopped reporting homicidal ideation or suicidal ideation after October 2013. Ms. Boban failed to accurately convey the information contained in Dr. Schubert's notes, as set out above, including the notes from January 2016, to the effect that the accused could be managed at lower levels of observation and that he would benefit from increased privileges.

[460] From the fall of 2013 to the fall of 2016, the continued segregation of the accused was supported by institutional and regional staff on the basis of protecting the security of the institution or other inmates. The health care administrative summaries used in the reviews for this period of time provided them with the grounds for doing so. However, as of the fall of 2013 the accused's psychiatric records were not being accurately reflected or summarized in these health care administrative summaries.

[461] I accept the accused's submission that the ongoing decisions to detain the accused in segregation after the fall of 2013 were not based on reliable information and objective criteria as

required by Ministry policy. I find that the segregation of the accused during this period of time was therefore contrary to Ministry policy and unlawful.

[462] During the first 13 months that the accused was held in segregation, numerous segregation reviews which corrections was required to conduct at the institutional level did not take place. Regional oversight during the same period of time was non-existent.

[463] For the three years that the accused was held in segregation between 2013 and 2016, segregation review decisions were based on inaccurate and unreliable information as to the accused's psychological status.

[464] Continuously detaining the accused in segregation without adhering to the segregation review policy and in the absence of a proper evidentiary basis that the accused was a risk to the safety or security of the institution or other inmates was unlawful and therefore arbitrary. I accept the submission of the accused that this represents a separate and distinct breach of his s. 9 *Charter* rights.

Section 15(1) of the *Charter*

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[465] Section 15 of the *Charter* is concerned with the application of the law, recognizing that every difference in treatment between individuals under the law will not necessarily result in inequality and that identical treatment may frequently produce serious inequality. To approach the ideal of full equality before and under the law, the main consideration must be the impact of the law on the individuals or the group concerned: *Andrews v. Law Society of British Columbia,*

[1989] 1 S.C.R. 143, at pp. 164-165.

[466] The s. 15 protection of substantive equality recognizes that a law, regulation, or state practice, expressed to bind and to apply equally to all, may nonetheless violate s. 15 if in its application it has a disproportionately negative impact on one as compared to its impact on another. The Supreme Court, in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at para. 18, framed the s. 15 analysis as follows:

> The focus of s. 15 is therefore on laws that draw discriminatory distinctions – that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group. [Citations omitted.]

[467] The Court in *Kahkewistahaw*, at paras. 19 and 20, reiterated the two step s. 15 analysis previously established by the Supreme Court. The first part of the s. 15 analysis asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. The second part of the analysis focuses on arbitrary – or discriminatory – disadvantage, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage. Citing *Droit de la famille – 091768, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 332*, referred to as *Quebec (Attorney General) v. A*, the Court in *Kahkewistahaw* stated as follows:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.

[468] It is not in dispute that the accused is Indigenous and that he suffered from mental health

issues that predated his placement in segregation on June 4, 2012. For the accused to establish that his s. 15 *Charter* rights have been violated as a result of his prolonged detention in segregation, it is incumbent on him to first establish, based on the evidence before me on this application, that segregation had a disproportionately negative impact on him relative to inmates who are not Indigenous and or/mentally ill.

[469] Professor Hannah-Moffat acknowledged in her report that "few studies have explored how Indigenous belief systems, cultures, and subject positions affect how solitary confinement is experienced as a function of Indigeneity." She did not elaborate on this comment or this issue when testifying.

[470] Professor Jackson was qualified as an expert in Canadian correctional law and policy with specific expertise in the use of segregation and in regard to Indigenous peoples within the correctional system. In his report, Professor Jackson did not comment on whether segregation had a disproportionately negative impact on the accused or on Indigenous people generally.

[471] When testifying, Professor Jackson stated that within Indigenous cultures "there is a sense of a relationship to nature and to other living things in the natural world" and a "deep connection" between Indigenous people and the natural world. He described as "polar opposites" the difference between "an Aboriginal culture of being with the land, being with natural elements and being confined in the absence of all natural elements without much in the way of human communication or sense of the outside world."

[472] This is the extent of the evidence before me on this issue. In my opinion, the limited evidence on this point fails to establish that segregation had a disproportionately negative impact on the accused as an Indigenous person relative to a non-Indigenous inmate.

[473] The accused has suggested that the disproportionately negative impacts of segregation on persons with mental illness have been well documented in the research literature. Professor Hannah-Moffat commented on this in her report. She summarized the documented negative effects of segregation on mentally ill inmates as follows:

1. Segregation exacerbates prior mental health problems, can lead to the development of previously undetected mental health problems, and is a significant risk factor for developing depression and suicidal ideation;

2. Segregated inmates with pre-existing mental health issues have a history of suicide attempts and high levels of hopelessness likely to result in suicide ideation;

3. Antipsychotic medication may have diminished effectiveness on segregated inmates.

[474] Dr. Bradford noted that the accused carried a "very heavy trauma load" when placed in segregation. Dr. Bradford believed that on the basis of the accused's history, he likely had PTSD when placed in segregation. He concluded that segregation re-traumatized the accused. Dr. Bradford described the accused's PTSD "currently as severe."

[475] Dr. Bradford was of the opinion that the effects of segregation are more pronounced for individuals who have ADHD and/or antisocial personality disorder. Dr. Bradford opined that the accused "likely experienced more severe effects of segregation than many other inmates would have."

[476] I am satisfied that segregation had a disproportionately negative impact on the accused, an inmate with pre-existing mental health issues, relative to inmates without pre-existing mental health issues.

[477] Given this finding, fulfilling the accused's right to substantive equality under s. 15

required that he be provided with differential treatment to ameliorate the heightened negative impact of segregation on him as a mentally ill inmate: *Withler v. Canada (Attorney General),* 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 39.

[478] Differential treatment required a meaningful and informed consideration of alternatives to continued segregation as time went on and the application of substantive measures to mitigate the effects of prolonged segregation on the accused.

[479] Mitigating measures such as daily yard time, increased time out of the cell each day, more frequent visits by the mental health nurse, social workers, and the NILO, cultural ceremonies, and educational supports were quickly implemented after Ms. Mandhane's October 2016 visit. They obviously could have been implemented at any time during the time the accused was in segregation. The record indicates that such measures were not even considered let alone implemented in the four and one-half years prior to October 2016.

[480] The accused was not provided with access to any Indigenous programming, services, or spiritual activities between June 4, 2012, and October 2016. The accused met with Dr. Schubert for a total of only nine hours over four and one-half years. Providing the accused with meaningful therapeutic mental health services from outside the institution was apparently never considered.

[481] The evidence on this particular issue is overwhelming – for four and one-half years the Ministry took absolutely no action in an attempt to mitigate the disproportionately negative impacts of prolonged segregation on this mentally ill inmate.

[482] As a result, I find that the accused's s. 15 *Charter* rights have been violated.

Proportionate Balancing

[483] The accused has not challenged the provincial law governing the use of segregation in Ontario. The subject matter of the constitutional challenge in this case is the administrative action taken or discretion exercised by correctional officials pursuant to that law. The application of *Charter* values in this context requires the administrative decision maker to balance the applicable *Charter* values with the statutory objectives: *Dore v. Barreau du Quebec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at para. 55.

[484] The statutory objectives engaged during the accused's detention in segregation were inmate safety and institutional security. The *Charter* values at issue are ss. 7, 9, 12, and 15. The evidence establishes that the severity of the state's interference with these *Charter* values in this case was prolonged and extreme.

[485] I accept the accused's submission that the evidence establishes that correctional officials had no regard for the severity of the impact the prolonged and highly restrictive segregation had on his *Charter* rights. There was no attempt by correctional officials to balance that impact against the statutory objective.

[486] When exercising their statutory discretion in making segregation decisions regarding the accused, the complete and utter failure of correctional officials to properly balance the accused's *Charter* rights with the statutory objectives can only be described as profoundly unreasonable, unacceptable, and intolerable.

Remedy

[487] The accused is seeking a stay of proceedings as a remedy for the violations of his *Charter* rights. A stay of proceedings, particularly in a first degree murder case, is the most drastic remedy that a criminal court can grant. It will only be appropriate in the clearest of cases.

[488] In *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at paras. 31-32, Moldaver J. clarified the proper analysis to be undertaken when a stay of proceedings is sought for state conduct that allegedly impinges on the integrity of the justice system. These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the main category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the residual category).

[489] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

1. There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome;

2. There must be no alternative remedy capable of redressing the prejudice; and

3. Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits.

[490] The question at the first stage of the test, when the main category is invoked, is whether the accused's right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is ongoing unfairness to the accused: *Babos*, at para. 34.

[491] When the residual category is invoked, the question is whether the state has engaged in conduct that is so offensive to societal notions of fair play and decency that proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system: *Babos*, at

para. 35

[492] The accused submits that this case falls into both the main and residual categories.

Trial Fairness

[493] The accused is charged with first degree murder and is to be tried by a judge and jury. It is conceded that the accused caused the death of Mr. Quisses. The issue for the jury will be the accused's mental state at the time of the offence.

Prejudice

[494] I have found that the actions of correctional officials have violated the accused's s. 7 *Charter* rights prospectively. The equivocal nature of Dr. Bradford's opinion on the issue of the criminal responsibility of the accused has significantly compromised his ability to advance that defence at trial. I also found that the accused's ability to make full answer and defence has been compromised in other ways as a result of his loss of memory of events during the time period encompassing the assault.

[495] The impact on trial fairness in these circumstances is permanent. The *Charter* breaches directly and significantly impact the vital issue of the accused's state of mind at the time of the offence

[496] In my opinion, there would be ongoing prejudice to the accused if forced to proceed to trial.

Alternative Remedies

[497] The permanency of the impact of the *Charter* breaches on trial fairness renders an adjournment an ineffective remedy.

[498] I accept the accused's submission that Dr. Bradford's unchallenged expert evidence,

together with other evidence on this application, allows the court at this stage of proceedings to assess the degree of prejudice that would result at trial and to assess the adequacy of remedies short of a stay.

[499] State misconduct has resulted in the loss of the accused's memory of the assault on Mr. Quisses and of the time period immediately prior to the assault. Dr. Bradford testified that he is not able to provide an unequivocal opinion on the criminal responsibility of the accused at the time of the offence. The accused's memory loss will also inhibit his ability to properly instruct counsel, to respond to evidence called by the Crown, to testify in his own defence, and to advance other defences to the charge of first degree murder.

[500] Any attempt to alleviate this prejudice at trial would inevitably require Dr. Bradford to explain to the jury that the accused was detained in almost total isolation immediately following the assault and kept in segregation for four years thereafter. This evidence would suggest to the jury that the accused, who is presumed innocent, is nonetheless a dangerous individual. However, I reject the submission of the accused that this anticipated evidence would exacerbate the prejudice to the accused. The jury would, at this point in the proceedings, know that the accused caused the death of Mr. Quisses and how he did so.

[501] I reject the Crown's submission that any prejudice to trial fairness could be remedied by this court ordering the Attorney General to consent to a judge alone trial pursuant to s. 473 of the *Criminal Code*. The Crown suggests that, if this was ordered, the accused could then choose between a jury trial and a judge alone trial.

[502] Pursuant to s. 11(f) of the *Charter*, the accused has a constitutional right to the benefit of trial by jury. The Crown's proposal of this remedy as an attempt to mitigate the prejudice to the

accused's *Charter* rights to a fair trial and to make full answer and defence is a suggestion that the accused waive his constitutional right to a jury trial to remedy state misconduct. In my opinion, this proposed remedy perversely compounds existing prejudice to the accused.

Balancing

[503] In *Babos*, at para. 40, the Supreme Court reiterated that the balancing of interests at the third stage of the test for a stay of proceedings need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed. The Court further stated that:

> In rare cases, it will be evident that state misconduct has permanently prevented a fair trial from taking place. In these "clearest of cases", the third and final balancing step will often add little to the inquiry, as society has no interest in unfair trials.

[504] I accept the accused's submission that, if a trial proceeded, the Crown would benefit from the accused's lack of memory and the frailties of Dr. Bradford's opinion, both a direct result of the state's violation of the accused's *Charter* rights.

[505] I am fully cognizant of the fact that it has been conceded that the accused caused the death of Mr. Quisses. However, in my opinion, it has been established that the egregious state misconduct toward the accused has permanently prevented the accused from receiving a fair trial. This case is exceptional. A balancing of interests adds nothing to the analysis. This is one of the "clearest of cases" in which a stay of proceedings is the necessary and appropriate remedy.

The Integrity of the Justice System

[506] In the event that I am incorrect in my conclusion that a stay of proceedings is the correct remedy to address the impact of the *Charter* violations on trial fairness, I will also analyze the impact of the state misconduct on the integrity of the justice system.

[507] At the first step in the *Babos* test to determine whether a stay of proceedings is warranted under this residual category, it must be established that there is prejudice to the integrity of the justice system that will be "manifested, perpetuated or aggravated through the conduct of the trial." *Babos,* at para. 32.

[508] The first requirement of the *Babos* test was discussed by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Tobias,* [1997] 3 S.C.R. 391, at para. 91:

> The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future…The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well – society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in light of it will be offensive. But such cases should be relatively rare.

[509] The analysis as to the prejudice to the accused's right to a fair trial focussed on the breach of the accused's s. 7 *Charter* rights prospectively. The analysis as to the prejudice to the integrity of the justice system as a result of state misconduct in violation of the accused's *Charter* rights must include all *Charter* violations established in this case.

[510] The accused, a young Indigenous man from a remote First Nations community with serious mental health issues was detained in continuous segregation for four and one-half years. During the initial three months of segregation, he was held in almost total isolation with correctional officers directed not to talk to him. During the same period of time, his segregation was not reviewed at either the institutional or regional levels. He received no therapeutic mental

health services during this period of time.

[511] For the next four years, the accused remained in segregation in deplorable conditions. In my opinion, his segregation during this period of time was devoid of meaningful review at both the institutional and regional levels, either because mandated reviews at both levels did not occur or because the reviews that did occur were based on unreliable and inaccurate information.

[512] During the entire period of segregation, correctional officers failed to consider any alternatives to segregation and failed to consider any measures directed at mitigating the devastating impact of segregation on the accused.

[513] In the expert opinion of Dr. Bradford, the accused's time in segregation, in particular, the initial period of near total isolation, almost certainly had a more serious effect on him than it would on many other individuals given his ADHD, antisocial personality disorder, and history of depression, self-injurious behaviour, and suicidality. Dr. Bradford was further of the opinion that segregation either exacerbated the accused's pre-existing PTSD or triggered its development, such that it is now chronic and severe and will persist as a legacy of the accused's prolonged segregation. Dr. Bradford also opined that segregation has resulted in significant cognitive impairments for the accused.

[514] Experts with decades of experience in the field of corrections and segregation were shocked and incredulous when describing the conditions in which the accused was segregated for four and one-half years. The accused has suggested that this case is not simply about state misconduct, but that it represents *the worst* state misconduct that decades of expert experience has ever seen. That submission, in my opinion, has a great deal of merit. As noted by the Supreme Court in *Babos*, at para. 35:

> At times, state conduct will be so troublesome that having a trial – even a fair one – will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency.

[515] The breaches of the accused's ss. 7, 9, 12, and 15 *Charter* rights have been found to be prolonged, abhorrent, egregious, and intolerable. It is against this factual backdrop that prejudice to the integrity of the justice system must be considered.

[516] I accept the accused's submission that the evidence heard in this application demonstrates a disturbing pattern of disregard for policy, procedure, and inmates' rights within the Ontario correctional system.

[517] Ms. McKay testified that the results of the December 21, 2015, CSOI Compliance Review of 143 randomly selected inmates in segregation for 30 days or longer as of July 2015 was "positive." The accused who, by July 2015, had been in continuous segregation for over three years, was included in this review.

[518] Mr. Naqvi, then Minister of Community Safety and Correctional Services, toured the Thunder Bay Jail on January 13, 2016. Mr. Lundy observed the Minister interact with the accused during this tour. Mr. Lundy advised the Minister that the accused had been in segregation for three and one-half years at that point in time.

[519] The record on this application fails to establish that any of the correctional officials involved in decision making or the review of decision making in regard to the accused's prolonged segregation have suffered any consequences despite the disturbing lack of compliance with provincial law and policy.

[520] In listening to the evidence on this application, I was disturbed by the contrast in the demeanour of the expert witnesses on the one hand and the Ministry witnesses on the other. As

previously noted, all experts were demonstrably appalled by the state's treatment of the accused over the span of four and one-half years. By contrast, with the exception of Mr. Lundy, I did not observe a single note of contrition or regret during the testimony of the correctional witnesses who were largely responsible for detaining the accused in segregation under abhorrent conditions for four and one-half years.

[521] The review and oversight of segregation decisions, in the form of consistent, meaningful segregation reviews at the institution and regional levels based on current, accurate, and reliable information, is designed to ensure that segregation decisions are scrutinized both within the institution and at the regional level. That oversight was simply non-existent in this case.

Alternative Remedies

[522] At the second stage of the Babos test, it must be established that there is no alternative remedy capable of redressing the prejudice to the integrity of the justice system. I reject the Crown's submission that judicial condemnation by way of a declaration or an award of monetary damages would be an appropriate and just remedy for the multiple and very serious *Charter* breaches in this case. By any measure, judicial condemnation of the abusive state conduct in this case is a woefully inadequate remedy.

[523] Assuming that a Superior Court has jurisdiction to award damages under s. 24(1) of the *Charter*, it apparently has never been done. In my opinion, such a remedy is simply inappropriate on the facts of this case.

[524] I also reject the suggestion that a reduction in sentence is an alternative remedy capable of redressing the significant prejudice to the integrity of the justice system in this case.

[525] If the accused is convicted of first degree murder, he is subject to a mandatory sentence

of life imprisonment and ineligible for parole for 25 years. There is conflicting authority as to whether mandatory minimum sentences can be reduced below the statutory minimum to remedy *Charter* breaches. To date, this has not been done.

[526] If the accused were to be convicted of manslaughter after trial (a possibility given the evidence of Dr. Bradford), a sentence reduction would quite likely be unavailable as the accused has now served six years and eight months of pretrial custody. If given a credit of 1.5 days for each day of day of pretrial custody, the accused would receive a credit of 10 years for pretrial custody against any sentence imposed. A compelling argument could be made that the accused should be entitled to a credit well in excess of 1.5 days for each day of pretrial custody, given the conditions he endured while in pretrial custody: *R. v. Prystay*, 2019 ABQB 8.

[527] If the accused received an enhanced credit for pretrial custody, the credit could very well exceed the sentence imposed if the accused were convicted of manslaughter. If so, the proposed remedy of a sentence reduction would be no remedy at all.

Balancing

[528] The balancing exercise at the third step in the *Babos* test takes on added importance under the residual category. Where prejudice to the integrity of the justice system is alleged, the court is being asked to decide which of two options better protects the integrity of the system: staying the proceedings or having the trial proceed despite the impugned conduct: *Babos*, at para. 41.

[529] Pursuant to the Supreme Court's direction in *Babos*, at para. 41, factors to be considered during the balancing exercise under the residual category include:

1. The nature and seriousness of the state misconduct;

2. Whether the misconduct is isolated or reflects a systemic and ongoing problem;

3. The circumstances of the defendant; and

4. The offences charged and the interests of society in having a trial on the merits.

[530] First degree murder is the most serious offence in Canadian criminal law. It is without question that society – and the family of Mr. Quisses - have a very high interest in seeing a charge of this nature addressed on its merits.

[531] The nature and seriousness of the state misconduct in this case weighs heavily in favour of granting a stay of proceedings. The details of that misconduct need not be repeated.

[532] The state misconduct in this case is not isolated. According to the unchallenged evidence of Ms. Mandhane, the inadequacy and ineffectiveness of the segregation review process in Ontario has been a long standing and ongoing problem. Professor Hannah-Moffat's expert opinion was that the significant dangers associated with segregation have been known for a "very long time."

[533] The accused's circumstances have been repeatedly referred to in this decision. Some have improved following his release from segregation. Others, according to Dr. Bradford, are "chronic and severe" and will persist over time as a lasting effect of Mr. Capay's prolonged segregation.

[534] In my opinion, this is the clearest of cases in which no remedy short of a stay is capable of redressing the prejudice caused to the integrity of the justice system as a result of the multiple and egregious breaches of the accused's *Charter* rights.

[535] For all of the reasons above, the charge of first degree murder against the accused, Adam Capay, is stayed.

" original signed by"
The Hon. Mr. Justice J.S. Fregeau

Released: January 28, 2019

CITATION: R. v. Capay 2019 ONSC 535
COURT FILE NO.: CR-13-0070
DATE: 2019-01-28

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and –

ADAM MARK CAPAY

REASONS ON APPLICATION

Fregeau J.

Released: January 28, 2019

/sf

This is Exhibit **"B"** to the
Affidavit of Ransome Capay affirmed before
me this 15th day of December, 2020.

A Commissioner, etc.

000830-004253 830 1 4

GLENDA BRISKET

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Page	1 / 7
Account Number	203581682
Bill Date	September 20, 2013
Customer ID Number	20358168ZZZ202
(14 Digit Number for online/telebanking)	

Your Bill

Previous Balance	758.36
Payment - Sep 06 - Thank You	300.00cr
Balance Forward	458.36
Your Bell Services	864.60
Your Bundle Savings	8.00cr
Account Charges or Credits	2.00
Paper bill fee	2.00
Amount Due	1316.96

** IMPORTANT INFORMATION

Payment due upon receipt. To ensure your payment is reflected on next invoice, please pay by: ***Oct 10, 2013.***

For other payment information please see page 2.

Your payment is OVERDUE. To avoid further late payment charges and possible service disruption, payment is now required. Please pay now or call 1-800-477-9205.

Telephone

(807) 582-3363

Monthly Charges	59.78
Other Charges or Credits	2.95
Usage	721.92
Total (before taxes)	784.65

Internet

b1pjim74 / 10019859

Monthly Charges	57.95
Usage	22.00
Total (before taxes)	79.95

Your Bundle Savings

Bell Home Phone Bundle Savings	4.00 cr
Bell Internet Bundle Savings	4.00 cr
Total (before taxes)	8.00cr

To reach us see page 2

20358168ZZZ202

Account Number	Bill Date	Please Pay by **	Amount Due	Amount Paid
203581682	September 20, 2013	October 10, 2013	1316.96	.

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Page	3 / 7
Account Number	203581682
Bill Date	September 20, 2013
Customer ID Number (14 Digit Number for online/telebanking)	20358168ZZZ202

Telephone Services

+++ Please note that effective November 1, 2013, the monthly price of your Home phone package will increase by $2.01. Price adjustments support our continued investments in network, product and service enhancements. Learn more at bell.ca/evenbetter. At any time, if you have questions or wish to add, modify, cancel or extend services, please call us at 310-BELL (2355).

Monthly Charges

(807) 582-3363

		Amount
Monthly Services (Sep 13 to Oct 12)		
1	Home Phone Complete package	
	Residence line	53.98
	Zero rated 30¢ a Minute Long Distance Feature	
	Call Forwarding	
	3 Way Calling	
	Call Return	
	Call Screen	
	Visual Call Waiting	
	WireCare	
	PhoneCare	
	Free non published listing	
1	Service Area Charge	3.00
1	Deny Bill to Third Calls	0.00
1	Telemarketing exclusion code	0.00
1	Adacc	0.00
1	Save your service	0.00
1	Touch-Tone service	2.80
Total Monthly Charges (before taxes)		**59.78**

Other Charges or Credits

(807) 582-3363

Monthly Charges Changes

		Monthly rate	Days	Amount
Sep 05	Order #CC019480 Addition			
	From Sep 05 to Sep 12			
1	Adacc	0.00	8	0.00
1	Save your service	0.00	8	0.00

(807) 582-3363

Miscellaneous Charges

		Amount
Aug 17	LD network connection fee	2.95
Total Other Charges or Credits (before taxes)		**2.95**

Usage - Summary

SUMMARY - USAGE	
Long distance calls before savings and discounts	27.18

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Account Number 203581682
Bill Date September 20, 2013
Customer ID Number 20358168ZZZ202
(14 Digit Number for online/telebanking)

Telephone Services (cont'd)

Usage - Itemized Calls (cont'd)

	Date	Message Type	Number Called	Time	Duration (min:)	Call Type*	Amount
	(807) 582-3363						
	Usage - other carrier messages (cont'd)						
21	Wed	Aug 21 From Telus Communications Inc HUDSON	ON &	18:02	14.0	4E	9.76
22	Wed	Aug 21 From Telus Communications Inc HUDSON	ON &	19:42	17.0	4E	11.53
23	Thu	Aug 22 From Telus Communications Inc HUDSON	ON &	12:03	20.0	4E	15.30
24	Thu	Aug 22 From Telus Communications Inc HUDSON	ON &	12:26	20.0	4E	15.30
25	Thu	Aug 22 From Telus Communications Inc HUDSON	ON &	12:46	20.0	4E	15.30
26	Thu	Aug 22 From Telus Communications Inc HUDSON	ON &	13:07	20.0	4E	15.30
27	Thu	Aug 22 From Telus Communications Inc HUDSON	ON &	13:28	11.0	4E	9.09
28	Thu	Aug 22 From Telus Communications Inc HUDSON	ON &	13:40	2.0	4E	2.88
29	Fri	Aug 23 From Telus Communications Inc HUDSON	ON &	17:08	20.0	4E	15.30
30	Fri	Aug 23 From Telus Communications Inc HUDSON	ON &	17:28	1.0	4E	2.19
31	Fri	Aug 23 From Telus Communications Inc HUDSON	ON &	17:30	3.0	4E	3.67
32	Fri	Aug 23 From Telus Communications Inc HUDSON	ON &	17:34	20.0	4E	15.30
33	Fri	Aug 23 From Telus Communications Inc HUDSON	ON &	17:56	20.0	4E	15.30
34	Sat	Aug 24 From Telus Communications Inc HUDSON	ON &	18:48	20.0	4E	13.30
35	Sat	Aug 24 From Telus Communications Inc HUDSON	ON &	19:09	20.0	4E	13.30
36	Sat	Aug 24 From Telus Communications Inc HUDSON	ON &	19:31	20.0	4E	13.30
37	Sat	Aug 24 From Telus Communications Inc HUDSON	ON &	19:51	7.0	4E	5.63
38	Tue	Aug 27 From Telus Communications Inc HUDSON	ON &	18:36	20.0	4E	13.30
39	Tue	Aug 27 From Telus Communications Inc HUDSON	ON &	18:57	20.0	4E	13.30
40	Tue	Aug 27 From Telus Communications Inc HUDSON	ON &	19:18	20.0	4E	13.30
41	Tue	Aug 27 From Telus Communications Inc HUDSON	ON &	19:43	17.0	4E	11.53
42	Wed	Aug 28 From Telus Communications Inc HUDSON	ON &	18:12	20.0	4E	13.30
43	Wed	Aug 28 From Telus Communications Inc HUDSON	ON &	18:33	20.0	4E	13.30
44	Wed	Aug 28 From Telus Communications Inc HUDSON	ON &	18:55	6.0	4E	5.04
45	Wed	Aug 28 From Telus Communications Inc HUDSON	ON &	19:01	20.0	4E	13.30
46	Wed	Aug 28 From Telus Communications Inc HUDSON	ON &	19:22	20.0	4E	13.30
47	Wed	Aug 28 From Telus Communications Inc HUDSON	ON &	19:43	2.0	4E	2.68
48	Fri	Aug 30 From Telus Communications Inc HUDSON	ON &	18:18	4.0	4E	3.86
49	Fri	Aug 30 From Telus Communications Inc HUDSON	ON &	18:48	20.0	4E	13.30
50	Fri	Aug 30 From Telus Communications Inc HUDSON	ON &	19:21	20.0	4E	13.30
51	Sun	Sep 01 From Telus Communications Inc HUDSON	ON &	10:14	20.0	4E	13.30
52	Sun	Sep 01 From Telus Communications Inc HUDSON	ON &	10:38	13.0	4E	9.17
53	Sun	Sep 01 From Telus Communications Inc HUDSON	ON &	10:54	20.0	4E	13.30
54	Sun	Sep 01 From Telus Communications Inc HUDSON	ON &	11:15	12.0	4E	8.58
55	Wed	Sep 04 From Telus Communications Inc HUDSON	ON &	15:36	20.0	4E	15.30
56	Wed	Sep 04 From Telus Communications Inc HUDSON	ON &	15:58	13.0	4E	10.47
57	Wed	Sep 04 From Telus Communications Inc HUDSON	ON &	16:21	20.0	4E	15.30
58	Wed	Sep 04 From Telus Communications Inc HUDSON	ON &	16:41	20.0	4E	15.30
59	Wed	Sep 04 From Telus Communications Inc HUDSON	ON &	17:02	20.0	4E	15.30
60	Wed	Sep 04 From Telus Communications Inc HUDSON	ON &	17:23	10.0	4E	8.40

Sub-total carried to the summary - Usage - Other Carrier messages 697.02

*Call Type: & : From coin telephone; 4 : Collect; 7 : Automated Calling Card call; 8 : Customer dialed; E : Non taxable; M : Minimum charge

**Plan: PM25 25¢ a Minute Long Distance Feature : Per minute rate for long distance in Canada and the U.S., 24 hrs/day, 7 days/week.

Total Telephone Services (before taxes) **784.65**

GLENDA BRISKET

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Page	7 / 7
Account Number	203581682
Bill Date	September 20, 2013
Customer ID Number (14 Digit Number for online/telebanking)	20358168ZZZ202

Internet Services

+++As of Sept 1, 2013, the usage overage fee for your Internet plan will increase to $4/GB, not $2/GB as formerly communicated. We are sorry for any confusion this may have caused. To help avoid overage charges, add unlimited Internet usage for just $10/mo extra in a 3-service bundle (including TV). If you have questions or wish to add, modify, cancel or extend services, call 310-BELL (2355).

+++ Please note that effective November 1, 2013, the monthly price of your Internet service will increase by $3. Price adjustments support our continued investments in network, product and service enhancements. Learn more at bell.ca/evenbetter. At any time, if you have questions or wish to add, modify, cancel or extend services, please call us at 310-BELL (2355).

Monthly Charges

Bell Internet ID: b1pjm74 Bell Internet PIN: 10019859

		Amount
Monthly Services (Aug 28 to Sep 27)		
1	Bell Tech Expert	6.00
1	Bell Internet Performance	51.95
1	McAfee® Security from Bell Good	0.00
Total Monthly Charges (before taxes)		**57.95**

Usage - Summary

	Usage	Amount
Usage Internet		22.00
Total Internet usage (before taxes)		**22.00**

Total Internet Services (before taxes) **79.95**

Taxes

	Amount
Total Taxes	**0.00**
Total (after taxes)	**79.95**

This is Exhibit **"C"** to the
Affidavit of Ransome Capay affirmed before
me this 15th day of December, 2020.

A ~~C~~ommissioner, etc.

000859-004435 859_3_3

Bell

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Account owner	Account number	Bill date	Customer ID number
[redacted]	[redacted]	[redacted]	[redacted]

14 digit number for online/telebanking

Home phone (cont'd)

Usage - Itemized Calls

	Date	To	Number Called	Time	Duration (min:)	Call Type*	Charges	Savings and/or discounts	Plan Type**	Amount
	(807) 582-3239									
	Long distance calls (Your plan savings appear in the Summary - Usage, if applicable)									
1	Mon Jan 11	From Kenora	ON & [redacted]	08:13	10.0	4VE	12.99	0.00		12.99
2	Wed Jan 13	Winnipeg	MB	09:45	4.0	8E	3.34	1.74	40¢M	1.60
3	Wed Jan 13	Winnipeg	MB	09:56	2.0	8E	1.67	0.87	40¢M	0.80
4	Thu Jan 21	Winnipeg	MB	09:02	3.0	8E	2.51	1.31	40¢M	1.20
5	Mon Jan 25	Oxdrift	ON	09:43	2.0	8E	1.40	0.60	40¢M	0.80
6	Mon Jan 25	Oxdrift	ON	10:34	2.0	8E	1.40	0.60	40¢M	0.80
7	Fri Jan 29	Dryden	ON	15:15	2.0	8E	2.10	1.30	40¢M	0.80
8	Sat Jan 30	Winnipeg	MB	10:26	5.0	8E	4.18	2.18	40¢M	2.00
9	Thu Feb 11	Oxdrift	ON	13:23	7.0	8E	5.60	2.80	40¢M	2.80
10	Thu Feb 11	Oxdrift	ON	13:30	2.0	8E	1.60	0.80	40¢M	0.80
	Sub-total carried to the Summary - Long Distance						12.99	0.00		12.99
	Sub-total carried to the Summary - Long Distance						23.80	12.20	PM40	11.60

	Date	Message Type	Number Called	Time	Duration (min:)	Call Type*	Amount
	(807) 582-3239						
	Usage - Other carrier messages						
1	Tue Jan 12	From WiMacTel - payphone call HUDSON	ON &	17:55	15.0	4E	7.06
2	Mon Jan 18	From WiMacTel - payphone call HUDSON	ON &	17:42	21.0	4E	8.76
3	Wed Jan 20	From WiMacTel - payphone call HUDSON	ON &	17:59	19.0	4E	8.19
4	Fri Jan 22	From WiMacTel - payphone call HUDSON	ON &	16:03	18.0	4E	7.91
5	Sun Jan 24	From WiMacTel - payphone call HUDSON	ON &	17:31	10.0	4E	4.52
6	Mon Jan 25	From WiMacTel - payphone call HUDSON	ON &	08:05	5.0	4E	4.24
7	Mon Jan 25	From WiMacTel - payphone call HUDSON	ON &	20:07	3.0	4E	3.33
8	Tue Jan 26	From WiMacTel - payphone call HUDSON	ON &	12:58	1.0	4E	3.11
9	Tue Jan 26	From WiMacTel - payphone call HUDSON	ON &	15:20	13.0	4E	6.50
10	Tue Jan 26	From WiMacTel - payphone call HUDSON	ON &	15:40	21.0	4E	8.76
11	Thu Jan 28	From WiMacTel - payphone call HUDSON	ON &	14:35	18.0	4E	7.91
12	Fri Jan 29	From WiMacTel - payphone call HUDSON	ON &	15:24	12.0	4E	6.22
13	Sat Jan 30	From WiMacTel - payphone call HUDSON	ON &	13:09	19.0	4E	6.05
14	Tue Feb 02	From WiMacTel - payphone call HUDSON	ON &	14:27	18.0	4E	7.91
15	Wed Feb 03	From WiMacTel - payphone call HUDSON	ON &	15:01	3.0	4E	3.67
16	Mon Feb 08	From WiMacTel - payphone call HUDSON	ON &	17:53	13.0	4E	6.50
17	Wed Feb 10	From WiMacTel - payphone call HUDSON	ON &	17:35	2.0	4E	3.39
	Sub-total carried to the summary - Usage - Other Carrier messages						104.03

*Call Type: & : From coin telephone; 8 : Customer dialed; V : Automated call; 4 : Collect; E : Non taxable

**Plan: PM40 40¢ a Minute Long Distance Feature : Per minute rate for long distance in Canada and the U.S., 24 hrs/day, 7 days/week.

Total Home phone charges (before taxes) **197.17**

Taxes

	Amount
Total Taxes	**0.00**
Total (after taxes)	**197.17**

This is Exhibit **"D"** to the
Affidavit of Ransome Capay affirmed before
me this 15th day of December, 2020.

A Commissioner, etc.

000860-004437 880_1_3

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
GLENDA BRISKET	203581682	March 17, 2016	14 digit number for online/telebanking

Previous bill

Previous bill balance	$242.30
Payment - Mar 08 - Thank you	CR $242.30
Adjustments	$0.00
Outstanding balance	**$0.00**

Current bill

Outstanding balance	$0.00
Your Bell services	$351.23
Taxes	$0.00
Amount due Please pay by Apr 06, 2016	**$351.23**

IMPORTANT INFORMATION: Payment due upon receipt. To ensure your payment is reflected on next invoice, please pay by: Apr 06, 2016.
For other payment information please see page 2.
For full billing details and account information, log in to MyBell, online.

To find out how to contact us, see page 2.

20358168ZZZ202

Bell

Account number	Bill date	Please pay by	Amount due	Amount paid
203581682	March 17, 2016	April 6, 2016	$351.23	

For Bell Use 1 1 #01#E#CONSO#RRC016##000004437

BELL CANADA
P.O. BOX 9000
STN DON MILLS
NORTH YORK ON
M3C 2X7

*0000860

GLENDA BRISKET
GD
LAC SEUL ON P0V 2A0

724851581686909090000291603174848484806484814848048000000351233

000880-004439 880_2_3

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
GLENDA BRISKE	[redacted]	March 12, 2018	[redacted]

14 digit number for online/telebanking

Internet

Monthly Charges & Credits

		Amount
Bell Internet ID: b1pjlm74	Bell Internet PIN: 10019859	
Monthly Services (Feb 28 to Mar 27)		
1	Bell Tech Expert	6.00
1	Bell Internet Plus	59.95
1	McAfee® Security from Bell Better	0.00
1	Bell Internet Bundle Savings	2.00cr
Total Monthly Charges & Credits (before taxes)		**63.95**

Partial and Other Charges & Credits

Bell Internet ID: b1pjlm74 Bell Internet PIN: 10019859

Rate changes	Difference in monthly rate	Days	Amount
Monthly rate increase since Feb 01			
1 Bell Internet Plus	4.00	27	3.60
Total Partial and Other Charges & Credits (before taxes)			**3.60**
Total Internet Charges (before taxes)			**67.55**

Taxes

	Amount
Total Taxes	**0.00**
Total (after taxes)	**67.55**

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
GLENDA PRISKE	[redacted]	[redacted]	[redacted]

14 digit number for online/telebanking

Home phone (cont'd)

Usage - Itemized Calls

	Date	To	Number Called	Time	Duration (min:)	Call Type*	Charges	Savings and/or discounts	Plan Type**	Amount
	(807) 582-3239									
	Long distance calls (Your plan savings appear in the Summary - Usage, if applicable)									
1	Tue Feb 23	Lakota	IA [redacted]	21:17	2.0	8E	2.42	1.62	40¢M	0.80
2	Tue Mar 01	Oxdrift	ON	09:16	4.0	8E	3.20	1.60	40¢M	1.60
3	Wed Mar 02	Oxdrift	ON	09:22	3.0	8E	2.40	1.20	40¢M	1.20
4	Mon Mar 07	ThunderBay	ON	09:32	5.0	8E	6.05	4.05	40¢M	2.00
5	Mon Mar 07	Oxdrift	ON	10:37	1.0	8ME	0.80	0.40	40¢M	0.40
6	Fri Mar 11	Sachigo Lk	ON	10:54	1.0	8ME	0.40	0.00	40¢M	0.40
	Sub-total carried to the Summary - Long Distance						15.27	8.87	PM40	6.40

	Date	Message Type	Number Called	Time	Duration (min:)	Call Type*	Amount
	(807) 582-3239						
	Usage - Other carrier messages						
1	Fri Feb 12	From WiMacTel - payphone call HUDSON	ON &	17:18	3.0	4E	3.67
2	Fri Feb 12	From WiMacTel - payphone call HUDSON	ON &	17:40	17.0	4E	7.63
3	Sun Feb 14	From WiMacTel - payphone call HUDSON	ON &	10:55	2.0	4E	3.16
4	Sun Feb 14	From WiMacTel - payphone call HUDSON	ON &	11:05	18.0	4E	5.88
5	Mon Feb 15	From WiMacTel - payphone call HUDSON	ON &	13:56	18.0	4E	7.91
6	Mon Feb 15	From WiMacTel - payphone call HUDSON	ON &	14:58	19.0	4E	8.19
7	Sat Feb 20	From WiMacTel - payphone call HUDSON	ON &	10:33	20.0	4E	6.22
8	Sat Feb 20	From WiMacTel - payphone call HUDSON	ON &	10:53	21.0	4E	6.38
9	Sat Feb 20	From WiMacTel - payphone call HUDSON	ON &	11:28	7.0	4E	4.01
10	Sun Feb 21	From WiMacTel - payphone call HUDSON	ON &	14:40	19.0	4E	6.05
11	Sun Feb 21	From WiMacTel - payphone call HUDSON	ON &	15:01	20.0	4E	6.22
12	Mon Feb 22	From WiMacTel - payphone call HUDSON	ON &	19:16	21.0	4E	6.38
13	Mon Feb 22	From WiMacTel - payphone call HUDSON	ON &	19:38	4.0	4E	3.50
14	Mon Feb 22	From WiMacTel - payphone call HUDSON	ON &	19:47	19.0	4E	6.05
15	Mon Feb 22	From WiMacTel - payphone call HUDSON	ON &	20:08	15.0	4E	5.37
16	Tue Feb 23	From WiMacTel - payphone call HUDSON	ON &	17:52	17.0	4E	7.63
17	Thu Feb 25	From WiMacTel - payphone call HUDSON	ON &	17:44	20.0	4E	8.48
18	Thu Feb 25	From WiMacTel - payphone call HUDSON	ON &	18:05	21.0	4E	6.38
19	Thu Feb 25	From WiMacTel - payphone call HUDSON	ON &	18:26	5.0	4E	3.67
20	Mon Feb 29	From WiMacTel - payphone call HUDSON	ON &	16:46	20.0	4E	8.48
21	Mon Feb 29	From WiMacTel - payphone call HUDSON	ON &	17:07	4.0	4E	3.96
22	Mon Feb 29	From WiMacTel - payphone call HUDSON	ON &	17:36	18.0	4E	7.91
23	Mon Feb 29	From WiMacTel - payphone call HUDSON	ON &	17:56	21.0	4E	8.76
24	Wed Mar 02	From WiMacTel - payphone call HUDSON	ON &	13:53	19.0	4E	8.19
25	Wed Mar 02	From WiMacTel - payphone call HUDSON	ON &	14:12	19.0	4E	8.19
26	Wed Mar 02	From WiMacTel - payphone call HUDSON	ON &	14:55	16.0	4E	7.35
27	Thu Mar 03	From WiMacTel - payphone call HUDSON	ON &	15:58	1.0	4E	3.11
28	Thu Mar 03	From WiMacTel - payphone call HUDSON	ON &	16:00	20.0	4E	8.48
29	Thu Mar 03	From WiMacTel - payphone call HUDSON	ON &	16:25	21.0	4E	8.76
30	Thu Mar 03	From WiMacTel - payphone call HUDSON	ON &	16:47	13.0	4E	6.50
31	Sat Mar 05	From WiMacTel - payphone call HUDSON	ON &	16:36	9.0	4E	4.35
32	Thu Mar 10	From WiMacTel - payphone call HUDSON	ON &	08:47	6.0	4E	4.52
33	Thu Mar 10	From WiMacTel - payphone call HUDSON	ON &	09:29	19.0	4E	8.19
	Sub-total carried to the summary - Usage - Other Carrier messages						209.53

*Call Type: & : From coin telephone; 4 : Collect; 8 : Customer dialed; E : Non taxable; M : Minimum charge

000981-004443 861_1_3

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
GLENDA BRISKET	203581682	April 17, 2016	20358168ZZZ202

14 digit number for online/telebanking

Previous bill

Previous bill balance	$351.25
Payment - Apr 06 - Thank you	CR $351.25
Adjustments	$0.00
Outstanding balance	**$0.00**

Current bill

Outstanding balance	$0.00
Your Bell services	$385.69
Taxes	$0.00
Amount due Please pay by May 09, 2016	**$385.69**

IMPORTANT INFORMATION: Payment due upon receipt. To ensure your payment is reflected on next invoice, please pay by: May 09, 2016.
For other payment information please see page 2.
For full billing details and account information, log in to MyBell, online.

To find out how to contact us, see page 2.

20358168ZZZ202

Bell

Account number	Bill date	Please pay by	Amount due	Amount paid
203581682	April 17, 2016	May 9, 2016	$385.69	

For Bell Use 1 1 #01#E#CONSO#RRC018##000004443

BELL CANADA
P.O. BOX 9000
STN DON MILLS
NORTH YORK ON
M3C 2X7

19800004

GLENDA BRISKET
GD
LAC SEUL ON P0V 2A0

72485158168690909000029160417484848480548481484804800000385694

This is Exhibit **"E"** to the
Affidavit of Ransome Capay affirmed before
me this 15th day of December, 2020.

A Commissioner, etc.

000864-004461 864_1_3

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
GLENDA BRISKET	203581682	July 17, 2016	203581682ZZZ202

14 digit number for online/telebanking

Previous bill

Previous bill balance	$225.54
Payment - Jul 06 - Thank you	CR $225.54
Adjustments	$0.00
Outstanding balance	**$0.00**

Current bill

Outstanding balance	$0.00
Your Bell services	$700.09
Taxes	$0.00
Amount due Please pay by Aug 08, 2016	**$700.09**

IMPORTANT INFORMATION: Payment due upon receipt. To ensure your payment is reflected on next invoice, please pay by: Aug 08, 2016.
For other payment information please see page 2.
For full billing details and account information, log in to MyBell, online.

To find out how to contact us, see page 2.

203581682ZZZ202

Bell

Account number	Bill date	Please pay by	Amount due	Amount paid
203581682	July 17, 2016	August 8, 2016	$700.09	

For Bell Use 11 #01#E#CONSC#RRC018##000004461

BELL CANADA
P.O. BOX 9000
STN DON MILLS
NORTH YORK ON
M3C 2X7

*0000864

GLENDA BRISKET
GD
LAC SEUL ON P0V 2A0

72485158168690909000029160717484848480248481484804800000700090

000864-004483 864_2_3

Bell

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Account owner	Account number	Bill date	Customer ID number
[redacted]	[redacted]	[redacted]	[redacted]

14 digit number for online/telebanking

Internet

Monthly Charges & Credits

Bell Internet ID: b1pjm74 Bell Internet PIN: 10019859

		Amount
Monthly Services (Jun 28 to Jul 27)		
1	Bell Tech Expert	6.00
1	Bell Internet Plus	59.95
1	McAfee® Security from Bell Better	0.00
1	Bell Internet Bundle Savings	2.00cr
Total Monthly Charges & Credits (before taxes)		**63.95**
Total Internet Charges (before taxes)		**63.95**

Taxes

	Amount
Total Taxes	**0.00**
Total (after taxes)	**63.95**

000864-004465 864_3_3

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
[redacted]	[redacted]	[redacted]	[redacted]

14 digit number for online/telebanking

Home phone (cont'd)

Usage - Itemized Calls

(807) 582-3239

Long distance calls (Your plan savings appear in the Summary - Usage, if applicable)

	Date	To	Number Called	Time	Duration (min:)	Call Type*	Charges	Savings and/or discounts	Plan Type**	Amount
1	Mon Jun 13	Winnipeg	MB [redacted]	14:43	5.0	8E	4.80	2.80	40¢M	2.00
2	Tue Jun 14	From Kenora	ON &	12:39	19.0	4VE	25.49	0.00		25.49
3	Fri Jun 17	Winnipeg	MB [redacted]	13:35	6.0	8E	5.76	3.36	40¢M	2.40
4	Mon Jun 20	From Kenora	ON &	16:16	19.0	4VE	25.49	0.00		25.49
5	Mon Jun 20	From Kenora	ON &	16:36	15.0	4VE	20.65	0.00		20.65
6	Mon Jun 20	From Kenora	ON &	17:20	14.0	4VE	19.44	0.00		19.44
7	Wed Jun 22	From Kenora	ON &	15:47	6.0	4VE	9.76	0.00		9.76
8	Wed Jun 22	From Kenora	ON &	15:54	17.0	4VE	23.07	0.00		23.07
9	Sat Jun 25	From Kenora	ON &	14:48	11.0	4VE	15.81	2.00		13.81
10	Tue Jun 28	From Kenora	ON &	15:45	18.0	4VE	24.28	0.00		24.28
11	Tue Jun 28	From Kenora	ON &	16:04	20.0	4VE	26.70	0.00		26.70
12	Wed Jun 29	From Kenora	ON &	19:12	21.0	4VE	27.91	3.81		24.10
13	Wed Jun 29	From Kenora	ON &	19:34	21.0	4VE	27.91	3.81		24.10
14	Thu Jun 30	From Kenora	ON &	11:32	5.0	4VE	8.55	0.00		8.55
15	Sun Jul 03	From Kenora	ON &	13:27	3.0	4VE	6.13	0.55		5.58
16	Wed Jul 06	From Kenora	ON &	18:41	15.0	4VE	20.65	2.72		17.93
17	Wed Jul 06	From Kenora	ON &	18:59	4.0	4VE	7.34	0.73		6.61
18	Wed Jul 06	From Kenora	ON &	19:05	20.0	4VE	26.70	3.63		23.07
19	Thu Jul 07	From Kenora	ON &	17:52	18.0	4VE	24.28	0.00		24.28
20	Thu Jul 07	From Kenora	ON &	18:27	20.0	4VE	26.70	3.63		23.07
21	Thu Jul 07	Kenora	ON [redacted]	20:25	1.0	8ME	1.21	0.81	40¢M	0.40
22	Thu Jul 07	From Kenora	ON &	20:50	1.0	4VE	3.71	0.18		3.53
23	Fri Jul 08	From Kenora	ON &	18:23	19.0	4VE	25.49	3.45		22.04
24	Fri Jul 08	From Kenora	ON &	18:54	21.0	4VE	27.91	3.81		24.10
25	Fri Jul 08	From Kenora	ON &	19:15	13.0	4VE	18.23	2.36		15.87
26	Tue Jul 12	From Kenora	ON &	18:00	18.0	4VE	24.28	3.27		21.01
27	Tue Jul 12	From Kenora	ON &	18:18	18.0	4VE	24.28	3.27		21.01
28	Tue Jul 12	From Kenora	ON &	18:40	2.0	4VE	4.92	0.36		4.56
29	Tue Jul 12	From Kenora	ON &	18:59	21.0	4VE	27.91	3.81		24.10
30	Tue Jul 12	From Kenora	ON &	19:33	18.0	4VE	24.28	3.27		21.01
31	Tue Jul 12	From Kenora	ON &	19:54	20.0	4VE	26.70	3.63		23.07
32	Tue Jul 12	From Kenora	ON &	20:32	19.0	4VE	25.49	3.45		22.04
33	Tue Jul 12	From Kenora	ON &	20:53	7.0	4VE	10.97	1.27		9.70
	Sub-total carried to the Summary - Long Distance						611.03	53.01		558.02
	Sub-total carried to the Summary - Long Distance						11.77	6.97	PM40	4.80

*Call Type: & : From coin telephone; 4 : Collect; 8 : Customer dialed; E : Non taxable; M : Minimum charge; V : Automated call

**Plan: PM40 40¢ a Minute Long Distance Feature : Per minute rate for long distance in Canada and the U.S., 24 hrs/day, 7 days/week.

Total Home phone charges (before taxes) 630.57

Taxes

	Amount
Total Taxes	0.00
Total (after taxes)	630.57

Do you have a complaint regarding your telecommunications services? If so, call us at 310-BELL or visit bell.ca/complaint. If we can't resolve your complaint, the independent Commissioner for Complaints for Telecommunications Services (CCTS) may be able to assist you: ccts-cprst.ca or 1-888-221-1687.

#01#E#CONSO#RRC018#000004465

This is Exhibit **"F"** to the
Affidavit of Ransome Capay affirmed before me
this 15th day of December, 2020.

A Commissioner, etc.

000865-004487 865_1_3

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
GLENDA BRISKET	203581682	August 17, 2016	203581682ZZZ202

14 digit number for online/telebanking

Previous bill

Previous bill balance	$700.09
Payment - Aug 10 - Thank you	CR $500.00
Adjustments	$0.00
Outstanding balance	**$200.09**

Current bill

Outstanding balance	$200.09
Your Bell services	$912.69
Taxes	$0.00
Amount due Please pay by Sep 06, 2016	**$1112.78**

IMPORTANT INFORMATION: Payment due upon receipt. To ensure your payment is reflected on next invoice, please pay by: Sep 06, 2016.
For other payment information please see page 2.
For full billing details and account information, log in to MyBell, online.

Your payment is OVERDUE.

To avoid further late payment charges and possible service disruption, payment is now required. Please pay now or call 1 800 477-9205.

To find out how to contact us, see page 2.

20358168ZZZ202

Bell

Account number	Bill date	Please pay by	Amount due	Amount paid
203581682	August 17, 2016	September 6, 2016	$1112.78	

For Bell Use 1 1 #01#E#CONSO#RRC018##000004467

BELL CANADA
P.O. BOX 9000
STN DON MILLS
NORTH YORK ON
M3C 2X7

*0008865

GLENDA BRISKET
GD
LAC SEUL ON P0V 2A0

724851581686909090000291608174848484801484814848048000001112782

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
[redacted]	[redacted]	[redacted]	[redacted]

14 digit number for online/telebanking

Internet

Monthly Charges & Credits

		Amount
Bell Internet ID: b1pjim74	Bell Internet PIN: 10019859	
Monthly Services (Jul 28 to Aug 27)		
1	Bell Tech Expert	6.00
1	Bell Internet Plus	59.95
1	McAfee® Security from Bell Better	0.00
1	Bell Internet Bundle Savings	2.00cr.
Total Monthly Charges & Credits (before taxes)		**63.95**

Usage - Summary

Bell Internet ID: b1pjim74 Bell Internet PIN: 10019859

	Usage Period	Actual Usage	Usage Above Plan	Amount
1	Jun 28 to Jul 27	165.50 GB	25.50 GB	100.00

For detailed usage information, please visit bell.ca.

Total Internet usage (before taxes)	**100.00**
Total Internet Charges (before taxes)	**163.95**

Taxes

	Amount
Total Taxes	**0.00**
Total (after taxes)	**163.95**

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
GLENDON BRISKET	293578952	August 17, 2016	203816R 7202

14 digit number for online/telebanking

Home phone (cont'd)

Usage - Itemized Calls

(807) 582-3239

Long distance calls (Your plan savings appear in the Summary - Usage, if applicable)

	Date	To	Number Called	Time	Duration (min:)	Call Type*	Charges	Savings and/or discounts	Plan Type**	Amount
1	Thu Jul 14	From Kenora	ON &	17:46	20.0	4VE	26.70	0.00		26.70
2	Sat Jul 16	Fergus	ON [redacted]	17:54	1.0	8ME	1.21	0.81	40¢M	0.40
3	Sat Jul 16	Fergus	ON	17:56	1.0	8ME	1.21	0.81	40¢M	0.40
4	Sun Jul 17	Adams	MN	09:20	1.0	8ME	1.21	0.81	40¢M	0.40
5	Sun Jul 17	From Kenora	ON &	09:30	20.0	4VE	26.70	3.63		23.07
6	Sun Jul 17	Fergus	ON [redacted]	18:35	11.0	8E	13.31	8.91	40¢M	4.40
7	Thu Jul 21	From Kenora	ON &	16:15	21.0	4VE	27.91	0.00		27.91
8	Fri Jul 22	From Kenora	ON &	18:42	19.0	4VE	25.49	3.45		22.04
9	Fri Jul 22	From Kenora	ON &	19:06	20.0	4VE	26.70	3.63		23.07
10	Fri Jul 22	From Kenora	ON &	19:37	20.0	4VE	26.70	3.63		23.07
11	Fri Jul 22	From Kenora	ON &	20:04	11.0	4VE	15.81	2.00		13.81
12	Sat Jul 23	From Kenora	ON &	18:09	18.0	4VE	24.28	3.27		21.01
13	Sat Jul 23	From Kenora	ON &	19:15	20.0	4VE	26.70	3.63		23.07
14	Sat Jul 23	From Kenora	ON &	19:36	19.0	4VE	25.49	3.45		22.04
15	Sat Jul 23	From Kenora	ON &	19:56	19.0	4VE	25.49	3.45		22.04
16	Sun Jul 24	From Kenora	ON &	18:04	19.0	4VE	25.49	3.45		22.04
17	Tue Jul 26	From Kenora	ON &	19:35	11.0	4VE	15.81	2.00		13.81
18	Tue Jul 26	From Kenora	ON &	19:47	3.0	4VE	6.13	0.55		5.58
19	Wed Jul 27	ThunderBay	ON [redacted]	17:14	1.0	8ME	1.21	0.81	40¢M	0.40
20	Wed Jul 27	ThunderBay	ON	17:16	1.0	8ME	1.21	0.81	40¢M	0.40
21	Wed Jul 27	From Kenora	ON &	17:22	4.0	4VE	7.34	0.00		7.34
22	Wed Jul 27	Fairmont	MN [redacted]	22:10	3.0	8E	3.63	2.43	40¢M	1.20
23	Fri Jul 29	ThunderBay	ON	12:06	7.0	8E	8.47	5.67	40¢M	2.80
24	Fri Jul 29	From Kenora	ON &	14:36	19.0	4VE	25.49	0.00		25.49
25	Fri Jul 29	From Kenora	ON &	15:29	17.0	4VE	23.07	0.00		23.07
26	Sat Jul 30	From Kenora	ON &	19:54	21.0	4VE	27.91	3.81		24.10
27	Sat Jul 30	From Kenora	ON &	20:25	11.0	4VE	15.81	2.00		13.81
28	Sun Jul 31	From Kenora	ON &	16:23	19.0	4VE	25.49	3.45		22.04
29	Tue Aug 02	Winnipeg	MB [redacted]	11:32	4.0	8E	3.84	2.24	40¢M	1.60
30	Tue Aug 02	Winnipeg	MB	11:38	1.0	8ME	0.96	0.56	40¢M	0.40
31	Tue Aug 02	Winnipeg	MB	11:44	4.0	8E	3.84	2.24	40¢M	1.60
32	Tue Aug 02	Winnipeg	MB	11:50	3.0	8E	2.88	1.68	40¢M	1.20
33	Tue Aug 02	Winnipeg	MB	12:06	3.0	8E	2.88	1.68	40¢M	1.20
34	Tue Aug 02	Winnipeg	MB	12:35	1.0	8ME	0.96	0.56	40¢M	0.40
35	Wed Aug 03	From Kenora	ON &	09:28	2.0	4VE	4.92	0.00		4.92
36	Wed Aug 03	From Kenora	ON &	10:41	20.0	4VE	26.70	0.00		26.70
37	Fri Aug 05	From Kenora	ON &	12:54	3.0	4VE	6.13	0.00		6.13
38	Fri Aug 05	From Kenora	ON &	14:48	19.0	4VE	25.49	0.00		25.49
39	Fri Aug 05	From Kenora	ON &	15:08	15.0	4VE	20.65	0.00		20.65
40	Sun Aug 07	Winnipeg	MB [redacted]	09:31	1.0	8ME	0.96	0.56	40¢M	0.40
41	Tue Aug 09	From Kenora	ON &	17:40	20.0	4VE	26.70	0.00		26.70
42	Tue Aug 09	From Kenora	ON &	18:00	18.0	4VE	24.28	3.27		21.01
43	Tue Aug 09	From Kenora	ON &	18:22	20.0	4VE	26.70	3.63		23.07
44	Tue Aug 09	From Kenora	ON &	18:44	18.0	4VE	24.28	3.27		21.01
45	Wed Aug 10	From Kenora	ON &	18:58	21.0	4VE	27.91	3.81		24.10
46	Fri Aug 12	From Kenora	ON &	12:28	9.0	4VE	13.39	0.00		13.39
47	Fri Aug 12	From Kenora	ON &	12:47	18.0	4VE	24.28	0.00		24.28
48	Fri Aug 12	From Kenora	ON &	13:06	13.0	4VE	18.23	0.00		18.23
	Sub-total carried to the Summary - Long Distance						720.17	59.38		660.79
	Sub-total carried to the Summary - Long Distance						47.78	30.58	**PM40**	17.20

*Call Type: & : From coin telephone; 8 : Customer dialed; M : Minimum charge; 4 : Collect; E : Non taxable; V : Automated call

#01#E#CONSO#RRC016##000004471

This is Exhibit **"G"** to the
Affidavit of Ransome Capay affirmed before
me this 15th day of December, 2020.

A Commissioner, etc.

000671-004503 871_1_3

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
GLENDA BRISKET	203581682	January 17, 2017	20358168ZZZ202

14 digit number for online/telebanking

Previous bill

Previous bill balance	$682.11
Payment - Jan 13 - Thank you	CR $682.11
Adjustments	$0.00
Outstanding balance	**$0.00**

Current bill

Outstanding balance	$0.00
Your Bell services	$1002.52
Taxes	$0.00
Amount due Please pay by Feb 06, 2017	**$1002.52**

IMPORTANT INFORMATION: Payment due upon receipt. To ensure your payment is reflected on next invoice, please pay by: Feb 06, 2017.
For other payment information please see page 2.
For full billing details and account information, log in to MyBell, online.

Bulletin Board FYI Message

+++Important: We've made our Privacy Policy clearer and easier to understand. Our updates take effect as of March 24, 2017. To learn more, visit bell.ca/privacy.

+++New! Even more affordable usage. For Bell subscribers, the average cost of 1 GB of usage has decreased by 76% in the last 5 years. So now you can do more of what you love to do online, for less.

To find out how to contact us, see page 2.

20358168ZZZ202

Bell

Account number	Bill date	Please pay by	Amount due	Amount paid
203581682	January 17, 2017	February 6, 2017	$1002.52	

For Bell Use 1 1 #01#E#CONSO#RRC018##000004503

BELL CANADA
P.O. BOX 9000
STN DON MILLS
NORTH YORK ON
M3C 2X7

*0000871

GLENDA BRISKET
GD
LAC SEUL ON P0V 2A0

72485158168690909000029170117484848480748481484804800001002520

Bell

Visit us online at bell.ca

Account owner	Account number	Bill date	Customer ID number
[redacted]	[redacted]	[redacted]	[redacted]

14 digit number for online/telebanking

Home phone (cont'd)

Usage - Itemized Calls (cont'd)

(807) 582-3239

Long distance calls (Your plan savings appear in the Summary - Usage, if applicable) (cont'd)

	Date	To	Number Called	Time	Duration (min:)	Call Type*	Charges	Savings and/or discounts	Plan Type**	Amount
2	Tue Dec 13	From Kenora	ON &	19:24	21.0	4VE	27.91	3.81		24.10
3	Tue Dec 13	Kenora	ON [redacted]	20:11	2.0	8E	2.42	1.62	40¢M	0.80
4	Tue Dec 13	From Kenora	ON &	20:16	21.0	4VE	27.91	3.81		24.10
5	Wed Dec 14	From Kenora	ON &	14:01	3.0	4VE	6.13	0.00		6.13
6	Wed Dec 14	From Kenora	ON &	16:39	2.0	4VE	4.92	0.00		4.92
7	Wed Dec 14	From Kenora	ON &	17:49	7.0	4VE	10.97	0.00		10.97
8	Wed Dec 14	From Kenora	ON &	19:17	21.0	4VE	27.91	3.81		24.10
9	Wed Dec 14	From Kenora	ON &	19:41	21.0	4VE	27.91	3.81		24.10
10	Wed Dec 14	From Kenora	ON &	20:35	11.0	4VE	15.81	2.00		13.81
11	Thu Dec 15	From Kenora	ON &	17:50	21.0	4VE	27.91	0.00		27.91
12	Thu Dec 15	From Kenora	ON &	18:13	20.0	4VE	26.70	3.63		23.07
13	Fri Dec 16	From Kenora	ON &	17:52	2.0	4VE	4.92	0.00		4.92
14	Fri Dec 16	From Kenora	ON &	20:35	1.0	4VE	3.71	0.18		3.53
15	Sat Dec 17	From Kenora	ON &	12:44	20.0	4VE	26.70	3.63		23.07
16	Sat Dec 17	From Kenora	ON &	19:58	19.0	4VE	25.49	3.45		22.04
17	Mon Dec 19	From Kenora	ON &	19:52	21.0	4VE	27.91	3.81		24.10
18	Mon Dec 19	From Kenora	ON &	20:14	21.0	4VE	27.91	3.81		24.10
19	Wed Dec 21	From Kenora	ON &	17:55	21.0	4VE	27.91	0.00		27.91
20	Wed Dec 21	From Kenora	ON &	19:59	20.0	4VE	26.70	3.63		23.07
21	Fri Dec 23	From Kenora	ON &	16:59	2.0	4VE	4.92	0.36		4.56
22	Fri Dec 23	From Kenora	ON &	20:49	3.0	4VE	6.13	0.55		5.58
23	Sat Dec 24	From Kenora	ON &	18:08	19.0	4VE	25.49	3.45		22.04
24	Sat Dec 24	From Kenora	ON &	20:34	21.0	4VE	27.91	3.81		24.10
25	Mon Dec 26	From Kenora	ON &	20:14	14.0	4VE	19.44	2.54		16.90
26	Tue Dec 27	From Kenora	ON &	13:59	21.0	4VE	27.91	0.00		27.91
27	Tue Dec 27	From Kenora	ON &	14:22	21.0	4VE	27.91	0.00		27.91
28	Wed Dec 28	Toronto	ON [redacted]	08:17	1.0	8ME	1.21	0.81	40¢M	0.40
29	Wed Dec 28	Toronto	ON [redacted]	08:47	1.0	8ME	1.21	0.81	40¢M	0.40
30	Wed Dec 28	From Kenora	ON &	17:24	1.0	4VE	3.71	0.00		3.71
31	Wed Dec 28	From Kenora	ON &	20:07	4.0	4VE	7.34	0.73		6.61
32	Wed Dec 28	From Kenora	ON &	20:38	20.0	4VE	26.70	3.63		23.07
33	Fri Dec 30	From Kenora	ON &	18:19	21.0	4VE	27.91	3.81		24.10
34	Fri Dec 30	From Kenora	ON &	18:42	16.0	4VE	21.86	2.90		18.96
35	Fri Dec 30	From Kenora	ON &	20:37	11.0	4VE	15.81	2.00		13.81
36	Sat Dec 31	From Kenora	ON &	18:38	3.0	4VE	6.13	0.55		5.58
37	Sat Dec 31	From Kenora	ON &	18:42	20.0	4VE	26.70	3.63		23.07
38	Sat Dec 31	From Kenora	ON &	20:22	16.0	4VE	21.86	2.90		18.96
39	Sat Dec 31	From Kenora	ON &	20:38	21.0	4VE	27.91	3.81		24.10
40	Mon Jan 02	From Kenora	ON &	13:05	1.0	4VE	3.71	0.00		3.71
41	Mon Jan 02	From Kenora	ON &	18:44	21.0	4VE	27.91	3.81		24.10
42	Mon Jan 02	From Kenora	ON &	19:05	20.0	4VE	26.70	3.63		23.07
43	Tue Jan 03	From Kenora	ON &	11:42	1.0	4VE	3.71	0.00		3.71
44	Tue Jan 03	From Kenora	ON &	19:07	21.0	4VE	27.91	3.81		24.10
45	Tue Jan 03	From Kenora	ON &	20:10	21.0	4VE	27.91	3.81		24.10
46	Tue Jan 03	From Kenora	ON &	20:38	7.0	4VE	10.97	1.27		9.70
47	Fri Jan 06	From Kenora	ON &	15:12	3.0	4VE	6.13	0.00		6.13
48	Fri Jan 06	From Kenora	ON &	15:16	19.0	4VE	25.49	0.00		25.49
49	Fri Jan 06	From Kenora	ON &	18:57	19.0	4VE	25.49	3.45		22.04
50	Sat Jan 07	From Kenora	ON &	19:37	21.0	4VE	27.91	3.81		24.10
51	Sat Jan 07	From Kenora	ON &	20:29	21.0	4VE	27.91	3.81		24.10
52	Sat Jan 07	From Kenora	ON &	20:50	3.0	4VE	6.13	0.55		5.58
53	Sat Jan 07	From Kenora	ON &	20:54	8.0	4VE	12.18	1.45		10.73
54	Mon Jan 09	From Kenora	ON &	19:51	20.0	4VE	26.70	3.63		23.07

VANESSA FAREAU, et al. -and- **BELL CANADA, et al.**
Plaintiffs Defendants

Court File No.: CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto
Proceeding under the *Class Proceeding Act, 1992*

AFFIDAVIT OF RANSOME CAPAY
(Affirmed December, 15 **2020)**

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Toronto ON M5G 1Z8

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Kirsten L. Mercer (LS#54077J)
Jody Brown (LS#58844D)

Lawyers for the Plaintiffs

Court File No.: CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

VANESSA FAREAU and RANSOME CAPAY

Plaintiffs

- and -

BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF DOUGLAS A. DAWSON
(Sworn January 5, 2021)

I, Douglas A. Dawson, of Asheville, North Carolina, in the United States, **MAKE OATH AND SAY:**

1. I am the president and owner of Competitive Communications Group, LLC, a full service telecommunications consulting firm offering services in areas such as regulatory, engineering, strategy and planning, operations, budgeting, and billing. I have knowledge of the matters to which I depose in this affidavit. Where the information in this affidavit is not based on my direct knowledge, I have stated the source of that information and I believe the information to be true.

2. I have prepared a methodology report, solely for use in the plaintiffs' certification motion. Attached as **Exhibit "A"** is a copy of my report.

3. Attached as **Exhibit "B"** is my acknowledgement of expert's duty.

Sworn remotely by Douglas A. Dawson, of Asheville, NC, before me at the City of Toronto in the Municipality of Metropolitan Toronto, on January 5, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A Commissioner for taking Affidavits *(or as may be)*
Mohsen Seddigh

DOUGLAS A. DAWSON

This is **Exhibit "A"** to the Affidavit of Douglas A. Dawson, of Asheville, NC, sworn before me at the City of Toronto in the Municipality of Metropolitan Toronto, on January 5, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.
A Commissioner, etc.

Methodology Report

In the matter of:
Fareau et al v Bell Canada et al, Court File No. CV-20-00635778-00CP

Date: January 5, 2021

I. INTRODUCTION

1. I am President of Nationwide CLEC, LLC dba CCG Consulting, ("CCG"), located at 825C Merrimon Avenue #290, Asheville, NC 28804. CCG is a general telephone consulting firm established in 1997 that has worked for over 1,000 communications companies, which includes Competitive Local Exchange Companies ("CLECs"), local telephone companies, cable TV providers, electric companies, wireless providers, municipalities and governments, and long-distance providers.

2. I have been engaged to determine benchmark prices for long-distance and local calls originated in Ontario prisons. Below I discuss the relevant experience that enables me to determine a benchmark price. I also will describe the methodology I expect to use to examine the pricing of calls from Ontario prisons. The methodology will involve examining the underlying cost of providing prison calling, with the goal being to compare prices charged against the cost of providing the service.

3. I have reviewed several documents in preparing this affidavit. First was a letter from Sotos LLP that engaged me and defined the scope of this report, as further described below. I reviewed the *Fresh as Amended Statement of Claim* between Vanessa Fareau and Ransome Capay, Plaintiffs, and Bell Canada and Her Majesty the Queen in right of Ontario, the Defendants. Finally, I reviewed documents forwarded to me by counsel entitled *Institutional Services Policy and Procedures Manual* for Inmate Telephone Communication from the Ministry of Community Safety and Correctional Services. Those documents included a Contract, *Agreement No. COS-0009* between Her Majesty the Queen in right of Ontario and Bell Canada, describing the Offender Telephone Management System (OTMS) and Conventional Public Pay Telephones.

II. RELEVANT EXPERIENCE

4. I have specific experience that is relevant to understanding pricing and costs for completing telephone calls. I have extensive experience with the long-distance business. I have assisted in the launch of over 50 long-distance companies in my career. I have even more experience in helping to start companies that offer local calling. In those roles I have come to understand the cost components involved in providing telephone calls. I am familiar with the regulatory aspects of providing local and long-distance calling in the United States. To the extent necessary, I will rely on a Canadian regulatory expert to understand the extent to which Canadian regulations differ from American regulations.

5. I have helped numerous companies select the electronics hardware and software needed to effectuate telephone calls. While this work has been done mostly in the United States, I have worked on similar projects in the Caribbean and Africa. I have negotiated numerous times on behalf of clients to purchase wholesale long-distance from U.S. providers like Sprint, Frontier, Qwest, MCI, and WorldCom. I understand the underlying networks used to complete telephone calls. I have extensive experience with and an in-depth understanding of the capabilities and configurations of the network switching systems that lie at the heart of how telephone calls are originated and terminated. I have also helped numerous companies with the provisioning of ancillary long-distance products such as calling cards, operator services, pre-paid calling cards, international long-distance, and Internet telephony (or Voice over IP). In recent years, I have helped to negotiate disputes between long-distance carriers and local telephone providers.

6. I also have relevant experience in the area of prison calling. Between 2003 and 2009, I was hired to provide an expert opinion on the cost of providing inmate calling in the United States Federal Communications Commission (FCC) Docket No. 12-375 that looked at the cost of providing interstate long-distance calling in prisons across the United States. In that docket, I provided

testimony that calculated the costs of providing inmate calling and that suggested the reasonable rates that should be used in prison calling. Through several rounds of filings, I defended my position against testimony filed by several prison-calling providers. The FCC finally resolved the docket in 2013 and significantly reduced prison calling rates. To quote one example from the FCC press release, the impact of FCC order is "dramatically decreasing rates of over $17 for a 15-minute call to no more than $3.75 or $3.15 a call". My filings in the docket are cited in a number of footnotes, and the final rates ordered by the FCC are close to the rates I suggested in the docket. I have enclosed the final order in the docket as Schedule "A".

7. Before the FCC prison-calling docket, I already had extensive experience in understanding the costs of providing local and long-distance calling. That docket gave me the opportunity to dive deeply into the unique aspects of providing calling for inmates. For example, I gained access to numerous contracts between the companies that provided prison calling and various prisons in the US. I was also able to gain a working knowledge of the technology used to provide the unique penological features that are necessary when providing calling for inmates.

8. Between 2012 and 2016, I acted in a similar role as an expert in Docket No. D.T.C 11-16 in the Commonwealth of Massachusetts. My testimony in that docket used the same methodologies I had used in the FCC Docket to examine the costs of long-distance and local calls from Massachusetts jails and prisons. I do not believe that the Massachusetts Department of Public Utilities has ever reached a conclusion in that docket. I have also filed comments in several cases in Virginia that looked at issues involved with providing prison calling to hard-of-hearing prisoners.

9. Regarding local calls, I also have experience relevant to examining the costs of providing local calls – calls that originate and terminate in the same community (which could be a single town or a large metropolitan calling area). Throughout my career at John Staurulakis, Inc., Southwestern Bell, CP National, and as a consultant at CCG, I have assisted clients in proving the costs and setting rates for local calling. More details are included in my resume enclosed as Schedule "B".

III. MY PLANNED APPROACH

10. In this case, I have been asked to provide an expert opinion as to the reasonableness of the long-distance and local calling rates charged by Bell Canada for calls originated from Ontario prisons. Counsel have specifically asked me to provide a report that: "Sets out a proposed methodology for determining a "but for" or benchmark price for phone rate(s) from Ontario prisons".

11. I plan to approach that task using a bottom-up cost approach.

Bottom-up Cost Approach

12. My primary approach in examining the rates charged to recipients of calls from prisoners is to calculate the cost of all of the components involved in providing calling services to prisoners. This methodology will be applied separately for both long-distance calling, with the results expressed as a cost per-minute, and local calling expressed as a cost per call. This will mean looking at costs as follows:

a. I will look at the cost of calling incurred at the prison. This includes the cost of prison telephones and the cost of any other electronics placed at the prison.

b. I will look at the cost of transport. Most of the switching of calls is done by electronics housed outside of prisons, and I will examine the cost of transporting calls from a prison to the switching hubs where calls are processed by Bell Canada.

c. I will look at the cost of switching a call. In modern networks, this is a computerized function that decides on the path that a call must traverse to be delivered from the switching hub to the party receiving the call from prisons.

d. I will look at the cost of terminating calls. This is the cost of delivering a call from the switching hub to the parties receiving the calls. Since Bell Canada is a local telephone company as well as a long-distance company, these costs are of two types. Some calls will be carried entirely on the Bell Canada networks when the party receiving the call is also a Bell Canada customer. For calls delivered to customers of other telephone providers, Bell Canada will have to pay to have the calls terminated.

e. I will look at the cost of providing the penological features. These are the features unique to prison calling that are not applied to calling done by other customers. These penological features are described in the contract between Bell Canada and the Ministry of Community Safety and Correctional Services. For example, a prison can limit an inmate to only calling pre-approved telephone numbers. Some of the penological features are carried out using specialized software that is used to switch calls from prisons, although there are functions like the recording of some calls that also involve hardware.

f. I will look at the operating costs of Bell Canada to provide the technicians, customer service representatives, and billing personnel needed to support prison calling.

g. I will also look at what I call billing costs. This is the cost of collecting the money to pay for the calls. These costs differ significantly by type of calling. For example, the billing costs for pre-paid calling in prisons come from the effort to collect and verify pre-paid funds and the cost of calculating and deducting the costs of calls from pre-paid balances. The costs of collect calling involve the cost of billing the recipients of collect calls and also must

include an allowance for the fact that some revenues from collect calling are never collected from the parties that accepted the collect calls.

h. Finally, I will add the various costs together to determine the total cost of placing a call from prison. I will separately calculate the cost of providing different kinds of calling, including collect calling, calling cards, and pre-paid calling.

i. These costs will allow for a comparison of the cost of calling to the rates being charged by Bell Canada. I will also discuss the normally expected range of profit margins in the telecom industry.

13. I believe that I will be able to obtain the information needed to calculate many of these costs from Bell Canada. If that is not possible, I will rely on my experience to estimate these costs. The cost components of completing calls in Canada are essentially the same as the cost components of completing calls in the United States. For example, the electronics used to switch calls in Canada are the same as in the US (and the same in much of the rest of the world). While the cost components are the same, there may be a difference in specific costs that are unique to Bell Canada and Ontario.

14. I expect that the bottom-up cost calculations will provide the court with a neutral assessment of the cost of providing local and long-distance calling services in the prisons. This will provide the basis for comparison to the rates actually being charged in the prisons today including a quantification of the level of profits that is included in the current rates charged to families of prisoners and other persons to whom calls were made by Ontario prisoners.

Before the

Federal Communications Commission

Washington, D.C. 20554

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

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 9, 2013 **Released: September 26, 2013**

Comment Date: 30 days after date of publication in the Federal Register

Reply Comment Date: 45 days after date of publication in the Federal Register

By the Commission: Acting Chairwoman Clyburn and Commissioner Rosenworcel issuing separate statements. Commissioner Pai dissenting and issuing a statement.

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I. INTRODUCTION

1. Nearly 10 years ago Martha Wright, a grandmother from Washington, D.C., petitioned the Commission for relief from exorbitant long-distance calling rates from correctional facilities.[1] Tens of thousands of others have since urged the Commission to act, explaining that the rates inmates and their friends and families pay for phone calls render it all but impossible for inmates to maintain contact with their loved ones and their broader support networks, to society's detriment.[2] Today, we answer those pleas by taking critical, and long overdue, steps to provide relief to the millions of Americans who have borne the financial burden of unjust and unreasonable interstate inmate phone rates.

2. This Order will promote the general welfare of our nation by making it easier for inmates to stay connected to their families and friends while taking full account of the security needs of correctional facilities. Studies have shown that family contact during incarceration is associated with lower recidivism rates.[3] Lower recidivism means fewer crimes, decreases the need for additional correctional facilities, and reduces the overall costs to society.[4] More directly, this helps families and the estimated 2.7 million children of incarcerated parents in our nation, an especially vulnerable part of our society.[5] One commenter states that the "[l]ack of regular contact with incarcerated parents has been linked to truancy, homelessness, depression, aggression, and poor classroom performance in children."[6] In this Order we help these most

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[1] *See generally* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 at 3 (filed Nov. 3, 2003) (First Wright Petition) ("Accordingly, Petitioners request that the Commission prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons and require such facilities to permit multiple long distance carriers to interconnect with prison telephone systems. . . ."). The Petitioners filed an alternative petition for rulemaking in 2007. *See* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007) (Alternative Wright Petition).

[2] *See, e.g.*, Petitioners 2013 Comments at 37-38; Letter from Drew Kukorowski, Research Associate, Prison Policy Initiative and Taren Stinebrickner-Kauffman, Founder and Executive Director, SumOfUs, to Julius Genachowski, Chairman, FCC, CC Docket No. 96-128 (filed Nov. 15, 2012) (including 36,690 public comments "supporting imposition of price caps on correctional facility telephone rates").

[3] The Center on the Admin. of Criminal Law 2013 Comments at 10 (citing Nancy G. La Vigne, *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. OF CONTEMP. CRIM. JUSTICE 314, 316 (2005)); *accord* Letter from Roy "Lynn" McCallum, Jail Commander, Elmore County Sheriff's Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed April 22, 2013) ("We recognize the value of retaining family contact during incarceration. The reduction in recidivism is well documented."); *see also* AMY L. SOLOMON, JENNY OSBORNE, LAURA WINTERFIELD ET AL., *Putting Public Safety First: 13 Parole Supervision Strategies to Enhance Reentry Outcomes* at 29-31 (Washington, D.C.: The Urban Institute 2008), *available at* http://www.urban.org/UploadedPDF/411791_public_safety_first.pdf (last visited July 30, 2013).

[4] *See infra* para. 43.

[5] BRUCE WESTERN AND BECKY PETTIT, THE ECONOMIC MOBILITY PROJECT, Collateral Costs: Incarceration's Effect on Economic Mobility at 18-19 (THE PEW CHARITABLE TRUSTS 2010), www.pewstates.org/uploadedfiles/PCS_Assets/2010/Collateral_costs(1).pdf.

[6] The Phone Justice Commenters 2013 Reply at 4-5. Another commenter states that "[m]aintaining relationships with their incarcerated parents can reduce children's risks of homelessness and of involvement in the child welfare (continued….)

vulnerable children by facilitating contact with their parents. By reducing interstate inmate phone rates, we will help to eliminate an unreasonable burden on some of the most economically disadvantaged people in our nation. We also recognize that inmate calling services (ICS) systems include important security features, such as call recording and monitoring, that advance the safety and security of the general public, inmates, their loved ones, and correctional facility employees. Our Order ensures that security features that are part of modern ICS continue to be provided and improved.

3. Our actions address the most egregious interstate long distances rates and practices. While we generally prefer to promote competition to ensure that inmate phone rates are reasonable, it is clear that this market, as currently structured, is failing to protect the inmates and families who pay these charges.[7] Evidence in our record demonstrates that inmate phone rates today vary widely, and in far too many cases greatly exceed the reasonable costs of providing the service.[8] While an inmate in New Mexico may be able to place a 15 minute interstate collect call at an effective rate as low as $0.043 per minute with no call set up charges, the same call in Georgia can be as high as $0.89 per minute, with an additional per-call charge as high as $3.95 – as much as a 23-fold difference.[9] Also, deaf prisoners and family members in some instances pay much higher rates than hearing prisoners for equivalent communications with their families.[10] For example, the family of a deaf inmate in Maryland paid $20.40 for a *nine minute* call placed via Telecommunications Relay Service (TRS) – an average rate of $2.26 per minute.[11] A significant factor driving these excessive rates is the widespread use of site commission payments – fees paid by ICS providers to correctional facilities or departments of corrections in order to win the exclusive right to provide inmate phone service.[12] These site commission payments, which are often taken directly from provider revenues, have caused

(Continued from previous page)

system." Letter from Margaret diZerega, Director, Family Justice Program, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Mar. 14, 2013) (Vera Mar. 14, 2013 *Ex Parte* Letter); *see also* Center on the Admin. of Criminal Law 2013 Comments at 11 ("A child that stays in touch with an incarcerated mother or father is less likely to drop out of school or be suspended.").

[7] *See infra* Section III.B.4.

[8] *See infra* Section III.B.3.

[9] *See* Letter from Alex Friedmann, Assoc. Director, HRDC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Rev. Exh. B (filed June 8, 2013) (HRDC June 8, 2013 *Ex Parte* Letter); *see also* Securus 2013 Comments, App. 2 (showing the wide range of rates in the various states).

[10] Transcript of Reforming ICS Rates Workshop at 36-38, WC Docket 12-375 (filed July 16, 2013) (Transcript of Reforming ICS Rates Workshop) (Talila Lewis, Founder and President, HEARD, discussing ways in which deaf inmates are frequently charged higher ICS rates than hearing inmates). For purposes of this Order, the terms "the deaf" or "the deaf and hard of hearing" include people with speech as well as hearing disabilities. Our actions here will help both inmates with these disabilities as well as inmates who need to call people with such disabilities.

[11] *See* HEARD 2013 Comments at 5 n.13. HEARD also asserts that some inmates are charged an additional fee of up to $8.00 to connect to TRS. *Id.*

[12] *See infra* para. 38.

inmates and their friends and families to subsidize everything from inmate welfare to salaries and benefits, states' general revenue funds, and personnel training.[13]

4. We applaud states such as New Mexico and New York that have already accomplished reforms, and thereby shown that rates can be reduced to reasonable, affordable levels without jeopardizing the security needs of correctional facilities and law enforcement or the quality of service. Similarly, we acknowledge that some federal agencies, such as the Department of Homeland Security's Immigration Customs and Enforcement (ICE), have taken similar measures to provide lower rates, resulting in nationwide calling rates of $0.12 a minute without additional fees or commissions at ICE facilities.[14] Following such reforms, there is significant evidence that call volumes increased,[15] which shows the direct correlation of how these reforms promote the ability of inmates to stay connected with friends and family. There is also support in the record that ICS rate reform has not compromised the security requirements of correctional facilities.[16] Thus, these examples disprove critics who fear that reduced rates will undermine security or cannot be implemented given provider costs. Our actions build upon these examples by reducing rates, while balancing the unique security needs of facilities and ensuring that inmate phone providers receive fair compensation and a reasonable return on investment.

5. While some states have taken action to reduce ICS rates, the majority have not. We therefore take several actions to address interstate rates. We require inmate phone providers to charge cost-based rates to inmates and their families, and establish "safe-harbor" rates at or below which rates will be treated as lawful (*i.e.*, just, reasonable, and fair) unless and until the

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[13] For example, Petitioners point out that in Orange County, California, the Inmate Welfare Fund had a budget of $5,016,429 in 2010, and of that amount, 74% of the funds were used for staff salaries, 0.8% was used for the actual services, supplies, and training for inmate educational programs, and 0.06% was used for services, supplies, and training for inmate re-entry programs. *See* Petitioners 2013 Reply at 26-27; *see also* Petitioners 2013 Reply, Exh. H (providing a list of states and counties that, pursuant to statute, extract revenues shared with ICS providers for non-inmate educational needs, including employee salaries and equipment, building renewal funds, salaries and benefits, states' general revenue funds, and personnel training); PLS 2013 Comments at 7 (noting that commissions paid to county facilities in Massachusetts are placed in a fund available for use by the Sheriff, while commissions paid to the Department of Correction are transferred to the General Fund of the Commonwealth).

[14] *See* Letter from Glenn B. Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 26, 2013) (Telmate July 26, 2013 *Ex Parte* Letter).

[15] *See id*. at Attach. (bar graphs showing call volume increases in Oregon DOC); *see also* Transcript of Reforming ICS Rates Workshop at 253 (Richard Torgersrud, CEO, Telmate, stating that "[W]e have done this in Oregon Department of Corrections, Montana Department of Corrections and we've done it for Homeland Security where we have implemented 16 cents per minute or less for calls. In doing so, we've seen up to 300 percent increase in call volume."); *see also id*. at 287 (Lee Petro, Counsel to Petitioners, noting that "Telmate references a Great Plains state where they reduced the rate down to, I guess their 16 cent rate, and their call volume went up by 233 percent. In New York they reduced their fees and the call volume went up 36 percent.").

[16] *See* Transcript of Reforming ICS Rates Workshop at 186-87 (Jason Marks, former Commissioner, New Mexico Public Regulation Commission, stating that "there are no security problems in New Mexico"); s*ee also* Letter from Anthony Annucci, Acting Commissioner, State of New York Department of Corrections and Community Supervision, to Gregory Haledjian, Attorney-Advisor, FCC, WC Docket No. 12-375 at 1 (filed July 16, 2013) (NY DOCCS July 16, 2013 *Ex Parte* Letter) (discussing the New York statute that "requires the department to . . . ensure that any inmate phone call system . . . provides reasonable security measures to preserve the safety and security of each correctional facility").

Commission issues a finding to the contrary.[17] Specifically, we adopt interim safe harbor rates of $0.12 per minute for debit and prepaid interstate calls and $0.14 per minute for collect interstate calls.[18] Based on the evidence in this record, we also set an interim hard cap on ICS providers' rates of $0.21 per minute for interstate debit and prepaid calls, and $0.25 per minute for collect interstate calls. This upper ceiling ensures that the highest rates are reduced immediately to the upper limit of what can reasonably be expected to be cost-based rates.[19] Interstate ICS rates at or below the safe harbor are presumed just, reasonable, fair and cost-based. Rates between the interim safe harbor and the interim rate cap will not benefit from this presumption.

6. We base the safe harbor rate levels and rate caps on data and cost studies presented by parties and/or taken directly from ICS provider service contracts in the record. The safe harbor rate levels are derived from ICS rates in seven states that have prohibited site commission payments from ICS providers to facilities.[20] The interim rate caps adopted are based on (1) the highest total-company costs presented in a cost study provided by Pay Tel, an ICS provider that exclusively serves jails, and (2) the highest collect calling cost data presented in the 2008 ICS Provider Data Submission, compiling data from seven different ICS providers that serve various types and sizes of correctional facilities. We based the interim rate caps on these high levels, without attempting to exclude any unrecoverable costs or adjust any inputs, in order to ensure that the cap levels were a conservative estimate of the levels under which all ICS providers could provide service. Even so, we provide a waiver process to account for any unique circumstances.

7. In addition to immediate rate reform, we find that site commission payments and other provider expenditures that are not reasonably related to the provision of ICS are not recoverable through ICS rates, and therefore may not be passed on to inmates and their friends and families.[21] We require that charges for services ancillary to the provision of ICS must be cost-based. We prohibit special charges levied on calls made using teletypewriter (TTY) equipment or other technologies used to access TRS.[22] While we find that the record fully supports the safe harbor and rate caps adopted here, we seek additional information that could allow us to refine these rates in the future. Accordingly, we require all ICS providers to submit

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[17] *See infra* Section III.C.3.

[18] We find that the record provides ample justification for assuming a 15-minute call as the basis for our calculations. *See infra* note 232. Additionally, we address rates by adopting interim safe harbor rate levels and interim rate caps that work together. We adopt interim safe harbor interstate rate levels for prepaid and debit calls and separately for collect calls, and we will presume that interstate ICS rates at or below the safe harbors are cost-based and therefore just, reasonable, and fair.

[19] We emphasize that ICS providers should not read this Order as providing a basis to increase rates up to either the interim safe harbor or interim rate caps. The goals of the reforms adopted herein are to reduce rates and ensure that rates are cost-based. This Order does not provide an independent basis for raising rates. Consistent with our requirement that rates be cost-based, providers may raise rates when necessary to ensure recovery of costs directly and reasonably related to the provision of ICS on a holding-company level.

[20] *See infra* para. 62.

[21] *See infra* Section III.C.2.b.

[22] *See infra* Section III.D.

data on their underlying costs so that the Commission can develop a permanent rate structure, which could include more targeted tiered rates in the future.[23]

8. The Communications Act (Act) requires that interstate rates be just and reasonable for *all* Americans—there is no exception in the statute for those who are incarcerated or their families.[24] The Act further requires that our payphone regulations "benefit . . . the *general* public," not just some segment of it.[25] Our actions in this Order, while long overdue, fulfill these statutory mandates while taking into account the legitimate and unique requirements for security and public safety in the provision of inmate phone services and the benefits to society of increased communications between inmates and their families. Our work, however, is not done, and we continue in the Further Notice (or FNPRM) our efforts to ensure that these rates are just, reasonable, and fair to the benefit of both providers and the general public.

II. PROCEDURAL BACKGROUND

9. In 2003, Mrs. Wright and her fellow petitioners (Petitioners), which included current and former inmates at Corrections Corporations of America-run confinement facilities, filed a petition with the Commission seeking to initiate a rulemaking to address high ICS rates.[26] The petition sought to prohibit exclusive ICS contracts and collect-call-only restrictions.[27] In 2007, the same petitioners filed a second rulemaking petition, seeking to address ICS rates by requiring a debit-calling option in correctional facilities, prohibiting per-call charges, and establishing rate caps for interstate, interexchange ICS.[28] The Commission sought and received comment on both petitions.[29] In 2008, certain ICS providers placed in the record a cost study that quantified their interstate ICS costs.[30]

10. In December 2012, the Commission adopted a notice of proposed rulemaking seeking comment on, among other things, the proposals in the Wright petitions.[31] The *2012 ICS*

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[23] *See infra* Section III.I.

[24] *See* 47 U.S.C. §§ 151, 201(b).

[25] *See* 47 U.S.C. § 276(b)(1) (emphasis added).

[26] *See generally* First Wright Petition.

[27] *Id.*

[28] *See generally* Alternative Wright Petition.

[29] *See Petition For Rulemaking Filed Regarding Issues Related to Inmate Calling Services Pleading Cycle Established*, CC Docket No. 96-128, Public Notice, DA 03-4027, 2003 WL 23095474 (Wireline Comp. Bur. 2003); *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, CC Docket No. 96-128, Public Notice, 22 FCC Rcd 4229 (Wireline Comp. Bur. 2007) (*2007 Public Notice*).

[30] *See generally* Don J. Wood, Inmate Calling Services Interstate Call Cost Study (WOOD & WOOD 2008) CC Docket No. 96-128 (filed Aug. 15, 2008); Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Aug. 22, 2008) (Joyce Aug. 22, 2008 *Ex Parte* Letter) (attaching supplemental cost and usage data); Record submission by "several providers of inmate telephone service," CC Docket No. 96-128 (filed Oct. 15, 2008) (amending supplemental cost and usage data) (collectively ICS Provider Data Submission).

[31] *See generally Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012) (*2012 ICS NPRM*). The *2012 ICS NPRM* incorporated relevant comments, (continued….)

NPRM sought comment on the two petitions and proposed ways to "balance the goal of ensuring reasonable ICS rates for end users with the security concerns and expense inherent to ICS within the statutory guidelines of sections 201(b) and 276 of the Act."[32] The *2012 ICS NPRM* sought comment on other issues affecting the ICS market, including possible rate caps for interstate ICS; the ICS Provider Data Submission; collect, debit, and prepaid ICS calling options; site commissions; issues regarding disabilities access; and the Commission's statutory authority to regulate ICS.[33]

11. The FCC's Consumer Advisory Committee (CAC) adopted a recommendation in 2012 finding that ICS rates may be "unreasonably high and unaffordable" and that such high ICS rates challenge the "national goal of the reduction of recidivism among inmates."[34] The CAC recommended that the Commission: ensure that the rates for ICS calls are reasonable; restrict "commissions" paid to correctional institutions; encourage the use of "prepaid debit accounts" or use of other "low-cost minutes;" and continue to allow collect calls "with charges that are a reasonable amount above the actual cost of providing the call."[35] On August 2, 2013, the CAC reiterated its request for the Commission to take action on "this long overdue issue" of high ICS rates.[36]

III. ENSURING THAT RATES FOR INTERSTATE INMATE CALLING SERVICES ARE JUST, REASONABLE, AND FAIR

12. In this Order, we take several actions to ensure that interstate ICS rates are just, reasonable, and fair as required by the Communications Act. First, we examine the statute and the current state of the ICS market and conclude that the current market structure is not operating to ensure that rates are consistent with the statutory requirements of sections 201(b) and 276 to be just, reasonable, and fair. Thus, we require that interstate ICS rates be cost-based. We address what appropriate costs are and conclude, among other things, that site commission payments, in and of themselves, are not a cost of providing the communications service—ICS. We then address several interrelated rate issues, including rate levels and options for provider

(Continued from previous page)

reply comments and *ex parte* filings from the prior ICS docket, CC Docket No. 96-128, into WC Docket No. 12-375. *See 2012 ICS NPRM*, 27 FCC Rcd at 16636, para. 15.

[32] *2012 ICS NPRM*, 27 FCC Rcd at 16636, para. 16.

[33] *See generally 2012 ICS NPRM*. While some commenters use the terms "debit" and "prepaid" interchangeably, in the *2012 ICS NPRM*, the Commission differentiated between the two, noting that for debit calling, "money is deducted from an account but the minutes are not purchased in advance," *id*. at 16641, para. 33, whereas prepaid calls are always funded in advance. *Id*. We continue that distinction in this Order.

[34] *See FCC Consumer Advisory Committee*, Recommendation Regarding Affordable Phone Access for Incarcerated Individuals and Families, CC Docket No. 96-123 at 1 (filed Oct. 18, 2012).

[35] *Id*.

[36] *See FCC Consumer Advisory Committee*, Further Recommendation Regarding Inmate Calling Rates, WC Docket No. 12-375 (filed Aug. 5, 2013). The CAC reiterated its former recommendations about ICS-related issues, and additionally proposed that the Commission require ICS providers to: "proportionally discount rates for TTY and relay calls;" allow more time for such calls; and "report all ICS-related complaints" to the Commission, including disability access complaints.

compliance with our rules including "safe harbor" rate levels. We require that ancillary service charges also be cost-based. We address rates for the use of TTY equipment.[37] We conclude that our actions herein do not require us to abrogate existing contracts between correctional facilities and ICS providers; to the extent that any agreement may need to be revisited, it is only because those agreements cannot supersede our authority over rates charged to end users. Finally, we address collect-calling only requirements at correctional facilities, require an annual certification filing, and initiate a mandatory data collection, directing all ICS providers to file data regarding their ICS costs. These actions take into account the needs of ICS providers for adequate cost recovery and the need for just, reasonable, and fair rates for ICS consumers while meeting the unique security needs inherent in the provision of ICS.

A. Statutory Requirements for ICS

1. Statutory Standards for ICS Rates and Practices

13. The Communications Act requires ICS rates, charges, and practices to be just, reasonable, and fair.[38] Section 201(b) provides that "charges, practices, classifications, and regulations for and in connection with [interstate common carrier] service, shall be just and reasonable," and grants the Commission authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[39] The

[37] We distinguish our decision to regulate interstate ICS rates here from the Commission's previous decision to rely on negotiated compensation for ICS. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd 21233, 21269, para. 72 (1996) (*Payphone Order on Reconsideration*) ("[W]henever a PSP is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied."). In that proceeding, the question presented was whether ICS providers were entitled to compensation additional to that which they had already negotiated with correctional facilities. The Commission denied the request for additional compensation. Here, the question before us is whether negotiated rates result in unfairly high compensation for ICS providers and unjust and unreasonable rates for end users. We conclude that they do and that we are obligated to ensure that rates comply with our statutory mandates.

[38] *See* 47 U.S.C. § 201(b); *see also* Petitioners 2013 Comments at 5 (asserting that "there is no legitimate question that the Act provides the FCC with sufficient authority to regulate all ICS rates and practices"); GTL 2013 Comments at 33 (stating that, "taken together, Sections 201 and 276 appear to provide broad authority for the FCC to address interstate interexchange ICS rates"); Raher 2013 Comments at 2 (contending that "there is no impediment to the Commission's jurisdiction in these matters"); Securus 2013 Comments at 10 (asserting that "the Commission's purview . . . remains interstate telephone rates"); CBC 2013 Reply at 2 ("A plain reading of §§ 276 and 201 of the Act indicates that the FCC has broad authority to regulate both interstate and intrastate inmate calling services to ensure that the rates of inmate calling services are reasonable.") (emphasis in original omitted); Hamden Ancillary Charges PN Reply at 12 (stating that "the widely diverging regulations, items of call billing that are not tariffed, and broad discrepancies in calling rates that can only be characterized as arbitrary, all demonstrate that regulation at the state level has been ineffectual" and that "in the absence of federal regulation, meaningful reform of the nationwide ICS industry simply cannot be achieved").

[39] *See* Petitioners 2013 Comments at 8 ("An ICS telephone call fits squarely within the definition of interstate or foreign communication by wire or radio."); NASUCA 2013 Comments at 7 (stating that "this broadly conferred authority plainly reaches interstate ICS calling"); The Phone Justice Commenters 2013 Reply at 5 ("Section 201(b) of the Communications Act grants the Commission broad authority to regulate interstate ICS rates."); Alternative Wright Petition at 11-12.

Commission has previously found that interstate ICS, typically a common carrier service, falls within the mandates of section 201.[40]

14. In addition, section 276[41] directs the Commission to "establish a per call compensation plan to ensure that all payphone service providers"—which the statute defines to include providers of ICS[42]—"are fairly compensated for each and every completed intrastate and interstate call."[43] The Commission has previously found the term "fairly compensated" permits a range of compensation rates that could be considered fair,[44] but that the interests of both the payphone service providers and the parties paying the compensation must be taken into account.[45] Section 276 makes no mention of the technology used to provide payphone service

[40] *See Billed Party Preference For Interlata 0+ Calls*, CC Docket No. 92-77, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122, 6156, para. 59 (1998) (finding that inmate phone rates "must conform to the just and reasonable requirements of Section 201") (*Second Report and Order and Order on Reconsideration*). We disagree with GTL's assertion that, because it is a provider of "competitive, non-dominant services," it is "not subject to rate regulation or cost justification requirements." *See* GTL Ancillary Charges PN Comments at 2. GTL asserts that it must detariff its rates, make them available in a public location and on its website, and "make certain oral disclosures prior to the completion" of an ICS call, but beyond such requirements, it is "subject to less stringent regulatory burdens" than dominant providers. *Id*. at 3-4. GTL compares itself to "carriers that are not rate-regulated by [the] Commission, namely interexchange carriers, CMRS providers, and competitive local exchange carriers" who "are exercising 'the freedom' granted by the Commission to non-dominant carries to make their own pricing decisions." *Id*. at 5. We reaffirm our finding in the *Second Report and Order and Order on Reconsideration* that ICS rates must be just and reasonable under section 201(b) of the Act. ICS providers are not exempt from "rate regulation or cost justification requirements" simply because they claim non-dominant status. *See Second Report and Order and Order on Reconsideration*, 13 FCC Rcd at 6165, para. 59.

[41] Section 276(b)(1) states that "within 9 months after February 8, 1996, the Commission shall take all actions necessary . . . to prescribe regulations" implementing subsections (b)(1)(A)—(E). 47 U.S.C. § 276(b)(1). Consistent with our prior interpretation of analogous statutory language, we believe this provision is best interpreted as permitting the Commission subsequently to change or adopt new regulations implementing section 276. As the Commission explained with respect to the similar six-month deadline imposed in section 251(d)(1), "the actions that were 'necessary' to implement section 251 at the time of the 1996 Act do not constitute the entire universe of regulations that may be necessary or appropriate to implement those provisions in the future." *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17918, para. 767 n.1381 (2011) (*USF/ICC Transformation Order*), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

[42] 47 U.S.C. § 276(d) ("As used in this section, the term 'payphone service' means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.").

[43] *Id.* § 276(b)(1)(A); *see also* Petitioners 2013 Comments, Exh. A at 8-9 (citing *Wright v. Corrections Corp. of America*, C.A. No. 00-293 (GK), Memorandum Opinion, slip op. at 8-9 (D.D.C. Aug. 22, 2001)).

[44] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3254-58, paras. 14-24 (2002) (*Inmate Calling Services Order on Remand and NPRM*).

[45] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 at 2570, para. 55 (1999) (*Payphone Third Report and Order*); *see also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21302-03, para. 82 (continued….)

and makes no reference to "common carrier" or "telecommunications service" definitions. Thus, the use of VoIP or any other technology for any or all of an ICS provider's service does not affect our authority under section 276.[46] Indeed, several commenters state that the Commission can regulate ICS regardless of the underlying technology used to provide the service.[47] Finally, section 276 provides that "[t]o 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."[48]

15. Our exercise of authority under sections 201 and 276 is further informed by the principles of Title I of the Act. Among other things, that provision states that it is the Commission's purpose "to make available, so far as possible, to *all* the people of the United States" communications services "at reasonable charges."[49] The regulation of interstate ICS adopted in this Order advances those objectives.

2. Types of Facilities

16. The rules we adopt herein apply to interstate ICS provided in "correctional institutions" as that term is used in section 276.[50] Accordingly, the scope of facilities covered by this Order is coextensive with the scope of the term "correctional institutions" in the statute and includes, for example, prisons, jails and immigration detention facilities.[51]

17. *Prisons and Jails*. Prisons and jails are both core examples of facilities that constitute "correctional institutions" under section 276 and this Order.[52] The Commission has

(Continued from previous page)

(2002) (*Fifth Order on Reconsideration and Remand*) (holding that "fair" compensation under section 276 "implies fairness to both sides").

[46] *See* 47 U.S.C. § 276.

[47] *See* Transcript of Reforming ICS Rates Workshop at 186, 221-22 (Statement of Jason Marks, former Commissioner, New Mexico Public Regulation Commission); NASUCA 2013 Reply at 2-3 (noting that "none of the commenters seriously challenge the Commission's jurisdiction to regulate rates for ICS services."); Petitioners 2013 Comments at 12-16.

[48] 47 U.S.C. § 276(c).

[49] *Id.* § 151 (emphasis added).

[50] *Id.* § 276(d) (defining "payphone service" to include "the provision of inmate telephone service in correctional institutions"). Throughout this Order and Further Notice we use "correctional facility" and "correctional institution" interchangeably. We also note that the requirements adopted in this Order apply to federal, state, and local correctional facilities.

[51] Beyond the guidance provided in this section, to the extent there are questions about whether a particular facility is a "correctional institution" under this Order, such questions will be resolved on a case-by-case basis.

[52] For these purposes, the term "jail" includes adult detention facilities (excluding secure mental health facilities) where individuals are held pending charges or pending trial. Moreover, we note that whether a particular facility is a correctional institution is a question of fact that focuses on the function of the facility. In this regard, we note that the name of a particular facility may not be dispositive. For instance, if a facility functions as a prison or jail, then it will be covered by our rules even if the facility does not include the term "prison" or "jail" in its name. *See e.g.*, http://www.fairfaxcounty.gov/sheriff/adc.htm (FAQs acknowledging that the Fairfax County Adult Detention Center is a "jail").

long made clear that its ICS rules apply at a minimum to inmate telephone service in prisons and jails. For instance, the 2002 *Inmate Calling Services Order on Remand and NPRM* repeatedly referred to "prisons" and "jails,"[53] often in contexts that explicitly make clear that both entities fall within the definition of "correctional institution."[54] Similarly, in the *2012 ICS NPRM*, the Commission repeatedly used the more generic term "prison,"[55] noting, however, that jails are a particular subset of prisons (*i.e.*, that jails are "local prisons" to be distinguished from "state prisons").[56] Finally, a number of commenters in this proceeding – including ICS providers – submitted data for both prisons and jails,[57] and/or otherwise stated or assumed within their written advocacy[58] that both entities would be subject to any new rules.[59] We do not distinguish in this Order between prisons and jails, in part because our record does not permit us to draw any clear distinctions. Because both are included within the scope of this Order, however, there is no need at this time to draw any distinction.[60]

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[53] *See Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd 3248, paras. 6, 9, 10, 11, 19, 39, 40, 42, 72, 75, 77.

[54] *See, e.g., id.* at 3276, para. 72 ("Correctional facilities must balance the laudable goal of making calling services available to inmates at reasonable rates, so that they may contact their families and attorneys, with necessary security measures and costs related to those measures. For this reason, most prisons and jails contract with a single carrier to provide payphone service and perform associated security functions.").

[55] *See 2012 ICS NPRM*, 27 FCC Rcd 16629, paras. 1, 4, 7, 12, 14, 26, 27, 31, 41, 43.

[56] *Id.* at para. 44 n.148; *see also id.* at para. 2 n.12. Similarly, the First Wright Petition and the Alternative Wright Petition repeatedly referred to "prisons," noting that most "low-capacity prisons" are "locally-administered jails." First Wright Petition at n.51.

[57] *See* ICS Provider Data Submission (data from seven ICS providers covering both prisons and jails); Securus 2013 Comments, Expert Report of Stephen E. Siwek (data covering both prisons and jails).

[58] *See generally* First Wright Petition (seeking relief from anticompetitive practices in prisons); Alternative Wright Petition (seeking the establishment of benchmark rates for prisons); Pay Tel Cost Study (cost study from a provider that serves primarily jails); Letter from Lee G. Petro, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 96-128 at 1 (filed Oct. 24, 2012) ("It was noted that not only would action on the Wright Petition affect inmate prison phone rates, but also those phone rates charged at immigration detention centers."); Letter from Holly S. Cooper, Assoc. Director, UC Davis Immigration Law Clinic, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 1 (filed Nov. 8, 2012) ("Immigrants in detention have a critical need for telephone access, and high phone rates leave them particularly vulnerable.").

[59] "[T]he Commission must consider all aspects of ICS—interstate and intrastate, at all kinds and sizes of correctional facilities—as it engages in reform." Pay Tel 2013 Comments at 2. ICS providers that have participated in this docket serve both prisons and jails. *See e.g.*, GTL 2013 Comments at 3-4 (GTL serves over 1,900 facilities); NCIC 2013 Comments at 2 (NCIC serves nearly 300 jails nationwide); Telmate July 26, 2013 *Ex Parte* Letter at 1-2 (Telmate serves state departments of corrections, ICE, and county and municipal jails.).

[60] Contrary to Commissioner Pai's dissenting statement that "the record evidence simply does not support the Commission's one-size-fits-all approach," Dissenting Statement of Commissioner Ajit Pai at 116 (Dissent), the interim rates we adopt are based on the data most likely to approximate the actual costs of providing inmate calling services. *See infra* para. 69. Moreover, as explained below, higher cost providers have the flexibility to charge cost-based rates up to the interim rate cap, and we have a waiver process for any unique circumstances. *See id.* We seek comment in the Further Notice on whether we should draw such a distinction for purposes of regulating ICS. *See infra* para. 159.

18. *Immigration Detention Facilities.* Immigration detention facilities also are a type of "correctional institutions." The term is widely understood to include "facility[ies] of confinement."[61] This common understanding of the term has long been reflected in advocacy regarding the lawfulness of ICS rates under section 276. As early as 2004, for example, commenters made arguments predicated on the assumption that immigration detention facilities are a type of "correctional institution" under section 276.[62] Petitioners in this proceeding likewise made arguments based on the same assumption, as did a number of commenters in response to the *2012 ICS NPRM*[63] as well as participants in the Reforming ICS Rates Workshop.[64] This common understanding of that statutory term was not disputed or called into question by any evidence in the record. As such, "correctional institution" as used within section 276 includes immigration detention facilities.

19. Additional support for this finding derives from the largely fungible nature of jails and facilities where immigrants are detained when viewed from the standpoint of detained immigrants. As commenters have pointed out, of the nearly 400,000 immigrants detained in this country each year, many are "held in local jails and prisons that have contracted with Immigration Customs and Enforcement."[65] This fact suggests a rough functional equivalence between jails and prisons on the one hand, and immigration detention facilities on the other – particularly from the perspective of the would-be users of ICS (*i.e.*, apprehended immigrants

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[61] *See, e.g.*, Black's Law Dictionary 396, 1314 (9th ed. 2009) (definitions of "correctional institutions" and "prison").

[62] MCI 2004 Comments at 18 ("Correctional facilities, ranging from county jails, state prisons, federal prisons, to Immigration and Naturalization Service detention facilities, uniformly rely on a single ICS provider because doing so gives them the greatest ability to maintain prison security and protect the public."); Coalition 2004 Comments at 6 ("There is a vast array of types of private correctional facilities. The Federal Bureau of Prisons, the Federal Bureau of Immigration and Customs Enforcement ('BICE'), and many state and county governments send people to private facilities.").

[63] NJAID/NYU IRC 2013 Comments at 5 (urging the Commission to "[p]revent future exploitation by prison telephone companies of vulnerable immigrant detainees, other persons held in correctional facilities, and their families"); AILA 2013 Comments at 1 (arguing that "[t]he exorbitant telephone rates paid by individuals in immigration detention are a well-documented concern," and urging the FCC to regulate ICS rates for calls "made from correctional facilities to ensure just and reasonable rates for inmates, including individuals in immigration detention"); CIVIC 2013 Comments at 1, 4 (noting that "there are more than 400,000 men and women held in U.S. civil immigration detention each year," and urging the Commission "to take action and cap the cost of interstate calls from prisons and detention centers" in order to help these detainees); Immigration Equality 2013 Comments at 1 (urging the Commission to "regulate the high cost of calls at immigration detention facilities"). *See also 2012 ICS NPRM*, 27 FCC Rcd at 16629, para. 1 n.6 (observing that "[r]ecently, there has been substantial renewed interest and comment in this docket highlighting . . . significant public interest concerns," and citing, *inter alia*, Letter from Katherine Grincewich, Assoc. General Counsel, United States Conference of Catholic Bishops, to Chairman Julius Genachowski, FCC, CC Docket No. 96-128 (filed Oct. 12, 2012) ("urging the Commission to cap ICS rates and highlighting the problem of high ICS rates in immigrant detention centers")).

[64] *See* Transcript of Reforming ICS Rates Workshop at 217-18 (amalia deloney, Assoc. Dir., Center for Media Justice, describing the monetary effects of immigrant detainees telephone calls); *id*. at 22-23 (Alex Friedman, Assoc. Dir., HRDC, discussing site Commission payments from jails, prisons, immigration detention facilities).

[65] Comments of NJAID/NYU IRC 2013 Comments at 1; *see also* http://www.ice.gov/news/library/factsheets/reform-2009reform.htm (stating that "most" of the roughly 350 facilities that detain immigrants are currently jails "designed for penal, not civil, detention" and are not operated by ICE).

who may be detained either in a jail or some other facility, depending on happenstance). Moreover, treating the two categories of institutions differently would result in disparate treatment among immigrant detainees. For instance, if immigration detention facilities were excluded from the scope of "correctional institution," immigrant detainees in jails would receive a "fair" rate for phone calls while immigrant detainees in ICE facilities would not. This kind of disparate treatment would not be just or consistent with the public interest, and for this reason as well we find it reasonable that "correctional institutions" includes immigration detention facilities.

B. Need for Reform

20. In this section, we first describe the different categories of rates and charges for ICS and the different options that end users have to pay for them. We then explore the record on the costs of providing ICS, and the record on rates, and find that in most facilities the rates for interstate ICS far exceed the cost of providing ICS. To assess why this occurs, we look at competition in the market for ICS, which, in this case, does not adequately exert downward pressure on end-user rates. We examine the societal impacts of high ICS rates, and we conclude that we must take action to meet our statutory mandate that all rates be just, reasonable, and fair.[66]

1. Current Structures for ICS Rates and Payment Options

21. ICS providers generally offer their services pursuant to contracts with correctional facilities.[67] These contracts vary by the correctional facilities and ICS providers involved, and the states and local jurisdictions in which the services are provided.[68] ICS rates can differ for local, intrastate long distance, and interstate long distance calls[69] and can include per-minute or per-call charges or both.[70] This varies, however, and some ICS contracts provide only for a per-minute charge[71] while others provide only for a flat rate per call.[72] It is important to note that the

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[66] *See* 47 U.S.C. §§ 201, 276.

[67] *See, e.g.*, GTL 2013 Comments at 4; Securus 2013 Comments at 2; CenturyLink 2013 Comments at 7-8.

[68] *See, e.g.*, Securus 2013 Comments at 2; GTL 2013 Comments at 14.

[69] *See, e.g.*, HRDC 2013 Comments, Exh. A (comparing local collect intrastate to local collect interstate rates, per state); *see also* Letter from Peter Wagner, Exec. Dir., Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 10-11 and Tbls. 8-9 (filed May 9, 2013) (Please Deposit All of Your Money Study) (noting different fees and "taxes" that Telmate charges for prepaid accounts, with resulting variety of fees, rates, and percentages, per state).

[70] *See, e.g.*, State of Maine Dept. of Corrections, Agreement to Purchase Services, *available at* http://prisonphonejustice.org/includes/_public/contracts/Maine/ME_contract_with_PCSGTL_20072012.pdf (ICS contract between GTL and Maine Department of Corrections dated July 24, 2007) (noting that in Maine, GTL charges a $3.00 set up fee for collect and prepaid calls and a $0.69 per-minute charge); *see also* HRDC June 8, 2013 *Ex Parte* Letter Rev. Exh. B; Letter from Jamie Susskind, Acting Legal Advisor to the Bureau Chief, Wireline Competition Bureau, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed June 6, 2013) (Susskind June 6, 2013 *Ex Parte* Letter) (noting that readily-available ICS contracts may be relevant to this proceeding and may be considered as part of the record).

[71] *See, e.g.*, Contract for Inmate Payphone and Associated Inmate Monitoring and Recording Equipment and Services (ITS), Contract Number 3999, Between Oregon Department of Corrections and Pinnacle Public Services (continued….)

users of ICS – the inmates and the family and friends whom they call – are not party to these contracts. Rather, the correctional institution agrees to an amount that *it* is willing to allow the ICS provider to charge.

22. The inmates who use ICS (or the persons called by those inmates) typically pay for calls by using collect, debit, or prepaid payment options. These methods differ as to who pays for the call and when payment is received.[73] Collect calls occur when an inmate places a call with the assistance of a live operator or an automated recording, and the called party is billed after the call is completed.[74] Correctional facilities use collect calling due to the relative ease of administering such calls, as well as the high degree of security and control involved.[75] ICS providers assert, however, that collect calling can pose billing and collection problems.[76]

23. Debit calling involves an arrangement whereby the charges are deducted from an inmate's pre-existing account that often can be used to pay for a variety of goods and services within a correctional facility.[77] An inmate's account can be funded by the inmate (with earned funds, for example) or by outside parties.[78] Inmates typically place debit calls by dialing into a central number and using a personal identification number (PIN) or by entering the numbers

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LLC at Attach. 2, *available at* http://www.prisonphonejustice.org/includes/_public/contracts//Oregon/OR_contract_with_PPSTelmate_20122015.pdf (ICS contract between Telmate and Oregon Department of Corrections dated June 28, 2012) (establishing per-minute rates only for domestic ICS calls under the contract); *see also* Susskind June 6, 2013 *Ex Parte* Letter.

[72] *See, e.g.*, Attachment "A," Rate Fees and Costs, IT Professional Services Contract, Amendment No. 02, *available at* http://www.prisonphonejustice.org/includes/_public/rates//New%20Mexico/NM_phone_rates_2011.pdf (rate worksheet portion of ICS contract between Securus Technologies and New Mexico Corrections Department, dated June 28, 2010); *see also* HRDC June 8, 2013 *Ex Parte* Letter Rev. Exh. B (noting that in New Mexico, Securus charges a flat rate of $0.65 for collect and debit calls and $.59 for prepaid calls) (New Mexico ICS Contract); *see also* Susskind June 6, 2013 *Ex Parte* Letter.

[73] *See 2012 ICS NPRM*, 27 FCC Rcd at 16640-41, paras. 30-33; *see also* GTL 2013 Comments at 20; Securus 2013 Comments at 21-23.

[74] *See generally* First Wright Petition, Dawson Aff. at 4-5; *see also* HRDC 2013 Comments at 7. Collect calling is often the most expensive type of ICS calling. *See* HRDC 2013 Comments at 7.

[75] *See, e.g.*, *2012 ICS NPRM*, 27 FCC Rcd at 16632, para. 5; CenturyLink 2013 Comments at 12-13, n.27; CCA 2003 Comments at 16-21.

[76] *See, e.g.*, Securus 2013 Comments at 4, 22 (asserting that called parties' LECs have refused payment and imposed penalties for telephone calls in which an end user claims to have not received or accepted an inmate's collect call).

[77] *See 2012 ICS NPRM*, 27 FCC Rcd at 16630, para. 2; *see also* Transcript of Reforming ICS Rates Workshop at 112-13 (Alex Friedmann, Assoc. Director, HRDC, stating that "the vast, vast, majority of prison phone calls, those rates are not paid by prisoners, they're paid by the call recipients, either through direct payment from collect calls, or through family members or loved ones placing money on prepaid accounts in their own name, or sending money into their loved ones in prison to set up debit accounts").

[78] *See, e.g.*, CenturyLink 2013 Comments at 12 (stating that "funds are deposited by family members or others into inmates' bank or commissary accounts"); Securus 2013 Comments at 21-22 (stating that inmates can hold their own prepaid accounts or many, in some facilities, purchase calling cards from an institution's commissary); *see also* GTL 2013 Comments at 18.

listed on a physical debit card.[79] An aggregated list on the record of current ICS contract rates indicates that 36 states currently allow debit calling, and that debit calling is less expensive than collect calling in many of those states.[80] Some facilities allegedly do not favor debit calling because debit calling can be more administratively burdensome than collect calling.[81]

24. Prepaid calling refers to arrangements whereby the called party has a prepaid account set up with the ICS provider in advance.[82] This account is often established and replenished by the inmates' friends and family members.[83] The record indicates that prepaid calling is generally less expensive than collect calling but can be about equal in rates to debit calling.[84] Some ICS contracts are limited to collect calling only[85] while others allow prepaid and/or debit calling options.[86]

2. The Record on ICS Costs

25. In this section, we highlight aspects of the record regarding the costs of providing ICS. In 2008, seven ICS providers filed a cost study based on proprietary cost data for certain correctional facilities with varying call cost and call volume characteristics.[87] The study apportioned interstate ICS costs into per minute and per call categories and calculated the resulting averages for both debit and collect calls. The results of the study indicated that the per-call cost for debit calls was $0.16 per minute and the per-call cost for collect calls was $0.25 per

[79] *See* GTL 2013 Comments at 20, Securus 2013 Comments at 21-22, T-Netix 2007 Comments at 13-14.

[80] *See* HRDC 2013 Comments at 7.

[81] *See, e.g.*, GTL 2013 Comments at 20-21 (asserting that debit calling "can actually increase some administrative costs depending on the characteristics of the inmate account"); CenturyLink 2013 Comments at 12-13 n.27; Securus 2013 Comments at 21 (noting that some correctional facilities forbid calling cards due to concerns about administrative burdens and potential violence).

[82] *See 2012 ICS NPRM*, 27 FCC Rcd at 16641, para. 33.

[83] *See* Securus 2013 Comments at 21.

[84] *See* HRDC 2013 Comments at 7-8 (noting that among 38 states that offer prepaid calling, prepaid rates are lower than or equal to collect rates in all 38 states); *see also 2012 ICS NPRM*, 27 FCC Rcd at 16641, para. 33. For the regulatory purposes of this Order we treat debit and prepaid ICS calling as similar services.

[85] *See, e.g.*, First Amended Contract for Inmate Telephone Services, *available at* http://www.prisonphonejustice.org/includes/_public/contracts//Georgia/GA_contract_with_MCIGTL_amendments111.pdf; (ICS contract between GTL and Georgia Department of Corrections dated May 3, 2001); *see also* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (noting that Georgia only allows collect calling); *see also* Susskind June 6, 2013 *Ex Parte* Letter.

[86] *See, e.g.*, CenturyLink 2013 Comments at 12-13 (estimating that approximately 70% of its ICS customers offer debit calling but noting that "debit calling varies widely by facility"); GTL 2013 Comments at 22 (noting that a "significant number" of correctional facilities offer either debit or prepaid calling but that debit calling "is not yet universally accepted"); *see also infra* Section III.G (addressing blocking of certain collect calls).

[87] *See generally* ICS Provider Data Submission. Providers that participated in the 2008 study include ATN, Inc., Custom Teleconnect, Inc., Embarq (now operating as CenturyLink), NCIC Inmate Telephone & Operator Services, Pay Tel Communications, Public Communications Services, Inc., and Securus Technologies, Inc. *See* ICS Provider Data Submission at 21.

minute.[88] The providers subsequently provided additional usage data and cost calculations but did not otherwise make the underlying proprietary cost information available.

26. In response to the *2012 ICS NPRM*, Securus filed a report analyzing per-call and per-minute costs of ICS for certain correctional facilities it serves.[89] The report was based on 2012 data and analyzed cost, call volume, site commission and other data according to type and size of facility. It divided the study sample into four groups, including one for state department of corrections facilities and three others for different-sized jail facilities.[90] The report contained total cost data for the facilities but did not otherwise provide disaggregated cost data. Using this data, the Commission calculated an average per-minute cost for interstate calls from all facilities included in the report to be $0.12 per minute with commissions and $0.04 per minute without them.[91] We note that the two groups in the Securus report with the smallest facilities ("Medium 10" and "Low 10") are estimated to have fewer than 50 ("Medium 10") and fewer than 5 ("Low 10") inmates per facility, respectively.[92] Facilities of these sizes hold only a very small share of inmates nationally.[93] Thus, the data for the "Medium 10" and "Low 10" groups do not necessarily reflect the costs of serving vast majority of inmates that generate nearly all calls. Nonetheless, for completeness we included those data in calculating the averages mentioned above.

27. Pay Tel also filed financial and operational data for its ICS operations, which it states are exclusively in jails, not prisons.[94] The filing contained comprehensive cost, capitalized

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[88] These estimates are based on per-minute costs and were derived from the per-call and per-minute data developed by the study, using an assumed 15-minute call duration. *See infra* note 232.

[89] *See generally* Securus 2013 Comments, Expert Report of Stephen E. Siwek.

[90] *Id.* at 2-3.

[91] *See id*. at 3, 5, and 8, Tbls. 2, 5, and 9. The results are for all call types, as the study does not provide differentiated data for collect, debit, and, prepaid calls.

[92] These estimates are based on call volume estimates by Pay Tel and the Commission. *See* Pay Tel Ancillary Charges PN Comments at 7 (assuming approximately 20 calls per occupied bed per month). Commission estimates are based on matching Securus jail facilities to population figures in the 2006 U.S. Bureau of Justice Statistics. *See* U.S. Bureau of Justice Statistics, Prisoners in 2011, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4559 (last visited June 20, 2013); *see also* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=530 (last visited June 20, 2013); *see also* Letter from Jamie N. Susskind, Acting Legal Advisor to the Bureau Chief, Wireline Competition Bureau, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed June 24, 2013) (Susskind June 24, 2013 *Ex Parte* Letter) (noting that certain readily-available information concerning data on the overall U.S. distribution of incarceration facility sizes may be used as a basis for this order). Pay Tel states that it "has no experience serving facilities as small as those depicted in the Securus Low 10. Presumably, these are small town police stations or remote police outposts, with extremely low call volume." Pay Tel Ancillary Charges PN Comments at 7.

[93] The Commission estimates that nationwide, incarceration facilities of the sizes in Securus' Medium 10 and Low 10 groups together hold approximately one percent of all inmates. *See generally* U.S. Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2005, *available at* http://dx.doi.org/10.3886/ICPSR24642.v2 (last visited June 20 2013), and Census of Jail Facilities, *available at* http://dx.doi.org/10.3886/ICPSR26602.v1 (last visited June 20, 2013); *see also* Susskind June 24, 2013 *Ex Parte* Letter.

[94] Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed July 23, 2013) (Pay Tel July 23, 2013 *Ex Parte* Letter). Pay Tel required (continued….)

asset, call volume, and other actual and projected data. The non-confidential cost summary included in the filing reported actual and projected 2012-2015 average total costs for collect and debit per-minute calling of approximately $0.23 and $0.21, respectively, (including the cost of an advanced security feature known as continuous voice biometric identification).[95]

28. Although CenturyLink[96] did not file a cost study, it did file summary cost information for its ICS operations.[97] Specifically, CenturyLink reported that its per minute costs to serve state departments of corrections facilities (excluding site commission payments) averaged $0.116 [98] and that its per-minute costs to serve county correctional facilities (excluding site commission payments) averaged $0.137.[99]

29. The record in this proceeding suggests that the costs of providing ICS are decreasing, in part due to technology advances.[100] As one smaller ICS provider stated, "[g]iven modern-day technology, the costs for providing secure phone and video services to correctional facilities are low (and are getting lower)."[101] As ICS moves increasingly to IP technology, we expect costs to decline as is the case for similar services that are not ICS.[102] Some commenters and the Petitioners posit that "[t]echnology has driven the actual cost of ICS calls to a fraction of what they were when the petitions were filed."[103] In particular, they point to the replacement of

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confidential treatment for some of the data in its cost study. *See* Transcript of Reforming ICS Rates Workshop at 238 (noting that "PayTel provides inmate telephone service . . . to jails throughout the United States.").

[95] Pay Tel July 23, 2013 *Ex Parte* Letter at Attach. 2 (Pay Tel Cost Summary).

[96] *See* Letter from John E. Benedict, VP – Federal Regulatory Affairs & Regulatory Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Aug. 2, 2013) (CenturyLink Aug. 2, 2013 *Ex Parte* Letter).

[97] We also note that CenturyLink's predecessor, Embarq, participated in the 2008 ICS Provider Data Submission. *See supra* note 87.

[98] *See* CenturyLink Aug. 2, 2013 *Ex Parte* Letter at 2. CenturyLink states that the state departments of corrections facilities it serves produced a median per-minute cost of $0.108, a low per-minute cost of $0.058 and high per-minute cost of $0.188. *See id*. We note that the per-minute rate proposal in the Dissent appears to rely on CenturyLink's high per-minute cost. *See* Dissent at 131 and n. 149.

[99] *See* CenturyLink Aug. 2, 2013 *Ex Parte* Letter at 3. CenturyLink states that the county correctional facilities it serves produced a median per-minute cost of $0.135, a low per-minute cost of $0.051, and a high per-minute cost of $0.220. *See id*.

[100] *See, e.g.*, Petitioners 2013 Comments at 18 ("[T]he only on-premises equipment at each correction and detention facility is a VoIP router, several workstations for the site's guards, and the actual inmate telephone handsets. Once a call is initiated, it is forwarded to a centralized ICS calling center, where security measures are applied, and the call is then forwarded to the called party.").

[101] Turnkey 2013 Comments at 3.

[102] *See also* Cisco "Next-Generation Cisco Unified Communications Platform Accelerates Return on Investment: white paper," (Nov. 2009) *available at* https://www.cisco.com/en/US/prod/collateral/voicesw/ps6790/gatecont/ps5640/white_paper_c11-568504.pdf (last visited Aug. 2, 2013) (asserting a substantial cost savings from moving from traditional time division multiplexing to IP-based technologies, with a focus on a particular Cisco commercial solution).

[103] Petitioners 2013 Comments at 5.

live operators with automated systems,[104] the reduction or total absence of on-site service by the ICS providers,[105] the consolidation of ICS providers,[106] and the centralized application of requested security measures.[107] The ability to centrally provision across multiple facilities is especially salient given that the spread of hosted and/or managed service capabilities can result in reduced total cost of ownership for solutions such as VoIP with more centralized—that is, cloud-based—remote services, provided over IP packet based networks.[108]

30. Other developments also point to lower costs. These changes include lower "basic telecommunications costs."[109] Consistent with recent trends in capital costs for the communications industry,[110] some providers acknowledge that capital costs for on-site equipment are decreasing.[111] In addition, ICS providers and correctional facilities increasingly offer prepaid and debit calling as an alternative to collect calling.[112] Because every prepaid or debit call is

[104] *See, e.g.*, Petitioners 2013 Comments at 18 ("Moreover, the operator-assisted collect call function has been eliminated, and these services are now automated and provided by the ICS provider without the intervention of a live operator.").

[105] *See id*.

[106] *See, e.g.*, The Phone Justice Commenters 2013 Reply at 8 (asserting that three ICS providers have "exclusive control over ICS in state prisons in states where 90% of incarcerated persons live"); Letter from Lee Petro, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 24, 2013) (stating that "three ICS providers control[] at least 90% of the ICS market") (Petitioners July 24, 2013 *Ex Parte* Letter).

[107] *See, e.g.*, GTL 2007 Comments at 2-3; Telmate 2013 Comments at 2-3. Cost data Securus subsequently entered into the record, while not directly comparable, also suggests a decrease in its costs since the 2008 study. *See generally* Securus 2013 Comments, Expert Report of Stephen E. Siwek.

[108] *See, e.g.*, Telmate 2013 Comments at 2-3 (asserting that it has invested in an all-IP network and offers "pioneering and innovative services," that its platform is modern and efficient, and that "its debt-service and capital costs are far lower than those of other providers); *see also* Diane Myers, The Cost Advantages of Hosted Telephony, Infonetics Research Cost Analysis Paper, *available at* http://www.infonetics.com/whitepapers/2010-Infonetics-Research-The-Cost-Advantages-of-Hosted-Telephony-081210.pdf (last visited July 24, 2013) (discussing the cost benefits of a hosted versus premises-based approaches, which are the gains achieved by centralizing hardware, software and management functions in a single location).

[109] *See* GTL 2013 Comments at 19.

[110] *See, e.g.*, Petitioners 2013 Comments, Exh. C, Bazelon Decl. at 10-11 (asserting that hardware and software costs in the ICS industry have dropped dramatically in the last decade).

[111] *See* Pay Tel 2013 Comments at 13 (asserting that since the 2008 ICS Provider Data Submission was developed, "consistent with general industry trends, Pay Tel's business model has shifted from a 'customer premises' model to a 'centralized platform' model" and that "there are now substantially more assets and personnel at the company's main Data Center location and its disaster recovery site—and fewer assets at individual correctional facilities—than used to be the case"); *see also* Telmate 2013 Comments at 2 (noting that their capital costs are far lower than other ICS providers); Petitioners 2013 Comments at Exh. C, Bazelon Decl., 10-11 n.42 (citing Douglas Dawson affidavit before the Commonwealth of Massachusetts Department of Telecommunications and Cable in 2012, in which he states that "today there is very little capital investment made by [a] prison telephone provider at each prison").

[112] *See, e.g.*, Telmate 2013 Comments at 3 (asserting that by offering a combination of debit and prepaid calls, it is able to offer lower-cost calls for inmates and their friends and families while simultaneously increasing call volume); *see also* Letter from Monica S. Desai, Counsel for Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 3 (filed May 31, 2013) (Securus May 31, 2013 *Ex Parte* Letter) ("Today, approximately 80 percent of inmate telephone calls are made using prepaid accounts.").

paid,[113] this trend is lowering provider costs by reducing uncollectibles.[114] Indeed, Pay Tel was a participant in the 2008 cost study, which concluded the difference between the costs of debit and collect calls was $0.09. In its 2013 submission, Pay Tel's costs indicate the differential between the costs of debit and collect calls had fallen to $0.02, with the collect calling costs decreasing significantly.

31. Further, the Commission adopted comprehensive intercarrier compensation reforms, which have reduced the costs of transport and certain long distance charges for ICS providers,[115] a trend that will continue as these reforms continue to be implemented.[116] Moreover, IP-transit charges, relevant for the supply of IP-based services, have also steadily fallen.[117]

32. Notwithstanding these lower cost trends, some providers assert their costs have stayed the same or increased due to factors such as investments in enhanced features,[118] general and administrative costs such as additional personnel to create and maintain individual customer accounts,[119] and high corporate debt.[120] Some ICS providers also include "free-to-the-inmate" services such as free calls to public defenders, free calls for indigent inmates,[121] and free visitation calls[122] as a portion of their costs of providing ICS. They also highlight the need to

[113] *See* GTL 2013 Comments at 19 (noting that "bad debt expense is expected to decline with increased use of prepaid calling plans"); *see also* CenturyLink 2013 Comments at 12 (stating that debit calling eliminates "bad debt/credit card charge-backs"); Telmate 2013 Comments at 3.

[114] *See, e.g.*, Securus 2013 Comments at 4, 22 (asserting that called parties' LECs have refused payment and imposed penalties for calls in which an end user claims to have not received or accepted an inmate's collect call).

[115] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17932-36, paras. 798-801 and Fig. 9 (noting the transition to a bill-and-keep methodology and adoption of default transitional glide path toward bill-and-keep for terminating end office switching and certain transport rate elements).

[116] *See id*.

[117] Reduced transit charges reflect the overall trend for transmission costs, which can influence ICS costs for connectivity to PSTN gateways, SIP trunks and other related network costs. *See, e.g.*, Telegeography, IP Transit Price Declines Steepen (August 2, 2012) *available at* http://www.telegeography.com/products/commsupdate/articles/2012/08/02/ip-transit-price-declines-steepen; *see also* Dr. Peering International, Internet Transit Prices - Historical and Projected (August 2010) *available at* http://drpeering.net/white-papers/Internet-Transit-Pricing-Historical-And-Projected.php.

[118] *See* GTL 2013 Comments at 19 (stating that the "development, installation, and maintenance of increasingly sophisticated software security features" result in increased costs); Telmate 2013 Comments at 15.

[119] *See* Pay Tel 2013 Comments at 13 (stating that general and administrative costs have increased, such as "administration, support, and personnel resulting from the deployment of advanced technology").

[120] *See* Telmate 2013 Comments at 13 (stating that some of the ICS providers that joined in the ICS Provider Data Submission "have issued large amounts of debt securities and are subject to substantial debt-service obligations, along with higher capital expenses").

[121] *See, e.g.*, NCIC 2013 Comments at 2-3 (noting that free services provided by NCIC also include free calls to bail bondsmen, consulates, and embassies, free booking calls, and free calls to the facilities' commissary provider to place orders.); Transcript of Reforming ICS Rates Workshop at 323-34 (Vincent Townsend, President, Pay Tel, discussing the variety of free calls for inmates that Pay Tel provides).

[122] Pay Tel notes that up to 50% of its ICS calls are non-revenue calls. These include calls to commissary accounts and face-to-face visitation while speaking through a telephone handset. *See* Pay Tel 2013 Comments at 14; *see also* Transcript of Reforming ICS Rates Workshop at 324 (Vincent Townsend, President, Pay Tel).

provide security features that are necessary to the provision of ICS though there is insufficient evidence to indicate that the costs of providing such security features have increased since the ICS Provider Data Submission.[123]

33. Finally, providers point to "site commissions" as a significant driver of increases to rates charged to inmates.[124] Site commissions are payments made from ICS providers to correctional facilities and related state authorities.[125] Since the First Wright Petition was filed in 2003, the record indicates that there has been a significant increase in site commission payments made in connection with the provision of ICS.[126] Such payments can take the form of a percentage of gross revenue, a signing bonus, a monthly fixed amount, yearly fixed amount, or in-kind contributions.[127] Site commission payments are currently prohibited in seven states, as well as at some federal detention facilities including dedicated facilities operated by ICE.[128]

34. The record makes clear that where site commission payments exist, they are a significant factor contributing to high rates.[129] Site commission payments are often based on a

[123] *See, e.g.*, CenturyLink 2013 Comments at 7-8 (noting that security features lead to a wide variety of costs in ICS provisioning); NCIC 2013 Comments at 5-6. Other commenters disagree that security requirements contribute substantially to ICS providers' costs or ultimately to rates. *See* Petitioners 2013 Comments at 2. While interstate ICS requires unique security measures, there is no evidence in the record that the costs of these additional security functions justify the higher interstate ICS rates that are in place today. Additionally, we do not find that security needs in those correctional facilities in which higher interstate ICS rates are charged are either more effective, or more expensive than, the security needs of those facilities in which lower interstate ICS rates are charged. *See, e.g.*, NARUC 2013 Reply at 3 ("It does not appear from the record that all charges can be justified on the basis of additional security measures. In New York, the prison phone rates are $0.048 per minute for local, intrastate and interstate calls, inclusive of all security features required by New York corrections officials.").

[124] *See 2012 ICS NPRM*, 27 FCC Rcd at 16632, para. 5 (*citing Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3253, para. 12).

[125] *See, e.g.*, Transcript of Reforming ICS Rates Workshop at 54, 92, 120 (Hon. Patrick Hope, VA House of Delegates, stating that approximately $3.5M annually from ICS in Virginia is deposited into Virginia's general fund, which finances, among other things, roads, transportation, education, and health care).

[126] *See* GTL 2013 Comments at 10; Telmate 2013 Comments at 7.

[127] *See* Securus 2013 Comments, Hopfinger Decl. at 6. Some correctional facilities that receive percentage-based commissions may also require a "Minimum Annual Guarantee" ("MAG") – that is, the ICS provider must contractually guarantee the facility will annually receive at least this MAG amount regardless of the amount of revenue brought in. *Id.*; *see also* Telmate 2013 Comments at 14-15 (discussing site commission payments).

[128] *See* Letter from Lee G. Petro, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Exh. A, at 16 (filed July 27, 2011) (Petitioners July 27, 2011 *Ex Parte* Letter) (Nationwide *PLN* Survey Examines Prison Phone Contracts, Kickbacks) (Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island, and South Carolina have banned site commissions.). Although both Michigan and Rhode Island have prohibited "site commissions" per se, it is unclear from the ICS contracts in these two states whether they include some form of in kind payment; nonetheless, we include ICS rates from those states in our calculations below in order to maintain a consistent approach in the forward-looking reform efforts of this proceeding. *See infra* notes 235and 237.

[129] *See, e.g.*, GTL 2013 Comments at 12 (agreeing that where a commission is present, it is "the single largest component affecting the rates for inmate calling service" (quoting *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3252, para. 10)); HRDC 2013 Comments at 6, 15; Verizon 2013 Comments at 2; TechFreedom 2013 Comments at 2; The Phone Justice Commenters 2013 Reply at 9-11.

percentage of revenues ICS providers earn through the provision of ICS, and such percentages can range from 20 to 88 percent.[130] While the record indicates that site commission payments sometimes fund inmate health and welfare programs such as rehabilitation and educational programs; programs to assist inmates once they are released; law libraries; recreation supplies; alcohol and drug treatment programs; transportation vouchers for inmates being released from custody; or other activities, in accordance with the decisions of prison administrators and other local policymakers,[131] such payments are also used for non-inmate needs, including employee salaries and benefits, equipment, building renewal funds, states' general revenue funds, and personnel training.[132] Thus, it is clear that the level of such payments varies dramatically and their use and purposes differ significantly, from funding roads to purposes that ultimately benefit inmate welfare.

3. The Record on ICS Rates

35. The record contains data regarding interstate ICS rates, including an aggregation of ICS contract data[133] and current ICS contracts by state.[134] Some of the rates for interstate calls are very high by any measure. While most Americans have become accustomed to paying no additional charge for individual long distance calls, inmates, or those whom they call, pay as

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[130] *See* GTL 2013 Comments at 10 (noting that its commissions range from zero to 75% of gross ICS revenues); Verizon 2013 Comments at 2 (stating that when it provided ICS, it paid site commissions between 40-50% of the amounts billed); Telmate 2013 Comments at 7 (listing current commissions paid to county- and municipal-level corrections departments: 67% in Osceola, Florida; 71% in Cobb County, Georgia; 81% in Fulton County, Georgia; and 86% in San Diego, California); HRDC 2013 Comments, Exh. C (asserting that in 2012, various ICS providers paid commissions ranging between 20% to 76.6%; that in Oklahoma, commissions can be as high as 76.6% of gross prison phone revenue; and that at least 26 states receive commissions of 40% or more of gross ICS revenue); PLS 2013 Comments at 6 (contending that in Massachusetts, half or more of an ICS telephone bill covers site commissions rather than the cost of service, and DOC consumers pay about 25% of their bills toward commissions). *But see* TurnKey 2013 Comments at 4-5 (asserting that high-quoted commission percentages are not accurate depictions of amounts being paid to jails, that the offered commission rates are inflated compared to actual commissions paid, and that commissions may only be paid for certain types of calls); Securus May 31, 2013 *Ex Parte* Letter at 2 (asserting that site commission are not "profit" and support correctional facilities and inmate services).

[131] *See, e.g.,* La. DOC 2013 Comments at 3-5 (asserting that commissions are used to pay for literacy training, GED, special education, job life skills, and vocational education); CSSA 2013 Comments at 1; County of Santa Clara DOC 2013 Comments at 2; MDOC 2013 Comments at 1; SDDOC 2013 Comments at 2; GTL 2013 Comments at 10-11.

[132] *See, e.g.*, Petitioners 2013 Reply at 26-27 and Exh. G. Petitioners provide a list of 13 states and counties that extract revenues shared with ICS providers for non-inmate educational needs, including employee salaries and equipment, building renewal funds, salaries and benefits, states' general revenue funds, and personnel training. Petitioners 2013 Reply at 26-27, Exh. H; *see also* PLS 2013 Comments at 7 (noting that commissions paid to county facilities in Massachusetts are placed in a fund available for use by the Sheriff, while commissions paid to the Department of Correction are transferred to the General Fund of the Commonwealth).

[133] HRDC filed comments in response to the *2012 ICS NPRM* that included rate data from 2007/2008 and 2012 for most state departments of corrections. *See* HRDC 2013 Comments at Exhs. A, B.

[134] *See* Susskind June 6, 2013 *Ex Parte* Letter; *see also Data on Service Contracts Included in Record of Inmate Calling Service Rates Proceeding*, WC Docket No. 12-375, Public Notice, DA 13-1446 (Wireline Comp. Bur. rel. June 26, 2013) (notifying the public of the same).

much as $17.30, $10.70 or $7.35 for a 15-minute interstate collect call, depending upon the facility where the inmates are incarcerated.[135]

36. Some states and federal agencies, such as ICE, have reformed ICS rates and achieved significantly lower rates. Additionally, interstate ICS rates vary significantly and in ways that are unlikely to be based on ICS providers' costs.[136] Individual ICS providers charge widely varying rates in the different facilities they serve, notwithstanding their ability to share the costs of serving multiple facilities using centralized call routing and management and security platforms. For example, ICS provider GTL has entered into contracts to charge both one of the highest rates for a 15-minute collect call ($17.30 in Arkansas, Georgia, and Minnesota) and one of the lowest ($0.72 in New York).[137]

37. One of the most significant factors in rate levels is whether the relevant state has reformed or addressed ICS rates.[138] For example, an interstate collect call in Missouri (a state that has reformed ICS rates) can cost as little as $0.05 per minute for a 15-minute call, while the same call in Georgia, a state that has not undertaken rate reform, can be as high as $0.89 per minute, plus an additional per-call charge as high as $3.95—as much as a 23 fold difference.[139]

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[135] These are the costs of a 15-minute collect call in Alabama, Arkansas and Maryland, respectively. *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (citing state departments of correction 2012 rates).

[136] The ratio of standard deviation to mean for ICS per minute call costs net of commissions is 75% greater that the corresponding ratio for total incarceration costs per inmate. *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B; *see also* VERA INSTITUTE OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS at 10 (Jan. 2012; updated July 2012), http://www.vera.org/pubs/price-prisons-what-incarceration-costs-taxpayers. The calculation is for the set of states for which both ICS call costs net of commissions and incarceration cost data are available.

[137] *See* Term Contract Award, *available at* http://prisonphonejustice.org/includes/_public/contracts//Arkansas/AR_Contract_Extension_with_GTL_20122014.pdf (ICS contract between GTL and Arkansas Office of State Procurement, dated Feb. 7, 2012); First Amended Contract for Inmate Telephone Services, *available at* http://www.prisonphonejustice.org/includes/_public/contracts//Georgia/GA_contract_with_MCIGTL_amendments111.pdf (ICS contract between GTL and Georgia Department of Correction, dated May 3 2001); Contract Release: T-512, *available at* http://prisonphonejustice.org/includes/_public/contracts//Minnesota/MN_contract_with_GTL_20102013.pdf (ICS contract between GTL and Minnesota Materials Management Division, dated May 11, 2012); Notice to Friends and Families of New York State Inmates, *available at* http://prisonphonejustice.org/includes/_public/rates//New%20York/NY_prison_phone_rates_2010.pdf (letter from New York State Department of Correctional Services listing new, reduced ICS rates, dated Feb. 11, 2010); *see also* Susskind June 6, 2013 *Ex Parte* Letter. Cost data entered into the record shows that without site commission payments, the rates are still not cost-based. *See*, *e.g.*, ICS Provider Data Submission.

[138] *See* The Phone Justice Commenters 2013 Comments at 10 (ICS "prices vary widely across states, even among states that use the same ICS provider."); *see supra* Section III.B.3.

[139] *See* First Amended Contract for Inmate Telephone Service, *available at* http://www.prisonphonejustice.org/includes/_public/contracts//Georgia/GA_contract_with_MCIGTL_amendments111.pdf (ICS contract between GTL and Georgia Department of Corrections, dated May 3, 2001); Contract, *available at* http://prisonphonejustice.org/includes/_public/contracts//Minnesota/MN_contract_with_GTL_20102013.pdf; *see also* Division of Purchasing and Materials Mgmt., Contract Renewal Agreement, *available at* http://prisonphonejustice.org/includes/_public/contracts//Missouri/MO_contract_with_PCS_20062011_contract_amendment_ext_thru_oct_2011.pdf (ICS contract between Missouri and PCS dated May 10, 2011); HRDC June 8,
(continued….)

States that have lowered rates have done so in different ways. Some have banned site commissions entirely,[140] and others permit only limited or sharply-reduced site commissions.[141] Some states have imposed rate caps,[142] disallowed or reduced per-call charges,[143] and required providers to offer less expensive calling options, such as prepaid or debit calling.[144]

38. Site commission payments appear to be a particularly significant contributor to high rates. Several states have eliminated or reduced such payments,[145] and available data indicate that ICS rates in those states are substantially lower than those in states that require commission payments.[146] For example, in New Mexico, after site commissions were prohibited, ICS rates fell from $10.50 for a 15-minute interstate collect call to $0.65 for the same 15-minute call based on revised ICS rates—a 94 percent reduction.[147] Similarly, New York ended site commission payments in 2008, "taking the position that the state prison system shall not accept or receive revenue in excess of its reasonable operating cost for establishing and administering its ICS, while ensuring that the system provides reasonable security measures to preserve the safety and security of prisoners, correctional staff, and call recipients."[148] New York's prison phone rates prior to ending its commission payments were $1.28 per call plus $0.068 per minute for all categories of calls, or $2.30 for a 15-minute call.[149] Today, New York rates are $0.048 per

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2013 *Ex Parte* Letter, Rev. Exh. B; *see also* Securus 2013 Comments, App. 2 (showing the wide range of rates in the various states).

[140] *See supra* note 128.

[141] *See* Nationwide *PLN* Survey Examines Prison Phone Contracts, Kickbacks at 16 (Arkansas, Kansas, Montana, and New Hampshire have limited or sharply-reduced site commission payments).

[142] Indiana has capped collect and debit ICS rates at $0.24 per minute and Michigan has capped collect and pre-paid rates at $0.23 per minute and debit rates at $0.21 per minute. *See* Exhibit A: Offender Phone Rates and Commissions, *available at* http://prisonphonejustice.org/includes/_public/rates//Indiana/IN_phone_rates_2012_with_kickback_percentages.pdf (rate sheet for ICS contract between the Indiana Department of Correction and PCS, dated May 26, 2011); *see also* Change Notice No. 1 of Contract No. 071B1300208, *available at* http://prisonphonejustice.org/includes/_public/contracts/Michigan/mi_prison_phone_contract_with_pcs_change_notice_1_2011.pdf (ICS contract between MI Department of Technology Management and Budget Purchasing Operations and PCS, dated Apr. 23, 2011); *see also* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B.

[143] *See* CenturyLink 2013 Comments at 9 n.21 (stating that "some facilities require ICS providers to charge on a per-minute basis only," not a per-call basis).

[144] *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (noting that in 2007, GTL's contract in Rhode Island added debit calling and e-mail options, and eliminated site commission payments).

[145] Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island, and South Carolina have eliminated site commissions from ICS rates. *See* Petitioners 2013 Comments at 23; NARUC 2013 Reply at App. A (Resolution Urging the FCC to take Action to Ensure Fair and Reasonable Telephone Rates from Correctional and Detention Facilities, adopted Nov. 14, 2012).

[146] *See* Securus May 31, 2013 *Ex Parte* Letter at 2; MMTC Comments at 4-5; HRDC Comments at 2, 14; *see also* NJ ISJ 2013 Reply at 2-3; Nationwide *PLN* Survey Examines Prison Phone Contracts, Kickbacks.

[147] HRDC 2013 Comments at 3.

[148] *Id.* (citing N.Y. Cor. Law § 623(3)).

[149] *See* HRDC 2013 Comments at 3.

minute for all categories of calls with no per-call charges, or $0.72 for a 15-minute call—a 69 percent reduction.[150] When site commission payments were eliminated in South Carolina and Michigan, the average cost of a 15-minute call went down, from $2.70 to $1.35 and from $5.30 to $1.10, respectively.[151] There is no evidence in this record that these reformed rates are below cost or insufficient to cover necessary security features of the ICS networks, or do not provide fair compensation for ICS providers.[152] Moreover, ICS providers have seen significant increases in call volumes in states in which rates have been lowered, often providing additional revenue even as rates decrease.[153]

4. Competition in the ICS Market

39. The Commission traditionally prefers to rely on market forces, rather than regulation, to constrain prices and ensure that rates are just and reasonable. The *2012 ICS NPRM* sought comment on the competitive nature of the ICS market and whether such competition constrains ICS rates.[154] Economic literature states that, in effectively competitive markets, firms expect to earn sufficient revenues to cover their long run economic costs, and not more.[155]

40. In response to the *2012 ICS NPRM*, some commenters suggest that the ICS market is competitive but, in so doing, these commenters focus on competition among providers to obtain contracts from correctional facilities, not whether there is competition within the facility giving inmates competitive options for making calls.[156] While the process of awarding

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[150] *See id*.

[151] *See* CenturyLink 2013 Comments at 15. South Carolina's site commission payments were previously 45%; Michigan's site commission payments were 50.99%. *See id.*

[152] NY DOCCS July 16, 2013 *Ex Parte* Letter at 1 (noting that New York has per-minute ICS rates of $0.048, and describing the New York statute that requires the focus of ICS contracts to be to obtain the lowest per-minute cost of the call. The letter also describes the necessary balance between low calling rates and security, as the department can also "establish rules and regulations or departmental procedures to ensure that any inmate phone call system established by this section provides reasonable security measures to preserve the safety and security of each correctional facility, all staff and all persons outside a facility who may receive inmate phone calls."); *see also* Indiana Commission 2013 Comments at 2-3 (Indiana has $0.24 per-minute ICS rates. Its comments describe state legislation requiring that state contracting officials balance the competing goals of facility security with lower per-call charges, per-minute rates and commissions when entering into ICS contracts.); *see also* CenturyLink 2013 Comments at 14-15. *But see* Ala. Sheriff's Assoc. 2013 Reply at 1 ("The revenue from inmate phone calls pays for the additional security measures necessary to maintain institutional security . . . . Without these security measures, the risks to institutional security and public safety would quickly outweigh the benefits of allowing inmate telephone access.").

[153] *See supra* note 15.

[154] *See 2012 ICS NPRM*, 27 FCC Rcd at 16042, para. 36.

[155] *See, e.g.*, Louis M. B. Cabral, Introduction to Industrial Organization, 85-86 (MIT PRESS: CAMBRIDGE, MA, 2000) (discussing perfect competition) 86-94 (discussing more realistic models of the world); *see also* Dennis Carlton and Jeffrey Perloff, Modern Industrial Organization at 6, 76-78 (PRENTICE HALL 4TH ED. 2004) (price being driven to long run cost under perfect competition, in contestable market, as a means of defining a barrier to entry).

[156] *See, e.g.*, Securus 2013 Comments at 2 ("The competition for service contracts is, to put it mildly, robust."); CenturyLink 2013 Comments at 4 ("[M]argins on ICS contracts are already constrained by the robust competition that exists in the ICS market."). *But see* TurnKey 2013 Comments at 1 ("As a general proposition, smaller ICS companies find that a level playing field does not exist when it comes to competing in the ICS market.").

contracts to provide ICS may include competitive bidding,[157] such competition in many instances benefits correctional facilities, not necessarily ICS consumers—inmates and their family and friends who pay the ICS rates, who are not parties to the agreements, and whose interest in just and reasonable rates is not necessarily represented in bidding or negotiation.[158]

41. Thus, the Commission has previously found that competition during the competitive bidding process for ICS "does not exert downward pressure on rates for consumers,"[159] and that "under most contracts the commission is the single largest component affecting the rates for inmate calling service."[160] We reaffirm those findings here. Indeed, as the Commission has found, competition for ICS contracts may actually tend to increase the rate levels in ICS contract bids where site commission size is a factor in evaluating bids.[161] For example, a former Commissioner on the New Mexico Public Regulation Commission, Jason Marks, has stated that the interstate ICS market is characterized by "reverse competition" because of its "setting and security requirements."[162] He further asserts that "reverse competitive markets are ones where the financial interests of the entity making the buying decision can be aligned with the seller, and not the buyer" and that such competition "is at its most pernicious in the inmate phone service context because buyers not only do not have a choice of service providers, they also have strong reasons not to forego using the service entirely."[163] Although one ICS provider asserts that "service providers compete vigorously with respect to rates"[164] it is clear from requests for proposals (RFPs) in the record that, at best, end user rates are but one of many factors that correctional facilities use to judge competing bids.[165] The record also indicates

[157] We do not address or making any findings with regard to the process for awarding contracts to provide ICS.

[158] *See* Petitioners 2013 Reply at 7 ("[T]he ICS consumer never benefits from the brief period of competition among ICS providers during . . . the RFP process.").

[159] *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3253, para. 11 ("Instead, perversely, because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates."); *see also id*. at 3253, 3256, 3259-80, paras. 11 nn.38-39, 19, 27-28 (the Commission has previously characterized ICS providers as enjoying location "monopolies" that contribute to higher ICS rates); Raher 2013 Reply at 5 ("Competition in procurement should not be confused with a competitive market for purposes of rate-setting.").

[160] *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3252-53, paras. 10, 12.

[161] *See id.*; *see also* Telmate 2013 Comments at 6 ("competition for these commissions decrease incentives for cost-reduction and technological innovation"); Raher 2013 Reply at 6 ("[P]rocurement processes in site-commission jurisdictions are likely to drive prices up because of the inherent conflict of interest that arises when the agency awarding the contract receives a profit interest in telephone revenues.").

[162] Letter from Jason Marks, Esq., to Mignon Clyburn, Acting Chair, FCC, WC Docket No. 12-375 at 1 (filed July 12, 2013) (Marks July 12, 2013 *Ex Parte* Letter).

[163] *Id*.

[164] GTL 2013 Comments at 14.

[165] *See* GTL 2013 Reply Exh. A at 56 (Florida Invitation to Negotiate (ITN) for Statewide Inmate Telephone Services listing five categories for which ICS providers may receive points in a bid process which include such things as technical response, initial cost sheets and statement of qualification); *see also* Transcript of Reforming ICS Rates Workshop at 315 (Richard Torgersrud, CEO, Telmate, describing State of Florida RFP that sought information on site commission payment levels when per-minute rates were $0.11, $0.12); Raher 2013 Reply at 6 (continued….)

that some correctional facilities may base their selection of a contractor largely on the amount of cash and/or in-kind inducement offered rather than being driven by proposals focused on high quality service at the most affordable rates for consumers.[166] In sum, market forces do not appear to constrain ICS rates. Absent Commission action here, it is clear that we will not have met our statutory obligation to ensure that rates are just, reasonable, and fair.

5. Societal Impacts of High ICS Rates

42. Excessive ICS rates also impose an unreasonable burden on some of the most economically disadvantaged in our society.[167] Families of incarcerated individuals often pay significantly more to receive a single 15-minute call from prison than for their basic monthly phone service. We have received tens of thousands of comments from individuals, including many personal stories from inmates, their family members and their friends about the high price of staying in touch using ICS.[168] These rates discourage communication between inmates and their families and larger support networks, which negatively impact the millions of children with an incarcerated parent,[169] contribute to the high rate of recidivism in our nation's correctional facilities, and increase the costs of our justice system.[170] Familial contact is made all the more difficult because "mothers are incarcerated an average of 160 miles from their last home, so in-person visits are difficult for family members on the outside to manage."[171]

43. Just, reasonable, and fair ICS rates provide benefits to society by helping to reduce recidivism.[172] The Congressional Black Caucus cites "a powerful correlation between regular communication between inmates and their families and measurable decreases in prisoner

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("[T]o say that procurement officials are focused on ensuring just and reasonable rates ignores the reality of the procurement process, in which administrators are interested in many non-price attributes of bids.").

[166] *See* PLS 2013 Comments at 7; Verizon 2013 Comments at 2 (explaining that competition for the contract tends to revolve around the commission percentage that the bidder is willing to pay the corrections facility, and the calling rates that the bidders will charge the collect call recipients of the inmates appear to be irrelevant to the process of selecting a provider). Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 26, 2013) (describing an RFP process that was modified after all provider proposals were received to require that the providers increase their ancillary charges, calling rates, and commission payment in order to continue to be considered). *But see* GTL 2013 Comments at 13 (explaining that because GTL is a large ICS provider it can charge lower rates and still pay high commissions thanks to economies of scale and other efficiencies).

[167] *See* Alternative Wright Petition App. A at 33; App. C.

[168] *See supra* note 2.

[169] *See supra* note 5.

[170] *See infra* para. 43.

[171] The Phone Justice Commenters 2013 Reply at 5; *see also* Transcript of Reforming ICS Rates Workshop at 48-52 (Charlie Sullivan, Founder, CURE, describing that women inmates receive few visitors during their incarceration).

[172] Studies have shown that family contact during incarceration is associated with lower recidivism rates. *See* The Center on the Admin. of Criminal Law 2013 Comments at 9-10 (*citing* Nancy G. La Vigne, *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. OF CONTEMP. CRIM. JUSTICE 314, 316 (2005)).

recidivism rates."[173] In addition, NARUC formally endorsed "lower prison phone rates as a step to reduce recidivism and thereby lower the taxpayer cost of prisons."[174] As the Center on the Administration of Criminal Law explains, "a reliable way of decreasing the likelihood that prisoners will re-offend is to foster the growth of a family support structure that gives inmates a stake in the community to which they return and can provide them with the tools and incentives they need to succeed upon release."[175] Further, reducing recidivism would provide significant cost savings, as the annual cost to incarcerate one person is estimated at over $31,000 per year[176] or between $60 and $70 billion per year nationwide.[177] Indeed, one study indicates that a one percent reduction in recidivism rates would translate to more than $250 million in annual cost savings across the United States.[178]

44. Just and reasonable interstate ICS rates will produce further societal benefits by providing the justice system with cost savings and improved representation for inmates. Some public defenders and court-appointed lawyers limit the number of collect calls they accept because the cost of calls from correctional facilities has become overly expensive. One commenter states that the cost to one public defenders' office for such collect calls rose to $75,000 in one year alone,[179] while another says that some public defenders "spend more than $100,000 a year accepting collect calls from prisoners."[180] Commenters assert a correlation between lower rates and a lower incidence of contraband cell phone use in correctional facilities, noting that efforts including "good security measures for both visitation and perimeter security" are also contributing factors.[181] Reforms are necessary to ensure that these benefits, which unquestionably are in the public interest and will not be accrued in the absence of ICS rate reform, are realized.

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[173] CBC 2013 Reply at 3 (citing various studies and congressional testimony); *see also* CJP 2013 Reply, App. at 8-9 (citing Minnesota Department of Corrections, THE EFFECTS OF PRISON VISITATION ON OFFENDER RECIDIVISM, a study that found more frequent contact with loved ones reduced the rates of recidivism).

[174] NARUC 2013 Reply at 6.

[175] Center on the Admin. Of Criminal Law 2013 Comments at 10.

[176] *See* Transcript of Reforming ICS Rates Workshop at 124 (Anne Boyle, Commissioner, Nebraska Public Service Commission).

[177] *See* Transcript of Reforming ICS Rates Workshop at 126 (Alex Friedmann, Assoc. Director, HRDC).

[178] Petitioners 2013 Comments Exh. C, Bazelon Decl. at para. 48; Petitioners 2013 Reply, Exh. A, Bazelon Decl. at para. 10.

[179] *See* Mo Pub. Defender Sys. 2013 Comments at 1; *see also* The Phone Justice Commenters 2013 Comments at 12. Some commenters assert that high interstate ICS rates affect inmates' right to effective counsel. *See, e.g.,* Mo Pub. Defender Sys. 2013 Comments at 1; CJP 2013 Comments at 2-3.

[180] CJP 2013 Comments at 2.

[181] *See* NY DOCCS July 16, 2013 *Ex Parte* Letter at 2 ("The Department believes that a lower calling rate has also contributed to a lower rate of illicit cell phone use by inmates in New York. In 2012, the Department confiscated less than 100 cell phones, compared to over ten thousand annual seizures in comparably sized correctional systems.").

6. Reforms are Necessary to Ensure That Interstate ICS Rates Are Just, Reasonable, and Fair

45. Based on the record, we conclude that the marketplace alone has not ensured that interstate ICS rates are just and reasonable and that they are fair to consumers, as well as providers.[182] The Commission must therefore take action to establish just, reasonable, and fair rates. As the Commission has previously explained, "the just and reasonable rates required by Sections 201 and 202 . . . must ordinarily be cost-based, absent a clear explanation of the Commission's reasons for a departure from cost-based ratemaking."[183] Thus, although the Commission "is not required to establish purely cost-based rates," it "must, however, specially justify any rate differential that does not reflect cost."[184] The Commission has not previously justified such a departure in the context of ICS rates, nor do we find a basis in this record to do so now.[185] Given our findings above that the rates for ICS frequently are well in excess of the costs reasonably incurred in providing those services, we conclude that the rate reforms we begin in this Order are necessary to ensure they are just and reasonable.

46. Likewise, under section 276, although the Commission has previously found the term "fairly compensated" to be ambiguous, and acknowledged that a range of compensation rates could be considered fair, it has evaluated the question with reference to the costs of providing the relevant service, including in the context of ICS.[186] As noted above, the Commission traditionally prefers to rely on market forces, rather than regulation, to constrain rates. Thus, the Commission indicated in 1996 that it preferred to defer to the results of commercial negotiations, and in a 1996 order stated that "whenever a PSP is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied."[187] There, however, the Commission was focused on fair compensation from the perspective of ensuring that payphone providers received compensation that was not too low.[188] As the Commission has recognized, the concept of

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[182] *See* 47 U.S.C. §§ 201(b), 276(b)(1)(A).

[183] *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606 at 16619-20, para. 44 (1997) (citing *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996)); *see also, e.g., MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982).

[184] *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d at 529; *see also, e.g., ALLTEL Corp. v. FCC*, 838 F.2d 551, 556–58 (D.C. Cir. 1988).

[185] *See infra* Section III.C.1.

[186] *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3254-59, paras. 14-26 (2002) (interpreting what "fairly compensated for each and every call" means under section 276 in the context of ICS by reference to the costs of ICS).

[187] *Payphone Order on Reconsideration*, 11 FCC Rcd at 21269, para. 72.

[188] In particular, the Commission was explaining why it rejected ICS providers' proposal that they be entitled to receive an additional $0.90 federal rate element per call even though they were negotiating agreements for compensation. *Id*. Further, the Commission's analysis in the underlying decision at issue in that Order on Reconsideration indicates that, in deferring to compensation amounts in negotiated agreements, the Commission was particularly focused on the adequacy of compensation from the perspective of the payphone service provider. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act* (continued….)

fairness encompasses both the compensation received by ICS providers and the cost of the call paid by the end-user.[189] Given the significant record evidence regarding the many exorbitant rates for ICS today, except in areas where states have undertaken reform, continuing to rely upon negotiated agreements in this context will not adequately ensure fairness to the end-user paying the cost of the ICS because evidence is clear that this process does not constrain unreasonably high rates. We thus find the rate reforms begun in this Order are necessary to implement section 276(b)(1)'s "fair compensation" directive.

C. Framework for Just, Reasonable, and Fair ICS Rates

47. In this section, we create a new framework to ensure that interstate ICS rates are just and reasonable, as required by section 201(b), and provide fair compensation to providers and consumers of interstate ICS consistent with section 276. We require ICS rates to be cost-based. We identify the costs that are and are not to be included in determining whether a rate is consistent with the statute.

48. We address rates by adopting interim safe harbor rate levels and interim rate caps that work together to ensure that ICS rates are just, reasonable, and fair to both providers and end users. We adopt interim safe harbor interstate rate levels for prepaid and debit calls and separately for collect calls, and we will presume that interstate ICS rates at or below the safe harbors are cost-based and therefore just and reasonable under section 201(b) and fair under section 276. Specifically, we adopt initial interim safe harbor rates of $0.12 per minute for debit and prepaid interstate ICS calls and $0.14 per minute for collect interstate ICS calls. We adopt an interim rate cap of $0.21 per minute for debit and prepaid interstate calls, and $0.25 per minute for collect interstate calls.[190]

49. As of the effective date of this Order, ICS providers' interstate per-minute rates must be at or below the interim rate cap levels. An ICS provider may elect to charge rates at or below the interim interstate safe harbor rates and benefit from a presumption that such rates are just, reasonable, fair, and cost-based. Rates above the safe harbor will not benefit from such a presumption.

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of 1996, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541, 20578-79, paras. 73-74 (1996) (*Payphone Report and Order*) (discussing how negotiations would enable payphone providers to adequately protect their interests against the backdrop of default Commission-specified compensation amounts and observing that a mandatory per-call recovery amount for ICS providers "could possibly lead to a double recovery of costs").

[189] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 at 21302-03, para. 82 (2002) ("fair" compensation under section 276 "implies fairness to both sides"); *Payphone Third Report and Order* 14 FCC Rcd 2545 at 2570, para. 55 ("PSPs will be fairly compensated if, at a minimum, we . . . balance interests of PSPs and those parties that will ultimately pay the default compensation amount."); *see also Payphone Report and Order* 11 FCC Rcd at 20568 para. 51 (stating the Commission's intention to revisit the deregulated local coin rate if locational monopolies or other market failures allowed payphone owners to be overcompensated).

[190] We allow ICS providers to calculate whether their rates are at or below the interim safe harbor levels or the interim rate caps by calculating their compliance on the basis of a 15-minute call (including any applicable per-connection charges). *See infra* para. 88.

1. Interstate ICS Rates and Charges Must Be Cost-Based

50. As discussed above, the Commission typically focuses on the costs of providing the underlying service when ensuring that rates for service are just and reasonable under section 201(b). Likewise, the cost of providing payphone service generally has been a key point of reference when the Commission evaluates rules implementing the fair compensation requirements of section 276(b)(1)(A). In the *2012 ICS NPRM* the Commission sought comment on ways of regulating ICS rates based on the costs of providing ICS.[191] Although the Commission theoretically might deviate from such an approach, we find no basis to do so here and conclude that interstate ICS rates, which include per-minute charges, per-call charges, and ancillary charges and other fees charged in connection with such service, must be cost-based.

51. Section 276(b)(1) states that the Commission's regulations implementing that provision should, among other things, "promote the widespread deployment of payphone services to the benefit of the general public."[192] Beyond harming the end users paying ICS rates, excessive ICS rates, and the resulting negative consequences, harm the public more generally.[193] Since cost-based rates help avoid such negative consequences, this statutory language supports our reliance on such an approach. Our mandate to carry out our responsibilities under section 276(b)(1), along with the same underlying policy considerations, likewise persuades us that requiring cost-based interstate ICS rates will best implement section 201(b), as well.

52. We recognize that the term "cost" is itself ambiguous, and a range of possible interpretations of this term might be reasonable.[194] For purposes of the interim rules and requirements adopted in this Order, we evaluate whether ICS rates are cost-based by relying on historical costs. We expect that historical cost information will be most readily available to ICS providers for production to the Commission as needed, making this approach readily

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[191] *See, e.g., 2012 ICS NPRM*, 27 FCC Rcd at 16637, para. 18 (seeking comment on the "costs associated with the per-call charge" and whether "a prohibition on per-call charges would result in below-cost service"); *id*. at 16637, para. 19 (seeking comment on "costs associated with call security and [whether they are] incurred on a fixed or per-call basis"); *id*. at 16637, para. 20 (stating that "[c]ommenters advocating an alternative per-minute rate cap should provide specific, detailed cost information and other relevant data to support their proposed per-minute rate caps"); *id*. at 16637-38, para. 21 (seeking evidence with respect to the claim that the Petitioners' "proposed per-minute rate caps are arbitrary and capricious because they would preclude providers from recovering their legitimate costs of providing service"); *id*. at 16638, para. 25 (seeking "comment on whether the ICS Provider Proposal has provided sufficient cost, demand, and revenue detail to allow the Commission to determine whether the proposed rates are just and reasonable"); *id*. at 6638, para. 26 (seeking "comment on whether the underlying cost and demand factors for public payphones and ICS are similar enough to justify using a cost methodology designed for public payphones to set ICS rates"); *id*. at 16642-43, para. 37 (seeking comment on the treatment of site commissions, including whether "location rents are not a cost of payphones, but should be treated as profit"); *id*. at 16642, para. 35 (seeking "comment on any other proposals parties contend address the concerns raised in this proceeding"); *see also* NASUCA 2013 Comments at 4 ("As a means of securing just and reasonable rates, the ICS rules adopted by the Commission should therefore require ICS providers to justify their rates and their costs. The rules should declare that rates for interstate ICS calls are unjust and unreasonable to the extent the rates exceed the reasonable costs of providing ICS, including a reasonable return.").

[192] 47 U.S.C. § 276(b)(1).

[193] *See id.*

[194] *See, e.g., Verizon Comm. v. FCC*, 535 U.S. 467, 500 (2002).

administrable for purposes of interim rules that will represent an improvement over the *status quo* for interstate ICS rates, while we consider possible further reforms as part of the FNPRM. We discuss in further detail below the types of historical costs that are reasonably and directly related to the provision of ICS to be included in those rates.

2. Costs of Providing Interstate ICS

a. General Standard

53. In this section, we conclude that only costs that are reasonably and directly related to the provision of ICS, including a reasonable share of common costs, are recoverable through ICS rates consistent with sections 201(b) and 276(b)(1).[195] Such compensable costs would likely include, for example, the cost of capital (reasonable return on investment); expenses for originating, switching, transporting, and terminating ICS calls; and costs associated with security features relating to the provision of ICS.[196] On the other hand, costs not related to the provision of ICS may include, for example, site commission payments,[197] costs of nonregulated service,

[195] We acknowledge that ICS providers will have to apportion their costs between interstate and intrastate ICS calls. However, we leave it up to the individual providers to determine the best and most efficient way to do so for their companies. Contrary to the Dissent's suggestion, we are not imposing rate-of-return regulation on ICS providers. Cost considerations may and frequently do play a role in rate cap regulatory regimes without *ipso facto* converting such regimes into rate of return regulation. Indeed, the Dissent itself acknowledges the need for cost data and thus a cost analysis for waiver requests, *see* n. 310 *infra*, and, as the Dissent notes, rate of return regulation is complex; it requires ex ante review, tariff filings, detailed cost support in compliance with various accounting rules, and a prescribed rate of return, among other things. Dissent at 128-129. However, the rate cap approach that we adopt here is fundamentally different than rate-of-return regulation. Our approach does not rely on a prescribed rate of return, ex ante review, tariff filings, or compliance with cost accounting rules. Instead, our approach is tailored to provide flexibility for the ICS providers. *See, e.g., infra* para. 69.

[196] Examples of costs that the Commission would likely find appropriate for inclusion in interstate ICS rates include costs that are closely related to the provision of interstate ICS. Such costs may include costs of the equipment housed in the confinement facility or in remote locations. Costs for originating, switching, and the transport and termination of calls, which permit calls to be originated and completed, will likely constitute recoverable costs. *See, e.g*. GTL 2013 Comments at 5 ("GTL provides durable telephone receivers to minimize prison maintenance costs. . . ."). Security features inherent in the ICS providers' network would also likely constitute recoverable costs. *See* GTL 2013 Comments at 4-5; Securus 2013 Comments at 3; NSA 2013 Comments at 1; County of Santa Clara DOC 2013 Comments at 1. Examples of such costs include the costs of recording and screening calls, as well as the blocking mechanisms the ICS provider must employ to ensure that inmates cannot call prohibited parties. *See, e.g*., CenturyLink 2013 Comments at 8-9; GTL 2013 Comments at 4-5; Telmate 2013 Reply at 4-5. Moreover, ICS providers discuss the capital investments they have made for more sophisticated security features—including biometric caller verification based on voice analysis, and sophisticated tracking tools for law enforcement. *See* GTL 2013 Comments at 4-5; Securus 2013 Comments at 3; Letter from John E. Benedict, VP – Federal Regulatory Affairs & Regulatory Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 26, 2013) (CenturyLink July 26, 2013 *Ex Parte* Letter) (asserting that "in the past few years," its calling platform "has been upgraded to include features such as voice biometrics, tracking location of cell phones receiving calls, link analysis software, audio word search, and contraband cell phone extraction equipment and integration"). We also would likely find the costs of the storage of inmate call recordings, which are necessary for court proceedings, and any reports that the ICS provider must provide to the confinement facility are recoverable as well as the costs of maintenance and repair of the ICS network. *See* GTL 2013 Comments at 9; County of Santa Clara DOC 2013 Comments at 1. Costs relating to billing and collection of ICS charges are also likely recoverable. *See* Securus 2013 Comments at 4; CenturyLink 2013 Comments at 7.

[197] In this Order we find that site commissions are not recoverable through interstate ICS rates because the record makes clear that they are not a direct cost of providing interstate ICS. If commissions or other payments from ICS (continued….)

costs relating to general security features of the correctional facility unrelated to ICS, and costs to integrate inmate calling with other services, such as commissary ordering, internal and external messaging, and personnel costs to manage inmate commissary accounts.[198]

b. Site Commission Payments

54. The Commission has previously held that site commissions are—for purposes of considering ICS rates under section 276—an apportionment of profit, not a cost of providing ICS.[199] In the *2012 ICS NPRM*, the Commission sought comment on its prior conclusion that site commission payments, or "location rents are not a cost of payphones, but should be treated as profit."[200] Site commission payments are not costs that are reasonably and directly related to the provision of ICS because they are payments made to correctional facilities or departments of corrections for a wide range of purposes, most or all of which have no reasonable and direct relation to the provision of ICS.[201] After carefully considering the record, we reaffirm the Commission's previous holding and conclude that site commission payments[202] are not part of the cost of providing ICS and therefore not compensable in interstate ICS rates.[203]

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providers to correctional facilities reflect costs of providing ICS, providers have several avenues available to them. *See infra* note 203.

[198] *See, e.g.*, Pay Tel 2013 Comments at 13 (asserting that jail officials today are requiring ICS providers to integrate calling systems with other services such as commissary ordering and internal and external messaging); CenturyLink 2013 Comments at 8 (contending that ICS providers must at times bear the costs associated with "complex systems integrations with other providers/systems such as commissary banking/trust, and offender management databases").

[199] *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3262, para. 38 ("[C]ommissions . . . represent an apportionment of profits between the facility owners and the providers of the inmate payphone service."). We acknowledge that the term "site commission payments" is broad and what these payments reflect—and the terminology used to describe them—may vary from facility to facility. For purposes of this Order, our reference to "site commission payments" refers to payments in money or services from ICS providers to correctional facilities or associated government agencies, regardless of the terminology the parties to the agreement use to describe them.

[200] *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3254-55, para. 15; *2012 ICS NPRM*, 27 FCC Rcd at 16642-43, para. 37. The Commission has used location rents and site commissions synonymously throughout its ICS proceedings. *See id*.

[201] *See supra* para. 53.

[202] Many commenters support this finding. *See* HRDC 2013 Reply at 4 (asserting that it is the responsibility of correctional agencies and legislatures to provide rehabilitative programs for prisoners); Petitioners 2013 Reply at 26-27; *see also* Hamden 2013 Reply at 3-4; NASUCA 2013 Comments at 3-4, 10 (asserting that the FCC has recognized that commissions are profits for ICS providers rather than costs of ICS); Petitioners 2013 Comments at 21-23 (asserting that it is an unjust and unreasonable practice to require ICS customers to contribute *solely* for the purpose of providing excess profits to be divided between the ICS provider and the corrective agency) (emphasis in original); PLS 2013 Comments at 4-5 (asserting that it is unjust and unreasonable to fund these rehabilitative activities as a hidden cost in telephone bills paid by the families of prisoners, explaining that such charges serve as a hidden tax on a largely low-income and vulnerable population); Verizon 2013 Comments at 3-5 (stating that commissions have their place and are often used to fund programs that benefit inmates but they should be funded from other sources); NASUCA 2013 Reply at 10-11 (arguing that the unsupported variability of commissions is an indicator that they do not provide a reasonable basis for rates).

[203] Although it is clear that site commissions are a revenue stream to the correctional facility, we cannot foreclose the possibility that some portion of payments from ICS providers to some correctional facilities may, in certain

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55. We disagree with commenters[204] who argue that site commission payments should be treated as compensable ICS cost for the purpose of determining whether rates are just or reasonable under section 201(b).[205] These commenters argue that the analysis conducted by the Commission with respect to fair compensation under section 276 for payphone providers is fundamentally different from determining whether a service provider's rates comply with section 201(b).[206] We need not determine whether the standards for determining compliance with section 276 and section 201(b) are identical because under the "fair compensation" requirement of section 276 or the "just and reasonable" requirement of section 201(b), we reach the same conclusion: site commission payments are not a compensable category of ICS costs because

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circumstances, reimburse correctional facilities for their costs of providing ICS. As a result, we provide several avenues for exploring this issue further. First, we set the interim safe harbors and interim rate caps at conservative levels above costs in our record. Second, any ICS provider seeking a waiver of the rate cap or seeking to justify costs between the safe harbor and the interim rate cap may provide specific details about payments to correctional facilities that it contends are compensable for costs meeting our cost standards through interstate ICS rates as articulated in this Order. Third, as part of the mandatory data collection we initiate below, we will seek further information on payments to correctional facilities and whether they cover any costs of service. Finally, in our accompanying Further Notice, we seek comment on whether we should categorically find that payments to correctional facilities are not compensable costs, or whether there are certain compensable costs that those payments can legitimately address. In his Dissent, Commissioner Pai notes that this Order recognizes that excluding site commissions from cost data used to develop our safe harbor benchmark and rate cap may be an "underinclusive approach given that correctional institutions themselves often incur costs to provide ICS and those costs may need to be included in any costs-of-service estimates." *See* Dissent at 116, n.44. While it is correct that the rates and cost studies that the Commission used as a basis for the safe harbor benchmarks and the interim rate caps do not include site commission payments, the Commission did not exclude them. Rather, the rates used to establish the safe-harbor benchmarks are rates for service in states that have prohibited site commission payments. Also, the ICS provider cost studies that we use as a basis for the interim rate caps adopted in the Order were prepared by the ICS providers to show costs of service excluding site commission payments. *See infra* para. 75. Furthermore, we do not remove costs or adjust inputs from the data used to establish the interim rate caps. For example, both cost studies used to establish the interim rate caps use an 11.25% rate of return to determine the cost of capital. We do not opine on whether this input is appropriate in this context. Instead, we accepted the figures in the cost study, as asserted, without considering whether they represent accurate levels of costs that are reasonably and directly related to provision of interstate ICS and, therefore, are appropriately recoverable thought interstate ICS rates. Consequently, it is likely that these cost figures are overstated, but we accept that possibility as part of our decision to set conservative interim rate cap levels.

[204] *See* GTL 2013 Comments at 12-13; Telmate 2013 Comments at 13-14.

[205] We likewise disagree with commenters that suggest that the adoption of reasonable rates for interstate ICS requires the Commission to make judgments about the management and operation of correctional facilities. *See, e.g.*, Securus 2013 Comments at 8-10; CCPS 2007 Comments at 4. The relevant Commission inquiries include whether rates are reasonable and whether costs are compensable. Articulating cost-based rates in other contexts has not required us to make judgments about how the customers of various communications providers run their businesses. For example, in determining whether location rents were compensable costs in the traditional payphone context, the Commission did not make any inquiry into the management or operation of the businesses in which payphones were located. *See Payphone Third Report and Order*, 14 FCC Rcd at 2615-16, paras. 154-56. Nor do we need to do so here.

[206] Moreover, GTL argues that the FCC's prior conclusion did not take into account the fact that ICS "are quite different from the public payphone services that non-incarcerated individuals use" or that ICS "is economically different than other payphone services." GTL 2013 Comments at 12-13.

they are not costs that are reasonably and directly related to provision of ICS. While we appreciate the view that these excess revenues are paid to correctional facilities and thus may not be "profits" to ICS providers in the sense that they can keep these excess revenues and use them for whatever purpose they like, they are excess revenues above costs nonetheless.[207] This argument is analogous to that considered in the *USF/ICC Transformation Order*, where the Commission determined that "excess revenues that are shared in access stimulation schemes provide additional proof that the LEC's rates are above cost."[208] There, the Commission concluded that "how access revenues are used is not relevant in determining whether switched access rates are just and reasonable in accordance with section 201(b)."[209] The same principle applies here: the fact that payments from excess revenues are made to correctional facilities is not relevant in determining whether ICS rates are cost-based and thus just, reasonable, and fair under sections 201(b) and 276. Moreover, even if site commission payments are viewed as a cost rather than as excess revenues, they still would not be reasonably and directly related to the provision of ICS because, as noted above, they are simply payments made for a wide range of purposes, most or all of which have no reasonable and direct relation to the provision of ICS.[210]

56. We also disagree with ICS providers' assertion that the Commission must defer to states on any decisions about site commission payments, their amount, and how such revenues are spent.[211] We do not conclude that ICS providers and correctional facilities cannot have arrangements that include site commissions. We conclude only that, under the Act, such commission payments are not costs that can be recovered through interstate ICS rates. Our statutory obligations relate to the rates charged to end users—the inmates and the parties whom they call. We say nothing in this Order about how correctional facilities spend their funds or from where they derive. We state only that site commission payments as a category are not a compensable component of interstate ICS rates. We note that we would similarly treat "in-kind" payment requirements that replace site commission payments in ICS contracts.[212]

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[207] *See, e.g.*, *Payphone Third Report and Order*, 14 FCC Rcd at 2615-16, paras. 154-56 (discussing location rents).

[208] Petitioners 2013 Comments at 21-22; *USF/ICC Transformation Order*, 26 FCC Rcd at 17876-77, para. 666.

[209] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17876-77, para. 666.

[210] *Cf. USF/ICC Transformation Order*, 26 FCC Rcd at 17883-85, paras. 684-86 (adopting the proposal that "payments made by a LEC pursuant to an access revenue sharing arrangement should not be included as costs in the rate-of-return LEC's interstate switched access revenue requirement because such payments have nothing to do with the provision of interstate switched access service").

[211] *See* GTL 2013 Comments at 3, 6, 10-11; Securus 2013 Comments at 9-10 (asserting that the authority to impose site commissions is within the correction agency's authority and the Commission cannot prohibit providers from relying on site commissions "to generate the funds they require"); Telmate 2013 Comments at 16 (asserting that the FCC must carefully assess whether a decision to overrule state and local collection of ICS commissions should be made by Congress rather than by an independent administrative agency).

[212] *See* Letter from Peter Wagner, Executive Director, Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1-3 (filed Aug. 1, 2013) (noting that "an overly narrow concept of commissions leaves some glaring loopholes" that have made some state reform initiatives "far less effective than originally expected," including some "rebranding" of commissions as "administrative fees, with no actual change;" and urging the Commission to "take an expansive view of the commission system" so that companies do not continue to exert a "wild west attitude" toward reform attempts).

57. The record reflects that site commission payments may be used for worthwhile causes that benefit inmates by fostering such objectives as education and reintegration into society.[213] Law enforcement and correctional facilities assert that some or all of these programs would cease or be reduced if commission payments were not received[214] as no other funding source would be available.[215] Although these causes may contain worthy goals, we are bound by our statutory mandate to ensure that end user rates are "just and reasonable," and "fair," taking into account end users as well as ICS providers. The Act does not provide a mechanism for funding social welfare programs or other costs unrelated to the provision of ICS, no matter how successful or worthy.

58. We also are cognizant of the critical security needs of correctional facilities. For example, the U.S. Department of Justice has chronicled hundreds of criminal convictions involving the use of ICS as part of the criminal activity.[216] Moreover, according to one commenter, a disproportionately large percentage of ICS-enabled crimes target and victimize vulnerable populations consisting of victims, witnesses, jurors, inmates, and family members of these individuals.[217] While our actions to establish interim ICS safe harbors and rate caps prohibit the recovery of site commission payments, we include costs associated with security features in the compensable costs recoverable in ICS rates.[218] Security monitoring helps correctional facilities identify potential altercations; monitor inmates who the facility is concerned may be suicidal; prevent criminal activity outside of the jail; prevent violation of no-contact orders and witness tampering; and aid in the prosecution of criminal cases.[219] Our actions

[213] Some commenters indicate that site commission payments also may help cover the correctional facilities' costs of facilitating phone calls, video visits, security monitoring, and administration of the phone system. S*ee* La. DOC 2013 Comments at 3-5; TurnKey 2013 Comments at 4 (explaining that jails have to provide staff supervision, some equipment, and space for inmates to call or video visit with friends and relatives); CSSA 2013 Comments at 1.

[214] *See, e.g.*, La. DOC 2013 Comments at 3, Routt Cnty. Sheriff's Office 2013 Comments at 1; San Diego Cnty. Sheriff's Dep't. 2013 Comments at 1; SDDOC 2013 Comments at 3.

[215] *See* Idaho DOC 2013 Comments at 1; La. DOC 2013 Comments at 5; County of Santa Clara DOC 2013 Comments at 2; NSA 2013 Comments at 2 (commenting that counties may need to increase taxes). *But see* Letter from Michael S. Hamden to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, NSA Resolution, at 2 (filed Oct. 28, 2008) (NSA Resolution including language urging "the FCC to establish a firm ceiling for reasonable inmate calling rates and to enforce that ceiling").

[216] *See* Letter from Jay Gainsboro, Founder, JLG Technologies to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 Attach. at 4 (filed July 17, 2013) (JLG White Paper). According to one report, inmates have been documented using ICS to order executions, to continue running organized crime operations; to continue the direction of large drug trafficking, manufacturing and distribution activities; to order or participate in gang activities; and even to conspire to commit acts of terrorism. *Id.*; *see also* NSA 2013 Comments at 1 (explaining that individuals in local jails try to continue their criminal activities on the outside via ICS while they are incarcerated, contact witnesses with wrongful intent, call their victims, and plot and plan criminal enterprises with regularity).

[217] *See* JLG White Paper at 4; *see also* Securus 2013 Reply at 1-2.

[218] *See supra* para. 53 & n.196.

[219] *See generally* JLG White Paper; *see also* NSA March 25, 2013 *Ex Parte* Letter at 1; Coconino Cnty. Sheriff's Office 2013 Reply at 1; Deschutes Cnty. Sheriff's Office 2013 Reply at 1; Thurston Cnty. Sheriff's Office 2013 Reply at 1-2; OSSA 2013 Reply at 2.

in this Order take into account security needs as part of the ICS rates as well as the statutory commitment to fair compensation. Indeed, data from facilities without site commission payments, which form the basis for our interim safe harbor rates, demonstrate the feasibility of providing ICS on an on-going basis to hundreds of thousands of inmates without compromising the levels of security required by these states' correctional facilities.[220] Our interim rate caps are based on cost studies that include the cost of advanced security features such as continuous voice biometric identification.[221]

3. Interim Interstate Rate Levels

59. In the *2012 ICS NPRM*, the Commission sought comment not only on various rate cap alternatives, but also on other possible ways of regulating ICS rates, as well as any other proposals from parties.[222] Below, we adopt interim rate caps that include interim safe harbors

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[220] *See* Transcript of Reforming ICS Rates Workshop, at 186-87 (Jason Marks, former Commissioner, New Mexico Public Regulation Commission, stating that "There are no security problems in New Mexico."); NY DOCCS July 16, 2013 *Ex Parte* Letter at 1 (discussing the NY statute that requires the "department to . . . ensure that any inmate phone call system . . . provides reasonable security measures to preserve the safety and security of each correctional facility").

[221] *See* Pay Tel Cost Summary at 3, 8, 15.

[222] *See generally 2012 ICS NPRM*, 27 FCC Rcd at 16636-47, paras. 16-48. From the outset, Petitioners made clear that their proposed rate caps were designed to ensure that ICS rates better reflected the costs of providing ICS service. *See, e.g., Alternative Wright Petition* at 4, 16-18 (the Commission should base caps on charges for comparable services as well as service costs, because even though it "'is not a pure cost-based methodology,'" reliance on rates for comparable services "'enables [the Commission] to bring rates closer to costs'"). The Commission sought comment on these proposed caps, and on possible variations, seeking comment throughout the *2012 ICS NPRM* on ways of regulating ICS rates based on the costs of providing ICS. *See supra* para. 48 & n.191. Moreover, the "just and reasonable" standard under section 201(b) has traditionally been construed to require rates to be cost-based, absent Commission justification for a departure from that approach. *See supra* para. 45. The Commission also historically has evaluated the issue of fair compensation under section 276 with reference to the costs of providing the relevant service, including in the context of ICS. *See supra* para. 46. In this context, no one can be surprised that the Commission is now adopting caps and taking other steps to ensure that rates reflect costs.

More specifically, the Commission sought comment on how any caps should be set and how they should operate. *See, e.g., 2012 ICS NPRM*, 27 FCC Rcd at 16637, para. 20 (seeking comment on the cap proposal in the Alternative Wright Petition, including whether "the proposed rate caps [are] just and reasonable consistent with sections 201 and 276 of the Act," and "[i]f not, [whether] different rate caps [would] be appropriate," as well as the "factors [] the Commission [should] consider in determining an appropriate per-minute rate cap"); *id*. at 16638, para. 22 (seeking comment on "benefits to per-minute rate caps," as well as "perceived problems or challenges associated with" such caps); *id*. at 16638, para. 23 (seeking comment on how the Commission should implement rate caps in the ICS market if it decided to do so). What we do here is establish a system that relies on rate caps as well as potential complaints that rates are not based on costs, which is the kind of variant on rate caps that was contemplated in the *NPRM*. The *2012 ICS NPRM* also specifically highlighted the relationship between possible rate caps and tailoring rates to the cost of providing service. For example, in earlier comments on these issues the GEO Group argued that there were variations among facilities in the costs of providing ICS and to reflect those in setting rate maximums the Commission would need to rely on facility-specific ICS cost evaluations. GEO Group 2007 Comments at 10-11. The *2012 ICS NPRM* sought comment on those arguments, in conjunction with asking how the Commission should implement rate caps if it decided to do so. *2012 ICS NPRM*, 27 FCC Rcd at 16638, para. 23 & n.76; *see also* Petitioners 2007 Reply at 15 (observing that "[s]ome opponents [of Petitioners' proposal] go so far as to suggest that each prison facility should have its own individualized cost-based rate") (citing GEO Group 2007 Comments at 10). The rate cap approach we adopt addresses both the concern about variability in ICS costs and the potential disconnect between a particular rate cap and the cost of providing ICS service. In particular, it sets caps at a level

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setting boundaries for rates that will be treated as lawful absent a Commission decision to the contrary,[223] and serve to minimize regulatory burdens on ICS providers.[224] The interim rate cap framework we adopt enables providers to charge cost-based rates up to the interim rate caps.[225]

a. Interim Safe Harbors for Interstate ICS Rates

60. We adopt interim safe harbor rates of $0.12 per minute for debit and prepaid interstate ICS calls and $0.14 per minute for collect interstate ICS calls. Rates at or below these

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designed to reflect the evidence of potential variability in ICS costs, *see* Section III.C.3.b(i), while also operating in a manner that enables rates to be linked back to costs on an ongoing basis, similar to the rate benchmark advocated by NASUCA in its comments in response to the *2012 ICS NPRM*, *see infra* note 224. We thus disagree with the Dissent that there was inadequate notice for the Commission to specify a cost-based rate requirement as part of a rate cap framework such as the one adopted here. *See* Dissent at 112-116. The *2012 ICS NPRM* sought comment on the relevant issues and made clear that we were contemplating such a rule; at a minimum, it plainly left open the possibility that we would implement rate caps in a manner that addressed concerns about the variability in ICS costs, such that the notice "adequately frame[d] the subjects for discussion." *Omnipoint v. FCC*, 78 F.3d 620, 631-32 (D.C. Cir. 1996) (citing precedent that "[a] final rule is not a logical outgrowth of a proposed rule 'when the changes are so major that the original notice did not adequately frame the subjects for discussion,'" and holding that the Commission's action there was a logical outgrowth of its notice where the notice had identified certain concerns about extending a rule but the record revealed ways to address those concerns, leading the Commission to modify the rule as the commenters proposed); *see also, e.g.*, *Nat'l Mining Ass'n v. Mine Safety and Health Admin.*, 512 F.3d 696, 699-700 (D.C. Cir. 2008) (rule was a logical outgrowth of a proposal where the proposal suggested a particular rule but left open certain questions about how it would be implemented). Contrary to the Dissent's claim, this conclusion is consistent with the recent *Time Warner* decision, which merely applied existing case law to find that a particular rule – the so-called "standstill" rule – was promulgated in violation of the APA. *Time Warner Cable Inc. v. FCC*, Nos. 11-4138(L), 11-5152(Con), slip op. (2d Cir. Sept. 4, 2013); *see* Dissent at 113, 115. There, the Commission had not provided notice of issues related to the standstill rule but nonetheless adopted it primarily based on the belief that it fell within the APA's exception for procedural rules, *see* slip op. at 19. The Court found that the standstill rule was substantive, not procedural, and then held that the rule – once stripped of its presumed exemption under the APA – could not be considered a logical outgrowth of issues considered in the earlier NPRM, whose solicitations were so general that not a single party commented on the merits of a possible standstill provision. *Id.* at 60-63. In contrast, the framework at issue here was never viewed as exempt from the APA's notice requirements; has evolved out of specific rate cap and cost issues teed up in the *2012 ICS NPRM*; and was the subject of extensive comments, reply comments, and ex parte submissions in the record, including the submission of cost studies intended to provide a basis for rates adopted by the Commission.

[223] *See infra* Section III.H.

[224] As described in greater detail below, our rate caps are similar to rate benchmarks proposed by NASUCA that would operate "without prejudice to any party's ability to argue that a higher or lower rate is in fact just and reasonable in a particular case." NASUCA 2013 Comments at 5-6. Because we conclude that our rate caps are set conservatively, *see infra* para. 83, we rely on a waiver process for ICS providers with costs that necessitate higher rates to justify rates above the rate caps. *See infra* Section III.C.3.b(ii). We also allow the Commission or others to challenge ICS providers' rates set at or below the level of the cap if not cost-based, in which case we may require lower rates, potentially including refunds. *See infra* Section III.H.4. However, to ease administrability, provide additional protection for ICS providers under this interim framework, and focus the Commission's resources where they are most likely to be beneficial, we insulate providers from the possibility of being subject to refunds when charging rates at or below the interim safe harbor levels. Consistent with our discussion above, *see supra* note 222, we disagree with the Dissent that there was insufficient notice to adopt rate caps that include a safe harbor mechanism. Dissent at 114-115.

[225] As noted above, we emphasize that ICS providers should not read this Order as providing a basis to increase rates up to either the interim safe harbor or interim rate caps, though they may raise rates to the extent necessary to recover their direct and reasonable costs on a holding-company level. *See supra* note 19.

interim interstate safe harbor rate levels will be treated as lawful, *i.e*., just and reasonable under section 201(b) of the Act and ensuring fair compensation under section 276(b)(1)(A) of the Act, unless and until the Commission makes a finding to the contrary.[226] Providers will have the flexibility to take advantage of the interim safe harbor rates if they so choose. Providers that elect to take advantage of the safe harbors will enjoy the presumption that their rates are lawful and will not be required to provide refunds in any complaint proceeding.

(i) Methodology for Setting Interim Safe Harbor Per-Minute Rate Levels

61. We base our methodology for setting conservative interim interstate ICS safe harbor rate levels on our analysis of rate data in the record. In particular, the record includes detailed data on interstate ICS rates charged by ICS providers serving various types of correctional facilities. Specifically, HRDC filed detailed and comprehensive 2012 ICS rate data for virtually all of the state departments of corrections in the country. We conclude that these data provide a reasonable basis for establishing safe harbor rates that are intended to approximate the costs of providing interstate ICS – costs that include fair compensation (including a reasonable profit) and include full recovery for security features the correctional facilities have determined to be necessary to protect the public safety.[227] Further, these safe harbor rates are validated by other evidence in the record.

62. The comprehensive rate data submitted by HRDC include data for seven states that have excluded site commission payments from their rates.[228] Rates in every state, including

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[226] To ensure that ICS providers are fairly compensated, we adopt a number of provisions that will ensure providers have adequate flexibility to implement the rates we establish. We also note that the "fair" standard in section 276 considers the impact on consumers. *See supra* para. 14. An ICS provider will lose the benefit of the safe harbor if rates at any of the facilities it serves exceed the safe harbor rate levels. We impose this requirement for several reasons. First, the record makes clear that ICS providers typically serve multiple correctional facilities by providing many of the necessary functionalities out of centralized locations. *See, e.g*., Pay Tel 2013 Comments at 13; Securus 2013 Comments at 4. Doing so significantly reduces the costs incurred on an individual facility basis. Moreover, the record indicates that ICS providers often obtain exclusive contracts for several facilities in a state, rather than specific rates per facility. *See, e.g*., Request for Proposal for Contractual Services, Inmate Calling services RFP No. 2505Z1, *available at* http://www.prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=Nebraska (ICS contract between Public Communications Services, Inc. and Nebraska Department of Correctional Services, dated July 8, 2008); *see also* Susskind June 6, 2013 *Ex Parte* Letter. Second, we have adopted interim safe harbor rates at conservative levels to ensure that providers are fairly compensated across facilities with different cost levels. In doing so, we find it would be unreasonable to allow ICS providers to be subject to the burdens of a challenge for only their higher cost facilities while, at the same time, obtaining the benefits of the safe harbor to protect rates in their lower cost facilities. *See infra* para. 121.

[227] HRDC 2013 Comments, Exh. A; HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B.

[228] The state departments of correction that do not include commissions are Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island, and South Carolina. *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B. Although California expressly does not include commission payments in its ICS rates, analysis of its ICS contract indicates its ICS rates recover the costs of significant in-kind contributions that, under the contract, the ICS provider is required to make, in addition to the costs of ICS. *See* Standard Agreement, *available at* http://www.prisonphonejustice.org/includes/_public/rates//California/CA_current_rates_from_2012_contract.pdf (ICS rate sheet for contract between GTL and California Technology Agency, dated May 31, 2012). Because

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the non-commission states, were included by ICS providers in their bids for state ICS contracts, such that we can presume that they are high enough to cover the providers' costs. We find that this subset of rates, derived from states that have eliminated site commissions and maintained adequate security, is the most relevant to our approach to determining the costs that should still be recoverable through interstate ICS rates. The subset provides a reasonable basis for establishing a conservative proxy for cost-based rates.[229] We set our interim safe harbor at conservative levels to account for the fact that there may be cost variances among correctional facilities.[230]

63. We first derive an interim safe harbor rate for interstate ICS debit and prepaid calls. We establish a single rate for both debit and prepaid calls, given the evidence that costs for both billing approaches are substantially similar.[231] We begin by calculating the average per-minute interstate ICS debit and prepaid call rates of the seven identified state departments of corrections. We assume a call duration of 15 minutes for purposes of our calculation.[232] We then

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California's ICS rates recover the costs of required in-kind contributions, we find that these rates are dissimilar to the other seven states that have prohibited site commissions and we therefore do not include California in the subset of data used to derive the interim safe harbor.

[229] Our use of these states' data does not indicate that we conclude these interstate rates are necessarily at cost. Instead, we select them because they exclude site commissions, which we find is the most important factor leading to interstate ICS rates being above cost. There may well be other factors driving these rates above what we would consider to be reasonable cost but we nevertheless include these states to make a conservative safe harbor rate level calculation.

[230] *See infra* para. 69. We note that in this Order we are not simply "calling" our measures conservative, *cf.* Dissent at 120, but rather are relying on record evidence in a conservative fashion. Indeed, as we emphasize herein, the rates we set for the safe harbor and cap reflect costs that *exceed* the cost data that any party submitted in the record.

The Dissent also faults the Order for setting a uniform rate based on average costs of serving multiple facilities, claiming that a "one-size-fits-all" approach is inherently arbitrary. Dissent at 120-123. But the Dissent itself supports a uniform rate cap of 19 cents a minute for debit calls, to apply to all prisons regardless of size. Dissent at 131. Moreover, if this argument had merit, it would mean that the Commission never could base a rate on any approach that relied on the averaging of relevant record data. If this argument were to be accepted, it would lead to absurd results, requiring the Commission to eschew any form of averaging – whether across providers, across facilities, across geographic regions, or across calls – whenever there is some degree of "variability" in the averaged data. Dissent at 120-121. In the end, it would not be possible, much less practical, to set this kind of exquisitely granular rate – unsullied by any taint of averaging notwithstanding the Dissent's arguments. Requiring such an outcome would be at odds with the Commission's long-standing practice of basing prescribed rates on some form of averaged data. *See infra* note 280.

[231] See HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (citing states such as Arizona, Maryland, Missouri, Nebraska, New Hampshire, South Carolina, South Dakota, and Virginia where rates for pre-paid and debit calls are the same and are both below those for collect calls).

[232] We find that the record supports an average call duration of 15 minutes. The record contains various assertions as to the call duration that should be used for purposes of calculating ICS rates. Petitioners use a 15-minute call duration as the basis for their proposal. Petitioners 2013 Comments, Exh. C, Bazelon Decl. at 14. They also state that in 2010 the average duration for interstate ICS calls in California prisons was 12.1 minutes. *Id.* The flat interstate ICS rates in South Carolina are based on a maximum 15-minute call length. *See* State of South Carolina B&CB DSIT DOC Inmate Calling System Contract, *available at* http://www.prisonphonejustice.org/includes/_public/contracts//South%20Carolina/SC_contract_with_GTL_20112016_with_RFP.pdf at 17 (ICS contract between GTL and the South Carolina DOC dated April 22, 2011). The flat interstate ICS rates in New Mexico are based on a 20-minute maximum call length. *See* New Mexico ICS Contract, (continued….)

total the charges for a 15-minute call for each state, taking into account per-minute as well as per-call charges. We divide that total by 15 to calculate an average per-minute rate for each state. Finally, we average those per-minute rates across the seven relevant states. This calculation results in an average rate of $0.1186 per minute for a 15-minute debit call.[233] We similarly calculate the same states' prepaid interstate ICS calling rates, to obtain an average prepaid rate of $0.1268 per minute. Given the similarities of debit and prepaid charges, we group the two into a single category[234] and average those rates to obtain an overall per minute average of $0.1227, which we round to $0.12 per minute.[235] We therefore adopt $0.12 as the safe harbor per minute rate for interstate ICS debit and prepaid calls. As described in more detail below, ICS providers have the flexibility to satisfy the safe harbor either by certifying that the per-minute rate is at or below the safe harbor or by demonstrating that their total charge for a 15-minute call is at or below the safe harbor per-minute rate times 15.[236]

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Attach. A. Securus states that the average duration of interstate calls across all of its facilities in 2012 was 11.63 minutes. Securus 2013 Comments, Expert Report of Stephen E. Siwek at 8. Given that lower rates tend to stimulate usage, it is reasonable to anticipate that call durations would tend to increase under our rates. We therefore utilize a 15-minute call duration to convert per-call charges to per-minute charges.

[233] To derive this per minute average, we initially converted the per-call charges that some of the states include in their rates to per-minute charges using a 15-minute call duration. For example, the ICS provider for South Carolina's state prisons charges a $0.75 per-call charge which was divided by 15 minutes to yield a per-minute charge of $0.05. We added the resulting per minute amounts to the per-minute rates also charged by the providers for the eight states to derive a total per-minute charge for each state. Finally, we averaged the total per-minute charges for the seven states to arrive at the average per-minute rate of $0.12. The rate data was submitted by HRDC. *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B.

[234] *See supra* note 231.

[235] Even with such rounding, we conclude that our interim safe harbor is conservative. Indeed, in evaluating the data from the states that have eliminated the use of commissions, we note that there are five state rates with a cluster within the $0.04 - $0.08 per minute range and two other states outside this cluster with significantly higher rates. *Compare* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (per-minute rates for interstate debit calls of $0.043 for New Mexico, $0.048 for New York, $0.05 for Missouri and South Carolina, and $0.08 for Nebraska) *with id.* (per-minute rates for interstate debit calls of $0.21 for Michigan and $0.348 for Rhode Island) (assuming a 15 minute call duration to translate per-call charges into effective per-minute rates). Given that evidence in the record does not suggest a dramatic difference in costs among states (and, indeed, such states may be served by the same ICS provider using common, centralized facilities), the states with higher rates are likely to include non-ICS costs and therefore could reasonably be excluded from the state rate data used to determine a reasonable interim safe harbor for interstate debit ICS rates. Excluding these states would result in an average per-minute rate of $0.054, less than half the safe harbor debit rate we set above. Although evidence in the record suggests that some of the seven states that have eliminated commissions may continue to include significant non-ICS costs in setting rates, in the interest of being conservative in setting our interim safe harbor, we choose not to exclude these states from our calculation.

Moreover, looking at these states from a statistical perspective, the two states with higher rates, Michigan and Rhode Island, have an average debit cost of $0.279 per minute whereas the other five states have an average debit cost of $0.054 per minute, less than one-fifth of the Michigan and Rhode Island level. An analysis of variance (ANOVA) indicates that this difference of $0.225 per minute is statistically significant ($p = 0.002$) under assumptions of normality. That is, there is only one chance out of 500 that one would randomly draw a sample with these characteristics if all seven rates came from a normal distribution with a common mean and standard deviation. Consequently, statistical evidence indicates that Michigan and Rhode Island debit costs are drawn from a different distribution than the debit costs for the other five states.

[236] *See infra* para. 88.

64. We derive a corresponding interim safe harbor rate level for interstate ICS collect calls by utilizing the data provided by HRDC for the interstate ICS collect calling rates for the same set of states. Employing the same methodology utilized by ICS debit and prepaid calls, we determine the average rate for a 15-minute interstate ICS collect call for these states to be $0.1411 per minute, which we round to $0.14 per minute. We therefore adopt $0.14 per minute as the safe harbor rate for interstate ICS collect calls.[237]

65. Other data in the record further validate that the interim interstate safe harbor rates we establish here are just, reasonable, and fair. In addition to being higher than rates currently charged by several state departments of corrections without site commissions,[238] our $0.12 per minute safe harbor debit call rate is at or above the rate that would result if site commissions were deducted from the rates in ten states that allow them.[239] Similarly, there are nine states with site commission payments in their rates whose interstate ICS collect rates are at or below our $0.14 per minute safe harbor collect call rate when their commissions are deducted.[240] Additionally, our interim safe harbor rate levels closely approximate the rates currently being charged in ICE-dedicated facilities.[241]

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[237] This interstate collect ICS rate is likewise conservative. The collect rate data of the seven states that have eliminated site commissions reflect substantially the same distribution pattern as did the debit and prepaid rates. *See supra* note 235. Five state rates are clustered in a relatively low range between $0.04 and $0.12 with the same two states' rates being significantly higher. Given the lack of record evidence suggesting a dramatic difference in costs among states, the states with higher rates likely include non-ICS costs and therefore could reasonably be excluded from the state rate data in a determination of a reasonable interim safe harbor for interstate collect ICS rates. Excluding these states would result in an average per-minute rate of $0.074, or approximately half the safe harbor rate we set above for interstate ICS calling. In the interest of being conservative in setting our interim safe harbor, however, we choose to include these states from our calculation. A statistical analysis of the state rate data would also lead to exclusion of these two states. Consistent with our view that both Michigan and Rhode Island departments of corrections debit rates likely include non-ICS costs, which we consider irrelevant to the recovery of ICS, both states stand out as unusual in the distribution of per-minute rates for a 15-minute collect call. They are the only states with collect rates that exceed $0.117 per minute. Taken together, Michigan and Rhode Island have an average collect rate of $0.3085 per minute, while the other five state have an average collect rate of $0.0742 per minute, less than one-fourth that of Michigan and Rhode Island. An analysis of variance (ANOVA) indicates that this difference of $.234 per minute is statistically significant ($p = 0.0045$) under assumptions of normality. That is, there is only one chance out of 220 that one would randomly draw a sample that looked like this if all seven rates came from a normal distribution with a common mean and standard deviation. Consequently, the evidence indicates that Michigan and Rhode Island collect rates are drawn from a different distribution than the collect rates for the other five states.

[238] *See* HRDC 2013 Comments, Exh. A; HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (New York charges $0.048 per minute for all calls ($0.72 total for a 15-minute call), New Mexico charges a flat rate of $0.65 per call for all calls ($0.043 per minute for a 15-minute call), and South Carolina charges effective rates of $0.05 per minute for debit calls and $0.12 per minute for collect calls (based on flat fees; assuming a 15 minute call)).

[239] The states are Colorado, Connecticut, Florida, Louisiana, Massachusetts, Montana, New Hampshire, North Carolina, Oklahoma, and Vermont. *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B. Per-call rates were translated into per-minute rates by assuming a 15 minute call duration.

[240] The states are Connecticut, Florida, Indiana, Louisiana, Massachusetts, Montana, Oklahoma, North Carolina, and Wisconsin. *Id.* Per-call rates were translated into per-minute rates by assuming a 15 minute call duration.

[241] *See* Telmate July 26, 2013 *Ex Parte* Letter at 2 (Telmate and its licensee Talton Communications, Inc. provide ICS services to ICE detainees at prices of $0.1235/minute (prepaid calling anywhere in the United States) and $0.15/minute (collect calling anywhere in the US.).

66. Data in the record on the demand stimulation effects of lower rates further validate the conservative nature of our safe harbor rates and the likelihood that the safe harbors will provide fair compensation to ICS providers. There is general agreement in the record that lower rates will stimulate additional ICS usage, which will help to offset any revenue declines ICS providers might experience from lower rates.[242] For example, petitioners cite an immediate increase in call volume of 36 percent following a significant reduction of ICS rates by New York in 2007. The New York State Department of Corrections and Community Supervision reported that call volumes continued to increase following their ICS rate reductions – from a total of 5.4 million calls in 2006 to an estimated 14 million calls in 2013 – an increase of approximately 160 percent.[243] Also, Telmate reported a 233 percent increase in call volume in one state when it brought its interstate ICS rates down to the $0.12 per minute level of its local ICS rates.[244] Telmate also saw an increase of up to 300 percent in call volume when it lowered its rates elsewhere.[245] Given the largely fixed cost nature of the ICS industry,[246] call volume increases are likely to generate significant revenues for ICS providers without resulting in significant cost increases. Such revenue increases are likely to offset in part the revenue declines ICS providers might otherwise experience from lower rate levels.[247]

67. *Other Methodologies.* We find that using comprehensive state rate data[248] to establish the interim safe harbor rates is preferable to other methodologies proposed in the record. For example, Petitioners propose a rate-setting methodology that combines an analysis of prevailing non-ICS prepaid calling card rates with estimates of the additional costs necessary

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[242] Petitioners 2013 Comments, Exh. C, Bazelon Decl. at 14; *see also* Securus 2013 Reply at 9-10 (agreeing with the percentage increase in usage but ascribing it to a single rate decrease by New York).

[243] *See* NY DOCCS July 16, 2013 *Ex Parte* Letter at 2.

[244] *See* Telmate 2013 Comments at 13.

[245] *See* Telmate July 26, 2013 *Ex Parte* Letter at Attach; *see also* Transcript of Reforming ICS Rates Workshop at 253 (Richard Torgersrud, Chief Executive Officer, Telmate) ("we have done this in Oregon Department of Corrections, Montana Department of Corrections and we've done it for Homeland Security where we have implemented 16 cents per minute or less for calls. In doing so, we've seen up to 300 percent increase in call volume").

[246] *See, e.g.*, CenturyLink 2013 Comments at 7 ("In general, the telecommunications business is a high fixed cost business, and most fixed costs are incurred before any revenues are generated. This is especially true in the ICS market.").

[247] Petitioners and Securus both attempt to quantify the elasticity of demand for ICS. Petitioners estimate the elasticity of demand to be -0.63 based on the increase in call volumes following New York's rate reduction in 2007. Petitioners 2013 Comments, Exh. C, Bazelon Decl. at 22-23. Securus disputes in part Petitioners methodology and instead calculates a relatively higher demand elasticity of -0.72. Securus 2013 Reply, Expert Rebuttal Report of Steven E. Siwek at 4. Neither calculation takes into consideration the much more considerable call volume increases that took place in New York in subsequent years. *See* NY DOCCS July 16, 2013 *Ex Parte* Letter at 2 (reporting an estimated increase of approximately 160% between 2006 and 2013). This level of usage increase indicates that demand elasticity may be greater than estimated by either party. Additionally, Telmate reported data for the Oregon Department of Corrections that also show greater demand elasticity. *See* Telmate July 26, 2013 *Ex Parte* Letter, Attach. A at i (by lowering its rate for the Oregon Department of Corrections for all calls by approximately 43 percent, call volume increased approximately 48 percent).

[248] *See generally* HRDC June 8, 2013 *Ex Parte* Letter at Rev. Exh. B.

to provide ICS.[249] Using their methodology, Petitioners propose a per-minute rate of $0.07 for both collect and debit interstate ICS calls.[250] Other commenters support Petitioners' approach.[251] Some ICS providers, however, oppose Petitioners' proposal, stating that interstate ICS is not comparable to prepaid calling card services[252] and that basing a methodology on such an assumption could preclude ICS providers from being fairly compensated.[253] Some claim that the rate levels proposed by Petitioners, if adopted, would undermine ICS providers' financial viability.[254] We do not find on the basis of this record that using commercial prepaid calling card rates is a reasonable starting point for calculating ICS calling rates given the significant differences between the two services, most notably, security requirements. Further, Petitioners' proposed methodology relies on combining prepaid calling card rates with ICS providers' costs.[255] Because the two sets of data are not necessarily related, it would be difficult for us to adopt this methodology as the basis for our rates without further explanation.[256]

68. We also decline to base our safe harbor rates on the call volume, cost, commission, and revenue data submitted by Securus or the cost data submitted by CenturyLink.[257] While Securus' data provide some insight into the costs of its ICS operations, we have concerns about relying entirely on these data to calculate rates, in part because Securus did not provide the disaggregated data used to derive the report's total cost results, and the data it submitted did not distinguish between collect, debit, or prepaid calls.[258] Similarly, consistent with our discussion below, we decline to base our safe harbors on the cost data CenturyLink submitted given the absence of underlying data, the lack of a description of its methodology, and the lack of a distinction between debit, prepaid and collect calling costs.[259]

69. *Additional Considerations.* We disagree with concerns that it is not feasible to adopt uniform rates for all correctional facilities, particularly with regard to the safe harbors we

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[249] *See* Petitioners 2013 Comments at 3; *see also id.*, Exh. C, Bazelon Decl. at 9-17.

[250] *See* Petitioners 2013 Comments at 3.

[251] *See, e.g.*, NCL 2013 Reply at 2.

[252] *See* GTL 2013 Reply at 2 ("Traditional long distance service are not comparable to inmate calling services given that the services 'have significantly different architectures, features, operations and cost structures.'").

[253] *See* Pay Tel 2013 Reply at 2 ("Petitioners' latest modification would drastically lower the proposed benchmark ICS rate cap to a punitive, unrealistic level.").

[254] *See, e.g.*, Telmate 2013 Reply at 2 ("The proposed rate cap of $0.07 per minute . . . would . . . reduce margins for ICS providers so severely that many, if not most, firms would as a rational business matter be forced to consider abandoning the market in relatively short order.").

[255] For example, prepaid calling cards do not include additional security features typically needed for ICS. *See, e.g.*, CenturyLink 2013 Comments at 12 n.27; CCA 2007 Comments at 16-17.

[256] *Cf. MCI v. FCC*, 143 F.3d 606, 608. The court rejected the Commission's payphone rate stating that "the Commission never explained why a market-based rate for coinless calls could be derived by subtracting *costs* from a *rate* charged for coin calls." *Id.* (emphasis in original).

[257] *See generally* Securus 2013 Comments, Expert Report of Stephen E. Siwek.

[258] *See* Petitioners 2013 Reply at 9; *id.*at Exh. A, Bazelon Reply Decl. at 7-9.

[259] *See infra* note 278.

are establishing here.[260] Our safe harbors are not binding rates but are designed to give providers that elect to use them an administratively convenient pricing option that offers a rebuttable presumption of reasonableness. If providers serving jails or other facilities with different cost characteristics do not choose to use them, they may price their service up to the rate caps we establish below or seek a waiver of those caps. Ultimately, we believe that the safe harbors are set at levels that are likely to ensure fair compensation for providers serving a significant proportion of inmates. Accordingly, we find that it is reasonable to establish a uniform set of interim safe harbor rate levels for providers serving different sizes and types of correctional facilities. Ultimately, we conclude that by setting the interim safe harbor rates at reasonable levels and providing flexibility to providers implementing the rates, including the ability to charge cost-based rates up to the interim rate cap, our interim interstate safe harbor rates will ensure that ICS providers are fairly compensated.

70. Because we find that the interim safe harbor rates we establish here will provide fair compensation to ICS providers and will encourage continued investment and deployment of ICS to the general public, we do not find persuasive the assertion that regulation of interstate ICS would negatively impact ICS providers generally,[261] possibly even curtailing ICS access.[262] Rather, our finding is supported by the fact that many state departments of correction make ICS available to inmates at rates lower than those we implement here and nonetheless operate in a safe, secure, and profitable manner.[263] Moreover, testimony in our record indicates that following a legislative mandate to lower rates in New Mexico, the New Mexico Corrections Department released an RFP for ICS that prescribed even lower rates than those adopted in the state's reform proceeding.[264] ICS continues to be made available to inmates even at these lower rates.

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[260] *See* Telmate 2013 Comments at 3 ("it is difficult to contemplate fashioning a single regulatory scheme applicable consistently nationwide"); Pay Tel 2013 Comments at 9 ("It is improper to paint either (all facilities or all providers) with one broad brush."); GTL 2013 Comments at 35; Securus 2013 Comments at 19; Pay Tel 2013 Reply at 6-7.

[261] *See* Ala. Sheriffs Assoc. 2013 Reply at 1 ("If the FCC enacts price caps which severely reduce or eliminate the financial incentive of private telephone companies to provide inmate phone service, many correctional facilities will simply be unable to afford to provide phone services to inmates at all."); OSSA 2013 Reply at 2 ("[T]he proposed ICS rate reforms proposed by petitioners may well reduce long-term inmate access to telephone services in correctional facilities.").

[262] *See* Telmate 2013 Comments at 4 ("Without careful calibration, a federal cap to interstate inmate rates . . . could in fact kill the business by making it financially unprofitable overall."); CenturyLink 2013 Comments at 18-19 ("Were the FCC to exercise its authority to cap the rates that ICS providers can charge for their services without corresponding adjustments being made by facilities and systems, the result would be to make the ICS market uneconomic to serve . . . . The net result would be to make it more, rather than less, difficult for inmates and their families to maintain telephonic contact with one another.").

[263] *See, e.g.*, HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (citing states such as New Mexico, New York, Missouri and others with interstate ICS rates below those established here).

[264] *See* Transcript of Reforming ICS Workshop at 202 (Jason Marks, former Commissioner, New Mexico Public Regulation Commission, stating that "by the time that we were . . . doing our rulemaking, our larger facilities actually had rates in place by contract that were lower than our caps").

71. Additionally, by using existing rates from states that have prohibited site commission payments to derive the interim safe harbors, we believe that our reforms will not impact security or innovation in the ICS market. Indeed, we note that innovation will continue to drive down costs through automation and centralization of the security features correctional facilities require. Some commenters have raised concerns that decreasing ICS rates will result in a lower quality of service for inmate calling.[265] As we discuss above, the interim safe harbor levels and rate caps we adopt today are conservative numbers.[266] Accordingly, we believe the rate framework we adopt today should not negatively impact quality of service. For example, ICE has rates for all long distance calls for their detainees on par with those we adopt today,[267] and concurrently includes quality of service standards, in addition to a 25 to 1 ratio of detainees to operable telephones.[268] We encourage continued innovation and efficiencies to improve the quality of service for ICS.[269]

72. In summary, on the effective date of this Order, which is 90 days following its publication in the Federal Register, all rates, fees, and ancillary charges for interstate ICS must be cost-based. ICS providers that elect to utilize the safe harbor to establish cost-based interstate ICS rates as of that date must lower their interstate ICS rates to or below $0.12 per minute for debit and prepaid interstate calls and $0.14 per minute for collect interstate calls for their rates to be presumed to be just, reasonable and fair. Separately, in the accompanying Further Notice we seek comment on adopting permanent safe harbors.

b. Interim Rate Caps for Interstate ICS Rates

73. We adopt interim rate caps to place an upper limit on rates providers may charge for interstate ICS.[270] As explained below, the interim rate caps we establish are $0.21 per minute

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[265] *See, e.g.*, Rogers 2013 Comments at 8 ("ICS providers facing a price below cost could compensate by reducing the quality of service or investment in the network.").

[266] *See supra* paras. 61-62. In calculating these safe harbor rates, we included states that had removed commissions. We also evaluated the reasonableness of these rates by finding that a number of other states' rates were below these levels once commissions were removed. We note below, however, that there are other costs that are often included in ICS rates that we find today to not be directly and reasonably associated with the costs of ICS such that they be recovered within ICS rates. In the calculation of conservative safe harbor rates, we have not sought to back out those additional charges. *See infra* Section III.C.3.d

[267] *See, e.g.*, Telmate July 26, 2013 *Ex Parte* Letter at 2.

[268] *Performance-Based National Detention Standards 2011*, U.S. Immigration and Customs Enforcement at 359-61 (2011), *available at* http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf.

[269] *See supra* paras. 28-30 (discussing decreasing costs of providing service due to technological advances).

[270] These caps are subject to waiver under the Commission's rules in extraordinary circumstances and for good cause shown. See 47 C.F.R. § 1.3. Commissioner Pai's Dissent states that, given the requirements of the Order, "waiver requests will come in swiftly," that those requests "might apply to hundreds or thousands of facilities across the country, "and that he "cannot see how the Commission will process these waivers in an effective or timely manner." Dissent at 126-127. As an initial matter, the Order delegates authority to approve or deny waiver requests to the Commission's Wireline Competition Bureau. *See infra* Section III.C.3.b(ii). The Wireline Competition Bureau houses a significant portion of the Commission's expertise in evaluating service provider data to establish rates. Also, the Bureau uses this expertise to ensure that the Commission is able to carry out its statutory mandate to ensure that charges for communications services are just and reasonable and also to ensure that payphone providers are fairly compensated under Commission rules implementing section 276. *See* 47 U.S.C. §§ 201(b), 276. Two
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for debit and prepaid interstate calls and $0.25 per minute for collect interstate calls. We adopt the interim rate caps to provide immediate relief to consumers. As of the effective date of this Order (90 days after Federal Register publication), providers' rates for interstate ICS must be at or below these levels.[271]

74. We believe that the rate caps we establish here are set at sufficiently conservative levels to account for all costs ICS providers will incur in providing ICS pending our further examination of such costs through the accompanying FNPRM and data collection.[272] The interim rate caps we establish are not a finding of cost-based ICS rates because we use the highest costs in the record, which include the costs of advanced ICS security features, to set an upper bound for interstate rates that will be subject to cost justification.[273] We also establish a waiver process to accommodate what we expect to be the rare provider that can demonstrate that recovery of its ICS costs requires rates that exceed our caps.

(i) Methodology for Establishing Interim Rate Caps

75. To establish interim interstate ICS rate caps, we identify the relevant ICS provider cost data available in the record, which consists principally of the ICS Provider Data Submission, cost filings by Pay Tel (an ICS provider that exclusively serves jails), Securus, and CenturyLink (ICS providers that serve a variety of type and sizes of correctional facilities). In 2008, the ICS Provider Data Submission identified the cost of debit and the adjusted cost of collect ICS calls as being $0.164 per minute and $0.246 per minute,[274] respectively, assuming a 15-minute call duration.[275] Both Pay Tel and Securus were participants in the 2008 study. In its recent cost study, Pay Tel reports average actual and projected costs for debit and collect ICS calls of $0.208 per minute and $0.225 per minute, respectively, inclusive of additional fees for continuous voice

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additional factors mitigate Commissioner Pai's concerns that the Commission will not be able to process waivers filed by ICS providers. First, the Order notes that the Commission will evaluate waiver petitions from ICS providers at the holding company level. Accordingly, if the three largest ICS providers each filed a waiver petition, those three petitions would account for over 90% of ICS provided in the country. *See* Petitioners July 24, 2013 *Ex Parte* Letter at 2. Second, the Bureau processes thousands of extraordinarily complex tariff filings each year, under extremely tight statutory timelines. *See* 47 U.S.C. § 204(A)(3) (establishing 15-day timeline for review of tariffs increasing rates) and, based on its experience, is well positioned to act on ICS waiver petitions.

[271] A rate that uses a rate structure that includes per-call charges will also be considered to be at or below the rate caps if the total charge for a 15-minute conversation is at or below the total charge for a 15-minute call using our interim rate caps. *See supra* Section III.C.3. Providers of ICS may also seek a waiver of our rate caps as we describe below. *See infra* Section III.C.3.b(ii).

[272] *See infra* Sections V.C.2 and III.I.

[273] Because we conclude site commissions are not part of the cost of ICS, we do not include the site commission profits in setting either the debit, prepaid or collect rate caps. *See supra* Section III.C.2.b.

[274] The calculation results in a $0.236 per minute figure for a 15-minute collect call. *See* ICS Provider Data Submission at 4. We acknowledge that these data presumably account for bad debt – a persistent problem with collect calling. *See e.g.*, Securus 2013 Comments at 4-5. However, more recent data submitted into the record suggests that bad debt can account for anywhere between 2.9% and 17.6% of ICS revenues. *See* Securus 2013 Comments, Expert Report of Stephen E. Siwek, at 7. As such, we add one cent to this collect calling rate cap to account for this wide variation in bad debt costs.

[275] *See* ICS Provider Data Submission at 4.

biometric identification service, or $0.189 and $0.205 per minute without such costs.[276] Securus submitted total cost data for a subset of the facilities it serves that on a minute-weighted basis averaged $0.044 per minute for all types of calls.[277] CenturyLink also submitted summary ICS cost data.[278] All these costs were reported excluding site commission payments.

76. *Debit and Prepaid Call Rate Cap.* We establish an interim rate cap for debit and prepaid interstate ICS calls of $0.21 per minute based on the public debit call cost data included in Pay Tel's cost submission.[279] The costs reported by Pay Tel for debit calling represent the highest, total-company costs of any data submission in the record and therefore represent a conservative approach to setting our interim debit and prepaid rate cap. Specifically, Pay Tel reported that the average of its actual and projected 2012-2015 debit calling costs, excluding commissions and including continuous voice biometric identification fees, is $0.208 per minute.[280] While Pay Tel's cost data are characterized by certain limitations,[281] we conclude that

[276] *See* Pay Tel Cost Summary.

[277] The $0.044 per minute average represents the total average cost per interstate minute of use, excluding commissions and weighted by call volume for the facility groups included in the study. *See* Securus 2013 Comments, Expert Report of Stephen E. Siwek, at 3, 5 and 8 (tables 2, 5 and 9).

[278] *See* CenturyLink Aug. 2, 2013 *Ex Parte* Letter. We note that CenturyLink did not provide to the Commission the underlying data for its summary information. *See id*. at 1. Also, CenturyLink did not provide the methodology it used in developing its cost summary or the year(s) the data represent or how many years' worth of data were used to create its cost summary. *See id*. CenturyLink did not provide ICS costs broken out by debit/prepaid calling and collect calling as other providers did. *See id*. *But cf. generally* 2008 ICS Provider Data Submission and Pay Tel Cost Summary. Data in this format therefore does not allow for an apples-to-apples comparison with other data in the record.

[279] *See supra* note 95.

[280] *Id.* The Dissent raises the question whether setting our rate caps based on average cost data will ensure fair compensation. *See* Dissent at 120-121. The use of averaged rates and data is common in the communications industry and telecommunications regulation. For example, within the communications industry, both wireline and CMRS providers routinely offer regional or nationwide service at a single rate, in spite of the fact that offering service in this manner necessarily involves averaging of higher and lower per-customer costs. Additionally, in the context of industry regulation, the Commission has used average cost data in various settings, including to establish public payphone dial-around compensation. *See generally Payphone Third Report and Order*, 14 FCC Rcd 2545 (1999); *see also* 47 C.F.R. § 64.1801 (Commission rule on Geographic rate averaging and rate integration). ICS providers themselves have submitted average cost data in the record on multiple occasions. *See* ICS Provider Data Submission, Pay Tel Cost Summary, CenturyLink Aug. 2, 2013 *Ex Parte* Letter, Securus 2013 Comments, Expert Report of Stephen E. Siwek. ICS providers typically use uniform rates when they serve multiple correctional facilities with differing cost and demand characteristics under a single contract. *See, e.g.*, State of California, California Technology Agency, IWTS/MASS Agreement Number OTP 11-126805 (listing approximately 80 correctional facilities served through a common rate structure) (available at http://prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=California) (last visited Sept. 17, 2013). *See also infra* note 493. As a result, the fact that there may be variations in cost between different facilities does not by itself suggest that providers will be unable to be fairly compensated.

Furthermore, the use of average cost data is not common in rate of return regulation because a provider's rates, although often averaged across its own facilities, are generally premised on that provider's individual costs. Contrary to the claims of the Dissent, however, we are not engaging in rate-of-return regulation here. *See generally* Dissent. We establish rate caps under a framework that operates as a less burdensome approach to rate regulation. Our intent is to set caps at a level that will ensure fair compensation for ICS providers based on the highest cost data in the record. Providers who believe their costs exceed the rate caps may seek a waiver on the basis of their ICS operations as a whole. Additionally, as we discuss below, the average cost data is derived principally from data

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Pay Tel's public cost submission provides a sound basis to derive the conservative high-end estimate that we use to set the debit and prepaid interim rate cap.[282] This is true for a number of reasons.

77. First, this interim rate cap for debit calls is significantly higher than the per-minute cost for debit calling reported in the 2008 ICS Provider Data Submission ($0.164 per minute, assuming a 15-minute call duration) or by Securus ($0.044 per minute for all call types).[283] The 2008 ICS Provider Data Submission is the only multi-provider cost sample in the record and includes debit call cost data from locations with varying cost and call volume characteristics, and is $0.05 per minute lower than our interim debit and prepaid rate cap.[284] The interim rate cap is also significantly higher than the cost study submitted by Securus. Second, Pay Tel serves jails exclusively, which are generally smaller and which providers claim are more costly to serve than prisons.[285] As a result, we expect that the rates of most facilities, whether jails or prisons, large or small, should fall below this rate. Third, we include Pay Tel's estimated *increases* in cost projections used to calculate our rate caps, despite record evidence showing that many ICS costs are significantly *decreasing*. We thus accept at face value Pay Tel's projected costs – costs that it reports to be increasing – which may include costs that we would conclude, after a thorough review, may not be related to the provision of ICS, and costs that it may have the incentive to overstate as the Commission evaluates reform.[286] Finally, we note that Pay Tel's

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regarding smaller facilities with lower than average call volumes, likely resulting in rate caps that are higher than providers' actual costs. *See infra* paras. 77, 80.

[281] Pay Tel is a smaller provider that serves a relatively small share of inmates in the U.S. overall, and evidence from larger providers indicates that their costs are lower. *See* Securus 2013 Comments, Expert Report of Stephen E. Siwek. Also, Pay Tel does not report different costs for interstate and intrastate ICS calls, presumably reflecting the fact that it manages its ICS calls through common, centralized call management facilities. We therefore find it is reasonable to assume that its cost data is representative of both types of calls.

[282] *See* Pay Tel July 23, 2013 *Ex Parte* Letter. We appreciate Pay Tel's willingness to provide the kind of objective cost data that the Commission sought in the *2012 ICS NPRM* in order to facilitate our data-driven analysis of ICS costs.

[283] *See* ICS Provider Data Submission at 4 (based on a 15-minute call duration, the cost for debit calls was $0.164 per minute); Securus 2013 Comments, Expert Report of Stephen E. Siwek (*see supra* note 277 for method of calculation). We also reject as unrepresentative using the cost data for individual facility groups contained in Securus' study as a potential basis for our rate caps. For example, Securus reports average per minute costs for its "Low 10" group of facilities of $1.39 (without commissions). This, however, is approximately six times the per minute cost for collect calls reported by the 2008 study, a study in which Securus participated. Securus also reports that the average call volume for these facilities in 2012 was 191 calls, or approximately 16 calls per month per facility. *See id.* at 4, Table 3. To the extent there are providers that primarily or exclusively serve facilities with such low call volume, they may seek a waiver.

[284] ICS Provider Data Submission at 4 ("The locations ranged from small county jails to large prison facilities."). The participating ICS providers also ranged from small to large companies. For example ATN, Inc. participated in the submission and serves approximately 150 correctional facilities. *See* www.atni.net (last visited Aug. 1, 2013). Another participating provider, Securus, was one of the largest providers at the time of the submission and currently "holds contracts with approximately 1,800 correctional authorities covering roughly 2,200 facility locations in 45 states around the country." *See* Securus 2013 Comments, Hopfinger Decl. at 1.

[285] *See generally* Pay Tel Ancillary Charges PN Comments.

[286] Pay Tel's actual costs in 2012 are $0.025 – 0.034 below the costs it projects for 2013-2015.

and all ICS providers' transport and termination costs will continue to decline pursuant to the Commission's intercarrier compensation reform, further reducing the cost of providing the transport and termination of ICS.[287] For all these reasons, we find Pay Tel's debit calling cost data to be an appropriately conservative basis for our debit and prepaid rate cap and adopt a $0.21 per minute interim rate cap for debit and prepaid interstate ICS calls.

78. *Collect Call Rate Cap.* We use a similar approach to establish the $0.25 per minute interim rate cap for interstate ICS collect calls. The costs reported by the ICS Provider Data Submission represent the highest costs of any data submitted in the record and represent a conservative approach to setting our interim collect rate cap. Specifically, the ICS Provider Data Submission reported an effective per minute cost for ICS collect calls of $0.246 per minute, assuming a 15-minute call duration.[288] We base our collect call rate cap on this record information and note that this cost is higher than both Pay Tel's and Securus' reported costs of collect calls ($0.225 per minute for collect calls and $0.124 per minute for all calls, respectively). Additionally, we take a conservative approach by setting the rate caps above the level we believe can be cost-justified while the Bureau reviews ICS provider rates and cost data submitted pursuant to the data collection and evaluates the record in response to the Further Notice.

79. The 2008 ICS Provider Data Submission represents an appropriately conservative foundation for our collect call rate cap.[289] These data represent the highest cost of a per-minute collect call in the record, and includes cost data from locations with varying cost and call volume characteristics.[290] The ICS Provider Data Submission states that its purpose is to "[p]rovide the basis for rates" and to "[p]rovide cost information necessary to develop cost-based rate levels and rate structures."[291] Although from five years ago, the record indicates continued support for such data,[292] and, as an ICS provider-submitted cost study, it presumably ensures fair compensation to ICS providers.

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[287] *See generally USF/ICC Transformation Order*, 26 FCC Rcd 17663.

[288] The Dissent also raises questions about the use of average cost data from the ICS Provider Data Submission to set the rate cap for collect calls. *See* Dissent at 120-121. The stated purpose of that submission, however, is "to develop a rate structure and rate level that meets the definition of 'fair compensation' as set forth in section 276(b)(1)(A) of the 1996 Act." ICS Provider Data Submission at 1; *see also supra* note 280.

[289] We note that the ICS providers participating in the data submission also entered supplemental data in the record, enabling the analysis of the size and call volumes of the locations included in the study. *See* Joyce Aug. 22, 2008 *Ex Parte* Letter; record submission by "several providers of inmate telephone service," to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Oct. 15, 2008). Notwithstanding, Petitioners note that the study did not contain all of the underlying cost data to support the cost conclusions contained in the data submission. *See* Letter from Frank W. Krogh, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Exh. A, Dawson Response at 2 (filed Dec. 23, 2008) (Petitioners Dec. 23, 2008 *Ex Parte* Letter).

[290] *See supra* note 284.

[291] ICS Provider Data Submission at 2.

[292] Pay Tel 2013 Comments at 12 (the ICS Provider Data Submission "generally remains a valid baseline for assessing ICS costs").

80. We find that the 2008 ICS Provider Data Submission on which we base our interim ICS collect rate cap likely overstates ICS providers' costs in a number of respects.[293] First, costs to provide interstate ICS have, by many measures, declined since the ICS provider data was submitted.[294] Second, smaller, potentially higher-cost facilities are over-represented in the data submission's sample, as compared with the national distribution of sizes of correctional facilities.[295] Third, the sample does not include cost data from the largest ICS provider, which cites economies of scale and efficiencies that it claims it enjoys, making it one of the lowest cost ICS providers.[296] The ICS Provider Data Submission also uses a marginal location analysis similar to an analysis that the Commission has used in the past to calculate payphone rates[297] and

[293] *See supra* para. 71. As noted above, in relying upon these cost studies for establishment of our rate caps, we do not conclude or even suggest that we believe such rates to be a representation of actual cost-based rates, as required and described in this Order. We believe these cost studies, although exclusive of site commissions, likely include significant other costs that are not reasonably and directly associated with the provision of ICS. Even so, as a conservative measure of an upper bounds of rates, we conclude that these studies are useful to enable us to establish an upper end rate cap for ICS rates and provide immediate relief for consumers.

[294] *See e.g.*, Petitioners 2013 Comments at 2 (noting that the consolidation of ICS providers and centralized application of safety protocols has "led to the substantial reduction in the costs associated with providing ICS"); *but see* Securus 2013 Comments at 4 (asserting that "costs of service have decreased in some respects but increased in others"); CenturyLink 2013 Comments at 6-11; GTL 2013 Comments at 7-8. To the extent software costs have increased, centralized software is typically a substitute for higher-cost, on-premises equipment and is generally more efficient, particularly when those costs are spread over the higher call volumes enabled by centralized call management systems. To the extent site commissions have increased, we find those costs not to be recoverable through interstate ICS rates. *See supra* section III.C.2.b.

[295] *See* U.S. Dept. of Justice, Bureau of Justice Statistics, Census of Jail Inmates: Individual-Level Data, 2005 (conducted by U.S. Dept. of Commerce, Bureau of the Census) (2007) *available at* http://dx.doi.org/10.3886/ICPSR20367.v1); U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of State and Federal Adult Correctional Facilities, 2005 (2007), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=530 (last visited June 11, 2013). Petitioners contend that the ICS Provider Data Submission "inflates the actual costs of providing interstate inmate calling services through the use of an unrepresentative sample of correctional facilities." Petitioners Dec. 23, 2008 *Ex Parte* Letter, Exh. A, Dawson Response at 1-2.

[296] *See* GTL 2013 Comments at 13 ("because GTL is one of the largest providers in the market, it has economies of scale and efficiency"). GTL is generally acknowledged to be the largest ICS provider at this time. *See, e.g.*, The Phone Justice Commenters 2013 Comments at 9 ("GTL alone has contracts for over half of the state correctional departments, controlling the phone service of almost 57% of state prison inmates following several mergers over the last five years.").

[297] This methodology determines rates based on the costs of the subset of payphone locations "where the payphone operator is able to just recoup its costs, including a normal rate of return on the asset, but is unable to make payments to the location owner" (effectively break-even locations). *See Payphone Third Report and Order*, 14 FCC Rcd at 2552, para. 15 n.20. Pay Tel states that the marginal location analysis methodology "recognizes . . . the challenges of providing ICS in small facilities" and "endorses" its use. Pay Tel 2013 Reply at 13. The Commission, however, has previously rejected its use in the context of ICS. *See Inmate Calling Services Order and NPRM*, 17 FCC Rcd at 3259-60, paras. 27-29. We find that Pay Tel's incorporation in the methodology of the ICS Provider Data Submission is acceptable here for the limited purpose of establishing ICS rate caps that are intended to set an upper limit on rates that can be cost-justified and that are interim in nature pending our development of other cost-based rates.

some commenters assert this data tends to overcompensate ICS providers.[298] Moreover, the rate is above the costs reported by Pay Tel, a provider serving exclusively smaller facilities and jails.[299] Further, as we noted above, all ICS providers' transport and termination costs will continue to decline pursuant to the Commission's intercarrier compensation reform, further reducing interstate ICS providers' costs.[300] Finally, the record supports the notion that lower rates will increase call volumes, providing an additional offset to compensation foregone as a result of lower rates.[301]

81. We disagree with commenters who assert it is not feasible to adopt uniform rates – in this instance our rate caps – for correctional facilities generally.[302] We base our rate caps on the highest cost data available in the record, which we anticipate will ensure fair compensation for providers serving jails and prisons alike. We note that ICS providers themselves submitted a single set of costs for the multiple providers participating in the ICS Provider Data Submission,

[298] Petitioners Dec. 23, 2008 *Ex Parte* Letter, Exh. A, Dawson Response at 2 (stating that the study "is limited entirely to data from unprofitable, "marginal" facilities … and disproportionately reflects unusually low-volume, high-cost facilities [which] improperly inflates the results").

[299] While some commenters have asserted that ICS providers and correctional facilities incur additional site-specific costs of making ICS available, none has attempted to quantify these costs for the record. Providers are free to raise any such issues in a waiver petition. *See, e.g.*, Letter from American Jail Association to Commission's Secretary, FCC, WC Docket 12-375 at 2 (filed June 21, 2013) (AJA 2013 Comments) ("Local jail facilities should be able to recover the costs of monitoring and administrative costs of managing the Inmate Calling Service.").

[300] *See generally USF/ICC Transformation Order*, 26 FCC Rcd 17663.

[301] *See supra* paras. 4, 66 and note 15. We find the foregoing rationales displace the assertions made in the ICS Provider Data Submission that the study's results are "conservatively low," particularly for the purposes of setting our rate cap. *See* ICS Provider Data Submission at 15. For example, we find that small jail locations are over-represented in the study, not under-represented as asserted; that it is premature to determine the actual cost of capital for ICS investments; and that, with widespread automation and centralized call management, various ICS costs have likely come down since the study.

Commissioner Pai's dissenting statement compares the $0.21 per minute rate cap that the Order adopts for debit and prepaid calling to the $0.208 four-year average (actual costs for 2012, and forward-looking projections for 2013-2015) of total per-minute costs for debit calling provided by PayTel and claims that "unless … no jails have above-average costs … a cap of 21 cents … almost certainly means that a significant number of small jails will be capped at below-cost rates." Dissent at 120. However, our approach is reasonable and consistent with the fair compensation mandate of section 276. Because each cap is set at a uniform level, without regard to the size of the facility being served, and application of the caps is evaluated on the basis of multiple facilities served by a provider, *see, e.g.*, *infra* paras. 83 and 123, even if a provider may under-recover at some facilities, it may over-recover at others. *See* Transcript of Reforming ICS Rates Workshop at 254-5 (Richard Torgersrud, CEO, Telmate, stating "[w]hen we get a request to provide phones to a facility with 15 beds we do it because we represent that community or because we have a lot of facilities in that area, and we do it knowing that we can't possibly make money providing calls in that facility. But we do make profits in other facilities and it offsets.") Moreover, insofar as a substantial portion of ICS costs are joint and common, *see, e.g.*, *id.*, and economic theory does not suggest a single correct way of allocating such costs, we anticipate that a provider with average costs at or below the level of the caps will be able to allocate those joint and common costs in a way that enables it to charge rates at or below the caps, and consistent with the requirement for cost-based rates. Consequently, our framework will enable the provider to be fairly compensated since the caps are derived from the highest costs in the record.

[302] *See supra* note 260.

regardless of the differing sizes of the correctional institutions they served.[303] Petitioners assert that "technical innovations in the provision of prison phone services imply that variation in costs at different facilities has largely been eliminated."[304] Further, the Commission previously has set a uniform rate for other interstate telecommunications services, including for public payphones, the costs of which also vary by location.[305] Moreover, even if we were to attempt to differentiate our rate caps on the basis of size or type of correctional facility, the record contains conflicting assertions as to what those distinctions should be. Some assert we should distinguish between jails and prisons,[306] while at least one other commenter advocates distinguishing between larger and smaller jails and between prison, jails and other "specialty locations."[307] Given the interim nature of our rate caps and the accompanying Further Notice, providers and other parties will have ample opportunity to assert that we should establish different rate caps for different types of providers and more precisely on what those distinctions should be based.[308]

(ii) Waivers

82. An ICS provider that believes that it has cost-based rates for ICS that exceed our interim rate caps may file a petition for a waiver.[309] Such a waiver petition would need to demonstrate good cause to waive the interim rate cap.[310] As with all waiver requests, the petitioner bears the burden of proof to show that good cause exists to support the request.[311] The

[303] *See* ICS Provider Data Submission at 4. *See id*. at 21 (listing ICS providers participating in the submission). We do not find persuasive the Dissent's argument that because costs may vary by facility, uniform rate caps are inappropriate. Dissent at 120-121. *See supra* note 280.

[304] *See* Petitioners 2013 Comments Exh. C, Bazelon Decl. at 5 (stating that "facility specific rates are unneeded").

[305] *See Payphone Third Report and Order*, 14 FCC Rcd 2545, 2613 para. 149 (noting that "payphone unit requirements vary from site to site" and the "costs of operating payphones at differing locations also vary" but that "because we are establishing a compensation amount for all payphones, we use the average cost of a typical PSP.").

[306] *See, e.g.*, Pay Tel 2013 Reply at 8-9.

[307] CenturyLink Aug. 2, 2013 *Ex Parte* Letter at 2. Contrary to the Dissent's suggestion that we "dismiss[] the importance of small jails," as noted above, in establishing our interim framework, we examine and rely on data pertaining to these types of facilities. Dissent at 118. *See, e.g.*, *supra* paras. 26, 77.

[308] The Dissent asserts that by establishing rate caps before the record is supplemented, we have placed "the cart . . . in front of the horse." Dissent at 123. However, the Commission is not required to defer action until it can assemble perfect data where, as here, it faces clear evidence of widespread unreasonable ICS charges. Rather, it may act on the basis of the record it has while assembling a more complete record for future action. *See Vonage Holding Corp. v. FCC*, 489 F.3d 1232, 1243 (D.C. Cir. 2007); *Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000); *Sorenson Commc'ns v. FCC*, 659 F.3d 1035, 1046 (10th Cir. 2011). Indeed, "[w]here existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information." *Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000). Here, we have done neither more nor less than advised by the Court. We have (i) formulated a solution, (ii) to the best of our ability, (iii) on the basis of available information. That the Dissent dislikes our solution, or believes it could do a better job in formulating a solution, or suspects that a different solution would be supported by new evidence, does not vitiate our "broad discretion" to act in the public interest based on the record currently before us.

[309] 47 C.F.R. § 1.3.

[310] We note that the Dissent also acknowledges that a waiver must be based on cost data. *See* Dissent at 126.

[311] 47 C.F.R. § 1.3 ("Any provision of the rules may be waived . . . on petition if good cause therefor is shown.").

following factors may be considered in a request to waive the interim rate caps: costs directly related to the provision of interstate ICS and ancillary services; demand levels and trends; a reasonable allocation of common costs shared with the provider's non-inmate calling services; and general and administrative cost data.

83. We reiterate that the interim rate caps are set at conservative levels. Accordingly, we expect that petitions for waiver of the interim rate caps would account for extraordinary circumstances. Further, we will evaluate waivers at the holding company level. We conclude that reviewing ICS rates at the holding company level is reasonable for several substantive and administrative reasons. First, the centralization of security and other functionalities provided by ICS providers that serve multiple correctional facilities has significantly reduced the cost incurred on an individual facility for some providers.[312] Moreover, the record indicates that ICS providers often obtain exclusive contracts for several facilities in a state, rather than specific rates per facility.[313] Second, we have adopted interim interstate safe harbor rates and interim interstate rate caps at conservative levels to ensure that all providers are fairly compensated. As a result, we believe it is appropriate to evaluate waivers at a holding company level to obtain an accurate evaluation of the need for a waiver.[314] Additionally, reviewing petitions in this manner is significantly more administratively feasible and will allow the Commission to address waiver petitions more expeditiously. Unless and until a waiver is granted, an ICS provider may not charge rates above the interim rate cap and must comply with all aspects of this Order including requirements that ancillary services charges must be cost-based as described.[315]

84. We delegate to the Wireline Competition Bureau (Bureau) the authority to request additional information necessary for its evaluation of waiver requests and to approve or deny all or part of requests for waiver of the interim rate caps adopted herein. We note that evaluation of these waiver requests will require rate setting expertise, and that the Bureau is well suited to timely consider any waiver requests that are filed. Because we will consider waiver requests on a holding company basis, waiver requests from the three largest ICS providers would cover over 90 percent of ICS provided in the country.[316] ICS provider waiver petitions may be accorded confidential treatment as consistent with rule 0.459.

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[312] *See, e.g.*, Pay Tel 2013 Comments at 13; Securus 2013 Comments at 4.

[313] *See, e.g.*, Request for Proposal for Contractual Services, Inmate Calling Services RFP No. 2505Z1, *available at* http://www.prisonphonejustice.org/includes/_public/contracts/Nebraska/NEphone_contract_PCS_RFP_20082013.pdf (ICS contract between PCS and Nebraska Department of Correctional Services, dated July 8, 2008); *see also* Susskind June 6, 2013 *Ex Parte* Letter.

[314] *See infra* para. 123.

[315] *See supra* Sections III.C.3.b, III.C.3.d.

[316] *See also* Petitioners July 24, 2013 *Ex Parte* Letter at 2 (noting that the three largest ICS providers, who control "at least 90% of the ICS market," were "remarkably silent" when asked to submit data regarding ancillary charges).

c. Interim Rate Structure

85. Some ICS rates include per-call charges—charges that are incurred at the initiation of a call regardless of the length of the call.[317] The record indicates concerns that these per-call charges are often extremely high and therefore unjust, unreasonable, and unfair for a number of reasons. First, it is self-evident that per-call charges make short ICS calls more expensive particularly if evaluated at the effective per-minute rate. For example, several state departments of correction allow $3.95 per-call and $0.89 per-minute charges for collect interstate ICS calls.[318] Under such an arrangement, the effective *per minute* rate for a one minute call is $4.84, whereas the effective *per minute* rate for a 15 minute call is $1.15, making the price for a shorter call disproportionately high.[319] Second, commenters raise issues regarding per-call charges that may be unjust, unreasonable, and unfair because callers are often charged more than one per-call charge for a single conversation when calls are dropped, which the record reveals can be a frequent occurrence with ICS.[320] Although some ICS providers contend that calls are usually terminated when callers attempt either to set up a three-way call or to forward calls, practices that are generally prohibited by correctional facilities,[321] other commenters maintain that calls are dropped because of faulty call monitoring software or poor call quality, leaving consumers no alternative but to pay multiple per-call charges for a single conversation.[322] Finally, some commenters question whether high per-call charges are justified by cost. In particular, Petitioners state that "[t]here are very few cost components that change with the

[317] *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B (showing, for example, that CenturyLink assesses a $3.95 per-call charge for all collect, prepaid, and debit calls made by Alabama Department of Corrections inmates).

[318] *See id*. (showing that providers serving state departments of corrections in Alabama, Alaska, Arkansas, Georgia, and Minnesota impose a $3.95 per-call charge on ICS collect calls).

[319] *See id.*

[320] *See* Petitioners 2013 Comments at 24 ("The record in this proceeding contains hundreds of complaints about the frequent disconnection of calls by the ICS providers."); PLS 2013 Comments at 13 (citing the fact that of the 228 written ICS complaints received by the Massachusetts Department of Telecommunications and Cable in 2012 "[e]xperience with dropped calls was mentioned in 79% of the letters, while bad connections and/or poorly maintained equipment was mentioned in 68% of the complaints").

[321] *See* Securus 2013 Comments, Hopfinger Decl. at 10 ("It has been the very clear policy of correctional facilities for decades that inmates cannot have three-way calls and cannot have a call forwarded to some number other than the number that was dialed and validated . . . . With Securus' advanced technology, this type of behavior is detected and – if required by the correctional authority – will result in call disconnection. In my experience, the overwhelming majority of allegations of unwarranted 'dropped calls' are found to be false.").

[322] *See* Petitioners 2013 Reply at 19 (citing one attorney stating that "calls to both his cellular phone and home phone were frequently dropped, and were generally preceded by a message stating that the system detected an attempt at a three-way call"); *id.* at 20 (citing "numerous accounts from attorneys that regularly receive inmate calls of such poor quality the inmates must yell into the phone in order to be heard"); *id.* at 22 ("One attorney stated that, of the three hundred inmate calls her office receives every month, '[a]pproximately 15-20% of the calls have too much static to hear the other party.'").

number of call initiations and that do not vary with the length of the call," and recommend eliminating per-call charges.[323]

86. We are concerned about the evidence regarding current per-call rates and associated practices. In particular, we are concerned that a rate structure with a per-call charge can impact the cost of calls of short duration, potentially rendering such charges unjust, unreasonable and unfair. We have particular concerns when calls are dropped without regard to whether there is a potential security or technical issue, and a per-call charge is imposed on the initial call and each successive call. As a result, we conclude that unreasonably high per-call charges and/or unnecessarily dropped calls that incur multiple per-call charges are not just and reasonable.

87. At the same time, we recognize that states that have reformed ICS rates and rate structures have addressed such concerns in different ways. Indeed, not all such states have eliminated per-call charges. Some have significantly reduced or capped such costs in seeking to bring the overall cost of a call to just, reasonable and fair levels.[324] Many of these pioneering state efforts form the foundation of the initial reforms we adopt today, and we are reluctant to disrupt those efforts pending our further evaluation of these issues in the Further Notice. As a result, we do not prohibit all per-call charges in this Order. Nonetheless, because our questions about the ultimate necessity and desirability of per-call charges remain, particularly as we seek comment on further reforming ICS rates more generally, we ask questions about whether rate structure requirements are necessary to ensure that the cost of a conversation is reasonable in the Further Notice.[325] We also require ICS providers to submit data on the prevalence of dropped calls and the reason for such dropped calls as part of their annual certification filing.[326]

88. Our interim rate structure will help address concerns raised about unreasonable per-call charges while we consider further reforms in the Further Notice. As described above, we adopt interim safe harbor rate levels and interim rate caps to ensure the overall cost of a 15-minute call is just, reasonable, and fair.[327] ICS providers have the flexibility to satisfy the safe harbor[328] either through a certification that the per-minute rate is at or below the safe harbor, or by demonstrating that the cost of a 15-minute call (including any per-connection charges) is at or below the safe harbor per-minute rate times 15.[329] Thus, where an ICS provider elects to take advantage of the interim safe harbor rate levels described above, we allow the provider flexibility

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[323] *See* Petitioners 2013 Comments, Exh. C, Bazelon Decl. at 13. The Congressional Black Caucus similarly recommends elimination of a per-call charge which "significantly inflates already-exorbitant telephone rates, and further deters inmate calling activity." CBC 2013 Reply at 4.

[324] *See, e.g.*, HRDC June 8, 2013 Ex Parte Letter, Rev. Exh. B; PLS 2013 Comments at 14-15; Petitioners Ancillary Charges PN Comments at 1-2.

[325] *See infra* Section V.C.1.

[326] *See infra* Section III.H.1.

[327] *See supra* Sections III.C.3.a, III.C.3.b.

[328] *See supra* para. 63.

[329] *See infra* Section III.H.1.

to determine whether its rate structure should include per-call charges. Specifically, we allow ICS providers to calculate whether their rates are at or below the interim safe harbor levels or the interim rate caps by calculating their compliance on the basis of a 15-minute call.[330] Because our interim safe harbors constrain the cost of a 15-minute conversation to a level we find to be just, reasonable, and fair, we find it is appropriate to afford ICS providers such flexibility.

89. Providers electing not to use the safe harbor but to charge rates at or below the interim rate cap will have similar flexibility but will not benefit from the presumption that the rates and charges are just and reasonable and, as a result, could be required to pay refunds in any enforcement action.

d. Ancillary Charges

90. In the *2012 ICS NPRM*, the Commission observed that "there are outstanding questions with prepaid calling such as: how to handle monthly fees; how to load an inmate's account; and minimum required account balance."[331] The record indicates that ICS providers also impose ancillary or non-call related charges on end users to make ICS calls,[332] for example to set up[333] or add money to a debit or prepaid account, to refund any outstanding money in a prepaid or debit account, or to deliver calls to a wireless number.[334] These additional charges represent a significant cost to consumers.[335] For example, prepaid account users who accept calls from prisoners and detainees in certain facilities may incur a $4.95 monthly "inactivity fee" if

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[330] Under the interim safe harbor for debit calls of $0.16 per minute, for example, the total charge for a 15-minute call cannot exceed $2.40. To illustrate, if a provider has a per-call charge of $1.00, its per-minute rate must be $0.093 or less to fall within the safe harbor. If a provider has a per-call charge of $0.50, its per-minute rate must be $0.126 or less to fall within the safe harbor. If a provider has a flat rate per call, that rate cannot exceed $2.40 for a 15-minute call. Likewise, a rate will be considered consistent with our rate cap for a 15-minute conversation if it does not exceed $3.75 for a 15-minute call using collect calling, or $3.15 for a 15-minute call using debit, prepaid, or prepaid collect calling.

[331] *2012 ICS NPRM*, 27 FCC Rcd at 16641, para. 33.

[332] We use the term ancillary service charges throughout to refer to charges imposed on ICS end users that do not relate to the telecommunications costs of making an ICS call.

[333] According to Petitioners, GTL charges $9.50 to open a new pre-paid or debit account. *See* Petitioners 2013 Comments at 24-25.

[334] *See* Petitioners 2013 Comments at 24; HRDC 2013 Comments at 8-9; Hamden 2013 Comments at 7-8; Pay Tel Comments at 15-16.

[335] GTL charges $9.50 to open a new pre-paid or debit account. An additional $4.75 charge is added to the account by GTL when a party wishes to add $25.00 to the balance, and a $9.50 charge is added to the account when a party wishes to add $50.00. If there is an outstanding balance at the end the month, GTL charges $2.89 to send a paper bill to the account holder. Finally, if an inmate is released, and a balance remains in the account, GTL charges $5.00 for the account holder to receive its refund. Securus charges $7.95 each time an account is funded over the internet or on the telephone, and also charges a monthly fee of $2.99 to maintain a wireless number on the account. In the event that the inmate is released, Securus will extract a $4.95 charge from the refunded amount if the account balance exceeds $4.95. *See* Petitioners 2013 Comments at 24-25; *see also* HRDC 2013 Comments at 8-9 (listing charges ranging from $2.95 to $15.75 that ICS providers charge in various states for setting up and funding accounts); Hamden Ancillary Charges PN Comments at 5 (asserting that "New Mexico ICS providers also generate revenue through imposing a wide variety of charges to establish pre-paid accounts and to maintain those accounts.").

their account "exceeds 180 days of no call activity until the funds have been exhausted or the call activity resumes."[336] End users may also be assessed a $4.95 fee to close their account, and a $4.95 "refund fee" when requesting a refund of money remaining in an account.[337] We question whether such charges are reasonable in and of themselves and note that the levels of such charges do not appear to be cost-based.

91. Although we are unable to find ancillary charges per se unreasonable based on the record, we have sufficient information and authority to reach several conclusions regarding ancillary charges. First, as stated earlier, interstate ICS rates must be cost-based, and to be compensable costs must be reasonably and directly related to provision of ICS. Ancillary service charges are no exception; they also fall within this standard and the Commission has the jurisdiction and authority to regulate them.[338] Section 201(b) of the Act requires that "all

[336] HRDC 2013 Comments at 8-9.

[337] *See id.*

[338] The Dissent claims that the *2012 ICS NPRM* "provides no basis" for regulating ancillary charges. Dissent at 115. Yet regulating ancillary charges was a necessary aspect of our cost-based reforms, as otherwise providers could simply increase their ancillary charges to offset lower rates subject to our caps. For that reason, many commenters properly understood that ancillary charges were part of the cost-based reform being considered. *See, e.g.*, Petitioners 2013 Comments at 3, 24-27; Pay Tel 2013 Reply at 2-3 & n.6; Telmate 2013 Reply at 3. Moreover, as the Dissent concedes, the Commission observed in the *2012 ICS NPRM* that "there are outstanding questions with prepaid calling such as: how to handle monthly fees; how to load an inmate's account; and minimum required account balance." Dissent at 115 (citing *2012 ICS NPRM*, 27 FCC Rcd at 16641, para. 33). Those are the very kinds of issues that this Order addresses. Moreover, in connection with that observation, the *2012 ICS NPRM* cited the Petitioners' reply comments filed in response to the Alternative Wright Petition, which raised issues regarding ancillary charges for prepaid services. *See id.* (citing Petitioners 2007 Reply at 29-30). The Commission also sought comment on per-call and per-minute rates for debit calls, and on other issues regarding debit calling (including the extent to which it is used today, and whether it should be mandated). *See, e.g.*, *2012 ICS NPRM*, 27 FCC Rcd at 16640-41, paras. 30-32. And the Commission broadly sought comment on "any proposals in the record that [were] not" expressly described in the *2012 ICS NPRM*. *2012 ICS NPRM*, 27 FCC Rcd at 16642, para. 35. Among the proposals for Commission action in the record at the time of the *2012 ICS NPRM* were a number identifying the need for Commission regulation to address excessive fees for ancillary services. *See, e.g.*, Letter from Cheryl A. Leanza, The Leadership Conference on Civil and Human Rights, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 2 (filed Mar. 22, 2012) (discussing "new abuses [that] have started to emerge, which include charging families to deposit money into prepaid accounts and exploiting new loopholes that enable the charging of service fees"); Petitioners July 27, 2011 *Ex Parte* Letter, Exh. A at 6 (filed July 27, 2011) (citing as illustrative of "price goug[ing]" numerous examples of ancillary charges); Letter from John Wesley Hall, President, National Association of Criminal Defense Lawyers, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 2 (filed July 6, 2009) (citing as "unconscionable practices" the examples of "'Service/set-up' fees (charged to customers setting up a required pre-pay account for the first time); 'recharge fees' (billed when a customer reopens an account); [and] 'processing fees' – imposed either by a service provider or a third party business – for processing a customer's payment"); Letter from Thomas M. Susman, American Bar Association, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 3 n.4 (filed Jan. 15, 2009) (arguing that "additional fees are billed to consumers who wish to establish pre-paid accounts; charges are assessed to process customers' payments,' and funds held in accounts without activity for as little as 3 months are confiscated. These 'tack-on' charges dramatically increase the cost of communicating with incarcerated loved ones, but they do not appear as a part of the cost of the call reflected on a telephone bill."); Letter from Michael S. Hamden, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Attach. at 14-15 (filed Oct. 28, 2008) (proposing that the Commission "close the door to mechanisms that would allow prison phone service providers to inflate service fees that unfairly and unjustifiably
(continued….)

charges, practices, classifications, and regulations for and *in connection with*" communications services be just and reasonable.[339] Section 276 of the Act defines "payphone service" to encompass "the provision of inmate telephone service in correctional institutions, and any *ancillary* services," and requires that providers be "fairly compensated."[340] The services associated with these ancillary charges are "in connection with" the inmate payphone services for purposes of section 201(b) and "ancillary" for purposes of section 276.[341] As such, they fall

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increase the price of prisoner phone calls" including "'tack-on'" charges such as fees to establish a pre-paid account and fees to process payments).

The Commission's request for comment on these kinds of record proposals, coupled with our other questions about regulation of debit calling and ancillary fees in the prepaid calling context, provided adequate notice that the Commission was contemplating the regulation of ancillary charges. *See, e.g., CSX Trans. v. Surface Trans. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009) (*CSX Trans.*) ("a final rule represents a logical outgrowth where the NPRM expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change"). This conclusion is bolstered by the fact that in June 2013, the Bureau asked parties to provide detailed "data and information" about the full range of "Ancillary ICS Fees," including "account setup fees, account replenishment fees, account refund fees, account inactivity fees." *More Data Sought on Extra Fees Levied on Inmate Calling Services*, WC Docket No. 12-375, Public Notice, 28 FCC Rcd 9080 (Wireline Comp. Bur. 2013); *see also* 78 Fed. Reg. 42034-01 (publishing the June 2013 Public Notice in the "Proposed Rules" section of the Federal Register). To be clear, we are not suggesting that this Bureau-level request itself provided notice with respect to ancillary charges. Rather, as indicated above, adequate notice with respect to ancillary charges was plainly provided to the public well before the release of the *Ancillary Charges PN*, and this notice generated an adequate record on which to base our requirements regarding ancillary charges, even without the additional comments submitted in response to the *Ancillary Charges PN*. However, it is instructive that no party argued in response to the Bureau's public notice that they or the public in general lacked notice that ancillary fees were at issue. If the prospect of regulating ancillary charges had truly been sprung on the public at the eleventh hour, as the Dissent claims, one would have predicted that at least some parties would have said as much in their comments. We similarly disagree with the Dissent's claim that the *Ancillary Charges PN* did not give parties sufficient time to file comments and replies on that discrete set of issues. Dissent at 115-116. We note that no one sought additional time to file comments, as is commonly the case when parties believe the comment pleading cycle is too abbreviated, and a number of parties did submit comments and replies within the time allotted. *But see* NASUCA Ancillary Charges PN Comments at 2.

As indicated above, moreover, the principal purpose of the *2012 ICS NPRM* was to consider ways to control ICS rates. This purpose could not be achieved if ancillary charges were not also controlled, since providers could increase those charges to make up for decreased charges elsewhere. Finally, as also noted above, the "just and reasonable" standard under section 201(b) has traditionally been construed to require rates to be cost-based, absent Commission justification for a departure from that approach. For all the foregoing reasons, parties "should have anticipated" the possibility that cost-based regulation of ancillary charges was possible, *see CSX Trans.*, 584 F.3d at 1081, and therefore, contrary to the Dissent's claim, we provided a very strong "basis" for our actions today with respect to those charges.

[339] 47 U.S.C § 201(b) (emphasis added).

[340] 47 U.S.C. §§ 276(b), (d) (emphasis added).

[341] Commission precedent supports our finding that charges other than those directly attributable to the provision of the service itself can be subject to section 201(b). *See, e.g., Kiefer v. Paging Network*, EB File No. 00-TC-F-002, Memorandum Opinion and Order, 16 FCC Rcd 19129 (2001) (evaluating reasonableness of a late payment fee under section 201(b)); *Long Distance Direct*, EB File No. ENF-99-01, Memorandum Opinion and Order, 15 FCC Rcd 3297 at 3302, para. 14 (2001) ("Section 201(b) of the Act prohibits 'unjust and unreasonable' practices by carriers 'in connection with [interstate or foreign] communications service.' LDDI's inclusion of 'membership' and 'other'
(continued….)

within the standards we articulate above for determining which costs are compensable through interstate ICS rates. Therefore, even if a provider's interstate ICS rates are otherwise in compliance with the requirements of this Order, the provider may still be found in violation of the Act and our rules if its ancillary service charges are not cost-based.

92. Therefore, parties concerned that any ancillary services charge is not just, reasonable and fair can challenge such charges through the Commission's complaint process.[342] The ICS provider will have the burden of demonstrating that its ancillary services charges are just, reasonable, and fair. We also caution ICS providers that the Bureau will review data submissions critically to ensure that providers are not circumventing our reforms by augmenting ancillary services charges beyond the costs of providing such services.[343]

93. In addition, we will take additional steps to gather further information that will inform how we address ancillary services. As part of the mandatory data request we initiate below, we require ICS providers to submit information on every ancillary services charge, and identify the cost basis for such charges. In our accompanying Further Notice, we seek comment on additional steps the Commission can take to address ancillary services charges and ensure that they are cost-based. We note that section 201 governs unjust and unreasonable practices and section 276 governs payphones, which expressly includes ancillary services, and seek comment in the Further Notice as to whether the imposition of ancillary services charges is a just, reasonable, and fair practice.

D. Inmate Calling Services for the Deaf and Hard of Hearing

94. The Commission sought comment in the *2012 ICS NPRM* on deaf or hard of hearing inmates' access to ICS during incarceration.[344] Our actions today will be of significant benefit to deaf and hard of hearing inmates and their families. First, the per-minute rate levels

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fees on Complainants' telephone bills was an 'unjust and unreasonable' practice because the fees were unauthorized. That practice was 'in connection with' communication service because it was inextricably intertwined with LDDI's long distance service.").

[342] *See infra* Section III.H.4.

[343] *See* Transcript of Reforming ICS Rates Workshop at 266 (Vincent Townsend, President, Pay Tel, asserting that if the Commission only addresses interstate ICS rates, ICS providers may have the incentive to increase ancillary charges to make up for the effects of rate reductions); *see also id*. at 136; (Talila Lewis, Founder and President, HEARD, asserting that other ICS fees will go up if the Commission only address ICS rates); HRDC 2013 Comments at 8 (urging the Commission to eliminate extra charges or "ICS providers could circumvent Commission-imposed caps on per-call and per-minute charges by simply increasing the extra fees or adding new account-related fees that effectively raise the overall costs of ICS calls"); Pay Tel 2013 Comments at 16 (arguing that interstate rate relief "will lack meaning and impact if these additional fees are not part of the equation because ICS providers will compensate for interstate rate caps by raising these fees on the very same inter-state customers"). Hamden Ancillary Charges PN Reply at 1 (asserting that, based on experiences of ICS reform in New Mexico, "the only prospect for meaningful reform and consumer protection rests with the FCC and the hope that it will adopt a comprehensive regulatory approach to ICS that governs not only per minute rates prohibits commissions, but one that also proscribes baseless ancillary fees"); CenturyLink July 26, 2013 *Ex Parte* Letter at 2 (asserting that "ancillary fees can have a major impact on calling costs" but asserting that "per-call or transaction fees are not inappropriate if they are recovering costs").

[344] *ICS 2012 NPRM*, 27 FCC Rcd at 16644, para. 42.

we adopt in this Order will result in a significant rate reduction for most, if not all, interstate calls made by deaf and hard of hearing inmates.[345]

95. Second, we clarify that ICS providers may not levy or collect an additional charge for any form of TRS call.[346] Such charges would be inconsistent with section 225 of the Act, which requires that "users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination."[347]

96. Third, we seek comment in the Further Notice below on additional issues relating to ICS for the deaf and hard of hearing, including: (i) whether and how to discount the per-minute rate for ICS calls placed using TTYs, (ii) whether action is required to ensure that ICS providers do not deny access to TRS by blocking calls to 711 and/or state established TRS access numbers, (iii) the need for ICS providers to receive complaints on TRS service and file reports with the Commission, and (iv) actions the Commission can take to promote the availability and use of Video Relay Service (VRS) and other assistive technologies in prisons.[348]

97. We decline to take other actions related to deaf and hard of hearing inmates requested by commenters at this time.[349] While we strongly encourage correctional facilities to ensure that deaf and hard of hearing inmates are afforded access to telecommunications that is equivalent to the access available to hearing inmates, we decline at this time to mandate the

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[345] *See supra* Section III.C.3.

[346] Section 225 defines TRS as "telephone transmission services that provide the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio." 47 U.S.C. § 225(a)(3). There are several forms of TRS, depending on the particular needs of the user and the equipment available. *See generally* FCC, Telecommunications Relay Service (TRS), *available at* http://www.fcc.gov/guides/telecommunications-relay-service-trs (last visited July 15, 2013).

[347] 47 U.S.C. § 225(d)(1)(D). We find our action here to be consistent with section 276(b)(1)(A), as well. In implementing section 276, the Commission has observed that section 276(b)(1)(A) exempted, among other things, TRS calls from the per-call compensation requirement, and it required payphone service providers to provide free access to connect to TRS. *See, e.g.*, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act Of 1996*, Report and Order, 11 FCC Rcd 20541, 20545, para. 6 (1996). *See also Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, Fifth Report and Order, 17 FCC Rcd 21233, 21244-45, para. 24 (2002) ("A call made from a payphone connects to a TRS facility via free local calling."). However, if the outgoing portion of the TRS call is a long distance call, the caller has been required to pay for that. *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, 17 FCC Rcd at 21244-45, para. 24. Insofar as our actions here permit compensation for the ICS provided, just not for a greater charge than the services are provided to other users, we also find this consistent with the statutory framework of section 276. As noted below, however, we seek comment in the Further Notice on these issues.

[348] *See infra* Section V.B. VRS is "[a] telecommunications relay service that allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users through video equipment. The video link allows the [communications assistant] to view and interpret the party's signed conversation and relay the conversation back and forth with a voice caller." 47 C.F.R. § 64.601(a)(27).

[349] *See infra* Section V.B.

number, condition, or physical location of TTY and other TRS access technologies (*e.g.*, devices and/or applications used to access VRS) or the times they are physically available to inmates,[350] allowed call durations for deaf and hard of hearing inmates,[351] or the types of TRS access technologies made available to inmates.[352]

E. Existing ICS Contracts

1. Background

98. The record indicates that contracts for the provision of ICS usually are exclusive contracts between ICS providers and correctional facilities to serve the relevant correctional facility.[353] The ICS end users (*i.e.*, the inmates and outside parties with whom they communicate via ICS) are not parties to such agreements. Contracts between ICS providers and facilities typically establish an initial term of three to five years, with one-year extension options.[354] Such contracts may include change-of-law provisions,[355] although some such provisions can be vague.[356] In the *2012 ICS NPRM*, the Commission sought comment on whether it would be appropriate to mandate a "fresh look" period for existing contracts, or whether any new ICS rules should apply only to contracts entered into after the adoption of the new rules.[357] The Commission also sought comment on typical ICS contract terms, as well as how change-of-law contract provisions would interact with any new Commission rules or obligations.[358]

99. The record in response was mixed.[359] Several commenters advocate for a "fresh look" period to review and renegotiate existing contracts;[360] some urge us to avoid delaying rate

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[350] *See, e.g.*, ACLU 2013 Comments at 5, Embracing Lambs 2013 Comments at 2; HEARD 2013 Comments at 6, 9; NDRN 2013 Comments at 2-3; P&A 2013 Comments at 1; RBGG 2013 Comments at 2-3.

[351] *See, e.g.*, NDRN 2013 Comments at 3; HEARD 2013 Comments at 9; Embracing Lambs 2013 Comments at 1-2; Consumer Groups 2013 Comments at 4; P&A 2013 Comments at 2; RIT/NTID Student Researchers 2013 Comments at 6; RBGG 2013 Comments at 2.

[352] *See, e.g.*, ACLU 2013 Comments at 2-3; DisAbility Rights Idaho 2013 Comments at 1-2; Embracing Lambs 2013 Comments at 2; HEARD 2013 Comments at 4-6; NDRN 2013 Comments at 2; P&A 2013 Comments at 2; RIT/NTID Student Researchers 2013 Comments at 4.

[353] *See* GTL 2013 Comments at 23; CenturyLink 2013 Comments at 13, Telmate 2013 Comments at 16-17; Verizon 2013 Comments at 5-6; NCL 2013 Reply at 2.

[354] *See* CenturyLink 2013 Comments at 15-16 (explaining that it can take three or more years to recuperate its ICS costs).

[355] *See* GTL 2013 Comments at 29-30, Letter from Lee G. Petro, Counsel to Petitioners, WC Docket No. 12-375 at 1, 2 (filed Aug. 2, 2013) (Petitioners Aug. 2, 2013 *Ex Parte* Letter) (stating that Petitioners' review of "scores of publicly-available contracts, both for large state correctional authorities and small county facilities," show that ICS contracts "routine[ly] include provisions reserving the right to amend or renegotiate the contracts in the event of a change in law."). *But see* Securus May 31, 2013 *Ex Parte* Letter at 2 (asserting that most contracts do not contain change of law provisions).

[356] *See e.g.*, CenturyLink 2013 Comments at 15-16; GTL 2013 Comments at 29-30.

[357] *See 2012 ICS NPRM*, 27 FCC Rcd at 16646, para. 46.

[358] *See id.*

[359] *Compare, e.g.*, Securus 2013 Comments at 11-12 (asserting that adopting rate caps would nullify existing, contracted rates in direct contravention of the *Sierra-Mobile* doctrine, and that the Constitution prevents existing (continued….)

reform;[361] and others assert that any new rules should apply only to contracts entered into after the effective date of the rules.[362]

2. Discussion

100. The reforms we adopt today are not directed at the contracts between correctional facilities and ICS providers. Nothing in this Order directly overrides such contracts. Rather, our reforms relate only to the relationship between ICS providers and end users, who, as noted, are not parties to these agreements. Our statutory obligations require us to ensure that rates and practices are just and reasonable, and to ensure that payphone compensation is fair both to end users and to providers of payphone services, including ICS providers.[363] We address, for example, ICS providers' responsibility to charge just, reasonable and fair rates to inmates and the friends and family whom they call via ICS, and we find that certain categories of charges and fees are not compensable costs of providing ICS reasonably and directly related to the provision of ICS and hence may not be recovered in ICS rates.[364]

101. Agreements between ICS providers and correctional facilities—to which end users are not parties—cannot trump the Commission's authority to enforce the requirements of the Communications Act to protect those users within the Commission's jurisdiction under sections 201 and 276. We thus do not, by our action, explicitly abrogate any agreements

(Continued from previous page)

contracts from being abrogated or altered by new regulations except in exigent circumstances not present here) *with* Petitioners 2013 Comments at 29 (observing that the Commission has confirmed that it has "undoubted power to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation," and that similar fresh-look mandates "do not constitute a regulatory taking" since the proposed maximum rates would provide "the opportunity for adequate cost recovery); *see also* Telmate 2013 Comments at 16-17 (commenting that whether the Commission has the legal power to order a "fresh look" window does not seem open to question) *but cf.* Letter from Glenn Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed July 30, 2013) (asserting that Telmate has "reconsidered" its position on "contractual 'fresh look,'" urges the Commission to take a "staggered" fresh look window).

[360] *See, e.g.*, Petitioners 2013 Comments at 28-29; NASUCA 2013 Comments at 7 (advocating that the Commission should allow facilities and providers up to 180 days to reform contracts and rates in accordance with the rules); Telmate 2013 Comments at 16 (suggesting that the Commission should couple any rate reform with a "fresh look" window); TurnKey 2013 Reply at 5; AILA 2013 Comments at 3; NASUCA 2013 Reply at 11; *see also* HRDC 2013 Comments at 14 (urging the Commission to require that ICS providers comply with mandates by no later than six months or when the provider's ICS contract is next renewed or extended, whichever comes first).

[361] *See* Telmate 2013 Comments at 17; HRDC 2013 Comments at 14 (commenting that it would not be just or reasonable to allow ICS providers to continue to charge existing high rates until their next contract renewal or extension); NASUCA 2013 Reply at 11 (commenting that to allow the various high-rate contracts to continue once the benchmark has been adopted would only exacerbate the harm that is currently being done to inmates and their friends and relatives).

[362] *See* CenturyLink 2013 Comments at ii, 15; GTL 2013 Comments at 29–30; CBC 2013 Comments at 2; La. DOC 2013 Comments at 8; Securus May 31, 2013 *Ex Parte* Letter at 2 (supporting an approach where new rates apply on a going-forward basis to contracts that are bid, signed, or re-negotiated after the effective date of the new rates).

[363] 47 U.S.C. §§ 201(b), 276(b)(1)(A).

[364] *See supra* Sections III.C.2.b, III.C.3.d.

between ICS providers and correctional facilities.[365] To the extent that any particular agreement needs to be revisited or amended (a matter on which we do not take a position), such result would only occur because agreements cannot supersede the Commission's authority to ensure that the rates paid by individuals who are not parties to those agreements are fair, just, and reasonable.

102. To the extent that any contracts are affected by our reforms, we strongly encourage parties to work cooperatively to resolve any issues. For example, ICS providers could renegotiate their contracts or terminate existing contracts so they can be rebid based on revised terms that take into account the Commission's requirements related to inmate phone rates and services. We find that voluntary renegotiation would be in the public interest, and observe that the record reflects that, at least in some instances, contracts between ICS providers and correctional and detention facilities are updated and amended with some regularity.[366] To the extent that the contracts contain "change of law" provisions, those may well be triggered by the Commission's action today.[367] We further note that the reforms we adopt today will not take effect immediately but, rather, will take effect 90 days after the Order and FNPRM are published in the Federal Register. Parties therefore will have time to renegotiate contracts or take other appropriate steps.

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[365] Even if our actions today were somehow construed as modifying particular contractual provisions or abrogating particular contracts, we still would be acting within our lawful authority. As an initial matter, section 276(b)(3) states, "[n]othing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 276(b)(3). This provision, by its terms, does not apply to agreements entered *after* the 1996 Act's adoption, thereby signaling Congress's intent that in the event of a conflict between Commission rules under section 276 and a post-1996 contract, the rules will take precedence. Furthermore, it is well established that "[u]nder the *Sierra-Mobile* doctrine, the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful, and to modify other provisions of private contracts when necessary to serve the public interest." *Western Union Tel. Co. v.* FCC, 815 F.2d 1495 at 1501 (D.C. Cir. 1987) (citations omitted); *cf. Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385 at 5392-93, para.18 (2008) ("we find that we have ample authority to regulate telecommunications carriers' contractual conduct [under section 201(b) of the Act] even though it may have a tangential effect on MTE owners."). Here, we have adopted reforms to ensure that rates and charges for interstate ICS are just, reasonable, and fair under the Act and consistent with the public interest. To the extent that a contract between a facility and an ICS provider contains a rate that does not meet those legal standards, it would be in the public interest to mandate that the contracts be modified so that they reflect rates that comply with the relevant legal requirements. Accordingly, we would be acting within our authority to adopt these reforms even if we were understood to be directly modifying existing contracts.

[366] *See* Petitioners Aug. 2, 2013 *Ex Parte* Letter at 2 (based on the record and Petitioners' review of scores of contracts, "it is clear that the parties to ICS contracts routinely reserve the right to amend or renegotiate contracts should there be changes in state or federal regulations") (attaching excerpts from ICS agreements, both for large state-run correctional authorities and smaller county facilities). *Contra* Dissent at 122-123.

[367] *See* Petitioners 2013 Comments at 28-29 (observing that the Florida DOC contract with Securus was amended on four separate occasions, each time changing the ICS rates, and noting that the ICS agreement with the Indiana Department of Corrections had also been amended); *see also* GTL 2013 Comments at 29 (asserting that ICS contracts "typically include change of law provisions"); Securus 2013 Comments at 3 (stating that contracts may, in "some instances," be extended for a finite period).

F. Commission Action Does Not Constitute a Taking

103. We reject arguments that our reforms adopted herein effectuate unconstitutional takings.[368] It is well established that the Fifth Amendment does not prohibit the government from taking lawful action that may have incidental effects on existing contracts.[369] Although we do not concede that any incidental effects would "frustrate" the contractual expectations of ICS providers, even if that were the case, such "frustration" would not state a cognizable claim under the Fifth Amendment. In *Huntleigh USA Corp. v. United States*, for instance, the court found that Congress's decision to create the Transportation Security Agency "had the effect of 'frustrating' [a private security company's] business expectations, which does not form the basis of a cognizable takings claim."[370] The court reached this finding even though the relevant legislation effectively *eliminated* the market for private screening services.[371] Here, far from eliminating the ICS market, our regulations are designed to allow providers to recover their costs of providing ICS, including a reasonable return on investment.[372] In this context, any incidental effect on providers' contractual expectations does not constitute a valid property interest under the Fifth Amendment.

104. Moreover, even assuming, *arguendo*, that a cognizable property interest could be demonstrated by ICS providers, we still conclude that our actions would not give rise to unconstitutional takings without just compensation. As an initial matter, our ICS regulations do not involve the permanent condemnation of physical property and thus do not constitute a *per se* taking.[373] Nor do our actions represent a regulatory taking.[374] The Supreme Court has stated that

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[368] *See* CenturyLink 2013 Comments at 15-16 (asserting that applying new rules to existing ICS contracts could result in the confiscation of ICS provider property); Securus 2013 Comments at 11-12 (arguing that the Constitution prevents existing contracts from being abrogated or altered by new regulations except in exigent circumstances not present here).

[369] *See, e.g.*, *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508–510 (1923) (holding that even where the government expressly targeted an existing contract the harmed party did not have a takings claim because the United States acquired the subject matter of the existing contract, and its losses were only "consequential").

[370] *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1380 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 1045 (2008).

[371] *See id.* at 1375.

[372] *See supra* para. 53.

[373] *See Loretto v. Teleprompter Manhattan City Corp.*, 458 U.S. 419, 427 (1982) ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) ("When the government physically take s possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.").

[374] *Cf. Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, WT Docket No. 99-217, 23 FCC Rcd 5385 at 5292-93, para. 18 (2008) (FCC prohibition on telecommunications exclusivity contracts pursuant to section 201(b) of the Act does not violate the Fifth Amendment); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20261-64, paras. 55-60 (2007) (*Video MDU Order*) (FCC prohibition on video exclusivity contracts pursuant to section 628 of the Act does not violate the Fifth Amendment), *aff'd*, *National Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

in evaluating regulatory takings claims, three factors are particularly significant: (1) the economic impact of the government action on the property owner; (2) the degree of interference with the property owner's investment-backed expectations; and (3) the "character" of the government action.[375] None of these factors suggests a regulatory taking here.

105. First, our regulation of end-user ICS rates and charges will have minimal adverse economic impact on ICS providers. As explained elsewhere in this Order, ICS providers are entitled to collect cost-based rates and will have opportunities to seek waivers to the extent the framework adopted in this Order does not adequately address their legitimate costs of providing ICS.[376] Under these circumstances, any cognizable economic impact will not be sufficiently significant to implicate the takings clause.[377] Even beyond that, the record supports the notion that lower rates are likely to stimulate additional call volume, enabling ICS providers to offset some of the impacts of lower rates without incurring commensurate added costs.[378]

106. Second, our actions do not improperly impinge upon investment-backed expectations of ICS providers. The Commission has been examining new ICS regulations for years,[379] and various proposals – including rate caps and the elimination of compensation in ICS rates for site commissions – have been raised and debated in the record.[380] In addition, some states have already taken action consistent with what we adopt here today.[381] Given this background, any investment-backed expectations cannot reasonably be characterized as having been upset or impinged by our actions today.[382]

107. Third, our action today substantially advances the legitimate governmental interest in protecting end-user consumers from unjust, unreasonable and unfair interstate ICS rates and other unjust and unreasonable practices regarding interstate ICS—an interest Congress has explicitly required the Commission to protect.[383] Moreover, the Commission is taking a

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[375] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

[376] Moreover, we note that the record supports the notion that lower rates are likely to stimulate significant additional call volume, which should generate additional revenues for ICS providers. *See supra* Section III.C.3.

[377] *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944) (where rates enable continued operation of regulated company, the company has no valid claim to compensation under the Takings Clause, even if the current scheme of regulated rates yields "only a meager return" compared to alternative rate-setting approaches).

[378] *See supra* paras. 4, 66, 80, and n.15.

[379] *See* First Wright Petition; Alternative Wright Petition; *see also 2007 Public Notice*, 22 FCC Rcd 4229.

[380] *See supra* Sections III.C.2.b, III.C.3.

[381] *See supra* para. 4 and Section III.B.3.

[382] *See Video MDU* Order, 22 FCC Rcd at 20263, para. 58 (finding no improper interference with investment-backed expectations because, *inter alia*, "exclusivity clauses in MDU contracts have been under active scrutiny for over a decade"; "the Commission has prohibited the enforcement of such clauses in similar contexts"; and "States have also taken action to prohibit such clauses"); *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 226-27 (1986) (declining to find interference with investment-backed expectations where subjects of regulation long had been "objects of legislative concern;" where "it was clear" that agency discretion to regulate, if exercised, would result in liability; and where affected entities had "more than sufficient notice" of possibility of regulation).

[383] *See* 47 U.S.C. §§ 201, 276.

cautious approach in lowering end-user ICS rates, and is carefully calibrating that approach to ensure that all parties are compensated fairly for their part of the ICS while simultaneously lowering ICS rates for all end users. In short, the rules at issue here are consistent with takings jurisprudence and will not wreak on ICS providers the kind of "confiscatory" harm – *i.e.*, "destroy[ing] the value of [providers'] property for all the purposes for which it was acquired" – that might give rise to a tenable claim under the Fifth Amendment's Takings Clause.[384]

G. Collect Calling Only and Billing-Related Call Blocking

108. In the First Wright Petition, the Petitioners requested that the Commission require ICS providers and prison administrators to offer debit calling, the rates for which Petitioners assert are typically lower than collect calling.[385] In the *2012 ICS NPRM*, the Commission requested comment on various issues related to prepaid calling and debit calling issues, including issues related to the security of debit calling and any increased cost or administrative workload associated with debit and prepaid calling.[386] Calling options other than collect calling appear to have increased since the Alternative Wright Petition was filed.[387] The record indicates that some facilities require the ICS provider to offer debit or prepaid calling for inmates, and other facilities or jurisdictions preclude options other than collect calling.[388]

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[384] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *see also Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254 at 1263 (D.C. Cir. 1993) (holding that a confiscatory "end result" may be established only upon a particularized showing that the rate order "threatens the financial integrity of the [regulated carrier] or otherwise impedes [its] ability to attract capital"); *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 at 1181 (D.C. Cir. 1987) (suggesting that federally prescribed rates could be confiscatory if a regulated company could provide its allegations that it "ha[d] been shut off from long-term capital, [was] wholly dependent for short-term capital on a revolving credit arrangement that [could] be cancelled at any time, and ha[d] been unable to pay dividends for four years"); *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101 at 1109 (D.C. Cir. 2011) (government action must "amount to a deprivation of all or most economic use" of property in order to amount to an unconstitutional regulatory taking) *cert. denied*, 131 U.S. 3003 (2011).

[385] *See* Alternative Wright Petition at 23-27 (contending that all ICS providers should be required to offer debit calling at all facilities, and that prison administrators be required to permit the option of debit calling); First Wright Petition, Dawson Aff. 42-43 (asserting that, in the case of debit account or debit card calling, billing costs and uncollectibles "virtually disappear," making debit calling much cheaper than collect calling).

[386] *2012 ICS NPRM*, 27 FCC Rcd at 16640-41, paras. 30-33.

[387] *See* CenturyLink 2013 Comments at 13 (estimating that approximately 70% of its ICS customers offer debit calling but noting that "debit calling varies widely by facility"); GTL 2013 Comments at 22 (noting that a "significant number" of correctional facilities "are becoming more open to debit calling," but that debit calling "is not yet universally accepted"); *see also* Securus 2013 Comments at 21 (noting that some correctional facilities forbid calling cards due to administrative burdens and concerns about potential violence); PCS 2007 Comments at 6 (noting that it "offered debit service to all its facilities" but has only about 60% penetration among its Department of Corrections facilities).

[388] *See* GTL 2013 Comments at 21-22 (noting that debit calling is not universally accepted and that some facilities "prefer not to give inmates the greater degree of latitude to direct their own calls"); Securus 2013 Comments at 21 (asserting that debit and prepaid options are increasingly prevalent but their "availability lies in the discretion of the resident correctional authority"); Telmate 2013 Comments at 17 and Telmate 2013 Reply at 9-10 (contending that ICS providers oppose a mandate to allow debit and prepaid calls because their calling systems and platforms are old and cannot support anything but collect calls); *see also* GA. COMP. R. & REGS. 515-12-1.30 (2013).

109. The *2012 ICS NPRM* also sought comment on Petitioners' claims that ICS providers block collect calls to numbers served by terminating providers with which they do not have a billing arrangement.[389] The *2012 ICS NPRM* noted that in facilities where collect calling is the only calling option available, inmates may be unable to complete any calls.[390] For example, if an inmate tries to call a family member whose phone service provider does not have a billing relationship with the ICS provider, then the ICS provider will prevent the call from going through, and the inmate cannot call his or her family member.[391] The *2012 ICS NPRM* asked if this blocking practice existed and whether there are ways, while other than mandating debit calling, to prevent billing-related call blocking.[392] Commenters agreed that billing-related call blocking occurs.[393]

110. *Availability of Debit and Prepaid Calling*. We believe the availability of debit and prepaid calling in correctional facilities will address the problem of call blocking associated with collect calling by enabling service providers to collect payment up front, which eliminates the risk of nonpayment and renders billing-related call blocking unnecessary.[394] We find that debit or prepaid calling yield significant public interest benefits and facilitate communication between inmates and the outside world. For example, the record indicates that debit and prepaid calling can be less expensive than collect calling because they circumvent the concerns of bad debt associated with collect calling and the expense of subsequent collection efforts.[395] We establish lower interim rate caps and safe harbor rate levels for debit and prepaid calling herein.[396] Additionally, the use of prepaid calling helps the called parties to better manage their budget for ICS, thus making inmate contact with loved ones more predictable.[397] We note that

[389] *See 2012 ICS NPRM*, 27 FCC Rcd at 16643-44, para. 40 (citing Alternative Wright Petition at 23-24).

[390] *See id*.

[391] *See id.*; *see also* GTL 2013 Comments at 24 (asserting that ICS providers "have no alternative but to block calls" to numbers served by LECs with which they do not have preexisting billing relationships because they would be completing calls with no way to bill and collect for the calls).

[392] *See 2012 ICS NPRM*, 27 FCC Rcd at 16643-44, para. 40.

[393] For example, Securus stated that approximately three out of ten calls result in a billable call. *See* Securus 2013 Comments at 16. GTL acknowledges that billing-related call blocking is increasing. *See* GTL 2013 Comments at 24-25.

[394] *See* GTL 2013 Comments at 25 (asserting that the best way to deter call blocking is to support increased use of debit or prepaid calling); Securus 2013 Comments at 22; Alternative Wright Petition at 7, 23-24.

[395] As a result, providers would benefit from reduced costs for operators and billings and collection personnel. *See* CURE 2007 Comments at 9. We note that some ICS providers offer products designed to help inmates' friends and families find the lowest-cost calling plan possible, through such features as remote kiosks for prepaid and debit services. *See* Securus Comments 2013 at Attach., Hopfinger Decl. at paras. 22-25 (describing prepaid cards sold at facility's commissary, or funded by check, credit card, online banking, money order, via its website or through a toll-free number); Telmate Reply 2013 Comments at 3 (offering remote kiosk payments).

[396] *See supra* Section III.C.3.

[397] *See, e.g.*, GTL 2013 Comments at 18 (asserting that "call volumes typically increase significantly as an inmate's family and friends can more easily manage a prepaid account for budgeting purposes").

the record indicates the increased availability of calling options other than collect calling.[398] In the accompanying Further Notice we seek comment about these options.[399] Additionally, we strongly encourage correctional facilities to consider including debit calling and prepaid calling as options for inmates, so they can more easily and affordably communicate with friends and family.

111. *Call Blocking*. The Commission has a long-standing policy that largely prohibits call blocking. Specifically, the Commission has determined that the refusal to deliver voice telephone calls "degrade[s] the nation's telecommunications network,"[400] poses a serious threat to the "ubiquity and seamlessness"[401] of the network, and can be an unjust and unreasonable practice under section 201(b) of the Communications Act.[402] Throughout this proceeding ICS providers have offered various justifications for their blocking practices.

112. Some ICS providers claim that they block calls to terminating providers with whom they do not have prior billing relationships to avoid potentially significant uncollectibles.[403] They assert that uncollectible revenue associated with collect calls drives up providers' costs, which are ultimately passed along through ICS rates charged to consumers.[404] Some commenters suggest that encouraging debit or prepaid calling is necessary to eliminate the issue of billing-related call blocking.[405] Other ICS providers note, however, that due to technical

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[398] *See, e.g.*, HRDC 2013 Comments at Exh. B (chart showing 2012 interstate ICS rates in state correctional facilities include prepaid and debit options in all but five states); Securus 2013 Comments at 21-22; Telmate 2013 Comments at 11 (stating that all of Telmate's platforms support debit and prepaid services).

[399] *See infra* Section V.E.

[400] *Establishing Just and Reasonable Rates for Local Exchange Carriers*; *Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629 at 11631 para. 5 (Wireline Comp. Bur. 2007) (*Call Blocking Declaratory Ruling*); *see also USF/ICC Transformation Order*, 26 FCC Rcd at 17903, para. 734; 18029 para. 973; *Blocking Interstate Traffic in Iowa*, FCC 87-15, Memorandum Opinion and Order, 2 FCC Rcd 2692 (1987) (denying application for review of a Bureau order that required petitioners to interconnect their facilities with those of an interexchange carrier in order to permit the completion of interstate calls over certain facilities).

[401] *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 at 9932-33, para. 24 (2001) (*Access Charge Reform*).

[402] *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11629, 11631, paras. 1, 5-6; *USF/ICC Transformation Order*, 26 FCC Rcd at 17903, 18029, paras. 734, 973; *Blocking Interstate Traffic in Iowa*, 2 FCC Rcd at 2692; *Telecommunications Research and Action Center and Consumer Action v. Central Corporation*, Memorandum Opinion and Order, 4 FCC Rcd 2157, 2159, para. 12 (1987).

[403] *See* GTL 2013 Comments at 24 (asserting that ICS providers "have no alternative but to block calls" to numbers served by LECs with which they do not have preexisting billing relationships because they would be completing calls with no way to bill and collect for the calls); Alternative Wright Petition at 7, 23-24 (alleging that ICS providers are "increasingly unable or unwilling to enter into billing agreements with LECs," resulting in increased call blocking and fewer inmate calls); CURE 2007 Comments at 10 (noting that collect calls from penal facilities will be blocked if the recipient's telephone company does not have an established billing arrangement with the telephone company serving the prison).

[404] *See, e.g.*, GTL 2013 Comments at 20-21; NCIC 2013 Comments at 5; SDDOC 2013 Comments at 1; Pay Tel 2007 Comments at 10-11.

[405] *See, e.g.*, GTL 2013 Comments at 24-25 (asserting that the only practical way to deter call blocking is to support increased use of debit or prepaid calling); NASUCA 2013 Reply at 7 (noting that states that do not offer debit card and prepaid calling options should be encouraged to do so); CURE 2007 Comments at 10-11 (contending that

(continued….)

advancements and new product developments, they do not block calls due to lack of a billing arrangement, and describe solutions they have implemented to address the problem of billing-related call blocking.[406] For example, Pay Tel offers a "prepaid collect" service which allows an inmate to initiate a free call and at its conclusion, Pay Tel offers to set up a direct billing arrangement with the call recipient to pay for any future calls.[407] Securus has implemented a similar strategy by allowing "a short conversation with the called party, after which the called party is invited to set up a billing arrangement with Securus via oral instructions.[408] CenturyLink has implemented a similar "prepaid collect" solution.[409]

113. Based on the availability of these "prepaid collect" services, the Commission's long-standing position against unreasonable call blocking,[410] and the public interest benefits realized from encouraging inmates connecting with friends and families, we find billing-related call blocking[411] by interstate ICS providers that do not offer an alternative to collect calling to be an unjust and unreasonable practice under section 201(b).[412] As such, we prohibit ICS providers from engaging in billing-related call blocking[413] of interstate ICS calls unless the providers have made available an alternative means to pay for a call, such as "prepaid collect," that will avoid

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mandating debit calling services would address call blocking because ICS providers would be assured of payment for an inmate's call).

[406] *See* CenturyLink 2013 Comments at 17 (stating that it and other ICS providers operate different billing programs that "effectively address" the issue of a lack of traditional billing arrangements with CLECs and wireless providers); Securus 2013 Comments at 21 (asserting that, due to new products it has developed, as well as advanced technology available, it is increasingly rare that an inmate call is blocked due to lack of a billing arrangement); CCA 2007 Comments at 20 (noting that ICS providers generally have billing arrangements with major ILECs, contract with billing clearinghouses, and work with CLECs to arrange for "alternative means" for calls to be completed in cases where CLECs refuse to bill for collect calls); Pay Tel 2007 Comments at 14-15 (alleging that call blocking issues should not be blamed on ICS providers, as it is the CLECs and wireless carriers who refuse to enter into billing arrangements with the ICS providers, as well as refusing to populate the information database, or LIDB, in an attempt to avoid payment).

[407] *See* Pay Tel 2013 Comments at 1-2; Pay Tel 2007 Comments at 23-24. Pay Tel allows an ICS call to go through and then sets up a direct billing relationship with the called party rather than having to rely on the called parties' phone service provider. *See* Pay Tel May 31, 2013 *Ex Parte* Letter at Attach., Presentation for Federal Communications Commission, 1. Pay Tel also says that "prepaid collect" calls account for approximately 61% of its ICS traffic. *See* Pay Tel 2013 Comments, Exh. 2.

[408] Securus 2013 Comments at 23.

[409] *See* CenturyLink 2013 Comments at 17.

[410] *See supra* para. 111.

[411] Consistent with prior Commission action, this prohibition also extends to providers of interconnected and of "one-way" VoIP traffic if those services are currently offered by ICS providers or are at some future time. *See USF/ICC Transformation Order*, 26 FCC Rcd at 18028-29, paras. 973-74 (prohibiting blocking of voice traffic to or from the PSTN by interconnected VoIP providers, or by providers of "one-way" VoIP).

[412] We also believe that the section 276(b)(1) requirement that payphone services benefit the general public supports our action here. *See* 47 U.S.C. § 276(b)(1). Collect calling only mandates coupled with call blocking by ICS providers effectively act to prevent an inmate from completing ICS calls.

[413] By billing-related call blocking, we clarify that we include blocking collect calls for lack of a billing arrangement between the ICS provider and the called party's provider.

the need to block for lack of a billing relationship or to avoid the risk of uncollectibles. We also note that the rates for these types of calls are subject to the debit/prepaid interim rate caps or safe harbor rate levels adopted in this Order. We expect this prohibition to have less of an impact on ICS providers serving facilities that make prepaid and debit calling available as an alternative means to pay for a call than it will have on ICS providers serving facilities where collect calling is the only option offered.

114. Absent these requirements, inmates at facilities that impose collect-only restrictions and are served by ICS providers that block calls to providers with whom they do not have a billing relationship would have no way to place calls to friends or family served by providers lacking such a billing relationship. The Commission has the authority to mandate that ICS providers implement solutions to address billing-related call blocking under section 201(b). The "prepaid collect" requirement regulates the manner in which ICS providers bill and collect for inmate calls. With regard to common carriers, the Commission and courts[414] have routinely indicated that billing and collection services provided by a common carrier for its own customers are subject to Title II.[415]

H. Enforcement

115. In this section, we explain the enforcement procedures to ensure compliance with the Act, our rules, and requirement that all ICS interstate rates and charges, including ancillary charges, be cost-based.[416] First, we require that ICS providers file annually with the Commission

[414] *See Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, CG Docket Nos. 11-116, 09-158, CC Docket No. 98-170, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 4436, 4480, paras. 123-25 (2012) (*2012 Cramming Order*) (carrier practice of placing third-party charges on bills makes cramming possible and is subject to section 201(b)); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Second Recommended Decision, 13 FCC Rcd 24744, 24771-72, para. 70 & n.87 (1998) ("We believe that a carrier's billing and collection practices for communications services are subject to regulation as common carrier services under Title II of the Act."); *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1512 (D.C. Cir. 1990) (explaining that "[b]illing and collecting for a carrier's own offering is part and parcel of providing that service in the first place, and since the service itself fell within the FCC's jurisdiction, the billing and collecting process did as well").

[415] In the *First Truth in Billing Order*, for example, the Commission rejected arguments that the *1986 Detariffing Order* precluded the Commission from regulating common carrier billing practices under Title II. *See Truth-in-Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7506-07, para. 25 (1999) ("The Commission has previously stated that it has jurisdiction under Title II to regulate the manner in which a carrier bills and collects for its own interstate offerings, because such billing is an integral part of that carrier's communications service."); *Detariffing of Billing & Collection Servs.*, 102 F.C.C. 2d 1150, 1167-68 (1986) (*1986 Detariffing Order*), *recon. denied*, 1 FCC Rcd 445 (1986). The Commission relied on this finding more recently in regulating carrier "cramming" practices, finding that the *1986 Detariffing Order* "did not prevent it from requiring that carrier billing practices 'for and in connection with' telecommunications services must be just and reasonable" under section 201(b). *See 2012 Cramming Order*, 27 FCC Rcd at 4480, para. 123.

[416] We recognize that ICS providers currently are not required to tariff their interstate ICS, and we decline to require tariffing in this context. Although tariffing requirements can provide valuable protections in appropriate circumstances, we conclude that the more limited requirements we adopt are appropriate as part of this interim regulatory framework, subject to further consideration in the Further Notice. The approach adopted here thus allows ICS providers greater flexibility in how they offer ICS than would be the case under a tariffing regime. *See, e.g.*, 47 U.S.C. § 203 (requiring, among other things, filing of tariffs publicly with the Commission and advanced notice to the Commission of changes to a tariff; authorizing the Commission to reject tariff filings; and prohibiting deviations (continued….)

information on their ICS rates as well as a certification of compliance with the requirements set forth in this Order. Second, we remind ICS providers of the requirement to comply with existing Commission rules. Finally, we remind parties that our enforcement and complaint process may result in monetary forfeiture and/or refunds to ICS end users.

1. ICS Provider Certification Requirement

116. We establish annual certification requirements to facilitate enforcement and as an additional means of ensuring that each and every ICS providers' rates and practices are just, reasonable, and fair and remain in compliance with this Order. First, we require all providers of ICS to file annually by April 1st data regarding their interstate and intrastate ICS rates, with local or other categories of rates broken out separately to the extent they vary, and minutes of use by correctional facility, as well as average duration of calls. Having comprehensive ICS rate information available in a common format will simplify the Commission's task of reviewing these rates and will provide consumers and advocates with an additional resource for understanding them. We require ICS providers to submit annually, by state, their overall percentage of calls disconnected by the provider for reasons other than expiration of time, such as security,[417] versus calls that the inmate or called party disconnected voluntarily. We also require ICS providers to file with the Commission their charges to consumers that are ancillary to providing the telecommunications piece of ICS. These include, for example, charges to open a prepaid account, to add money to a prepaid account, to close a prepaid account, to receive a paper statement, to receive ICS calls on a wireless phone, or any other charges to inmates or other end users associated with use of ICS.[418] These data will assist the Commission in monitoring the effectiveness of the reforms we adopt today and in addressing the issues raised in the attached Further Notice.

117. We further require an officer or director of each ICS provider annually to certify the accuracy of the data and information in the certification, and the provider's compliance with all portions of this Order, including the requirement that ICS providers may not levy or collect an additional charge for any form of TRS call, and the requirement that ancillary charges be cost-based. We find this to be a minimally burdensome way to ensure compliance with this Order. To ensure consistency with other reporting requirements and to minimize burden on ICS providers, we delegate to the Bureau the authority to adopt and implement a template for submitting the required data, information, and certifications.

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from the tariff); *American Tel. & Tel. Co. v. Central Office Tel.*, 524 U.S. 214, 227 (1998) (under the filed tariff doctrine, "'the rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier'") (citation omitted); 47 C.F.R. §§ 61.38, 61.39, 61.49 (supporting information required to be submitted with tariff filings; 47 C.F.R. Part 61, subparts B and F (tariff filing, formatting and notice requirements).

[417] One indicia of this would be a call to the same telephone number initiated shortly after a call to the same telephone number was disconnected.

[418] *See supra* Section III.C.3.d. *See generally* Please Deposit All of Your Money Study.

2. Compliance with Existing Rules

118. We remind ICS providers of their ongoing responsibilities to comply with our existing rules. For example, providers of inmate operator services are required to make certain oral disclosures prior to the completion of the calls. Specifically, section 64.710 of our rules requires providers of inmate operator services to disclose to the consumer the total cost of the call prior to connecting it, including any surcharges or premise-imposed fees that may apply to the call as well as methods by which to make complaints concerning the charges or collection practices.[419] Additionally, ICS providers that are non-dominant interexchange carriers[420] must make their current rates, terms, and conditions available to the public via their company websites.[421] Any violation of such responsibilities or failure to comply with existing rules may subject ICS providers to enforcement action, including, among other penalties, the imposition of monetary forfeitures.[422] In the case of carriers, such penalties can include forfeitures of up to $160,000 for each violation or each day of a continuing violation, up to a maximum of $1,575,000 per continuing violation.[423] Where the Commission deems appropriate, such as in particularly egregious cases, a carrier may also face revocation of its section 214 authorization to operate as a carrier.[424] We caution ICS providers that, in order to avoid the potential imposition of these and other penalties, they must comply with all existing rules and requirements.

3. Investigations

119. In this Order, we require ICS providers to charge cost-based rates and charges[425] to inmates and their families, and establish "safe-harbor" rates at or below which rates will be presumed just and reasonable. Specifically, we adopt interim safe harbor rates of $0.12 per

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[419] *See* 47 C.F.R. § 64.710(a)(1).

[420] *See* 47 C.F.R. § 42.10.

[421] *See* 47 C.F.R. § 42.10(b). In the *USTelecom Forbearance Order*, the Commission conditionally forbore from section 42.10(a) of its rules requiring that rates, terms and conditions be made publicly available at a physical location, as long as the information is available on a provider's publicly-accessible website or the provider makes reasonable accommodations to provide the information to consumers without Internet access. *See Petition of USTelecom for Forbearance Under 47 U.S.C. Section 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order and Report and Order in WC Docket 10-132 and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7672-74, paras. 98-99 (2013).

[422] *See* 47 C.F.R. § 503(b); 47 C.F.R. § 1.80(a).

[423] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80(b)(2). Part 1.80(b) of the Commission's rules was recently amended to increase penalty amounts to account for inflation. *See Amendment of Section 1.80(B) of the Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, DA 13-1615 (Enf. Bureau rel. Aug. 2, 2013); *see also* 78 FR 49370.

[424] *See* 47 U.S.C. § 214; 47 C.F.R. § 63.01(a) (granting domestic section 214 authority generally); *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, Report and Order, MM Docket No. 87-531, 14 FCC Rcd 11364, 11373–74, paras. 15–16 (1999) (stating that a carrier's blanket section 214 authority can be revoked "when warranted in the relatively rare instances in which carriers may abuse their market power or their common carrier obligations").

[425] *See supra* Section III.C.1 and note 196.

minute for debit and prepaid interstate calls and $0.14 per minute for collect interstate calls.[426] Based on the evidence in this record, we also set an interim hard cap on ICS providers' rates of $0.21 per minute for interstate debit and prepaid calls, and $0.25 per minute for collect interstate calls. This upper ceiling ensures that the highest rates are reduced without delay. Although we expect the vast majority of providers to be at or below our safe harbor rate levels, we provide this cap to accommodate unique circumstances. ICS providers may elect to charge cost-based rates between the interim safe harbor and the interim cap. We delegate to the Bureau the authority to investigate ICS provider rates and take appropriate actions in such investigations, including the ordering of refunds.

4. Complaints

120. As discussed above, we require all interstate ICS rates and charges to be cost-based, including ancillary charges, per-call or connection charges, and per-minute rates. We note that ICS providers' interstate rates that are at or below the relevant safe harbor rate levels will be treated as lawful until the Commission has issued a decision finding otherwise. Parties can file a complaint challenging the reasonableness of interstate ICS rates and ancillary charges under sections 201 and 276 of the Act, but to the extent that any such complaint challenges rates that are within our safe harbor, the complainant must overcome a rebuttable presumption that such rates are just, reasonable, and fair.[427] Accordingly, those rates may be challenged but any rate prescription rising out of such a proceeding will be forward-looking and will not include refunds.

121. *Formal Complaints.* Complaints against ICS providers under the rules we adopt herein should follow the process set forth in the Commission's formal complaint rules.[428] Compliance with our safe harbor ICS rates will establish a presumption that such rates are just, reasonable, and fair. An ICS provider will bear the burdens of production and persuasion in all complaints challenging whether its ICS rates and/or ancillary charges are just, reasonable, and fair in compliance with sections 201 and 276 of the Act.[429]

122. *Informal Complaints.* Parties may submit informal complaints to the Commission pursuant to section 1.41 of the Commission's rules.[430] Unlike formal complaints, no filing fee is required.[431] We recommend that complaining parties submit any complaints through the

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[426] We find that the record provides ample justification for assuming a 15-minute call as the basis for our calculations. *See supra* note 232. Additionally, we address rates by adopting interim safe harbor rate levels and interim rate caps that work together. We adopt interim safe harbor interstate rate levels for prepaid and debit calls and separately for collect calls, and we will presume that interstate ICS rates at or below the safe harbors are cost-based and therefore just, reasonable, and fair.

[427] *See* 47 U.S.C. §§ 201, 208, 276.

[428] 47 C.F.R. §1.720, *et seq.*

[429] As noted above, a provider will lose the benefit of the safe harbor if its rates at any of the facilities it serves exceed the safe harbor rate levels. *See supra* note 226.

[430] 47 C.F.R. § 1.41.

[431] Refunds to end users will not be available under the informal complaint process.

Commission's website, at http://esupport.fcc.gov/complaints.htm. The Consumer and Governmental Affairs Bureau will also make available resources explaining these rules and facilitating the filing of informal complaints. Although individual informal complaints will not typically result in written Commission orders, the Enforcement Bureau will examine trends or patterns in informal complaints to identify potential targets for investigation and enforcement action.[432]

123. If, after investigation of an informal or formal complaint, it is determined that ICS providers interstate rates and/or charges, including ancillary charges, are unjust, unreasonable or unfair under sections 201 and 276 lower rates will be prescribed and ICS providers may be ordered to pay refunds. In addition to refunds, providers may be found in violation of our rules and face additional forfeitures. We also interpret the language in section 276 that ICS providers be "fairly compensated" for each and every completed call to require that an ICS provider be fairly compensated on the basis of either the whole of its ICS business or by groupings that reflect reasonably related cost characteristics, and not on the basis of a single facility it serves. Indeed, we doubt that a party could reasonably claim that the Commission must individually determine the costs of each call. Some averaging of costs must occur, and there is no logical reason that it must occur at the facility level. Finally, we note that this approach is consistent with our traditional means of evaluating providers' costs and revenues for various types of communications services.

I. Mandatory Data Collection

124. To enable the Commission to take further action to reform rates, including developing a permanent cap or safe harbor for interstate rates, as well as to inform our evaluation of other rate reform options in the Further Notice, we require all ICS providers[433] to file data regarding their costs to provide ICS. All such information should be based on the most-recent fiscal year data at the time of Office of Management and Budget approval, may be filed under protective order, and will be treated as confidential.[434] Such information will also ensure that rates, charges and ancillary charges are cost-based.

125. Specifically, we require all ICS providers to provide data to document their costs for interstate, intrastate long distance and intrastate local ICS for the past year. The collection of intrastate data is necessary to allow us to assess what costs are reasonably treated as jurisdictionally interstate. We have identified five basic categories of costs that ICS providers incur: (1) telecommunications costs and interconnection fees; (2) equipment investment costs; (3) equipment installation and maintenance costs; (4) security costs for monitoring, call blocking; (5) costs of providing ICS that are ancillary to the provision of ICS, including any

[432] As with our other complaint rules, the availability of complaint procedures does not bar the Commission from initiating separate and independent enforcement proceedings for potential violations. *See* 47 C.F.R. § 0.111(a)(16).

[433] ICS providers whose rates are at or below the applicable safe harbor rate level must comply with the mandatory data collection as well.

[434] *See* 47 C.F.R. § 0.459. We will also provide parties that opportunity to comment on the data after it is submitted, provided that they abide by any relevant protective order, or other requirements, adopted in this docket.

costs that are passed through to consumers as ancillary charges; and (6) other relevant cost data as outlined in the data template discussed below. For each of the first four categories, we require ICS providers to identify the fixed costs, the per-call costs and the per-minute costs. Furthermore, for each of these categories (fixed, per-call and per-minute costs), we require ICS providers to identify both the direct costs, and the joint and common costs. For the joint and common costs, we require providers to explain how these costs, and rates to recover them, are apportioned among the facilities they serve as well as the services that they provide. For the fifth category, we require ICS providers to provide their costs to establish debit and prepaid accounts for inmates in facilities served by them or those inmates' called parties; to add money to those established debit or prepaid accounts; to close debit or prepaid accounts and refund any outstanding balance; to send paper statements; to send calls to wireless numbers; and of other charges ancillary to the provision of communications service. We also require ICS providers to provide a list of all ancillary charges or fees they charge to ICS consumers and account holders, and the level of each charge or fee. We require all ICS providers to provide data on their interstate and intrastate long distance and local demand (*i.e.*, minutes of use) and to apportion the minutes of use between interstate and intrastate calls.[435] Finally, we will require ICS providers to submit forecasts, supported by evidence, of how they expect costs to change in the future.

126. These data will guide the Commission as it evaluates next steps in the Further Notice. To ensure consistency and to minimize the burden on ICS providers, we delegate to the Bureau the authority to adopt a template for submitting the data and provide instructions to implement the data collection. We also delegate to the Bureau authority to require an ICS provider to submit additional data that the Bureau deems necessary to determine cost-based rate levels for that provider.

IV. SEVERABILITY

127. All of the rules that are adopted in this Order are designed to work in unison to ensure just, reasonable, and fair interstate ICS rates. However, each of the reforms we undertake in this Order serves a particular function toward this goal. Therefore, it is our intent that each of the rules adopted herein shall be severable. If any of the rules is declared invalid or unenforceable for any reason, it is our intent that the remaining rules shall remain in full force and effect.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

128. We seek comment on additional measures we could take to ensure that interstate and intrastate ICS are provided consistent with the statute and public interest, the Commission's authority to implement these measures, and the pros and cons of each measure. We believe additional action on ICS will help maintain familial contacts stressed by confinement and will better serve inmates with special needs while still ensuring the critical security needs of correctional facilities of various sizes. Specifically, we seek comment on:

- Reforming intrastate ICS rates and practices;

[435] For purposes of this data collection, data on intrastate demand includes both intrastate local and long distance.

- ICS for the deaf and hard of hearing community;
- Further reforms of interstate and intrastate ICS rates;
- Cost recovery in connection with the provision of ICS;
- Ensuring that charges ancillary to the provision of ICS are cost-based;
- ICS call blocking;
- Ways to foster competition to reduce rates within correctional facilities; and
- Quality of service for ICS.

A. Reforming Intrastate ICS

129. In this section, we seek comment on reforming intrastate ICS rates[436] and practices to ensure that consumers across the country can benefit from a fair, affordable ICS rate framework that encourages inmates to stay connected with friends and family. As discussed below, we believe that intrastate reform is necessary and that the Commission has the authority to reform intrastate ICS rates. We seek comment on these issues.

1. Need for Intrastate Rate Reform

130. We commend states that have undertaken ICS reform. In particular, we encourage more states to eliminate site commissions, adopt rate caps, disallow or reduce per-call charges, or take other steps to reform ICS rates.[437] The reforms adopted in the Order are structured in a manner to encourage other states to undertake reform and to give states sufficient flexibility to structure reforms in a manner that achieves just and reasonable rates. Even so, it is unlikely that all 50 states, Washington D.C., and the U.S. territories will all engage in ICS reform in the near term. Indeed, several comments encourage the Commission to reform intrastate ICS rates as well as interstate ICS rates.[438] As a result, if the Commission does not take action to reform unfair intrastate ICS rates, the unreasonably high rates will continue, many families will remain disconnected, and the available societal benefits will not be realized.

131. The Order explains the legal and policy reasons why the Commission needed to adopt reforms of interstate ICS rates.[439] We believe the same legal and policy concerns identified in the Order apply equally with regard to high intrastate rates.[440] For example, lower ICS rates

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[436] In this Further Notice of Proposed Rulemaking, "intrastate ICS rates" means both local rates and intrastate long distance rates unless otherwise specified.

[437] *See supra* paras. 4, 36-38.

[438] *See e.g.*, CenturyLink 2013 Comments at 4; MICPR 2013 Comments at 1; Pay Tel 2013 Comments at 3; Legal Center and CODDC 2013 Comments at 4.

[439] *See supra* Sections III.A, III.B.5-III.B.6.

[440] *See, e.g.*, Transcript of Reforming ICS Rates Workshop at 185-88 (Jason Marks, former Commissioner, New Mexico Public Regulation Commission, urging the Federal Communications Commission to "take a broad look at its jurisdiction" due to the need to reform ICS rates and fees together); *id*. at 265-66, 331 (Vincent Townsend, President, Pay Tel, requesting that the Federal Communications Commission take a "comprehensive approach" to ICS reform); Pay Tel 2013 Comments at 3 (urging the Commission to take a "holistic" approach to ICS reform, (continued….)

result in increased communications between incarcerated parents and their children. Additionally, the record indicates that the lack of regular contact between incarcerated parents and their children is linked to truancy, homelessness, depression, aggression, and poor classroom performance.[441] Further, studies have demonstrated that increased contact with families during incarceration leads to lower rates of recidivism,[442] and associated lower taxpayer costs.[443] Indeed, the record indicates that a significant number of ICS calls are intrastate, highlighting the need for reform of intrastate rates.[444] We tentatively conclude and seek comment on the conclusion that intrastate ICS rate reform will yield these and other societal benefits in the same manner as interstate ICS rate reform.

132. As discussed in the Order, the variance in interstate ICS rates is significant (from an effective rate of $0.043 per minute in New Mexico to $0.89 per minute with a $3.95 call set up charge in Georgia)[445] and that such variance is unlikely to be based on the ICS providers' costs.[446] In the Order, we conclude that competition and market forces have failed to ensure just, reasonable, and fair interstate ICS rates, and, for the same reasons, we tentatively conclude that the same failure has occurred for intrastate ICS rates as well.[447] We invite comment on this analysis. Where states have failed to ensure just, reasonable, and fair ICS rates for intrastate

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including "all aspects of local and non-local, intrastate and interstate calls at both prisons and jails" and noting that reforming only interstate rates will lead to "rate shopping' that [will] raise critical security and fraud concerns"); CenturyLink 2013 Comments at 4-5 (asserting that the "best way to achieve a fair and equitable resolution of the ICS issue is to adopt a holistic rate structure that addresses both intrastate and interstate ICS and balances the needs of all stakeholders").

[441] *See supra* para. 2; *see also* The Phone Justice Commenters 2013 Reply at 4-5. Another commenter states that "[m]aintaining relationships with their incarcerated parents can reduce children's risks of homelessness and of involvement in the child welfare system." *See* Vera Mar. 14, 2013 *Ex Parte* Letter at 2; *see also* Center on the Admin. of Criminal Law 2013 Comments at 11 ("A child that stays in touch with an incarcerated mother or father is less likely to drop out of school or be suspended.").

[442] *See supra* note 172.

[443] *See* NARUC 2013 Reply at 6.

[444] *See, e.g.,* La. DOC 2013 Comments at 6 (asserting that the FCC regulates "only 4% of the calls made or 4% of the minutes used" in its facilities); Pay Tel 2013 Comments at 7 (asserting that in 2012, 84% of its calls in jail facilities were local calls); Telmate 2013 Comments at 3 (stating that "interstate traffic is a small percentage of ICS calling"); Pay Tel 2007 Comments at 6 (stating that in 2007, 81% of its calls in jail facilities were local calls).

[445] *See* The Phone Justice Commenters 2013 Comments at 6 (citing Georgia Department of Corrections, Inmate Telephone System: GTL Customer User Guide, *available at* http://www.dcor.state.ga.us/pdf/GDC_GTL_user_manual.pdf (a long distance interstate telephone call has a $3.95 connection surcharge and $0.89 per-minute rate)); HRDC 2013 Comments at 3, 12 (stating that New Mexico has an interstate collect calling rate of $0.043/min.).

[446] The ratio of standard deviation to mean for ICS per minute call costs net of commissions is 75% greater that the corresponding ratio for total incarceration costs per inmate. *See* HRDC June 8, 2013 *Ex Parte* Letter, Rev. Exh. B; *see also* The Price of Prisons: What Incarceration Costs Taxpayers at 10, Fig. 4 (Vera, Jan. 2010, updated July 20, 2012), *available at* http://www.vera.org/pubs/price-prisons-what-incarceration-costs-taxpayers (last visited July 19, 2013).

[447] *See supra* Sections III.B.4, III.B.6.

services, is the Commission compelled to take action to ensure just, reasonable, and fair rates under section 276? Should the Commission only take action to reform intrastate ICS rates in states that have not reformed rates to levels that are at or below our interim safe harbor adopted above? Would doing so permit other states to adopt reforms?

133. For the same reasons we found that site commission payments are not part of the cost of providing interstate ICS, we tentatively conclude that site commissions should not be recoverable through intrastate rates, and seek comment on this tentative conclusion.[448] Where states have prohibited site commission payments, we seek comment on whether the resulting intrastate ICS rates are just and reasonable and whether an average of such rates would provide a reasonable safe harbor for fair intrastate ICS rates.

134. The record also reflects that differing interstate, intrastate long distance and local rates have encouraged the use of technology to reduce the costs on families. In practice, call recipients obtain telephone numbers associated with a geographic area (either local or long distance) that corresponds to the lowest ICS rate for a particular correctional facility.[449] Will the cost-based rates required by the Order create a market-based solution for driving intrastate rates to cost-based levels absent further regulatory actions? Also, does the existence of uniform ICS rates evidence ICS providers' ability to provide intrastate and interstate calls at the same rate level, and therefore support Commission action to ensure such uniformity among interstate and intrastate ICS rates?

2. Legal Authority

135. Several commenters in this proceeding have argued that the Commission has authority to regulate rates for intrastate ICS under section 276 of the Act,[450] which directs the Commission to regulate the rates for intrastate and interstate payphone services and defines such services to include "the provision of inmate telephone service in correctional institutions, and any ancillary services."[451] We agree and tentatively conclude that section 276 affords the

[448] *See supra* para. 54.

[449] *See* Letter from Phil Marchesiello, Counsel to Millicorp, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-144 at 4 n.4 (filed July 12, 2013) (Millicorp occasionally assigns non-local to the facility numbers to customers located internationally or if a customer resides near a correctional facility, and Millicorp numbers in that NPA-NXX are being blocked).

[450] *See, e.g.*, Hamden 2013 Comments at 5 (stating that section 276 "extends the Commission's authority over intrastate rates, in addition to interstate rates"); NASUCA 2013 Comments at 9 ("[T]he Commission has jurisdiction over all ICS calling, both interstate and intrastate …."); Pay Tel 2013 Comments at 6 & n.17 ("[t]here is no question but that the Commission has jurisdiction over intrastate inmate calling rates" under section 276); Letter from Lee G. Petro, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed June 19, 2013) ("[T]here should be no reasonable question that the FCC can address intrastate ICS rates in the instant proceeding …."). The questions in this section of the FNPRM pertain to the Commission's legal authority to regulate the rates paid by end users of intrastate ICS calls: *e.g.*, rates paid by inmates for debit-based calling, and rates charged to called parties for collect calls accepted from inmates. This section does not address the Commission's legal authority to regulate payphone compensation between providers, which is well-established under section 276 and the Commission's implementing rules. *See* 47 U.S.C. § 276(b), 201(b); *ICS 2012 NPRM* at 16647, para. 49 n.158.

[451] 47 U.S.C. §§ 276(b)(1)(A) & (d).

Commission broad discretion to regulate intrastate ICS rates and practices that deny fair compensation, and to preempt inconsistent state requirements. We seek comment on this tentative conclusion and related issues below.[452]

136. While the Commission has broad jurisdiction over interstate telecommunications services, its authority over intrastate telecommunications is, except as otherwise provided by Congress, generally limited by section 2(b) of the Act, which states that "nothing in this Act shall . . . give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio."[453] As the Supreme Court has held, however, section 2(b) has no effect where the Communications Act, by its terms, unambiguously applies to intrastate services.[454] That is the case here. Section 276(b)(1) expressly authorizes – indeed, instructs – the Commission to regulate intrastate payphone services:

> In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission *shall* take all actions necessary (including any reconsideration) to prescribe regulations that . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed *intrastate* and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation . . . .[455]

Furthermore, section 276(c) provides that "[t]o 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."[456]

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[452] NARUC has urged us to seek comment on these issues. NARUC 2013 Reply at 4 (stating that while the Commission's authority with respect to interstate interexchange calling is clear, "the scope of the FCC's authority to address intrastate, long-distance calls and/or operator services is not," and requesting issuance of an FNPRM seeking comment on the "legal rationale" for any such authority); *see also* Transcript of Reforming ICS Rates Workshop at 185-88 (Jason Marks, former Commissioner, New Mexico Public Regulation Commission, urging the Commission to "take a broad look at its jurisdiction"); *id*. at 265-66, 331 (Vincent Townsend, President, Pay Tel, requesting a comprehensive approach to ICS reform that includes both interstate and intrastate rates).

[453] 47 U.S.C. § 152(b).

[454] *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999) (ruling that section 2(b) does not preclude the Commission from regulating intrastate telecommunications under the provisions of section 251); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986) (*Louisiana Pub. Serv. Comm'n*) (section 2(b)'s jurisdictional fence may be breached when Congress used "unambiguous or straightforward" language to give the Commission jurisdiction over intrastate communications); *see also Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 561-62 (D.C. Cir. 1997) (*Ill. Pub. Telecomms. Ass'n*) (applying "unambiguous or straightforward" standard to find that section 276 unambiguously grants the Commission authority to regulate the rates for local coin payphone calls).

[455] 47 U.S.C. § 276(b)(1) (emphasis added).

[456] 47 U.S.C. § 276(c).

137. We also believe that our authority in this regard finds support in judicial precedent. In *Illinois Public Telecommunications Association v. FCC*, the D.C. Circuit upheld against jurisdictional challenge the Commission's authority to regulate, and to preempt inconsistent state regulation of, the local coin rate for payphones:

> It is undisputed that local coin calls are among the intrastate calls for which payphone operators must be "fairly compensated;" the only question is whether in § 276 the Congress gave the Commission the authority to set local coin call rates in order to achieve that goal. We conclude that it did.[457]

Thus, we tentatively conclude these statutory provisions and associated case law permit the Commission to regulate intrastate ICS provider compensation, including end-user rates. We seek comment on this conclusion.

138. We also seek comment on whether and how the Commission's potential regulation of intrastate ICS pursuant to section 276 might be informed by any relevant provisions within section 276, including, for example, (i) the introductory "purpose" clause of section 276(b)(1) ("In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to benefit the general public . . . ."); and (ii) section 276(b)(1)(A)'s requirement that regulations adopted by the Commission ensure that payphone service providers are compensated "per call" and for "each and every completed intrastate and interstate call."

139. Commenters are asked to identify what, if any, limits apply to Commission authority to regulate intrastate ICS rates under section 276. We note that the Commission's authority to regulate interstate ICS rates derives from both sections 276 and 201. We seek comment on whether this impacts the Commission's authority to regulate intrastate ICS rates.[458] For instance, section 201(b) authorizes this Commission to ensure that all charges "for and in connection with" an interstate common carrier communication service are just and reasonable.[459] Does the absence of similar language in section 276 constrain our authority to regulate intrastate

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[457] *Ill. Pub. Telecomms. Ass'n*, 117 F.3d at 562 (D.C. Cir. 1997) (finding that "compensation," as used in section 276, is reasonably construed to encompass rates paid by callers and there is no indication that Congress intended to exclude local coin rates from that term); *see also id.* at 563 (because "the Commission has been given an express mandate to preempt State regulation of local coin calls [under section 276] . . . , the requirement that the FCC's regulation be narrowly tailored simply does not come into play"). *Cf. New England Public Comm'ns Council, Inc. v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) ("Here we find that section 276 unambiguously and straightforwardly authorizes the Commission to regulate the BOCs' intrastate payphone line rates."), *cert. denied sub nom. North Carolina Payphone Ass'n v. FCC*, 541 U.S. 149 (2004); *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) ("It is true that § 276 substantially expands the Commission's jurisdiction and gives it broad authority to regulate both intrastate and interstate payphone calls.") (citing *Ill. Pub. Telecomms. Ass'n*, 117 F.3d at 561-62), *aff'd sub nom. Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007)).

[458] Section 201(b), referring to section 201(a), extends only to "interstate or foreign communications." 47 U.S.C. § 201.

[459] 47 U.S.C. § 201(b).

ICS rates in the same manner and to the same extent as interstate ICS rates? Alternatively, by broadly defining payphone service to also include "any ancillary services," does section 276 effectively grant the Commission authority over intrastate rates that is similar in scope to authority under the "for and in connection with" provision in section 201(b)?

140. We seek comment on any sources of authority other than section 276 that would authorize the Commission to regulate intrastate ICS rates paid by end users. Does the provision of ICS – either in its current form or as it evolves to include new services and technologies – implicate the "impossibility" exception to section 2(b) of the Act, which allows a Commission regulation to preempt a state regulation when it is impossible to separate the interstate and intrastate components?[460] Would application of this exception here give the Commission any additional authority over intrastate ICS rates beyond what is already conferred by the preemption provision in section 276(c) and the "each and every intrastate . . . call" provision in section 276(b)(1)(A)?

141. We also ask whether there are other limits on our authority to regulate intrastate ICS rates. For instance, are intrastate ICS rates, as some commenters allege, tightly bound up with issues, such as inmate discipline and prison security, that are traditionally regulated by states, localities, or prison officials and, if so, does that limit the Commission's ability to regulate intrastate ICS rates in ways that would not be applicable for interstate ICS rates?[461] Would Commission regulation of intrastate ICS rates, or any specific elements thereof, "present[] unsettled constitutional implications under the 10th and 11th Amendments," as one commenter contends?[462] The record reflects only limited analysis in favor of these arguments, and we note that the proponents of these arguments have not cited any precedents that would preclude the Commission from exercising broad authority over intrastate ICS rates under section 276. Commenters should provide a complete supporting analysis and justification. We also invite comments on any other issues that may be relevant to assessing the scope of the Commission's authority to regulate intrastate ICS rates.

B. Inmate Calling Services for the Deaf and Hard of Hearing Community

142. We seek comment on four additional issues raised in our record, including: (i) whether and how to discount the per-minute rate for ICS calls placed using TTYs,[463] (ii) whether

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[460] *See, e.g., Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375-76 n.4; *California v. FCC*, 75 F.3d 1350, 1359 (9th Cir. 1996), *cert. denied*, 517 U.S. 1216 (1996).

[461] *See* GTL 2013 Comments at 33-35 (claiming that courts have "routinely ruled that the regulation of state and local corrections facilities must be left to the local authorities," and have articulated a policy of "deference" to state and local administrators that it asserts should apply to the Commission's regulation of intrastate ICS) (citing *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001); *United States v. Michigan*, 940 F.2d 143, 154-55 (6th Cir. 1991)).

[462] Telmate 2013 Comments at 7 (citing no precedents).

[463] Commission rules define TTY as "text telephone" and as a "machine that employs graphic communication in the transmission of coded signals." 47 C.F.R. § 64.601(a)(22). Video relay service, or VRS, is defined as a relay service that allows people with hearing or speech disabilities to use sign language to communication through video equipment. 47 C.F.R. § 64.601(a)(27). Telecommunications relay service, or TRS, is defined as a service that performs in a manner that is "functionally equivalent" of voice communications used by a hearing person, and may (continued….)

action is required to ensure that ICS providers do not deny access to TRS by blocking calls to 711 and/or state established TRS access numbers,[464] (iii) the need for ICS providers to receive complaints on TRS service and file reports with the Commission,[465] and (iv) actions the Commission can take to promote the availability and use of VRS and other assistive technologies in correctional facilities.[466]

143. *Rates for TTY Calls*. The record indicates that despite the fact that using TTY equipment is not the preferred form of TRS for many deaf and hard of hearing individuals, the equipment is still in widespread use in correctional facilities.[467] Consistent with the Commission's statement in the *2012 ICS NPRM*, commenters assert that TTY-to-voice calls take at least three to four times longer than voice-to-voice conversations to deliver the same conversational content, not including the time it takes to connect to the operator.[468] Given this difference in communication speed, commenters argue that TTY users should be charged a discounted rate for TTY calls.[469]

144. We tentatively conclude that inmate calling service per-minute rates for TTY calls should be set at 25 percent of the safe harbor rate for inmate calls. The 25 percent figure is consistent with record evidence regarding the length of a conversational call via TTY as compared to regular voice calls.[470] We seek comment on this proposal.

145. The Commission previously has noted that section 276(b)(1)(A) specifically exempts "telecommunications relay service calls for hearing disabled individuals" from the Commission-established "per call compensation plan" ensuring that ICS providers are "fairly

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include text messaging, speech-to-speech devices, video relay services, and non-English relay services. 47 C.F.R. § 601(a)(22).

[464] *See, e.g.*, RBGG 2013 Comments at 3 (stating that many correctional facilities block calls to toll-free numbers); Embracing Lambs Ministry 2013 Comments at 1 (same).

[465] *See, e.g.*, Consumer Groups 2013 Comments at 5 (suggesting that the FCC require the filing of inmate ICS complaints).

[466] *See supra* para. 96.

[467] ACLU 2013 Comments at 3 (stating that a "sufficient number of people still use TTY equipment to support the continued presence of the technology in prisons"); Embracing Lambs 2013 Comments at 2; NDRN 2013 Comments at 2-3.

[468] *See 2012 ICS NPRM*, 27 FCC Rcd at 16644, para. 42; HEARD 2013 Comments at 5; Consumer Groups 2013 Comments at 2-3; Embracing Lambs 2013 Comments at 1; Legal Center and CODDC 2013 Comments at 2; NDRN 2013 Comments at 3. Commenters further assert that TTY-to-TTY calls take six to eight times as long as voice phone calls because of the use of TTYs on both sides of the call. *See* HEARD 2013 Comments at 5-6; *see also* RIT/NTID Student Researchers 2013 Comments at 5.

[469] *See* Consumer Groups 2013 Comments at 4 (urging the Commission to "proportionally discount all relay calls by seventy-five percent"); P&A 2013 Comments at 2 (asking the Commission to reduce rates charted for TTY calls to "at least one half or one quarter . . . of the charges for voice calls"); HEARD 2013 Comments at 9; RIT/NTID Student Researchers 2013 Comments at 6 (stating that an 85 percent reduction in TTY-TTY calls would achieve an appropriate price reduction).

[470] *See supra* note 468.

compensated."[471] No party has, to date, responded to the Commission's request for comment on how it should take this exemption into account in examining rates. We also note that section 225(d)(1) of the Act requires the Commission to prescribe regulations that "require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day and the distance from point of origination to point of termination."[472] We seek comment on whether sections 276 and 225 provide sufficient authority for us to adopt a discounted rate for TTY calls.

146. We also seek comment on how ICS providers should recover the costs of providing discounted TTY calls. One proposal would be to ensure that the safe harbor per-minute rate levels are set high enough to ensure that ICS providers recover the full cost of TTY calls. Given the very small number of deaf and hard of hearing inmates relative to the overall prison population,[473] are the safe harbor rates adopted in today's Order sufficient to allow recovery of the discount? What are the total number of TTY minutes of use compared to the total minutes of use charged by ICS providers? If the safe harbor rates adopted today are not sufficient to recover the cost of a TTY discount, by what amount would the rate need to be increased? If the Commission adopts a tiered rate structure as discussed below or reduces the safe harbor rates adopted in the Order, what effect would this have on the ability to recover the discount?

147. We also seek comment on allowing ICS providers to recover the cost of a TTY discount from the Telecommunications Relay Service Fund.[474] What steps would the Commission need to take to allow ICS providers to obtain certification to request payment from the Fund?[475] What types of data would ICS providers need to submit to the Fund administrator when seeking compensation? What other steps would the Commission and the Fund administrator need to take to ensure that ICS providers are fully compensated for discounted TTY calls while protecting the TRS Fund against waste, fraud, and abuse?

148. *Access to 711 and State TRS Numbers*. We seek comment below on ICS call blocking practices generally.[476] We note that commenters allege that many ICS providers block calls to toll-free numbers, including 711, which "impede[s] deaf inmates' abilities to call a relay service provider from a TTY."[477] We seek specific comment on the practice of blocking calls to

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[471] 47 U.S.C. § 276(b)(1)(A).

[472] 47 U.S.C. § 225(d)(1).

[473] *See, e.g.*, Transcript of Reforming ICS Rates Workshop at 18 (introduction of Talila Lewis President, HEARD, which maintains a national database of approximately 500 deaf inmates).

[474] The costs of providing TRS on a call are supported by shared funding mechanisms at the state and federal levels. The federal fund supporting TRS is the Interstate Telecommunications Relay Services Fund (TRS Fund or Fund). 47 C.F.R. § 64.604(c)(5)(iii).

[475] *See, e.g.*, 47 C.F.R. § 64.606.

[476] *See infra* Section V.E.

[477] *See, e.g.*, RIT/NTID Student Researchers 2013 Comments at 1; *see also* NDRN 2013 Comments at 3 (stating "relay numbers should be accessible from *all* ICS") (emphasis in original); P&A 2013 Comments at 2; HEARD (continued….)

711 and other TRS access numbers. Section 225 of the Act states that the Commission "shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States."[478] Does section 225 of the Act provide to the Commission an independent source of authority to prevent such blocking? What actions, if any, should the Commission take to ensure that deaf and hard of hearing inmates are able to access TRS? What methodologies exist to enable deaf inmates to reach relay services utilizing 711 and 800 numbers while blocking access to all other 800 numbers?

149. *TRS Complaints and Reporting.* Commenters urge the Commission to require ICS providers to collect and report to the Commission: (i) data on TRS usage via ICS,[479] and (ii) complaints from individuals that access TRS via ICS.[480] We seek comment on these proposals. If the Commission were to require ICS providers to submit TRS usage data, what data would be appropriate? Would the data that TRS providers submit to the TRS Fund Administrator be an appropriate model?[481] Likewise, were the Commission to require the collection and reporting of user complaints, would the rules applicable to TRS providers serve as an appropriate model?[482] Are the Commission's existing consumer complaint procedures sufficient to accommodate complaints of this type?[483] We seek comment on the benefits and burdens, including on small entities, of imposing these reporting requirements.

150. *Availability of Assistive Technologies in Correctional Facilities.* As discussed above,[484] we decline to mandate the types of TRS access technologies correctional facilities must make available to inmates. We note, however, that some correctional facilities already make VRS or other types of video communication available to inmates,[485] and seek comment on how

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2013 Comments at 6; RBGG 2013 Comments at 3. *See* HEARD 2013 Comments at 7 (alleging that access to Spanish language relay services is particularly problematic).

[478] 47 U.S.C. § 225(b)(1).

[479] HEARD 2013 Comments at 9 ("All ICSs should be required to assemble and report data regarding the number of phone calls placed using TTYs and videophones.").

[480] HEARD 2013 Comments at 9 ("ICSs should file with the FCC, periodic reports regarding all telecommunications access grievances filed by prisoners with sensory disabilities."); Consumer Groups 2013 Comments at 5.

[481] *See* 47 C.F.R. § 64.604(c)(5)(iii)(D).

[482] *See* 47 C.F.R. §§ 64.604(c)(1)-(2).

[483] *See* FCC, Guide: How to File a Complaint, *available at* http://www.fcc.gov/guides/how-file-complaint (last visited July 16, 2013); 47 C.F.R. §§ 1.720-1.735.

[484] *See supra* para. 97.

[485] *See, e.g.*, Transcript of Reforming ICS Rates Workshop at 90 (Talila Lewis, President, HEARD, asserting that video phones are already set up in some prisons); *id*. at 105 (Alex Friedmann, Assoc. Director, HRDC, stating that "a number of jails have gone over to video visits"); *id*. at 181 (Barry Marano, Case Mgmt. Counselor, Powhatan Correctional Center, asserting that video-to video visitation occurs at the Powhatan facility); *see also* Letter from Glenn B. Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 25, 2013) (stating that Telmate offers video visitation at 49 correctional facilities, "with several more coming online in 2014 (comprising approximately 70% of total inmates served)").

the Commission can facilitate the availability of VRS and other forms of assistive technologies in correctional facilities. What assistive technologies and devices should ICS providers make available? What are the advantages and disadvantages of each? Would additional assistive technologies supplant or complement TTY technology in the prison context? How can the security concerns of correctional facilities be accommodated, especially where 700/800/900 number calls or IP enabled devices are used?

151. VRS communications require the interaction of three separate yet interlinked components: VRS access technologies, video communication service, and relay service provided by ASL-fluent communications assistants (CAs).[486] We note that in the recently adopted *VRS Structural Reform Order*, the Commission directed the creation of a neutral video communication service provider and a VRS access technology reference platform – key elements of VRS service that will be operated pursuant to contract with the Commission or the TRS Fund Administrator and paid for out of the TRS Fund.[487] We seek comment on whether the availability of the neutral video communication service provider and the VRS access technology reference platform could facilitate the introduction of VRS in correctional facilities. What features or requirements, if any, would correctional facilities require the neutral video communication service provider and the VRS access technology reference platform to offer before allowing their use by inmates? Would it be possible for the administrator(s) of the neutral video communication service provider and the VRS access technology reference platform to implement such requirements or features at a reasonable cost to the TRS Fund? What other factors, such as security issues unique to correctional facilities, may serve as a barrier to the introduction of VRS and other forms of Internet-based TRS in correctional facilities?

C. Further ICS Rate Reform

152. In the Order, we adopted interim safe harbor rate levels and interim rate caps based on a conservative analysis of rate and cost data in the record.[488] In this section, we seek comment on additional reforms including further rate reductions.

1. Rate Structure

153. We seek comment on additional reforms and alternative ways of accomplishing interstate and intrastate rate reforms including the establishment of unified interstate and intrastate rates and various suggestions for a tiered rate structure. First, we note that in the Order we make clear that the rules we adopt apply to inmate telephone service provided to the full range of "correctional institutions," including institutions such as prisons, jails and immigration detention facilities.[489] Beyond the guidance already provided in the order, we seek comment on

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[486] *See Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Notice of Inquiry, 25 FCC Rcd 8597, 8608, paras. 32-33 (2010).

[487] *See Structure and Practices of the Video Relay Service Program*, Report and Order and Further Notice of Proposed Rulemaking, CG Docket Nos. 10-51, 03-123, 28 FCC Rcd 8618, 8644-47, 8656-61, paras. 53-61, 87-108 (2013).

[488] *See supra* Sections III.C.3.

[489] *See supra* Section III.A.2.

whether the Commission should provide a definition in the Commission's rules or to provide a more exhaustive list of the kinds of facilities covered. Parties that support the adoption of a definition of "correctional institution" should suggest proposed rule language and the reasons to support the inclusion or exclusion of various facilities.

154. *Permanent Safe Harbors and Rate Caps*. We seek comment on the methodology the Commission should use to establish cost-based permanent safe harbors and rate caps to ensure just, reasonable rates and fair compensation to providers. We seek comment on maintaining the interim rate caps and safe harbor rate levels adopted in the Order and expanding that structure to encompass intrastate ICS rates. We note that both the safe harbors and rate caps are set at conservative levels fully supported by the record but are intended to be interim in nature while the Commission further analyzes data received from the mandatory data collection adopted in the Order in order to consider whether any permanent rates should be further refined. Should we maintain the current safe harbors and make them permanent or should they be reduced over time given that they were set at conservative levels? Should they be applied to intrastate rates? Do commenters propose any specific modifications to the interim rate caps and safe harbor rate levels adopted above? For example, we seek comment below on various tiered approaches. Should any permanent safe harbor or cap be based on a tiered approach? Should we adopt a mechanism to adjust any permanent safe harbor or rate cap over time to account for changing ICS provider costs, inflation, or other factors? We invite commenters to identify factors we should consider and to detail the proposed benefits of such modifications.

155. *All-Distance Rates.* Some providers recommend that the Commission adopt a rate structure that charges the same rate regardless of the distance or jurisdictional nature of the call.[490] Under such a structure, "all calls are charged at the same per-minute rate regardless of distance, call type or jurisdictional classification."[491] The Commission has, in other contexts, determined that the cost of calling today is distance insensitive.[492] We seek comment on parties' experience with distance insensitive ICS rates. Do commenters believe such a rate structure would be useful in regulating ICS rates going forward? Why or why not? We note that some facilities already have such rates.[493] Do such rates sufficiently deal with claimed cost differences between prisons and jails of varying sizes? Commenters suggest that after reducing and

[490] *See* Telmate 2013 Comments at 3. We note that Telmate refers to a uniform rate as a "postalized" rate. *Id.*

[491] *See, e.g.*, CenturyLink 2013 Comments at 16-17; Telmate 2013 Comments at 12.

[492] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17910-11, para. 751, *citing generally Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000), rev'd and remanded *sub nom, Texas Office of Public Utility Counsel v. FCC*, 265 F. 3d 313 (5th Cir. 2001).

[493] *See, e.g.*, Letter from Glenn Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 26, 2013) (noting that, through its licensee Talton Communications, it offers prepaid rates of $.1235/minute prepaid calling for ICE detainees anywhere in the United States); CenturyLink 2013 Comments at 17 (asserting that "almost half of all DOCs have implemented postalized rates for in-state or all domestic calls"); Telmate 2013 Comments at 3, 12-13.

standardizing all ICS rates call volumes will increase, resulting in increased revenues.[494] Is this suggestion correct? Have other commenters experienced such a change? We seek comment on the various ICS rate structures suggested in the record. In particular, would adoption of the Petitioner's proposed rate of $0.07 per minute bring about the benefits of a distance-insensitive rate claimed by proponents of such an approach?

156. *Tiered Rate Structure*. In the Order we adopted interim safe harbor rate levels and interim rate caps that are sufficiently conservative to enable providers to recover their costs and account for any potential differing characteristics associated with providing service to varying types and sizes of facilities.

157. In the *2012 ICS NPRM*, the Commission sought comment on the usefulness of a tiered rate structure based on volume of ICS minutes at the facility.[495] In response, commenters suggested a tiered rate structure with rate levels that vary according to a facilities' monthly volume of minutes.[496] We again seek comment on a rate structure tiered by volume of minutes.[497] We seek comment on whether a tiered rate structure would enable the Commission to adopt a lower rate for larger facilities. Have providers or jurisdictions adopted rate structures based on either call volume or inmate capacity? If so, what has been their experience? How do the costs of providing service differ among facilities for providers serving multiple facilities? Specifically, we seek identification of costs incurred individually by facility and what proportion of such costs make up the provider's total cost of providing service. We note that Securus, in response to the *2012 ICS NPRM*, submitted cost data broken out by four tiers of facility size.[498] We seek comment on the call volume based tiers used in Securus' filing. Do commenters believe division by such call volume categories is a useful way to establish a tiered rate structure? Or is this type of division too subjective or too specific to be useful for the industry as a whole?

158. If the Commission were to adopt a tiered ICS rate approach by facility size, should the Commission use the breakdown of confinement facility sizes from the Bureau of Justice Statistics?[499] Also, commenters indicate that centralization in call processing is prevalent

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[494] *See* Telmate 2013 Comments at 12-14.

[495] *See 2012 ICS NPRM*, 27 FCC Rcd at 16639-40, para. 28.

[496] *See, e.g.*, Raher 2013 Comments at 2-6 (suggesting two tiers of regulation based on facility size); Pay Tel May 31, 2013 *Ex Parte* Letter at 2; Securus 2013 Comments at 18-19.

[497] Parties urge the Commission to "consider a tiered rate structure that distinguishes between, at a minimum, ICS in jails and prison . . . ." Pay Tel May 31, 2013 *Ex Parte* Letter at 2.

[498] *See* Securus 2013 Comments at 19, Expert Report of Stephen E. Siwek at 2.

[499] *See* James J. Stephan & Georgette Walsh, *Census of Jail Facilities, 2006*, Bureau of Justice Statistics, Off. of Justice Programs, U.S. Dept. of Justice, December 20, 2011, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2205 (summary of data); Census of Jail Facilities, 2006, Study No. 26602, National Archive of Criminal Justice Data, *available at* http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/26602 (last visited June 11, 2013) (actual dataset).

in the ICS industry, and that this centralization has changed the costs of providing ICS.[500] In light of this centralization, we seek comment on whether differences in the cost to provide ICS remain between differently sized facilities. We also seek comment on whether a tiered rate structure would be more applicable to the way ICS is provided in practice if the rate tiers varied by ICS provider size rather than by facility size.[501]

159. *Tiered Rate Structure between Prisons and Jails*. Some parties claim that the differences between jails and prisons in terms of such factors as size and inhabitants' length of incarceration make the cost of service vary.[502] Others disagree.[503] If the Commission were to adopt such a proposal, we seek comment on how to define "jails" and "prisons."[504] Should a jail be defined as a facility where inmates are incarcerated for less than one year? If not, what is the appropriate definition of a jail? Or should the Commission define prisons and all other facilities would be considered jails? We seek comment on whether jails have different communications needs and calling practices than inmates in longer-term facilities like prisons.[505] Commenters advocating for such a difference should explain whether such differences apply uniformly to all jails, to smaller jails, or to jails with certain characteristics. We note that the record indicates that some jails benefit from technological developments that have centralized their ICS operations

[500] *See* PLS 2013 Comments, Exh. 2, Dawson Amend. Aff. at 9-11 ("[T]he large providers like Securus and GTL have benefitted greatly by centralization and economies of scale . . . . Today there is very little capital investment . . . . All of the brains of the prison calling network are housed now at large centralized locations."); Petitioners 2013 Comments at 2 ("[T]he consolidation of the ICS providers, and the centralized application of safety protocols, has led to the substantial reduction in the costs associated with providing ICS."). *But cf.* Securus 2013 Comments at 4 ("[A]lthough Securus has gained efficiencies through its deployment and use of a centralized, IP-based transmission network, its cost savings has been offset by an increase in the costs arising from regulatory compliance."); Pay Tel 2013 Comments at 13 ("Pay Tel's business model has shifted from a 'customer premises' model to a 'centralized platform' model . . . . [this] has led to significant cost shifting. Specifically, general and administrative costs . . . have increased dramatically. On the other hand, capital costs for on-site equipment have seen a significant decrease.").

[501] "[B]ecause of the variety of options available and the varying needs of each correctional facility customer, pricing assumptions based on the size of a facility and the number of beds would ignore the economic realities of the ICS market." Letter from Chérie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-144, 12-375 at 2 (filed July 29, 2013).

[502] *See, e.g.*, Pay Tel 2013 Comments at 9-10, 23 (noting that approximately 47% of jail inmates are released in less than 24 hours and approximately 73% of jail inmates are released within 48 hours); Pay Tel 2007 Comments at 6-7; AJA 2013 Comments at 1-2.

[503] *See* Letter from Lee G. Petro, Counsel for Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed July 16, 2013) (Petitioners' July 16, 2013 *Ex Parte* Letter) (noting that a Bureau of Justice Statistics Study showed that in 2011, 39% of inmates were serving their sentences in local jails and over 50% of the inmates in Louisiana were confined in local jails).

[504] There was an insufficient record to pursue a proposal like that set forth in the Dissent. *See* Dissent at 111, 131 (proposing to adopt different interstate ICS rates for large jails and prisons).

[505] *See, e.g.*, Transcript of Reforming ICS Rates Workshop at 240-45 (Mitch Lucas, Assistant Sheriff, Charleston County Sheriff's Office and 1st Vice President, AJA, discussing differing communications needs of jails); *id*. at 265-68 (Vincent Townsend, President, Pay Tel, discussing differences between ICS in prisons and jails); *see also* Pay Tel July 3, 2013 *Ex Parte* Letter (discussing differences in ICS jail costs and rates).

and lowered the costs of providing ICS.[506] Should we adjust our regulations and adopt different results for prisons and jails, and if so, how? What cost considerations for the provision of ICS affect jails that may not affect, or that may be different from, those that affect prisons?[507] Instead of treating all jails differently than prisons, should we have a tiered structure based on the size of the facility or jail? Do commenters suggesting that jails be treated differently believe that larger jails have characteristics and call volumes similar to prisons? If so, how would the Commission define "larger" jails? Should a facility be considered a "larger jail" if it has more than 100, 200, 500 or 1000 beds? Would a tiered approach, which would permit higher rates for smaller facilities, adequately address any unique needs of jails? We also seek comment on the impact of ICS provider call processing centralization for prisons and jails. Does this centralization diminish or eliminate differences between the cost to provide ICS in prisons and jails? Are there other distinctions between different types of correctional institutions that the Commission should incorporate as it considers additional rate reforms? Commenters advocating such distinctions should address the considerations noted above with respect to possible distinctions between "jails" and "prisons," including how the different facilities should be defined, the basis for drawing the distinctions, and specifically how the distinctions should be reflected in our rules.

160. *Per-Call Cap.* We seek comment on whether the Commission should adopt an overall maximum per-call cap. We note that some states, for example, have created flat-rated rate structures (such as those found in New Mexico and South Carolina) with only a per-call charge, irrespective of the length of the call.[508] Similarly, Washington, D.C. has adopted a $1.75 per-call intrastate cap.[509] Securus suggests that the Commission adopt an $8.00 maximum charge for interstate ICS calls "no matter how long the call, no matter the size of the facility, and no matter the location of the originating facility."[510] We seek comment on whether the Commission should adopt an overall rate cap and the caps that have been adopted by states and proposed by Securus. How does such overall rate cap ensure that rates are just, reasonable, and fair? Is a per-minute rate cap also necessary to ensure that shorter calls are cost-based and reasonable?

161. *Per-Call Charges.* In the Order, we adopted an interim rate structure with safe harbor levels and rate caps.[511] While we adopted per-minute rate levels to effectuate these rate structure elements, we also provided some flexibility in implementation. ICS providers electing to take advantage of the safe harbor rate levels are permitted to use a rate structure that includes per-call charges.

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[506] *See, e.g.*, Pay Tel July 3, 2013 *Ex Parte* Letter at Attach. 1-2 (Changes in ICS Costs in Jails: 2008 to the Present) (asserting that ICS providers in most jails use a "centralized broadband-based platform" in which "call management functions are handled remotely in a central office").

[507] Commenters have said that "[j]ails are more likely to be smaller and need some sort of exemption from the otherwise prevailing rate caps." Marks July 12, 2013 *Ex Parte* Letter at 3.

[508] *See* Securus 2013 Comments at 6; Petitioners 2013 Comments at 20, 23; HRDC 2013 Comments at 2, 5.

[509] *See* DC PSC 2013 Comments at 1-2.

[510] Securus July 16, 2013 *Ex Parte* Letter at 1. This charge would be comprised of a per-call charge and per-minute charges but the per-minute charges would "stop being assessed once the total price of the call reaches $8.00." *Id.*

[511] *See supra* Section III.C.3.

162. Although we permit the use of per-call charges in the Order, we express serious concerns about such charges.[512] With the significant automation of a modern ICS network, are there any costs that are uniquely incurred during the call initiation phase that would be inappropriate, or difficult, to recover through a pure per-minute rate structure? Some states and facilities have eliminated per-call charges and are presumably able to provide full-cost recovery for ICS providers.[513] What are the experiences of parties (facilities, ICS providers, and ICS users) where per-call charges have been eliminated? What is the experience with such rate structures and do they offer benefits that do not exist with per-minute rate structures? What is the experience for providers and users with these flat-rated rate structures given the identified risks of per-call charges in the ICS context? Are providers able to recover the costs of calls with such a rate structure? Do the benefits of leaving flexibility to the states, facilities, and ICS providers, outweigh the issues associated with per-call charges?

2. Determining Costs for ICS Rates

163. In the Order, the Commission adopted interim rate caps and safe harbor rate levels for interstate ICS.[514] The Order also required ICS providers to file certain ICS-related data to enable the Commission to begin the process of establishing permanent rates.[515] As part of this process, we seek comment on whether there are additional factors, including possibly declining costs related to technological innovations, that the Commission should consider in order to refine its findings in the Order and how the Commission should proceed in establishing ICS rates for interstate and intrastate ICS. Additionally, we note that the Order adopts a historical cost methodology for the interim rules and we seek comment on the what measure of cost – *e.g.*, historical, forward looking – should be adopted for the permanent rate structure.[516]

164. *Impact of Technology Innovations.* The record highlights significant changes in the technology and the equipment used to provide ICS.[517] In some facilities, Telmate offers video conferencing between inmates and their families, e-mail and voice mail services for inmates, a secure social media alternative, and a secure photo-sharing service for inmates and

[512] *See supra* Section III.C.3.c.

[513] *See* NY DOCCS July 16, 2013 *Ex Parte* Letter at 2 ("Today the cost of a 20-minute call for an inmate in DOCCS is $.96. The call rate includes a flat $.048 per minute charge, for both local and long distance calls, with no connection fee."); *see also* HRDC 2013 Comments at 5 ("With respect to per-call charges, some states currently do not include per-call charges in their ICS rate structures but only have a per-minute charge for both interstate collect *and* debit calls. Those states include Indiana, Michigan, New Jersey, New York, Oregon and Texas.").

[514] *See supra* Sections III.C.3.

[515] *See supra* Section III.I.

[516] *See supra* para. 52.

[517] *See, e.g.*, Telmate 2013 Comments at 2 (noting its "pioneering and innovative services, such as virtual, IP-powered visitations" and its modern and efficient equipment platforms); Pay Tel 2013 Comments at 13 (stating that it is moving from a "customer premises" to a "centralized platform" model); Petitioners 2013 Comments at 17-18 (stating that "each of the major ICS providers now route each call through their centralized calling centers – which are located hundreds, if not thousands, of miles from both the caller and the person receiving the call"); *id*. at Exh. D.

their families.[518] The Virginia DOC expanded its video visitation program in 2010 and offers numerous visitor centers sites at which an inmate's friends and family can connect through videoconferencing.[519] We seek comment on the impact of technological advancements on the ICS industry. Have such advancements reduced the cost of providing ICS?[520] We seek comment on specific ways in which advanced services help to address security concerns and whether such advancements reduce costs. We also invite comment on ways in which advanced services could affect access for inmates with disabilities, and communications between abled inmates and their friends and family with disabilities.[521]

165. We seek comment on the future of voice-based services in correctional settings. In the non-ICS context, voice calling minutes have been falling while other forms of communications (*e.g.*, text messaging, email, social networks) have been growing in importance. We seek comment on the frequency of such alternatives in correctional facilities and, where applicable, the impact on ICS calling volumes. How have ICS providers introduced such alternatives while still providing adequate security capabilities, and why? We seek comment on our legal authority to regulate the rates for such alternative services.

3. International ICS

166. We seek comment on the prevalence of international calling and whether the Commission should take action to reform ICS rates for international calls. The record indicates that although it is feasible to make international calls, international ICS calling is not always an available option for inmates.[522] Do facilities block international calls for security reasons? If so,

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[518] *See* Telmate 2013 Comments at 15. *See, e.g.*, Transcript of Reforming ICS Rates Workshop at 258-9, 334-5 (Richard Torgersrud, CEO, Telmate); *see also* Les Zaitz, *New Technology Helps Oregon Inmates Stay Connected*, OregonLive (Sept. 12, 2012*), available at* http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/09/new_technology_helps_oregon_in.html (last visited July 31, 2013).

[519] *See, e.g.*, "Virginia Visitation Program," Virginia Department of Corrections, *available at* http://vadoc.virginia.gov/offenders/prison-life/videoVisitation.shtm (last visited July 11, 2013) (Virginia Department of Corrections website explaining the Video Visitation Program, listing rates and providing directory of participating visitor centers. It states that "Video Visitation is a way for families to meet with their imprisoned family or friends without having to invest the time and money in traveling long distances to correctional facilities."). Other providers offer video visitation through JPay or HomeWav. *See, e.g.*, Transcript of Reforming ICS Rates Workshop at 106 (Alex Friedmann, Assoc. Director HRDC); *id.* at 292-93 (Mitch Lucas, Assistant Sheriff, Charleston County Sheriff's Office and 1st Vice President, AJA).

[520] For example, Pay Tel asserts that ICS providers in most jails use a centralized broadband-based platform in which call management functions are handled remotely in a central location. Pay Tel 2013 Comments at 13.

[521] *See* Americans with Disabilities Act, 42 U.S.C. § 1.2101 *et seq*.

[522] *See, e.g.*, Telmate July 26 *Ex Parte* Letter at 1 (asserting that "International services (with instructions in a wide variety of different languages) are offered to all facilities" with which Telmate has an ICS contract). GTL includes an "Invitation to Negotiate" from the Florida Department of Corrections that mandates live operator assistance for international calls as the only exception to its no-operator calling rule. *See* GTL 2013 Reply Exh. 1 at 27 (noting that "[a]t no time shall an inmate be automatically connected to a 'live operator'" but that "the only exception to this requirement is that international collection calls through a live operator will be allowed when the country being called accepts collect calls"). Securus provides a U.S. Department of Justice Federal Bureau of Prisons' Program Statement regarding "Telephone Regulation for Inmates" that includes provisions for international calling but states that "staff will not place collect telephone calls to foreign countries for inmates" and that such calls, as with domestic calls, are subject to the availability of inmate funds. *See* Securus 2013 Comments, Exh. 12 at 15, 21.

we seek comment on what specific reasons justify blocking international calls. Several commenters assert that the lack of availability of international calling is particularly burdensome to immigrant inmates and their families.[523] Do most facilities allow international calling? If not, why not? How are such calls priced? Are any additional restrictions applied to such calls, such as time-of-day restrictions or prior-permission requirements? Should the Commission require the availability of international calls, and what would be the source of legal authority that would authorize the Commission adopt such a requirement? If we were to adopt such a requirement, what rates should apply to international calls and how should the Commission set such rates? We seek comment as to whether these rates are appropriate and compensatory.

D. Ancillary Charges

1. Background

167. In response to inquiries in the *2012 ICS NPRM*,[524] the record indicates that ICS providers impose charges on inmates and ICS call recipients that do not recover the costs of providing phone service but rather recover costs associated with functions ancillary to provisioning ICS such as initiating, maintaining and closing debit or prepaid ICS accounts, sending a paper bill or sending calls to a wireless number.[525] The Order adopted requirements that such ancillary service charges related to ICS be cost-based and provides enforcement mechanisms applicable to any challenges.[526] The Bureau released a Public Notice on June 26, 2013 seeking additional comment on these charges including: "the level of each fee, the total amount of revenue received from each fee, and the cost of providing the service for which the fee recovers."[527] The record received indicates that providers are charging a variety of fees at fee levels ranging from no fee for account replenishment when a paper check is sent in the mail, to a $7.95 processing fee for payment by credit or debit card, and $11.95 processing fee for payment through Western Union, among others.[528]

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[523] *See, e.g.*, AILA 2013 Comments at 2 (asserting that asylum and immigration applicants must gather substantial information from their home countries, much of which must be coordinated by telephone from a correctional facility); *see also* Immigration Equal. 2013 Comments at 2 (stating that the majority of detained immigrants have no legal representation in immigration court and must communicate with the outside world on their own, primarily through collect calls).

[524] For example, the Commission acknowledged "outstanding questions with prepaid calling such as: how to handle monthly fees; how to load an inmate's account; and minimum required account balance." *2012 ICS NPRM*, 27 FCC Rcd at 16641, para. 33. *See also supra* note 338.

[525] *See supra* para. 90.

[526] *See supra* para. 91.

[527] *More Data Sought on Extra Fees Levied on Inmate Calling Services*, WC Docket No. 12-375, Public Notice, 2013 WL 3270975, DA 13-1445 at 1 (Wireline Comp. Bur. rel. June 26, 2013).

[528] Petitioners July 17, 2013 Comments at Attach., "Securus Tariffs" at 1; *see also* Pay Tel July 17, 2013 Comments at 4 (payment processing fee using Western Union is $5.95 for Pay Tel and as high as $12.95 for other vendors); Prison Policy Initiative July 17, 2013 Comments at 2 (noting that GTL charges $4.75 for a web payment of $25 and $9.50 for a $50 payment—these charges are per phone line, not per account).

2. Discussion

168. In the Order, we require charges for any services that are ancillary to the costs of providing ICS to be cost-based,[529] and require ICS providers to submit cost data for these ancillary service charges as part of the mandatory data request.[530] Here we seek comment on how the Commission can ensure, going forward, that ancillary charges are just, reasonable, and cost-based. For example, the record reflects that ICS providers typically use third parties to process debit and prepaid transactions,[531] and there are concerns that the charges passed on to inmates or their called parties are not entirely cost-based.[532] Is this accurate? If so, what are the actual costs charged to the ICS providers by such third parties? We seek comment on whether the Commission should identify certain ancillary charges that are unreasonable practices and therefore prohibited under the Act?

169. The record indicates that some ICS providers offer "no fee" options for replenishing debit or prepaid accounts.[533] What are commenters' experiences with such options? We request that commenters describe any other no- or low-fee options offered by ICS providers. Should the Commission mandate that ICS providers offer such no or low fee options? We seek comment on this approach, including our legal authority to mandate a no or low fee option.

170. Likewise, we seek comment on the cost drivers underlying ICS providers' ancillary service charges. Are charges for these services currently cost-based? Will our complaint process ensure that charges for services that are ancillary to the telecommunications costs of providing ICS are cost-based on an ongoing basis? Do commenters believe that the costs underlying ancillary service charges should be treated as compensable though ICS rates? Can we set a safe harbor rate that will ensure that charges for such ancillary services are cost-based? How would such a safe harbor work? If we set such a safe harbor, what kind of process should be available to ICS providers that believe they cannot recover their costs for such ancillary services? What information should we require the ICS providers to submit to support such requests?[534]

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[529] *See supra* Section III.C.1.

[530] *See supra* Section III.I.

[531] *See* Pay Tel May 31, 2013 *Ex Parte* Letter at Attach., Presentation for Federal Communications Commission at 3 (showing partnerships with third parties Money Gram and Western Union to facilitate alternative payment options).

[532] *See id*. at 3 (comparing Pay Tel's third party fees to those of other ICS providers); *see also* NCIC 2013 Comments; Securus 2013 Comments; Expert Report of Stephen E. Siwek.

[533] *See* Pay Tel May 31, 2013 *Ex Parte* Letter at Attach. Account Statement, 2 ("There is no payment processing fee when payments are mailed to Pay Tel."); *see also* Letter from Monica Desai, Counsel to Securus Technologies, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (filed May 31, 2013) (stating that Securus does not charge a fee to establish a prepaid calling account or for "standard payment methods").

[534] *See* NARUC Ancillary Charges PN Reply at 1 (noting the "few comments filed" in relation to the Commission's public notice seeking comment on ancillary cost data, it asserts that "if the providers fail to submit this cost data – which is basically in their sole possession – the FCC would be entitled to, and should, construe that failure against the providers. This would lead to a long-overdue order reducing the price . . . of inmates' calls."); *see also* Petitioners July 24, 2013 *Ex Parte* Letter at 2 (noting that the three largest ICS providers, who control "at least 90% of the ICS market" were "remarkably silent" when asked to submit data regarding ancillary charges).

171. Finally, we seek comment on whether some ancillary services charges constitute unjust and unreasonable practices, in violation of section 201(b), or a practice that would lead to unfair rates in violation of section 276, regardless of the level of the charge, because how such charges are imposed make ICS too expensive and thus unavailable to some consumers. The Commission has consistently held that practices may be unjust and unreasonable without regard to the charges related to those practices.[535] Examples of practices that we believe may be unjust and unreasonable to the extent they impose *de minimis* costs to the ICS provider include imposing inactivity charges on a customer's prepaid account,[536] and charging a customer to close an account and refund their money to them.[537] We seek comment on whether we should consider these charges, or any other ancillary service charges, to be unjust and unreasonable.

E. Prohibiting Call Blocking

1. Background

172. The Commission has a long-standing policy that largely prohibits call blocking. Specifically, the Commission has determined that the refusal to deliver voice telephone calls "risks degradation of the country's telecommunications network"[538] and poses a serious threat to the "ubiquity and seamlessness"[539] of the network. The issue of call blocking has arisen in multiple contexts in the ICS industry.[540] Throughout this proceeding ICS providers have offered various justifications for their call blocking practices. Here we seek additional comment on these practices which break down into two fundamental types. We invite commenters to address any other types of blocking and we seek comment on whether we need to address blocking beyond the two specific types described below.

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[535] *See e.g.*, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92*; Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Declaratory Ruling, 27 FCC Rcd 1351 (Wireline Comp. Bur. 2012) (determining that certain practices negatively affecting call completion in rural areas may constitute an unjust practice prohibited by section 201(b) of the Act); *see also* Transcript of Reforming ICS Rates Workshop at 330 (Lee G. Petro, Counsel to Petitioners, arguing that section 201 of the Act gives the Commission the authority to set aside unjust and unreasonable practices such as fees to load money onto a prepaid account).

[536] *See, e.g.*, Letter from Peter Wagner, Executive Director, Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2-3 (filed July 17, 2013) (noting fees imposed by different providers for inactivity on an inmate's account).

[537] *See* Transcript of Reforming ICS Rates Workshop at 135 (Cheryl Leanza, President, A Learned Hand, LLC, discussing various fees imposed by providers on inmate calling plans); *see also* Letter from Peter Wagner, Executive Director, Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed July 5, 2013) (noting prepaid account refund fees of up to $10 per account).

[538] *USF/ICC Transformation Order*, 26 FCC Rcd at 18029, para. 973 (internal quotation marks omitted).

[539] *Access Charge Reform*, 16 FCC Rcd at 9932-33, para. 24.

[540] *See supra* Section III.G.

2. Billing-Related Call Blocking

173. The Commission sought information in the *2012 ICS NPRM* on billing-related call blocking.[541] In the Order above we conclude that billing-related call blocking of interstate ICS calls is only permissible if the ICS provider offers a "prepaid collect" option, as described above.[542] We seek comment on whether our conclusion resolves the issues surrounding billing-related blocking of interstate ICS calls. Additionally, we seek comment on whether we should extend our prohibition on blocking to intrastate ICS calls. In particular, we invite comment on whether it is possible to block only interstate calls while not blocking intrastate calls, or whether such a separation is impracticable. In light of our mandate above for "prepaid collect," do the problems Petitioners describe remain?[543] Or is it correct, as commenters have said, that such "products help to ensure that inmates reach their intended parties regardless of their billing status"?[544] Does our mandate regarding "prepaid collect" options address ICS providers' problems of uncollectibles? What other options are there to prevent call blocking due to a lack of a billing relationship between the ICS provider and the called parties' provider, whether ILEC, CLEC, wireless provider or VoIP provider? Should we prohibit ICS providers from entering into a new contract or contract extension for ICS that include collect calling-only requirements unless they offer an alternative prepaid collect calling option? What would be our authority for doing so? We also seek comment on whether our mandate should apply only to interstate collect-only calling, or whether it should also apply to intrastate collect-only calling. Can the two be separated? Under what authority could we mandate a prepaid collect calling option for intrastate ICS?

174. Finally, one ICS provider suggests that the best way to deal with billing-related call blocking is to encourage the use of prepaid or debit ICS accounts.[545] We seek comment on the usefulness and ubiquity of debit and prepaid calling in correctional facilities and whether we should mandate that ICS providers offer such services.[546] Under what authority can we mandate provision of such services?

3. Non-Geographically Based Telephone Number Call Blocking

175. Consumers today can and do obtain telephone numbers that do not reflect their geographic location. In the ICS context, doing so may enable consumers to be charged a lower rate depending on the differences among local, intrastate long distance, and interstate long distance rates.[547] The Commission sought comment on this practice in the *ICS 2012 NPRM*.[548]

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[541] *See 2012 ICS NPRM*, 27 FCC Rcd at 16643-44, para. 40.

[542] *See supra* para. 113.

[543] *See supra* paras.108-109.

[544] Securus 2013 Comments at 23.

[545] *See* GTL 2013 Comments at 24-25.

[546] *See supra* Section III.G.

[547] *See supra* para. 134. For ease of reference, we will refer to these telephone numbers that do not reflect geographic location in the Further Notice of Proposed Rulemaking as "non-geographic numbers."

Given the Commission precedent largely prohibiting call blocking, with limited exceptions, we seek comment on whether any types of ICS call blocking may be necessary or appropriate, particularly in relation to non-geographically based telephone numbers. If such blocking is necessary, how can this need be reconciled with Commission precedent? To the extent that commenters assert that blocking occurs to address security concerns, we seek comment on the reason and frequency of such blocking. We seek comment on whether there are any additional concerns that could justify blocking outgoing ICS calls to non-geographically based telephone numbers. Given the Commission's policy against unreasonable call blocking, we are skeptical of the need for call blocking and seek alternatives to blocking that maintain the ubiquity of the national telecommunications network while balancing security needs.

F. Exclusive ICS Contracts

176. We conclude in the Order that competition does not effectively constrain rates for interstate ICS to ensure that such rates are just, reasonable, and fair.[549] While the Commission found that there is competition among ICS providers to provide service to correctional facilities, it concluded that there is not sufficient competition within facilities to ensure that rates are just and reasonable to end users because of exclusive contract arrangements.[550] We seek comment in this section on whether we should encourage competition within correctional facilities to reduce rates.

177. We generally seek comment on whether there are ways to foster competition to constrain rates to just, reasonable, and fair levels within correctional facilities. When the Commission previously sought comment on allowing multiple providers to serve correctional facilities, correctional facilities and ICS providers generally opposed the allowance of multiple providers because of security concerns.[551] What has changed, if anything, in the last decade that may allow for competition among ICS providers within a single facility? If commenters believe that security concerns still provide a reason for not allowing multiple ICS providers within a facility, we seek comment on what the specific concerns are. For example, could a facility have uniform security requirements that would apply to any provider offering service in the facility? What are the advantages and disadvantages of such an approach? In its comments, Verizon

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[548] *See 2012 ICS NPRM*, 27 FCC Rcd at 16644, para. 41.

[549] *See supra* Section III.B.4.

[550] *See id*. As discussed above, ICS contracts are typically exclusive contracts to serve the relevant correctional facility for a period of years. *See supra* Section III.E.

[551] Specifically, they claimed that the high cost security needs of ICS, such as the ability to identify a called party in real time to prevent imminent criminal activity, preclude the allowance of multiple ICS providers in a single facility. *See, e.g*., La. DOC 2013 Comments at 2-3 (asserting that "free market place options" such as multiple providers are "not feasible in the secure environments of our facilities" and listing such concerns as the ability to "control offender telephone usage," monitor transfers between institutions, and prevent criminal activities); GTL 2013 Comments at 23 (asserting that the "unique security needs of correctional facilities necessitate the use of exclusive contracts" and opining that if multiple providers were operating within a single facility, "no one provider would be responsible for security procedures" and that it is "highly likely that the facilities' overall costs" would increase); Telmate 2013 Comments at 5-6 (stating that a "single-provider model" for ICS is still required for security purposes).

states that allowing multiple ICS providers to serve inmates at a correctional facility could promote competition among ICS providers.[552] Verizon also raises the question of whether the security concerns justifying exclusive contracts have been superseded by any technological advances. Do technological advances change the equation?[553] If so, could we expect in the future to rely on competition to ensure just, reasonable, and fair ICS rates for inmates and ICS providers? Are there rules or requirements the Commission could adopt to facilitate such a transition? We seek comment on these issues and the Commission's authority to adopt rules and requirements to facilitate such a transition.

G. Quality of Service

178. In the Order, we observe that, given our conservative safe harbor and rate cap scheme, quality of service should not be negatively impacted by the ICS rates we adopt, and we further encourage continued innovation and efficiencies to improve quality of service.[554] Here, we seek comment on whether it is necessary for the Commission to develop minimum federal quality of service standards that would apply to all facilities. For example, ICE set forth national detention standards, which established requirements for effective communication,[555] sufficient access,[556] and daily maintenance.[557] Under these standards, facilities must maintain at least a 25 to 1 ratio of detainees to operable telephones.[558] Do prison and jail facilities currently have similar rules or regulations in place to secure the quality of inmate calling services? Have states adopted any regulations of this sort? We seek comment on whether national standards are necessary. Should we establish rules regarding the quality of inmate phone calls, the number of phones in a facility, or the maintenance of telephones? If adoption of such national standards would be beneficial, under what authority could the Commission adopt such rules? We also seek comment on whether we should require ICS providers to include the ratio of telephones to inmates per facility in their annual certification filings. Commenters advocating for such an approach should specify the Commission's legal authority to adopt their proposals.

H. Cost/Benefit Analysis of Proposals

179. Acknowledging the potential difficulty of quantifying costs and benefits, we seek to determine whether each of the proposals above will provide public benefits that outweigh their costs, and we seek to maximize the net benefits to the public from any proposals we adopt. For example, commenters have argued that inmate recidivism is decreased with regular family

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[552] *See* Verizon 2013 Comments at 6; NJ ISJ 2013 Reply at 4–5.

[553] *See, e.g.*, TurnKey 2013 Reply at 2 (explaining that TurnKey provides video visitation and email services at rates significantly below the rates the large ICS provider charges for equivalent phone services, and that TurnKey's rates for video visitation services are also three times lower than the ICS provider's rates for the same services).

[554] *See supra* para. 71.

[555] *See Performance-Based National Detention Standards 2011*, U.S. Immigration and Customs Enforcement, at 359 (2011), *available at* http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf (last visited July 31, 2013).

[556] *Id.* at 360.

[557] *Id.* at 361.

[558] *Id.* at 360.

contact.[559] Accordingly, we seek specific comment on the costs and benefits of the proposals above and any additional proposals received in response to this Further Notice. We also seek any information or analysis that would help us to quantify these costs or benefits. Further, we seek comment on any considerations regarding the manner in which the proposals could be implemented that would increase the number of people who benefit from them, or otherwise increase their net public benefit. We request that interested parties discuss whether, how and by how much they will be impacted in terms of costs and benefits of the proposals included herein. We recognize that the costs and benefits may vary based on such factors as the correctional facility served and ICS provider. We request that parties file specific analyses and facts to support any claims of significant costs or benefits associated with the proposals herein.

VI. PROCEDURAL MATTERS

A. Filing Instructions

180. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). Comments and reply comments on this FNPRM must be filed in WC Docket No. 12-375.

- Electronic Filers: Direct cases and other pleadings may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

[559] *See* Letter from Cheryl Leanza, Policy Advisor, United Church of Christ, OC Inc., and the Leadership Conference Education Fund, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 1 (filed June 18, 2012) ("Communication with families will combat recidivism, which is extremely expensive. A report by the Pew Center on the States found that more than four in ten offenders return to state prisons within three years of being released and reducing recidivism by just ten percent could save the states more than $653 million in one year. While communication is not a silver bullet, evidence shows it helps to reduce recidivism.").

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

B. Ex Parte Requirements

181. The proceeding this Further Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[560] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

C. Paperwork Reduction Act Analysis

182. This Report and Order contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in the proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought comment on how the Commission might further

[560] 47 C.F.R. §§ 1.1200 *et seq.*

reduce the information collection burden for small business concerns with fewer than 25 employees.

183. This Further Notice does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

D. Congressional Review Act

184. The Commission will send a copy of this Report and Order and Further Notice of Proposed Rulemaking in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA). *See* 5 U.S.C. § 801(a)(1)(A).

E. Final Regulatory Flexibility Analysis

185. As required by the Regulatory Flexibility Act of 1980, *see* 5 U.S.C. § 604, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules, as proposed, addressed in this Order. The FRFA is set forth in Appendix C.

F. Initial Regulatory Flexibility Analysis

186. As required by the Regulatory Flexibility Act of 1980 (RFA),[561] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this Notice, of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth as Appendix D. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided on or before the dates indicated on the first page of this Notice. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). [562]

VII. ORDERING CLAUSES

187. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 4(j), 201, 225, 276, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 201, 225, 276, 303(r), the Report and Order and Further Notice of Proposed Rulemaking in WC Docket No. 12-375 ARE ADOPTED, effective 90 days after publication in the Federal Register, except those rules and requirements involving Paperwork Reduction Act burdens, as discussed below.

188. IT IS FURTHER ORDERED that Part 64 of the Commission's Rules, 47 C.F.R. Part 64, is AMENDED as set forth in Appendix A. These rules shall become effective 90 days

[561] *See* 5 U.S.C. § 603.

[562] *See* 5 U.S.C. § 603(a).

after publication in the Federal Register, except for § 64.6060 of the Commission's Rules and the Mandatory Data Collection requirement as discussed in Section I of the Order, which WILL BECOME EFFECTIVE immediately upon announcement in the Federal Register of OMB approval.

189. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order and Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

1. Add new subpart FF to part 64 to read as follows:

Subpart FF – INMATE CALLING SERVICES

§ 64.6000 Definitions

As used in this subpart:

Ancillary charges mean any charges to Consumers not included in the charges assessed for individual calls and that Consumers may be assessed for the use of Inmate Calling Services. Ancillary Charges include, but are not limited to, fees to create, maintain, or close an account with a Provider; fees in connection with account balances, including fees to add money to an account; and fees for obtaining refunds of outstanding funds in an account;

Collect calling means a calling arrangement whereby the called party agrees to pay for charges associated with an Inmate Calling Services call originating from an Inmate Telephone;

Consumer means the party paying a Provider of Inmate Calling Services;

Debit calling means a calling arrangement that allows a Consumer to pay for Inmate Calling Services from an existing or established account;

Inmate means a person detained at a correctional institution, regardless of the duration of the detention;

Inmate calling services means the offering of interstate calling capabilities from an Inmate Telephone;

Inmate telephone means a telephone instrument or other device capable of initiating telephone calls set aside by authorities of a correctional institution for use by Inmates;

Prepaid calling means a calling arrangement that allows Consumers to pay in advance for a specified amount of Inmate Calling Services;

Prepaid collect calling means a calling arrangement that allows an Inmate to initiate an Inmate Calling Services call without having a pre-established billing arrangement and

also provides a means, within that call, for the called party to establish an arrangement to be billed directly by the Provider of Inmate Calling Services for future calls from the same Inmate;

Provider of Inmate Calling Services, or Provider, means any communications service provider that provides Inmate Calling Services, regardless of the technology used.

§ 64.6010 Cost-Based Rates for Inmate Calling Services

All rates charged for Inmate Calling Services and all Ancillary Charges must be based only on costs that are reasonably and directly related to the provision of ICS.

§ 64.6020 Interim Safe Harbor

(a) A Provider's rates are presumptively in compliance with § 64.6010 (subject to rebuttal) if:

(1) None of the Provider's rates for Collect Calling exceed $0.14 per minute at any correctional institution, and

(2) None of the Provider's rates for Debit Calling, Prepaid Calling, or Prepaid Collect Calling exceed $0.12 per minute at any correctional institution.

(b) A Provider's rates shall be considered consistent with paragraph (a) of this section if the total charge for a 15-minute call, including any per-call or per-connection charges, does not exceed the appropriate rate in paragraph (a)(1) or (2) of this section for a 15-minute call.

(c) A Provider's rates that are consistent with paragraph (a) of this section will be treated as lawful unless and until the Commission or the Wireline Competition Bureau, acting under delegated authority, issues a decision finding otherwise.

§ 64.6030 Inmate Calling Services Interim Rate Cap

No provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. A Provider's rates shall be considered consistent with this section if the total charge for a 15-minute call, including any per-call or per-connection charges, does not exceed $3.75 for a 15-minute call using Collect Calling, or $3.15 for a 15-minute call using Debit Calling, Prepaid Calling, or Prepaid Collect Calling.

§ 64.6040 Rates for Telecommunications Relay Service (TRS) Calling

No Provider shall levy or collect any charge in addition to or in excess of the rates for Inmate Calling Services or charges for Ancillary Charges for any form of TRS call.

§ 64.6050 Billing-Related Call Blocking

No Provider shall prohibit or prevent completion of a Collect Calling call or decline to establish or otherwise degrade Collect Calling solely for the reason that it lacks a billing relationship with the called party's communications service provider unless the Provider offers Debit Calling, Prepaid Calling, or Prepaid Collect Calling.

§ 64.6060 Annual Reporting and Certification Requirement

(a) All Providers must submit a report to the Commission, by April 1st of each year, regarding their interstate and intrastate Inmate Calling Services for the prior calendar year. The report shall contain:

(1) The following information broken out by correctional institution; by jurisdictional nature to the extent that there are differences among interstate, intrastate, and local calls; and by the nature of the billing arrangement to the extent there are differences among Collect Calling, Debit Calling, Prepaid Calling, Prepaid Collect Calling, or any other type of billing arrangement:

(i) Rates for Inmate Calling Services, reporting separately per-minute rates and per-call or per-connection charges;

(ii) Ancillary charges;

(iii) Minutes of use;

(iv) The average duration of calls;

(v) The percentage of calls disconnected by the Provider for reasons other than expiration of time;

(vi) The number of calls disconnected by the Provider for reasons other than expiration of time;

(2) A certification that the Provider was in compliance during the entire prior calendar year with the rates for Telecommunications Relay Service as required by § 64.6040;

(3) A certification that the Provider was in compliance during the entire prior calendar year with the requirement that all rates and charges be cost-based as required by § 64.6010, including Ancillary Charges.

(b) An officer or director from each Provider must certify that the reported information and data are accurate and complete to the best of his or her knowledge, information, and belief.

APPENDIX B

List of Commenting Parties to WC Docket No. 12-375

Organization(s) Submitting Comments	Abbreviated Citation
Adair County Sheriff's Office	Adair Cnty. Sheriff's Office
Alabama Sheriffs Association	Ala. Sheriffs Assoc.
American Civil Liberties Union	ACLU
American Immigration Lawyers Association	AILA
American Jail Association	AJA
Arizona Department of Corrections	ADC
Asian American Justice Center The Center for Media Justice Communications Workers of America Free Press The Leadership Conference on Civil and Human Rights National Association for the Advancement of Colored People National Council of La Raza National Hispanic Media Coalition National Organization for Women Foundation National Urban League New America Foundation's Open Technology Institute Public Knowledge United Church of Christ Office of Communications Inc.	The Phone Justice Commenters

California Department of Corrections and Rehabilitation	CDCR
California State Sheriffs' Association	CSSA
Center on the Administration of Criminal Law	Center on the Admin. of Criminal Law
CenturyLink	CenturyLink
Clackamas County Sheriff's Office	Clackamas Cnty. Sheriff's Office
Clark County Sheriff's Office	Clark Cnty. Sheriff's Office
Coconino County Children of Incarcerated Parents (CIP) Task Force	Coconino Cnty. CIP
Coconino County Sheriff's Office	Coconino Cnty. Sheriff's Office
Community Initiatives for Visiting Immigrants in Confinement	CIVIC
Community Justice Project	CJP
Congressional Black Caucus	CBC
County of Santa Clara Department of Corrections	County of Santa Clara DOC
Deschutes County Sheriff's Office	Deschutes Cnty. Sheriff's Office
DisAbility Rights Idaho	DisAbility Rights Idaho
Elmore County Sheriff's Office	Elmore Cnty. Sheriff's Office
Embracing Lambs Ministries	Embracing Lambs
Global Tel*Link Corporation	GTL
Helping Educate to Advance the Rights of the Deaf	HEARD
Human Rights Defense Center	HRDC
Idaho Department of Correction	Idaho DOC
Idaho Sheriffs' Association	ISA
Immigration Equality	Immigration Equality
Indiana Utility Regulatory Commission	Indiana Commission

Jefferson County Sheriff's Office	Jefferson Cnty. Sheriff's Office
Lake County Sheriff	Lake County Sheriff
The Leadership Conference on Civil and Human Rights	The Leadership Conference
Legal Center for People with Disabilities and Older People Colorado Developmental Disabilities Council	Legal Center and CODDC
Louisiana Department of Public Safety & Corrections	La. DOC
Marion County Detention Center	Marion Cnty. Det. Ctr.
Martha Wright, *et. al*. The D.C. Prisoners' Legal Services Project, Inc. Citizens United for Rehabilitation of Errants Prison Policy Initiative The Campaign for Prison Phone Justice	Petitioners
Media Action Grassroots Network	MAG-Net
MetroPCS Communications, Inc.	MetroPCS
Michael S. Hamden	Hamden
Michael Rogers	Rogers
Michigan Citizens for Prison Reform	MICPR
Minority Media and Telecommunications Council	MMTC
Mississippi Department of Corrections	MDOC
Missouri State Public Defender System	Mo. Pub. Defender Sys.
Moultrie County Sheriff's Office	Moultrie Cnty. Sheriff's Office
National Association of Regulatory Utility Commissioners	NARUC

National Association of State Utility Consumer Advocates	NASUCA
National Association of the Deaf Telecommunications for the Deaf and Hard of Hearing, Inc. Deaf and Hard of Hearing Consumer Advocacy Network Association of Late-Deafened Adults, Inc. Hearing Loss Association of America California Coalition of Agencies Serving the Deaf and Hard of Hearing Cerebral Palsy and Deaf Organization	Consumer Groups
National Consumers League	NCL
National Disability Rights Network	NDRN
National Sheriffs' Association	NSA
Network Communications International Corp.	NCIC
Nevada Department of Corrections	NDOC
New Jersey Advocates for Immigrant Detainees New York University School of Law Immigrant Rights Clinic	NJAID/NYU IRC
New Jersey Institute for Social Justice	NJ ISJ
Oregon State Sheriffs' Association	OSSA
Pay Tel Communications, Inc.	Pay Tel
Prison Law Office	Prison Law Office
Prisoners Legal Services of Massachusetts	PLS
Protection and Advocacy for People with Disabilities, Inc.	P&A

Public Service Commission of the District of Columbia	DC PSC
Rochester Institute of Technology Student Researchers National Technical Institute for the Deaf	RIT/NTID Student Researchers
Rock County Sheriff	Rock Cnty. Sheriff
Rosen Bien Galvan & Grunfeld LLP	RBGG
Routt County Sheriff's Office	Routt Cnty. Sheriff's Office
San Diego County Sheriff's Department	San Diego Cnty. Sheriff's Dep't
Securus Technologies, Inc.	Securus
South Dakota Department of Corrections	SDDOC
Stephen A. Raher	Raher
T.W. Vending, Inc. d/b/a TurnKey Corrections	TurnKey
TechFreedom	TechFreedom
Telmate, LLC	Telmate
Texas Civil Rights Project	TCRP
Texas Jail Project	Tex. Jail Project
Thurston County Sheriff's Office	Thurston Cnty. Sheriff's Office
Vera Institute of Justice	Vera
Verizon and Verizon Wireless	Verizon

APPENDIX C

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) in WC Docket 12-375.[2] The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA.[3] The Commission did not receive comments directed toward the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[4]

A. Need for, and Objectives of, the Report and Order

2. The Report and Order (Order) adopts rules to ensure that interstate inmate calling service (ICS) rates in correctional institutions are just, reasonable, and fair. In the initiating NPRM, the Commission sought information on issues related to the ICS market, ICS rates, and provider costs and ancillary fees.[5] In this Order, the Commission addresses interstate ICS rates, site commission payments, ancillary fees, ICS for deaf and hard-of-hearing inmates, ICS call types, and enforcement and data collection requirements.

3. Evidence in the Commission's record demonstrates that ICS rates today vary widely, and in far too many cases greatly exceed the reasonable costs of providing the service. In the Order, the Commission has found that a significant factor driving these excessive rates is site commission payments: fees paid by ICS providers to correctional facilities or departments of corrections in order to win the exclusive right to provide ICS. The Commission's actions in the Order are required by the Communications Act, which mandates that the Commission ensure that interstate rates are just and reasonable for all Americans.[6] Similarly, Congress made clear in the Act that any compensation under section 276 should be fair and "benefit . . . the general public," not just some segment of it.[7]

4. In the Order, the Commission sets an interim cap on interstate ICS rates and establishes safe harbor rates. Additionally, the Commission mandates that any site commission

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16653-57 (2012) (*2012 ICS NPRM*).

[3] *See id*. at 16649, para. 56.

[4] *See* 5 U.S.C. § 604.

[5] *See generally 2012 ICS NPRM*, 27 FCC Rcd 16629.

[6] 47 U.S.C. § 201(b).

[7] 47 U.S.C. § 267(b)(1).

payments recovered in end-user rates must be based upon ICS related costs. Similarly, in the Order, the Commission concludes that ancillary charges, such as account set-up fees, fees to receive a paper statement, or fees to refund an outstanding account balance, must also be cost-based. The Further Notice of Proposed Rulemaking (Further Notice) seeks comment on additional ICS issues.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

5. The Commission did not receive comments specifically addressing the rules and policies proposed in the IRFA.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

6. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[8] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[9] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[10] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[11]

7. **Small Businesses**. Nationwide, there are a total of approximately 27.9 million small businesses, according to the SBA.[12]

8. **Wired Telecommunications Carriers**. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[13] According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.[14] Of this total, 3,144 firms had

[8] 5 U.S.C. § 604(a)(3).

[9] 5 U.S.C. § 601(6).

[10] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[11] 15 U.S.C. § 632.

[12] *See* SBA, Office of Advocacy, "Frequently Asked Questions," *available at* http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf (last visited June 26, 2013).

[13] 13 C.F.R. § 121.201, NAICS code 517110.

[14] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110" (issued Nov. 2010).

employment of 999 or fewer employees, and 44 firms had employment of 1,000 employees or more.[15] Thus, under this size standard, the majority of firms can be considered small.

9. **Local Exchange Carriers (LECs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[16] According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[17] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[18] Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the Commission's action.

10. **Incumbent Local Exchange Carriers (incumbent LECs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[19] According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[20] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[21] Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the Commission's action.

11. The Commission has included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[22] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[23] The Commission has

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[15] *See id.*

[16] 13 C.F.R. § 121.201, NAICS code 517110.

[17] *See Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

[18] *See id.*

[19] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[20] *See Trends in Telephone Service* at Table 5.3.

[21] *See id.*

[22] 5 U.S.C. § 601(3).

[23] *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (filed May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); *see also* 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

therefore included small incumbent LECs in this RFA analysis, although it emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

12. **Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[24] According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[25] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.[26] In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[27] In addition, 72 carriers have reported that they are Other Local Service Providers.[28] Of the 72, 70 have 1,500 or fewer employees and two have more than 1,500 employees.[29] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the Commission's action.

13. **Interexchange Carriers (IXCs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[30] According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[31] Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.[32] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the Commission's action.

14. **Local Resellers**. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if

[24] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[25] *See Trends in Telephone Service* at Table 5.3.

[26] *See id.*

[27] *See id.*

[28] *See id.*

[29] *See id.*

[30] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[31] *See Trends in Telephone Service* at Table 5.3.

[32] *See id.*

it has 1,500 or fewer employees.[33] According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.[34] Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.[35] Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by the Commission's action.

15. **Toll Resellers**. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[36] According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.[37] Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.[38] Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by the Commission's action.

16. **Other Toll Carriers**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[39] According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[40] Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.[41] Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the Commission's action.

17. **Payphone Service Providers (PSPs)**. Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[42] According to Commission data,[43] 535 carriers have reported that they are engaged in the

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[33] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[34] *See Trends in Telephone Service* at Table 5.3.

[35] *See id.*

[36] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[37] *See Trends in Telephone Service* at Table 5.3.

[38] *See id.*

[39] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[40] *See Trends in Telephone Service* at Table 5.3.

[41] *See id.*

[42] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[43] *See Trends in Telephone Service* at Table 5.3.

provision of payphone services. Of these, an estimated 531 have 1,500 or fewer employees and four have more than 1,500 employees.[44] Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the Commission's action.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

18. *Monitoring and Certification.* The Order takes steps to reform ICS by requiring providers to charge cost-based rates, adopting interim rate caps for collect calling and prepaid and debit calling, and adopting safe-harbor rates, at or below which ICS rates will be presumed to be just, reasonable, and fair.[45] The Order requires that all ICS providers file annually data on their interstate and intrastate ICS rates and minutes of use.[46] The adopted monitoring requirements will facilitate enforcement and act as an additional means of ensuring that ICS providers' rates and practices are just, reasonable, fair and in compliance with the Order. The Commission also requires ICS providers to submit annually their overall percentage of dropped calls versus completed calls, as well as the number of dropped calls by state.[47] The Commission also requires ICS providers to file their charges to consumers that are ancillary to providing the telecommunications portion of ICS.[48] The Commission further requires each provider to annually certify its compliance with other portions of the Order, including that ICS providers may not levy or collect an additional charge for any form of TRS call and that ancillary service charges be cost-based.[49]

19. *Data Collection.*[50] In order to allow the Commission to establish a permanent cap on interstate rates and to inform the Commission's evaluation of other rate reform options in the Further Notice, the Commission requires all ICS providers to file data regarding their costs to provide ICS. All such information should be based on the most-recent fiscal year at the time of Office of Management and Budget approval, may be filed under protective order, and will be treated as confidential.

20. The Commission has identified five basic categories of costs that ICS providers incur: (1) telecommunications costs, or interconnection fees; (2) equipment investment costs; (3) equipment installation and maintenance costs; (4) security costs for monitoring, call blocking, (5) costs that are ancillary to the provision of telecommunications service and (6) other relevant cost data as outlined in the Bureau-produced data template discussed below. For each of the first four categories, ICS providers must identify the fixed costs, the per-call costs and the per-minute

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[44] *See id.*

[45] *See supra* Section III.C.3.

[46] *See supra* Section III.H.

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] *See supra* Section III.I.

costs to provide each of these cost categories of ICS. Furthermore, for each of these categories (fixed, per-call and per-minute costs), ICS providers must identify both the direct costs, and the joint and common costs. For the joint and common costs, providers must explain how these costs, and recovery of them, are apportioned among the facilities they serve, as well as the services to which they provide. For the fifth category, we require ICS providers to provide their costs to establish debit and prepaid accounts for inmates in facilities served by them or those inmates' called parties; to add money to those established debit or prepaid accounts; to close debit or prepaid accounts and refund any outstanding balance; to send paper statements; to send calls to wireless numbers and other charges ancillary to the provision of telecommunications service. We also require ICS providers to provide a list of all ancillary charges or fees they charge to ICS consumers and account holders, and the level of each charge or fee. All ICS providers must provide data on their interstate and intrastate demand and to apportion the minutes of use between interstate and intrastate calls. The Commission delegates to the Wireline Competition Bureau (Bureau) the authority to adopt a template for submitting the data.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

21. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[51]

22. The Commission needs access to data that are comprehensive, reliable, sufficiently disaggregated, and reported in a standardized manner. The Order recognizes, however, that reporting obligations impose burdens on the reporting providers. Consequently, the Commission limits its collection to information that is narrowly tailored to meet its needs.

23. *Monitoring and Certification*. The Commission requires ICS providers to submit annually their overall percentage of dropped calls versus completed calls, as well as the number of dropped calls by state. The Commission requires ICS providers to file their charges to consumers that are ancillary to providing the telecommunications piece of ICS. Providers are currently required to post their rates publicly on their websites. Thus, this additional filing requirement should entail minimal additional compliance burden, even for the largest ICS providers.

24. The information on providers' websites is not certified and is generally not available in a format that will provide the per-call details that the Commission requires to meet its statutory obligations. Thus, the Commission further requires each provider to annually certify its compliance with other portions of the Order, including the requirement that ICS providers

[51] 5 U.S.C. § 603(c)(1)–(c)(4).

may not levy or collect an additional charge for any form of TRS call, and that ancillary service charges are cost-based. The Commission finds that without a uniform, comprehensive dataset with which to evaluate ICS providers' rates, the Commission's analyses will be incomplete. The Commission recognizes that any information imposes burdens, which may be most keenly felt by smaller providers, but concludes that the benefits of having comprehensive data substantially outweigh the burdens. Additionally, some of these potential burdens, such as the filing of rates currently required to be posted on an ICS provider's website, are minimally burdensome.

25. *Data Collection.* The Commission requires ICS providers to provide their costs for five basic categories of ICS costs. These data will provide the Commission with sufficient information to establish permanent ICS rate caps. The Commission delegates to the Bureau the authority to adopt a template for submitting the data.

26. The Commission is cognizant of the burdens of data collections, and has therefore taken steps to minimize burdens, including directing the Bureau to adopt a template for filing the data that minimizes burdens on providers by maximizing uniformity and ease of filing, while still allowing the Commission to gather the necessary data. The Commission also finds that without a uniform, comprehensive dataset with which to evaluate ICS providers' costs, its analyses will be incomplete, and its ability to establish permanent ICS rate caps in the future will be severely impaired. The Commission thus concludes that requiring ICS providers to report this cost data appropriately balances any burdens of reporting with the Commission's need for the data required to carry out its statutory duties.

F. Report to Congress

27. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[52] In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.[53]

[52] 5 U.S.C. § 801(a)(1)(A).

[53] *See id.* § 604(b).

APPENDIX D

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (Further Notice). Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Notice

2. In today's Order, the Commission adopted rules to ensure that rates for interstate calling from correctional institutions are just and reasonable, and to that end, established calling rates for interstate inmate calling services (ICS). This Further Notice seeks comment on additional measures the Commission could take to ensure that interstate and intrastate ICS are provided consistent with the statute and public interest, the Commission's authority to implement these measures, and the pros and cons of each measure. The Commission believes that additional action on ICS will help maintain familial contacts stressed by confinement and will better serve inmates with special needs while still ensuring the critical security needs of correctional facilities of various sizes. Specifically, the Further Notice seeks comment on:

- Reforming intrastate ICS rates and practices;
- ICS for the deaf and hard of hearing community;
- Further reforms of interstate and intrastate ICS rates;
- Cost recovery in connection with the provision of ICS;
- Ensuring that charges ancillary to the provision of ICS are cost-based;
- ICS call blocking;

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id*.

- Ways to foster competition to reduce rates within correctional facilities; and
- Quality of service for ICS.

B. Legal Basis

3. The legal basis for any action that may be taken pursuant to the Further Notice is contained in sections 1, 2, 4(i)-(j), 201(b) and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b) and 276.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.[6] A "small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[7]

5. **Small Businesses**. Nationwide, there are a total of approximately 27.9 million small businesses, according to the SBA.[8]

6. **Wired Telecommunications Carriers**. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[9] According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.[10] Of this total, 3,144 firms had

[4] *See* 5 U.S.C. § 603(b)(3).

[5] *See* 5 U.S.C. § 601(6).

[6] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[7] *See* 15 U.S.C. § 632.

[8] *See* SBA, Office of Advocacy, "Frequently Asked Questions," http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf (last visited July 30, 2013).

[9] 13 C.F.R. § 121.201, NAICS code 517110.

[10] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110" (issued Nov. 2010).

employment of 999 or fewer employees, and 44 firms had employment of 1,000 employees or more.[11] Thus, under this size standard, the majority of firms can be considered small.

7. **Local Exchange Carriers (LECs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[12] According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[13] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[14] Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by our action.

8. **Incumbent Local Exchange Carriers (incumbent LECs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[15] According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[16] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[17] Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

9. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[18] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[19] We have therefore included

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[11] *See id.*

[12] 13 C.F.R. § 121.201, NAICS code 517110.

[13] *See Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

[14] *See id.*

[15] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[16] *See Trends in Telephone Service* at Table 5.3.

[17] *See id.*

[18] 5 U.S.C. § 601(3).

[19] *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); *see also* 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

10. **Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[20] According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[21] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.[22] In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[23] In addition, 72 carriers have reported that they are Other Local Service Providers.[24] Of the 72, 70 have 1,500 or fewer employees and two have more than 1,500 employees.[25] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by our action.

11. **Interexchange Carriers (IXCs)**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[26] According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[27] Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.[28] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by our action.

12. **Local Resellers**. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if

[20] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[21] *See Trends in Telephone Service* at Table 5.3.

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[27] *See Trends in Telephone Service* at Table 5.3.

[28] *See id.*

it has 1,500 or fewer employees.[29] According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.[30] Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.[31] Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our action.

13. **Toll Resellers**. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[32] According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.[33] Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.[34] Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

14. **Other Toll Carriers**. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[35] According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[36] Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.[37] Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by our action.

15. **Payphone Service Providers (PSPs)**. Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[38] According to Commission data,[39] 535 carriers have reported that they are engaged in the

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[29] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[30] *See Trends in Telephone Service* at Table 5.3.

[31] *See id.*

[32] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[33] *See Trends in Telephone Service* at Table 5.3.

[34] *See id.*

[35] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[36] *See Trends in Telephone Service* at Table 5.3.

[37] *See id.*

[38] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[39] *See Trends in Telephone Service* at Table 5.3.

provision of payphone services. Of these, an estimated 531 have 1,500 or fewer employees and four have more than 1,500 employees.[40] Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

16. In this Further Notice, the Commission seeks public comment on options to reform the inmate calling service market. Possible new rules could affect all ICS providers, including small entities. In proposing these reforms, the Commission seeks comment on various options discussed and additional options for reforming the ICS market.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[41]

18. The Further Notice seeks comment from all interested parties. The Commission is aware that some of the proposals under consideration may impact small entities. Small entities are encouraged to bring to the Commission's attention any specific concerns they may have with the proposals outlined in the Further Notice. In addition, the Commission seeks updated data, as described in the Further Notice, from small entities that may be impacted by Commission action on ICS.

19. The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the Further Notice, in reaching its final conclusions and taking action in this proceeding. Specifically, the Commission will conduct a cost/benefit analysis as part of this Further Notice and consider the public benefits of any such requirements it might adopt, to ensure that they outweigh their impacts on small businesses.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

20. None.

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[40] *See id.*

[41] 5 U.S.C. § 603(c)(1)–(c)(4).

STATEMENT OF

ACTING CHAIRWOMAN MIGNON CLYBURN

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

For ten years, family, friends and legal representatives of inmates have been urging the courts and waiting for the FCC to ease the burden of an exorbitant inmate calling rate structure. Their wait is at long last over. Borrowing from a 1964 anthem inspired by challenges of his time, the immortal songwriter Sam Cooke sang that it's been a long, long time in coming, but change has finally come.

Today's Order reforms the rates and charges for interstate inmate calling services and provides immediate and meaningful relief, particularly for low income families across this nation. This Order fulfills our obligation to ensure just, reasonable and fair phone rates for all Americans, including the millions with loved ones in prison.

This all began with one Washington, D.C. grandmother, Mrs. Martha Wright, who spoke truth to power in 2003, and reminded us that one voice can still spur a movement and drive meaningful change.

Mrs. Wright once talked with her grandson Ulandis, who is here with us today, a couple of times a week, about 15 minutes each call. For this minimal contact she often paid more than $100 a month – no small change for a retired nurse. In 2003, she filed a petition with the FCC asking for help. Others who were paying a high toll for interstate inmate calls would follow her lead and after many twists and turns – we are finally here.

I am happy that Mrs. Wright's grandson and many of her fellow petitioners are our special guests today. Millions will benefit from your perseverance and your willingness to take a stand. Thank you for seeing us through to this important day.

Mrs. Wright's story, and those of many others, reveals many common themes that illustrate why the change we put forth is so very necessary. Too often, families are forced to choose between spending scarce resources to stay in touch with their loved ones or covering life's basic necessities. One family member described how communicating with her husband is a "great hardship," but that the few minutes that they are able to talk each week, "have changed his

life." Another parent told us how he has spent significant amounts of money to receive collect calls from his son -- calls that he "cannot afford," but accepts because his son's "emotional health and survival in prison is important" to him.

And, just yesterday, I spoke with Monalisa Johnson, a woman I met behind the stage at the Urban League convention. You see, nine months ago her daughter began serving a 10-year sentence in Georgia, and now the "new line item" in Ms. Johnson's monthly budget includes a $600 per month charge to stay in touch from New York. She pays $21 for a 15-minute call, which she describes as "highway robbery."

We've heard from inmates – many of whom are concerned about the financial burden that calling their parents, significant others, and children can impose. Too often, they are unable to make a simple phone call on birthdays and other special occasions, and from these stories and thousands more we have learned just how much of a difference telephone contact can make. As one inmate said: "To be able to actually hear your loved ones helps to strengthen the relationship…unlike any letter that one can write."

These are not isolated anecdotes.

There are 2.7 million children with at least one parent in prison and they often want and need to maintain a connection. In addition to coping with the anxiety associated with a parent who is not there on a daily basis, these young people are often suffering severe economic hardships, which are exacerbated by unaffordable inmate calling costs.

In the meantime, 700,000 inmates are released from correctional facilities each year. It's critical for them to have strong support structures in order to re-assimilate successfully. Studies have shown that having meaningful contact beyond prison walls can make a real difference in maintaining community ties, promoting rehabilitation, and reducing recidivism. Making these calls more affordable can facilitate all of these objectives and more.

So how much money are we really talking about? We've learned that rates can be as high as $17 for a 15-minute call, and that inmates can pay as much as a $4 connection charge each time and that calls made to, or coming from, one who is deaf or hard of hearing can be, and often are, even more expensive. For families on a fixed income or barely managing to get by, personal engagement is much too often beyond reach.

But today's Order takes action. It requires interstate rates to be cost-based. In other

words, rates and other charges to and from these facilities will be tied to the actual costs of providing inmate calling service. The Order sets forth a framework that provides for immediate relief from high long distance phone rates.

We adopt interim interstate rate caps and safe harbors to provide relief to families, without delay, from exorbitant rates while permitting providers to secure reasonable compensation.

This Order will reduce rates that may run from over $17 to a maximum cap of $3.75. The rate structure we adopt is grounded in the record, based on data that include security costs, yields fair compensation to providers, and provides to these families the just and reasonable rates that this Commission is charged with ensuring under the Communications Act.

All rates and charges, including ancillary charges must be based on the provider's actual costs. Those in violation of this requirement could be subject to enforcement and required to provide refunds to consumers.

Today's Order takes a measured but firm approach to reform. We also make clear that site commissions are not related to the cost of providing inmate calling services, and therefore cannot be included in the interstate rate. We also address related practices that drive up rates and make it difficult for families and friends to communicate.

At the same time, this Order recognizes and puts measures in place to ensure that security is not compromised. Inmate calling services require additional security to prevent inmates from using phones to break the law or violate facility rules. Tying rates to actual costs is fair, is guided by the law, and will provide significant financial relief for families, without sacrificing the requisite security protocols.

I am also pleased that today's Order takes steps toward future reforms. First, the reform includes a mandatory data collection that will enable the Commission to refine these interim rates going forward and to take additional action, including ensuring that rates for intrastate calls are just, reasonable and fair. And, through our Further Notice, we will collect information to determine how to best move forward on additional reforms, including for deaf and hard of hearing communities.

I would like to thank the many Members of Congress for their attention to this issue and our partners in the states, who have provided us with valuable examples of their own reforms.

Thank you to my colleagues for their expedited consideration of this Order, and a special thank you to Commissioner Rosenworcel for her support on this important milestone.

Finally, thank you to the Wireline Competition Bureau, in coordination with the Office of General Counsel, as well as other Offices and Bureaus for your tireless work on this item. These dedicated public servants truly went above and beyond the call of duty, working long nights (well after the air conditioning went off) and weekends, sacrificing quality time with their family and friends. This list includes: Julie Veach, Pam Arluk, Larry Barnes, Randy Clarke, Robin Cohn, Lynne Engledow, Doug Galbi, Victoria Goldberg, Kalpak Gude, Greg Haledjian, Derian Jones, Melissa Kirkel, Rhonda Lien, Travis Litman, Eric Ralph, Deena Shetler, Jamie Susskind, Don Sussman, David Zesiger, Sean Lev, Suzanne Tetreault, Diane Griffin Holland, Marcus Maher, Rick Mallen, Claude Aiken, Larry Schecker, Jim Carr, Nick Alexander, and Rosemary McEnery. I would like to thank my staff, especially Rebekah Goodheart. I am grateful to you for seeing this through, and Angie Kronenberg, formerly of my office, who passed to Rebekah an incredibly stable baton.

But the most important people in the room for me today are the petitioners and their families, led by Mrs. Martha Wright. Because of your courage and persistence, millions of families across the country, will soon realize more just and reasonable rates.

And to you, those hundreds of persons in at least five cities across this nation, participating in watch parties organized by the campaign for Prison Phone Justice, and thousands more who worked for and will forever benefit from today's action, we thank you.

It's been a long time coming, and not in time to directly benefit Mrs. Wright, but a change has finally come. Thank you.

STATEMENT OF

COMMISSIONER JESSICA ROSENWORCEL

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

When I step back from the record in this proceeding, there is one number that simply haunts me—perhaps because I am a parent. Across the country, 2.7 million children have at least one parent in prison. That is 2.7 million children who do not know what it means to talk regularly with their mother or father. After all, families with an incarcerated parent are often separated by hundreds of miles. They may lack the time and means to make regular visits. So phone calls may be the only way to stay in touch. Yet when the price of single phone call can be as much as you and I spend for unlimited monthly plans, it is hard to keep connected. Reaching out can be an impossible strain on the household budget. This harms the families and children of the incarcerated. But it goes far beyond that. It harms all of us because we know that regular contact between prisoners and family members reduces recidivism.

Today, this changes. After a long time—too long—the Commission takes action to finally address the high cost that prison inmates and their families must pay for phone service. This is not just an issue of markets and rates; it is a broader issue of social justice.

We establish a framework that will immediately reduce interstate inmate calling service rates. Consistent with our statutory mandate to ensure that rates are just and reasonable, we require that going forward the rates at issue are cost-based. We also set standards for ancillary charges and per-call fees and put an end to billing-related call blocking. In addition, we lower the exorbitant cost of inmate calls for the deaf and hard of hearing. In the Further Notice of Proposed Rulemaking, we seek comment on a range of other issues, including intrastate rate practices.

This effort has my unequivocal support.

So thank you to the Wireline Competition Bureau for your work on this proceeding. Thank you also to the many advocates for justice who pressured this agency to help relieve this burden borne by the families of those in prison.

On a personal level, thank you to Martha Wright for long ago bringing this issue to our

attention. Thank you to Bethany Fraser for your powerful personal story and willingness to describe what this means for the children of the incarcerated. Finally, we would not be here if it was not for the leadership of acting Chairwoman Clyburn. She saw a great wrong and has put us on the path toward making it right. Her advocacy on this issue on behalf of prisoners and their kin has been relentless. As a result, more families will be able to stay connected—and more children will be able to keep in touch with an incarcerated parent. Thank you.

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

Not long after I started working at the U.S. Senate Judiciary Committee in 2005, my boss, former Senator Sam Brownback, championed the Second Chance Act.[1] The bill recognized in its findings that family support was the most important factor in helping released prisoners reenter society and in reducing recidivism.[2] As the Senator shepherded the bill through the Committee, I got an up-close understanding of the social and economic challenges faced by those who are incarcerated and their families. How gratifying it was for so many, then, to see President Bush sign the Second Chance Act just three years later.[3]

This experience informs my approach to our work on this item. I believe that the government should usually stay its hand in economic matters and allow the price of goods and services to respond to consumer choice and competition. But sometimes the market fails. And when it does, government intervention carefully tailored to address that market failure is appropriate.

The provision of inmate calling services (ICS) is one such market. Inmates cannot choose their carrier, and carriers do not compete with each other for an inmate's calls. Instead, a prison administrator signs an exclusive contract with a single carrier. The decision to enter into such a contract often is driven by commissions and in-kind services offered to the prison by a prospective carrier.[4] As such, the incentives of prison administrators and inmates may not align. This means that we cannot necessarily count on market competition to keep prices for inmate calling services just and reasonable.

For this reason, I welcomed the opportunity to address the petition filed by Martha Wright almost a decade ago, when she came to the FCC seeking redress for the high rates she paid to speak with her then-incarcerated grandson. Having reviewed the record thoroughly, I am convinced that we must take action to meet our duties under the law, not to mention our obligations of conscience. Indeed, the FCC should have acted years ago. I said last December and I say again here: Ms. Wright expected and deserved better.

It is therefore with a heavy heart that I am dissenting from this item. In an effort to seek common ground, I offered a simple proposal to cap interstate rates, with one rate for large jails

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[1] Second Chance Act of 2005, S. 1934, 109th Cong., 1st Sess. (2005), *available at* http://go.usa.gov/jf4C.

[2] *Id.* § 2(14).

[3] Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008), *available at* http://go.usa.gov/jf4R; *see also* "President Bush Signs H.R. 1593, the Second Chance Act of 2007," *available at* http://go.usa.gov/jf4W.

[4] *See, e.g.*, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Remand & Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3253, para. 12 (2002); Telmate Comments at 6 ("[C]ompetition for these commissions decreases incentives for cost-reduction and technological innovation.").

and a lower rate for prisons. My proposal would have cut interstate rates for prisoners in 36 states (and slashed exorbitant rates by more than 50 percent in 26 states) while balancing the need for security. It would have been easy for the FCC to administer and easier for the courts to sustain. I am disappointed that we were unable to achieve consensus and move forward unanimously.

Instead of instituting simple rate caps, as I had proposed, the *Order* essentially imposes full-scale rate-of-return regulation on ICS providers. I have no doubt that the *Order*'s approach was crafted with the best of intentions. But I cannot support it. To put it simply, I do not believe that it is within the Commission's competence to micromanage the prices of inmate calling services. Nor do we have the resources to review the effectively-tariffed rates of ICS providers, to sort out legitimate costs from illegitimate costs, and to separate intrastate costs from interstate costs, possibly in every one of the thousands of correctional institutions in America. I am not sure how we will handle all of the disputes that are likely to arise with the limited and already-hardworking staff we have.

I also believe that the Commission's decision to impose a one-size-fits-all safe harbor and cap on all correctional institutions is a serious mistake. Based on the record, the rates set forth in the item are likely too low for most jails (the majority of jails in our nation hold fewer than 100 inmates), secure mental health facilities, and juvenile detention centers. The end result could be that some facilities receive limited phone service or no service at all. This could disconnect some inmates from their families entirely. For other facilities, the arbitrarily low rate will likely mean fewer security measures. As the National Sheriffs' Association puts it, this would pose "a substantial security risk to inmates and jail staff and to public safety in the community at large."[5]

Had we charted a different course—say, by applying reasonable caps on interstate rates—we could have substantially reduced interstate calling rates in a way that would have easily survived judicial scrutiny. As it stands, however, I believe that the *Order* may not withstand a court challenge. No party could have foreseen the reach of today's *Order* when we opened this proceeding last December. The notice of proposed rulemaking teed up a per-minute rate cap and other discrete proposals, but the *Order* codifies *de facto* rate-of-return regulation. Moreover, the record evidence simply does not support the Commission's approach. Indeed, the *Order* recognizes that we do not have the data to establish long-term rates and accordingly commences a mandatory data collection—which underscores that the cart is before the horse. All of this portends protracted litigation, which jeopardizes the very benefits this *Order* is supposed to provide to inmates and their families. As Ms. Wright and the other petitioners know all too well, justice delayed is justice denied.

I.

I'll start with the *Order*'s legal flaws. In my view, the *Order* fails to comply with the Administrative Procedure Act (APA) for two principal reasons. In terms of process, parties were

[5] Letter from Sheriff (ret.) Aaron D. Kennard, Executive Director, National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (July 31, 2013).

not provided with requisite notice of the rules the Commission adopts today. Additionally, these rules are arbitrary and capricious in light of the evidence contained in the record.

A.

On the issue of notice, no party could have foreseen the reach of the *Order* when we opened this proceeding last December. In our unanimous Notice of Proposed Rulemaking (*Inmate Calling NPRM*), the Commission teed up several discrete proposals to regulate the rates of interstate inmate calls: eliminating per-call charges,[6] capping per-minute rates,[7] using a "marginal location methodology" to establish just and reasonable caps,[8] using tiered pricing to set differing caps for higher-volume and lower-volume facilities,[9] establishing different caps for collect calls and debit calls,[10] capping interstate rates at intrastate long-distance rates,[11] requiring ICS providers to offer debit or prepaid calling options,[12] and mandating a certain amount of free calling for each inmate per month.[13]

Notably, *de facto* rate-of-return regulation was not on the table.[14] Instead, that option was proposed by the National Association of State Utility Consumer Advocates (NASUCA) in its comments, three full months after we adopted the *Inmate Calling NPRM*.[15] Although the Commission can address comments in the record (and indeed must respond to significant ones), the APA does not allow for such informal methods to propose rules. Rather, an agency "must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment."[16]

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[6] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16637, paras. 18–19 (2012).

[7] *Id.* at 16637–38, paras. 20–23.

[8] *Id.* at 16638–39, paras. 24–26.

[9] *Id.* at 16639–40, para. 28.

[10] *Id.* at 16640–41, paras. 30–32.

[11] *Id.* at 16641, para. 34.

[12] *Id.* at 16641–42, paras. 33, 36.

[13] *Id.* at 16643, para. 39.

[14] The *Order* implicitly acknowledges as much when it describes the *Inmate Calling NPRM* as proposing "possible rate caps for interstate ICS; the ICS Provider Data Submission; collect, debit, and prepaid ICS calling options; site commissions; issues regarding disabilities access; and the Commission's statutory authority to regulate ICS" but not the cost-based, rate-of-return methodology the *Order* in fact adopts. *See Order* at para. 10.

[15] NASUCA Comments at 4 ("As a means of securing just and reasonable rates, the ICS rules adopted by the Commission should therefore require ICS providers to justify their rates and their costs. The rules should declare that rates for interstate ICS calls are unjust and unreasonable to the extent the rates exceed the reasonable costs of providing ICS, including a reasonable return.").

[16] *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983) (emphasis in original); *see also Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (explaining that a proposal "not published in the Federal Register" expressing the views of a party but "not the Commission" does not satisfy the APA's requirements); *Shell Oil Co. v. EPA*, 950 F.2d 741, 760 (D.C. Cir. 1991).

The *Order* attempts to establish notice partly by pointing to language in the *Inmate Calling NPRM* seeking "comment on any other proposals parties contend address the concerns raised in this proceeding."[17] But a jejune request for comment on "any other proposals" did not apprise stakeholders that rate-of-return regulation was under consideration.[18] This omission matters. The D.C. Circuit has instructed that "[a]gency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making."[19] And the Second Circuit just recently chided the Commission for "solicitations . . . too general to provide adequate notice that a [particular] rule was under consideration."[20]

Unfortunately, that is exactly what happened here. Had the Commission sought comment on imposing rate-of-return regulation upon ICS providers, the record almost surely would look quite different than it does today.[21] But instead, after parties provided extensive commentary on the specific ideas set forth in the *Inmate Calling NPRM*, the Commission adopted far more onerous rate-of-return regulation—a scheme that was nowhere mentioned in the *Inmate Calling NPRM*. It is therefore unsurprising that no party other than NASUCA, to my knowledge, discussed it as an option for regulating ICS rates.[22] And given ICS providers' comments strenuously opposing a rate cap, it strains credulity to think that they would have chosen to stay silent about rate-of-return regulation had they realized it was a possible endpoint.[23]

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[17] *Inmate Calling NPRM*, 27 FCC Rcd at 16642, para. 35; *see Order* at para. 59.

[18] *Cf. Time Warner Cable Inc. v. FCC*, Nos. 11-4138(L), 11-5152(Con), slip op. at 61 (2d Cir. Sept. 4, 2013) (agency solicitation of comment on whether it "should adopt additional rules" to protect programming networks from retaliation did not provide adequate notice regarding a particular rule—the standstill rule—designed "to provide such protection").

[19] *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 549.

[20] *Time Warner Cable Inc.*, slip op. at 61.

[21] *See id.* at 62.

[22] As such, the *Order*'s claim that the framework adopted by the Commission here was the subject of "extensive comments, reply comments, and ex parte submissions in the record" is simply wrong. *See Order* at note 222. Indeed, the *Order* does not cite *any* submission from *any* service provider commenting on rate-of-return regulation. Instead, the lengthiest discussion of the subject comes from the Wright Petitioners themselves, who explained why rate caps (as proposed in the *Inmate Calling NPRM*) were superior to traditional rate-of-return regulation. Martha Wright *et al.* Comments at 32 ("[T]he FCC has previously found that the adoption of price caps provide a powerful incentive for service providers to become more efficient. . . . The price cap regime was imposed because of a concern that traditional rate-of-return regulation did not result in sufficient incentives to improve efficiency. Indeed, the FCC's previous reviews of rate-of-return regulation over many years led it to conclude that, under certain circumstances, rate-of return regulated firms have an incentive to raise rather than lower their costs by increasing investment in the asset base on which the regulated return is calculated well beyond the efficient level.").

[23] For all of these reasons, a generic request for comment on "any other proposals" is best seen as an indication that the agency may consider in a Further Notice any ideas raised in the record that are beyond the initial NPRM. Indeed, the Commission does just that with its Further Notice to extend today's action to intrastate rates—a proposal that originated in comments and inspired discussion in the record (unlike rate-of-return regulation).

The *Order* also attempts to establish notice by citing a variety of paragraphs in which the Commission sought information about "costs."[24] But just because we sought information about "costs" as an input in evaluating eight discrete proposals does not mean that *every* possible "cost-based" solution is a logical outgrowth of the *Inmate Calling NPRM*,[25] let alone a cost-based solution as complex as the one contained in the *Order*. The *Order* admits that "cost"-based ratemaking is itself ambiguous[26] and could mean ratemaking based on historical costs,[27] projected costs,[28] or even forward-looking modeled costs.[29] That not a single commenter to my knowledge (and the *Order* cites none) discussed these issues simply confirms that no one realized that granular rate-of-return regulation was imminent.

The *Order* lastly attempts to establish notice by pointing to various questions about how to establish rate caps.[30] But no one doubts the notice for the rate caps adopted in the *Order* (rule 64.6030). The question is whether there was notice for an independent rule, the rate-of-return regulations contained in rule 64.6010. And in my view there was not, given the lack of any discussion in the *Inmate Calling NPRM* of requiring rates to be cost based (rather than simply capped), let alone any mention of rate-of-return regulation.

Notice deficiencies extend to at least two further aspects of the rate-of-return system adopted by the *Order*. *First*, the safe harbor adopted by the *Order* only makes sense as part of a rate-of-return system—indeed, the safe-harbor rule explicitly ties itself to the rate-of-return ratemaking rule.[31] And just as the *Inmate Calling NPRM* did not propose *de facto* rate-of-return regulation, so too did it fail to fairly apprise commenters that a safe harbor might be a part of that regulation.[32]

Second, the *Order* extends rate-of-return regulation to ancillary charges, even though the *Inmate Calling NPRM* did not make any such proposal, did not propose capping or otherwise regulating such charges, and did not even contain the phrase "ancillary charges." At most, the

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[24] *See Order* at note 191 (citing *Inmate Calling NPRM*, 27 FCC Rcd at 16637–38, 16642–43, paras. 18–21, 25–26, 37); *id.* at note 222 (citing *Inmate Calling NPRM*, 27 FCC Rcd at 16637–38, paras. 20, 22–23 & n.76).

[25] *See United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Ass'n, Inc. v. Donovan*, 453 U.S. 913 (1981).

[26] *Order* at para. 52; *see also id.* at para. 163 (seeking comment on whether the Commission should continue to measure cost for purposes of rate-of-return regulation based on "historical" or "forward looking" costs).

[27] 47 C.F.R. § 61.39 (setting forth tariffing parameters for historical "cost schedule" carriers).

[28] 47 C.F.R. § 69.106 (setting forth access charges for non-price cap incumbents based on their "projected annual revenue requirement," *i.e.* their projected costs).

[29] *Verizon Comm. Inc. v. FCC*, 535 U.S. 467, 500 (2002) (upholding the FCC's decision to use a forward-looking cost model to establish "cost-based" rates).

[30] *See Order* at note 222.

[31] *See* Rule 64.6020(a) ("A Provider's rates are presumptively in compliance with section 64.6010 (subject to rebuttal) . . .").

[32] As before, the only party to argue for a safe harbor in the context of rate-of-return regulation was the National Association of State Utility Consumer Advocates. *See* NASUCA Comments at 5–6 (discussing a "benchmark" rate similar to the safe harbor rate adopted in the *Order*).

Inmate Calling NPRM observed that "there are outstanding questions with prepaid calling such as: how to handle monthly fees; how to load an inmate's account; and minimum required account balance."[33] But the Commission didn't make that comment—the Wright petitioners did.[34] And the *Inmate Calling NPRM* repeated it not in the context of proposing to regulate such charges but as a counterweight to assertions that prepaid calling should be an "alternative to collect and debit calling."[35] At most, the questions posed in the *Inmate Calling NPRM* could form a basis for regulating ancillary charges related to prepaid calling *if* we were to make the offering of prepaid calling an alternative to other forms of regulation.[36] But the *Order* does not take that step. As the Second Circuit recently reminded the Commission, "[e]ven if it was the FCC's intent to solicit comment on a [particular] rule, 'an unexpressed intention cannot convert a final rule into a logical outgrowth that the public should have anticipated.'"[37] Accordingly, the *Inmate Calling NPRM* provides no basis for rate-of-return regulation of all ancillary charges.

The *Order* appropriately does not attempt to rely on the public notice titled "More Data Sought on Extra Fees Levied on Inmate Calling Services" to satisfy the notice-and-comment requirement with respect to ancillary charges.[38] For one thing, that public notice did not seek to expand the scope of the *Inmate Calling NPRM*, but instead to "seek[] comment on certain issues raised in the *Rates for Interstate Inmate Calling Services NPRM* that is intended to refresh the record regarding rates for interstate ICS calling."[39] For another, that public notice could not have expanded the scope of the *Inmate Calling NPRM* given that the Wireline Competition Bureau cannot propose rules on its own.[40] For yet another, that public notice was not published in the Federal Register until July 15, just two days before comments and nine days before replies were due.[41] An agency must provide commenters "enough time with enough information,"[42] so that

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[33] *Inmate Calling NPRM*, 27 FCC Rcd at 16641, para. 33; *Order* at para. 90 (relying on this observation for purposes of complying with the Administrative Procedure Act). The *Order* also relies on a few disparate filings made between 2008 through 2013 that mention ancillary charges and the need for some sort of regulation of them. *See Order* at note 338. But expecting the public to piece together a hodgepodge of comments strewn over several years is hardly the fair notice required by the Administrative Procedure Act and does not make "clear that the agency [is] contemplating a particular change." *CSX Trans. v. Surface Trans. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

[34] *Inmate Calling NPRM*, 27 FCC Rcd at 16641, para. 33 ("Petitioners note that . . ."); *see* Martha Wright *et al.* Alternative Wright Petition Reply at 29–30.

[35] *Inmate Calling NPRM*, 27 FCC Rcd at 16641, para. 33 (noting that prepaid ICS calling is offered "usually at a discount" to collect or debit calling).

[36] The *Inmate Calling NPRM* asked the following questions: "If these issues can be sufficiently addressed, is prepaid calling a viable ICS option? Do any ICS providers currently offer prepaid calling? What are some other concerns or considerations with prepaid calling?" *Id.* (footnote omitted).

[37] *Time Warner Cable Inc.*, slip op. at 61 (quoting *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 254 (3d Cir. 2010) (internal quotation marks omitted)).

[38] *Order* at note 338 ("To be clear, we are not suggesting that this Bureau-level request itself provided notice with respect to ancillary charges . . . .").

[39] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Public Notice at 2 (Wireline Comp. Bur. June 26, 2013).

[40] *See* 47 C.F.R. § 0.291(e).

[41] *See* 78 Fed. Reg. 42034 (July 15, 2013).

"[t]he opportunity for comment [is] a meaningful opportunity."[43] Two days for comments and one more week for replies is surely insufficient.

B.

Lack of notice is not the *Order*'s only legal infirmity. Also problematic is the fact that the record evidence simply does not support the Commission's one-size-fits-all approach or its chosen safe harbor and rate cap.

The Commission establishes an across-the-board safe harbor of 12 cents a minute and an across-the-board cap of 21 cents a minute for debit calls at *all* correctional institutions. It does not matter whether an ICS provider is serving a prison with thousands of inmates or a county jail with fewer than twenty beds. The same safe harbor and cap applies.

Yet the record is replete with evidence that the costs[44] of serving a statewide prison system are different than the costs of serving large county jails, which in turn are much different than the costs of serving small jails, secure mental health facilities, and juvenile detention centers.[45] One provider's cost study, for example, shows that it costs 12 cents more a minute to serve midsize jails than statewide prisons or the largest jails—and the cost of serving the smallest jails tops $1.39 a minute.[46] Another provider shows that the average cost of serving jails is almost 20 percent higher than that of serving state prisons, and the highest-cost jail the company serves costs 20 percent more than the most expensive prison.[47] Again, the smallest institutions

(Continued from previous page)

[42] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2010).

[43] *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (*Rural Cellular Ass'n I*).

[44] For purposes of making apples to apples comparisons, all cost data discussed here exclude site commissions, which the *Order* recognizes may be an underinclusive approach given that correctional institutions themselves often incur costs to provide ICS and those costs may need to be included in any cost-of-service estimates. *See Order* at note 203.

[45] *See, e.g.*, Pay Tel Reply at 8 ("Generally speaking, the inherent and fundamental differences between state prison and county jail calling result in increased costs to providers servicing local facilities."); NCIC Comments at 3–4 ("The Market Analysis explored by Petitioners using the Federal Bureau of Prisons and Department of Correction facilities to determine their benchmark rates completely disregards the diversity of specific service costs relating to city holding facilities, county jails and privately owned facilities."); CenturyLink Comments at 7 ("There is an incredibly wide variance in the costs associated with providing interstate ICS to different facilities."); Global Tel*Link Comments at 6–7 ("Petitioners' desire to impose a one-size-fits-all approach in the form of nationwide rate caps is wholly at odds with the enormous variability among correctional institutions across the United States."); Letter from Glenn B. Manishin, Counsel for Telmate, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (July 26, 2013) ("[T]here are substantial differences in terms of scale, capacity, broadband costs and inmate 'churn' between larger state department of corrections ('DOC') systems and the thousands of smaller county and municipal jails served by ICS providers like Telmate.").

[46] *See* Expert Report of Stephen E. Siwek on behalf of Securus Technologies, Inc., WC Docket No. 12-375, at 3, 5 (Mar. 25, 2013) (Siwek Report) (calculated by subtracting site commissions from costs and dividing by the number of minutes), *available at* http://go.usa.gov/jM7V.

[47] Letter from John E. Benedict, Vice President – Federal Regulatory Affairs & Regulatory Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2–3 (Aug. 2, 2013) (CenturyLink Report) (noting CenturyLink's per-minute costs of 11.6 cents for prisons on average, 13.7 cents for jails on average, 18.8 cents for the highest cost prison, and 22 cents for the highest cost jail).

like jails with fewer than 100 beds, secure mental health facilities, and juvenile correctional facilities are in a whole other category of costs; for these facilities, costs "vary widely" and go up to 70.9 cents per minute.[48] Even the 2008 cost study relied upon by the Commission showed an increase in the average per-minute cost of 20 percent when it was adjusted to include small facilities "whose traffic characteristics cause them to represent locations at which cost recovery is unlikely."[49]

Why does the cost of ICS vary widely between prisons, large jails, and smaller correctional institutions? The record suggests several explanations. One is that the majority of costs for ICS are fixed and do not vary with the length or number of calls. As such, the fewer minutes of use at a given facility, the greater the average cost per minute.[50] This means that the average cost per minute in a jail can be much higher than the average cost per minute in a prison, both because of size differences and because phone calls made by prison inmates tend to last longer on average than calls placed by those in jail.[51] Another explanation is that jails experience a significantly heavier turnover of inmate populations than do prisons: 62.2 percent per week in jails versus just 1.01 percent in prisons.[52] Because the costs for setting up payment features such as debit account creation and maintenance and for activating security features such as approved calling lists are incurred for each new inmate, even jails comparable in size to prisons are likely to cost more to serve.[53] Yet another explanation is that inmates in jails are more likely than inmates in prison to use free telephone services—to call an attorney, for example—increasing the costs of service while reducing the volume over which fixed costs can be spread.[54]

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[48] *Id.* at 2.

[49] Don J. Wood, Inmate Calling Services Interstate Call Cost Study, CC Docket No. 96-128, at 4–5 (Aug. 15, 2008) (Wood Report), *available at* http://go.usa.gov/jMA4; *see also* Telmate Comments at 15 (reporting that average per-minute costs for prepaid calling are 40 percent higher for "county" facilities than the average for "all" facilities but not explaining whether those costs include site commissions).

[50] Wood Report at 5; Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 4 (July 23, 2013) (Pay Tel Report); *see also, e.g.*, CenturyLink Comments at 7.

[51] *See* Siwek Report at 8 (average length of interstate call made in state prisons is 12.51 minutes compared to 7.10 minutes in small jails).

[52] Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (July 3, 2013).

[53] Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. (Aug. 1, 2013) ("In the jail market, Pay Tel's typical customer accepts calls for less than a week and then closes his prepaid account and requests a refund of any available balance. Conversely, at the prison level, a single account remains in place anywhere from six months to several years.").

[54] Telmate Comments at 15 (reporting that 21 percent of minutes from county facilities are free vis-à-vis 12 percent of minutes from all facilities); Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. (Aug. 1, 2013) ("Jails require ICS providers to provide free calls to specific telephone numbers (e.g., bail bondsmen, public defenders, etc.), . . . 33% of inmates who are booked make *only* free calls and are then released (meaning ICS providers do not see a penny for provision of services to these inmates) . . . ." (emphasis in original)).

The *Order* sets out five reasons for ignoring this variability and adopting a single set of safe harbors and a single set of caps to apply to all facilities. None of them carry the day, in my view. *First*, the *Order* asserts that the 2008 cost study submitted by ICS providers reported average costs across a variety of facilities, rendering appropriate a single safe harbor and a single cap.[55] But that study did not claim that costs were the *same* across all facilities; indeed, the supplements to that study showed that the costs of providing service varied significantly from one facility to the next.[56] Using the same 15-minute methodology as the *Order*, the lowest per-minute debit rate at a facility was 7.1 cents, the highest was $1.59, the unweighted average was 30.6 cents, and the standard deviation was 32.6 cents. For collect calls, the lowest was 12.9 cents, the highest was $2.05, the unweighted average was 42.8 cents, and the standard deviation was 42.3 cents.[57]

Second, the *Order* suggests that because we have adopted a "uniform rate" for public payphones, a single safe harbor and cap is suitable here as well.[58] But different records justify different rules. In the public payphone context, the Commission found insufficient evidence that costs varied significantly from one payphone to the next[59] where the number of calls varied by up to 46 percent at a particular location.[60] In contrast, the record here specifically demonstrates that the costs of service are higher at jails than in prisons and even higher at small correctional institutions.[61] And call volumes vary much more dramatically with ICS. Small institutions

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[55] *See Order* at para. 81 ("ICS providers themselves submitted a single set of costs for the multiple providers participating in the ICS Provider Data Submission, regardless of the differing sizes of the correctional institutions they served.").

[56] *See* Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Attach. (Aug. 22, 2008); Report of Several Providers of Inmate Telephone Service, CC Docket No. 96-128 (Oct. 15, 2008).

[57] *Id*. (redacted numbers reverse-engineered from unredacted information).

[58] *Order* at para. 81 (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2613, para. 149 (1999) (*Payphone Third Report and Order*)); *see also id.* at note 280 (noting that "[t]he use of averaged rates and data is common in the communications industry and telecommunications regulation").

[59] *Payphone Third Report and Order*, 14 FCC Rcd at 2613–15, paras. 149–53 (noting that while payphone costs may differ from one location to the next, "there is no support in the record for MCI's assertion that the fixed costs at a marginal payphone location will be significantly different from the fixed costs at an average payphone location" and verifying "that a marginal location can support an average payphone").

[60] *Payphone Third Report and Order*, 14 FCC Rcd at 2607–08, para. 140 (noting the number of monthly calls per payphone ranged from 478 to 700 in the record).

[61] The *Order*'s primary response to this record evidence appears to be the assertion of one party that "technical innovations in the provision of prison phone services imply that variation in costs at different facilities has largely been eliminated." *Order* at para. 81 (quoting Martha Wright *et al*. 2013 Comments, Exh. C at 5 (Bazelon Report)). The problem with that assertion is that the commenter never discussed the variation in *costs* between state prisons, county jails, and small correctional institutions but instead focused on the variation in *rates* among state prisons. *See* Bazelon Report at 15–16 ("The underlying costs of providing prison phone service may vary somewhat state by state, but nothing that would support the variation [in rates] reported in Table 1.").

might have only about 1,200 monthly minutes of use whereas prisons have up to 15,000 times as much traffic.[62]

Third, the *Order* dismisses the importance of small jails, stating that "[f]acilities of these sizes hold only a very small share of inmates nationally."[63] Hence, the *Order* concludes that cost data for these facilities "do not necessarily reflect the costs of serving [the] vast majority of inmates that generate nearly all calls."[64] This might be a good argument for exempting such facilities from the safe harbor and rate cap. But so long as the Commission insists on subjecting small jails to each, it cannot refuse to take into account the uncontroverted cost data for small jails on the grounds that they don't house many inmates.[65] Indeed, the Commission's deliberate refusal to take account of different costs of serving different types of facilities defines arbitrary decision-making.[66] The *Order*, moreover, ignores the reality that a substantial percentage of facilities covered by our rules will in fact be small jails. After all, most jails in our nation have fewer than 100 inmates, and about 35 percent of jails house fewer than 50.[67]

Fourth, the *Order* suggests that setting uniform safe harbors and caps without regard to the size of the facility being served is reasonable because "ICS providers typically use uniform rates when they serve multiple correctional facilities with differing cost and demand characteristics under a single contract"[68] and thus "even if a provider may under-recover at some facilities, it may over-recover at others."[69] Such assertions might have some relevance if the *Order* only regulated state prison systems (where statewide contracts appear to be the norm) or if

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[62] *See* Siwek Report at 2 (reporting that the "low 10" institutions had between 885 and 1,668 minutes of calling each month, whereas state prisons had between 2,488,244 and 120,643,191 minutes).

[63] *Order* at para. 26.

[64] *Id.*

[65] To be fair, the *Order* includes some small jail data in calculating the collect call rate cap. *See Order* at note 307. But that does not change the fact that, even in that calculation, the higher cost of serving small jails is offset by averaging with the cost of serving larger facilities, nor does it address the propriety of applying the other caps to small jails.

[66] *See United States Telephone Ass'n v. FCC*, 188 F.3d 521, 525 (D.C. Cir. 1999) (finding FCC's rate determination arbitrary and capricious where agency eliminated outlying data points in reaching a judgment and did not explain "why the outliers were unreliable or their use inappropriate").

[67] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of Jail Facilities (2006), *available at* http://dx.doi.org/10.3886/ICPSR26602.v1.

[68] *Order* at note 280. The *Order* supports this claim by pointing to a contract with the state of California's prison system, another with the state of Nebraska's prison system, and a third with U.S. Immigration and Customs Enforcement at the Department of Homeland Security. *See id.* at note 226 (citing ICS contract between Public Communications Services, Inc. and Nebraska Department of Correctional Services, dated July 8, 2008, *available at* http://www.prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=Nebraska); *id.* at note 280 (citing State of California, California Technology Agency, IWTS/MASS Agreement Number OTP 11-126805, *available at* http://prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=California, and citing note 493, which in turn cites Letter from Glenn Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed July 26, 2013)). Although note 493 also cites two additional comments, those comments discuss "postalized" rates within a facility (*i.e.*, the same rates for local and long-distance calls), not uniform rates across facilities.

[69] *Order* at note 301.

small facilities were only covered if part of a larger contract. But the *Order* insists that its safe harbors and caps apply to all correctional institutions, without exception, and there is absolutely no evidence in the record that jails in different counties are covered under the same contracts or that county jails are covered under the same contracts as state prisons.

Indeed, the *Order* conspicuously does not claim (and cannot claim) that ICS providers set uniform rates across all of the facilities they serve. The record evidence contradicts such a claim generally,[70] and there is zero evidence in the record that ICS providers set uniform rates across local jails in different counties. Moreover, the *Order* contains no credible explanation for why any provider would continue to serve any county jail where it is unable to recoup all of its costs. After all, providers are under no legal obligation to provide inmate calling services to any particular correctional facility. Should they make the rational business decision to withdraw from facilities where they would have to operate at a loss, inmates in those facilities ultimately will suffer.[71] And even if a provider for some reason chooses to engage in cross-subsidization between prisons and county jails, uniform safe harbors and caps mean that long-term prison inmates will be forced to subsidize the calls of short-term jail inmates.

Fifth, the *Order* suggests that because the safe harbor and cap are set conservatively, they already account for cost variances across facilities.[72] Unfortunately, calling a measure "conservative" 34 times doesn't make it so.[73]

Consider the cap on debit rates. The *Order* primarily relies on Pay Tel's cost data to establish a cap of 21 cents per minute.[74] But Pay Tel's *average* costs were 20.8 cents. Unless this is a most unusual situation in which no jails have above-average costs—a Bizarro Lake Wobegon—a cap of 21 cents almost certainly means that a significant number of small jails will be capped at below-cost rates. Other evidence in the record leads to a similar conclusion. The Siwek Report points to smaller correctional facilities where costs average $1.39 per minute, a

[70] For example, the letter touted by the *Order* for its discussion of a contract with U.S. Immigration and Customs Enforcement at the Department of Homeland Security goes on to explain the different rates that same ICS provider offers for state prisons and county jails. *See* Letter from Glenn Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed July 26, 2013).

[71] Although the *Order* quotes a single ICS provider that occasionally serves small facilities at a loss when it "represent[s] that community or . . . ha[s] a lot of facilities in that area," *Order* at note 301, it is naïve to expect that charitable intentions will lead ICS providers to serve all the small institutions with below-cost rates.

[72] *See, e.g.*, *Order* at para. 62 ("We set our interim safe harbor at conservative levels to account for the fact that there may be cost variances among correctional facilities."); *id.* at para. 79 (noting that the data underlying the cap calculation "represent the highest cost of a per-minute collect call in the record, and includes cost data from locations with varying cost and call volume characteristics" (indirectly citing Wood Report at 4)); *id.* at note 230 ("[W]e are not simply 'calling' our measures conservative . . . but rather are relying on record evidence in a conservative fashion.").

[73] *Cf.* Inigo Montoya, *The Princess Bride* (Act III Communications 1987) ("You keep using that word. I do not think it means what you think it means.").

[74] *Order* at para. 76.

figure almost seven times the rate cap.[75] And CenturyLink reports that its highest-cost large jails cost 22 cents a minute to serve, not including an additional 4 cents for more recent security features.[76] Moreover, CenturyLink explains that smaller jails with 100 or fewer inmates "are much costlier to serve, with CenturyLink's costs to serve as high as [70.9 cents] per minute."[77] So the evidence in the record demonstrates that a rate cap for debit calls of 21 cents per minute is not a conservative approach—it is arbitrarily low as applied to jails.

So too with the cap on collect rates. The 25 cent cap here is based on a 24.6 cent *average* cost of service in 2008.[78] Right off the bat, this means costs in many facilities are likely to be above the cap, as is true for the cap on debit rates. And the 24.6 cent average is only true if you both assume the average call lasts 15 minutes and include only the 25 least expensive locations in that study. Using the actual average call length (12 minutes), the average cost jumps to 27.8 cents per minute. Including the three highest cost locations, the average cost jumps to 28.3 cents. Taking into account both of these adjustments pushes the average cost up to 33.6 cents. So based on a full and fair review of the record, average costs of the facilities in that study are more than *34 percent* above the cap. And even that assumes that costs have held steady over the past five years. The record, however, shows that the cost of security measures such as biometric voice scanning and real-time monitoring have actually increased over time.[79]

Next, consider the safe harbor. It is based on the *prison* rates of seven states that have eliminated site commissions. No data for jails (service to which, again, requires higher per-minute costs) was used to calculate the safe harbor, even though that benchmark applies to jails. It is therefore not surprising that the safe harbor is below the average per-minute costs of serving jails.

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[75] The fact that *average* costs in the Siwek Report (referred to by the *Order* as the cost study submitted by Securus, *see Order* at para. 77) were below the cap does nothing to establish that 21 cents per minute is a reasonable cap as applied to jails when that same study shows that costs in small jails averaged $1.39 a minute.

[76] CenturyLink Report at 3.

[77] *Id.* This information, as well as other data described above, simply cannot be squared with the Commission's claim that the interim rate caps were established "us[ing] the highest costs in the record." *Order* at para. 74; *see also id*. at note 230 ("[T]he rates we set for the safe harbor and cap reflect costs that *exceed* the cost data that any party submitted in the record.").

[78] *Order* at para. 78.

[79] *See, e.g.*, Pay Tel Report at 3 (noting that the use of continuous biometric identification, once unavailable, now costs Pay Tel 1.93 cents per minute); CenturyLink Report at 2 (asserting that "current generation security features" require payments of 4 cents a minute to third-party software vendors); Securus Supplement at 5–6 (Mar. 27, 2013) ("Another area in which Securus's costs have gone up is software development. Because of the unique nature of inmate telephone services, in 2012 alone Securus spent over $4.5 million on the development of safety, security, and investigative software for its inmate telephone systems."); Securus Reply (Declaration of Kelly Solid) (Apr. 22, 2013) (describing the proprietary THREADS software program that mines inmate calling data "to predict, prevent, or address activity that would be harmful to inmates or the general public," such as apprehending an escapee or preventing attempts to assassinate law enforcement officials").

Additionally, the safe harbor of 12 cents does not make sense even as applied to prisons. While acknowledging that rates charged for services do not necessarily correlate with the costs,[80] the item nevertheless concludes that a subset of seven states that have eliminated site commissions in prisons "provides a reasonable basis for establishing a conservative proxy for cost-based rates."[81] And yet, the safe harbor is based on *averaging*, so some prison rates in these states will by definition come out above the benchmark. So it is that rates in Michigan and Rhode Island are above the benchmark even though both states have adopted the reforms the *Order* suggests are necessary to correlate rates with costs.[82] (Ironically, even though the rates in Rhode Island are used to compute the safe harbor, ICS providers there cannot continue to charge those rates going forward given that they are not only above the safe harbor but also above the cap.)

The Commission's calculations also skew the average rate of these seven states lower than it actually is. For example, the *Order* assumes the average ICS calls lasts 15 minutes (rather than 12[83]) because it "anticipate[s] that call durations would tend to increase under our rates."[84] And the *Order* rounds the average rate down (which would place the average rate itself outside the safe harbor) rather than up. Taking the less aggressive approach in each situation would have yielded safe harbors two cents higher than those adopted in the *Order*.[85] And again, the result would be even higher for jails (two additional cents higher), where the average call lengths are even shorter and less price elastic.[86]

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[80] Record evidence suggests that the rates charged in many jurisdictions do not correlate with the costs. Even in states that have adopted reforms, there is evidence that ICS providers have raised ancillary charges to offset revenue losses from low interstate calling rates. *See, e.g.*, Michael S. Hamden Ancillary Charges PN Comments at 5 (asserting that "New Mexico ICS providers also generate revenue through imposing a wide variety of charges to establish pre-paid accounts and to maintain those accounts"); Michael S. Hamden Ancillary Charges PN Reply at 1. *Cf. MCI Telecomm. Corp. v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998) ("The Commission never explained why a market-based rate for coinless calls could be derived by subtracting costs from a rate charged for coin calls. If costs and rates depend on different factors, as they sometimes do, then this procedure would resemble subtracting apples from oranges.").

[81] *Order* at para. 62.

[82] To try to get out of this box, the item later concludes that something must be rotten in the States of Michigan and Rhode Island. *See Order* at notes 235, 237. But it cites no evidence in support of that assertion. Furthermore, if this is true, then it begs the question of why these two states were used to calculate the safe harbor in the first place. *Cf. id.* at note 237 ("A statistical analysis of the state rate data would also lead to exclusion of these two states.").

[83] The average duration in California prisons was 12.1 minutes in 2010, Bazelon Report at 14, and the average call duration across Securus-served facilities was 11.63 minutes in 2012, Siwek Report at 8.

[84] *Order* at note 232.

[85] Specifically, the average rate for collect calls would have been 16 cents (rounded up from 15.21 cents) and for debit/prepaid calls 14 cents (rounded up from 13.03 cents).

[86] *See* CenturyLink Comments at 11 (noting that call lengths in jail do not appear to be particularly sensitive to price). The average call length was 10.45 minutes for midsize jails and 7.1 minutes for small jails. Siwek Report at 8. For midsize jails, the average rate for collect calls would have been 17 cents (rounded up from 16.03 cents) and for debit/prepaid calls 14 cents (rounded up from 13.57 cents). For small jails, the average rate for collect calls would have been 20 cents (rounded up from 19.02 cents) and for debit/prepaid calls 16 cents (rounded up from 15.58 cents).

Considering all these facts together, I believe that the decision to establish a safe harbor and cap that applies to all correctional institutions, regardless of their size and regardless of their nature, is arbitrary. I also believe that the specific safe harbor and cap chosen by the Commission are not supported by substantial evidence. By ignoring the differences between prisons and jails (among other things), the Commission has "fail[ed] to consider an important aspect of the problem" before us.[87] And by setting a safe harbor and cap that is unreasonably low for jails, especially smaller ones, the Commission has made a decision that "runs counter to the evidence" in the record.[88]

To be sure, the *Order* affixes an "interim" label on the safe harbor and the cap as well as the rate structure and rate levels adopted. Perhaps this is meant to invoke courts' "particularly deferential" review of interim rules.[89] The problem is that such deference is premised on "[a]voidance of market disruption pending broader reforms"[90] and the agency "act[ing] to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated."[91] Neither factor obtains here. In fact, the interim rules in this case will significantly disrupt the market given that 21 state prison systems (and the Federal Bureau of Prisons) have interstate rates above the cap and another 11 have rates above the safe harbor, not to mention the thousands of jails and smaller facilities with ICS that will be affected. This approach is intended to perturb, not preserve, the status quo.[92]

Nor does the "interim" designation bridge the evidentiary gap that will persist until the completion of the mandatory data collection appended to the *Order*.[93] The data collection seeks

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[87] *Motor Vehicle Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[88] *Id.* The *Order* sets up a straw man by arguing that under my approach, "the averaging of relevant record data" would never be allowed. *See Order* at note 230. The permissibility of averaging costs depends upon the particular market and particular record at issue. And my position, as explained in detail above, is that relying on an average-cost approach is arbitrary in light of the nature of the market for ICS and the record compiled in this proceeding. By contrast, where providers are required by law to serve all locations within a geographic area, then an average-cost approach could well have merit.

[89] *Rural Cellular Ass'n I*, 588 F.3d at 1105; *see also Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1095 (D.C. Cir. 2012).

[90] *Rural Cellular Ass'n I*, 588 F.3d at 1106 (quoting *Competitive Telcomms. Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002)).

[91] *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

[92] Given that today's *Order* is not an interim rule as envisioned by these precedents, I need not broach the question of whether Congress intended courts to apply a more deferential standard to interim rules. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (rejecting a change in the standard of deference where "statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action").

[93] It is worth noting too that interim rules can remain in place for a significant period of time. *Compare Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557, 10558, 10561, paras. 1, 7 (2012) (suspending certain rules on an "interim" basis and stating that a data collection will commence by October 22, 2012), *with* Comment Deadlines Extended in Special Access Proceeding, WC Docket No. 05-25, RM-10593, Public Notice (July 31, 2013) (noting

(continued….)

the costs of all ICS providers to serve all their facilities, including how joint and common costs are apportioned among facilities, as well as certain rate and usage information.[94] With this cost information, the Commission could determine how to adequately address the cost variability shown in the present record. But without it, the cart at this point stands in front of the horse.[95]

For all of these reasons, I fear the *Order* invites protracted litigation, which may tie up the agency for years to come and delay any hope of reducing the most egregious ICS rates in the near term.[96]

II.

Leaving aside the *Order*'s legal infirmities, I cannot support an *Order* that we cannot administer with consequences we cannot control. I would have supported action to institute simple and reasonable rate caps. But this item instead combines *de facto* rate-of-return regulation for ICS providers at all correctional institutions in America, which we will not be able to administer effectively, with a flawed rate cap that will result in county jails, secure mental health facilities, and juvenile detention centers scaling back their security measures or even terminating inmate calling services entirely.

(Continued from previous page)

that the Office of Management and Budget has not yet approved the special access data collection and collection will not likely commence until "the end of this year or early next year").

[94] *Order* at para. 125.

[95] I do not suggest that the Commission must "assemble perfect data" before acting nor that the Commission must set an "exquisitely granular rate[,] unsullied by any taint of averaging," as hyperbolically suggested by the *Order*. *See Order* at notes 230, 308; *cf. infra* Part III. But I do insist that any solution adopted actually be supported by the record. So do the courts. *See State Farm*, 463 U.S. at 43 (agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (internal quotation marks and citation omitted). If the record contains uncontroverted evidence that the costs of serving different correctional institutions varies widely, as it does here, the Commission must either tailor its solution to that evidence or defer action until it obtains new evidence. It is arbitrary and capricious for the Commission to set aside the record evidence (by averaging) and adopt far-reaching regulations in the hope that later data will justify them.

[96] I tend to doubt the *Order*'s severability clause will help the Commission avoid or escape the thicket. That clause notes that even though "[a]ll of the rules . . . are designed to work in unison," "[i]f any of the rules is declared invalid or unenforceable for any reason, it is our intent that the remaining rules shall remain in full force and effect." *Order* at para. 127. Practically speaking, of course, the severability clause may mean nothing at all. After all, some rules (like the safe harbor) make no sense without others (like the requirement that all interstate ICS rates be cost-based). And courts do not accept without question agencies' assessments of what rules can stay and what rules can go. Perhaps for these reasons, we rarely include such clauses when we adopt rules and have done so only three times in the last decade by my count. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17241, n.139 (2011); *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18149, para. 1405 (2011); *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 06-121 et al., Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2018, para. 12 (2008) (subsequent history omitted).

A.

To understand the challenges of administering the *Order*, consider what it requires. *First*, each ICS provider must adjust its interstate ICS rates and ancillary charges so that they are "cost based." If the Commission determines those rates are not cost based, it may reduce an ICS provider's rates, impose forfeitures, and require refunds. *Second*, each ICS provider must determine whether *all* of those cost-based rates fall beneath the safe harbor or *any* of those cost-based rates rise above the cap. *Third*, each ICS provider must report annually on the rates charged, minutes billed, calls disconnected, and other information for each correctional institution it serves. And *fourth*, each ICS provider must document its costs for the past year and report those costs to the Commission on an institution-by-institution basis. Together these requirements amount to the imposition on ICS providers of all-out rate-of-return regulation, with its requisite cost studies, separations, cross-subsidizations, tariffing, and other accoutrements. I'll address each piece in turn.

1.

First, all interstate ICS rates and all ancillary charges must be cost based.[97] In this context, this means that rates must be based on "historical costs that are reasonably and directly related to the provision of ICS" plus some return on investment.[98] To calculate this, an ICS provider must record and document its costs of providing service. It must distinguish between eligible costs (such as "costs of the equipment housed in the confinement facility," the costs of "originating, switching, and the transport and termination of calls," "the costs of recording and screening calls," the costs of "blocking mechanisms," the costs of "biometric caller verification," the costs of "storage of inmate call recordings," and the costs of "billing and collection"[99]) and ineligible costs (such as some, but not all, site commissions[100]). If the provider uses the same equipment or personnel to provide ICS and another service (for example, if a jail requires that ICS be integrated with commissary ordering), the provider must figure out some way to unbundle the eligible costs from the ineligible costs. For capital investments, the provider must determine an amortization schedule, a depreciation method, the appropriate rate of return, and a tax rate. After answering all these questions, the ICS provider will presumably have determined its historical costs.

But there's more. While some costs will be tied to the provision of a service at a particular facility, many ICS costs today are joint and common costs, such as corporate operating expenses (including the cost of complying with FCC rules) or the cost of a centralized inmate calling recording platform that serves multiple facilities. For these costs, the ICS provider must apportion them among the prisons, jails, and other correctional institutions it serves and between ICS and "ancillary" services in a just and reasonable manner. Then, at least for ICS, the provider must separate the costs of interstate service from the costs of intrastate service since only

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[97] *See* Rule 64.6010.

[98] *Order* at para. 52.

[99] *Id.* at note 196. Notably, the *Order* only states that these costs are "likely" eligible.

[100] *Id.* at note 203.

interstate costs can factor into interstate rates. And then the ICS provider must translate those interstate, eligible costs into per-call and per-minute rates.

To administer this same process for incumbent rate-of-return carriers, the Commission has rules spanning at least five different parts of the Code of Federal Regulations. Part 64 explains how carriers must allocate costs between eligible and ineligible services.[101] Part 32 explains how carriers should account for their different categories of expenses.[102] Part 36 explains how carriers should separate their interstate costs from their intrastate costs.[103] Part 65 explains how carriers should calculate their rates of return.[104] And Part 69 explains how carriers should translate their interstate costs into interstate rates.[105] But this *Order* leaves most of the questions on how to actually implement such regulation wholly unanswered. For example, must ICS providers follow the principles of Part 32 accounting, or may they employ Generally Accepted Accounting Principles (GAAP)? Should the rate of return be the same as for rural incumbent local exchange carriers (11.25 percent) or should it reflect the ICS market? And what adjustments to rate-of-return accounting are necessary given that ICS providers compete against each other for contracts that last only a few years (by contrast, rate-of-return principles were developed to police state-granted monopolies)?

Complicating this exercise for ICS providers is that most are not free to adjust their rates unilaterally. Instead, most ICS rates are subject to contracts between the ICS provider and the correctional institution—contracts that will remain in place even after the *Order* becomes effective.[106] As such, an ICS provider must renegotiate existing contracts or pursue other legal recourse, all in the next 90 days,[107] in addition to calculating new, cost-based rates for interstate ICS calls and ancillary charges.

If an ICS provider's rates are challenged, things get even more complicated. The Commission may investigate their rates, whether or not inmates file complaints. ICS providers bear the burden of production in all such cases, meaning they must submit all documentation necessary to prove that their rates are just and reasonable. And ICS providers will usually bear the burden of proof.[108] The Commission must then evaluate on a facility-by-facility basis which

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[101] 47 C.F.R. Part 64, Subpart I (Allocation of Costs).

[102] 47 C.F.R. Part 32 (Uniform System of Accounts for Telecommunications Companies).

[103] 47 C.F.R. Part 36 (Jurisdictional Separations Procedures; Standard Procedures for Separating Telecommunications Property Costs, Revenues, Expenses, Taxes and Reserves for Telecommunications Companies).

[104] 47 C.F.R. Part 65 (Interstate Rate of Return Prescription Procedures and Methodologies).

[105] 47 C.F.R. Part 69 (Access Charges).

[106] *Order* at para. 100 ("Nothing in this Order directly overrides such contracts.").

[107] Note that the effective date of the *Order* is 90 days after publication in the Federal Register. For ease of exposition, I assume that such publication will occur shortly after release.

[108] *Order* at para. 121. The ICS provider always bears the burden of proof for ancillary charges. For ICS rates, the burden may shift to complainants if the provider meets the safe harbor, as discussed below.

costs are legitimate and which are not, and determine whether it agrees with the way the ICS provider accounted for its costs, separated them, and translated them into rates.

If the Commission disagrees with the ICS provider's accounting after the fact, the provider must lower its rates. In ordering rate changes, the Commission reserves the right to decide that "[s]ome averaging of costs must occur" so that it may "require that an ICS provider be fairly compensated on the basis of either the whole of its ICS business or by groupings that reflect reasonably related cost characteristics, and not on the basis of a single facility it serves."[109] In other words, after the Commission looks at the costs of serving each of a provider's facilities, it might order an ICS provider to start cross-subsidizing—charging inmates at one facility more in order to reduce the cost of serving another facility. But the *Order* provides no guidance as to when the Commission may impose this remedy.

In some cases, the Commission may order refunds and forfeitures, but the *Order* does not mention how the former would be implemented. How far back would refunds go? How long must ICS providers track who paid how much at a particular rate? If an inmate has already left the jail or prison, must the ICS provider track him or her down? May the ICS provider include the cost of administering refunds in its rates going forward? None of these questions is asked, much less answered.

2.

Second, the *Order* establishes both a safe harbor (of 12 cents minute) and a cap (of 21 cents) for debit and prepaid calls, and a higher safe harbor (14 cents) and cap (25 cents) for collect calls.[110] For ease of discussion, let's focus on a provider's debit rates.

Take first the safe harbor. To qualify for it, an ICS provider's rates must be 12 cents a minute or less. But having rates at a particular facility or within a particular state below 12 cents is not sufficient—the safe harbor applies only if *all* of an ICS provider's rates are below 12 cents.[111] If the rates for a single facility are above that benchmark, the ICS provider will not qualify for the safe harbor at *any* facility. Because there is uncontroverted evidence in the record that the cost of serving many county jails is far above 12 cents a minute,[112] this means that one of two things will happen. Either ICS providers will continue to provide service to county jails and none of them will qualify for the safe harbor, so it will be a dead letter. Or in order to qualify for the safe harbor, ICS providers will stop providing service to numerous jails across the country.[113]

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[109] *Order* at para. 123.

[110] Notably, there is no safe harbor for, and no cap on, ancillary charges.

[111] *Order* at notes 226, 429.

[112] *See supra* Part I.B.

[113] Theoretically, an ICS provider could raise rates in some facilities (such as the prisons of New York and New Mexico) in order to reduce rates below cost in others (e.g., county jails). But the *Order* offers no meaningful guidance as to when (and to what extent) such cross-subsidization would be permissible, other than to say that "ICS providers should not read this *Order* as providing a basis to increase rates" unless "necessary to ensure recovery of costs directly and reasonably related to the provision of ICS on a holding-company level." *Order* at note 19; *see also id.* at note 225. So the Commission has put a Sword of Damocles over the ICS providers that continue to serve (continued….)

Moreover, the "safe harbor" is a bit of a misnomer since it provides no refuge from complaints. The *Order* explicitly states that "[p]arties can file a complaint challenging the reasonableness of interstate ICS rates" even if those rates are within the safe harbor.[114] If those rates are challenged, the Commission will have to decide whether they are cost-based and may reduce a provider's rates even further below the safe harbor. To be sure, the provider will benefit from a rebuttable presumption that its rates are just and reasonable, but rebuttable means that the safe harbor isn't really safe.

Next, turn to the cap of 21 cents. If any of an ICS provider's cost-based rates are above the cap, the Commission's message appears to be "too bad." Unless the Commission decides to grant a special dispensation, providers serving county jails will be subject to what is perhaps best described as negative rate-of-return regulation. Under the *Order*, a provider cannot charge cost-based rates at a small jail with above-average costs unless and until the Commission grants a waiver for "extraordinary circumstances." In deciding whether to grant such a waiver, the Commission may examine not just the costs of serving that one facility, but its costs of serving each and every facility, including "costs directly related to the provision of interstate ICS and ancillary services; demand levels and trends; a reasonable allocation of common costs shared with the provider's non-inmate calling services; and general and administrative cost data."[115]

Given that the record shows that the cost of serving jails, and especially small jails, can be significantly higher than 21 cents a minute, there are sure to be many jails, juvenile correctional institutions, and secure mental health facilities, with costs above the cap.[116] Given that the *Order* requires ICS providers to charge below-cost rates at such facilities until the Commission says otherwise, either providers will stop serving smaller jails or the waiver requests will come in swiftly. And given that our country has 2,859 jails, of which 1,681 have fewer than 100 beds and 1,129 have fewer than 50 beds,[117] the waiver requests might apply to hundreds or thousands of facilities across the country.[118] I cannot see how the Commission will

(Continued from previous page)

jails, as the Commission could well decide after the fact that a provider's decision to cross-subsidize is unjust and unreasonable. So while, as explained earlier, it is naïve to expect that charitable intentions will lead ICS providers to serve all small correctional institutions with below-cost rates, expecting them to serve institutions where they will lose money *and* where doing so may invite enforcement action by the Commission is less an indication of naïveté than wishful thinking.

[114] *Id.* at para. 120.

[115] *Id.* at paras. 82–83.

[116] As I explain above, the cap is not "conservative," and I do not see the basis for the *Order*'s "expect[ation] that the rates of most facilities, whether jails or prisons, large or small, should fall below this rate." *Id.* at para. 77.

[117] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of Jail Facilities (2006), *available at* http://dx.doi.org/10.3886/ICPSR26602.v1.

[118] The *Order* suggests that because the three largest ICS providers "account for over 90% of ICS provided in the country," processing waiver requests will not be a problem. *Order* at note 270. But that statistic is irrelevant for these purposes. The vast majority of ICS minutes come from state and federal prisons, where providers are unlikely to require waivers. The question instead is whether the Bureau has the capacity to process waivers covering the country's 2,859 jails, each of which may face different costs of service.

process these waivers in an effective or timely manner considering our limited resources. Indeed, recent experience counsels otherwise.[119]

And assume that the Commission finds, after a grueling review, that an ICS provider has justified its waiver request. What then? Presumably the provider may, at that point, raise its rates above the cap. But how can the ICS provider recoup the revenues it lost while the Commission required it to charge below-cost rates? The short answer is it cannot. And thus the rate-of-return regulations adopted in the *Order* are a one-way ratchet—all designed to lower rates regardless of the consequences.

3.

Third, each ICS provider must file by April a list of the interstate and intrastate rates it charges at each correctional institution it serves, as well as the "their charges to consumers that are ancillary to providing the telecommunications piece of ICS."[120] This is effectively a tariffing requirement that allows the Commission to scrutinize the rates of all providers, especially given that ICS providers must update these filings every year going forward. May an ICS provider change its rates between filings? Perhaps. Will the Commission require providers to update their filing if they do? Not yet. But will the Commission likely cast a skeptical eye on rate increases between filings? Almost certainly. And where we will get the resources to review the effectively tariffed rates at each of the thousands of correctional institutions in America? I don't know. In order to administer the rules contained in this *Order*, the Commission may need to create its own Bureau of Prisons.

4.

Finally, there is the massive data collection. Each ICS provider must document its costs for the past year and report them to the Commission on an institution-by-institution basis. Those costs must be broken down into five separate categories (connections, equipment, maintenance, security, and ancillary), which must be apportioned among three methods of cost accrual (fixed, per call, and per minute), and which must then again be divided between direct costs and joint and common costs. In addition, ICS providers must report the costs for establishing, maintaining, and closing debit and prepaid accounts, for sending paper statements, and for calling wireless phones, as well as the rates they charge for these services. And ICS providers must report "data on their interstate and intrastate long distance and local demand (*i.e.*, minutes of use) and . . . apportion the minutes of use between interstate and intrastate calls."[121] For jails

[119] *Cf. Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663,17842, para. 544 (2011) (directing the Wireline Competition Bureau to process waivers filed by Tribal or insular carriers for certain new universal service rules to complete review within 45 days of the record closing).

[120] *Order* at para. 116.

[121] *Id.* at para. 125.

alone, that's 122,937 separate pieces of information.[122] How we will review that information, check it for errors, and analyze it within a reasonable time frame is a mystery.

What is more, the mere fact of this data collection means that the safe harbor is ephemeral. Even if an ICS provider qualifies for the safe harbor (an uncertain proposition for the reasons described above), it must submit data that the Commission may well use to require that provider's rates to be reduced even further.[123]

As if all these administrative problems were not enough, the Commission proposes to expand these same rules to local and intrastate services. This novel interpretation of section 276 would empower the Commission to preempt the role of state regulatory commissions in overseeing local and intrastate long-distance rates.[124] And it would foist even more work on our already-crowded plate.

5.

The *Order* rejects the rate-of-return label for its approach, instead terming it alternately a "rate cap regulatory regime[],"a "rate cap approach," "rate caps . . . similar to rate benchmarks," a "rate cap framework," "rate caps under a framework," a "kind of variant on rate caps," "rate caps that include a safe harbor mechanism," "a system that relies on rate caps as well as potential complaints that rates are not based on costs," or even "caps and . . . other steps to ensure that rates reflect costs."[125] But whatever it's called, the name matters less than the substance. And the substance of the *Order* is *de facto* rate-of-return regulation.

At its core, rate-of-return regulation is about limiting the profits providers make by tying rates to historical costs plus a rate of return; it's the regulatory equivalent of a cost-plus contract.[126] As outlined above, that's exactly what the *Order* requires: "[I]nterstate ICS rates . . . must be cost-based,"[127] and costs are defined as "historical costs"[128] plus a "reasonable return on investment."[129] The fact that the *Order* also caps the rates of ICS providers does not convert this

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[122] The calculation is 43 pieces of information collected from each of the 2,859 jails in the United States. U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of Jail Facilities (2006), *available at* http://dx.doi.org/10.3886/ICPSR26602.v1.

[123] *Order* at note 433.

[124] An ICS provider in today's market usually plays three separate roles under the statute: a payphone service provider (providing the equipment to connect to the network), a local exchange carrier (providing the connection to the local network), and an interexchange carrier (providing the connection beyond the local area). We have never before suggested that section 276 allows us to evaluate whether intrastate rates and practices are just and reasonable (a la section 201) for local exchange carriers and interexchange carriers just because they connect to a payphone.

[125] *Order* at para. 59 & notes 195, 222, 224, 280.

[126] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6787, 6789, paras. 1, 22 (1990) (*Price Cap Order*).

[127] *Order* at para. 50; *see also id.* at para. 119 ("we require ICS providers to charge cost-based rates and charges"); *id.* at para. 120 ("we require all interstate ICS rates and charges to be cost-based").

[128] *Id.* at para. 52.

[129] *Id.* at para. 53.

rate-of-return regulation into something else; indeed, the Commission has used caps to supplement rate-of-return regulation before.[130]

In rebuttal, the *Order* suggests that its approach is "fundamentally different than rate-of-return regulation" because it "does not rely on a prescribed rate of return, ex ante review, tariff filings, or compliance with cost accounting rules."[131] Set aside for the moment whether this assertion is true—whether, for example, the *Order* does not rely on tariff filings (despite the annual rate-filing requirement) or does not require compliance with cost accounting rules (despite the fact that ICS providers must allocate their costs as specified in the *Order*) or does not require ex ante review (despite the fact that carriers may not charge cost-based rates above the cap without ex ante review). The larger problem with this argument is that it seeks to sell a bug of the *Order* as a feature—the lack of clarity over how the Commission will implement its rate-of-return regulation (such as the prescribed rate of return) will lead to less certainty and more *ex post* decision-making. After all, ICS providers are not going to be able to choose whatever rate of return they desire; the *Order* even suggests that the 11.25 percent rate of return assumed by ICS providers "likely" overstates the cost of capital.[132] As the Commission goes about implementing this *Order*, it eventually will have to reveal to service providers what their rate of return may be. In short, whatever label the *Order* slaps on this package of new rules, it cannot deny that the contents constitute *de facto* rate-of-return regulation.[133]

B.

Turning from administrative difficulties to unintended consequences, I believe, as set forth above, that the rates in the item are below the costs of serving most jails (the majority of jails in our nation hold fewer than 100 inmates), secure mental health facilities, and juvenile detention centers. This arbitrarily low rate will impede the continuing deployment of current-generation security measures and the development of next-generation security techniques. The end result will be more crime. Over time, I also fear that ICS providers will reduce service to some facilities and entirely eliminate service to others.

No one disputes that public safety and security are important. Although many use ICS only for its intended purposes—staying in touch with friends and family—not all inmates are so

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[130] *See* 47 C.F.R. § 69.104 (prescribing caps for the subscriber line charge for rate-of-return carriers).

[131] *Order* at note 195. I note that I cannot find any source—and the *Order* cites none—suggesting that all (let alone any) of the proffered regulatory methods are necessary requirements of rate-of-return regulation. By my reading, the Commission has used these methods in numerous circumstances, sometimes as part of rate-of-return regulation and sometimes not. *See, e.g.*, *Price Cap Order*, 5 FCC Rcd at 6787–91, paras. 5–37 (maintaining the use of these methods for price-cap regulation).

[132] *Order* at note 203.

[133] The *Order* also tries to ditch the rate-of-return label by noting that the safe harbor and cap are based on averages and claiming that "the use of average cost data is not common in rate of return regulation because a provider's rates, although often averaged across its own facilities, are generally premised on that provider's individual costs." *Order* at note 280. That just proves the point, though, since the requirement that each ICS provider's rates be cost based apparently means "averag[ing] across its own facilities, . . . that provider's individual costs." *See, e.g.*, *id.* at note 301 (suggesting an ICS provider may average its costs among its facilities in establishing rates); *id.* at para. 83 (suggesting that an ICS provider seeking a waiver must average its costs among its facilities in establishing rates).

benign. Some "[i]nmates utilize the telephone to communicate with individuals in the community to conspire and carry out serious criminal activities" such as intimidating witnesses and crime victims or coordinating gang activity.[134] Indeed, the *Order* appropriately notes that "security features, such as call recording and monitoring . . . advance the safety and security of the general public."[135]

And yet, security does not come cheap. ICS providers are constantly developing and deploying new security techniques, many of which are required just to keep pace with the tactics of certain inmates. For example, "inmates try to hide their identities through pin sharing, pin stealing, and/or three-way calls" in 1 out of every 14 calls, and biometric identification technologies have allowed for increased detection of such activities.[136] The cost of these new techniques may be significant, adding two to four cents per minute on top of the other costs (including call monitoring and recording) of a call.[137] If an ICS provider's costs of providing service are already just below or at the cap (as is likely the case at some jails), these security features will likely never be deployed since there will be no way for the ICS provider to recover the additional costs without going through the trouble of seeking a waiver from the Commission. And what about those jails where the cost of providing service is just above the cap? Far from taking on additional security costs, many of them will aim to reduce costs to get under the cap, and existing security measures could end up being jettisoned in the process.

Those who protect our safety day in and day out agree that maintaining security measures are vital. The National Sheriffs' Association explains that "dangerous individuals in local jails . . . try to continue their criminal activities on the outside while they are incarcerated," "contact witness[es] with wrongful intent," "call their victims," and "plot and plan criminal enterprises . . . with startling regularity, literally every day."[138] The sheriff of Rock County, Wisconsin, writes that current technology measures have "uncover[ed] information that assisted with the prosecution of an attempted homicide," "led to countless drug investigations, and dramatically reduced the amount of contraband that enters our facility."[139] The sheriff's office of Deschutes County, Oregon, explains that recording calls and verifying the voice of the caller before

[134] Letter from Danielle Burt, Counsel for JLG Technologies, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. A at 3 (July 30, 2013) (JLG *Ex Parte* Letter); *see also* Statement of Commissioner Ajit Pai, Promoting Technological Solutions to Combat Contraband Wireless Device Use in Correctional Facilities, GN Docket No. 13-111, *available at* http://go.usa.gov/jM75.

[135] *Order* at para. 2.

[136] JLG *Ex Parte* Letter at 1 (reporting that "JLG's biometric based 3-way call detection technology detected at least one 3-way call on 3.8% of the suspicious calls that its systems uncovered").

[137] JLG *Ex Parte* Letter at 1 (reporting that JLG charges ICS providers 2 cents a minute for its technology); Pay Tel Report at 3 (noting third-party expenses for biometric analysis of 1.93 cents a minute); CenturyLink Report at 2 (noting a cost of 4 cents a minute for "current generation technologies").

[138] Comments of Sheriff Larry D. Amerson, President, National Sheriffs' Association.

[139] Comments of Robert D. Spoden, Rock County Sheriff, Janesville, Wisconsin.

connecting a call have "reduced the amount of witness tampering and violations of no-contact orders."[140]

And they too believe that burdensome rate regulation, like that adopted today, will undermine that security. The California State Sheriffs' Association argues that rate regulation "would seriously hamper the ability of California Sheriffs to effectively secure and manage their jails."[141] The sheriff of Marion County, Oregon, explains that such regulation "will have serious impacts on the safety and security of correctional facilities."[142] The Captain of the Detention Division of the Elmore County Sheriff's Office, Idaho, fears the "extremely detrimental" effects of losing the security measures he calls "critical for the safety of staff and inmates, as well as for the continued reduction and prosecution of crimes."[143] And the sheriff's office of Coconino County, Arizona, believes that unduly low rates will end the "technological advances and free services that have been so effective in the prevention and prosecution of crimes. . . . The only ones to benefit are those people involved in criminal activity, as preventing and prosecuting crime will become much more difficult."[144] Indeed, the record contains overwhelming opposition to today's *Order* from our nation's sheriffs.[145] These are front-line perspectives from those who put their lives on the line every day to keep us safe. While the Commission must take into account the interests of inmates and their families, we must also do what's right for crime victims, witnesses, and other law-abiding Americans.

Moreover, when faced with this loss of security measures, America's smaller correctional institutions will then be put to a choice: endanger the public or eliminate service. In the words of the Oregon State Sheriffs' Association: "If correctional facilities cannot ensure that inmate phone calls do not present threats to the safety of the facility and the public, many will choose—or be forced—to restrict phone access or remove phones entirely."[146] Ironically, this means that

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[140] Comments of Captain Michael Espinoza, Deschutes County Sheriff's Office, Bend, Oregon.

[141] Comments of Keith Royal, Sheriff, Nevada County, and President, California State Sheriffs' Association.

[142] Comments of Jason Myers, Marion County Sheriff, Salem, Oregon on behalf of the Oregon State Sheriffs' Association.

[143] Comments of Rob "Lynn" McCallum, Captain, Detention Division, Elmore County Sheriff's Office, Mountain Home, Idaho.

[144] Comments of Kurt Braatz, Commander, Detention Services, Coconino County Sheriff's Office, Flagstaff, Arizona.

[145] *See also* Comments of John Buncich, Lake County Sheriff, Lake County, Indiana; Comments of Todd L. Thomas, Chief Deputy of Corrections, Thurston County Sheriff's Office, Olympia, Washington; Comments of Vaughn Killeen, Executive Director, Idaho Sheriffs' Association; Comments of Craig Roberts, Sheriff, Clackamas County Sheriff's Office, Portland, Oregon; Comments of Robert D. "Bobby" Timmons, Executive Director, Alabama Sheriffs Association.

[146] Comments of Jason Myers, Marion County Sheriff, Salem, Oregon on behalf of the Oregon State Sheriffs' Association; *see also* Comments of Vaughn Killeen, Executive Director, Idaho Sheriffs' Association ("If the FCC enacts price caps which severely reduce or eliminate the financial incentive of private telephone companies to provide inmate phone service (and the security features that are imperative to such services), some jails will simply be unable to afford to provide phone services to inmates at all.").

some of the inmates and families today's *Order* is meant to serve may soon be prevented from connecting with one another at *any* price.

III.

The *Order*'s approach was not inevitable. I proposed to my colleagues that we cap interstate calling rates for prisons at 19 cents a minute for debit calls, with higher rates for collect calls and for ICS provided at the largest jails in the country.[147] There is APA notice for such an approach: The Alternative Wright Petition proposed capping the interstate rates of ICS providers, and so did the *Inmate Calling NPRM*.[148] The record evidence supports that approach, too. The highest cost in the record of providing current service to a prison is 18.8 cents a minute,[149] and there is no evidence in the record that the cost of serving state prisons—the largest correctional institutions where ICS providers experience the greatest economies of scale—exceeds 19 cents a minute. And that approach is administratively feasible.[150] For a bright line eliminates the need for cost studies, investigations, and tariffs and grants an actual safe harbor to all those providers below the cap. And the consequences of my proposal are easily foreseen: The elimination of the most egregious rates in the country at prison payphones without any loss of security or access.

* * *

In conclusion, I very much hope that my concerns about today's *Order* prove to be unfounded. I hope that these rules will be easy to administer. I hope no inmates will lose access to calling services. And I hope that security inside and outside of prisons does not suffer. But because I can only make these statements out of hope rather than belief, I must respectfully and regretfully dissent.

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[147] Because the record contains widely varying information on the costs of serving the country's smaller jails, and we lack detailed data regarding the costs of serving juvenile correctional institutions and secure mental health facilities, I would have deferred consideration of rate caps for those facilities until after our Further Notice of Proposed Rulemaking.

[148] Indeed, the *Order* does not dispute that there was notice for such an approach—appropriately so. In the *Inmate Calling NPRM*, we asked "[i]f the Commission decides to implement rate caps in the ICS market how should we?", noted that "parties argue that differences between correctional facilities including size, location, security levels, facility age and staffing levels will not allow a one size fits all solution," and then asked "[h]ow can the Commission establish a solution that addresses the many variations among confinement facilities?" *Inmate Calling NPRM*, 27 FCC Rcd at 16638, paras. 22–23. Applying one per-minute cap to prisons, applying another to large jails, and deferring consideration of rates involving small correctional institutions responds directly to these questions.

[149] CenturyLink Report at 2 (noting that the cost to serve its most expensive prison is 18.8 cents a minute).

[150] Notably, this simple cap would not have required rate-of-return regulation for those with rates at or below the cap (thus eliminating the need for a safe harbor), would not have required tariffing, would not have applied to those facilities that are most likely to have costs above the cap, and would have allowed those serving high-cost facilities covered by the cap to seek a waiver based on their costs without any cross-subsidy requirements.

CV of Douglas A. Dawson

I began my telephone career in 1975 as a test technician building telephone switches for Litton Industries in College Park, Maryland. Litton was one of the few companies other than AT&T that built telephone switching systems, which Litton installed in Navy ships. In this position I did system integration testing and learned in detail how early digital telephone switches operate.

My next job in the industry began in 1978 with John Staurulakis, Inc. ("JSI"). JSI is a telephone consulting firm that specializes in consulting for independent telephone companies (those smaller telephone companies that were not part of the Bell System). In this job, I worked on separations cost of service studies for Independent Telephone Companies. In this role, I had my first detailed exposure to developing the costs of providing telephone service. Additionally, I performed numerous traffic studies for telephone switches. These studies were used to determine the patterns of customer usage for switches, and were used to determine costs, but also were used to determine the most efficient way to configure the network.

Next, in 1981, I became a Staff Manager of Industry Relations at Southwestern Bell Telephone Company in St. Louis, Missouri. Southwestern Bell was a huge regional division of AT&T. My functions there included tracking issues that impacted Bell's relationships with the independent telephone industry, calculating and negotiating various interconnection and settlement rates between companies for local calling and other network arrangements, and overseeing the review of an independent telephone company's traffic and long-distance cost studies. In performing the traffic studies, I gained experience in working with measuring usage and costs all of the different brands and vintages of telephone switches. I also served for a period of time as a member of the rate case team for the Missouri operations – the group that was activated when the company wanted to raise retail rates. In working on rate cases, I further developed my knowledge of understanding and quantifying the costs of telephone services.

In my next position, beginning in 1984, I gained operating telephone company experience at CP National in Concord, California. CP National was a holding company that owned, among other things, 13 telephone companies. I had several jobs with increasing responsibility and ended as Director of Revenues. In that capacity, I oversaw a large group that performed telephone accounting, cost separations, and traffic engineering studies for a seven-state area. My group also monitored earnings, developed access and local rates, maintained tariffs, filed rate cases, and monitored and commented in state and federal regulatory proceedings. In this role, I was directly responsible for setting rates and for defending those rates in front of various regulatory authorities. Accordingly, I testified in a number of ratemaking cases and regulatory proceedings in California, Texas, Nevada, Oregon, Arizona, and New Mexico. Part of my responsibility at CP National included calculating costs and setting rates for four separate operator centers where CP National maintained live operators for completing collect and other types of operator-assisted calls. While at CP National, I also became responsible for earnings monitoring and rate case development for electric, gas and water properties.

In my next position, in 1991 I rejoined John Staurulakis, Inc. in various capacities. My final position there was as Director of Special Projects. In that capacity, I oversaw all projects and clients who were not historically part of JSI's core cost separations business. Some of the projects

I worked on included assisting clients in launching long distance companies and Internet service providers; studying and implementing traditional and measured local calling plans; developing optional long-distance and local calling plans; performing embedded Total Element Long-Run Incremental Cost ("TELRIC") and incremental cost studies for products and services; assisting in local rate case preparation and defense; and conducting cross-subsidy studies determining the embedded cost overlap between telephone services. In this role, I gained in-depth experience in long distance rates rate setting and the regulatory process. I also became thoroughly familiar with the underlying costs of running a long-distance company and providing telephone service.

In 1997, I became a founder and owner of Competitive Communications Group, LLC (CCG). My title at CCG is President, and I am directly responsible for all of the consulting work performed by our company. The company was re-formed twice, mostly due to changing tax laws. This same company is now Nationwide CLEC LLC, dba CCG Consulting. The services provided by CCG are described below. The company has been successful, and since 1997 we have worked for over 1,000 clients in the telecom industry. Since 2013, I have written a daily blog calls Pots and Pans[1] where I discuss numerous topics that I think are of interest to my client base.

The firm was initially created to specialize in launching new telecom ventures – new companies, new markets, or new products. Over time we've grown to become general telecom consultants due to the wide range of services we offer to the industry. As a firm we offer the following telephone consulting products and services, all under my direct control and supervision:

CCG Background

CCG has had a strong track record of helping our clients become successful. CCG has worked with over 900 clients on a wide range of communications issues. We have worked in every state in the country.

CCG specializes in the following areas

Planning Services: Strategic Planning, Policy Development, Business Plan and Feasibility Studies, and assisting with Financing.

Regulatory Services: Interconnection Agreements, Certification Assistance, Regulatory Compliance, and Tariff Creation.

Marketing Services: Market Research, New Product Development, Development of pricing, packaging and promotional programs, and Revenue enhancement opportunities.

[1] https://potsandpansbyccg.com/

Implementation Services: Timelines and Gantt chart development, customer service and billing platforms, hiring and training, setting sales quota and sales training, implementing number portability, and finding vendors.

Engineering Services: Facilities-based network design and optimization, designing central office facilities, network interconnections, sizing, ordering and implementing the network, developing network migration strategies, detailed customized RFPs and vendor selection.

Contract Negotiations: Contract mediation and dispute resolution, local exchange, utility and municipality agreements, right-of-way and pole attachment fees.

Partnership Opportunities: Financing solutions, strategic alliances, third-party relationships, outsourcing of non-strategic competencies.

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Testimony Presented Within the Preceding Ten Years.

Supreme Court of the State of New York. Index 450660/2017. (2019) *The City of New York vs Verizon New York, Inc. and Verizon Communications.* Provided an expert report on behalf of the City in a case concerning Verizon's failure to meet a contractual obligation to build fiber to serve residents and businesses in New York City.

Pennsylvania Public Utilities Commission. Docket No. A-2016-2535279. (2016) *Joint Application of XO Holdings and Verizon Communications Inc. for Any Approvals Required Under the Public Utiltiy Code for a Transfer of Control of XO Communications Services, Inc.* Filed direct testimony on behalf of Core Communications Inc. that described the potential negative impact in Pennsylvania due to the merger of XO Communications and Verizon Communications, Inc.

American Arbitration Association, Philadelphia Branch. AAA Case no. 14-20-1400-0221. (2014) *Core Communications, Inc. V. Zayo Group, LLD, F/K/A PPL Telecom, LLC.* Wrote an expert report supporting Core's claim that Zayo had not provided the redundant fiber network to Core that had been promised in the contracts between the parties. Case settled.

Federal Communications Commission Dockets 14-115 and 4-116 (2014). *Comments of Electric Power Board and City of Wilson Petitions to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting Deployment of Certain Broadband Networks*. Wrote and filed comments on behalf of Bristol Virginia Utilities in support of removing barriers for municipal construction and operation of fiber networks.

15th Judicial District Court of Louisiana. Docket 2011-3264-J (2013). *Lafayette City-Parish Consolidated Government V. Chain Electric Company, et al.* Provided affidavit calculating the

damages in a suit involving a contractor that built a fiber network too shallowly in thousands of road intersections. Case settled.

Department of Telecommunications and Cable, Commonwealth of Massachusetts, Case No D.T.C 11-16 (2012, 2013, & 2016). *Petition of Recipients of Collect Calls From Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls*. Provided written affidavits and live testimony about the price of prison calling in Massachusetts jails and prisons.

US District Court, Eastern District of Virginia, Case Number 3:11-cv-456 (2011). *Ricky Duncan Taylor vs. Riverside Regional Jail Authority.* Prepared written testimony on behalf of hard-of- hearing prisoners and access to calling. Case settled.

US District Court, Eastern District of Virginia, Case Number 1:10-cv-96-TSE-TRJ (2010). *Minnis, et al vs. Virginia Department of Corrections, et al.* Filed written testimony describing the options available to supply calling to hard-of-hearing and deaf prisoners. Case settled.

US District Court, Northern District Court of California, Case Numbers 08-4575 SI and 09-1437 SI (2010). *Nuveen and Osher versus the City of Alameda.* Provided affidavits and testimony as an expert witness for the City of Alameda. Judgment for the City.

Federal Communications Commission, File No. CSR-8357-P (2010). *In the Matter of Lafayette City-parish Government of Lafayette, Louisiana versus National Cable Television Cooperative, et al.* Filed declarations on behalf of Lafayette City, Louisiana, to seek the ability to join the National Cable Television Cooperative. Case settled.

This is **Exhibit "B"** to the Affidavit of Douglas A. Dawson, of Asheville, NC, sworn before me at the City of Toronto in the Municipality of Metropolitan Toronto, on January 5, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.
A Commissioner, etc.

Court File No. CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:
(Court Seal)

VANESSA FAREAU and RANSOME CAPAY

Plaintiffs

and

BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is Douglas Dawson. I live at 55 Austin Avenue, Asheville, NC 28801.

2. I have been engaged by or on behalf of Vanessa Fareau and Ransome Capay to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the Court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date 1/5/21

Signature

VANESSA FAREAU et al
Plaintiffs

-and-

BELL CANADA et al
Defendants

Court File No. CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

ACKNOWLEDGMENT OF EXPERT'S DUTY

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Lawyers for the Plaintiffs

VANESSA FAREAU, et al. -and- **BELL CANADA, et al.**
Plaintiffs Defendants

Court File No.: CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto
Proceeding under the *Class Proceeding Act, 1992*

AFFIDAVIT OF DOUGLAS A. DAWSON (Sworn January 5, 2021)

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Mohsen Seddigh (LS#707441)
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Jody Brown (LS#58844D)

Lawyers for the Plaintiffs

Court File No.: CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

VANESSA FAREAU and RANSOME CAPAY

Plaintiffs

- and -

BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF NADINE BLUM
(Affirmed December 21, 2020)

I, Nadine Blum, of the City of Toronto, Province of Ontario, **MAKE OATH AND SAY:**

1. I am a lawyer at Goldblatt Partners LLP, one of the two class counsel firms in this action. I have direct knowledge of the matters to which I depose in this affidavit. Where the information in this affidavit is not based on my direct knowledge, but is based upon information and belief from other sources, I have stated the source of that information and I believe the information to be true. Nothing in this affidavit is intended to waive solicitor-client or other privilege.

2. Attached as **Exhibit "A"** is a copy of a package of documents that I am advised by, and believe, were obtained by Ottawa lawyer Michael Spratt from the Ministry of Community Safety and Correctional Services ("**MCSCS**") through a request under the *Freedom of Information and Protection of Privacy Act* (Request Number CSCS-A-2016-02841). This

package includes a covering letter; the Institutional Services Policy and Procedure Manual; Memorandums regarding the Offender Management Telephone System dated February 13, 2013 and October 29, 2013; Bell Canada's proposal dated November 20, 2012 in response to the Crown's Request for Proposals No. COS-0009; agreement number CO-0009 between the Crown and Bell Canada; an information note by the Deputy Minister at MCSCS dated May 9, 2016. I am advised by Mr. Spratt and believe that the redactions in these documents were made by the MCSCS before the documents were disclosed to Mr. Spratt.

3. Attached as **Exhibit "B"** is a copy of a document titled "Corrections - Inmate Telephone Communication | Ministry of the Solicitor General", obtained from the following URL: <https://www.mcscs.jus.gov.on.ca/english/Corrections/Policiesandguidelines/CorrectionsInmateTelephoneCommunication.html>.

4. Attached as **Exhibit "C"** is a chart of prison telephone rates across Canada. I am informed by my colleague at Goldblatt Partners LLP, Geetha Philipupillai, and believe that she created this chart based on publicly available information regarding those rates. The sources of the information are identified within the chart and I believe the information to be true.

5. Attached as **Exhibit "D"** is an article dated January 14, 2020 titled "Ontario looking to adjust jail phone call system, include calls to cellphones", obtained from the following URL: <https://globalnews.ca/news/6410719/ontario-jail-phone-call-cellphones/>.

6. Attached as **Exhibit "E"** is an article dated January 31, 2019 titled "Bell, let's talk about making it easier for inmates to call from jail, say protesters", obtained from the following URL: <https://ottawacitizen.com/news/local-news/bell-lets-talk-about-making-it-easier-for-inmates-to-call-from-jail-say-protesters>.

7. Attached as **Exhibit "F"** is the Verdict of Coroner's Jury dated December 17, 2018, obtained from the following URL: <https://www.mcscs.jus.gov.on.ca/english/Deathinvestigations/Inquests/Verdictsandrecommendations/OCCInquestGeddes2018.html>.

8. Attached as **Exhibit "G"** is a proposed litigation plan.

Affirmed remotely by Nadine Blum of the City of Toronto in the Province of Ontario, before me at the City of Toronto in the Municipality of Metropolitan Toronto, on December 21, 2020 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

NADINE BLUM

A Commissioner for taking Affidavits *(or as may be)*

Jody Brown LSUC: 5844D

This is Exhibit **"A"** to the
Affidavit of Nadine Blum affirmed
before me this 21st day of December, 2020.

A Commissioner, etc.

Ministry of Community Safety and Correctional Services

Freedom of Information and Protection of Privacy Services
200 First Avenue West
North Bay ON P1B 9M3

Telephone (705) 494-3080
Toll Free 1-855-273-3080
Facsimile (705) 494-3081
www.ontario.ca/mes4

Ministère de la Sécurité communautaire et des Services correctionnels

Services d'accès à l'information et de la Protection de la vie privée
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Ontario

FEB 0 6 2017

Mr. Michael J. Spratt
116 Lisgar Street, Unit 200
Ottawa, Ontario K2P 0C2

Dear Mr. Spratt:

SUBJECT: REQUEST NUMBER CSCS-A-2016-02841

In response to your request for access to information under the Freedom of Information and Protection of Privacy Act (the Act), please be advised that partial access is granted to records pertaining to the inmate telephone system at Ontario detention centres

Access to part of the responsive information is denied in accordance with section(s) 14(1)(i), 14(1)(j), 14(1)(k), 14(1)(l), 17(1), 18(1)(a), 18(1)(c), 18(1)(d), 21(1), and 22(a) of the Act as follows:

14(1)(i)
The ministry may refuse to disclose a record where the disclosure could reasonably be expected to endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of such items, for which protection is reasonably required.

14(1)(j)
The ministry may refuse to disclose a record where the disclosure could reasonably be expected to facilitate the escape from custody of a person who is under lawful detention.

14(1)(k)
The ministry may refuse to disclose a record where the disclosure could reasonably be expected to jeopardize the security of a centre for lawful detention.

14(1)(l)
The ministry may refuse to disclose a record where the disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

.../3

Mr. Michael J. Spratt
Page three

Please be advised that a portion of the Inmate Information Guide for Adult Institutions is being withheld in accordance with section 22(a) of the Act, as the information is publicly available on the Ministry's website and can be viewed at the following address:

http://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/ec167925.pdf

Please note that some information has been removed from the records. This information is not responsive to your request and has been either stamped Not Relevant to Your Request or marked N/R.

Attached is a copy of the information being released. This access decision was made by the undersigned. You are entitled to appeal this decision within 30 days to:

Information and Privacy Commissioner/Ontario (IPC)
2 Bloor Street East, Suite 1400
Toronto, ON M4W 1A8
(416) 326-3333

Should you decide to file an appeal, please provide the IPC with the following information:

1) a copy of this decision letter;
2) a copy of your original request for access to information;
3) the mandatory appeal fee of $25.00 in the form of a cheque or money order payable to the Minister of Finance.

Should you have any questions regarding the foregoing, please do not hesitate to contact Vanessa Fox, Senior Program Analyst & Advisor, at (705) 494-3077.

Sincerely,

Nicole St. Pierre
Manager
Freedom of Information and
Protection of Privacy Services

Attachment

Ministry of
Community Safety
and Correctional Services

Institutional Services
Policy and Procedures Manual

Ontario

Section:
Inmate Management

Release Date:
July 4, 2013

Sub Section:
General Inmate Management

Inmate Telephone Communication

1.0 Purpose

This policy establishes guidelines for providing inmates with access to telephones within correctional institutions.

2.0 Staff Affected

All Correctional Services employees involved in facilitating/supervising inmate access to telephones.

3.0 Policy

Correctional Services recognizes that communication between inmates and members of the community is important for rehabilitation and successful reintegration into society. The telephone is the primary method by which inmates maintain contact with others. It is therefore the policy of Correctional Services to allow inmates to make telephone calls in accordance with this policy. Furthermore, to assist inmates who are deaf or hard of hearing, each region will ensure it has a TTY/Teletypewriter for use by each institution that has an operating inmate telephone system and/or a local telephone system that can accommodate the TTY/Teletypewriter equipment.

4.0 Definitions

4.1 **Call Blocking:** allows the blocking of calls to victims, witnesses, concerned citizens and blocking toll free numbers that are not pre-approved or are common carrier assistance numbers.

4.2 **Collect Calls:** Telephone calls that are billed to and payable by a third party. Collect calls are billed to the called party through a separate bill issued by a local telephone carrier.

4.3 **Common access** - allows inmates to call a common pre-approved toll free or local telephone number (e.g. The Office of the Ombudsman, The Office of the Child and Family Service Advocate, Office of the Independent Police Review Director, Probation and Parole office, etc.).

4.4 **Emergency Calls:** Calls related to a serious family illness or injury, death, etc. The superintendent or designate may allow the inmate to use the telephone. The institution pays for this call.

4.5 **Inmate Telephones:** Telephones located within common secured areas of the institution that inmates may access for personal use without direct staff assistance, in accordance with this policy. Inmate telephones are governed by the Offender Telephone Management System (OTMS).

4.6 **Monitoring:** The process where telephone calls are actively listened to and/or checked for content, either in person through direct supervision or through electronic means.

4.7 **Offender Telephone Management System:** Governs inmate telephones and includes:

4.7.1

s.14(1)(i)
s.14(1)(j)
s.14(1)(k)
s.14(1)(l)

4.7.2 maintaining call data records (see 6.12)

4.7.3 ability to allow outgoing collect calls as well as calls to ministry-approved toll free numbers (Common Access List)

4.7.4 ability to limit to a 20-minute length of each call

4.7.5 automatic voice prompts at established intervals advising the parties of the time remaining

4.8 **Three Way or Conference Call:** A telephone call involving three or more telephone numbers or separate telephone subscribers.

4.9 **Three way Call Detecting and Blocking:** The Offender Telephone Management System (OTMS) is programmed to detect and disconnect three way calling features. Prior to call acceptance and commencement of the conversation the call recipient hears the following recorded notification, "Do not use three way or call waiting features or your call will be disconnected." Should the OTMS detect a three way call attempt or call waiting feature, both parties hear the following recorded notice prior to the call being disconnected, "Three way or call waiting features are not allowed. Your call will be disconnected."

5.0 Responsibilities

5.1 The Regional Directors ensure a TTY/Teletypewriter is available in their region for institution use if required.

5.2 The superintendent ensures compliance with this policy.

5.3 The superintendent develops criteria for determining when an incoming message is appropriate.

5.4 The superintendent or designate ensures call blocking is in place where appropriate in accordance with this policy.

5.5 The superintendent or designate determines the times when telephones are available.

5.6 The superintendent or designate has the authority to temporarily suspend telephone use during times of institutional unrest, emergency or any other circumstance, which may jeopardize the health, and/or safety of an individual or the security of the institution.

5.7 The superintendent or designate ensures a process is in place if no inmate telephones are accessible in an inmate area.

5.8

5.9 The Transportation and Communications Services Unit maintains and manages the OTMS, the Common Access List, Legal Counsel three way call detect acceptance (see 6.7.2.c), and call data records/requests.

5.10 Correctional staff ensure general supervision and control of the inmate telephone system.

5.11 Correctional staff ensure inmates without direct access to telephones have the opportunity to make calls and assist inmates in making such calls as per policy.

6.0 Procedures

6.1 Monitoring or Recording

Telephone communication between inmates and members of the community will not be monitored or recorded in any manner except by law enforcement personnel who will produce a properly authorized warrant for the purpose.

6.2 Inmate Telephones

6.2.1 Inmates may call any person with a standard North American ten digit telephone number who is capable of being billed for collect calls, providing the person is willing to accept the charges and the communication does not violate a court order, constitute an offence under federal or provincial statute, or jeopardize the safety of any person or the security of the institution. In most instances, collect calls to cell phones will result in a recording that states that the call cannot be processed.

6.2.2 When the superintendent is notified that an inmate call has violated a legal sanction or has jeopardized the safety of any person or the security of the institution, restrictions will be imposed on the inmate's telephone use. On the authority of the superintendent or designate, an inmate may be relocated to an area where telephones are not directly accessible. In addition, inmates abusing telephone privileges may be placed on misconduct or, if appropriate, reported to the police (see Discipline and Misconduct).

6.2.3 With the exception of inmates in segregation, health care or other restricted areas, all inmates are allowed to dial their own telephone calls. The superintendent or designate will, on a case by case basis, determine if inmates in segregation retain this privilege or whether designated employees must dial the telephone calls for them. In some restricted areas, the lack of direct physical access to the telephone may require the assistance of a staff member to dial the telephone number for the inmate.

6.2.4 While inmate telephones are under the general supervision and control of the correctional staff, equitable access to the telephones rests with the peer group in each living unit. Where, in the opinion of the superintendent or designate, equity is not maintained, the superintendent or designate may discontinue service for the unit, remove the privilege from inmates identified as responsible for the problem or remove those inmates from the living unit.

6.2.5 In general, the inmate population may access the telephone system five hours a day, unless suspended due to institutional unrest or emergency.

6.2.6 All inmate telephones are shut off between the hours of 23:00 and 06:00 hours seven days a week, unless otherwise authorized by Correctional Services.

6.2.7 Requests for exemptions to the corporate policy regarding the operation of inmate telephones are to be directed to the applicable Regional Director, who will forward to the Director, Management and Operational Support Branch. Requests to alter the standardized hours of operation of inmate phones are to be directed to the Manager, Transportation and Communication Services Unit.

6.2.8 To ensure that concerns raised by inmates are resolved at the local level, staff at Corporate and Regional Offices will not accept collect calls from inmates, including those concerning medical/clinical issues.

6.2.9 Institutions do not normally accept collect calls from inmates.

In emergency situations, collect calls may be accepted from inmates who are not currently in the institution (e.g., on Temporary Absence, recently released from a treatment centre and who are in crisis, etc.).

6.3 Inmates Without Access to Inmate Telephones

6.3.1 Where inmates do not have direct access to telephones, Correctional Services has devised procedures to ensure that telephone calls can be made for inmates. In addition, Correctional Services ensures that incoming messages for inmates are delivered.

6.3.2 Where inmates have lost the privilege of making telephone calls, the following procedures apply:

a. The inmate submits a request form for a telephone call to be made. The request must contain the name and telephone number of the individual to be called, the message, the most likely time that the individual can be contacted and the reason for the call. Long distance calls will normally be made collect (see Emergency Telephone Calls section 6.10.1 below).

b. All reasonable requests are acted upon, particularly when the calls are of a compassionate or urgent nature, and are to be made to members of the immediate family, the inmate's lawyer/licensed paralegal, Ombudsman office, chaplains, or leaders of recognized faith groups. Repeated attempts are made to contact these designated parties.

c. The individual making the call indicates on the request the time and results of any and all attempts to deliver the message. The form is returned to the inmate within 24 hours for signature.

d. The completed, signed request is placed on the inmate file as a record of the call.

6.4 Staff Supervised Calls

In exceptional circumstances, the superintendent or delegate may permit an inmate to make a supervised personal telephone call (e.g., from the office of the sergeant, social worker, chaplain, etc.).

a. The inmate must provide the telephone number and agree that the call will be terminated if it threatens the safety and security of any person or the institution or involves criminal behaviour.

b. The staff member dials the number and, by sitting in the office, directly supervises the inmate but does not record or listen to the conversation.

c. If the inmate violates the agreement the call is terminated and both an occurrence report and a misconduct report are prepared.

6.5 Text Telephone for the Deaf and Hard of Hearing

6.5.1 This policy applies only to institutions having an operating inmate telephone system and/or where the local telephone system can accommodate TTY/Teletypewriter equipment.

At the present time, the inmate telephone system will not accommodate the use of a TTY/Teletypewriter. Until this capability exists, an inmate requiring a TTY/Teletypewriter will be given reasonable, supervised access to an institutional office telephone.

6.5.2 If a hearing impaired inmate is admitted to an institution where use of this equipment is not possible, consideration must be given to transferring the inmate to an institution where this capability exists.

6.5.3 Such determinations are based on the special needs of the inmate and the individual circumstances of the case (e.g., need for frequent contact with legal counsel or community supports). For additional information on assistive devices, see Assistive Devices.

a. Each region has a TTY/Teletypewriter, which resembles a small typewriter with a modem.

b. The device is to be located in an institution determined by the regional director and made available to other institutions in the region as required.

c. Requests for the device are made by telephone and confirmed by the requesting superintendent or designate by fax.

d. If a regional device is already in use or out of service, an out-of-region request is be made by the same procedure. When requested, units are forwarded in a secure but timely manner (e.g., by courier, Provincial Bailiffs or institutional vehicle).

e. To facilitate out-of-region requests, the regional director will advise the Senior Medical Consultant, other regional directors and superintendents of the regular storage location of the device.

6.6 Call Blocking

s.14(1)(i)

s.14(1)(j)

s.14(1)(k)

s.14(1)(l)

s.14(1)(i)
s.14(1)(j)
s.14(1)(k)
s.14(1)(l)

6.7 Call Transfers and Three way Calls

6.7.2 The OTMS has an additional security feature that includes the detection and disconnection of attempted three way calls and call transfers. This feature:

a. is programmed to prevent three way calling activity.

b. detects and terminates calls where three way call attempts occur.

c. does not apply to toll free numbers, probation office numbers and ministry-verified and approved Legal Counsel numbers.

6.8 Exemptions to Allow for Call Transfers and Three Way Calls

6.8.1 The Ministry may, at its discretion, exempt verified telephone numbers from the three way call detect and blocking security feature.

6.8.2 This exemption is provided for the purpose of facilitating the transfer of offender calls from a receptionist or automated telephone attendant system to the intended call recipient at the called number.

6.8.3 The onus is on individuals to request to have their telephone number(s) included on either the Common Access List or the Call Blocked List and to advise of any changes to their telephone numbers.

6.8.4 The Ministry may, at its discretion, also allow for call transfers by Legal Counsel offices when receiving offender calls.

6.8.5 In order to exempt telephone numbers from the three way call detect and block feature or enable call transfers by Legal Counsel offices, the Ministry has provided an exemption form to be completed and returned for processing.

6.8.6 This exemption form may be acquired through the Transportation and Communications Services Unit - Legal Counsel 3-way call detect acceptance. (also see 8.0 - Notices and Exemption form)

6.8.7 Once the Ministry has received the completed exemption form and verified the telephone number, the telephone number will be entered into the OTMS. Calls to the verified telephone number will be exempt from the three way call detection and disconnection security feature. A minimum of five business days is required to verify and process telephone numbers into the OTMS.

6.8.8 The exemption form may be mailed to the Ministry of Community Safety and Correctional Services, Transportation and Communications Services, 2301 Haines Road, Suite 100, Mississauga, Ontario L4Y 1Y5, faxed to 905-279-6233 or emailed. For questions, please contact the Transportation and Communications Services Unit.

6.9 Incoming Messages

6.9.1 When an appropriate incoming message for an inmate is received, the person receiving the message completes an Incoming Message form:

a. The form is located on the institution templates menu (Administration and Miscellaneous - Incoming Messages).

b. The form is delivered to the inmate in a timely manner, but within 12 hours of receipt of the message.

c. Both the employee delivering the message and the inmate receiving the message sign the form.

d. The signed form is placed in the inmate's file as a record of the incoming message.

6.9.2 The superintendent establishes criteria to determine if an incoming message is appropriate.

6.10 Emergency Telephone Calls

In the event of an emergency (e.g., serious family illness or injury, death, etc.), the superintendent or designate may allow the inmate to use the telephone and the institution pays for the call.

6.11 Non-Emergency Long Distance Calls

6.11.1 Upon completion of a written request, the superintendent may authorize a long distance call that is not an emergency and cannot be made collect.

6.11.2 The superintendent may require the inmate to have sufficient funds to pay for the call.

6.12 Call Data Records

6.12.1 OTMS call data records may be made available for investigations by either Correctional Services staff or external agencies (e.g.; police, Canadian Border Services Agency staff, etc.). All requests for call data records are forwarded to the Transportation and Communications Services and must be accompanied by a completed copy of the "Call Data Request" form found on the institution templates at Transportation and Communications Services - Call Data Request.

6.12.2 Requests from Correctional Services staff will be responded to accordingly. Requests from external agencies will be reviewed on an individual basis. In most cases, requests from external agencies require appropriate legal documentation.

6.13 Reports

6.13.1 Any occurrence involving an OTMS telephone or the system must be documented in an Inmate Incident Report and reported to both the Information Management Unit and the appropriate Regional Director (see Report Writing).

6.13.2 In addition, the report must also be sent, by fax, to the Manager, Transportation and Communications Services, at 905-279-6233.

7.0 Authority

Ministry of Correctional Services Act, ref. "Functions of Ministry"

Ministry of Correctional Services Act, Regulations 778, ref. Section 17.2

6.1.7 For information on services to assist communication by inmates who are deaf or hard of hearing please refer to the texts entitled Interpreter Services, and Text Telephone for the Deaf and Hard of Hearing.

s.N/R

Ministry of Community Safety and Correctional Services

Office of the Assistant Deputy Ministers

Operational Support, 16th Floor
Institutional Services, 17th Floor
25 Grosvenor Street
Toronto, ON M7A 1Y6

Telephone: (416) 327-9911
Fax: (416) 314-6669

Ministère de la Sécurité communautaire et des Services correctionnels

Bureau du sous-ministre adjoint

Appui opérationnel, 16 étage
Services établissement, 17 étage
25 rue Grosvenor
Toronto, ON M7A 1Y6

Téléphone: (416) 327-9911
Fax: (416) 314-6669

Ontario

MEMORANDUM TO: Superintendents

From: Steve Small
Assistant Deputy Minister
Institutional Services

Curt Arthur
Assistant Deputy Minister
Operational Support

Date: February 13, 2013

Subject: Offender Telephone Management System and Conventional Public Pay Telephones

---

As a result of a competitive procurement process conducted last fall, the Ministry has awarded a new contract to Bell Canada for the provision of the Offender Telephone Management System (OTMS) and conventional public pay telephones in public areas of institutions.

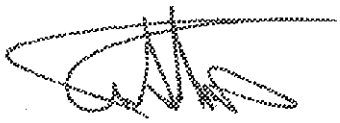
Over the next several months, there will be on-going activities by Bell Canada and TELUS Communications representatives and the Ministry's Transportation and Communication Services (TCS) unit to prepare the institutions for the removal of TELUS' OTMS and conventional public pay telephone equipment and the installation of new equipment by Bell Canada. This will be conducted using a phased approach throughout the province and is expected to commence in early June 2013 for completion by early December 2013.

As the transition period approaches, the TCS unit will share information regarding the process and schedule for replacing the current TELUS OTMS and conventional public pay telephone equipment with the new Bell Canada equipment at your institution. The TCS unit will also provide information regarding the security features and functions of the Bell Canada OTMS.

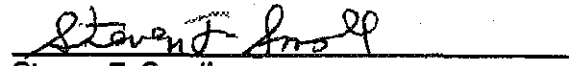
.../2

Should you have any questions, please direct them to Don Ostrom, Communications Coordinator at Donald.Ostrom@Ontario.ca or at 905-279-6245.

Sincerely,



Curt Arthur
Assistant Deputy Minister
Operational Support Division



Steven F. Small
Assistant Deputy Minister
Institutional Services

c: Regional Directors
Deputy Regional Directors
Lynn Kenn, Director, Management Operational Support Branch
Brian O'Rourke, Manager, Transportation and Communications Unit
Bruce Meyrick, Sr. Manager, Alternative Services Delivery Unit and Quality Assurance
Paul Coons, Manager (A), Alternative Service Delivery Unit
Fran Foulds, Program Consultant / Contract Manager, Alternative Service Delivery Unit
Don Ostrom, Communications Coordinator, Transportation and Communications Unit

Ministry of Community Safety and Correctional Services
Operational Support Division
Management and Operational Support

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Ontario

MEMORANDUM TO: Regional Directors, Institutional Services

FROM: Lynn Kenn
Director, Management and Operational Support Branch

DATE: October 29, 2013

SUBJECT: Offender Telephone Management System

The ministry has been receiving many written inquiries from the general public and inmates alike regarding the recently upgraded inmate telephone system. Incoming correspondence indicates that collect calls are being terminated as three-way calls are being detected.

To remain consistent, the approved messaging below was developed and is being sent to respond to these types of inquiries:

The Ontario Ministry of Community Safety and Correctional Services provides inmates with the use of the Offender Telephone Management System (OTMS) to make outgoing collect calls to North American 10-digit telephone numbers so that they can maintain contact with their families and communities. The OTMS has been developed with enhanced security features that include a three-way call detection feature in order to ensure the protection of victims and witnesses, and to ensure public safety and security. In addition, calls are not permitted to cellular telephones, whether directly dialed or forwarded from a landline.

As of June 2013, the ministry has been transitioning to a new OTMS service provider and has moved from the traditional analog telephony environment to a digital telephony environment. This digital platform has increased the quality of calls and has enabled further enhancement of the required security features.

The paragraph below is used when the author is not specific about the type of telephone service used:

In the event you are using a wireless telephone or a Voice over Internet Protocol (VoIP) telephone service, you should know that these wireless telephones and internet services are dependent on signal strength and bandwidth. The three-way call detection feature

monitors the call to detect three-way call "triggers", such as but not limited to, clicks, signal pauses and other noises or changes to the signal energy and strength which are common when calls are put on hold, forwarded or transferred to a third party or a VoIP telephone service is used. Therefore, depending on the quality of the service or product, these "triggers" may occur more often and increase the frequency of the three-way call detection, resulting in terminating calls.

In the event the caller identifies TrappCall as their service provider, the following paragraph replaces the paragraph above:

You should know that TrappCall uses a 'Voice over Internet Protocol' service, and is, therefore, dependent on the bandwidth and the Internet services. The three-way call detection feature monitors the call to detect three-way call "triggers", such as but not limited to, clicks, signal pauses and other noises or changes to the signal energy which are common when calls are put on hold, forwarded or transferred to a third party. Therefore, depending on the quality or nature of the Internet service or product, these "triggers" may occur more often and increase the frequency of the three-way call detection, resulting in terminating calls.

We understand that collect calls can pose a financial burden on members of the community. Rest assured that the ministry continuously monitors our services and works closely with our service providers to ensure that services are functioning as required, while maintaining public safety and security.

I ask that you please reference the above-noted messaging when handling queries locally about this matter.

Thank you for your cooperation.

Original Signed By

Lynn Kenn

c: C. Arthur, Assistant Deputy Minister, Operational Support Division
S. Small, Assistant Deputy Minister, Institutional Services
M. Welch, Assistant Deputy Minister, Community Services
S. Rooke, Chief of Oversight & Investigation, Correctional Services
W. Love, Director, Strategic and Operational Initiatives Branch
J. Shepherd, Director, Ontario Correctional Services College
B. Cook, Assistant Director, Management and Operational Support Branch
R. Zinn, Manager, Integrated Operations Unit
Deputy Regional Directors, Institutional Services
All MOSB Managers
All SOIB Managers

Agreement No: COS-0009

Between

HER MAJESTY THE QUEEN
in right of Ontario as represented by

the Minister of Community Safety and Correctional Services

and

BELL CANADA

Offender Telephone Management System (OTMS)
and Conventional Public Pay Telephones

Agreement

THIS AGREEMENT ("Agreement"), made in quadruplicate, for a telephone management system

BETWEEN:

HER MAJESTY THE QUEEN
in right of Ontario as represented by
the Minister of Community Safety and Correctional Services

(referred to as "the Ministry")

AND:

BELL CANADA

(referred to as the "Supplier")

In consideration of their respective agreements set out below, the parties covenant and agree as follows:

ARTICLE 1 – INTERPRETATION AND GENERAL PROVISIONS

1.01 Defined Terms

When used in this Agreement, the following words or expressions have the following meanings:

"Business Day" means any working day, Monday to Friday inclusive, excluding statutory and other holidays, namely: New Year's Day; Family Day; Good Friday; Easter Monday; Victoria Day; Canada Day; Civic Holiday; Labour Day; Thanksgiving Day; Remembrance Day; Christmas Day; and Boxing Day;

"Call Blocking" means a feature that prevents a particular telephone number, as determined by the Ministry, from being called by an inmate when the Ministry determines it is necessary to do so;

"Call Traffic Records" means the information contained in the monthly reports set out in Section 2.3.7 of the RFP plus any other information relating to the calling activity from telephones located in the Facilities including the time, date, number of calls made per telephone, total duration of calls, specific telephone used and number of calls blocked;

"Commencement Date" has the meaning ascribed thereto in Section 3.7(d);

"Commission" has the meaning ascribed thereto in Section 4.01;

"Commission Percentage Rate" has the meaning ascribed thereto in Section 4.01;

"Common Access Numbers" means the pre-approved telephone numbers (e.g. Ombudsman's Office) created within OTMS to which telephone calls will be allowed for all inmates. The Ministry will identify these numbers;

"Conflict of Interest" includes, but is not limited to, any situation or circumstance where:

(a) in relation to the RFP process, the proponent has an unfair advantage or engages in conduct, directly or indirectly, that may give it an unfair advantage, including but not limited to (i) having or having access to information in the preparation of its proposal that is confidential to the Crown and not available to other proponents; (ii) communicating with any person with a view to influencing preferred treatment in the RFP process, including the giving of a benefit of any kind, by or on behalf of the Supplier to anyone employed by or otherwise connected with, the Ministry; or (iii) engaging in conduct that compromises or could be seen to compromise the integrity of the open and competitive RFP process and render that process non-competitive and unfair; or

(b) in relation to the performance of its contractual obligations in a Crown contract, the Supplier's other commitments, relationships or financial interests (i) could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of its independent judgement; or (ii) could or could be seen to compromise, impair or be incompatible with the effective performance of its contractual obligations;

"Contract" or **"Agreement"** means the aggregate of (a) the main body of this Contract; (b) the RFP, including for greater certainty the addenda thereto, attached as Schedule I; (c) the Proposal, attached as Schedule II; and (d) any amendments executed in accordance with the terms of the Contract;

"Deliverables" means everything developed for or provided to the Ministry in the course of performing under the Contract or agreed to be provided to the Ministry under the Contract by the Supplier or its employees, volunteers, agents or subcontractors;

"Effective Date" has the meaning ascribed thereto in Section 1.11;

"Expiry Date" means the day preceding the fifth anniversary of the Commencement Date, or, if the Ministry elects to extend the term of this Agreement pursuant to Section 8.08 or Section 8.09, the last day of the latest extension term;

"Facility" or "Facilities" means the respective adult correctional institution(s) identified in Section 2.3.5 Table 1 – Facility Data and Appendix H of the RFP and such other locations in Ontario that the Ministry may notify the Supplier of from time to time;

"FIPPA" means the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended;

"Indemnified Parties" means Her Majesty the Queen in right of Ontario, her Ministers, directors, officers, agents, appointees and employees;

"Industry Standards" include, but are not limited to (a) the provision of any and all labour, supplies, equipment and other goods or services that are necessary and can reasonably be understood or inferred to be included within the scope of the Contract or customarily furnished by Persons providing Deliverables of the type provided hereunder in similar situations in Ontario and; (b) adherence to commonly accepted norms of ethical business practices, which shall include the Supplier establishing, and ensuring adherence to, precautions to prevent its employees or agents from providing or offering gifts or hospitality of greater than nominal value to any person acting on behalf of or employed by Her Majesty the Queen in right of Ontario;

"Initial Term" means the 5-year period starting on the Commencement Date;

"Intellectual Property" means any intellectual, industrial or other proprietary right of any type in any form protected or protectable under the laws of Canada, including, without limitation, any intellectual, industrial or proprietary rights protected or protectable by legislation, by common law or at equity;

"Internet Protocol (IP)" means a data-oriented set of rules used by the source and destination telecommunications hardware to exchange data and digitized or digital voice transmissions across a secure internet connection;

"MCYS" means the Ministry of Children and Youth Services;

"Ministry Address" and **"Ministry Representative,"** mean:

Ministry of Community Safety and Correctional Services
25 Grosvenor, 16th Floor
Toronto, ON M7A 1Y6

Curt Arthur, Assistant Deputy Minister
Telephone: 416-327-2387
Email: curt.arthur@ontario.ca

"Ministry Confidential Information" means all information of the Ministry that is of a confidential nature, including all confidential information in the custody or control of the Ministry, regardless of whether it is identified as confidential or not, and whether recorded or not, and however fixed, stored, expressed or embodied, which comes into the knowledge, possession or control of the Supplier in connection with the Agreement. For greater certainty, Ministry Confidential Information shall:

(a) include: (i) all new information derived at any time from any such information whether created by the Ministry, the Supplier or any

third-party; (ii) all information (including Personal Information) that the Ministry is obliged, or has the discretion, not to disclose under provincial or federal legislation or otherwise at law; but

(b) not include information that (i) is now or subsequently becomes generally available to the public through no fault or breach on the part of the Supplier; (ii) the Supplier can demonstrate to have had rightfully in its possession prior to disclosure to the Supplier by the Ministry; (iii) is independently developed by the Supplier without the use of any Ministry Confidential Information; or (iv) the Supplier rightfully obtains from a third party who has the right to transfer or disclose it;

"Ministry's Contract Compliance Manager" means the person appointed under Section 3.22;

"Ontario Public Service" (or "OPS") means the ministries and other administrative units of the government of Ontario over which Ministers of the Crown preside, and includes agencies;

"PBX" means a Private Branch Exchange for the Ministry's internal administrative telephone system;

"Person" if the context allows, includes any persons, firms, partnerships or corporations or any combination;

"Personal Identification Numbers (PINs)" means a unique numeric sequence issued to an inmate for the purpose of identification;

"Personal Information" has the same definition as in Subsection 2(1) of FIPPA, that is, recorded information about an identifiable individual or that may identify an individual, and includes all such information obtained by the Supplier from the Ministry or created by the Supplier pursuant to the Contract;

"Proceeding" means any action, claim, demand, lawsuit or other proceeding;

"Project Operational Records" means the policies and documents prepared by the Supplier pursuant to Section 3.02 and approved by the Ministry; for greater certainty, Project Operational Records do not include Call Traffic Records;

"Proposal" means all the documentation submitted by the Supplier in response to the RFP, which is attached hereto as Schedule II;

"Record", for the purposes of the Contract, means any recorded information, including any Personal Information, in any form, that is: (a) provided by the Ministry to the Supplier, or provided by the Supplier to the Ministry, for the purposes of the Contract; or (b) created by the Supplier in the performance of the Contract and includes Call Traffic Records and Project Operational Records;

"Requirements of Law" mean all applicable requirements, laws, statutes, codes, acts, ordinances, orders, decrees, injunctions, by-laws, rules, regulations,

official plans, permits, licences, authorisations, and directions with all government authorities that now or at any time hereafter may be applicable to either the Contract or the Deliverables or any part of them;

"RFP" means the Request for Proposals dated September 28, 2012 for Offender Telephone Management System (OTMS) and Conventional Public Pay Telephones, reference number #COS-0009 issued by the Ministry for the Deliverables and addenda 1 through 5 to it, all of which are attached hereto as Schedule I;

"Supplier Address" and **"Supplier Representative,"** mean:

s.21(1)

"Supplier Confidential Information" means information of the Supplier or its subcontractors or suppliers which is received and is reasonably identified as confidential and as either a trade secret, technical, commercial, financial or labour relations information but does not include information that is now or subsequently becomes generally available to the public through no fault or breach on the part of the Ministry, that the Ministry can demonstrate to have had rightfully in its possession prior to disclosure to the Ministry by the Supplier, that is independently developed by the Ministry without the use of any Supplier Confidential Information, or that the Ministry rightfully obtains from a third party who has the right to transfer or disclose it. For greater certainty, Call Traffic Records shall not be considered Supplier Confidential Information;

"Supplier Project Manager" means the person appointed under Section 3.23;

"Supplier's Resources" means furniture, fixtures, equipment, materials, chattels, hardware, software, motor vehicles and other items that are required to perform the Deliverables;

"Term" means the period of time from the Effective Date up to and including the earlier of (a) the Expiry Date; or (b) the date of termination of the Contract in accordance with its terms;

"Third-Party Intellectual Property" means any Intellectual Property owned by a party other than Her Majesty the Queen in right of Ontario or the Supplier;

"TTY" is an acronym for Teletype, which is a device that converts voice into typed script for the deaf and hard of hearing; and

"Victim Support Line (VSL)" means an Ontario government service that provides a range of province-wide, multilingual, toll-free services to victims of

crime such as specific information about victim services and general information about the criminal justice system. The OTMS Call Blocking feature will be managed by the Ontario Victims' Services Secretariat, Ministry of the Attorney General through the Victim Support Line.

1.02 **No Indemnities from Ministry**
Notwithstanding anything else in the Contract, any express or implied reference to the Ministry providing an indemnity or any other form of indebtedness or contingent liability that would directly or indirectly increase the indebtedness or contingent liabilities of Ontario, whether at the time of execution of the Agreement or at any time during the Term of the Contract, shall be void and of no legal effect.

1.03 **Entire Agreement**
The Contract embodies the entire agreement between the parties with regard to the provision of Deliverables and supersedes any prior understanding or agreement, collateral, oral or otherwise with respect to the provision of the Deliverables, existing between the parties at the date of execution of the Agreement.

1.04 **Severability**
If any term or condition of the Contract, or the application thereof to the parties or to any Persons or circumstances, is to any extent invalid or unenforceable, the remainder of the Contract, and the application of such term or condition to the parties, Persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby.

1.05 **Interpretive Value of Contract Documents**
In the event of a conflict or inconsistency in any provisions in this Contract: (a) the main body of this Contract shall govern over the RFP and the Proposal; and (b) the RFP shall govern over the Proposal.

1.06 **Interpretive Value of Headings**
The headings in the Contract are for convenience of reference only and in no manner modify, interpret or construe the Contract.

1.07 **Force Majeure**
Neither party shall be liable for damages caused by delay or failure to perform its obligations under the Contract where such delay or failure is caused by an event beyond its reasonable control. The parties agree that an event shall not be considered beyond one's reasonable control if a reasonable business person applying due diligence in the same or similar circumstances under the same or similar obligations as those contained in the Contract would have put in place contingency plans to either materially mitigate or negate the effects of such event. Without limiting the generality of the foregoing, the parties agree that force majeure events shall include natural disasters and acts of war, insurrection and terrorism but shall not include shortages or delays relating to supplies or services, or any strike, work refusal or other labour dispute or disruption (see Section 2.13 with respect to labour disputes). If a party seeks to excuse itself from its obligations under this Contract due to a force majeure event, that party shall immediately notify the other party of the delay or non-performance, the

reason for such delay or non-performance and the anticipated period of delay or non-performance. If the anticipated or actual delay or non-performance exceeds twenty (20) Business Days, the other party may immediately terminate the Contract by giving notice of termination and such termination shall be in addition to the other rights and remedies of the terminating party under the Contract, at law or in equity.

1.08 **Notices by Prescribed Means**

Unless otherwise expressly provided in this Agreement, all notices, requests and other communications and approvals required or permitted by this Agreement shall be in writing and shall be delivered by postage-prepaid envelope, personal delivery or facsimile and shall be addressed to, respectively, the Ministry Address to the attention of the Ministry Representative, with a copy to the Ministry's Contract Compliance Manager at the address provided by the Ministry in accordance with Section 3.22, and to the Supplier Address to the attention of the Supplier Representative. Notices shall be deemed to have been given (a) in the case of postage-prepaid envelope, five (5) Business Days after such notice is mailed; or (b) in the case of personal delivery or facsimile one (1) Business Day after such notice is received by the other party. In the event of a postal disruption, notices must be given by personal delivery or by facsimile. Unless the parties expressly agree in writing to additional methods of notice, notices may only be provided by the methods contemplated in this paragraph.

1.09 **Governing Law**

The Contract shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.

1.10 **Counterparts and Delivery by Facsimile**

This Agreement may be executed in any number of counterparts that, taken together, shall constitute one and the same agreement. To evidence the fact that it has executed this Agreement, a party hereto may send a copy of its executed counterpart to the other party hereto by facsimile transmission. Such party shall be deemed to have delivered its executed counterpart of this Agreement on the date it sent such facsimile transmission. In such event, such party shall forthwith deliver to the other party hereto an original counterpart of this Agreement executed by such party.

1.11 **Effective Date**

This Agreement shall be effective as of the date on which it is signed by the last of the parties to do so ("Effective Date").

1.12 **Time of the Essence**

Time is of the essence of every provision of the Contract. Extension, waiver or variation of any provision of the Contract shall apply only as specified in a written amendment to the Contract and shall not be deemed to affect this provision and there shall be no implied waiver of this provision.

ARTICLE 2 – LEGAL RELATIONSHIP BETWEEN MINISTRY, SUPPLIER AND THIRD-PARTIES

2.01 **Supplier's Power to Contract**
The Supplier represents and warrants that it has the full right and power to enter into this Agreement and there is no agreement with any other Person that would in any way interfere with the rights of the Ministry under this Agreement.

2.02 **Representatives May Bind the Parties**
The parties represent that their respective representatives have the authority to legally bind them to the extent permissible by the Requirements of Law.

2.03 **Supplier Not a Partner, Agent or Employee**
The Supplier shall have no power or authority to bind the Ministry or to assume or create any obligation or responsibility, express or implied, on behalf of the Ministry. The Supplier shall not hold itself out as an agent, partner or employee of the Ministry. Nothing in the Contract shall have the effect of creating an employment, partnership or agency relationship between the Ministry and the Supplier (or any of the Supplier's directors, officers, employees, agents, partners, affiliates, volunteers or subcontractors) or constitute an appointment under the *Public Service of Ontario Act, 2006*.

2.04 **Responsibility of Supplier**
The Supplier agrees that it is liable for the acts and omissions of its directors, officers, employees, agents, partners, affiliates, volunteers and subcontractors. This paragraph is in addition to any and all of the Supplier's liabilities under the Contract and under the general application of law. The Supplier shall advise these individuals and entities of its obligations under the Contract and shall ensure their compliance with the applicable terms of the Contract. In addition to any other liabilities of the Supplier pursuant to this Agreement or otherwise at law or in equity, the Supplier shall be liable for all damages, costs, expenses, losses, claims or actions arising from any breach of the Contract resulting from the actions of the above mentioned individuals and entities. This paragraph shall survive the termination or expiry of the Contract.

2.05 **No Subcontracting or Assignment**
The Supplier shall not subcontract or assign the whole or any part of the Contract without the prior written consent of the Ministry. Such consent shall be in the sole discretion of the Ministry and subject to the terms and conditions that may be imposed by the Ministry. Without limiting the generality of the conditions which the Ministry may require prior to consenting to the Supplier's use of a subcontractor, every contract entered into by the Supplier with a subcontractor shall adopt all of the terms and conditions of the Contract as far as applicable to those parts of the Deliverables provided by the subcontractor. Nothing contained in the Contract shall create a contractual relationship between any subcontractor or its directors, officers, employees, agents, partners, affiliates or volunteers and the Ministry.

2.06 **Duty to Disclose Change of Control**
In the event that the Supplier undergoes a change in control the Supplier shall immediately disclose such change in control to the Ministry and shall comply with

any terms and conditions subsequently prescribed by the Ministry resulting from the disclosure.

2.07 **Conflict of Interest**

The Supplier shall (a) avoid any Conflict of Interest in the performance of its contractual obligations; (b) disclose without delay any actual or potential Conflict of Interest that arises during the performance of its contractual obligations; and (c) comply with any requirements prescribed by the Ministry to resolve any Conflict of Interest. In addition to all other contractual rights or rights available at law or in equity, the Ministry may, at its sole and absolute discretion, immediately terminate the Contract upon giving notice to the Supplier where (a) the Supplier fails to disclose an actual or potential Conflict of Interest; (b) the Supplier fails to comply with any requirements prescribed by the Ministry to resolve a Conflict of Interest; or (c) the Supplier's Conflict of Interest cannot be resolved.

2.08 **Security Clearance**

Subsection 1 below applies in respect of security clearance required for individuals the Supplier is considering employing or retaining to provide any of the Deliverables, as further described therein. Security clearance requirements with respect to the Supplier's directors, officers and security officer are addressed in Subsection 2 below.

1. **CPIC Checks on Individuals who are to provide Deliverables**

The Supplier shall obtain a Canadian Police Information Centre (CPIC) criminal record check on any individual the Supplier is considering employing or retaining to provide any of the Deliverables (including any subcontractor personnel) and who, if employed or retained, would:

a. have access to the software that performs the OTMS security features set out in the RFP;
b. be involved in the design or development of the OTMS provided under this Agreement, including any enhancement thereto;
c. require access to any Facilities or Ministry offices; or
d. have access to Call Traffic Records or financial records.

The CPIC criminal record checks must be specific for the purpose intended and must be obtained by the individual at the local police service agency based on the individual's residential address.

Unless the Supplier decides, after conducting the criminal record check, that it no longer wishes to so employ or retain the individual in question the Supplier must provide the Ministry with a copy of such individual(s) criminal record check. If the check reveals the existence of a criminal record, the Ministry shall determine, in its sole and absolute discretion, whether the individual may participate in the provision of the Deliverables.

Where the Ministry provides the Supplier with written confirmation that the criminal record is not incompatible with the provision of the Deliverables, the Supplier may permit the individual to so participate. For the purpose of determining whether or not the criminal record is incompatible with the provision

of the Deliverables, the Ministry may, in its discretion, consider whether any information obtained through the criminal record check is incompatible with (i) the proper and impartial provision of the Deliverables in accordance with the terms of the Contract; (ii) the safety of any Ministry employees, clients or the public; (iii) the reputation of or public confidence in the Ministry; (iv) the security of revenue, equipment or any other property of the Ministry; or (v) the confidentiality or integrity of Records, Personal Information or Ministry Confidential Information.

After the initial security clearance has been obtained, the criminal record checks referred to in this Subsection 1 must also be completed every twelve (12) months during the Term, and as may be requested by the Ministry at any other time during the Term, and a copy provided to the Ministry. If such check reveals the existence of a criminal record, the Ministry shall determine, in its sole and absolute discretion, whether the individual may continue to participate in the provision of the Deliverables in accordance with this Subsection 1.

2. **Security Clearance Checks of Supplier Officers, Directors and Security Officer**

This Subsection 2 applies in respect of security clearance required for any director, officer or security officer of the Supplier.

Definitions

"Security Clearance Check" includes all of the following:

a. A written declaration by an individual disclosing any unresolved charges and previous convictions under the offence provisions of federal statutes, including but not limited to the *Criminal Code (Canada)*, for which a pardon under the *Criminal Records Act (Canada)* has not been granted;
b. A police records check through the Canadian Police Information Centre and provincial and municipal police force records for information about the individual in relation to:
    i. convictions under the offence provisions of federal statutes, including but not limited to the *Criminal Code (Canada)*, for which a pardon under the *Criminal Records Act (Canada)* has not been granted;
    ii. findings of guilt in relation to federal statutes for which a court has granted a discharge;
    iii. charges laid under the offence provisions of any federal statutes that are unresolved;
    iv. records of judicial orders in effect made in relation to the offence provisions of federal statutes; and
    v. a police records check in other jurisdictions as deemed necessary by the information provided to the Ministry or the SSCPB during a Security Clearance Check.
c. If deemed necessary by the Ministry or SSCPB considering the circumstances of the Deliverables, a driving records check.
d. Other types of security checks if required.

"SSCPB" means the Government of Ontario's Security Services and Contingency Planning Branch.

Renewal of Security Clearance: On notification from the Ministry, the Supplier shall require each officer, director and security officer of the Supplier as requested by SSCPB to undergo a Security Clearance Check. Security Clearance Checks in respect of the Supplier's directors, officers and security officer shall be renewed at such intervals as may be specified by the Ministry or SSCPB.

Written Consent: Where such a Security Clearance Check is required, the Supplier shall obtain written consent on specified forms provided by the Ontario government from each individual for which a Security Clearance Check is required and such other information as the Ministry or SSCPB, in their sole discretion, may deem necessary in order to allow the SSCPB to conduct the Security Clearance Check of the individual.

Changes: During the Term of this Agreement, Supplier shall ensure that within five Business Days of any change:

a. that individuals provide written declarations as required under Subsection a. of the above definition of Security Clearance Check whenever new or different information is available for that individual for the purpose of enabling SSCPB to update the individual's Security Clearance Check;

b. the Supplier notifies the Ministry and SSCPB of changes in the Supplier's directors, officers and security officer as requested by SSCPB for the purpose of enabling SSCPB to conduct the individual's Security Clearance Check.

Default under Agreement

During the Term of this Agreement, the Supplier shall be in default under this Agreement if

(a) within five Business Days, the Supplier fails to provide notification to the Ministry and SSCPB as required under Subsection a. under the heading "Changes";

(b) without having a Security Clearance Check or update as required, the Supplier or if the Supplier is a corporation if any of its directors, officers and security officer (if a security screening of those individuals has been expressly required):

(i) has been convicted under the offence provisions of a federal statute for which a pardon under the *Criminal Records Act (Canada)* has not been granted;

(ii) has been granted an absolute or conditional discharge in relation to a federal offence and in the case of an absolute discharge, it was granted less than one year from the date of disposition of the offence by the court and in the case of a conditional discharge, it was granted less than three years from the date of disposition of the offence by the court;

(iii) is subject to a charge for a federal offence that remains unresolved; or

(iv) is subject to a judicial order in effect made in relation to the offence provisions of federal statutes; and

(c) in the sole discretion of the SSCPB any of the information obtained from a Security Clearance Check or update is incompatible with:

(i) the proper and impartial provision of the Deliverables in accordance with the terms of the Contract;

(ii) the safety of Ministry employees, clients or the public;

(iii) the reputation of or public confidence in the Ministry;

(iv) the security of revenue, equipment or any other property of the Ministry: or

(v) the confidentiality or integrity of Records, Personal Information or Ministry Confidential Information.

3. **Security Clearance Approval**
The Ministry and the SSCPB, on behalf of the Ministry, may in their sole discretion decline to grant security clearance to any Person.

4. **Security Clearance Costs**
The Ministry shall not bear the cost of the Supplier obtaining any criminal record checks or otherwise complying with the requirements in this Section 2.08.

2.09 **Criminal Proceedings Policy**
The Supplier shall develop a comprehensive policy that addresses how the Supplier will deal with Persons for whom it is responsible who are charged with or convicted of a criminal offence. The policy must address the responsibility of the Person to report any criminal charges and convictions to the Supplier and the Ministry (and, if directed by the Ministry, to SSCPB). The policy must address the status of the Person prior to conviction and subsequent thereto. The Supplier's written policy shall be subject to the approval of the Ministry.

2.10 **Conflict of Interest Policy**
The Supplier must develop a comprehensive conflict of interest policy, subject to the Ministry's approval, that will be applicable to all Persons for whom it is responsible who provide any of the Deliverables. The policy must include specific provisions regarding individuals who knowingly form or continue a relationship or connection of a personal or business nature with an inmate or ex-inmate or with someone known to be in close relationship with an inmate or ex-inmate, which might reasonably be perceived as, or might lead to, a conflict of interest or a breach of security. Definitions and direction regarding conflicts of interest must be consistent with Section 30(2) of the *Ministry of Correctional Services Act*. The Supplier must submit a written report to the Ministry Contract Compliance Manager with respect to any conflict of interest incidents within twenty-four (24) hours of the Supplier becoming aware of the situation.

2.11 **Transition Plan**
In accordance with Section 3.02(b), the Supplier must develop a plan for the smooth transition between service providers that addresses the criteria set out in the RFP.

2.12 **Compliance with Collective Agreements**
The Supplier shall:

(a) comply with all applicable collective agreements; and

(b) ensure that all employees of the Supplier are paid and receive wages and conditions as provided for by each applicable collective agreement.

2.13 **Labour Disputes**
(a) If a strike, work refusal or other labour dispute or disruption involving any Person for whom the Supplier is responsible is pending, occurs or is threatened, the Supplier shall:

(i) immediately inform the Ministry and continue to keep the Ministry informed throughout the course of the dispute;

(ii) while appropriate steps are implemented to resolve the dispute, continue to perform all Deliverables;

provided that the Supplier shall in no event be required by virtue of this Section 2.13 to breach any of its obligations at law or under any of its collective bargaining agreements.

(b) The Supplier shall not be liable for any damages caused by delay in performing any Deliverables where such delay is caused by a strike, work refusal or other labour dispute or disruption on the part of any Person for whom the Ministry is responsible that prevents the Supplier from having access to any Facility or Ministry office as required for the Supplier to perform the Deliverables in question. If such a strike, work refusal or other labour dispute or disruption is pending, occurs or is threatened, the Ministry reserves the right to reschedule any access by the Supplier or any of its subcontractors at the affected Facilities or Ministry offices without liability to the Supplier. For greater certainty, where the Supplier is prevented from having access to a Facility or Ministry office in such circumstances, the Supplier shall continue to provide Deliverables for all other Facilities or Ministry offices that are not affected, and shall work cooperatively with the Ministry to reschedule the work for the affected Facilities or Ministry offices or find other means of providing such Deliverables where possible. In no event shall the Ministry be required to breach any of its obligations at law or under any of its collective bargaining agreements to facilitate access by the Supplier to any Facilities or Ministry offices.

2.14 **Contract Binding**
The Contract shall enure to the benefit of and be binding upon the parties and their respective successors, executors, administrators and permitted assigns.

ARTICLE 3 - PERFORMANCE BY SUPPLIER

3.01 **Performance**
(a) The Supplier hereby represents and warrants that the Deliverables shall be provided fully and diligently in a professional and competent manner

by persons qualified and skilled in their occupations and furthermore that all Deliverables will be provided in accordance with (a) the Contract; (b) the policies and documents approved by the Ministry under Section 3.03; (c) Industry Standards; and (d) Requirements of Law. If any of the Deliverables, in the opinion of the Ministry, are inadequately provided or require corrections, the Supplier shall forthwith make the necessary corrections at its own expense as specified by the Ministry in a rectification notice. For greater certainty, the parties agree that there are no warranties, express or implied, other than as set out in the Contract.

(b) The Supplier hereby represents and warrants that it shall have a business continuity plan to address continuity of service in the event of any circumstances that could lead to a business disruption including, but not limited to, a pandemic, utility failure or Supplier or Ministry labour disruption. Upon the Ministry's request, the Supplier shall submit such business continuity plan to the Ministry for review. Despite any such review by the Ministry, the Supplier shall be solely responsible for ensuring the effectiveness of its business continuity plan.

3.02 **Preparation of Policies**

(a) Not later than forty (40) Business Days after the Effective Date, the Supplier shall prepare and submit for the Ministry's approval, the following policies and documents, each of which shall meet the requirements in the RFP:

(1) the Supplier's proposed conflict of interest policy;
(2) the Supplier's proposed criminal proceedings policy;
(3) the Supplier's proposed maintenance and on-site technical support procedures including the Supplier's proposed system for receiving requests for repair and maintenance from the Ministry and ensuring timely repairs;
(4) the Supplier's proposed training plan, materials and manuals; and
(5) such information as the Ministry may require demonstrating that all calling charges are no higher than the published residential rates established by the Incumbent Local Exchange Carrier (ILEC) that would apply to comparable calls connected and billed by the Supplier in the community of the applicable Facility.

(b) Not later than sixty (60) Business Days after the Effective Date, the Supplier shall prepare and submit for the Ministry's approval the Supplier's proposed (i) implementation plan and (ii) termination transition plan, each of which shall meet the requirements in the RFP.

3.03 **Approval of Proposed Policy**

(a) The Ministry shall notify the Supplier within twenty (20) Business Days of receiving a proposed policy or document from the Supplier pursuant to Section 3.02 whether or not the Ministry approves that proposed policy or document.

(b) If the Ministry does not approve a proposed policy or document, the Ministry shall, within the period of twenty (20) Business Days specified in

Subsection 3.03(a) notify the Supplier of the reason why the Ministry did not approve the proposed policy or document.

3.04 **Amendment of Proposed Policy**
If within twenty (20) Business Days of receiving a proposed policy or document from the Supplier, the Ministry informs the Supplier that the Ministry does not approve the proposed policy or document as submitted, then within a further ten (10) Business Days the Supplier shall either:

(a) supply a new or amended policy or document in place of the policy that was not approved by the Ministry, in which case the provisions of Section 3.03 and this Section 3.04 shall apply to the new or amended policy or document; or

(b) notify the Ministry that the Supplier does not consider it reasonable or practicable to supply a new or amended policy or document in the manner required to satisfy the Ministry, in which case:

(1) the Supplier and the Ministry shall meet within a further period of five (5) Business Days and negotiate, using all reasonable endeavours, to resolve any matters of contention between the Ministry and the Supplier;

(2) if the Ministry and the Supplier are able to resolve the matters of contention between the Ministry and the Supplier, the Supplier shall supply a new or amended proposed policy or document to the Ministry within ten (10) Business Days; and

(3) if the Ministry and the Supplier are not able to resolve the matters in contention within a further five (5) Business Days, then, in the sole and absolute discretion of the Ministry, the Supplier shall be required to comply with the Ministry's requirements.

3.05 **No Variation of Policies; Annual Review**

(a) The Supplier shall not update or vary the contents of any of the Supplier's approved policies and documents, including the Supplier's calling rates, without the Ministry's prior written consent, which consent may be arbitrarily withheld.

(b) The Supplier shall comply with and shall conduct a review of its operations at least once each year to confirm compliance with the approved policies and documents.

3.06 **Initial Installation**
The Supplier shall install the OTMS system and related equipment in accordance with its implementation plan approved by the Ministry and the following terms. Within four (4) weeks of the date that the Ministry has approved all of the policies and documents set out in Section 3.02, the Supplier shall install the Deliverables (including all hardware necessary for accessing the OTMS system) first at the Transportation and Communication Services ("TCS") and the Victim Support Line ("VSL") offices in Mississauga and North Bay respectively followed by the

implementation of the Supplier's OTMS telephones and conventional public pay telephones at the Toronto Intermittent Centre (TIC).

During the above 4-week period, the Supplier shall provide initial staff training as set out in the RFP and in accordance with the Supplier's training plan approved by the Ministry, and notify the Ministry that such installation and training has been completed.

The Supplier shall ensure that sufficient time is allocated during the above 4-week period for the Ministry to conduct acceptance testing as set forth in Section 3.07.

3.07 **Commencement Date**

(a) The Ministry will conduct acceptance testing of the installed Deliverables and shall notify the Supplier within ten (10) Business Days of receiving the notification under Section 3.06 whether or not the Ministry is satisfied that the Deliverables installed at the TCS office, the VSL office and the TIC meet the requirements specified in the RFP and will operate effectively and reliably.

(b) If the Ministry is not satisfied that the Deliverables meet the requirements or will operate effectively and reliably, the Ministry shall, within the period of ten (10) Business Days specified in Subsection 3.07(a) notify the Supplier of the reason why the Ministry is not satisfied.

(c) If the Ministry informs the Supplier pursuant to Subsection 3.07(b) that the Ministry is not satisfied, then within a further five (5) Business Days the Supplier shall either:

(1) make the necessary adjustments to the Deliverables, in which case the provisions of this Section shall apply to the adjusted Deliverables; or

(2) notify the Ministry that the Supplier does not consider it reasonable or practicable to adjust the Deliverables in the manner required to satisfy the Ministry in which case:

(i) the Supplier and the Ministry shall meet within a further period of five (5) Business Days and negotiate, using all reasonable endeavours, to resolve any matters of contention between the Ministry and the Supplier;

(ii) if the Ministry and the Supplier are able to resolve the matters of contention between the Ministry and the Supplier, the Supplier shall make the necessary adjustments to the Deliverables within ten (10) Business Days; and

(iii) if the Ministry and the Supplier are not able to resolve the matters in contention within a further five (5) Business

Days, then, in the sole and absolute discretion of the Ministry, the Supplier shall be required to comply with the Ministry's requirements to render the Deliverables compliant with the Contract and shall make the necessary adjustments to the Deliverables within 10 (ten) Business Days.

(d) If the Ministry is satisfied that the Deliverables installed at the TCS office, the VSL office and the TIC meet the requirements as specified in the RFP and will operate effectively and reliably, the Ministry shall give notice thereof to the Supplier and shall state in such notice a date (the "Commencement Date") which shall not be more than thirty (30) days after the giving of such notice and which shall not be before June 8, 2013. The statement of the Commencement Date in such notice shall be conclusive evidence of the Commencement Date.

3.08 **Subsequent Installations**

The Deliverables shall be installed at all of the remaining Facilities in accordance with the implementation plan referred to in Section 3.02 and approved pursuant to Section 3.03 no later than twenty-two (22) weeks following the Commencement Date. The Supplier shall provide staff training in respect of those installed Deliverables at each Facility as set out in the RFP and in accordance with the Supplier's training plan approved by the Ministry. The Supplier shall notify the Ministry of the completion of the installations at each Facility and the completion of associated training. Section 3.07 shall apply in respect of acceptance testing for those additional installations except that the notice period in Subsection 3.07(a) shall be five (5) Business Days and not ten (10) Business Days.

3.09 **Use and Access Restrictions; Cooperation**

(a) The Supplier acknowledges that unless it obtains specific written preauthorization from the Ministry, any access to or use of Ministry property, technology or information that is not necessary for the performance of its contractual obligations with the Ministry is strictly prohibited. The Supplier further acknowledges that the Ministry may monitor the Supplier to ensure compliance with this paragraph.

(b) The Supplier shall be required to work in a cooperative manner with the existing service provider during the implementation of the Deliverables.

3.10 **Notification by Supplier to Ministry**

During the Term, the parties shall advise each other promptly of (a) any contradictions, discrepancies or errors found or noted in the Contract; (b) supplementary details, instructions or directions that do not correspond with those contained in the Contract; and (c) any omissions or other faults that become evident and should be corrected in order to provide the Deliverables in accordance with the Contract and Requirements of Law.

3.11 **Condonation Not a Waiver**

Any failure by the Ministry to insist in one or more instances upon strict performance by the Supplier of any of the terms or conditions of the Contract

shall not be construed as a waiver by the Ministry of its right to require strict performance of any such terms or conditions, and the obligations of the Supplier with respect to such performance shall continue in full force and effect.

3.12 **Changes By Written Amendment Only**
Any changes to the Contract shall be by written amendment signed by the parties. No changes shall be effective in the absence of such an amendment.

3.13 **Supplier to Comply With Reasonable Change Requests; Technology Advances**

(a) The Ministry may, in writing, request changes to the Contract, which may include altering, adding to, or deleting any of the Deliverables. The Supplier shall comply with all reasonable Ministry change requests and the performance of such request shall be in accordance with the terms and conditions of the Contract. If the Supplier is unable to comply with the change request, it shall promptly notify the Ministry and provide reasons for such non-compliance. In any event, any such change request shall not be effective until a written amendment reflecting the change has been executed by the parties.

For greater certainty, notwithstanding the foregoing, the Ministry reserves the right to add or delete facilities to those listed in the RFP and the Supplier shall be required to cooperate with respect to such additions or deletions and to install its equipment, or remove as the case may be, as expeditiously as possible.

(b) The OTMS supplied by the Supplier must have the capacity to support a PIN-based OTMS solution, allow for monitoring and recording of inmate calls and support alternate call payment method options as described in the RFP. Should the Ministry choose to implement any of these features during the Term of the Contract; the Ministry will enter into discussions with the Supplier for planning the implementation and ongoing use of the feature in question. Any such implementation plans shall be subject to the Ministry's prior written approval and the Ministry shall not be responsible for any costs associated with any such changes. Notwithstanding Subsection 3.13(a), if implemented, the use of any such features must not result in a decrease in the Commission Percentage Rate and may only have a minimal workload impact on, or be workload neutral to, the Ministry.

(c) In the event that the Supplier acquires or develops alternate or new technology that may enhance the Deliverables and still meet the Ministry's needs, the Supplier shall notify the Ministry in writing. The Ministry and the Supplier shall discuss the potential benefits and implications and by mutual agreement, determine whether the new technology should be included in the Deliverables. For greater certainty, no changes may be made without the Ministry's prior written approval and the Ministry shall not be responsible for any costs associated with any changes made pursuant to this Subsection. For greater certainty, any such approved changes shall not result in any reduction in the Supplier's

Commission Percentage Rate. Any alternate or new technology must meet the same requirements as the original equipment.

3.14 **Work Volumes**
The Supplier acknowledges that it is providing the Deliverables to the Ministry on a non-exclusive basis during the Term. The Ministry makes no representation regarding the volume of goods and services required under the Contract. The number of telephones and offender capacity in the RFP is an estimate only and does not represent a guarantee of the number of telephones to be installed in each Facility or the number of offenders who will be accessing them.

3.15 **Ministry Rights and Remedies and Supplier Obligations Not Limited to Contract**
The express rights and remedies of the Ministry and obligations of the Supplier set out in the Contract are in addition to and shall not limit any other rights and remedies available to the Ministry or any other obligations of the Supplier at law or in equity.

3.16 **Accessibility**
The Supplier shall ensure that the Deliverables comply with the RFP requirements with respect to features designed to make the telephones supplied under the Contract accessible by persons with disabilities. In addition, the Supplier's delivery of the Deliverables shall comply with all applicable requirements, specifications and standards for accessibility established by the Ministry in accordance with the *Accessibility of Ontarians with Disabilities Act, 2005* and any regulations made thereto.

3.17 **French Language Services**
The Supplier shall provide the Deliverables in French and English in those parts of the Province of Ontario that are designated under the *French Language Services Act.*

3.18 **Performance Management Framework**
The Supplier's performance of the Deliverables shall be subject to the performance management framework set out in the RFP.

3.19 **Reports**

(a) The Supplier shall provide to the Ministry the monthly reports set out in the RFP.

(b) The Supplier shall provide to the Ministry such other reports as the Ministry may request in writing with such frequency as the Ministry may reasonably require in the form, and incorporating the particulars, required by the Ministry in respect of the performance of the Deliverables and other matters arising under this Agreement.

3.20 **Information**
Upon request, the Supplier shall provide the Ministry with all information required to enable the Ministry to assess the quality of the Supplier's performance of the Deliverables.

3.21 **Records to be Maintained**

The Supplier shall maintain, and provide to the Ministry's Contract Compliance Manager upon request:

(a) an accurate record of the Supplier's property located at Ministry Facilities and offices under the Contract; and

(b) a full record of all requests received from the Ministry for repair and maintenance and all repair and maintenance matters self-diagnosed by the Supplier's system and the manner in which they have been responded to.

3.22 **Ministry's Contract Compliance Manager**

(a) The Ministry shall, not later than ten (10) Business Days after the Effective Date, appoint a person to be the Ministry's Contract Compliance Manager.

(b) The Ministry shall notify the Supplier of the name, contact address and facsimile and telephone numbers of the person appointed as the Ministry's Contract Compliance Manager.

(c) Subject to other provisions of this Agreement or as otherwise specified by the Ministry, the Ministry's Contract Compliance Manager shall act as the Ministry's primary contact in respect of all day to day contract management matters arising under the Contract.

(d) The Ministry shall also notify the Supplier of any other Ministry representatives with respect to day-to-day operational matters under the Contract.

3.23 **Supplier Project Manager**

(a) The Supplier shall, not later than ten (10) Business Days after the execution of this Contract, appoint a person to be the Supplier Project Manager.

(b) The Supplier shall notify the Ministry of the name, contact address and facsimile and telephone numbers of the person appointed.

(c) The Supplier Project Manager shall be the person primarily responsible for supervising the day-to-day performance of the Deliverables and be the first point of contact for the Ministry's Contract Compliance Manager in respect of any matter relating to the performance of the Deliverables or any other matter under the Contract.

ARTICLE 4 - PAYMENT

s.17(1)
s.18(1)(a)
s.18(1)(c)
s.18(1)(d)

4.01 **Payment**

On a monthly basis, the Supplier shall pay the Ministry of the gross revenue generated by all calls made from all telephones (both OTMS and conventional public pay telephones) supplied by the Supplier under the Contract ("Commission"). For greater certainty, in determining gross revenue, all forms of call payment including connection fees shall be included and there shall be no adjustment for any

associated expenses or taxes incurred by the Supplier in providing the Deliverables or consideration for whether payment has been received by the Supplier. Gross revenue shall not include taxes collected by the Supplier.

4.02 **Payment Process**
The following process shall govern:

(a) The Supplier shall provide the Ministry with payment for the month's Commission for all Facilities no later than thirty (30) days following the last day of the month in which the applicable revenues were generated. Payment of such monthly Commission shall be accompanied by a statement that shall include the reference number assigned to the Contract by the Ministry, the gross revenue and Commission in respect of each facility, and the total Commission in respect of all Facilities.

(b) Each payment must also be accompanied by the complete monthly reports referred to in the RFP. In the event that there is a discrepancy between the amount of the payment and the amount supported by the monthly reports or the statement referred to in Subsection 4.02(a), the Supplier shall provide further documentation to support the amount of the payment no later than ninety (90) days following the last day of the month to which it relates.

(c) The Supplier may make payments under the Contract by way of cheque made payable to the Minister of Finance (Ontario) and sent to the Ministry's Contract Compliance Manager for processing.

4.03 **No Charges**
There shall be no charges payable by the Ministry under the Contract to the Supplier unless otherwise agreed upon by the parties in writing.

4.04 **Supplier Responsible for Operating Costs**
The Supplier shall be responsible for all operating costs of providing the Deliverables except the costs of the Ministry in the performance of the Ministry's obligations. For greater certainty, the Supplier shall be responsible for collection of all payments in connection with the use of the telephones provided under the Contract and shall provide payment to the Ministry pursuant to Section 4.01 without consideration of whether or not the Supplier has received payment from the users of such telephones or recipients of calls from such telephones.

4.05 **Payment of Taxes and Duties**
The Supplier shall pay all applicable taxes, including excise taxes incurred by or on the Supplier's behalf, with respect to the Contract.

4.06 **Interest on Late Payment**
The Supplier shall pay interest on any late payment providing that such late payment was through no fault of the Ministry. The interest rate for such late payment shall be the rate of interest fixed by order by the Lieutenant Governor in Council from time to time pursuant to Section 10(4) of the *Financial Administration Act.*

4.07 **Document Retention and Audit**

During the fiscal period (fiscal period runs from April 1 to March 31) to which they relate and for a period of seven (7) years thereafter ("Retention Period"), the Supplier shall maintain all necessary records to substantiate all payments under the Contract. During such Retention Period, the Supplier shall permit and assist the Ministry in conducting audits of the operations of the Supplier to verify payments under the Contract. The Ministry shall provide the Supplier with at least ten (10) Business Days prior notice of its requirement for such audit. The Supplier's obligations under this paragraph shall survive any termination or expiry of the Contract.

4.08 **Calling Rates**

Subject to this Section 4.08 and to Section 3.05(a), the Supplier shall establish the calling rates for local and long distance calls from all telephones. The Supplier shall ensure that the local and long distance rates and connection fees for all telephones are no higher than the published residential rates established by the Incumbent Local Exchange Carrier (ILEC) applicable to a comparable call connected and billed by the Supplier placed outside the Facility within the local community of the applicable Facility. In accordance with Section 3.02(a)(5) and upon the Ministry's request during the Term of the Contract, the Supplier shall provide written documentation satisfactory to the Ministry, in its sole discretion, to demonstrate compliance with this Section 4.08.

ARTICLE 5 – CONFIDENTIALITY, RECORDS AND FIPPA

5.01 **Confidentiality and Promotion Restrictions**

Any publicity or publications related to the Contract shall be at the sole discretion of the Ministry. The Ministry may, in its sole discretion, acknowledge the Deliverables provided by the Supplier in any such publicity or publication. The Supplier shall not make use of its association with the Ministry without the prior written consent of the Ministry. Without limiting the generality of this paragraph, the Supplier shall not, among other things, at any time directly or indirectly communicate with the media in relation to the Contract unless it has first obtained the express written authorization to do so by the Ministry.

5.02 **Public Documents**

(a) Nothing in the Contract prevents or restricts the Ministry from complying fully with its obligations under Requirements of Law.

(b) The Ministry shall have the right to publish or otherwise disclose information about the performance of the Contract and/or any other information as it may deem appropriate from time to time. The Supplier acknowledges that information about its performance under the Contract does not constitute Supplier Confidential Information.

(c) The Supplier consents to the release of this Agreement at the option of the Ministry subject to the Ministry's obligations with respect to Supplier Confidential Information under Section 5.04. The Supplier acknowledges that the Ministry may be required to disclose this Agreement pursuant to a request under the *Freedom of Information and Protection of Privacy Act* (Ontario) and that this Agreement may become a public document.

5.03 **Ministry Confidential Information**

During and following the Term, the Supplier shall (a) keep all Ministry Confidential Information confidential and secure; (b) limit the disclosure of Ministry Confidential Information to only those of its directors, officers, employees, agents, partners, affiliates or subcontractors who have a need to know it for the purpose of providing the Deliverables and who have been specifically authorized to have such disclosure; (c) not directly or indirectly disclose any Ministry Confidential Information (except for the purpose of providing the Deliverables, or except if required by order of a court or tribunal), without first obtaining: (i) the written consent of the Ministry and (ii) in respect of any Ministry Confidential Information about any third-party, the written consent of such third-party; (d) provide Ministry Confidential Information to the Ministry on demand; and (e) return all Ministry Confidential Information to the Ministry before the termination or expiry of the Term, with no copy or portion kept by the Supplier.

5.04 **Supplier Confidential Information**

The Ministry shall hold the Supplier Confidential Information in confidence and shall not publish or otherwise disclose or make use of the Supplier Confidential Information otherwise than in connection with the Contract, save

(a) with the Supplier's prior consent, which consent may be arbitrarily withheld; or

(b) to the extent required by Requirements of Law or other competent regulatory authority,

provided that the provisions of this Section 5.04 shall not restrict the Ministry from disclosing Supplier Confidential Information to the Ombudsman, to OPS staff or to the professional advisors of the Ministry to the extent necessary for the purpose of the Contract.

5.05 **Restrictions on Copying**

The Supplier shall not copy any Ministry Confidential Information, in whole or in part, unless copying is essential for the provision of the Deliverables. On each copy made by the Supplier, the Supplier must reproduce all notices that appear on the original.

5.06 **Injunctive and Other Relief**

The Supplier acknowledges that breach of any provisions of this Article may cause irreparable harm to the Ministry or to any third-party to whom the Ministry owes a duty of confidence, and that the injury to the Ministry or to any third-party may be difficult to calculate and inadequately compensable in damages. The Supplier agrees that the Ministry is entitled to obtain injunctive relief (without proving any damage sustained by it or by any third-party) or any other remedy against any actual or potential breach of the provisions of this Article.

5.07 **Notice and Protective Order**

If the Supplier or any of its directors, officers, employees, agents, partners, affiliates or subcontractors becomes legally compelled to disclose any Ministry

Confidential Information, the Supplier will provide the Ministry with prompt notice to that effect in order to allow the Ministry to seek one or more protective orders or other appropriate remedies to prevent or limit such disclosure, and it shall co-operate with the Ministry and its legal counsel to the fullest extent. If such protective orders or other remedies are not obtained, the Supplier will disclose only that portion of Ministry Confidential Information which the Supplier is legally compelled to disclose, only to such person or persons to which the Supplier is legally compelled to disclose, and the Supplier shall provide notice to each such recipient (in co-operation with legal counsel for the Ministry) that such Ministry Confidential Information is confidential and subject to non-disclosure on terms and conditions equal to those contained in the Agreement and, if possible, shall obtain each recipient's written agreement to receive and use such Ministry Confidential Information subject to those terms and conditions.

5.08 **Compulsory Disclosure**

If the Ministry receives a request to disclose Supplier Confidential Information, the Ministry will provide the Supplier with notice to that effect in order to allow the Supplier to seek one or more protective orders or other appropriate remedies to prevent or limit such disclosure, and it shall co-operate with the Supplier and its legal counsel to the extent possible. If such protective orders or other remedies are not obtained, the Ministry will only disclose that portion of Supplier Confidential Information which the Ministry is legally compelled to disclose, only to such person or persons to which the Ministry is legally compelled to disclose.

5.09 **FIPPA Records and Compliance**

The Supplier and the Ministry acknowledge and agree that FIPPA applies to and governs all Records and may require the disclosure of such Records to third parties. Furthermore, the Supplier agrees:

(a) to keep Records secure and, without limiting the foregoing, to keep all OTMS traffic records and data in a secure location within Canada;

(b) to provide Records to the Ministry within seven (7) calendar days of being directed to do so by the Ministry for any reason including an access request or privacy issue;

(c) not to directly or indirectly use, collect, disclose or destroy any Personal Information for any purposes not directly related to the performance of its obligations under the Contract and as authorized by the Ministry;

(d) to restrict access to Personal Information to those of its employees or employees of any of its subcontractors, as authorized by the Ministry, who have a need to know it for the purpose of providing the Deliverables; and

(e) that any confidential information supplied to the Ministry may be disclosed by the Ministry where it is obligated to do so under FIPPA, by an order of a court or tribunal or pursuant to a legal proceeding;

and the provisions of this paragraph shall prevail over any inconsistent provisions in the Contract.

5.10 **Survival**
The provisions of this Article shall survive any termination or expiry of the Contract.

ARTICLE 6 – INTELLECTUAL PROPERTY

6.01 **Ministry Intellectual Property**
The Supplier agrees that all Intellectual Property and every other right, title and interest in and to all concepts, techniques, ideas, information and materials, however recorded, (including images and data) provided by the Ministry to the Supplier shall remain the sole property of Her Majesty the Queen in right of Ontario at all times.

6.02 **Supplier's Intellectual Property**
All Intellectual Property rights vested in the Supplier or any of its subcontractors or suppliers before the Effective Date and any Intellectual Property created by the Supplier or its subcontractors or suppliers during the Term of the Contract independently of the performance of the Supplier's obligations under the Contract are and shall remain vested in and the property of the Supplier or the applicable subcontractor or supplier as the case may be.

6.03 **Transfer of Intellectual Property Rights**

(a) The Supplier shall not challenge whether the Ministry owns Intellectual Property rights in or assert that the Supplier owns any Intellectual Property rights in:

(1) Ministry Confidential Information; and
(2) all Call Traffic Records and, subject to Subsection (b) below, Project Operational Records.

(b) The Ministry shall own all Intellectual Property rights in all Call Traffic Records. For greater certainty, the ownership rights granted herein shall extend to the data within the Call Traffic Records but shall not extend to any of the concepts, ideas, techniques or know-how relied upon by the Supplier to develop such items. The Ministry shall own all Intellectual Property Rights in the Project Operational Records developed for the Ministry under the Contract. For greater certainty, the ownership rights granted herein shall not apply to any documents or materials owned by the Supplier or its subcontractors or suppliers before the Effective Date that were not developed specifically for the Ministry, or to any concepts, ideas, techniques or know-how relied upon by the Supplier to develop such items. During the Term, Supplier grants a world-wide, non-exclusive, irrevocable, royalty-free, fully paid-up right and license to use those parts of the Project Operational Records for which the Supplier retains any Intellectual Property Rights in accordance with Section 6.04.

(c) The Ministry and the Supplier acknowledge that in the event that the parties agree to jointly develop an idea, process or technique during the Term of the Contract:

(1) subject to Subsections 6.03(a) and (b), all Intellectual Property arising out of such development shall be jointly owned by the Ministry and the Supplier;

(2) the Ministry is not obliged to make any payment or to provide any other compensation to the Supplier in respect of the Intellectual Property rights referred to in Paragraph 6.03(c)(1) and may grant licenses to such Intellectual Property rights to any Person for use in connection with the correctional system in the Province of Ontario; and

(3) the Supplier is not obliged to make any payment or provide any other compensation to the Ministry in respect of the Intellectual Property rights referred to in Paragraph 6.03(c)(1).

6.04 **No Restrictive Material**

The Supplier shall not incorporate into any of the items identified in Subsection 6.03(a)(2) anything that would restrict the right of the Ministry to modify, further develop or otherwise use this information in any way that the Ministry deems necessary, or that would prevent the Ministry from entering into any contract with any contractor other than the Supplier for the modification, further development of or other use of the information.

6.05 **Supplier Representation and Warranty Regarding Third-Party Intellectual Property**

The Supplier represents and warrants that, to the best of its knowledge, the provision of the Deliverables shall not infringe or induce the infringement of any Third-Party Intellectual Property rights. The Supplier further represents and warrants that it has obtained assurances with respect to any Third-Party Intellectual Property that any rights of integrity or any other moral rights associated therewith have been waived in connection with the Deliverables listed in Subsection 6.03(a).

For greater certainty, the Supplier represents and warrants that the once the Call Traffic Records are provided to the Ministry pursuant to the Contract, the Ministry shall be able to access them without requiring any software or other equipment that is proprietary to the Supplier and in a format accessible by software applications operated by the Ministry during the Term of the Contract.

6.06 **Moral Rights**

The Supplier shall obtain waivers of all rights of integrity and any other moral rights in relation to the Deliverables from its employees, volunteers, agents and subcontractors and from any other party in the position to assert such rights in relation to any of the Deliverables, which waivers may be invoked without restriction by any person authorized by the Ministry to use the Deliverables. Any such waiver shall be in a form acceptable to the Ministry.

6.07 **Further Assurances Regarding Moral Rights and Copyright**

At the request of the Ministry, at any time or from time to time, the Supplier shall execute and agrees to cause anyone in the position to assert copyright in or rights of integrity or any other moral right (including its employees, volunteers,

agents and subcontractors) in relation to the Deliverables to execute a written assignment of copyright (for any Deliverables to be owned by the Ministry or jointly owned by the Ministry and the Supplier in accordance with Section 6.03, as the case may be) and waiver of moral rights in the applicable Deliverable to the Ministry in a form acceptable to the Ministry. The Supplier shall deliver such written assignment(s) and waivers to the Ministry within 10 Business Days of the receipt of the request from the Ministry. The Supplier shall assist the Ministry in preparing any Canadian copyright registration that the Ministry considers appropriate. The Supplier will obtain or execute any other document reasonably required by the Ministry to protect the Intellectual Property of the Ministry.

6.08 **No Use of Ontario Government Insignia**
The Supplier shall not use any insignia or logo of Her Majesty the Queen in right of Ontario except where required to provide the Deliverables, and only if it has received the prior written permission of the Ministry to do so.

6.09 **Software Licence**
During the Term of the Contract, the Supplier grants a world-wide, non-exclusive, irrevocable, royalty-free, fully paid-up right and license to the Ministry to use the Supplier's software and any software sublicensed by the Supplier and any updates thereto, solely in executable object code format and solely as required for the purposes of the Contract. The Ministry acknowledges that title to all Intellectual Property in the software shall remain with the Supplier or the software licensor, as applicable. The Ministry agrees not to copy, modify, disassemble or decompile the software provided by the Supplier or to authorize any third party to do so.

6.10 **Survival**
The obligations contained in this Article shall survive the termination or expiry of the Contract.

ARTICLE 7 – INDEMNITY AND INSURANCE

7.01 **Supplier Indemnity**
The Supplier hereby agrees to indemnify and hold harmless the Indemnified Parties from and against any and all liability, loss, costs, damages and expenses (including legal, expert and consultant fees), causes of action, actions, claims, demands, lawsuits or other proceedings, (collectively, "Claims"), by whomever made, sustained, brought or prosecuted, including for third party bodily injury (including death), personal injury and property damage, in any way based upon, occasioned by or attributable to anything done or omitted to be done by the Supplier, its subcontractors or their respective directors, officers, agents, employees, partners, affiliates or independent contractors in the course of performance of the Supplier's obligations under, or otherwise in connection with, the Contract. The Supplier further agrees to indemnify and hold harmless the Indemnified Parties for any incidental, indirect, special or consequential damages, or any loss of use, revenue or profit, by any person, entity or organisation, including, without limitation, the Ministry, claimed or resulting from such Claims. The obligations contained in this paragraph shall survive the termination or expiry of the Contract.

7.02 **Supplier's Insurance**

The Supplier hereby agrees to put in effect and maintain for the duration of the Contract, at its own cost and expense, with insurers having a secure A.M. Best rating of B+ or greater, or the equivalent, all the necessary and appropriate insurance that a prudent person in the business of the Supplier would maintain including, but not limited to the following:

commercial general liability insurance on an occurrence basis for third party bodily injury, personal injury and property damage, to an inclusive limit of not less than $2,000,000 per occurrence, $2,000,000 products and completed operations aggregate.

The policy is to include the following:

- the Indemnified Parties as additional insureds with respect to liability arising in the course of performance of the Supplier's obligations under, or otherwise in connection with, the Contract
- contractual liability coverage
- cross-liability clause
- employers liability coverage (or compliance with the paragraph below entitled "Proof of W.S.I.A. Coverage" is required)
- 30 day written notice of cancellation
- tenants legal liability coverage (if applicable and with applicable sub-limits)
- non-owned automobile coverage with blanket contractual coverage for hired automobiles

7.03 **Proof of Insurance**

The Supplier shall provide the Ministry with proof of the insurance required by this Agreement in the form of valid certificates of insurance that reference this Agreement and confirm the required coverage, before the execution of the Agreement by the Ministry, and renewal replacements on or before the expiry of any such insurance. Upon the request of the Ministry, a copy of each insurance policy shall be made available to it. The Supplier shall ensure that each of its subcontractors obtains all the necessary and appropriate insurance that a prudent person in the business of the subcontractor would maintain and that the Indemnified Parties are named as additional insureds with respect to any liability arising in the course of performance of the subcontractor's obligations under the subcontract for the provision of the Deliverables.

7.04 **Proof of W.S.I.A. Coverage**

If the Supplier is subject to the *Workplace Safety and Insurance Act, 1997* (WSIA), it shall submit a valid clearance certificate of WSIA coverage to the Ministry prior to the execution of this Agreement by the Ministry. In addition, the Supplier shall, from time to time at the request of the Ministry, provide additional WSIA clearance certificates. The Supplier covenants and agrees to pay when due, and to ensure that each of its subcontractors pays when due, all amounts required to be paid by it/its subcontractors, from time to time during the Term of the Contract, under the WSIA, failing which the Ministry shall have the right, in

addition to and not in substitution for any other right it may have pursuant to the Contract or otherwise at law or in equity, to pay to the Workplace Safety and Insurance Board any amount due pursuant to the WSIA and unpaid by the Supplier or its subcontractors and to recover such amount from the Supplier together with all costs incurred by the Ministry in connection therewith.

7.05 **Supplier Participation in Proceedings**
The Supplier shall, at its expense, to the extent requested by the Ministry, participate in or conduct the defence of any Proceeding against any Indemnified Parties referred to in this Article and any negotiations for their settlement. The Ministry may elect to participate in or conduct the defence of any such Proceeding by notifying the Supplier in writing of such election without prejudice to any other rights or remedies of the Ministry under the Contract, at law or in equity. Each Party participating in the defence shall do so by actively participating with the other's counsel. The Supplier shall enter into no settlement unless it has obtained the prior written approval of the Ministry. If the Supplier is requested by the Ministry to participate or conduct the defence of any such Proceeding, the Ministry agrees to co-operate with and assist the Supplier to the fullest extent possible in the Proceedings and any related settlement negotiations. If the Ministry conducts the defence of any such Proceedings, the Supplier agrees to co-operate with and assist the Ministry to the fullest extent possible in the Proceedings and any related settlement negotiations. This paragraph shall survive any termination or expiry of the Contract.

ARTICLE 8 – TERMINATION AND EXPIRY

8.01 **Immediate Termination of Contract**
The Ministry may immediately terminate the Contract upon giving notice to the Supplier where:

(a) the Supplier is adjudged bankrupt, makes a general assignment for the benefit of its creditors or a receiver is appointed on account of the Supplier's insolvency;

(b) the Supplier breaches any provision in paragraphs 5.01, 5.03, 5.05, 5.06, 5.07 or 5.09 of Article 5 (Confidentiality, Records and FIPPA) of this Agreement;

(c) the Supplier breaches the Conflict of Interest paragraph in Article 2 (Legal Relationship Between Ministry, Supplier and Third-Parties) of this Agreement;

(d) the Supplier, prior to or after executing this Agreement, makes a material misrepresentation or omission or provides materially inaccurate information to the Ministry;

(e) the Supplier undergoes a change in control which adversely affects the Supplier's ability to satisfy some or all of its obligations under the Contract;

(f) the Supplier subcontracts for the provision of part or all of the Deliverables or assigns the Contract without first obtaining the written approval of the Ministry;

(g) the Supplier's acts or omissions constitute a substantial failure of performance; or

(h) the Ministry has issued a rectification notice to the Supplier setting out the manner and time-frame for rectification and the Supplier has failed to, within fifteen (15) Business Days of receipt of such notice, either (a) comply with that rectification notice or (b) provide a rectification plan satisfactory to the Ministry

and the above rights of termination are in addition to all other rights of termination available at law, or events of termination by operation of law.

8.02 **Rectification Notice**
Subject to the above paragraph, where the Supplier fails to comply with any of its obligations under the Contract, the Ministry may issue a rectification notice to the Supplier setting out the manner and time frame for rectification. Within fifteen (15) Business Days of receipt of that notice the Supplier shall either (a) comply with that rectification notice; or (b) provide a rectification plan satisfactory to the Ministry.

8.03 **Supplier's Obligations on Termination**
Upon the termination of the Contract, the Supplier shall, in addition to its other obligations under the Contract and at law:

(a) provide the Ministry with a report detailing (i) the current state of the provision of Deliverables by the Supplier at the date of termination; and (ii) any other information reasonably requested by the Ministry pertaining to the provision of the Deliverables and performance of the Contract;

(b) execute such documentation as may be required by the Ministry to give effect to the termination of the Contract; and

(c) comply with any other instructions provided by the Ministry, including but not limited to instructions for facilitating and cooperating with respect to the transfer of its obligations to another Person.

This paragraph shall survive the expiry or termination of the Contract.

8.04 **Return of Property**
(a) Subject to Subsection 8.04(b), the Supplier shall, within a reasonable period of time after the expiry or termination of the Contract, as applicable, deliver to the Ministry:

(1) all Ministry Confidential Information;
(2) all Call Traffic Records to the extent they may be in the possession or control of the Supplier;

(3) if applicable, all inmate call recordings in a format approved by the Ministry; and

(4) any other Ministry property or information used in performing the Deliverables.

(b) The Supplier may:

(1) retain all materials not specifically set out in Subsection 8.04(a); and

(2) retain originals or copies of documents required by the Supplier to comply with its obligations under Requirements of Law and

(A) in the case of originals retained, deliver copies to the Ministry; and
(B) in the case of copies retained, deliver the originals to the Ministry.

8.05 **Supplier's Payment upon Termination**
The Supplier shall only be responsible for providing compensation to the Ministry up to and including the effective date of any termination. For greater certainty, during the end of the Initial Term when the Supplier is decommissioning and removing its equipment or during the period referred to in Subsection 8.08 (b) and 8.09(a), as the case may be, the Supplier shall only be responsible for providing compensation to the Ministry while the telephones remain operational and not once they have been decommissioned. Termination shall not relieve the Supplier of its warranties and other responsibilities relating to the Deliverables performed.

8.06 **Termination in Addition to Other Rights**
The express rights of termination in this Agreement are in addition to and shall in no way limit any rights or remedies of either party under this Agreement, at law or in equity, except to the extent such rights and remedies have been expressly waived, amended or limited by the terms of this Agreement.

8.07 **Expiry**
The Contract shall expire on the Expiry Date unless terminated earlier in accordance with the terms of the Contract. The Supplier acknowledges that if the Ministry does not exercise any option to extend the Contract after the Initial Term, the Supplier will be required to decommission and remove its equipment at the direction of the Ministry by the end of this Initial Term or as otherwise directed by the Ministry, and that a new service provider may be commencing operations.

8.08 **Options upon Expiry of Initial Term**
Upon the expiry of the Initial Term, the Ministry shall have the following options:

(a) to extend the term for up to one (1) year, such extension to be upon the same terms, conditions and covenants contained in the Contract excepting this option to extend; or

(b) to extend the term for up to one (1) year, such extension to be upon the same terms, conditions and covenants contained in the Contract excepting this option to extend and the following conditions. The Supplier acknowledges that during this period it will be required to decommission

and remove its equipment at the direction of the Ministry and that a new service provider may be commencing operations.

Such options shall be exercisable by giving written notice to the Supplier not less than six months before the expiry of the Initial Term.

8.09 **Further Options**
In the event that the Ministry exercises the extension option set out in Subsection 8.08(a), the Ministry shall have the following option upon the expiry of such extension:

(a) to extend the term for up to one (1) year, such extension to be upon the same terms, conditions and covenants contained in the Contract excepting this option to extend and the following conditions. The Supplier acknowledges that during this period it will be required to decommission and remove its equipment at the direction of the Ministry and that a new service provider may be commencing operations.

Such option shall be exercisable by giving written notice to the Supplier not less than six months before the expiry of the extension referred to in Subsection 8.08(a).

8.10 **Supplier's Resources**
The Supplier's Resources shall remain the property of the Supplier or its applicable subcontractors or suppliers throughout the Term of the Contract.

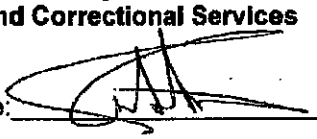
ARTICLE 9 – SECURITY AND ACCESS TO FACILITIES

9.01 **Security Issues**
The Ministry retains the right in its sole discretion to deny any Person access to any or all of the Facilities or any Ministry offices. Without limiting the foregoing, the Ministry, in its sole discretion, may at any time prohibit the Supplier's personnel or subcontractors from accessing any Facility or Ministry office, including in the event of a riot, lockdown or other security event at a Facility. If the Ministry prohibits such access by the Supplier, the provisions of Section 2.13(b) shall apply with necessary amendments.

9.02 **Disruption**
Unless permitted by the Ministry to do otherwise, the Supplier shall use its best efforts not to disrupt or to interfere with the Ministry's day-to-day operations and business in the course of providing the Deliverables under the Contract.

IN WITNESS WHEREOF the parties hereto have executed this Agreement effective as of the date of the last signature.

Her Majesty the Queen in right of Ontario as represented by the Minister of Community Safety and Correctional Services

Signature: 

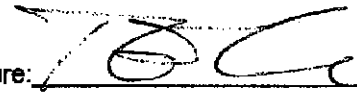
Name: Curt Arthur

Title: Assistant Deputy Minister

Date of Signature: 25-Jan-13

Pursuant to delegated authority

Bell Canada

Signature: 

Name: THOMAS Little

Title: President Bell Business Markets

Date of Signature: JAN 18, 2013

I have authority to bind the Supplier.

Bell

Proposal for

Offender Telephone Management System (OTMS)

and Conventional Public Pay Telephones

Ministry of Community and Correctional Services

Request for Proposals No.: COS-0009

s.21(1)

November 20, 2012 @ 11:00 a.m. (Toronto Time)

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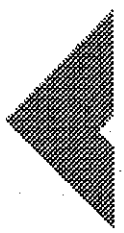
s.17(1)



Executive Summary

Bell Canada (Bell) is proud to submit a fully compliant proposal to the Ministry of Community Safety and Correctional Services for an Offender Telephone Management System. With Bell services, network reliability and dedicated account management, we are best positioned to provide a solution that will exceed all of your requirements.

Our priority is to deliver an Inmate Telephone System (ITS) that focuses on reliability, simplicity and quality; meeting all of your requirements. Bell will be accountable for the end-to-end service delivery of our proposed solution and provide the Ministry with a single point of contact for the term of the agreement.

Bell was the first Canadian communications company invited by Correctional Authorities to provide offender telephone communication within secure areas of the institution. We are proud that our relationships with correctional authorities have stood the test of time and look forward to the opportunity to renew this partnership.

Bell is focused on the unique requirements of offender communications by providing our corrections clients with valuable applications and services. Our experience is built into the foundation of our ITS product which was developed and continues to be upgraded in-house. With the introduction of Bell ITS we believe we will provide an application that is efficient and reliable for the user while providing new and targeted capabilities to manage and control offender calling such as:

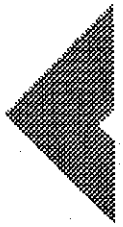
- Management, Administration and Maintenance
- All real time security controls, including call blocking
- Tracking Reports which provide specific network call dispositions, including call and traffic reports
- Statistical and financial reports accessible 7/24/365
- Repair and Service reporting 7/24/365
- Customizable Bell ITS management tool allowing for enhancements based on customer's changing needs
- Bell ITS offers bilingual support

Bell understands the importance of deploying the right technology to better service the institutions in order to meet the Ministry policy objectives to:

- Protect victims of crime, witnesses and other members of the public from harassment and intimidation by offenders in the provincial institutions
- Restrict the ability of offenders to conduct criminal activity while incarcerated
- Provide offenders with reasonable access to telephone services for the purpose of maintaining family, friend and community ties, and supporting rehabilitation
- Provide Commission from the OTMS and conventional public pay telephones

- Provide unparalleled service levels for repair and support via multiple points of presence geographically
- Bell is providing identical call rate and connection fees including all time of day and mileage discounts as are experienced by Bell residential customer

Bell believes we are uniquely positioned within the province to deliver a fully compliant integrated inmate solution which will address all your specific requirements. Bell looks forward to working with the Ministry of Community Safety and Correctional Services to deploy Bell Inmate Telephone System.



Bell

Ministry of Community Safety and Correctional Services

Response to Rated Criteria

Experience and Qualifications

3.3.1. Experience and Qualifications (16 points)

Each Proponent should provide in its proposal a summary of the Proponent's experience in providing an offender telephone management system and conventional public pay telephones including:

(a) Number of years of experience (3 points);

Headquartered in Montréal, Quebec since its founding in 1880, Bell is Canada's largest communications and multimedia company. Bell is wholly owned by BCE Inc. (TSX, NYSE: BCE). Bell Canada has a long history of providing payphone services to correctional facilities with 19 years experience providing offender telephone management systems and over 130 years of providing conventional public pay telephone services.

Offender Telephone Management Systems (OTMS) Experience: Bell has 19 years of OTMS experience and was the first provider of OTMS in Canada.

Bell Canada was the first Canadian communications company to provide a specific tool for offender telephone management within secure areas of correctional institutions in Canada. Since 1993, Bell has provided customized services for secure environments. Bell's first solution was Nortel's Millennium™ Inmate Maximizer System which still services some customers to this day. Bell recognized the need for a customized solution to meet the various levels of restriction in their customers' requirements. In 2006 Bell developed its own in-house Inmate Telephone System (ITS). The original Bell ITS has seen many upgrades but its fundamental benefit – to make life simpler for our customers – remains unchanged. This reliable, robust solution was built from the ground up so that management, administration and maintenance are available 7/24/365 with no single point of failure.

In 2012 Bell payphones have come full circle, serving a need to those without home service, those who may be wireless challenged, and continuing to serve locations/environments where wireless service is not permitted/available.

The Bell ITS solution has evolved to surpass industry standards, while still based on a Bell foundation which is configured to be fully redundant and network based.

Conventional Public Pay Telephone Service Experience: Bell Canada has over 130 years of providing conventional public pay telephone services in Canada.

In 1999, Bell's payphone business had evolved to almost 86,000 payphones located throughout Ontario and Quebec. Today, with just over 51,000 Millennium™ payphones, located in Ontario/Quebec and Alberta/British Columbia, Bell is the largest Millennium™ payphone

operation in the world. Each payphone is still individually monitored and managed by Bell's dedicated payphone department and our Millennium Network Control Centre (NCC).

(b) Description of services previously provided and specifics of the secure custodial environment for which services were provided (3 points);

DESCRIPTION OF PRODUCTS PROVIDED

Bell Inmate Maximizer

The Inmate Maximizer was the first generation offender telephone management tool to be installed and supported in secure custodial locations. This provided OTMS support for all deliverables and requirements by using a graphically based software operating system that ran on a PC work station. In summary, the Bell Inmate Maximizer met all requirements for controlling inmate calls, call detail reports, inmate pin numbers, and call blocking.

Bell Inmate Telephone System

In 2006, Bell Canada introduced a new Inmate Telephone System (ITS). Bell chose to develop the new application in-house to ensure the needs and priorities of Canadian Correctional Ministries were addressed – something that no other product on the market could offer in either Canada or the United States. The ITS offered a suite of new features for correctional authorities to discretely manage and supervise offender calling. The Bell ITS was engineered to monitor 7/24/365 and provide fail-safe features in the event of a system outage, scheduled maintenance, or application/software upgrades. Offender calls can be routed automatically to an alternate service node with no loss of data or compromise of call controls. Bell's experience is reflected in the inmate product which targets the user experience while providing an application that efficiently and effectively manages and controls offender calling.

s.14(1)(i)
s.14(1)(j)
s.14(1)(k)
s.14(1)(l)
s.17(1)
s.18(1)(c)

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Page(s) 54 – 57 have been exempted pursuant to sections 14(1)(i), 14(1)(j), 14(1)(k), 14(1)(l), 17(1) and 18(1)(c) of the Freedom of Information and Protection of Privacy Act.

Type of Document:
Proposal

Reporting Requirements

3.3.2. Reporting Requirements (8 points)

Each Proponent should provide in its proposal a sample report identifying all requirements as listed in section 2.3.7 including:

Read, understood and comply.

2.3.7. Call Tracking and Call Traffic Reports

The Ministry must have direct access to all call record data generated for reporting purposes during the Term of the Agreement.

The Successful Proponent's business solution must provide the capability for call tracking; an automated process to track telephone use; call details; and local and long distance telephone call Gross Revenue. In addition, the business solution shall track call data from the OTMS telephones that enables the Ministry to identify specific telephone numbers called from specific OTMS telephones. The Ministry must be capable of running a report for all data from all Facilities at any time directly from the Successful Proponent's business solution. The business solution must not time out during the generation of the report. The business solution must be able to save generated reports for two (2) Business Days onto the Successful Proponent's business solution allowing Ministry authorized staff to download large data reports after creation.

s.14(1)(i)
s.14(1)(l)
s.17(1)
s.18(1)(c)

(a) a sample Facility Report by Individual Telephone (as per Section 2.3.7.1 i) (3 points);

2.3.7.1 Types of Reports

The Successful Proponent must provide to the Ministry monthly reports containing the information specified below. All data from the OTMS and conventional public pay telephones contained in the reports will be the property of the Ministry.

Each report shall include a Ministry approved reference number identifying the dates the report represents and shall include the required information as follows:

i) Facility Report by Individual Telephone
List of telephones in the Facility identified by:

- *Telephone number;*
- *Location of telephone in the Facility; and*
- *Type of telephone (OTMS or conventional public pay telephone).*

For each OTMS and conventional public pay telephone, between the hours of 0801-1800hrs, 1801-0800hrs, and 2300-0600hrs for Monday-Friday, and a separate report for the same time frames for weekends and holidays:

- *Number of local calls and total minutes;*
- *Gross Revenue from local calls;*
- *Local collect call connection fees;*
- *Number of long distance calls and total minutes;*
- *Gross Revenue from long distance calls;*
- *Long distance collect call connection fees; and*
- *Number of blocked call attempts.*

s.17(1)

(b) a sample Provincial System Report: Consolidated by Facility (as per Section 2.3.7.1 ii) (2 points); and

ii) Provincial System Report: Consolidated by Facility
List of Facilities:

- *Location of each Facility; and*
- *Number of OTMS and conventional public pay telephones at each Facility.*

Totals at each Facility between the hours of 0801-1800hrs, 1801-0800hrs, and 2300-0600hrs for Monday-Friday, and a separate report for the same time frames for weekends and holidays:

- *Number of local calls and total minutes;*
- *Gross Revenue from local calls;*
- *Local collect call connection fees;*
- *Number of long distance calls and total minutes;*
- *Gross Revenue from long distance calls;*
- *Long distance collect call connection fees; and*
- *Number of blocked call attempts.*

s.17(1)

(c) a sample System Service Report (as per Section 2.3.7.1 iii) (3 points).

iii) System Service Report
For each Facility location with system equipment installed:

- *Number of instances that the Successful Proponent was contacted by the Ministry for system related service issues;*
- *Number of instances that the Successful Proponent contacted the Ministry for system-related service issues;*
- *Number of occasions on which the Successful Proponent provided technical assistance on-site;*
- *Percentage of out-of-service trouble reports cleared within 24 hours (as set out in CRTC Decision 97-16 Quality of Service Indicators for Use in Telephone Company Regulation);*
- *Percentage of repair appointments met within twenty-four hours (as set out in CRTC Decision 97-16); and*
- *Percentage of repair appointments which failed to meet the Ministry requirements.*

The Successful Proponent's business solution must, at no cost to the Ministry, allow for:

- *Reporting flexibility in applying changes to the above report parameters;*
- *Retention of all data, both current and historical during the Term of the Agreement;*
- *A secure location for data storage;*
- *All OTMS traffic records and data to remain in Canada; and*
- *All reported data to be provided to the Ministry in a non-proprietary electronic format.*

These reports must be received by the Ministry in a non-proprietary electronic format on a monthly basis, no later than thirty (30) days following the end of the month to which the data relates.

The Ministry must be able to directly generate a report from the system outlining the programmed on/off times for a particular telephone, a Facility, or all Facilities.

Should the Ministry implement a PIN based solution, the monthly report definitions will be reviewed for any required changes in required data, format and/or additional reports that may be required.

The Successful Proponent's proposal must provide a mechanism which alerts designated Ministry personnel by electronic mail indicating the opening status updates and closing of all trouble tickets. The electronic mail will clearly document the ticket number, individual logging ticket, nature of the problem as reported by the Facility or by the Successful Proponent, the time the problem was reported, the name of the individual reporting the issue, the time and concise repair steps leading to the resolution and final resolution date.

All data from the OTMS and conventional telephones, including Call Traffic Records (including service reports), the monthly Commission report, and relevant data dictionaries shall be provided by the Successful Proponent at no cost to the Ministry. These reports, including adhoc reports must be available in a non-proprietary format to the Ministry using Microsoft Excel, Access or SQL (Oracle) in comma delimited ASCII text files that allows the Ministry to access and analyze the data with the Ministry's standard statistical reporting/writing tools. The Ministry will notify the Successful Proponent of the Ministry personnel who are authorized to request and receive all reports generated by the Successful Proponent. The Successful Proponent will redirect any requests for information or reports from other sources to such personnel.

All costs associated with producing both regular and adhoc reports for the Ministry will be the responsibility of the Successful Proponent for the term of the Agreement.

The Ministry may publish selected Call Traffic Records for the purpose of facilitating competitive procurements for subsequent telephone contracts.

s.17(1)

Technology Infrastructure, Systems and Applications

3.3.3. Technology Infrastructure, Systems and Applications (20 points)

Each Proponent should provide in its proposal information on how they will maintain necessary resources including staff and infrastructure components to fully support the system and ensure that it continues to operate as required (as per Section 2.3.8). Proponents should describe the:

2.3.8. Technology Infrastructure, Systems and Applications

All OTMS equipment, other than wiring currently installed at each Facility's main telephone room located within the Facility, will be supplied, owned, supported and maintained by the Successful Proponent. This equipment includes, but is not limited to the conventional public pay telephones, OTMS telephones, bix blocks, digital equipment (for example digital analog converters), on/off switches, and personal computers, if required by the Successful Proponent's business solution, for managing the features of the OTMS. The Successful Proponent must install all technical components required to make the entire business solution operate as required. The Ministry will not be responsible for the installation of any additional cabling, analog or digital (CAT3. CAT5 CAT6 fibre optic cabling etc.), required for the OTMS beyond the minimum CAT 3 wiring already in existence within the Facilities and owned by the Ministry. Any such additional wiring will become the property of the Ministry at the end of the term of the Agreement.

The Successful Proponent shall maintain necessary resources including staff and infrastructure components to fully support the OTMS and ensure that it continues to operate as required throughout the term of the Agreement. The Ministry shall take reasonable care of the Successful Proponent's personal computers and other equipment installed in the VSL and the TCS.

The Successful Proponent shall not be responsible for supplying electrical power required for the operation of the equipment. The Successful Proponent shall be responsible for supplying all necessary power conditioners, line filters, UPS devices or any other devices connected between the Ministry's supplied power outlet and the Successful Proponent's equipment.

The Successful Proponent must ensure all system data and all features are accessible by the VSL and the TCS staff on a twenty-four (24) hour, seven (7) day a week, 365 day per year basis, at no cost to the Ministry. The OTMS must be designed to provide reliable inmate telephone service with separate redundant connectivity at each Facility for the purpose of maintaining the OTMS functionality in the event of a primary data circuit failure.

(a) Process for providing notification and reporting system malfunctions (10 points);

Read, understood and comply.

Purpose

Bell will provide a Single Point of Contact (SPOC) for the Ministry to report system and application issues with the Inmate Telephone System during business and off-hours as identified below:

s.17(1)

Notification Procedure

The purpose of the notification process is to ensure that problem situations are communicated efficiently and effectively internally. Through this process, all appropriate levels of management are kept informed of the current status, and of action plans for resolution. Management and technical support personnel can prepare to take appropriate action to accelerate problem resolution activities.

Escalation process

The purpose of the escalation process is to ensure that any problem resolution is directed to the appropriate management level, to be addressed within the necessary timeframe.

s.14(1)(i)
s.14(1)(j)
s.14(1)(k)
s.14(1)(l)
s.17(1)

Maintenance Window

As per industry standards and to maximize the Bell ITS system performance, Bell schedules routine maintenance of the Bell ITS platform. Planned maintenance windows provide opportunities to perform administrative and operational tasks that cannot be done during normal operating hours and production periods. The service level, the dependencies, and maintenance windows are verified to ensure all customer expectations are met during the maintenance activities.

s.14(1)(i)
s.14(1)(j)
s.14(1)(k)
s.14(1)(l)
s.17(1)

Severity Levels and Resolution Time

Bell will take every precaution to ensure continuous uninterrupted service of the Bell ITS platform; however, unforeseen circumstances may lead to unscheduled downtime. It may be the result of application or equipment failures without prior notice. Bell would be remiss not to account for such occurrences, and as such, this section presents the multiple levels of severity should such an incident transpire. In the table below, Bell identifies the resolution target timeframes, gives definitions of service criticality, and examples of impacts to adequately evaluate the severity when a problem arises.

(b) Proponent's availability of sufficient technical resources to address system issues (5 points); and

s.14(1)(i)
s.14(1)(j)
s.14(1)(k)
s.14(1)(l)
s.17(1)

Read, understood and comply.

Roles and Responsibilities

Bell

s.14(1)(i)
s.14(1)(j)
s.14(1)(k)
s.14(1)(l)
s.17(1)

(c) Process for troubleshooting system related issues (5 points).

Read, understood and comply.

OTMS Customer-Reported Problem

s.14(1)(i)
s.14(1)(k)
s.14(1)(l)
s.17(1)

The Ministry can report Bell ITS application issues to the Bell ITS RSB. The Bell service representative will attempt to resolve the issue online. If the issue cannot be resolved online, the problem will be analyzed further and resolved remotely or escalated as required.

Refer to the flow chart below for Bell ITS system repair ticket resolution details.

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Page(s) 67 have been exempted pursuant to sections 14(1)(i), 14(1)(k), 14(1)(l), and 17(1) of the Freedom of Information and Protection of Privacy Act.

Type of Document:
Proposal

Equipment Servicing and Repairs

3.3.4. Equipment Servicing and Repairs (15 points)

Each Proponent should provide in its proposal information on how they will maintain necessary resources including staff and infrastructure components to fully support the hardware and ensure that it continues to operate as required (as per Section 2.3.12). Proponents should describe the:

Read, understood and comply.

2.3.12. *Equipment Servicing and Repairs*

Following the execution of the Agreement, the Successful Proponent must provide a proposed technical support procedures manual, identifying on-site technical support for the installation of any new equipment and de-installation of existing OTMS and conventional public pay telephone equipment and the identification of regular maintenance schedules.

The Successful Proponent must have the ability to remotely identify/diagnose problems with the telephones and local supporting technology infrastructure that will immediately notify the designated Ministry official, to ensure repairs are completed and the system is operating properly. All of the Successful Proponents OTMS and conventional public pay telephone hardware inventory must be securely managed and stored in Ontario.

The Successful Proponent must commence timely technical repairs after notification by the Ministry as follows:

- *Provincially (all Facilities or the TCS or the VSL , or the OTMS system) within two (2) hours of notification;*
- *More than 50% of OTMS telephones at any Facility within eight (8) hours of notification; and*
- *Single OTMS or conventional public pay telephones within an institution within one (1) calendar day of notification.*

The Successful Proponent must notify the affected Facility(s) to coordinate a repair visit within the time lines listed above. All repairs shall meet the standards set by the Canadian Radio-television and Telecommunications Commission (CRTC). The Ministry may monitor the Successful Proponent's performance with respect to repairs and maintenance as part of the performance measurement framework. All costs associated with the repairs and replacements of defective/damaged OTMS and conventional public pay telephones, however caused, and local supporting technology will be the responsibility of the Successful Proponent.

The Successful Proponent's system must provide mechanisms whereby operational problems can be reported by the Ministry via electronic mail or by a central telephone number, and timely repairs put into motion by the Successful Proponent based on the above repair time criteria. The Ministry will promptly advise the Successful Proponent in the above described manner upon becoming aware of any damage to the Successful Proponent's equipment including but not limited to telephones that are not functioning properly and/or out of order telephones. The Successful Proponent must provide all service calls necessary, in the sole and absolute discretion of the Ministry, in order to provide the required service to the Facilities and to ensure all equipment necessary to operate the OTMS and conventional public pay telephone systems are fully functional. For scheduling and access reasons, some Facilities require scheduled weekly visits for OTMS maintenance purposes. As required, the Successful Proponent will arrange through the Ministry for regularly scheduled site specific visits and adhere to that schedule.

The Successful Proponent's system must provide mechanisms that alert designated Ministry staff, including the Ministry's Contract Compliance Manager, by electronic mail indicating the opening and closing of all trouble tickets. The electronic mail will clearly document the name of the Facility, the nature of the problem as reported by the Ministry, the time the problem was reported, the name of the individual reporting the issue and the time and concise repair steps leading to an acceptable resolution.

(a) Process for providing the notification and reporting of damaged or malfunctioning equipment (8 points); and

Read, understood and comply.

Bell is the sole provider of the Bell Inmate Telephone System (ITS) along with all equipment and networking associated with the Bell ITS solution. As such, the process for reporting and providing notifications is identical for all issues experienced requiring resolution.

In the event that an issue is identified with the Bell ITS or equipment, the Ministry will have three methods to notify the Bell Single Point of Contact as listed and described below.

- Toll free repair number
- Electronic email report
- ITS repair report

Distribution of notification emails back to the Ministry upon resolution of the issue will be totally flexible based on Ministry requirements.

Toll Free Repair Number

The Ministry will be provided with 7/24/365 live access to a dedicated ITS customer service representative via a toll free number to report issues with the ITS or equipment. Once a call is received from the Ministry, a repair ticket will be created within Bell's Access Care Universal Ticket (ACUT) management system. If the identified issue can be resolved online with the individual reporting then the repair ticket will be closed.

In the event the issue cannot be corrected at the time it is reported, further remote testing and analysis will be undertaken to determine if the problem can be corrected remotely, and if so, the repair ticket will be closed. If it cannot be remedied remotely, a technician will be dispatched to correct the issue.

When a technician dispatch is required the repair ticket will be assigned to a designated technician based on the results of the aforementioned testing and analysis. If access to the facility is required, the technician will make access arrangements with on-site contact to resolve the problem on site. Once the problem is corrected the repair ticket will be closed.

Once any of the above situations is resolved, the repair ticket will be closed, and shortly thereafter, a notification email will be sent to Ministry staff, including the Ministry's Contract Compliance Manager with the name of the facility, the nature of the problem as reported by the Ministry, the time the problem was reported, the name of the individual reporting the issue and the time and concise action taken to resolve the issue.

Electronic Email Report

In addition to the reporting method described above, should the Ministry wish to report an issue with the ITS or equipment using alternate means, Bell will provide the Ministry with a repair report form which the Ministry can transmit via email to Bell's ITS Repair Service Bureau

(RSB). The form is a combination of drop down choices for the most common types of issues experienced, as well as free script for Ministry personnel to add comments regarding the issue being reported.

The form is sent via email directly to the Bell ITS RSB support team. A reply will be sent to the sender acknowledging that the form was received, and that a repair ticket has been generated in Bell's ACUT management system. If more information is required by Bell to diagnose the issue, Bell's ITS support representative may contact the Ministry representative identified on the repair report to gather additional information. As per the process described above in the live issue reporting scenarios, email initiated reports; Bell will either resolve on line with a Ministry representative, effect remote reparations, or dispatch a technician to remedy the issue as the case may warrant. In every instance, once the reported issue has been corrected, the repair ticket will be closed. A notification email will be sent to Ministry staff, including the Ministry's Contract Compliance Manager with the name of the facility, the nature of the problem as reported by the Ministry, the time the problem was reported, the name of the individual reporting the issue and the time and concise action taken to resolve the issue.

ITS Repair Report

The Bell ITS RSB repair report is an online reporting engine that can be accessed by logging into the Bell ITS. The repair report is identical to the email form and is a combination of drop down choices for the most common types of problem experienced; as well as, free script for Ministry personnel to add comments regarding the issue being reported. All processes, scenarios and notifications documented above for e-mail reports would be followed, in the event the Ministry were to report an issue via the Bell ITS RSB repair report process.

In order to ensure accessibility for the Ministry to report issues with Bell ITS or equipment, Bell has developed three fully supported methods of reporting. This provides the Ministry with 100% accessibility in which to report issues, and backup reporting alternatives should one or even two methods be unavailable due to unforeseen circumstances.

Bell Initiated Surveillance Reports

s.17(1)

In the event a problem is found a repair ticket will be created. Subsequent remedial actions will be undertaken similar to those described above as they relate to either remote problem correction, or technician dispatch. As per above, and a technician on site visit is required, the technician will arrange for onsite access with the Correctional Facility contact. As with the scenarios described above, once the problem is corrected, the repair ticket will be closed, and a notification email will be sent to Ministry staff, including the Ministry's Contract Compliance Manager with the name of the Correctional Facility, the nature of the problem found, the time the problem was detected, and the time and concise action taken to resolve the issue.

(b) Proponent's availability of sufficient technical resources and availability of equipment/components on hand to meet repair timelines (7 points).

Read, understood and comply.

Bell is equipped to respond to all OTMS inmate telephone and payphone requirements.

Bell has forged strong relationships with the independent Telephone Companies servicing the remainder of Ontario. This relationship allows Bell to utilize local resources in these independent territories who deliver the same service standards that Bell provides within its own service area. As the incumbent telephone service provider in Ontario, Bell manages and supports the entire network end to end from originating dial tone to set connection. Since the entire network is internal to Bell all network and/or cable issues can be expedited without delay.

Our dedicated Bell ITS trained technicians, their vehicles, and material storage are located at numerous work centres throughout Ontario (refer to the diagram provided below). Given the widespread coverage of our technicians in these strategically located work centres, material is always available and close at hand for Bell's technicians; along with a redundancy of stock should the need arise. Technicians are equipped with fully stocked vehicles ensuring that all tools, equipment and associated cabling are available when required, avoiding return visits. Bell maintains large volumes of equipment at a centralized warehouse located in Toronto, allowing overnight shipment throughout Ontario.

Our state of the art Bell ITS RSB has specialized diagnostic software that is operated by Bell's dedicated ITS technical specialists. These individuals have over 25 years combined ITS experience in both Federal and Provincial environments. With the Bell ITS diagnostic tools available the ITS specialists have the knowledge, experience and acumen to analyze issues to determine an appropriate course of action.

s.14(1)(l)
s.17(1)

The aforementioned Bell ITS specialists and ITS technicians are supported by a dedicated "Inmate Team" comprised of Bell management and account executives. The "Inmate Team's" primary focus is the enhancement of the customer experience, and the ongoing improvement of the ITS platform. In addition, Bell employs who are regionally located and available for onsite support as required.

Bell maintains and continuously updates its Bell Canada Recovery Plan (BCRP). This comprehensive plan is in place to mitigate against any interruptions in service. This plan as it relates to ITS services has built in network redundancies. In addition the Bell ITS (RSB) operations can be transferred seamlessly to a planned alternate Bell location in the event of any unforeseen emergencies. All existing ITS support and functionality would be available.

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Page(s) 72 has been exempted pursuant to sections 14(1)(i), 14(1)(j), 14(1)(k), 14(1)(l), 17(1), 18(1)(a) and 18(1)(c) of the Freedom of Information and Protection of Privacy Act.

Type of Document:
Proposal

Implementation and Transition Plan

3.3.5. Implementation Plan (30 points)

Each Proponent should provide in its proposal a proposed draft implementation plan (in accordance with section 2.3.10) which provides the following:

Read, understood and comply.

2.3.10. Implementation Plan and Transition between Service Providers

The Successful Proponent will be required to work in a cooperative manner with the Ministry's current service provider with respect to the implementation of the Successful Proponent's OTMS and conventional public pay telephone business solution and with any new service provider with respect to the Successful Proponent's decommissioning and removal of its equipment and the new service provider's implementation of its OTMS and conventional public pay telephone system during the respective transition periods as set out in Sections 3.09(b) and 8.03(c) in the Form of Agreement.

Following execution of the Agreement, the Successful Proponent must provide, within sixty (60) Business Days, for Ministry approval, a detailed implementation plan that demonstrates a continuous, uninterrupted telephone service will be maintained during the transition period. The plan shall detail all events and contacts for all Facilities that will be required in order to install the new equipment and implement the OTMS and conventional public pay telephone systems. Upon request from the Successful Proponent and subject to operational requirements and security clearances, the Ministry will provide the Successful Proponent with reasonable access to the Facilities in order that the Successful Proponent may prepare their proposed implementation plan.

The Successful Proponent must adhere to all Ministry security procedures and protocols within all Facilities, which include but are not limited to security procedures and protocols related to the use of electronic devices, the taking of any photographs, and the use of or reproduction of drawings, diagrams and/or photographs. Should there be a need for any photographs to be taken within a Facility, prior written Ministry approval must be sought, and, if approved, the Ministry will retain ownership of all photographs taken. Any use of these photographs will require prior written approval of the Ministry.

The final implementation plan submitted by the Successful Proponent, and approved by the Ministry, shall include, but not be limited to, the following new network components supplied by the Successful Proponent:

- *New inmate and public telephones;*
- *Wiring closet cable terminations and cross-connects;*
- *Manual on/off shut down switches;*
- *AC power supply sources – wiring closet and other locations as required;*
- *Wide Area Network (WAN) Facilities;*
- *Local Area Network (LAN) Facilities;*
- *Personal computer devices;*
- *Central office cable terminations and/or other central office equipment;*
- *Digital conversion equipment; and*
- *Uninterrupted power source (UPS) for system equipment.*

The implementation plan must set out a schedule identifying the order in which the Successful Proponent proposes to install the equipment and begin providing services at the institutions subject to the requirement to first install the Deliverables at the TCS, VSL and TIC and the other requirements below. Once the initial installations have been completed, acceptance testing on the equipment at those locations has been performed to the Ministry's satisfaction and the installations have been approved by the Ministry, staff training has been completed to the Ministry's satisfaction, and the equipment has been implemented, the Ministry will set a Commencement Date and the Successful Proponent may start the installations at the other Facilities in accordance with the Ministry approved implementation schedule.

The implementation plan must therefore meet the following criteria:

- *On or around June 1, 2013, the Successful Proponent will be required to conduct the initial installation of the hardware necessary for accessing the system at the TCS in Mississauga and VSL in North Bay followed by the installation of the Successful Proponents OTMS telephones and conventional public pay telephones at the Toronto Intermittent Centre (TIC). Following these installations, the Ministry will conduct rigorous acceptance testing to ensure the solution is functioning as required and meeting Ministry requirements. This must be completed within the first 4 weeks of the transition period; and*
- *Following the above initial installations and the setting of the Commencement Date, installation of the Successful Proponent's OTMS telephones and conventional public pay telephones, acceptance testing and any required staff training at all of the remaining 29 Facilities must be completed no later than twenty-two (22) weeks after the above initial installations have been completed and approved by the Ministry.*

Further details are set out in the Agreement.

(a) The planned approach to ensure a continuous, uninterrupted telephone service will be maintained during the implementation and transition within a Facility and across the province (12 points);

Read, understood and comply.

Bell has developed a flexible draft implementation schedule to accommodate both the Ministry's expectations and the exiting provider's projected availability. Bell's schedule incorporates provisioning activities scheduled concurrently at multiple Correctional Facilities accounting for geographic considerations to ensure resource availability.

s.17(1)

Bell has completed several successful transitions and our schedule accounts for multiple variables that can impact a project of this nature. Bell's schedule has been developed to minimize disruption to both offenders and the Ministry at each Correctional Facility. The plan accommodates for flexibility in the event of unforeseen circumstances while still meeting the requisite timeline of 22 weeks.

Bell has sufficient resources to accelerate the number of installations at any of the Correctional Facilities throughout the 22 week transition period. Bell's schedule can seamlessly be advanced should the acceptance testing period be shortened.

Bell has excluded specific facilities within the draft implementation schedule since the Ministry has indicated uncertainty regarding the requirements of transitioning these facilities based on possible closures in 2013. In the event any or all of these Facilities will later be added to the transition expectations, Bell will accommodate the Ministry's requirement. Similarly, for the Toronto South Detention Centre, Bell will be available to accommodate timeline requirements from the Ministry.

Bell, as the incumbent local exchange carrier in Ontario provides Bell with flexibility in the provisioning of due dates. This enables the removal and installation of inmate sets and public payphones to align, eliminating any potential loss of service, and ensuring network dial tone availability.

All equipment for the transition will be stored at the technician's work centre, allowing for easy access to all material required minimizing delays. In the event that Bell receives the authorization to remove the equipment on behalf of the exiting provider, Bell will provide secure storage for the exiting provider's equipment for pick-up at a Bell facility thus permitting single end to end transition.

(b) How they will structure their working relationship with the Ministry's current OTMS and conventional public pay telephone service provider, any telecommunication partners and any potential subcontractors with respect to the transition, as well as with Ministry staff (8 points); and

Read, understood and comply.

Bell understands that communication is the key to a smooth transition program. A dedicated Project Manager will be assigned to oversee the transition process. The Bell Project Manager will communicate and coordinate with the Ministry, the exiting service provider, any potential subcontractors, and all Bell internal resources ensuring a smooth transition across the province.

The Bell Project Manager will schedule a kick-off meeting with all stakeholders to present the project plan. This will highlight and address all Ministry concerns and issues through the transition between providers. On an ongoing basis, Bell will facilitate regularly scheduled meetings with all stakeholders to evaluate progress and address any issues.

The Bell Project Manager will coordinate transition activities with regional operations (installation and repair) managers throughout the province. They have firsthand knowledge of local network infrastructure, numerous contacts within Bell, and an excess of 10+ years experience in the correctional environment at both Federal and Provincial levels. The operations managers and the local technicians who report to them will interface with Ministry and exiting provider personnel at each Correctional Facility to ensure continued seamless transition of services.

At the Ministry's earliest convenience, and in conjunction with the Ministry, Bell will provide a schedule to survey and document installation requirements at each correctional facility. Two weeks prior to the start of a conversion at an institution, the project manager will confirm with

the correctional facility representative and the exiting provider to ensure readiness for the scheduled transition dates.

Upon commencement of transition at each corrections facility Bell personnel will interface on site with the Ministry's facility representatives and the exiting provider to ensure alignment on that facility's access procedures and scheduling.

Bell's planned approach will ensure continuous uninterrupted telephone service through ongoing communication with all stakeholders.

(e) Draft schedule identifying the order in which the services will be proposed to be installed at the Facilities (10 points).

s.17(1)

Staff Training

3.3.6. Staff Training (6 points)

Each Proponent should provide in its proposal a training plan that describes the Proponent's approach for initial and on-going Ministry staff training as in accordance with section 2.3.11.

Read, understood and comply.

2.3.11. Staff Training

All Proponents should include in their Proposal a detailed training plan that describes the Proponent's approach to initial and on-going OTMS training for Ministry staff. Following the execution of the Agreement, the Ministry will review the Successful Proponent's training plan for Ministry staff and upon approval, training will be scheduled by the Ministry. Equipment specific information (e.g. operating manuals) must be provided by the Successful Proponent with the training plan. Final training materials will be subject to Ministry approval prior to implementation of any training designed for Ministry staff. The Successful Proponent will be responsible for all costs associated with training Ministry staff.

The Successful Proponent must have the ability to remotely identify/diagnose problems with the OTMS and conventional public pay telephones and local supporting technology infrastructure that will immediately notify the designated Ministry representative(s), to ensure repairs are completed and the system is operating properly. All of the Successful Proponents OTMS and conventional public pay telephone hardware inventory must be securely managed and stored in Ontario.

The Successful Proponent shall also provide training on an on-going basis throughout the term of the Agreement as required by the Ministry for system upgrades or changes and training of new staff.

The Successful Proponent shall supply appropriate manuals and instructional materials and all training, which shall be held at the workplace of the staff being trained. Training requirements for staff will be specific to their responsibilities and authorized level of system access.

Time Frame

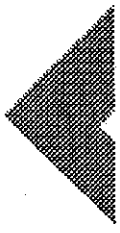
The training sessions will be offered two weeks prior to a regional implementation where applicable. The estimated duration of training will be two days.

The following training plan will commence on June 3, 2013 subject to OTMS Project Team acceptance.

s.14(1)(i)
s.14(1)(k)
s.14(1)(l)
s.17(1)

Overall Training Goals

1. Basic Training - All regions



s.14(1)(i)
s.14(1)(k)
s.14(1)(l)
s.17(1)

Learning Activities/Strategies/Methods

Activities to be undertaken to achieve the training goals

1. Basic training – site specific – 1 day

s.14(1)(i)
s.14(1)(k)
s.14(1)(l)
s.17(1)

3. Refresher training sessions to be conducted via web meeting as required.
4. Computer based training modules by function.
5. Laminated Job-Aid for task reference.

Documentation

Documentation	Status	Date
Inmate Telephone System User Guide	Complete	October 31, 2012
Quick Reference Task sheet	Complete	October 31, 2012

Additional Features

3.3.7. Additional Features (5 points)

Each Proponent should provide in its proposal a summary of any additional features available at no cost to the Ministry and without any change in the Proponent's proposed Commission Percentage Rate.

Read, understood and comply.

s.14(1)(i)
s.14(1)(k)
s.14(1)(l)
s.17(1)

Request Number: CSCS-A-2016-02841

Page(s) 81 – 83 have been exempted pursuant to section 22(a) of the Freedom of Information and Protection of Privacy Act.

Type of Document:
Inmate Information Guide for Adult institutions

REVISION 2 – APPENDIX C (Continued)

PROPONENT NAME: Bell Canada

TABLE 2

	Rates per Facility (as per Table 1)							
Monday – Friday 08:01 - 1800	**A**	**B**	**C**	**D**	**E**	**F**	**G**	**H**
Collect local call rate, including any connection fee per call								
Collect long distance call rate (per minute)								
Collect long distance connection fee per call								
Monday – Friday 18:00:01- 0800								
Collect local call rate, including any connection fee per call								
Collect long distance call rate (per minute)								
Collect long distance connection fee per call								
Saturday, Sunday, Holiday 08:00:01 - 1800								
Collect local call rate, including any connection fee per call								
Collect long distance call rate (per minute)								
Collect long distance connection fee per call								
Saturday, Sunday, Holiday 18:00:01 - 0800								
Collect local call rate, including any connection fee per call								
Collect long distance call rate (per minute)								
Collect long distance connection fee per call								

s.17(1)
s.18(1)(a)
s.18(1)(c)
s.18(1)(d)

REVISED - APPENDIX C (Continued)

PROPONENT NAME: Bell Canada

Proposed Commission Percentage Rate to be paid to the Government of Ontario based on the monthly Gross Revenue generated from all of the OTMS and conventional public pay telephones at the Facilities

COMMISSION PERCENTAGE RATE:

of monthly Gross Revenue

s.17(1)
s.18(1)(a)
s.18(1)(c)
s.18(1)(d)

May 9, 2016/Version 1

INFORMATION NOTE – DEPUTY MINISTER
MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES
OPERATIONAL SUPPORT DIVISION, CORRECTIONAL SERVICES

PURPOSE/ISSUE(S)

- To provide an overview of the Bell Offender Telephone Management System (OTMS) contract and issues arising from the current service provided.

CURRENT STATUS

- The ministry uses the OTMS for outgoing, collect, non-operator assisted inmate telephone calls.
- The ministry has a seven year contract (2013 – 2020) with Bell for providing the OTMS.
- Current rates from the service provider are as follows:

s.17(1)
s.18(1)(a)
s.18(1)(c)
s.18(1)(d)

  - o
  - o

- The contract with Bell stipulates that rates can be no more than the basic residential rate charged within the community from which the call originates.
- *Effective May 9, 2016, as a pilot project, immigration detainees currently housed at Central East Correctional Centre will have the ability to make telephone calls through the OTMS using virtual Personal Identification Number (PIN) cards paid for by the Canada Border Services Agency, up to a maximum of $40 per month per detainee. Collect calls will still be available. The security features of the OTMS will remain in place at all times. It is important to note that the detainees will be able to make calls to cellular phone subscribers.*
- *The ministry can consider enabling this type of calling card provision at its own cost for inmates that are relocated from one facility to another.*

CRITICAL INFORMATION

- The *Victim Empowerment Act*, enacted on November 19, 2002, provides the ministry with the authority to monitor and block inmate telephone calls. In turn, the blocking of inmate calls to victims eliminates the victim's potential exposure to unwanted contact during the inmate's custodial period.
- The Regulations found in the *Victim Empowerment Act* allow the ministry to monitor, record and block inmate calls on reasonable grounds for the purpose of protecting personal safety and/or preserving institutional security. However, currently the ministry is only using the call blocking feature to block telephone calls from correctional facilities to a specific telephone number upon the request from a citizen.
- The ministry does not record or monitor inmate telephone calls at this time. The ministry can, however, require the vendor to implement this feature during the contract term.

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-
-
-

s.14(1)(i)
s.14(1)(j)
s.14(1)(k)
s.14(1)(l)
s.17(1)
s.18(1)(c)

- Additional complaints have been received regarding the inability to make calls to cellular telephones. These complaints are likely to become more frequent as subscribers switch from landline to cellular telephones.
- Superintendents have been provided with the standard messaging to these concerns in the event that a complaint is received locally.

NEXT STEPS

- Ongoing issues identification and resolution with the vendor.
- The ministry is considering alternative options for collect calling in order to assist inmates with limited income.
- Three-way calling detection is not a perfect science. Some three-way calls may manage to go through the system and some genuine calls may be wrongly dropped. The ministry works with Bell to resolve technological issues.
- When the ministry recognized the concerns being raised by inmates and their families regarding the cost of reconnecting after a called was inappropriately dropped, it was formally raised at the monthly meetings with Bell.
- In July 2014, Bell agreed to produce a monthly report showing the rate of three-way-call detection at each institution

- *The next meeting with Bell is scheduled to take place on May 10, 2016. Ministry representatives from the Resources Planning Unit, Business Planning, Resources and Solutions Branch, Operational Support Division will be in attendance.*

BACKGROUND

OTMS – Bell Contract (2013 – 2020)

- The OTMS is a digital Voice Over Internet Protocol (VOIP) solution. The new technology allowed for enhancements to personal safety and for the preservation of institutional security.

Excerpts from the actual Bell Canada OTMS contract;

"Agreement with Bell Canada, COC-0009, Additional Information:

1. Remediation of Technological Problems, Complaints flagged by MCSCS and Contractual Obligations:

s.14(1)(i)
s.14(1)(j)
s.14(1)(k)
s.14(1)(l)
s.17(1)
s.18(1)(c)

No specific reference in the agreement, but in the RFP.

Section 2.1 of the 2012 RFP (Management of the Agreement)

- The Successful Proponent must have representatives attend meetings with the Ministry Contract Compliance Manager and operational representatives on a regular basis, no less frequently than once every two months, to discuss any issues of mutual concern. Such communication may cover the entire scope of the Agreement including but not limited to opportunities to maximize value and reduce overall costs, administrative issues, and the Successful Proponent's service and performance.

Section 2.3 of the 2012 RFP (The Deliverables)

- Attendance at meetings, at a minimum of once every two months and on an as required basis, with the Ministry to review and discuss ongoing operational and contract management performance issues during the Term of the Agreement. Bell has met its contractual obligations by meeting with the Ministry on a monthly basis.
- The manner and time of communicating through meetings or teleconferences will be arranged by the Ministry with the Successful Proponent as required after the Agreement has been established."

Key System Features

- Key features of the OTMS provided by Bell through contract include:
  -
  - ministry approved common access numbers to provide inmates with a minimum of 30 telephone numbers (i.e., the Ombudsman's Office);
  - multi-lingual voice over technology to allow call recipients to accept or refuse the in-coming call (note that currently the ministry is using both English and French voice over technology);
  -

- programming to detect and disconnect three-way calls; and
- inmate making the call will be informed by the system that "Call forwarding and three way calling is forbidden" and if a three-way call is detected, the inmate will also hear and "A possible three-way has been detected. Your call will now be terminated."

s.14(1)(i)
s.14(1)(j)
s.14(1)(k)
s.14(1)(l)
s.17(1)
s.18(1)(c)

Collect Calling to Cellular Telephones

- While there have been requests from inmates' families to allow for calls to be placed to cellular telephones, it should be noted that currently, the three largest telecommunications companies (i.e. Bell Canada, Rogers Communications Inc. and

Telus Communications) do not allow collect calls to cellular telephones. The Ministry has no influence on this decision.

s.17(1)

s.18(1)(c)

This is Exhibit **"B"** to the
Affidavit of Nadine Blum affirmed
before me this 21st day of December, 2020.

A Commissioner, etc.

Policies and Guidelines

Inmate Telephone Communication

The following information is a summary of Correctional Services' Inmate Telephone Communication policy.

Ontario's Correctional Services recognizes that communication between inmates, family members and members of the community is important for their rehabilitation and successful reintegration into society. The telephone is the primary method by which inmates maintain contact with others.

Inmate Telephones and Calls

Inmates may call any person with a standard North American 10-digit telephone number who is capable of being billed for collect calls. This is provided the person is willing to accept the charges, and the call does not violate a court order, constitute an offence under federal or provincial statute, or jeopardize the safety of any person or the security of the institution. Collect calls cannot be made to mobile telephones.

In the event of an emergency such as a serious family illness, injury or death, the superintendent or designate may allow the inmate to use the telephone and the institution will pay for the call. In cases where a call is not an emergency but cannot be made collect, the superintendent may authorize the call upon completion of a written request.

The superintendent may require the inmate to have sufficient funds to pay for the call.

Monitoring or Recording Calls

Telephone calls between inmates and members of the community will not be monitored or recorded in any manner. Law enforcement personnel may monitor or record specific calls provided they produce a properly authorized warrant.

Access to Telephones

Telephone access times may vary from institution to institution. In general, inmates may access the telephone system five hours a day (with additional access in case of emergency). The telephone system puts a 20 minute limit on all calls made on a pay phone. After that time, the call automatically ends.

All inmate telephones are shut off between the hours of 23:00 (11:00 p.m.) and 06:00 (6:00 a.m.) seven days a week. Extensions to calling hours may be authorized by Correctional Services.

While inmate telephones are under the general supervision and control of the correctional staff, equitable access to inmate telephones rests with the inmate population in each living unit.

Inmates Without Access to Inmate Telephones

Where inmates do not have direct access to telephones, Correctional Services will ensure that telephone calls by inmates can still be made. Correctional Services also ensures that incoming messages for inmates are delivered.

Staff Supervised Calls

In exceptional circumstances, the superintendent or delegate may permit an inmate to make a supervised personal telephone call (e.g. from the office of the sergeant, social worker or chaplain).

Text Telephone for the Deaf and Hard of Hearing

At the present time, the inmate telephone system will not accommodate the use of a TTY/Teletypewriter. Until this capability exists, an inmate requiring a TTY/Teletypewriter will be given reasonable, supervised access to an institutional office telephone.

If a hearing impaired inmate is admitted to an institution, all efforts will be made to accommodate the inmate with necessary equipment or supports. Where use of this equipment is not possible, consideration must be given to transferring the inmate to an institution where this capability exists.

Such determinations are based on the special needs of the inmate and the individual circumstances of the case. For example, the need for frequent contact with legal counsel or community supports.

Abusing Telephone Privileges

Restrictions will be imposed on an inmate's telephone privileges when the superintendent is notified that an inmate call has violated a legal sanction or has jeopardized the safety of any person or the security of the institution. Inmates abusing telephone privileges may be placed on misconduct or, if appropriate, reported to the police.

Where inmates have lost the privilege of making telephone calls, the following procedures apply:

The inmate must submit a request form for a telephone call to be made. The form must contain:

- Name and telephone number of the individual to be called
- Most likely time that the individual can be contacted and the reason for the call
- Details of the message

All reasonable requests are acted upon, particularly when the calls are of a compassionate or urgent nature, and are to be made to:

- Members of the immediate family
- An inmate's lawyer or licensed paralegal
- Office of the Ombudsman
- Chaplains or leaders of recognized faith groups

Repeated attempts are made to contact the above designated parties.

The individual staff person making the call on the inmate's behalf will indicate on the request form the time and results of any and all attempts to deliver the message. The form is returned to the inmate within 24 hours for signature.

Long distance calls will normally be made collect.

Call Blocking

Correctional Services has adopted call blocking protocols to prevent inmates from contacting victims, witnesses or other concerned citizens by telephone while incarcerated.

In addition to the above protocol, an inmate may be prevented from communicating with a specified person by telephone if the superintendent or designate believes that the security of the institution or the safety of any person would be jeopardized.

An inmate may also be prevented from communicating with a specified person by telephone if that person submits a request to the superintendent or designated employee that they not receive any telephone communication from the inmate. In the case of a minor, this request may be made by a

parent or guardian.

If an individual wishes to have calls blocked from an institution's telephones, the institution must contact the Victim Support Line (VSL) in North Bay at (705) 494-3368.

Call blocks remain in effect until

- The complainant requests that it be lifted
- A court order expires in cases where the call block was ordered by the court
- The superintendent or designate determines there is no longer a security concern

Call Transfers and Three-way Calls

The telephone three-way call blocking feature has been implemented to support public safety and institutional security.

The ministry may exempt verified telephone numbers from the three-way call detect and blocking feature. This exemption is provided for the purpose of facilitating the transfer of offender calls from a receptionist or automated telephone attendant system to the intended call recipient.

It is the responsibility of individuals to request to have their telephone number(s) included on either a Common Access List or a Call Blocked List. It is also their responsibility to advise of any changes to their telephone numbers.

The ministry may also allow for call transfers by Legal Counsel offices when receiving offender calls.

This is Exhibit **"C"** to the
Affidavit of Nadine Blum affirmed
before me this 21st day of December, 2020.

A Commissioner, etc.

A. Rate Information from Publicly Available Contracts or Provincial Rate Summaries

British Columbia –December 2012 Contract[1]

Call Type	Debit (Client) (these rates include applicable taxes)	Collect (Client Contact) (these rates do not include applicable taxes)	Pre-Paid (Client Contact) (these rates include applicable taxes)
Local calls	$0.90	$2.00	$0.90
Long Distance Canada & USA	$0.80 (first minute) + $0.30 (each additional minute)	$1.50 + $0.30 (each additional minute) (to change to $0.40 effective March 1, 2013)	$0.80 (first minute) + $0.30 (each additional minute)
Long Distance – overseas	$0.85 (first minute) + $0.35 (each additional minute)		
Voicemail Incoming only		$1.00 per message	

Nova Scotia – From rate information on provincial website, first posted October 1, 2018[2]

	Local	Long-Distance
Collect *subject to additional taxes and bill rendering fees imposed by the CRTC	$1.85/per call	$1.50 plus a toll charge of 30 cents per minute
Debit	$1.35/per call	$1.00 plus a toll charge of 30 cents per minute
Maximum duration	20 minutes	20 minutes

- CBC reported that Nova Scotia has been with Synergy since 2013.[3]
- In April 2017, CBC reported that calls at Nova Scotia jails cost between $1.50 - $1.85 per 20 minute collect call, or $1-$1.35 per 20-minute prepaid call, plus 30 cents a minute on long-distance calls. There are also additional reported taxes and fees for collect calls.[4]

[1] Attached at Schedule "A".
[2] Attached at Schedule "B".
[3] https://www.cbc.ca/news/canada/nova-scotia/synergy-inmate-phones-jails-collect-calls-cost-1.4072950
[4] https://www.cbc.ca/news/canada/nova-scotia/synergy-inmate-phones-jails-collect-calls-cost-1.4072950

B. Rate Information from Academic Articles, Newspaper Articles or Provider Webpages

Provider	Pre-paid account system offered?	Local and long-distance rates	Date associated with rate & any earlier rates	Trust or benefit to inmates from the profit of the calls
Synergy	Yes[5]			
	Yukon	Charge is $1.35 for each 20 minute, pre-paid, local phone call.[6] Long distance calls have a connection fee of $1 plus a rate of $0.30 per minute.[7] Proposal from another company (NCIC Inmate Phone Service) to charge the government $90/month per phone after they lost out on the contract.[8]	November 2018 In 2013, local calls from Whitehorse jail were also reported as at least $1.35 per call.[9]	Revenue generated goes to revolving fund for programming at site and crime prevention victim services trust fund (3% of the money in the fund).[10]
	Alberta	$1.25 flat fee for 20-minute local calls and $1.75 for collect calls.[11]	October 2016.[12]	
***Note provider reported as**	**Saskatchewan**	2010: Province signed contract with Telmate to provide inmate	$0.30 per minute rate for long distance	10% of revenue is returned to an inmate trust.[17]

[5] https://www.inmatephones.ca/phone-calls-messages/
[6] https://www.yukon-news.com/news/a-phone-company-wants-to-provide-free-inmate-calls/
[7] https://www.whitehorsestar.com/News/inmates-phone-costs-may-be-detrimental-hanson
[8] https://www.yukon-news.com/news/a-phone-company-wants-to-provide-free-inmate-calls/
[9] https://www.yukon-news.com/news/whitehorse-jail-charging-inmates-for-phone-calls/; https://www.cbc.ca/news/canada/north/yukon-inmates-now-being-charged-1-35-for-local-calls-1.1327551
[10] https://www.whitehorsestar.com/News/inmates-phone-costs-may-be-detrimental-hanson
[11] https://www.thestar.com/news/canada/2016/10/27/prisons-in-canada-are-increasing-the-phone-costs-for-inmates.html
[12] https://www.thestar.com/news/canada/2016/10/27/prisons-in-canada-are-increasing-the-phone-costs-for-inmates.html
[17] https://globalnews.ca/news/3421101/texas-company-makes-9m-from-jail-phones-contract-saskatchewan-government-1m/

Telmate[13]		telecommunication services. **2012:** Fees from Saskatchewan Correctional Centres that use Telmate Local collect: $1.85 per call, up to 20 minutes (flat rate) Local Prepaid/Debit: $1.35 per call for up to 20 minutes (flat rate) Long Distance Collect: $1.50 connect fee + $0.30 per minute Long Distance Prepaid/Debit: $1.00 connect fee + $0.30 per minute[14] October 2016: $1.50 to connect a long distance collect call plus 30 cents per minute up to 20 minutes. Pre-paid long distance calls through Synergy cost $1.00 to connect plus 30 cents per minute up to 20 minutes.[15]	collect calls goes back to 2012.	Telmate has generated over $9,000,000 from Saskatchewan prisons since signing the contract in 2010. 10% of earnings go to province.[18]

[13] https://www.saskatchewan.ca/residents/justice-crime-and-the-law/correctional-facilities-and-probation/calling-an-inmate

[14] "The High Costs of Calling: Telephone Access in Saskatchewan's Correctional Centres," June 7, 2017, accessed online: https://cfbsjs.usask.ca/documents/HighCostOfCalling.pdf. See rates at pp. 14-15.

[15] https://www.cbc.ca/news/canada/manitoba/saskatchewan-manitoba-inmates-phone-system-1.3819423#:~:text=In%20Saskatchewan%2C%20Synergy%20charges%20%241.50,minute%20up%20to%2020%20minutes.

[18] Kennedy Morrow, "Private Companies in Saskatchewan Prisons: The Impact of the Increasing Cost Barrier for Accessing Inmate Telecommunications," *Saskatchewan Law Review*, April 2020, accessed online: https://sasklawreview.ca/comment/private-companies-in-saskatchewan-prisons-the-impact-of-the-increasing-cost-barrier-for-accessing-inmate-telecommunications.php

		New contract in 2017 reported as: Long distance calls "$2.50 for 20 minutes. Local calls are going up by more than one dollar, from $1.35 for 20 minutes, to $2.50 for 20 minutes. Inmates can also pay $35 a month to make two calls a day on 15 days."[16]		
	Manitoba	Three free personal calls per day for inmates who have not been sentenced.[19] $3 flat rate for calls which last up to 15 minutes.[20] $4.30 for local and long distance collect calls.[21] Province is getting a commission on the contract.[22] Charges for putting money on an offender's pre-paid card - $13 for loading $60.[23]	$3 flat rate was introduced in around October 2016.[24]	
	Nova Scotia	See above and attached Offender Telephone System	FAQ attached at Schedule "B"	Province takes a commission which goes into

[16] https://globalnews.ca/news/3421101/texas-company-makes-9m-from-jail-phones-contract-saskatchewan-government-1m/
[19] https://www.cbc.ca/news/canada/manitoba/manitoba-corrections-phones-inmates-1.3806686
[20] https://www.thestar.com/news/canada/2016/10/27/prisons-in-canada-are-increasing-the-phone-costs-for-inmates.html
[21] https://www.cbc.ca/news/canada/manitoba/saskatchewan-manitoba-inmates-phone-system-1.3819423#:~:text=In%20Saskatchewan%2C%20Synergy%20charges%20%241.50,minute%20up%20to%2020%20minutes.
[22] https://www.winnipegfreepress.com/local/pricier-jail-phone-calls-in-manitoba-dial-up-outrage-398765471.html
[23] https://www.winnipegfreepress.com/local/pricier-jail-phone-calls-in-manitoba-dial-up-outrage-398765471.html
[24] https://www.thestar.com/news/canada/2016/10/27/prisons-in-canada-are-increasing-the-phone-costs-for-inmates.html

		FAQ for rates since October 2018. With Synergy since 2013.[25]	posted October 2018.[26]	inmate trust fund. In 2015, contribution was $100,000.[27] Total charges by Synergy in Nova Scotia was over $580,000 for four facilities in 2015.[28]
Lattice	Yes			
	British Columbia	2012 Contract at Schedule "A"		Telus will make quarterly payments up to $125,000 to the Inmate Benefit Fund, operated by the Corrections Branch to purchase goods and services for the benefit of inmates.

[25] https://www.cbc.ca/news/canada/nova-scotia/synergy-inmate-phones-jails-collect-calls-cost-1.4072950. Synergy also operates: Alberta, Saskatchewan, Manitoba, New Brunswick and PEI.
[26] See Schedule "B ".

[27] https://www.cbc.ca/news/canada/nova-scotia/synergy-inmate-phones-jails-collect-calls-cost-1.4072950
[28] https://www.cbc.ca/news/canada/nova-scotia/synergy-inmate-phones-jails-collect-calls-cost-1.4072950

SCHEDULE "A"

This Change Order is made under and is subject to the terms and conditions of the Telecommunications Service Master Agreement effective July 29, 2011, as may be amended from time to time, between TELUS Communications Company, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Labour, Citizen's Services and Open Government, Insurance Corporation of British Columbia, British Columbia Hydro and Power Authority, British Columbia Lottery Corporation, Workers Compensation Board of British Columbia, Provincial Health Services Authority, Northern Health Authority, Interior Health Authority, Fraser Healthy Authority, Vancouver Island Health Authority and Vancouver Coastal Healthy Authority (the "**Agreement**").

Where capitalized words and expressions defined in the Agreement are used in this Change Order, such words and expressions shall have the meaning ascribed to them in the Agreement.

CR Number:	**TSMA-0036-CO**		
Change Name:	Addition of new Available Service: Client Communication Services		
Requesting Organization: TD Dec 28, 2012	Legal Name: Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Labour, Citizen's Services and Open Government	**Requested by:**	C. J. Ritchie Administrator and Assistant Deputy Minister, Strategic Partnerships CJR Dec 31/12
Agreement Service Tower:	Client Communication Services		

A. CHANGE DESCRIPTION

For the purposes of enabling TELUS to provide Client Communication Services ("CCS") to the Corrections Branch of the Ministry of the Justice of the Province ("Corrections Branch"), the Province and TELUS hereby agree to the following changes to the Agreement:

1. **Available Service.** The CCS are added as an Available Service under the Agreement to be ordered solely by the Corrections Branch on behalf of the Province. For clarity, the CCS are not available to any other GPS Entity.
2. **Attachments.** The following Attachments, contained in Schedules 1 through 9 to this Change Order, are hereby added to the Agreement:

Schedule 1:	Attachment H-11	Schedule 6: CCS-Specific Definitions
Schedule 2:	Attachment J-VI	Schedule 7: Client Credit Account
Schedule 3:	Attachment N-11	Schedule 8: Implementation Project Plan
Schedule 4:	Attachment R-11	Schedule 9: CCS-Specific Governance
Schedule 5:	Attachment BB-11	

TD Dec 28, 2012 CJR Dec 31/12

3. **CCS.** TELUS will provide and maintain, funded solely by the Commissionable Services revenues to TELUS net of contributions to the Client Credit Account, a hosted communication infrastructure that includes:

Change Order			
This Change Order is made under and is subject to the terms and conditions of the Telecommunications Service Master Agreement effective July 29, 2011, as may be amended from time to time, between TELUS Communications Company, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Labour, Citizen's Services and Open Government, Insurance Corporation of British Columbia, British Columbia Hydro and Power Authority, British Columbia Lottery Corporation, Workers Compensation Board of British Columbia, Provincial Health Services Authority, Northern Health Authority, Interior Health Authority, Fraser Healthy Authority, Vancouver Island Health Authority and Vancouver Coastal Healthy Authority (the "**Agreement**"). Where capitalized words and expressions defined in the Agreement are used in this Change Order, such words and expressions shall have the meaning ascribed to them in the Agreement.			
CR Number:	**TSMA-0036-CO**		
Change Name:	Addition of new Available Service: Client Communication Services		
Requesting Organization:	The Province	**Requested by:**	C. J. Ritchie Administrator and Assistant Deputy Minister, Strategic Partnerships
Agreement Service Tower:	Client Communication Services		
A. CHANGE DESCRIPTION			

For the purposes of enabling TELUS to provide Client Communication Services ("CCS") to the Corrections Branch of the Ministry of the Justice of the Province ("Corrections Branch"), the Province and TELUS hereby agree to the following changes to the Agreement:

1. **Available Service.** The CCS are added as an Available Service under the Agreement to be ordered solely by the Corrections Branch on behalf of the Province. For clarity, the CCS are not available to any other GPS Entity.
2. **Attachments.** The following Attachments, contained in Schedules 1 through 5 to this Change Order, are hereby added to the Agreement:

   Schedule 1: Attachment H-11
   Schedule 2: Attachment J-VI
   Schedule 3: Attachment N-11
   Schedule 4: Attachment R-11
   Schedule 5: Attachment BB-11

3. **CCS.** TELUS will provide and maintain, funded solely by the Commissionable Services revenues to TELUS net of contributions to the Client Credit Account, a hosted communication infrastructure that includes:

a the provision of the CCS in compliance with all of the functionality and the requirements set out in schedules 1 through 5 referenced in Section 2 above,

b. a Secure WAN Network and devices for the authentication, authorization and connection of Clients and Client Contacts to the CCS;

c enabling the Corrections Branch to deliver eServices in accordance with the *Correction Act* the *Correction Act Regulation* and other applicable laws; and

d. the integration and alignment with the Corrections Branch's applications, government standards and architectures.

4 **No SIF Contributions Except for Province Dollars.** The CCS, except as payable by Province Dollars, shall not be considered SIF Eligible Core Services under the Strategic Relationship Agreement effective July 29, 2011 between TELUS and the GPS Entities (the "SRA"), and TELUS shall have no obligation to make contributions of SIF Dollars to the SIF Account in respect of the CCS However, where payments are made for CCS with Province Dollars, and such Province Dollars are paid in respect of SIF Eligible Core Services (as defined in the SRA), TELUS will contribute SIF Dollars to the SIF Account in the same manner and amount in respect of such payments as would otherwise be made for SIF Eligible Core Services under subsection 5 2(a) of the SRA

5. **Definitions.** The definitions listed in Schedule 6 to this Change Order are hereby added to Schedule A to the Agreement as applicable solely to the CCS. Where a defined term is already defined in Schedule A to the Agreement and is defined differently in Schedule 6 to this Change Order, the definition found in Schedule 6 to this Change Order will govern as it relates to the CCS, but not in respect of other Available Services.

6 **Pricing.**

a The rates for the CCS are those set out in the Price Book

b. The Client Credit Account is established in accordance with the terms and conditions contained in Schedule 7 hereto; and

c. Sections 16 1.3, 16 3, 16.4, 16.5, 16 6, 16.8, 17 1 and 17.5 of the Agreement are excluded from application to the CCS, with the exception that these sections shall continue to apply to CCS, or Services related to CCS, which are paid for with Province Dollars. With respect to section 16.6, the CCS shall not be considered to be Eligible Spend for the purposes of Schedule MM of the Agreement except with respect to CCS which are paid with Province Dollars, which amounts shall be considered to be Eligible Spend.

7. **Term.** The term for CCS will commence on the effective date of this Change Order and end on the date that is 10 years after the Effective Date of the Agreement, unless terminated or cancelled earlier (the "CCS Term").

8 **Termination**. Sections 31.6.2 and 31.6.3 of the Agreement are excluded with respect to the CCS. For the purposes of the CCS only, the following provision shall apply instead

a. **Termination for Convenience.** If the Corrections Branch or the Province Cancels the CCS or terminates all of its obligations and rights under this Agreement or a Service Order pursuant to section 31 6 1 with respect to the CCS, the Corrections Branch or the Province will pay to TELUS a one-time termination charge of 50% of the Average

Monthly Projected Revenue for the lesser of. (A) the next five years (commencing on the Termination Date) or (B) the remainder of the CCS Term

9. **Top Up.** The parties agree to the following retroactive top-up mechanism
   a. At the end of each six-month period ending in June or December of the CCS Term, TELUS will compare the revenues received in respect of Commissionable Services in the last six-month period (January to June or July to December, as the case may be) (the "Current Period") to those received in the immediately preceding six-month period (the "Compare Period"). For example, if the Current Period ends in June, the Compare Period would be the six-month period ending in December of the previous year If the aggregate revenue to TELUS in respect of Commissionable Services (net of the percentage payable to the Client Credit Account) in the Current Period falls at least 20% below such aggregate revenue to TELUS in the Compare Period (the "Revenue Drop"), then subject to subsection b below, TELUS shall invoice, and the Corrections Branch shall pay to TELUS, an amount equal to the aggregate revenue to TELUS in respect of Commissionable Services (net of the percentage payable to the Client Credit Account) in the Compare Period less such aggregated revenue to TELUS in the Current Period (the "Top Up"); and
   b. The Corrections Branch shall only have the obligation to pay the Top Up if
      i. the Province implemented a decision during the CCS Term relating to the use of an alternate service provider, including the Corrections Branch, for services within the scope of the CCS or which are functionally equivalent to or a functional replacement of the CCS, and
      ii the reason behind the Revenue Drop is not directly related to one of the following. a court order; Federal or Provincial legislative or regulatory changes; policy decisions with regard to volume or conditions of prisons that do not relate directly to the CCS; and steps taken by TELUS to change, replace, substitute or upgrade the CCS (i.e.TELUS cannibalization).

10 **Remedies.** Section 31.3.1 of the Agreement is excluded from application to the CCS, and replaced with the following provision:

"Without requirement for recourse to legal process and without limiting any other rights or remedies the Province may have at law, in equity, as otherwise set forth in this Agreement or otherwise, upon the occurrence of a TELUS Event of Default as set forth in section 31 1 or notice of an Event of Default pursuant to section 31.2 the Province may:

(a) not pay any or all of the Fees to TELUS in respect of any Service that is paid for by Province Dollars that TELUS fails to provide (in whole or in part) during the period of time such Event of Default remains uncured,

(b) to the extent that the right is available to TELUS in any Subcontracts existing as of the Effective Date, require that TELUS immediately cease using any Subcontractor where such Event of Default is reasonably attributable in whole or in material part to such Subcontractor by delivery of a written notice to TELUS of such required cessation of use of such Subcontractor, with TELUS then being required to exercise commercially reasonable efforts to replace such Subcontractor as soon as possible, subject to the Approval rights with respect to new Subcontractors as set forth in Section 15, or

(c) terminate its obligations or any portion thereof with respect to the CCS without the payment of any fees under Section 8a above, by delivery of a Termination Notice to TELUS,

and TELUS acknowledges and agrees that, upon such occurrence of an Event of Default, the Province may exercise any or all of, or any combination of, the above-listed rights and remedies in this section."

11 **Service Order and Change Process.**

a. **Service Orders** Without otherwise limiting the application of section 7 for any other purpose under the Agreement, section 7 shall be modified as follows for the sole purpose of enabling Corrections Branch to order directly, and TELUS to provide to Corrections Branch, the CCS

(i) For the purposes of CCS only, and except as set out in section (iii) below, Section 7 of the Agreement shall have no application,

(ii) Despite anything to the contrary contained in Section 7 of the TSMA, service orders relating to CCS shall be in a form to be mutually agreed between TELUS and Corrections Branch ("CCS Service Orders");

(iii) CCS Service Orders shall be available solely for the scope of Services described in this Change Order (the "In Scope CCS") For all other Services, including any new services proposed by TELUS or the Corrections Branch with respect to the CCS (the "Out of Scope Services"), the Service Order process in Section 7 of the Agreement shall continue to apply For greater certainty, the authority for ordering the Out of Scope Services under the Agreement resides solely with the Administrator and not with Corrections Branch. Any Out of Scope Services ordered without the express written consent of the Administrator shall be of no force and effect under the Agreement.

b **Change**. Without otherwise limiting the application of section 9 for any other purpose under the Agreement, section 9 shall be modified as follows for the sole purpose of enabling change in respect of In Scope CCS:

(i) For the purposes of In Scope CCS only, and except as set out in section (iii) below, Section 9 of the Agreement shall have no application

(ii) Despite anything to the contrary contained in Section 9 of the TSMA change orders relating to In Scope CCS shall be in a form to be mutually agreed between Corrections Branch and TELUS ("CCS Change Orders");

(iii) CCS Change Orders shall be available solely for In Scope CCS. For all other Services, including Out of Scope Services, the Change Process in Section 9 of the Agreement shall continue to apply. For greater certainty, the authority for executing Change Orders with respect to Out of Scope Services under the Agreement resides solely with the Administrator and not with Corrections Branch Any change with respect to Out of Scope Services ordered without the express written consent of the Administrator shall be of no force and effect under the Agreement

(iv) Corrections Branch will bring requirements for any Out of Scope Services to TELUS initially through the CCS Governance Process and then to the

Administrator for approval. Any Out of Scope Services must be approved as a Change Order under the Agreement by the Administrator

12 **Service Availability Planning.** Section 11 of the Agreement is excluded from application to the CCS TELUS will, prior to implementation of the CCS, work with the Corrections Branch to identify major service availability risks and solution a mitigation strategy at no cost to the Corrections Branch

13 **Quality Management and Continuous Improvement**. Sections 6 8 1(b) and (c) and Section 8 2 are excluded from application to the CCS In year four of the CCS Term, TELUS and the Corrections Branch shall meet to (i) discuss current available technology and end user requirements and (ii) identify opportunities for updates, enhancements, and infrastructure currency

14. **Reports.** Section 18 of the Agreement is excluded from application to the CCS CCS-specific reporting obligations are contained in Attachment H-11

15. **Transition**. Sections 3, 4 and 16.2 and Schedule S of the Agreement are excluded from application to the CCS TELUS will take responsibility and accountability for managing and completing the transition and implementation of the CCS as a Project pursuant to s. 6 4 and Schedule I of the Agreement (the "CCS Implementation Project") TELUS will provide Corrections Branch with the Implementation Project Plan containing the information detailed in Schedule 8 attached hereto, no later than February 15, 2013. The Implementation Project Plan will provide for a "no later than" completion date for the CCS Implementation Project as a whole; failure to meet this deadline will be considered an Event of Default.

16. **Governance.** Without otherwise limiting the application of section 13 under the Agreement for any other purpose, section 13 shall be modified as follows for the sole purpose of relationship management in respect of the CCS.
    a. For the purposes of CCS only, a separate governance process (the "CCS Governance Process") shall be established in accordance with Schedule 9 to this Change Order;
    b. The CCS Governance Process is intended to supersede and replace Levels 3 and 4, but not Levels 1 and 2, of the Governance Process under the Agreement solely in respect of the CCS Its purpose is solely to address implementation, operational and day-to-day issues, including Ordinary Course Changes, CCS Service Orders and CCS Change Orders (but excluding the Change Process under the Agreement) that arise as between Corrections Branch and TELUS
    c For greater certainty, the CCS Governance Process shall have no application or jurisdiction in respect of the following matters:
        i. Out of Scope Services.
        ii. the Change Process;
        iii. Disputes other than those specifically described in this Change Order as subject to the CCS Governance Process,
        iv. The SRA; or
        v. any matters that impact upon, or relate to, other Services or the rights, obligations or interests of the GPS Entities under the Agreement

17. **Subcontractors.** Pursuant to section 15 of the Agreement, the Province consents to the use of Lattice Incorporated ("Lattice") and Sierra Systems Group Inc. ("Sierra") as Subcontractors ("CCS Approved Subcontractors") Pursuant to section 15.1.2, TELUS confirms that such

Subcontractors will not have access to any Personal Information or GPS Entity Confidential Information.

18. **Intellectual Property** Notwithstanding anything to the contrary contained in Section 21 of the Agreement, modifications, revisions, additions, bug fixes, patches, work-arounds, enhancements, improvements and updates made exclusively by Lattice to TELUS Intellectual Property and exclusively for the Corrections Branch (collectively "Lattice Enhancements") constitute TELUS Intellectual Property and do not constitute New Material. TELUS hereby grants the Province a perpetual, transferable, non-exclusive, royalty-free right to use the Lattice Enhancements, solely for the Province's internal use Coding created by Province employees for application interfaces, functionality and integration with respect to the CCS ("Province CCS Code") and modifications, improvements, enhancements and updates to Province CCS Code shall constitute New Material. The Province acknowledges that the TELUS Group may use the Province CCS Code on a perpetual, transferable, non-exclusive, royalty-free basis with respect to other projects and customers.

19. **Entire Agreement**. This Change Order supersedes any other prior agreements between the Corrections Branch and TELUS, including the Payphone Equipment and Services Agreement dated April 12, 2001. TELUS hereby releases Corrections Branch from any termination fees that would otherwise be payable by Corrections Branch to TELUS in respect of these prior agreements.

B. APPROVALS			
This Change Order may be executed in several counterparts and delivered by electronic transmission, each of which when so executed and delivered shall be deemed to be an original. Such counterparts together shall constitute one and the same instrument, notwithstanding that all of the parties are not signatories to the original or the same counterpart.			
Authorizing Individual (including title) of the GPS Entity:	C. J. Ritchie Administrator and Assistant Deputy Minister, Strategic Partnerships	**Phone Number:**	
Highest Level of Change Request Approval: NB: Select one of these bodies, per nature of change.			Operational Management Committee
			Strategic Management Committee
		X	Executive Governance Committee

Signatures			
On Behalf of TELUS:		***On Behalf of the GPS Group:***	
Agreed To:		**Agreed To:**	
Name:	~~Joe Natale~~ MONTY CARTER	**Name:**	C.J. Ritchie
Title:	~~Chief Commercial Officer~~ SENIOR VICE PRES	**Title:**	Administrator and Assistant Deputy Minister, Strategic Partnerships [Co-chair, OMC]
Signature:		**Signature:**	
Date:	December 21, 2012	**Date:**	December 27, 2012

Schedule 1

Attachment H-11

Client Communication Services

Service Title:	Client Communication Services
Service Number:	H-11

1. **Service Title and Number**

(a) The Service Title and the Service Number of this specific Available Service are set out in the above table.

2. **Services Description**

(a) The table under this section 2 sets out the scope of the CCS, to which the parties may add additional services pursuant to the CCS Change Process or the Change Process, as applicable.

(b) For the purposes of the table below, the following terms are defined as follows:

(i) "Privileged" means that the service is a privileged communication between the Client and another party and is not to be recorded;

(ii) "Subsidized" means that the service is paid for in whole or in part from the Client Credit Account or by some other source and there is no fee charged for the service; and

(iii) "Commissionable" means that the service is paid for in whole or in part by the Client or a third party and thereby generates revenue for TELUS and the Client Credit Account.

Basic Services	Privileged	Subsidized	Commissionable	Payer
Controlled Voice Calling (Debit/Collect)	No	No	Yes	Client or Client Contact
Controlled Voice Calling (Pre-paid)	No	No	Yes	Client Contact
Controlled Voice Calling (Subsidize Number - Privileged)	Yes	Yes	No	Corrections Branch via Client Credit Account
Controlled Voice Calling (Toll Free Numbers)	No	No	No	External 3rd Party
Controlled Voice Calling (Subsidize Number – Corrections Branch)	No	Yes	No	Corrections Branch via Client Credit Account

Controlled Voicemail	No	No	Yes	Client Contact
Controlled Voicemail (Broadcast)	N/A	N/A	N/A	N/A
Controlled Voice Calling (No Cost)	No	No	No	TELUS
Additional Services				
Controlled Text Messaging	No	No	Yes	Client or Client Contact
Controlled Text Messaging (Privileged)	Yes	No	Yes	Client or Privileged Contact
Controlled Video Calls	No	No	Yes	Client or Client Contact
Controlled Video Calls (Privileged)	Yes	No	Yes	Privileged Contact
Soft Phone	N/A	N/A	N/A	TELUS
eDevice	N/A	Yes	N/A	Corrections Branch via Client Credit Account
Secure CCS LAN	N/A	Yes	N/A	Corrections Branch via Client Credit Account

3 CCS Features

(a) Call Services

(i) TELUS will ensure that the CCS allows Inmates to make local and long distance (including international) calls from Correctional Centres.

(ii) TELUS will ensure that the CCS provides automated voice scripts as directed by the Province.

(b) Voicemail Services

(i) TELUS will ensure that the CCS provides Controlled Voicemail options for Inmates. All voice mail messages will follow the recorded calls retention and disposal policies in accordance with this Attachment H11 and any other applicable requirements under the Agreement.

(c) Provisioning

(i) TELUS will ensure that the CCS provides the ability to enrol an Inmate, manage and control Inmates' access (including transfers from one Centre to another without the need to re-provision) and disable/cancel access to the system when an Inmate is discharged from a Correctional Centre.

(ii) TELUS will ensure that the CCS phone system enrolment interface includes the Inmate's unique CS Number and Client Biometric.

(iii) TELUS will ensure that the CCS provides the Corrections Branch with the ability to activate, suspend or deactivate a Client's account via the CCS Call Control Platform

(iv) TELUS will use CORNET to ensure that CS Numbers are unique in the CCS.

(d) Call Control/Monitoring/Recording

(i) TELUS will ensure that the CCS provides the ability for a Called Party to accept or deny debit, prepaid, prepaid collect or collect calls

(ii) TELUS will ensure that the CCS provides the Corrections Branch with the ability to record or Monitor calls made by Inmates, excluding Privileged Calls For clarity, the CCS will not record or permit Monitoring of a phone call to Privileged Contact.

(iii) TELUS will ensure that the CCS have the ability to be configured to allow Inmates to.

A. Make calls only to numbers that have been preapproved; and

B. Make calls to any number that is not blocked.

(iv) TELUS will ensure that the Corrections Branch has the option to set the account for any Inmate to 'closed' or 'open' ('open means that the Inmate account has no restrictions on the telephone numbers it may call; 'closed' means that the Inmate account does have restrictions on which numbers may be called

(v) TELUS will ensure that the CCS provides the Corrections Branch with the ability to detect and end three way call attempts made by Inmates

(vi) TELUS will ensure that the CCS provides the Corrections Branch with the ability to shutdown all phones or a subset of phones in a Centre in the event of an emergency

(vii) TELUS will ensure that the CCS provides the Corrections Branch with the ability to prevent phones from receiving incoming calls

(viii) TELUS will ensure that the CCS records the call details for each call including date and time of call, CS Number, first and last name of the Inmate, length of call, and termination reason

(ix) TELUS will ensure that the CCS provides the Corrections Branch with the ability to identify the following anomalous activities through CCS alerts:

A Numbers that are called numerous times.

B Multiple authentication attempts; and

C Numbers that are called at the same time by multiple Inmates.

(x) TELUS will ensure that the CCS provides an alert system that will notify Corrections Branch staff by email text message or system generated call when the activities described in (ix) A, B or C above have occurred or are occurring.

4 **Call Control**

(a) TELUS will ensure that the CCS provides the Corrections Branch with the ability to restrict the length of time an Inmate can be on a call by Centre, phone or CS Number

(b) TELUS will ensure that the CCS allows Corrections Branch staff to disconnect live calls.

(c) TELUS will ensure that the CCS provides configuration to allow automatic shut-off of individual phones, all phones in a living unit, all phones in a Centre, or all phones in all Centres, at times designated by the Corrections Branch, so as to allow the phones to function during a set hours of operation within a 24 hour period.

(d) TELUS will ensure that the CCS provides the Corrections Branch with the ability to listen to and review the recording of an Inmate's name that is used in the voice script to advise Called Parties who is calling

(e) TELUS will ensure that debit, collect and prepaid calls, Privileged Calls, and calls to Subsidized Numbers are accepted by the Called Party before an Inmate can communicate with the Called Party TELUS will enable the Corrections Branch to configure specified Client Contact numbers for passive acceptance.

(f) TELUS will ensure that the CCS provides the Corrections Branch with the option to block a phone number for a specified time period

(g) TELUS will ensure that the CCS includes searchable first name last name and role fields to register against individual phone numbers

(h) TELUS will ensure that the CCS has no limit on the amount of phone numbers that can be blocked for each Centre and each Inmate

(i) TELUS will ensure that the CCS provides the Corrections Branch with the ability to permit a Called Party to block all future calls from all Centres.

(j) TELUS will ensure that, in the event that a Called Party inadvertently blocks a call, the CCS will provide the ability for Corrections Branch staff to reverse the blocking at the request of the Called Party

(k) TELUS will ensure that the CCS provides the Corrections Branch with the ability to prevent an Inmate from calling one or more telephone numbers

(l) TELUS will ensure that the CCS provides the Corrections Branch with the ability to prevent one or more telephone numbers from being called from a specified phone, Living Unit, Centre or from all Centres

(m) TELUS will ensure that when a call is transferred to a new number, the CCS will retain the call cost and if applicable, the configuration as a Privileged Call associated with the original number

(n) TELUS will ensure that the CCS restricts Inmates from dialling toll free numbers, unless approved by the Corrections Branch. The Corrections will be able to configure toll free numbers as approved to call

(o) TELUS will ensure that the CCS restricts Inmates from dialling 1-900 numbers, unless approved by the Corrections Branch. The Corrections Branch will be able to configure 1-900 numbers as approved to call.

(p) TELUS will ensure that the CCS provides the Corrections Branch staff with the ability to shut down an individual phone, all phones on a living unit, all phones in a Centre or in all Centres at the same time with one action. TELUS will ensure that this emergency shutdown mechanism will include the ability for TELUS to do so remotely at the request of the Corrections Branch.

5 **Call Monitoring**

(a) TELUS will ensure that the CCS provides the Corrections Branch with the ability to Monitor live phone calls from Inmates, except for Privileged Calls, without any interference to existing recording operations. TELUS will ensure that Monitoring will not be detectable by the Inmate or the Called Party

(b) TELUS will ensure that the CCS provides the Corrections Branch with the ability to monitor live call activity including the number of phones in use, individual call details, whether particular phones are idle or in use, phone locations, whether calls are debit, collect or free the numbers dialled, call lengths and CS Numbers, without any interference to existing recording operation. This monitoring must not be detectable by the Inmate or Called Party

(c) TELUS will ensure that the CCS provides the Corrections Branch staff with the ability to Monitor calls in different Centres

6 **Call Recording**

(a) TELUS will ensure that the CCS provides the Corrections Branch with the ability to record phone calls from Inmates, except for Privileged Calls, without any interference to the call.

(b) TELUS will ensure that Privileged Calls cannot be recorded or Monitored.

(c) TELUS will ensure that call recording (excluding Privileged Calls) occurs as soon as a number that is dialled by the Inmate is determined to be a valid phone number. Recording will include all call scripts, announcements and notifications heard by the Inmate and the Called Party.

(d) TELUS will ensure that the CCS automatically deletes recorded calls after thirty (30) days unless the recordings have been flagged as 'do not delete .

(e) TELUS will ensure that the CCS provides the Corrections Branch with the ability to flag one or more recorded calls in the system to prevent them from being deleted after thirty (30) days.

(f) TELUS will ensure that the CCS provides the Corrections Branch staff with a searchable comment field attached to any call recording (i.e a case number or other pertinent

information). The comment field must have the capability to be exported to PDF, rich text format and HTML format.

(g) TELUS will ensure that the CCS provides the Corrections Branch with the ability to play back recorded calls from Inmates and to search for recorded calls based on CS Number, phone number or location, Living Unit or Centre.

(h) TELUS will ensure that any recordings made by the CCS can be converted to a standard .wav file format

(i) TELUS will ensure that downloaded recordings will include a player to decode proprietary formats.

(j) TELUS will ensure that the CCS provides authorized Corrections Branch staff with the ability to download recordings to local hard drives, optical drives and USB drives. Only authorized users will be able to download recordings.

(k) TELUS will ensure that the downloaded recordings will contain data elements, including metadata tags for CS Number, date, time, number called, number called from, and duration of call

(l) TELUS will ensure that the CCS provides the Corrections Branch staff with the ability to bookmark a spot and add a note within a recorded call

7 **Scripts/Announcements/Notifications**

(a) TELUS will ensure that the CCS provides an automated control and messaging system that includes usage instructions, account balances, call rates, call length, termination reasons, and custom notifications as defined by the Corrections Branch

(b) TELUS will ensure that the automated control and messaging system will be developed with input from the Corrections Branch and that the content of all automated messages utilized in the CCS are approved by the Corrections Branch before they are put into use

(c) TELUS will ensure that the CCS automated control and messaging solution

(i) provides the name of the Correctional Centre, the name of the Inmate, collect call rates if applicable, and an 'accept, deny or block' response prompt' for all calls,

(ii) notifies the Inmate and the Called Party that the call is subject to Monitoring and recording, when an Inmate initiates a call other than a Privileged Call

(iii) notifies the Inmate and Called Party that the Privileged Call is confidential and will not be Monitored or recorded, when an Inmate initiates a Privileged Call

(iv) advises Inmates when a number dialled is collect call restricted.

(v) notifies Inmates immediately following the entry of the call number if the call they are making is long distance.

(vi) advises an Inmate making a long distance debit call, when the Inmate s account is running low in funds;

(vii) notifies the Inmate and Called Party before the maximum allotted time has been reached and the call is terminated,

(viii) notifies the Inmate and Called Party of the time remaining before the phone system will be shut down in accordance with a standard shutdown; and

(ix) notifies the Inmate of the reason that a call is terminated.

8. **Security/Access**

(a) Without otherwise limiting the Privacy Obligations or the Security Obligations, or its compliance with the Policies, TELUS will ensure that the CCS provides security and authentication functionality, consistent with all Applicable Laws and Corrections Branch policies, to allow Corrections Branch staff to access and administer the CCS.

(b) TELUS will ensure that the CCS will include a phone system enrolment interface that will provide the Inmate's CS Number and Client Biometric along with other data such as Inmate's name in order to create a CCS account profile

(c) TELUS will ensure that the CCS provides web-based central management of the phone services, which will be accessible by authorized Corrections Branch staff using government workstations accessing the secure TELUS Network.

(d) The CCS will provide the ability for authorized Corrections Branch staff to access the system on a real-time basis twenty-four (24) hours per day, seven (7) days per week.

9 **Hardware/Software**

(a) TELUS will ensure that the CCS system specifications will include a description of the hardware and software that make up the CCS

(b) TELUS will ensure that the CCS includes a secure network for Inmate communication and phone calls.

10 **Configuration and Data**

(a) Without otherwise limiting the Privacy Obligations or the Security Obligations, or its compliance with the Policies, TELUS will ensure that all data stored by the CCS is stored in Canada, is backed up in a secure location in Canada, and is restorable within 24 hours if that data cannot be accessed from the central database, at no additional cost to the Province.

(b) TELUS will ensure that the CCS provides the Corrections Branch with the ability to store, search and report on call details data for a period of three years.

(c) TELUS will ensure that the CCS automatically deletes stored call recordings after 30 days, unless otherwise flagged in the CCS by Corrections Branch staff.

(d) TELUS will confirm in writing, on an annual basis, that it complies with subsections (b) and (c) above.

(e) TELUS will ensure that the CCS provides the Corrections Branch with the ability to merge phone account and phone records where more than one unique CS Number has been found for an Inmate

(f) TELUS will ensure that the CCS provides the Corrections Branch with the ability to advise the user when data exists for the original CS Number before proceeding with a merge

(g) TELUS will ensure that the CCS provides the Corrections Branch with the ability to split phone account and phone records where a single CS Number has been used for more than one Inmate

(h) TELUS will ensure that the CCS provides the Corrections Branch with the ability to force an Inmate to re-authenticate before using the phone in the event that data integrity issues are discovered.

(i) TELUS will ensure that the CCS allows the Corrections Branch to configure specific numbers in the system as numbers for Privileged Contacts

(j) TELUS will ensure that, for all phone numbers configured in the CCS, the supporting data will include the following fields first and last name, company name, and phone number type (cell, home or business).

(k) TELUS will ensure that the CCS allows the Corrections Branch staff to automatically add any new numbers dialled by the Inmate, and to add new numbers

(l) TELUS will ensure that the CCS allows the Corrections Branch to search for all numbers in the CCS by all supporting data: phone number first and last name role and phone number type.

(m) TELUS will ensure that the CCS will provide the ability to add or update numbers using a database file from external sources

(n) TELUS will ensure that the CCS will not delete called numbers and PINs but will allow such data elements to expire

11. **Usability/User Interface**

(a) TELUS will ensure that the CCS.

(i) has an effective search capability,

(ii) will find the correct record when blank spaces are included at the end of a line of text or when a field value begins with zero;

(iii) will allow an Inmate's CS Number to be entered with dashes, spaces. decimals or parenthesis, and will allow phone numbers to be entered with dashes and parenthesis;

(iv) provides the Corrections Branch with the ability to search on data elements (including partial - wild card search %) in the CCS, including date, time, Centre CS#, phone number and location), phone number called, call type (prepaid,

collect, debit, free), configured numbers (blocked, subsidized, privileged), call length, call termination code; and

(v) operates through a unified set of controls and not contain distinct modules.

12. Specific Reporting Requirements

(a) TELUS will ensure that the CCS allows the Corrections Branch to build new reports, customize and expand existing reports, and save report preferences if required.

(b) TELUS will ensure that the CCS includes robust reporting functionality with web based historical and real-time reporting at no additional cost to the Corrections Branch.

(c) TELUS will include, at a minimum, the following reporting parameters and filters: individual phone usage statistics, Inmate phone usage (FOI), system user audit (recorded calls and system actions), frequently called numbers, blocked numbers, subsidized/free numbers, privileged numbers, call volume, Inmate account statements, Inmate account balance, and billing reconciliation.

(d) TELUS will ensure that the CCS produces reports available in PDF, WORD and EXCEL formats and that these reports can be accessed by the Corrections Branch. At a minimum, these reports will include the report configurations set out in the table below:

Report .	Description	Frequency	Data Elements	Filters/sorts
R-1	Phone Usage Statistics - displays usage by phone	Weekly Monthly	Phone (name) Centre Call attempts Call connects Call accepts Call denies Termination reason Total call time for each phone (minutes)	All data elements Minutes Time period
R-2	Inmate Phone Usage - displays Inmates phone use, used for investigations or to troubleshoot Inmate complaints	Daily Weekly Monthly	CS# Inmate name Called number Centre Phone (name) Phone number Call length Date & time (of call acceptance) Start time (pickup, connect, accept) Stop time Call type (debit, collect, free) Termination reason Call cost	All data elements Time period

Report .	Description	Frequency	Data Elements	Filters/sorts
R-3	FOI - Inmate Phone Usage - displays Inmate's phone usage. Provided to Inmates in response to FOI request.	Daily Weekly Monthly	CS Number Inmate name Called number Centre Phone (name) Call length Date & time (of call acceptance) Call type (debit, collect, free) Call cost	All data elements Time period
R-4	System User Audit - Recorded Calls - displays system user actions (SSU)	Daily Weekly Monthly	Name of staff who listened to recorded call Date listened Time listened Length of time listened Call recording Call Date Call Time Centre Living Unit Phone (name) Phone number CS Number Inmate name Call flagging ('do not delete' recorded call)	All data elements Length of time listened Time period
R-5	System User Audit - displays system user actions - excluding recorded calls (SSU)	Daily Weekly Monthly	Corrections staff name User action (any system changes, e.g., programming phone numbers, programming accounts, system changes - set time of phone usage, emergency shutdown etc.) Date Time Centre Living Unit CS Number Inmate name Subsidized or privileged number modifications (create, update, delete)	All data elements Time period

Report .	Description	Frequency	Data Elements	Filters/sorts
R-6	Frequently Called Numbers - investigative tool for reviewing excessive phone usage	Daily Weekly Monthly	Called number Centre CS Number Inmate name Call attempts (& unique attempts) Call connects Call accepts Call denies Call length (minutes) Call length (rounded up minutes) Termination reason	Centre Phone (name) Number of call attempts Time period
R-7	Blocked Calls - display all blocked numbers, used for troubleshooting Inmate complaints, Called Party complaints	Weekly Monthly	Blocked number Blocked reason (call party, Corrections or Vendor) Date blocked Time blocked User that blocked the number Centre	All data elements Time period Centre CS# Inmate name
R-8	Subsidized Numbers /Privileged Numbers- report of all legal representatives and agencies that provide support to Inmates	Weekly Monthly	Number of calls Phone number (cell, home and work) Phone number type (free, privileged, and passive acceptance (rotary phone)) Name of party (first/last) Company name Company address Type of contact Last updated (date) Last date called ID # of update	All data elements (multiple phone number types) Group by Company Name (all lawyers associated to a Company) Group by number (all lawyers associated to a number) Time period

Report .	Description	Frequency	Data Elements	Filters/sorts
R-9	Call Volume Report - summarizes calls for billing reconciliation	Daily Weekly Monthly	Number of calls Number of minutes of call Call type (debit, collect, free) Centre name Living Unit Phone (name) Total cost	Time period Centre Living Unit Phone (name)
R-10	Cost Call Transactions - displays all cost call transactions NOTE: Account type will always be 'debit'	Daily Weekly Monthly	CS Number Inmate name Inmate Trust Account # Transaction type (deposit/ withdrawal/adjustment) Transaction date Transaction time Transaction amount (call cost) Transaction receipt # Cash receipt Centre	Centre Time period CS Number Inmate name Transaction type
R-11	Inmate Account Statement - report of all cost call and account transactions for an Inmate NOTE: Account type will always be 'debit'	Daily Weekly Monthly	CS Number Inmate name Inmate Trust Account # Transaction type (deposit/withdrawal/correction) Call date Call time Call length (minutes) Call cost Transaction receipt # Centre Living Unit Centre phone # Called Party phone #	CS Number Inmate name Inmate Trust Account # Time period Transaction receipt # Centre
R-12	Inmate Account Balances - displays the phone account balance for Inmates (useful for Inmate transfer/discharge) NOTE: Account type will always be 'debit'	Daily Weekly Monthly	CS Number Inmate name Inmate Trust Account # Date account activated (most recent) Account status (active, inactive) Account balance cost Centre Living Unit	CS Number Inmate name Time period Inmate Trust Account # Centre

13 **Secure CCS LAN**

(a) TELUS will provide a Secure CCS LAN within Correctional Centres designed to enable the CCS to be paid for via the Client Credit Account

14. **Service Integration**

(a) TELUS will provide an interface that is integrated with intake and eServices provisioning in CORNET for the purpose of managing Client enrolment, transfer and release.

(b) TELUS will ensure that the CCS accounting system integrates with the Inmate Trust Account

(c) (a) and (b) are subject to the Client Communication Service (CCS) – CORNET Nexus Integration Points document to be finalized between the Corrections Branch andTELUS.

15 **System Audit**

(a) TELUS will ensure that the CCS provides full auditing that tracks the time, date, location user, user access level/role and action for all user activity

16. **System Administration**

(a) TELUS will ensure that the CCS provides an interface to manage access to the CCS and security based on groups and roles.

(b) TELUS will ensure that the CCS provides an interface to manage access and system security based on locations

(c) TELUS will ensure that, on a planned or emergency basis, the CCS will provide the ability for Corrections Branch staff to enable, disable or create voice scripts, announcements and notifications

(d) TELUS will ensure that the CCS will include the ability to configure specific access levels

17 **CCS Help Features**

(a) TELUS will ensure that the CCS provides phone usage help features for Inmates using scripts, announcements, notifications or interactive options.

(b) TELUS will ensure that the CCS provides a web-based online help system for Corrections Branch staff.

18 **Data Conversion**

(a) TELUS will ensure that all pre-existing phone numbers and the following associated data configurations will be entered and configured in the CCS

(i) Privileged numbers;

(ii) Blocked numbers,

(iii) Subsidized/free numbers and

(iv) Comment fields - to provide supporting details for call control configurations

(b) The following pre-existing data associated with the Inmate phone accounts will be entered and configured in the CCS

(i) CS Number (same as CCS PIN Number),

(ii) First/last name;

(iii) Date of birth;

(iv) Comments fields - to provide supporting details for call control configurations;

(v) Blocked numbers: and

(vi) Current phone account balance

19 **Additional Services**

(a) The following are the additional services that may be offered to Corrections Branch by TELUS during the CCS Term

(i) TELUS will provide Softphone capabilities that can be delivered via the eDevice;

(ii) TELUS will develop a pay per use Controlled Text Messaging service; and

(iii) TELUS will develop a pay per use Controlled Video Calling service.

(b) Corrections Branch will bring requirements for any additional CCS Services or Out of Scope Services, to TELUS initially through the CCS Governance Process, and then to the Administrator for approval Any additional CCS service or Out of Scope Services must be approved as a Change Order under the Agreement by the Administrator.

20 **Capacity Management**

(a) TELUS will

(i) manage capacity requirements for CCS components based on the traditional volume averages as indicated in the call volume reports produced pursuant to s. 12 of this attachment, up to an overage variance of 25%. If the call volume exceeds the 25% overage variance, TELUS will inform Corrections Branch and provide a plan within 90 days, at no cost to Corrections Branch, to maintain CCS performance;

(ii) advise Corrections Branch when an upgrade is available or if future capacity expansion is required; and

determine if the upgrade or capacity expansion will impact the CCS and work with Corrections Branch, at no cost to Corrections Branch, to plan and test the upgrade or capacity expansion

21. **Maintenance**

(a) As part of the CCS, and at no additional cost, TELUS will.

(i) provide maintenance services including repair, replacement of Hardware or Systems, upgrades in compliance with the Hardware manufacturer's specifications, and ongoing support of the CCS system to Corrections Branch for the CCS Term;

(ii) in accordance with the procedures of the CCS Governance Process, maintain and upgrade the CCS (including security patches) to align with the Corrections Branch infrastructure, and

(iii) include a plan that will be used for all CCS enhancements or bug fixes and that includes a Forward Schedule of Changes (FSC) review/approval cycle, where approval from the Corrections Branch will be given one month before implementation (excluding emergency changes and a separate condensed review/approval cycle for emergency changes, where approval from the Province will be required at least one day before implementation, or sooner based on urgency and mutual agreement with the Corrections Branch.

(b) TELUS will provide notification to the Corrections Branch staff of any system shut downs (routine maintenance or emergency system outage) in accordance with Attachment N-11

(c) TELUS will maintain the network hardware including routers, servers, switches provided by TELUS for the CCS.

(d) TELUS will advise the Corrections Branch when an upgrade is available or if future capacity expansion is required.

22. **Phone and Trust Account Management**

(a) TELUS will provide an accounting system that manages costs and payments associated with Inmate collect, debit, prepaid debit/collect or subsidized calls

(b) TELUS will ensure that the CCS enables the Corrections Branch to credit Inmate accounts for calls that were disconnected in error

(c) TELUS will provide the ability to reimburse Client Contacts and Inmates

(d) TELUS will reimburse phone funds that belong to Client Contacts

(e) The Corrections Branch will reimburse phone funds that belong to Inmates.

(f) TELUS will ensure that phone funds are directly linked to the Inmate so that there is no need to transfer funds between Centres when an Inmate moves from one Centre to another Centre.

(g) TELUS will allow Corrections Branch staff to place a configurable number of free calls on an Inmate's PIN.

(h) TELUS will provide a debit calling option for Inmates making international calls The international calls must not require any assistance from an operator and will be subject to the same call control and restrictions in place for local and long distance calls

(i) TELUS will ensure that billing does not begin until the Called Party actively accepts the call.

(j) TELUS will notify the Inmates of their current phone account balance after authentication

(k) TELUS will allow Corrections Branch staff to limit the amount of funds that may be deposited in an Inmate's phone account.

(l) TELUS will allow Client Contacts to deposit funds into an Inmate's phone account by phone or online using credit cards or debit cards.

(m) TELUS will enable Inmates to transfer their funds back and forth between their CCS Inmate debit phone accounts and their Inmate Trust Accounts.

23 On a weekly basis the Corrections Branch and TELUS will reconcile the net amount of all funds transferred between the CCS Inmate debit phone accounts and the Inmate Trust Accounts

24. **Third party Software** The Corrections Branch will notify TELUS of third party Software that needs to be included into specific CCS components and their inclusion will be subject to the following additional procedures.

(a) TELUS will review such notifications against TELUS' standard protocols and processes regarding the use of third party Software from a risk review and security perspective,

(b) TELUS will use commercially reasonable efforts to identify a risk mitigation strategy/plan (such as a separate dedicated environment) to accommodate the inclusion of such third party Software. If such risk mitigation plan/strategy is not viable, TELUS, in its sole and absolute discretion, has the right to refuse the inclusion of such third party Software;

(c) For greater certainty, nothing in this Attachment H-11 will restrict the Corrections Branch from selecting or using any Software, including engaging another service provider or hosted environment for any third party Software that TELUS refuses to permit on the TELUS side of the Demarcation Point,

(d) With respect to third party Software that TELUS permits, TELUS will work with applicable third parties to integrate the Software into the CCS, on a time and materials basis in accordance with the fees set out in the Price Book, and

(e) For greater certainty, the addition of third party Software to a CCS component under this Section 3 will be considered an Ordinary Course Change and will not be subject to the CCS Change Process.

25 **CCS Hosted from within Canada**

(a) Without otherwise limiting the Privacy Obligations or the Security Obligations, or its compliance with the Policies, TELUS will ensure that the CCS is hosted from within Canada at all times during the CCS Term

26. **Service Availability**

(a) TELUS will ensure that the CCS are available within Correctional Centres at times specified by the Corrections Branch and as agreed to by TELUS in accordance with Attachment J-VI of the Agreement.

Schedule 2

Attachment J-VI
Service Level Descriptions for Client Communication Services

1. **Introduction**

This Attachment identifies Service Levels that TELUS is required to achieve in performing the CCS and the corresponding Service Level Descriptions and Critical Thresholds.

2. **Service Levels**

(a) TELUS will comply with the following Service Levels for the CCS Services:

Reference Number:	**J-VI-SLO-1**	
Service Level Name:	Service Availability	
Service Level Requirement:	Service Availability for Call Control Platform Percentage ≥ 99.7%	
Type of Service Level:	SLO	
Service Unit(s):	Reference:	Service/Service Title
	H-11	Client Communication Services
Definitions:	"Available Hours" means 17 hours, which for clarity are during the Availability Window. Availability Window" means 0600 – 2300 PST. "Total Downtime" means the sum of all minutes the Call Control Platform is unavailable or subject to a material degradation of the CCS Service during the Measurement Period. "Total Possible Uptime" means the sum of all minutes during the Measurement Period (e.g. 60 minutes x Available Hours x number of days in the Measurement Period), excluding time accrued for Excluded Events.	
Monitoring	Reactive	
Measurement Methodology:	TELUS Network monitoring tools.	
Measurement Period:	Monthly	

Measurement Calculation:	Service Availability Percentage = 100 - (100 x Total Downtime / Total Possible Uptime)
Special Reporting Requirements:	Monthly
Critical Threshold:	If TELUS fails to meet this Service Level on 3 or more consecutive times or for 4 or more times in any twelve 12 month period, such failure will be deemed to be a Chronic Failure for the purposes of section 10.09 of this Agreement and all corresponding rights and remedies will apply.

Reference Number:	**J-VI-SLO-2**	
Service Level Name:	P1 & P2 Time to Restore	
Service Level Requirement:	Time to Restore Rate ≥ 70%	
Type of Service Level:	SLO	
Service Unit(s):	Reference:	Service/Service Title
	H-11	Client Communication Services
Definitions:	"**Compliant Restoration Time**" means the Time to Restore for a Priority 1 Incident or Priority 2 Incident is ≤ 4 hours within the Availability Window.	
Monitoring	Reactive	
Measurement Methodology:	TELUS Network monitoring tools.	
Measurement Period:	Monthly	
Measurement Calculation:	Time to Restore Rate = (total number of Compliant Restoration Times in the Measurement Period) / (total number of Priority 1 Incidents and Priority 2 Incidents in Measurement Period) x 100	
Special Reporting Requirements:	Monthly	
Critical Threshold:	N/A. This Service Level will not qualify for Chronic Failure.	

Reference Number:	**J-VI-SLO-3**	
Service Level Name:	P3 & P4 Time to Restore	
Service Level Requirement:	Time to Restore Rate ≥ 85%	
Type of Service Level:	SLO	
Service Unit(s):	Reference	Service/Service Title
	H-11	Client Communication Services
Definitions:	"**Compliant Restoration Time**" means the Time to Restore for a Priority Level 3 Incident and for Priority Level 4 Incident is ≤ 3 Business Day.	
Monitoring	Reactive	
Measurement Methodology:	TELUS Network monitoring tools.	
Measurement Period:	Monthly	
Measurement Calculation:	Time to Restore Rate = (total number of Compliant Restoration Times in the Measurement Period) / (total number of Priority 3 Incidents and Priority 4 Incidents in Measurement Period) x 100	
Special Reporting Requirements:	Monthly	
Critical Threshold:	N/A. This Service Level will not qualify for Chronic Failure.	

Schedule 3
Attachment N-11
Problem and Incident Management Procedures for
Client Communication Services

1. **Introduction**

In connection with any Incidents or other service issues with respect to the CCS, TELUS will comply with the requirements, including, without limitation, procedures and documentation, set out in this Attachment, and to the extent not conflicting or inconsistent with this Attachment, Schedule N (excluding Attachments)

2. **TELUS Single Point of Contact**

Notwithstanding section 3 of Schedule N, TELUS will provide a dedicated single point of contact 24 hours a day, 7 days per week (including statutory holidays) throughout the CCS Term to receive, initiate and escalate Trouble Tickets regarding the CCS (the "**CCS Centre**") The CCS Centre will be accessible to the Corrections Branch by a toll free telephone number

3 **Notification and Reporting**

Notwithstanding sections 6 and 11 of Schedule N, TELUS will provide notice and status updates only with respect to Incidents classified as Priority Level 1 or Priority Level 2.

4. **Client and Client Contact Support**

(a) TELUS will provide the following support:

(i) support services for Client Contacts will be provided via a Canadian-based website to log issues and receive responses;

(ii) support services for Client Contacts will be provided via a Canadian based e-mail service to log issues and receive responses.

(iii) Client Contacts will be provided with a Single Point of Contact ("SPOC") 24 hours a day, 7 days per week (including statutory holidays) throughout the CCS Term to provide technical support. The SPOC will be accessible by a toll free telephone number, electronic mail address and website, and

(iv) a voicemail system available to Clients to log issues (the "Client Helpline") TELUS will respond to Client issues by voicemail

(b) TELUS will ensure that all Client calls to the Client Contact SPOC are Monitored and recorded and are accessible by the authorized Corrections Branch staff at any time

(c) TELUS will maintain an electronic log of all issues received and resolved through the Client Helpline, including CS Numbers, date and time This electronic log will be accessible by authorized Corrections Branch staff through the Call Control Platform.

Schedule 4
Attachment R-11
CCS Specific Security Requirements

In addition to TELUS' other obligations under Schedule R, and without limitation, TELUS will, at no charge to the Province comply with the following terms, conditions and requirements in connection with the provision of CCS under the Agreement.

1. TELUS will provide a team led by a senior project manager directing a business lead, project lead and technical lead as a part of a dedicated core team that will be the key liaisons with the Corrections Branch for the Term Descriptions of the resources will include name, expertise and role.

2 As an additional security screening requirement, in addition to the criminal record check requirements contained in section 26 of Schedule R, TELUS will ensure that each of its personnel or its Approved Sub-contractor's personnel involved in providing CCS and who have access to the Correctional Centres, or the CCS communication records (CCS Communication Records means communications detail records which describe the originator, time, duration, destination of the communications and any record of the communication itself) have completed a criminal record check obtained through their local policing agency Criminal records checks must be repeated on an annual basis throughout the Term.

3 TELUS will, at the request of the Corrections Branch and subject to the CCS Change Order process, comply with any additional security screening requirements before allowing any employees and or CCS Approved Sub-Contractors access to Corrections Branch equipment, Buildings, or sensitive information.

4 TELUS will not allow any individual to provide the CCS under the Agreement unless the Corrections Branch has indicated to TELUS that the results of any criminal records check and any additional security screening checks the Province requested are satisfactory

5. TELUS will have procedures in place to immediately revoke access of their personnel and/or CCS Approved-Subcontractors in case of employment or contract termination or security concerns

6 TELUS will provide fully trained, qualified workers for the CCS equipment and software as required

Schedule 5
Attachment BB-11
CCS Specific Training

1. **Introduction**

As of the date the CCS become available, TELUS will make available to the Corrections Branch the specific training and related training documentation detailed in this Attachment

2. **Training and Documentation**

(a) TELUS will develop a training plan with the Corrections Branch during the implementation of the CCS to meet the business needs of the Corrections Branch and that includes

(i) initial onsite training and support for the Corrections Branch and Clients, and

(ii) on-line training sessions and materials

(b) TELUS will provide manuals and documentation for the Corrections Branch and Clients that will cover all aspects of the CCS including both CORNET and CCS components.

(c) TELUS will provide a calling instruction handout to be provided to Clients. Instructions will be in English using plain language approved by the Province

(d) TELUS will ensure that each phone displays calling instructions on the phone set in the form of a printed instruction card

(e) TELUS will provide written calling instructions posted within view of each phone. Instructions will be in English using plain language as approved by the Corrections Branch from time to time

3. TELUS will, with consultation from the Corrections Branch, develop a training/communications plan to coincide with the implementation of the CCS The training will consist of a maximum of 120 hours of onsite training prior to the implementation of the CCS to those staff members designated by the Corrections Branch

4 TELUS will support onsite training and will provide secure access to on-line resources such as training materials and documentation 24 hours per day, seven days per week and by providing hard copies of training materials to the Corrections Branch as required by the training plan.

Schedule 6

CCS-Specific Definitions

In this Change Order:

"Average Monthly Projected Revenue" means the average monthly gross revenue to TELUS for Commissionable Services, less any contributions made to the Client Credit Account, over the six-month period immediately preceding the Termination.

"Buildings" means the building infrastructures of Correctional Centres or of offices where adults under supervision pursuant to a court order report to a probation officer appointed under the *Correction Act*

"Call Control Platform" means the hosted application and server located in the TELUS data centre that supports the CCS

"Called Party" means the receiver of a call made by a Client or Client Contact.

"CCS Approved Subcontractors" has the meaning set out in Section 17 of this Change Order.

"CCS Centre" means a TELUS dedicated single point of contact 24 hours a day, 7 days per week (including statutory holidays) throughout the CCS Term to receive, initiate and escalate Trouble Tickets regarding the CCS

"CCS Governance Process" means the process described in Schedule 9 to this Change Order.

"CCS Implementation Project" has the meaning set out in Section 15 of this Change Order.

"CCS Term" has the meaning set out in Section 7 of this Change Order.

"Client" means an Inmate as defined in the *Correction Act* or a person under supervision in the community in accordance with a court order

"Client Biometric" means a voice biometric service created within the Call Control Platform;

"Client Communication Services" or "CCS" means the Available Services described in this Change Order.

"Client Contacts" means family and friends of Clients, professionals and external agencies contacted by Clients.

"Client Credit Account" means the account established pursuant to section 1(a) of Schedule 7 to this Change Order

"Client Credit Dollars" means dollars credited to the Client Credit Account.

"Commissionable Services" means those CCS Services identified as "Commissionable" in section 2 of Attachment H-11.

"Controlled" means any communications subject to the features and configurations within the

CCS.

"Controlled Text Messaging" means an electronic text messaging service enabling Client Contacts approved by the Corrections Branch to communicate with a Client.

"Controlled Video Calling" means scheduled internet protocol based secure video/audio calls enabling Client Contacts approved by the Corrections Branch to communicate with a Client.

"Controlled Voice Calling" means calls placed by Inmates to Client Contacts through the CCS

"Controlled Voice Calling – Subsidized" means calls placed by Inmates to Subsidized Numbers, that are free of charge to organizations and professionals approved by the Corrections Branch.

"Controlled Voicemail" means electronic voice messages left for a Client by a Client Contact.

"Controlled Voicemail – Broadcast" means recorded messages delivered to Clients from Corrections Branch staff using Controlled Voicemail

"CORNET" means Corrections Network, which is an offender and case management system for all persons who come into contact with the Corrections Branch of the Ministry of Justice or the Youth Justice Branch of the Ministry of Children and Families in BC

"Corrections Branch" means the Corrections Branch of the Ministry of Justice of the Province

"Correctional Centres" or **"Centres"** means the following correctional centres for adults, and any other correctional centres designated under the *Correction Act*.

- Alouette Correctional Centre,
- Ford Mountain Correctional Centre,
- Fraser Regional Correctional Centre
- Kamloops Regional Correctional Centre,
- Nanaimo Correctional Centre,
- North Fraser Pre-Trial Centre,
- Okanagan Correctional Centre,
- Prince George Regional Correctional Centre,
- Surrey Pre-Trial Services Centre, and
- Vancouver Island Regional Correctional Centre

"Correctional Industry Standards" means the standards and common practices followed by correctional centres, penitentiaries and community supervision offices in North America.

"CS Number" means the unique numeric eight digit identification number assigned to a Client by the Corrections Branch

"eDevice" means a softphone capable electronic device connected to the Secure WAN Network and designed to provide Clients with secure access to electronic justice services

"eServices" means electronic justice services provided to Clients by the Corrections Branch through eDevices and the CCS

"ICON II Project" means the Integrated Corrections Offender Network **(ICON)** II project.

"Implementation Project Plan" means the plan referenced in section 15 of this Change Order

"Inmate" has the same meaning as in the *Correction Act*

"Inmate Benefit Fund" or "IBF" means the fund operated by the Corrections Branch to purchase goods and services for the benefit of Inmates.

"Inmate Trust Account" means an Inmate's CORNET electronic trust account managed by the Corrections Branch.

"Monitor" has the same meaning as in Section 14 of the *Correction Act Regulation.*

"Price Book" has the meaning set out in the Agreement.

"Privileged Call" means a call between a Client and a Privileged Contact.

"Privileged Contact" means entities described in section 13 of the *Correction Act Regulation*

"Province Dollars" means fees, charges or other amounts paid directly by the Province and/or Corrections Branch to TELUS in respect of the CCS or Services relating to the CCS, including Province payments to balance the Client Credit Account pursuant to s 1(f) of Schedule 7, but excludes any fees charges or other amounts paid by Clients or Client Contacts to TELUS and deductions from the Client Credit Account as contemplated pursuant to ss. 1(d) and (e) of Schedule 7

"Secure CCS LAN" means a local area network within Correctional Centres designed to enable eServices to the eDevices.

"Secure WAN Network" means a secure wide area network designed to enable the CCS

"Softphone" means a software capability which enables VoIP telephony on an eDevice

"Subsidized Numbers" means phone call type identified as Subsidized in Section 2 of H11 that can be called by a Client without a cost to the Client and paid for by the Client Credit Account

Schedule 7

Client Credit Account

1 **Client Credits**

(a) TELUS and the Corrections Branch hereby establish a client credit account (the 'Client Credit Account"). The Client Credit Account is an account expressed in dollars ("Client Credit Dollars") administered by TELUS for the CCS Term for the sole benefit of the Corrections Branch For clarity, the purpose of the Client Credit Account is to maintain and enhance the CCS.

(b) Each month TELUS will contribute Client Credit Dollars to the Client Credit Account in accordance with Section 2 of Attachment C11 of the Price Book.

(c) Each month TELUS will provide an invoice and report including the details as described in Section 2 below by the 15th day of the month following. The Corrections Branch will review and approve the invoice for processing within 5 Business Days. If the Corrections Branch determines that the invoice is not acceptable then the issue will be escalated to the CCS Governance for resolution within 5 Business Days. The actual deduction from the Client Credit Account will not take place without Corrections Branch approval as set out in this section.

(d) TELUS will deduct Client Credit Dollars from the Client Credit Account to pay for:

(i) Controlled Voice Calling –Subsidized;

(ii) Provision and maintenance of eDevices,

(iii) Installation, management and maintenance of the Secure CCS LAN; and

(iv) Interfaces with Corrections Branch offender management systems to support the CCS as described in H11 Section 11

(v) With respect to items (ii), (iii), and (iv) above the Corrections Branch must approve budgets, work plans and payment schedules prior to TELUS providing these goods and services or any Client Credit Dollars being deducted from the Client Credit Account.

(e) In addition to the deductions pursuant to section 1(d) above, TELUS will where directed by the Corrections Branch make quarterly payments up to a maximum of $125 000 annually to the Inmate Benefit Fund to be deducted from, and subject to available funds in the Client Credit Account At the sole discretion of the Corrections Branch this amount may be reduced.

(f) As of December 31st of each year of the CCS Term, if the costs deducted pursuant to 1(d) and the payments made pursuant to 1(e) of this Attachment exceed the available Client Credit Dollars in the Client Credit Account at year end including the full amount of the December Client Credits. the Corrections Branch will balance the Client Credit Account by January 31st of the year following. If an expenditure to be made by the Corrections Branch, or a deduction to be made by TELUS from the Client Credit Account, will result in a Client Credit Account deficit, the matter will be referred to Governance, beginning at CCS Management Committee TELUS and the Corrections

Branch will work together cooperatively and proactively to manage the Client Credit Account, and take all reasonable steps to ensure that it does not fall into deficit.

(g) As of December 31st of each year of the Term, if there is a remaining balance of Client Credit Dollars in the Client Credit Account after the deductions are made pursuant to section 1(d) of this Attachment and the payments are made pursuant to section 1(e), that remaining balance will be, at the direction of the Corrections Branch, payable by TELUS to the Corrections Branch or will remain as an outstanding balance in the Client Credit Account and will carry forward into the next calendar year

2. **Monthly Accounting**

(a) The TELUS report described in Section 1(c) above shall provide the Corrections Branch with the following information

(i) Commissionable Services revenue (by type);

(ii) Subsidized Services and calls (by type).

(iii) The amount of Client Credit Dollars credited to the Client Credit Account;

(iv) The amounts under sections 1(d) and 1(e) of this Attachment, and

(b) Charges for SIF Eligible Core Services will be reported to the Administrator's Office.

Schedule 8
Implementation Project Plan

The Implementation Project Plan document will contain the following.

1 a governance process for the Project (which may be the CCS Governance Process or elements thereof),
2 list of TELUS key personnel, including the TELUS project director who will be responsible for the project and its activities;
3. TELUS' responsibilities in managing and performing the activities necessary to complete the Project;
4. ongoing project management reporting obligations by TELUS;
5. clearly defined Milestones that TELUS will meet in its performance of activities and Milestone Dates for completing such Milestones in a tabular format.
6. clearly defined deliverables, including Tested Deliverables, that TELUS must deliver as part of the Project, and GPS Dependencies which function in accordance with section 3 of Schedule I of the TSMA, in a tabular format;
7. for each deliverable, a clear definition of the nature of the deliverable and its purpose;
8. a project schedule in Microsoft Project format which will set out, among other things, the timeline for completing the Project, including work packages(tasks), logical dependencies between tasks, resources assigned to tasks and all delivery milestones and Acceptance Testing periods,
9. The schedule to include all implementation activities, including but not limited to the following activities.

(i) Pre-Installation Activities

- i Contract Negotiations
- ii Project Initiation
- iii. Planning and Design
- iv Service Design
- v. Integration Planning
- vi. Lab Setup & Testing
- vii. Transition Planning

(ii) Implementation and Transition Activities

- i. Production Platform Installation
- ii. Production IP Network Build (in parallel with platform build)
- iii. Test Facility Installation
- iv. Production Facilities Installation and Cutovers
  1. Facility #2

2 Facility #3
3. Facility #4
4. Facility #5
5 Facility #6
6 Facility #7
7 Facility #8
8. Facility #9

(iii) Project Closure Activities

10 a project budget, in a form mutually agreed by TELUS and the Corrections Branch for any elements of the plan which are to be funded from the Client Credit Accounts or direct Province financial contribution.

11 unless otherwise specified in the Project Documentation, and where mutually agreed by the Parties, remedies for the Corrections Branch to address Milestones Dates that are missed by TELUS (except as a result of non-fulfilled GPS Dependencies);

Schedule 9

CCS-Specific Governance

1 Introduction

This Schedule describes the governance model for the CCS Services.

2 Governance Model

(a) The ICON II Project Management Committee will manage the implementation of the CCS until cutover to operational status. TELUS will provide a representative to the ICON II Project Management Committee until the CCS is operational.

(b) When the CCS is operational, the Operations Governance model provided for under Section 4 of this Schedule comes into effect This model will remain in effect for the remainder of the Term.

3. ICON II Project Governance

(a) ICON II Project Management Committee ("**PMC**")

(i) The ICON II PMC consists of representatives appointed by the Province to oversee the implementation of the ICON II Project, which includes CCS.

(ii) TELUS will appoint a representative to become a member of the ICONII PMC to attend weekly meetings. Meetings will include status and progress reports, tasks assigned, issues management and change requests raised.

(b) Technical Working Committee ("**TWC**")

(i) ICON II PMC will create technical working committees with terms of references, as required. As required by the PMC, TELUS will appoint representatives to the TWCs.

(ii) In general, TWC members will.

A. Supply detailed information about their requirements to the PMC;

B. Review and comment on deliverables prepared and presented by the PMC;

C. Communicate project information to the projct users, partners and stakeholders;

D. Identify risks and recommend mitigation strategies,

E. Identify issues raised, and refer recommendations to the PMC,

F Provide input and advise on proposed scope changes; and

G Attend Meetings and workshops

(c) Dispute Resolution

(i) Any disputes which may arise pertaining to the management of the CCS which cannot be resolved by the PMC shall be referred to the ICON II Project Director and their counterpart at TELUS

(ii) Any disputes which cannot be resolved by the Project Director and TELUS shall be referred to the Assistant Deputy Minister, Corrections Branch, and their counterpart at TELUS.

(iii) Any disputes which cannot be resolved by the Assistant Deputy Minister, Corrections Branch, and his or her counterpart at TELUS shall be referred to the Strategic Management Committee under the Agreement and resolved by the Province and TELUS in accordance with Section 28 of the Agreement

4 **Operations Governance**

(a) The Operations Governance model comes into effect for the remainder of the CCS Term when the CCS is operational

(b) CCS Management Committee

(i) The CCS Management Committee will be established and have the authority to make decisions with respect to the operations and budget of the CCS service

(ii) The Corrections Branch and TELUS will appoint management representatives to the CCS Management Committee The CCS Management Committee will establish terms of reference for itself and its sub-committees, to manage the ongoing operation of the CCS

Change Order

This Change Order is made under and is subject to the terms and conditions of the Telecommunications Service Master Agreement effective July 29, 2011, as may be amended from time to time, between TELUS Communications Company, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Labour, Citizen's Services and Open Government, Insurance Corporation of British Columbia, British Columbia Hydro and Power Authority, British Columbia Lottery Corporation, Workers Compensation Board of British Columbia, Provincial Health Services Authority, Northern Health Authority, Interior Health Authority, Fraser Healthy Authority, Vancouver Island Health Authority and Vancouver Coastal Healthy Authority (the "**Agreement**").

Where capitalized words and expressions defined in the Agreement are used in this Change Order, such words and expressions shall have the meaning ascribed to them in the Agreement.

CR Number:	**TSMA-0037-CO**		
Change Name:	Addition of new Available Service: Client Communication Services		
CJR Dec 31/12 **Requesting Organization:** TD Dec 28, 2012	Legal Name: Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Labour, Citizen's Services and Open Government	**Requested by:**	C. J. Ritchie Administrator and Assistant Deputy Minister, Strategic Partnerships
TSMA Service Tower:	Client Communication Services		

A. CHANGE DESCRIPTION

In connection with the provision of Client Communication Services by TELUS to the Corrections Branch of the Ministry of the Justice of the Province ("Corrections Branch"), as document by Change Order Number **TSMA-0036-CO** (the "TSMA CCS Change Order"), the Province and TELUS hereby amend the Price Book to add Attachment C-11, attached hereto as Schedule 1.

B. APPROVALS

This Change Order may be executed in several counterparts and delivered by electronic transmission, each of which when so executed and delivered shall be deemed to be an original. Such counterparts together shall constitute one and the same instrument, notwithstanding that all of the parties are not signatories to the original or the same counterpart.

Authorizing Individual (including title) of the GPS Entity:	C. J. Ritchie Administrator and Assistant Deputy Minister, Strategic Partnerships	**Phone Number:**	
Highest Level of Change Request Approval: NB. Select one of these bodies, per nature of change.			Operational Management Committee
			Strategic Management Committee
		X	Executive Governance Committee

Change Order			
This Change Order is made under and is subject to the terms and conditions of the Telecommunications Service Master Agreement effective July 29, 2011, as may be amended from time to time, between TELUS Communications Company, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Labour, Citizen's Services and Open Government, Insurance Corporation of British Columbia, British Columbia Hydro and Power Authority, British Columbia Lottery Corporation, Workers Compensation Board of British Columbia, Provincial Health Services Authority, Northern Health Authority, Interior Health Authority, Fraser Healthy Authority, Vancouver Island Health Authority and Vancouver Coastal Healthy Authority (the "**Agreement**"). Where capitalized words and expressions defined in the Agreement are used in this Change Order, such words and expressions shall have the meaning ascribed to them in the Agreement.			
CR Number:	**TSMA-0037-CO**		
Change Name:	Addition of new Available Service: Client Communication Services		
Requesting Organization:	The Province	**Requested by:**	C. J. Ritchie Administrator and Assistant Deputy Minister, Strategic Partnerships
TSMA Service Tower:	Client Communication Services		

A. CHANGE DESCRIPTION

In connection with the provision of Client Communication Services by TELUS to the Corrections Branch of the Ministry of the Justice of the Province ("Corrections Branch"), as document by Change Order Number **TSMA-0036-CO** (the "TSMA CCS Change Order"), the Province and TELUS hereby amend the Price Book to add Attachment C-11, attached hereto as Schedule 1.

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Authorizing Individual (including title) of the GPS Entity:	C. J. Ritchie Administrator and Assistant Deputy Minister, Strategic Partnerships	**Phone Number:**	

Highest Level of Change Request Approval: NB: Select one of these bodies, per nature of change.		
		Operational Management Committee
		Strategic Management Committee
	X	Executive Governance Committee

Signatures			
On Behalf of TELUS:		***On Behalf of the GPS Group:***	
Agreed To:		**Agreed To:**	
Name:	~~Joe Natale~~ MONTY ARORA	**Name:**	C.J. Ritchie
Title:	Chief Commercial Officer SVP	**Title:**	Administrator and Assistant Deputy Minister, Strategic Partnerships [Co-chair, OMC]
Signature:		**Signature:**	
Date:	December 24, 2012	**Date:**	December 27, 2012

Schedule 1

Attachment C11– Client Communication Services Pricing

This Attachment sets out the pricing for the CCS Services and its associated features.

Definitions. The definitions listed in Schedule 6 to the TSMA CCS Change Order are applicable in the same manner to this Change Order as set out in Section 5 to the TSMA CCS Change Order.

1. **Pricing**

(a) Notwithstanding Section 16.1.1 of the Agreement, TELUS will charge Clients and Client Contacts directly for the following Commissionable Services at the rates set out in the following table:

CCS Call Type	Debit (Client) (these rates include applicable taxes)	Collect (Client Contact) (these rates do not include applicable taxes)	Pre-Paid (Client Contact) (these rates include applicable taxes)
Local Calls	$0.90	$2.00	$0.90
Long Distance Canada & USA	$0.80 (first minute) + $0.30 (each additional minute)	$1.50 + $0.30 (each additional minute) (to change to $0.40 effective March 1, 2013)	0.80 (first minute) + $0.30 (each additional minute)
Long Distance - Overseas	$0.85 (first minute) + $0.35 (each additional minute)	N/A	N/A
Toll-Free	N/C	N/C	N/A
Voicemail - Incoming Only	N/A	$1.00 per message	N/A

(b) TELUS will deduct the costs of calls to Subsidized Numbers from the Client Credit Account at the following rates per call:

Subsidized Voice Call	CCS Rate (per call) (these rates include applicable taxes)
Local Calls	$0.40

Long Distance Calls	$0 40
Voicemail - Broadcast	N/C

(i) TELUS will ensure that the CCS allows the Corrections Branch to configure specific numbers in the system at no cost to the Client and subsidized by the Client Credit Account

(ii) TELUS will ensure that the CCS allows the Corrections Branch to configure toll free numbers and phone numbers at no cost to the Client and not subsidized by the Client Credit Account.

(c) Additional services rates

(i) If the Corrections Branch requires additional professional services from TELUS other than those set out in Section 3 of the Change Order then such professional services must be approved in advance by the Corrections Branch, and will be provided at the rates set out in the Agreement and the costs will be deducted from the Client Credit Account or such other payment mechanisms as the Corrections Branch may determine

2 **Client Credit Account**

(a) Pursuant to section 1(b) of Schedule 7 to the TSMA CCS Change Order, TELUS will contribute Client Credit Dollars to the Client Credit Account in the amount of 22% of the revenues generated from Commissionable Services

SCHEDULE "B"

OFFENDER TELEPHONE SYSTEM
Frequently Asked Questions

Synergy Inmate Phone Solutions, Inc. (Synergy) provides telephone service for offenders at the Central Nova Scotia Correctional Facility, the Cape Breton Correctional Facility, the Northeast Nova Scotia Correctional Facility, and the Southwest Nova Scotia Correctional Facility. There are two ways an offender can place a call: collect calling and prepaid calling. Collect calling is where the recipient accepts and pays for the call; prepaid is where the offender or the recipient can prepay for the call, both at reduced rates. The prepaid feature with Synergy ensures that telephone calls can be completed to any telephone, whether that is a cellular telephone, Internet-connected home telephone, or a land line. Prepaid options include:

- Prepaid calls from the offender telephone account
- Prepaid by the person receiving the call
- Paid for by the called party's credit card at the time of the call

A feature available in some facilities is the use of offender wireless tablets. Tablets are a user pay device that allows offenders to access music and entertainment, movies, games, TV/news, messaging with friends and family, legal research and spiritual guidance websites, facility information, telephone account information, and video visitation (where available).

Telephone calls may be made between 8:00 a.m. and 9:45 p.m. 7 days a week. This includes tablet use.

If parties receive harassing calls, video visits or messaging, you can block the caller from future calls either on the phone or by contacting Synergy directly at 1-866-713-4761.

The Synergy telephone system can detect telephone numbers that are being utilized for 3-way calling and will subsequently block this number from receiving calls in the future.

A voicemail can be sent anytime to an offender by calling 1-866-713-4761 and following the prompts. Voicemails can be up to 3 minutes each. Any communication on voicemail is not subject to the ordinary protections for communications, and may be listened to by Correctional Services Division staff. Please note that an account by the person leaving the voicemail is required to use this feature. Account set up options through Customer Service or website are listed below.

Funds can be deposited into an offender's telephone account with cash, bank debit card, Moneygram deposit at any Canada Post location, or a credit card. Please note that any credit card deposits are subject to a service fee from Synergy. An additional feature of the Synergy kiosks provide family members and friends an option to deposit cash into the offender's trust account for Canteen purchases (cash only, not credit cards). Trust deposits will also be accepted by Moneygram deposits at any Canada Post location (cash, bank debit card, or credit card). Also with Moneygram deposits, you will need to call the number on the receipt to validate who the funds are for. You must have the offender's personal identification number or PIN number to deposit money into either their telephone or trust account.

The following payment options are available:

- Any Synergy kiosk located in correctional facility lobbies throughout Alberta, Saskatchewan, Manitoba, Prince Edward Island, or New Brunswick – credit card, or cash
- At all adult correctional facilities within Nova Scotia (CNSCF, CBCF, SNSCF, NNSCF) - credit card, or cash
- Toll-Free Customer Service (1-866-713-4761) - Credit Card Deposit
- Website (www.telmate.ca) - Credit Card Deposit
- Canada Post – Moneygram – cash, bank debit card, credit card

Please be advised that all telephone calls including secure visitation are subject to recording and monitoring, except calls with a lawyer, as per Correctional Services Act (s. 55) and Correctional Services Regulations (s. 59 and 60). The electronic records of your telephone communications are stored in a database and could be listened to when there are reasonable grounds to do so. Offender telephone calls to legal representation, Legal Aid, the Ombudsman, Human Rights, Nova Scotia Complaints Commissioner, and Nova Scotia Civilian Director of the Serious Incident Response are unrecorded.

TELEPHONE RATES

Local Calls

Collect - $1.85 per call
Debit - $1.35 per call
Collect calls are subject to taxes and bill rendering fees imposed by the CRTC
Calls are a maximum of 20 minutes in duration

Long Distance Calls

Collect - $1.50 plus a toll charge of 30 cents per minute
Debit - $1.00 plus a toll charge of 30 cents per minute
Collect calls are subject to taxes and bill rendering fees imposed by the CRTC
Calls are a maximum of 20 minutes in duration

Fees

Messaging - $0.50 per message sent (no charge for receiving messages)
Video Visitation - $0.25/minute
Voicemail - $1.25 + HST for up to a 3 minute message
Billing statement cost recovery fee (applied to phone bill monthly; collect call only) - $0.45/collect call
Cash trust fund deposits in kiosks - $2.00/transaction + 2% of deposit
Credit card transaction fee - $2.00 + 5% of deposit + HST
Cash deposit in kiosk for telephone account – no transaction fee but charged HST
Deposit processing fee – money order/MoneyGram (Canada Post) - $3.95/transaction
Refund processing fee - $5.00
Return cheque charge - $25.00

This is Exhibit **"D"** to the
Affidavit of Nadine Blum affirmed
before me this 21st day of December, 2020.

A Commissioner, etc.

Ontario looking to adjust jail phone call system, include calls to cellphones

By **Staff · The Canadian Press**
Posted January 14, 2020 2:46 pm

Almost three-quarters of male immigration detainees in Ontario jails are held in the Central East Correctional Centre in Lindsay. **LIAM MALONEY / GLOBAL NEWS**

-A A+

TORONTO – Ontario is working toward a new telephone system for provincial jails that would allow inmates to call cellphones.

Currently they are only able to place collect calls to landlines – an absurd restriction in the year 2020, say critics and inmate advocates.

High rates for calls are another barrier, they say. Lawyer Michael Spratt said it can be about $1 per minute, and families sometimes can't afford those charges when they start adding up.

Inmates need to make calls to maintain employment, housing and counselling connections while incarcerated, Spratt said.

READ MORE: Memorial at Elgin Middlesex Detention Centre shines light on inmate mistreatment

"This all leads to a situation that is unfair, is overly punitive, but more importantly it leads to a situation that makes our streets less safe," he said. "When we have people who lose their job, lose connections to the family and are unable to arrange counselling, it means that it's harder for them to reintegrate themselves back into society."

Gabby Aquino, a law student with the Toronto Prisoners' Rights Project, said the restrictions make it virtually impossible for some inmates to reach family and other contacts.

“Those costs and calls do add up, especially if folks might be in a mental health crisis, or if they need to get in touch with legal counsel for a time-sensitive issue,” she said.

TRENDING STORIES

How long will the COVID-19 vaccine protect you? Here’s what we know so far

Matthew Raymond ruled ‘high risk’ and ordered to remain in hospital for treatment

Kristy Denette, a spokeswoman for the Ministry of the Solicitor General, said the government is working on a procurement process for a new, modern inmate phone system that will include calls to cellphones and international numbers.

READ MORE: Conditions at EMDC ‘among the worst’ in Ontario: human rights commissioner

The existing contract, with Bell, expires in June and the company said it has submitted a new proposal for services.

“Bell provides communications service to correctional facilities in other jurisdictions as well and the terms vary in each case,”

said spokeswoman Jacqueline Michelis.

“Rates for operated assisted calls are the same as Bell’s public rates.”

That may be, said Spratt, but virtually no one other than inmates pays those posted rates.

READ MORE: Ontario hiring more jail staff, including officers, nurses, psychologists

He slammed Bell for promoting Bell Let's Talk day, but at the same time making it difficult for inmates suffering from mental health issues to access their support systems.

"I think Bell needs to take a hard look in the corporate mirror about what it's doing and where it's making its profit," he said.

In 2017, Spratt obtained documents under a Freedom of Information request that show Bell pays the ministry a certain amount of "gross revenue generated by all calls made from all telephones" in the offender telephone system. The percentage is redacted.

Part of the new phone system should be to allow inmates to make free calls to an approved list of people, Spratt said.

"If we need to impose a cost for these phone calls, large corporations and government shouldn't be profiting off the back of people who are presumed innocent," he said.

About 70 per cent of inmates in Ontario's adult correctional facilities are on remand, Ontario's auditor general said in her recent annual report, meaning those people haven't been convicted or sentenced.

This is Exhibit **"E"** to the
Affidavit of Nadine Blum affirmed
before me this 21st day of December, 2020.

A Commissioner, etc.

1. **Local News**

Bell, let's talk about making it easier for inmates to call from jail, say protesters

Author of the article:
Joanne Laucius
Publishing date:
Jan 31, 2019 • Last Updated 1 year ago • 4 minute read

Farhat Rehman, (R) a member of MOMS / Mothers Offering Mutual Support, talks about the difficulty of phoning her son in prison as a demonstration is held Wednesday on #BellLetsTalk day outside

160 Elgin St, offices of Bell Canada, against the Ontario jail phone system run by Bell Canada. PHOTO BY WAYNE CUDDINGTON /Postmedia

Article Sidebar

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Article content

Farhat Rehman's son Rehman Kurd is in prison in the Millhaven Institution, a maximum-security prison.

Kurd suffers from mental illness but most recently has been battling paranoia, said his mother. He fears his mother is being attacked and leaves messages on her landline at home. Because of the way the system works, she can't call him back to assure him that she's fine.

Farhat Rehman, a member of MOMS / Mothers Offering Mutual Support, talks about the difficulty of phoning her son in prison. Photo by Wayne Cuddington/ Postmedia PHOTO BY WAYNE CUDDINGTON /Postmedia

A single phone call can save the life of a loved behind bars, said Rehman, a member of Mothers Offering Mutual Support, a support group for women. "This is someone who is ridden with anxiety and fear. They need that close contact."

Rehman was one of about two dozen family members and activists gathered on the sidewalk to Place Bell on Elgin Street on Wednesday to protest the cost and complications around telephone communications between people behind bars and their families.

Protesters during a demonstration held Wednesday on #BellLetsTalk day outside 160 Elgin Street offices of Bell Canada, against the Ontario jail phone system run by Bell Canada. Photo by Wayne Cuddington/ Postmedia PHOTO BY WAYNE CUDDINGTON /Postmedia

It’s no coincidence that the protest was held on the same day as Bell Let’s Talk Day, the telecommunications giant’s popular initiative to reduce the stigma around mental illness.

Article content continued

“Bell, let’s talk abut how people with mental health conditions who are marginalized and imprisoned,” said Justin Piché, as assistant professor of criminology at the University of Ottawa.

The protesters were calling for two changes: First, that Bell reduce high phone charges paid by prisoners in provincial institutions, including the Ottawa Carleton Detention Centre. They also want changes in the system, which makes it impossible for prisoners to call cellphones. Growing numbers of people don’t have land lines, and this makes it very difficult to prisoners to reach their families.

The prison phone system is a justice issue, a human rights issue and a moral issue, said lawyer Michael Spratt.

“These poor souls are our clients. They can’t reach out for the help and support they need,” he said. “In Ontario, nearly 70 per cent of provincial prisoners are awaiting their day in court. Imagine if your future was hanging in the balance and you weren’t able to call your lawyer’s cellphone to discuss your defence.”

The costs and rules around making calls from incarceration depend on whether it is a federal or provincial institution. In some cases, families can make arrangements for prepaid accounts.

The mother of a man who has since been paroled said she has spent between $250 and $600 a month taking collect calls from her son in prison.

Another woman whose daughter has since been released on bail said her daughter would call 14 times a day at a cost of $1 a call. Her husband took time off work so he could take the calls on the landline to help their daughter through a mental health crisis.

Article content continued

“We were willing to pay anything,” she said. “She needed the support. She needed that lifeline.”

The phone access issue came up in November during an inquest into the suicide of Cleve “Cas” Geddes, who died Feb. 10, 2017 after he hanged himself at the Ottawa Carleton Regional Detention Centre.

 Cleve ‘Cas’ Geddes. OTTwp

Geddes had schizophrenia and should have been admitted to hospital, but instead ended up in solitary confinement at the Innes Road jail. His family was unable to contact him because inmates can’t receive calls and can only call collect, his sister Sigrid told the inquest. Sigrid had a cellphone, but collect calls to cellphones were not permitted.

Geddes’s mother called the jail and begged the guards to bring her son to the phone, which they did. The next time the family heard was a call from the hospital to say Geddes had hanged himself and was on life support.

In its recommendations, the coroner’s jury urged the Ministry of Community Safety and Correctional Service and the jail to change the phone system to make it easier for inmates to make outgoing phone calls — specifically to be able to call cellphones and not make only collect calls.

According to the Ministry of Community Safety and Correctional Services, inmates may call any person with a standard North American 10-digit telephone number who is capable of being billed for collect calls, providing the person is willing to accept the charges. The call can’t violate a court order, constitute an offence under federal or provincial statute, or jeopardize the safety of any person or the security of the institution.

Article content continued

In the event of an emergency, such as a serious family illness, injury or death, the jail superintendent may allow an inmate to use the telephone and the institution will pay for the call, according to the ministry. “In cases where a call is not an emergency but can’t be made collect, the superintendent may authorize the call upon receiving a written request. The superintendent may require the inmate to have sufficient funds to pay for the call.”

In a brief statement, a Bell spokeswoman said rates for operator-assisted collect calls from Ontario correctional facilities are the same as Bell's public rates. "We couldn't comment further about any of our business or government contracts."

Piché said it's true the rates are the same. But the point is that prisoners in Ontario jails have no choice but to call their families at Bell's rates, he said.

One solution would be to allow prisoners to purchase phone cards at costs comparable to those outside jail walls, he said. If that doesn't happen, he warned the group will fight for another phone company to get the contract for the jail phone system.

ALSO IN THE NEWS:

Council toes charter line in asking questions about transit commissioner

Video from McDonald's parking lot confrontation shown at first day of Ottawa murder trial

Ottawa man charged in fentanyl bust

Article Comments

COMMENTS

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have enabled email notifications—you will now receive an email if you receive a reply to your comment, there is an update to a comment thread you follow or if a user you follow comments. Visit our Community Guidelines for more information and details on how to adjust your email settings.

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Secondary Links

365 Bloor Street East, Toronto, Ontario, M4W 3L4

This is Exhibit **"F"** to the
Affidavit of Nadine Blum affirmed
before me this 21st day of December, 2020.

A Commissioner, etc.

Verdict of Coroner's Jury

Office of the Chief Coroner

The Coroners Act - Province of Ontario

Name(s) of the deceased: GEDDES, Cleve Gordon
Held at: Ottawa, ON
From the: 26-29th of November, 2018
To the: 10-14, 17th of December, 2018
By: Dr. Michael B. Wilson, Coroner for Ontario
having been duly sworn/affiremed, have inquired into and determined the following:

Surname: Geddes
Given name(s): Cleve Gordon
Age: 30
Date and time of death: February 10, 2017 at 3:13 p.m.
Place of death: The Ottawa Hospital, 501 Smyth Rd., Ottawa, ON
Cause of death: Hypoxic-ischemic encephalopathy
By what means: Undetermined

(original signed by Foreman and Jurors)

This verdict was received on the 17th of December, 2018
Coroner's Name: Dr. Michael B. Wilson
(original signed by coroner)

We, the jury, wish to make the following recommendations:

Inquest into the death of:

Cleve Gordon Geddes

Jury Recommendations

To: the Ontario Provincial Police (OPP) and the Ministry of Community Safety and Correctional Services (MCSCS):

1. The OPP (Ontario Provincial Police) and MCSCS (Ministry of Community Safety and Correctional Services) should ensure that all front line uniform members are trained and aware that incarceration is often harmful for persons suffering from mental illness, custody may make their condition worse, and they have an increased suicide risk in detention. The following should be

considerations when dealing with persons with mental illness: Pre-charge Diversion and engagement with local community mental health services, such as the Assertive Community Treatment Teams and Mobile Crisis Teams.

2. The OPP (Ontario Provincial Police) and MCSCS (Ministry of Community Safety and Correctional Services) should ensure that every OPP (Ontario Provincial Police) uniform member has regular training on the guide "Not Just Another Call…..Police Response To Persons with Mental Illnesses in Ontario" including de-escalation techniques and options under the *Mental Health Act*.
3. The MCSCS (Ministry of Community Safety and Correctional Services) should review section 3(e) of the Provincial Police Standards Manual to determine whether this wording needs to be amended to provide better guidance and/or direction regarding "compelling circumstances" and to ensure it is consistent with the Mental Health Act, and that it takes into account the circumstances of the offence and the individual, and provides better guidance to officers regarding appropriate circumstances to consider hospitalization or other options.
4. The OPP (Ontario Provincial Police) and MCSCS (Ministry of Community Safety and Correctional Services) should consider whether each OPP (Ontario Provincial Police) Detachment should have a dedicated Mental Health Community Liaison Officer who is tasked with strengthening appropriate, collaborative police/community partnerships with mental health response models such as Assertive Community Treatment and Mobile Crisis Teams and providing advice and training to uniform members who may be interacting with individuals with mental illness.
5. All active uniform members at the Killaloe OPP (Ontario Provincial Police) Detachment should make best efforts to attend any regular training offered by Renfrew Community Health Services staff to learn about the Assertive Community Treatment (ACT), Mobile Crisis Teams, or any other available resources, and how they can support police responding to calls involving individuals with mental illness.
6. The OPP (Ontario Provincial Police) consider reviewing its Police Orders (policies) to ensure that the InterRAI Brief Mental Health Screening form is provided to correctional institutions and/or hospitals when appropriate.
7. The OPP (Ontario Provincial Police) and MCSCS (Ministry of Community Safety and Correctional Services) should ensure that all OPP (Ontario Provincial Police) uniform members are trained to recognize that, to address public safety concerns in appropriate circumstances, the provisions of the *Mental Health Act* provides alternatives to arrest under the *Criminal Code* for the apprehension of persons with mental health issues.
8. When dealing with a person believed to have major and/or acute mental health issues, the OPP (Ontario Provincial Police) and MCSCS (Ministry of Community Safety and Correctional Services) should make best efforts, where legally permissible, to ensure that the family/support contact is advised that the person is being held in custody or taken to hospital.
9. The OPP (Ontario Provincial Police) and MCSCS (Ministry of Community Safety and Correctional Services) should make best efforts to develop a pre-charge diversion protocol on which all uniform members are trained.
10. The OPP (Ontario Provincial Police) and MCSCS (Ministry of Community Safety and Correctional Services) should make best efforts to facilitate training of uniform members to work with mobile mental health crisis teams in order to assist them in their interactions with mentally ill individuals whenever possible.

To: Ottawa Carleton Detention Center (OCDC (Ottawa Carleton Detention Center)) and the Ministry of Community Safety and Correctional Services

11. The MCSCS (Ministry of Community Safety and Correctional Services) and the OCDC (Ottawa Carleton Detention Center), should create a Mental Health Unit at OCDC (Ottawa Carleton

Detention Center) as soon as possible. This new unit should have specialized staff who have both an interest in and are trained to deal with inmates with mental health issues.

12. In accordance with the Ministry's Suicide Prevention Policy, the MCSCS (Ministry of Community Safety and Correctional Services) and the OCDC (Ottawa Carleton Detention Center), should make best efforts to avoid putting inmates who are put on suicide watch in segregation. Subject to documented reasons why there is a safety concern, such inmates should be provided with social interaction as well as appropriate health care and access to programming.
13. A designated member of the nursing team at OCDC (Ottawa Carleton Detention Center) should notify the Royal Ottawa Health Care Group (ROH) if an inmate on the Forensic Bed Registry waiting list is identified as suicidal or has a significant deterioration in mental health and document that the notification was made to the ROH (Royal Ottawa Health Care Group).
14. The OCDC (Ottawa Carleton Detention Center) should assign a mental health nurse to monitor the status of all inmates who are waiting for an assessment at the ROH (Royal Ottawa Health Care Group) including contacting the ROH (Royal Ottawa Health Care Group) as needed for updates on the bed list, and bringing forward any pertinent information to the Interdisciplinary Team for advice and further action.
15. The OCDC (Ottawa Carleton Detention Center) should ensure that dedicated rooms are available that are proximate to the range or unit where the inmate is housed to avoid the need for assessments to be done through a hatch in the cell door.
16. The MCSCS (Ministry of Community Safety and Correctional Services) and the OCDC (Ottawa Carleton Detention Center) should make best efforts, upon admission into the institution, to ask inmates if they have an emergency contact/support person. If the inmate consents, the institution should make every effort to make contact with their support person to notify them of the inmate's status and location, particularly where the inmate is identified as having a major mental illness.
17. When an inmate has attempted suicide and is transported to hospital, the OCDC (Ottawa Carleton Detention Center) should notify the emergency contact/support person as soon as possible.
18. The MCSCS (Ministry of Community Safety and Correctional Services) should ensure that the phone system in correctional institutions is changed to make it easier for inmates to make outgoing phone calls. Specifically, the phones available to inmates should be able to call cell phones and should not make only collect calls.
19. The OCDC (Ottawa Carleton Detention Center) should make best efforts that the clinical team's placement recommendations for inmates with mental health issues should be followed whenever possible. When placement recommendations cannot be followed, the rationale should be documented and the clinical team should be consulted forthwith or as soon as practicable to determine safe alternatives.
20. The MCSCS (Ministry of Community Safety and Correctional Services) should revise its Suicide Prevention Policy to ensure correctional officers are advised at the beginning of each shift of any inmate in their area who has recently come off suicide watch or enhanced supervision. For the OCDC (Ottawa Carleton Detention Center) this can be during unit "muster" at the beginning of each shift, or through some other reasonable means.
21. The OCDC (Ottawa Carleton Detention Center), should consider whether correctional officers conducting cell checks should carry an emergency response knife to cut down inmates who have hanged themselves.
22. The OCDC (Ottawa Carleton Detention Center) may consider that, to ensure the 911 knife is kept in peak condition, the knife should have an easy-to-remove one-time wrapping, such as a taped safety seal.
23. The OCDC (Ottawa Carleton Detention Center) should ensure that every correctional officer working in an area with inmates is required to carry a radio to shorten the response time to emergencies.

24. The OCDC (Ottawa Carleton Detention Center) should consider the installation of emergency buttons in common areas to shorten response time.
25. The OCDC (Ottawa Carleton Detention Center) should consider a mechanism to ensure that the view of the hallway between the dorms can be restricted, by use of one way glass or other suitable methods.
26. The MCSCS (Ministry of Community Safety and Correctional Services) and the OCDC (Ottawa Carleton Detention Center) should make regular training of correctional officers for suicide response mandatory, scheduled and tracked. The facts of this inquest and other jail suicides as scenarios should be considered in the training, including actual practice in cutting of ligatures.
27. The OCDC (Ottawa Carleton Detention Center) should routinely verify that the temperature within the stabilization unit is within acceptable norms; consideration should be given to time of year, inmate activity levels, inmate state of dress, and bedding. Extra blankets should be offered. Consideration should be given to installing data tracking thermometers in appropriate locations and take appropriate measures as required.
28. The MCSCS (Ministry of Community Safety and Correctional Services) and OCDC (Ottawa Carleton Detention Center) should collaborate to establish a policy that authorizes clinical staff at OCDC (Ottawa Carleton Detention Center), where appropriate, to seek inmate consent to reach out, proactively, to family members and/or support contacts of suicidal or mentally ill inmates so that they may provide support to the inmate.
29. The OCDC (Ottawa Carleton Detention Center) should ensure that existing standing orders are followed, or amend standing orders if necessary, so that Admissions and Discharge assist all individuals to complete an initial visitor's list at the time of their admission.
30. The OCDC (Ottawa Carleton Detention Center) should amend its standing orders to ensure that if a phone message is left for an inmate, the message is delivered.
31. The MCSCS (Ministry of Community Safety and Correctional Services) and OCDC (Ottawa Carleton Detention Center) should review the policy forbidding books (except for the Bible and the Koran) for inmates under suicide watch or enhanced supervision. Inmates should be allowed to have other reading materials that do not pose a safety concern.
32. OCDC (Ottawa Carleton Detention Center) Admissions and Discharge should, as a matter of standard procedure, send a copy of the court order for a ROH assessment to the jail clinical/medical staff.

To: the Ministry of Community Safety and Correctional Services

33. The MCSCS (Ministry of Community Safety and Correctional Services) should review salary and benefits in order to attract and hire more psychologists for the OCDC (Ottawa Carleton Detention Center) to increase staffing including the possibility of contracting with external sources in order to make best efforts that there is a mental health professional on duty in the evenings and the weekends.
34. The MCSCS (Ministry of Community Safety and Correctional Services) should give consideration to whether all clinical staff at correctional institutions should have electronic access to an inmate's medical and psychiatric history. Correctional institution records, such as watch initiation notices and care and recovery plans, should be in electronic form and easily available to clinical staff.
35. The MCSCS (Ministry of Community Safety and Correctional Services) should review suicide prevention and suicide rescue training practices at the OCDC (Ottawa Carleton Detention Center) and take appropriate measures to ensure all correctional officers are properly trained.
36. The MCSCS (Ministry of Community Safety and Correctional Services) should incorporate the World Health Organization publication "Preventing Suicide in Prison" as part of their suicide prevention training.

To: the Ministry of Community Safety and Correctional Services and the Ontario Police College

37. The guide "Not Just Another Call…..Police Response To Persons with Mental Illnesses in Ontario" should be reviewed and consideration should be given to updating it.

To: Royal Ottawa Health Care Group (ROHCG) and The Ministry of Health and Long Term Care (MOHLTC)

38. The ROHCG (Royal Ottawa Health Care Group) may consider the potential suicidality of an inmate awaiting a court ordered assessment, along with all other factors taken into consideration in determining prioritization of individuals on the bed waiting list.
39. The Forensic Bed Waiting List should include functionality to show how many people are on the waiting list for each facility in order to assist the court in making the referral.

To: the Royal Ottawa Health Care Group, Ministry of Health and Long Term Care, Ottawa Carleton Detention Center, Ministry of Community Safety and Correctional Services

40. This inquest in itself proved useful for all parties to understand the inter- relationships and effects of decisions, processes and policies on the system up and down stream. When an apparent suicide occurs in custody, the MCSCS (Ministry of Community Safety and Correctional Services)/OPP (Ontario Provincial Police), MOHLTC (Ministry of Health and Long Term Care), ROHCG (Royal Ottawa Health Care Group) and OCDC (Ottawa Carleton Detention Center) should consider holding an independently facilitated end-to-end mentally-ill inmate-centric process review with representation from stakeholders and technology/data. Such a facilitated review is intended to be completed in a condensed period of weeks.
41. In collaboration, the MCSCS (Ministry of Community Safety and Correctional Services), the MOHLTC (Ministry of Health and Long-term Care), the ROHCG (Royal Ottawa Health Care Group) and the OCDC (Ottawa Carleton Detention Center) should continue to engage in discussion with respect to the implementation of an adapted Forensic Early Intervention Service (FEIS) model between the ROHCG (Royal Ottawa Health Care Group) and the OCDC (Ottawa Carleton Detention Center).
42. The MCSCS (Ministry of Community Safety and Correctional Services) should continue to work on police/hospital transfer of care protocols with the aim of ensuring officers are able to return to regular duty in a timely manner.

To: the Ministry of Health and Long Term Care, and the Pembroke Regional Hospital

43. Court Mental Health Workers should be trained about the different options available in court to deal with persons with mental health issues, including the possibility of post-charge diversion and admission to hospital under Sections 21 and 22 of the *Mental Health Act*.

To: the Chief Justice of the Ontario Court of Justice

44. The Chief Justice of the Ontario Court of Justice should ensure that all Judges of the court are trained and knowledgeable about the following in relation to mentally ill accused person who appear before them:
    a. The conditions of confinement for mentally ill accused persons which exist in detention centers in their jurisdictions.
    b. The potential negative impacts of detention on mentally ill accused persons, including the increased risk of suicide.
    c. The legal requirements for making orders, pursuant to the *Criminal Code*, for the assessment of criminal responsibility, particularly the presumption against custody.
    d. The need to ensure that a proper determination is made, by use of the Forensic Bed Registry, or otherwise, about the availability of beds at Schedule 1 hospitals before an in-custody assessment order for criminal responsibility is made.

e. The need to ensure that an accused person who is subject to an in-custody assessment order, in circumstances where a bed is not immediately available, is informed that they may be required to be confined in a detention centre for some time before a bed becomes available in a Schedule 1 hospital.
f. The availability and appropriate use of Brief Assessment Units (BAU) where they exist in Schedule 1 hospitals.
g. The circumstances where an order under Section 21 and 22 of the *Mental Health Act* may be appropriate for dealing with a mentally ill accused.
h. The use of post-charge diversion programs to deal with mentally ill accused persons when appropriate.
i. In every case where an in-custody assessment under the Criminal Code is considered, Judges and Assistant Crown Attorneys should be aware of whether a bed in a forensic unit is available. Where the individual is placed on a waiting list, there should be consideration of having the individual return to Court within seven days if the individual is incarcerated and still on the waiting list.

To: the Attorney General of Ontario

45. The Attorney General should ensure that all Crown Attorneys, Assistant Crown Attorneys, and court Mental Health Support workers are trained and knowledgeable about the following in relation to mentally ill accused persons :
    a. The conditions of confinement for mentally ill accused persons which exist in detention centers in their jurisdictions.
    b. The potential negative impacts of detention on mentally ill accused persons, including the increased risk of suicide.
    c. The legal requirements for making orders, pursuant to the Criminal Code, for the assessment of criminal responsibility, particularly the presumption against custody.
    d. The need to ensure that a proper determination is made, by use of the Forensic Bed Registry, or otherwise, about the availability of beds at Schedule 1 hospitals before an in-custody assessment order for criminal responsibility is made.
    e. The need to ensure that an accused person who is subject to an in-custody assessment order, in circumstances where a bed is not immediately available, is informed that they may be required to be confined in a detention centre for some time before a bed becomes available in a Schedule 1 hospital.
    f. The availability and appropriate use of Brief Assessment Units (BAU) where they exist in Schedule 1 hospitals.
    g. The circumstances where an order under Section 21 and 22 of the *Mental Health Act* may be appropriate for dealing with a mentally ill accused.
    h. The use of post-charge diversion programs to deal with mentally ill accused persons when appropriate.
    i. In every case where an in-custody assessment under the *Criminal Code* is considered, Judges and Assistant Crown Attorneys should be aware of whether a bed in a forensic unit is available. Where the individual is placed on a waiting list, there should be consideration of having the individual return to Court within seven days if the individual is incarcerated and still on the waiting list.

46. Consideration should be given to the establishment of a Mental Health Court in Renfrew County based on a model that takes into account local circumstances and is appropriate for that jurisdiction.

To: The Government of Ontario

47. Persons who are apparently mentally ill and have been ordered by the Court to be assessed in a hospital should not be warehoused in detention centers. The Government of Ontario should increase the number of hospital beds available for persons who have been ordered by the courts to have a mental assessment.
48. As soon as feasible, the Government of Ontario should proclaim into force the *Correctional Services and Reintegration Act, 2018*, SO 2018, c 6, Sch 2 (Bill 6), which prohibits placement on segregation of inmates who are suicidal or who have mental illness.

This is Exhibit **"G"** to the
Affidavit of Nadine Blum affirmed
before me this 21st day of December, 2020.

A Commissioner, etc.

Court File No. CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

VANESSA FAREAU and RANSOME CAPAY

Plaintiffs

and

BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

Proceeding under the *Class Proceedings Act, 1992*

LITIGATION PLAN

DEFINED TERMS

1. Unless otherwise defined herein, capitalized terms have the same meaning as set out in the Fresh as Amended Statement of Claim issued August 14, 2020. In addition, the following terms are defined as follows:

(a) "**Action**" means the action, in the Ontario Superior Court of Justice Court File No. CV-20-00635778-00CP;

(b) "**Administrator**" means the person who will be appointed by the **Court** to carry out the functions described in this **Plan**;

(c) "**Arbitrator**" means a person who will be appointed by the **Court** to review and adjudicate any appeals made of the **Administrator's** decisions pursuant to this **Plan**;

(d) "**Claimant**" means a person whose name appears on the **Class Members List** or he/she/they/it alleges that he/she/they/it was a member of the **Class** and he/she/they/it provides a completed **Claim Form** to the **Administrator** in the manner stipulated in this **Plan**;

(e) "**Claim Form**" means an electronic claim form approved by the **Court**, to be completed by a **Claimant** whose name does not appear on the **Class Members List** and he/she/they/it asserts to the **Administrator** that he/she/they/it was a **Claimant** eligible to participate in the procedure described herein;

(f) "**Claims Deadline**" means the date by which the **Claim Forms** must be received by the **Administrator**;

(a) "**Class**" means the class asserted from time to time in the **Action** including any subclasses;

(g) "**Class Counsel**" means the law firms of Sotos LLP and Goldblatt Partners LLP;

(h) "**Class Counsel Fees**" means the fees, disbursements and taxes payable to **Class Counsel** as ordered by the **Court**;

(i) "**Class Counsel Representative**" means the person(s) appointed by the **Court** to represent the interests of the **Class**;

(j) "**Contact Information**" includes the full name, postal address, email address, and phone number of the members of the **Class** who did not opt out of the **Action**;

(k) "**Court**" means the Ontario Superior Court of Justice;

(l) "**Defendants**" means **Bell Canada** and **Her Majesty the Queen in right of Ontario**;

(m) "**Class Members List**" means a list of the **Class Members** who have not opted out of the **Action**;

(n) "**Notice**" means the notice to the **Class** of the certification of the **Action** as a class proceeding in the form approved by the **Court**;

(o) "**Notice Plan**" means the method of distributing the **Notice** described in paragraph 26(d) of this **Plan**;

(p) "**Plan**" means this litigation plan; and

(q) "**Website**" means the website developed and maintained by **Class Counsel** at https://sotosclassactions.com/bell-canada-prison-calls/ or any such other or additional website that **Class Counsel** may develop and maintain in the future for this **Action**.

CLASS COUNSEL

2. Class Counsel have the requisite knowledge, skill, experience, personnel and resources to prosecute this Action to conclusion.

3. Class Counsel may add other lawyers or other professionals to their complement if Class Counsel decide they are necessary. Aside from experts intending to provide expert evidence to the Court, such lawyers or other professionals may be paid on a contingency basis.

CLASS DEFINITION

4. The Plaintiffs seek to represent a class defined as follows, or any other such definition that the Court determines:

> All persons in Canada who made a Collect Call or accepted and/or paid for a Collect Call from a person in custody or otherwise in an Ontario correctional Facility through the Offender Telephone Management System between June 1, 2013 and the

certification of this lawsuit as a class action or such other time as the Court deems appropriate.

REPORTING TO AND COMMUNICATING WITH THE CLASS MEMBERS

5. The number of Class Members across Canada is known by either or both of the Defendants but unknown to the Plaintiffs.

6. The defendant Bell has the last known Contact Information of Consumer Class members because Bell or its agents billed those Class Members, directly or indirectly, for accepting Collect Calls.

7. The defendant Crown has the last known Contact Information of Prisoner Class members because they are or were incarcerated in Ontario Facilities.

8. Once the action is certified as a class proceeding, Class Counsel will ask the Court to order Bell to provide to Class Counsel a report of the Consumer Class members who accepted Collect Calls, together with the Contact Information, including any address and/or email address associated with payment for Collect Calls, because Bell is the only party able to provide an accurate report.

9. Once the action is certified as a class proceeding, Class Counsel will ask the Court to order the Crown to distribute a report of the Prisoner Class members who were held in Ontario Facilities during the Class Period and had access to the OTMS telephones, because the Crown is the only party able to provide an accurate report.

10. The Plaintiffs will also ask the Court to order the Defendants to give notice to the Class Members from time to time as the Plaintiffs deem appropriate and the Court orders.

11. Once the opt-out period has expired, and after Class Counsel have delivered an affidavit particularizing the opt-outs, the Defendants will deliver the Class Members List and the Contact Information.

12. Class Counsel have established a Website containing information about the status of the Action, explaining the operation of a class action, and providing links to key Court documents, decisions, notices and other information relating to the Action. The Website will permit Class Counsel to keep Class Members aware of the status of the Action.

13. Class Members are able to register securely on the Website in order to receive updates about the case.

14. Class Counsel will post updates on the Website from time to time, and send the updates to all Class Members who have provided valid email addresses.

LITIGATION SCHEDULE

15. Justice Perell has been appointed to case manage the case.

16. If the certification motion is successful, Class Counsel will ask the case management judge to set a litigation schedule for:

(a) completion of pleadings;

(b) documentary production and delivery of affidavits of documents by the parties and a list of documents by the Crown;

(c) examinations for discovery;

(d) delivery of experts' reports; and

(e) summary judgment or the trial of the common issues.

17. Class Counsel and counsel for the Defendants may request that the litigation schedule be amended from time to time.

ACCESS TO AND PRESERVATION OF EVIDENCE

18. Class Counsel have requested that all of the Defendants' records, documents (electronic or otherwise) or other evidence relating to this Action shall be preserved.

DOCUMENT EXCHANGE AND MANAGEMENT OF DOCUMENTS

19. The Defendants possess most of the material documents relating to the common issues. Such documents will be produced to the Plaintiffs through the normal production, cross-examination and examination for discovery processes. The Plaintiffs will produce all material documents in their possession.

20. Class Counsel anticipate that most of the evidence in this Action will be in electronic form.

21. Class Counsel will utilize data management systems to organize, code, and manage the electronic documents produced by the Defendants and the Plaintiffs.

PLAINTIFFS' EXPERTS

22. The Plaintiffs will likely retain experts as the Action progresses.

DISPUTE RESOLUTION PROCESS

23. The Plaintiffs will participate in non-binding dispute resolution efforts if the Defendants are prepared to do so.

NOTICE OF CERTIFICATION OF THE ACTION AS A CLASS PROCEEDING

24. As part of the certification order, the Plaintiffs will ask the Court to:

(a) settle the form and content of the Notice;

(b) set an opt-out date;

(c) order the Defendants to provide to Class Counsel a list of the most current names and Contact Information, including email addresses, of all Class Members;

(d) decide on the Notice Plan which may change during the certification motion; Presently, the Plaintiffs suggest particulars of the Notice Plan be as follows:

(i) Class Counsel will post the Notice on the Website and email the Notice to any person who registered with Class Counsel and provided an email address;

(ii) Class Counsel will send the Notice to all Class Members whose email addresses have been provided and file an affidavit attesting compliance with the term of the Notice Plan;

(iii) Class Counsel will publish and promote the Notice in a form approved by the Court on the internet and social media; and

(iv) The Crown will post the Notice in all Ontario correctional Facilities in a place visible to prisoners in such Facilities.

(e) direct Class Counsel to receive the written elections to opt-out;

(f) Class Members may opt-out of this Action by sending by email or regular mail a written election to opt-out to Sotos LLP or Goldblatt Partners LLP before the expiration of the opt-out period; and

(g) no Class Member may opt out of this Action after the expiration of the opt-out period;

(h) within 30 days after the expiration of the opt-out period, Class Counsel will deliver to the Defendants an affidavit listing the names and email addresses of all Class Members who opted-out of this Action.

EXAMINATIONS FOR DISCOVERY

25. The Plaintiffs will seek to examine for discovery at least one representative of each of the Defendants.

26. The Defendants may examine the representative plaintiffs.

27. The Plaintiffs may seek an Order from this Honourable Court permitting them to examine additional representatives of the Defendants, if necessary.

COMMON ISSUES AND AGGREGATE DAMAGES

28. Unless the Plaintiffs decide to pursue summary judgment, they will ask this Honourable Court to set a date in Toronto for the trial of the common issues within six months after the completion of the examinations for discovery.

29. At the trial of the common issues, this Court will be asked to:

(a) answer the certified common issues;

(b) establish the amount of profits the Defendants generated through the OTMS Collect Calls during the Class Period;

(c) give judgment for the amount of the unjust enrichment through the use of the Defendants' records and/or through expert evidence regarding reasonable Collect Call rates;

(d) award damages in the aggregate as follows:

(i) all amounts charged by the Defendants for the OTMS Collect Calls, inclusive of the Crown's Commissions; or

(ii) alternatively, the difference between the actual Collect Call rates and Commissions charged by the Defendants and what the reasonable rates for Collect Calls should have been as established by expert evidence.

(e) award punitive damages; and

(f) establish grids for aggregate damages for Class Members or subclasses.

30. If such an aggregate award is made, the Court will be asked to approve a distribution protocol. The issue of payment to the Class Members will be decided by this Court after payment of Class Counsel Fees.

31. Class Members who seek to recover more than their individual share of aggregate damages may pursue an individual assessment post-trial.

32. The findings of fact and conclusions on the common issues will permit the judge at the common issues trial to give directions to address any remaining individual issues.

AFTER THE RESOLUTION OF THE COMMON ISSUES

33. Assuming the common issues are resolved by judgment in favour of the Class, the Plaintiffs will ask the Court to establish and supervise a claims and assessment procedure. The precise structure of the assessment process will depend upon the conclusions reached by the judge at the common issues trial. The Class Members may participate in the process described in the following paragraphs.

34. The representative plaintiffs will ask this Honourable Court to:

(a) appoint an Administrator. The Administrator will:

(i) hold any monies recovered at the common issues trial as aggregate damages in a segregated interest bearing trust account subject to an application to this Court to approve payment to the Class Members;

(ii) implement this Plan;

(iii) receive and evaluate Claim Forms from Claimants in accordance with this Plan and protocols approved by the Court;

(iv) decide whether or not a person is a Class Member when his/her/their/its name does not appear on the Class Members List;

(v) decide how much compensation each Class Member will receive in accordance with the grids for damages established under paragraph 29(f),

(b) appoint an Arbitrator to decide any appeals from the decisions of the Administrator and to decide any issues not determined at the common issues trial, including quantum of damages; and

(c) appoint Class Counsel Representatives.

35. The cost of the Administrator, Arbitrator and Class Counsel Representatives will be paid by the Defendants and their costs shall be addressed at the time of their appointment.

36. The representative plaintiffs will also ask the Court to:

(a) settle the form and content of the Resolution Notice and the Claim Form;

(b) order that the Resolution Notice be disseminated substantially in accordance with the Notice Plan set out at paragraph 26(d), except that the Resolution Notice shall not be conveyed to any Class Member who validly opted-out in accordance with the procedure set out in the certification order;

(c) set a date for the Claims Deadline; and

(d) set guidelines to clarify how a Class Member qualifies to be compensated for damages in the grids.

CLASS COUNSEL'S ONGOING REPRESENTATION OF THE CLASS MEMBERS

37. Class Counsel, other than the Class Counsel Representatives, may, but are not required to, act as the lawyer for a particular Class Member after the common issues are resolved if requested to do so by the Class Member. The Class Member will be required to pay fees, disbursements and

taxes for this additional service which is not provided as part of Class Counsel's responsibility. If a Class Member retains other lawyers or representatives, the Class Member will be responsible for any fees, disbursements, taxes or other costs in the agreement between the Class Member and the lawyers or representatives.

INDIVIDUAL ISSUES

38. After determining the common issues, the Court will be asked to provide directions to the Judge or Master to determine any individual issues which are not resolved at the trial of the common issues.

39. Specifically, if some issues are not resolved at the trial of the common issues, this Honourable Court will be asked to authorize a hearing(s) before a Judge or Master during which the Class Members and the Defendants may present general and expert evidence relevant to some or all individual issues.

40. A Class Member may appear before a Judge or Master during the determination of his/her/their/its individual issues either in person or with counsel. The Class Member is responsible for the cost of such representation.

REVIEW OF THE LITIGATION PLAN

41. The Court may revise this Plan from time to time, as required.

VANESSA FAREAU, et al. -and- **BELL CANADA, et al.**
Plaintiffs Defendants

Court File No.: CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto
Proceeding under the *Class Proceeding Act, 1992*

AFFIDAVIT OF NADINE BLUM
(Affirmed December 21 2020)

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-and-

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Defendants

Court File No. CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

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