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

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

PETITION OF GLOBAL TEL*LINK FOR STAY PENDING JUDICIAL REVIEW

Michael K. Kellogg
Courtney S. Elwood
Benjamin S. Softness
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

*Counsel for Global Tel*Link*

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INTRODUCTION AND EXECUTIVE SUMMARY

Petitioner Global Tel*Link ("GTL")[1] respectfully requests that the Commission grant a stay as to the rate caps for "Inmate Calling Services" ("ICS") adopted in the *Order*[2] pending GTL's petition for judicial review of those caps and other aspects of the *Order*. A stay is warranted because (1) GTL is likely to succeed in its challenge to the *Order*; (2) GTL will suffer irreparable harm if the *Order* goes into effect and is later vacated; and (3) the balance of equities weighs in favor of a stay.

The reviewing court will likely set aside the rate caps, first of all, because – as the Commission itself acknowledged – they do not allow ICS providers to recover the legitimate costs of providing service in correctional institutions. To obtain permission to place their equipment inside prisons and jails, ICS providers must pay state and local authorities location rents or site commissions. The Commission recognized that the rate caps it set do not allow ICS providers to recover those location rents. Accordingly, those caps violate § 276(b)(1)(A), which requires the Commission to ensure that ICS providers receive fair compensation for all calls made from their payphones; § 201(a), which requires that rates be just and reasonable; and the United States Constitution, which bars the Commission from setting confiscatory rates. Although the Commission expressed its distaste for substantial site rental payments required by correctional institutions, it declined to prohibit them, thus confirming that they are consistent

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[1] As used in this petition, "Global Tel*Link" or "GTL" refers to Global Tel*Link Corporation and its affiliates, including Public Communications Services, Inc. and Value-Added Communications, Inc.

[2] Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 15-136 (rel. Nov. 5, 2015) ("*Order*").

with federal law. The Commission cannot endorse site commissions – however reluctantly – yet prevent ICS providers from recovering that real cost of providing service.

Even leaving the issue of location rents to one side, the Commission's rate caps are unlawful because they set rates below the documented costs of many ICS providers. The Commission's assertion that greater efficiency would permit ICS providers to bring their costs below the caps is contrary to the record evidence.

Furthermore, the Commission's failure to address site commissions in its *Order* – when it had already recognized that the requirement to pay those commissions was at the heart of the problem its regulations were intended to address – was arbitrary and capricious and an unfair bait-and-switch that deprived parties of fair notice.

With respect to intrastate calls, the *Order* is unlikely to survive review because § 276(b)(1)(A) cannot reasonably be read to grant the Commission authority to reduce the rates charged by ICS providers. As the history of the statute and the Commission's own prior statements make clear, that provision was enacted to ensure that payphone providers received fair compensation for calls that they had previously been required to originate for free or at below-cost, regulated rates. The Commission has no authority to force payphone providers to *reduce* their rates under that provision.

GTL will suffer irreparable harm if the *Order* is not stayed, because it will be forced to charge unlawful, confiscatory rates; the revenues lost cannot be recovered. By contrast, if the *Order* is stayed, existing rate caps from the *2013 Order* will remain in place with regard to interstate calls. The public will be harmed if the dramatically lower rate caps imposed by the *Order* lead to loss of or reduction in available services. Accordingly, the equities favor a stay pending (expedited) review.

Because of the severe and irreparable harm that will be caused by the new rate caps if they are permitted to take effect, and to allow sufficient time for the reviewing court to address a stay motion in the event that the Commission does not grant relief, GTL respectfully requests action on this petition by January 11, 2016. If the Commission fails to resolve this petition by that date, GTL will seek relief in the court of appeals pursuant to Rule 18 of the Federal Rules of Appellate Procedure.

BACKGROUND

The *Order* marks the Commission's latest action on two petitions, both filed in the mid-2000s, that asked for rulemaking related to interstate ICS rates.[3] The Commission first sought to address those petitions in 2012, when it issued a notice of proposed rulemaking soliciting comment on a set of varying proposals to cap rates and to restrict certain charges and practices related to interstate ICS calls.[4] That notice resulted in the Commission's first rulemaking order in this docket, which was released on September 26, 2013.[5] In the *2013 Order,* the Commission adopted some of the proposals on which it had sought comment, including interim rate caps of $0.21 per minute for debit and prepaid interstate ICS calls, and $0.25 per minute for collect interstate ICS calls.[6] But it also departed from the notice in significant ways, including by

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[3] *See* Petition of Martha Wright, *et al.* for Rulemaking or, in the Alternative, Petition To Address Referral Issues in Pending Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (FCC filed Nov. 3, 2003); Petitioners' Alternative Rulemaking Proposal, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (FCC filed Mar. 1, 2007).

[4] *See* Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629 (2012).

[5] Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) ("*2013 Order*").

[6] *See id.* ¶ 48.

ordering that all interstate ICS rates and all “ancillary charges” must be “cost-based” or be subject to invalidation – even if those rates were below the interim caps.[7] The Commission also established “safe harbor” levels, below which rates for interstate ICS calls (but not any ancillary charges) would be presumed lawful – though still subject to challenge and invalidation.[8]

Several parties, including GTL, filed petitions for review challenging the *2013 Order*.[9] GTL (along with other petitioners) also sought a stay of the portions of the *2013 Order* that imposed cost-based regulation, highlighting the Commission’s failure to provide either notice of its intent to adopt a de facto rate-of-return regime or guidance on how ICS providers were supposed to comply with this unexpected requirement.[10] GTL further demonstrated the irreparable harm it would suffer in lost revenues if it were forced to comply with the *2013 Order* by reducing interstate ICS rates below GTL’s own costs to the safe harbor levels – $0.12 per minute for interstate prepaid and debit calls, and $0.14 per minute for interstate collect calls – in order to avoid the risks of setting higher rates without knowing how the Commission would apply its new standards.[11] The D.C. Circuit granted GTL’s requested stay.[12]

The court had no occasion to issue a final ruling on the merits of the *2013 Order*, however. After the parties had fully briefed the issues, and with oral argument on the calendar,

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[7] *Id.* ¶ 12.

[8] *See id.* ¶¶ 60, 120.

[9] *See* Pet. for Review, *Global Tel*Link v. FCC*, No. 13-1281 (D.C. Cir. filed Nov. 14, 2013).

[10] *See* Mot. of Global Tel*Link for Partial Stay Pending Judicial Review at 8-16, *Securus Techs., Inc. v. FCC*, Nos. 13-1280 et al. (D.C. Cir. filed Nov. 25, 2013).

[11] *See id.* at 16-18.

[12] *See* Order, *Securus Techs., Inc. v. FCC*, Nos. 13-1280 et al. (D.C. Cir. Jan. 13, 2014). One of the panel members voted to grant an even broader stay of the entire *2013 Order*, which certain parties had requested.

the Commission successfully moved to have the case held in abeyance pending the completion of further agency-level proceedings.[13] The Commission explained that it had recently issued a new notice of proposed rulemaking (the "*2014 NPRM*"[14]) after receiving additional cost and operational data and input from interested parties, and that the outcome of the new rulemaking "could moot or significantly alter the scope of" the pending challenges to the *2013 Order*.[15] In particular, the Commission noted its plans to move to a "more market-based approach" using rate caps only as a "backstop."[16]

Consistent with the Commission's message to the D.C. Circuit, the *2014 NPRM* signaled a change in the Commission's intended approach to ICS reform. The Commission proposed "a simplified, market-based approach focused on aligning the interests of ICS providers and facilities."[17] The Commission repeatedly identified location rents or site commissions – that is, "fees paid by ICS providers to correctional facilities or departments of corrections to win the exclusive right to provide inmate calling service at a facility" – as the primary factor driving high ICS rates.[18] Therefore, the centerpiece of the Commission's proposed "comprehensive solution"

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[13] *See* Uncontested Mot. of Federal Communications Commission To Hold Case in Abeyance, *Securus Techs., Inc. v. FCC*, Nos. 13-1280 et al. (D.C. Cir. filed Dec. 10, 2014) ("FCC Abeyance Mot.").

[14] Second Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170 (2014) ("*2014 NPRM*").

[15] *See* FCC Abeyance Mot. at 3, 4.

[16] *Id.* at 3 (quoting *2014 NPRM* ¶ 47).

[17] *2014 NPRM* ¶ 6.

[18] *Id.* ¶ 3 ("Excessive rates are primarily caused by the widespread use of site commission payments . . . ."); *see also id.* ¶ 20 ("The pressure to pay site commissions . . . continues to disrupt and even invert the competitive dynamics of the industry."), ¶ 21 ("The record is clear that site commissions are the primary reason ICS rates are unjust and unreasonable and ICS compensation is unfair . . . ."), ¶ 24 (deeming site commission payments "the main cause of the

was the elimination of such rent payments.[19] The Commission also sought comment on alternative ways for facilities to recover costs that may currently be funded by such payments.[20] More broadly, the Commission explained that the comprehensive nature of its intended reform would allow for "a more market-based approach," reflecting its "prefer[ence] to allow market forces to ensure that rates are just and reasonable."[21] Instead of the safe harbors and cost-based rates of the *2013 Order*, the Commission sought comment on adopting permanent rate caps for both interstate and intrastate ICS calls as a "backstop" to market forces; capping certain ancillary fees and prohibiting others; and issues related to enforcement, accessibility, advanced services, and promoting competition.[22]

The *Order*, released on November 5, 2015, departed sharply from the plan laid out in the *2014 NPRM*. The Commission took no action to eliminate or reduce site commission payments. The Commission never suggested that its earlier (and extensive) criticisms of site commissions were off-base; it simply concluded, without elaboration, that "we do not need to prohibit site commissions in order to ensure that interstate rates for ICS are fair, just, and reasonable and that intrastate rates are fair."[23] The Commission adhered to its view, however, that location rental payments to correctional facilities are not a cost of providing ICS "and should not be considered in determining fair compensation for ICS calls."[24] It then proceeded to set tiered rate caps that,

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dysfunction of the ICS marketplace"), ¶ 30 (stating that "the record continues to show that the payment of site commissions causes ICS rates to be set at excessive levels").

[19] *Id.* ¶ 6; *accord id.* ¶ 19.

[20] *See id.* ¶ 19.

[21] *Id.* ¶¶ 47-48.

[22] *See id.* ¶¶ 19, 47, 87.

[23] *Order* ¶ 118.

[24] *Id.* ¶ 123.

instead of serving as a "backstop" to market forces, impose an even more stringent cost-based regime than the one adopted in the *2013 Order*. For prisons, the Commission slashed the former rate caps in half and set maximum rates that are even lower than the "safe harbor" rates that were presumed lawful under the prior rules.[25] It set slightly higher caps for jails of varying sizes, which are more expensive for providers to serve.[26] The Commission acknowledged both that (1) the caps were not high enough to cover the site commission payments that many ICS providers are contractually obligated to make[27] and that (2) even excluding site commissions, the caps were below the costs reported by at least some ICS providers.[28] As to site commissions, the Commission concluded, with no evidentiary analysis, that the rate caps would "likely" trigger change-of-law clauses in existing contracts[29] – although it failed to discuss the number or percentage of ICS contracts that actually contain such clauses, or to offer any solution (beyond voluntary renegotiation) for those contracts that do not. The Commission avoided the latter problem by asserting that ICS providers with average costs are not "efficient."[30]

In addition to the rate caps, the Commission set caps for a limited list of ancillary service charges, such as taxes and regulatory fees, automated-payment fees, and third-party financial

[25] *See id.* ¶ 9, tbl. 1 (setting rate caps of $0.11 per minute for debit and prepaid calls and $0.14 per minute for collect calls). The Commission also determined to phase all collect-call rates down to the debit/prepaid rates within two years. *See id.*

[26] *See id.* (setting rate caps ranging between $0.14 and $0.22 per minute for debit and prepaid calls from facilities of different sizes, with collect calls initially capped at $0.49 per minute and phasing down to the debit/prepaid rates).

[27] *See id.* ¶ 54 (finding caps sufficient to allow recovery of what the Commission deems "efficiently-incurred ICS costs (*excluding reported commissions*)") (emphasis added), ¶ 125 ("If site commissions were factored into the costs we used to set the rate caps, the caps would be significantly higher.").

[28] *See id.* ¶ 116.

[29] *See id.* ¶ 132.

[30] *See id.* ¶ 52 n.170.

transaction fees (to be passed through without mark-up), and it prohibited ICS providers from charging any other ancillary fees.[31] It established a periodic review process for ICS cost data,[32] annual reporting requirements for ICS rates and traffic volumes,[33] and consumer disclosure requirements for ICS rates and charges.[34] It also established a waiver process for ICS providers seeking relief from the rate caps.[35] And it "confirm[ed]" the finding from the *2013 Order* that § 276 is "technology neutral" and that ICS therefore encompasses any service, including an advanced service that uses VoIP or other technology, "that allows Inmates to make calls to individuals outside the Correctional Facility where the Inmate is being held."[36] Finally, the Commission issued a Further Notice of Proposed Rulemaking seeking comment on several matters, including exclusivity of ICS contracts, video calls and other enhanced services, data collection and disclosure requirements, international calling rates, and third-party financial transaction fees.[37]

Notice of the Commission's new rules was published in the Federal Register on December 18, 2015. The rules are scheduled to take effect in two stages: 90 days after publication (for prisons) and six months after publication (for jails).[38]

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[31] *See id.* ¶¶ 161-163 & tbl. 4.

[32] *See id.* ¶ 201.

[33] *See id.* ¶ 267.

[34] *See id.* ¶ 278.

[35] *See id.* ¶ 219.

[36] *Id.* ¶ 250 & nn.879-880; *see also* 47 C.F.R. § 64.6000(j); *2013 Order* ¶ 14.

[37] *See generally Order* ¶¶ 291-327.

[38] *Id.* ¶ 251.

DISCUSSION

The Commission should stay the rates caps adopted in the *Order*, 47 C.F.R. §§ 64.6010 and 64.6030, pending judicial review.[39] A petitioner seeking a stay must show that (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay.[40] Those factors are satisfied here, and the Commission should grant a stay.

I. GTL IS LIKELY TO SUCCEED ON THE MERITS

GTL is likely to succeed on its petition for review because the Commission acted unlawfully, arbitrarily and capriciously, and in violation of the APA's notice-and-comment obligations when it adopted cost-based caps on ICS rates while doing nothing to address the location rental payments that are a real expense to ICS providers and that the Commission admits are the biggest obstacle to ICS reform. GTL is also likely to succeed on the merits because the Commission acted in excess of its statutory authority in capping rates for *intra*state ICS.

A. The Commission's Rate Caps Are Unlawful Because They Deny ICS Providers Recovery of Legitimate, Real Costs

The Commission's acknowledgment that, once site commission payments are taken into account, the rate caps adopted in the *Order* are insufficient to cover the costs of providing service, is fatal to the *Order*. Congress has required the Commission "to ensure that all

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[39] Although GTL seeks a stay only as to the rate caps, GTL believes that the *Order* is unlawful in several other respects as well, including the Commission's expansion of the term "inmate calling service" well beyond the statutory bounds of § 276. *See also* O'Rielly Dissent at 209. GTL has challenged this and other portions of the *Order* in its petition for review.

[40] *See* Order Denying Stay Request, *Amendment of Parts 73 and 76 of the Commission's Rules*, 4 FCC Rcd 6476, ¶ 6 (1989) (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."[41] Site commissions – in effect, location rental payments – are a necessary cost of providing service. Accordingly, the Commission cannot lawfully set rates that the Commission acknowledges fail to compensate ICS providers for the costs they actually incur to provide service (including site commissions as well as the costs that the Commission deems "legitimate").

1. The Commission's Refusal To Allow ICS Providers To Recover Site Commissions – Which the Commission Recognized As Lawful Costs – Is Unlawful

a. The Commission acknowledged that the rate caps will not allow ICS providers to recoup the site commission payments that they are contractually obligated to make to correctional facilities.[42] In fact, the Commission admitted that the caps "would be significantly higher" if these payments were factored in as a cost of providing ICS.[43] But the Commission insisted that site commissions "are not reasonably related to the provision of ICS and should not be considered in determining fair compensation for ICS calls."[44] That position ignores reality. Site commission payments are, in effect, the rent that ICS providers pay for permission to locate their equipment within a correctional institution. Such location rental payments – no less than the purchase of telephone equipment or the lease of local telephone lines – are a real cost of providing ICS.

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[41] 47 U.S.C. § 276(b)(1)(A).

[42] *See Order* ¶ 54 (describing caps as sufficient to allow recovery of "efficiently-incurred ICS costs (*excluding reported commissions*)") (emphasis added).

[43] *Id.* ¶ 125.

[44] *Id.* ¶ 123.

They are also a substantial cost. As the *Order* notes, "ICS providers paid over $460 million in site commissions in 2013 alone," and such payments "can amount to as much as 96 percent of gross ICS revenues."[45] For ICS providers, these costs are often unavoidable. Many state and local correctional authorities require payment of location rents in their ICS contracts, sometimes because of a statutory mandate.[46] According to state and local law and the choices of correctional officials and policymakers, such location rental payments are used to support inmate health and welfare programs and other prison initiatives.[47] The Commission may not favor such payments, but it has no statutory authority to treat real costs as though they do not exist. In declaring that location rents are "non-ICS-related costs"[48] and accordingly need not be recovered in the rates that ICS providers charge, the Commission simply disregarded undisputed evidence that, at least in the absence of a preemptive federal law barring such payments, site commissions are a real cost of ICS. By ignoring those costs, the Commission has set rate caps that will cause ICS providers to lose money – a fact the Commission acknowledged.[49]

b. Because the rate caps were set below cost, they violate the statute and the Constitution. Section 276 directs the Commission "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."[50] By setting rate caps that admittedly do not cover the costs of providing ICS service, the Commission has violated that statutory mandate. With respect to interstate calls

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[45] *Id.* ¶ 122.

[46] *See, e.g.*, Miss. Code Ann. § 47-5-158.

[47] *See Order* ¶ 123 & n.400.

[48] *Id.* ¶ 125.

[49] *See id.* ¶ 116.

[50] 47 U.S.C. § 276(b)(1)(A).

subject to the caps, the Commission's new rates are not "just and reasonable" under § 201. With respect to all calls that are subject to the caps, because the rates deny ICS providers the ability to recover the costs that they actually incur, they violate the Fifth Amendment.[51]

c. The Commission's unlawful rate caps are not saved by the mere exhortation to correctional institutions that they change their requirement for rental payments as a condition of awarding contracts to ICS providers because the Commission specifically declined to prohibit site commissions. The Commission claims to have implicitly addressed site commissions "by establishing comprehensive rate caps and caps on ancillary service charges that may limit providers' ability to pass site commissions through to ICS consumers."[52] Essentially, the Commission suggests that, by announcing that site commissions are not a legitimate cost of ICS, and by setting ICS rate caps that fail to account for commission payments, the *Order* will force the industry to eliminate both existing and future site commission provisions without any explicit command to do so. But this theory has already been proven false. The Commission tried the same thing when it issued the *2013 Order*, and it did not work. The Commission itself recognized in the *2014 NPRM* that "despite the Commission's decision to not permit site commission payments to be included in interstate rates, the record indicates that site

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[51] *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (Fifth Amendment to the Constitution protects regulated entities from rates that are "so 'unjust' as to be confiscatory"); *Federal Power Comm'n v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575, 585 (1942) ("By long standing usage in the field of rate regulation the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense."); *cf. Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 160 (1930) ("In determining what is a confiscatory regulation of rates, it is necessary to consider the actual effect of the rates imposed in the light of the utility's situation, its requirements and opportunities."); Order, *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209, ¶ 51 (2001) (explaining that "constitutionally valid" rates are those "which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed").

[52] *Order* ¶ 128.

commissions have *continued to increase*."[53] That is precisely why the Commission proposed to deal with the problem affirmatively in the current rulemaking. And although the Commission, in a footnote, speculates that capping intrastate rates will prevent ICS providers from shifting the burden of recovering site commissions to intrastate calls,[54] it offers no reason to suggest that this type of "gaming" was a reason (let alone a significant reason) why the reaction to the *2013 Order* did not accord with the Commission's predictions. And it offers no basis to believe the result will be different this time around.

This is particularly clear in the case where existing contracts with correctional institutions impose on ICS providers a continuing obligation to provide services *and* to pay location rents. In such cases, ICS providers will risk substantial contractual liability if they cease to pay required commissions; the ICS provider likewise cannot simply walk away from a money-losing contract. To be sure, if the Commission (assuming it has the authority) had barred the payment of commissions and rendered existing contracts unenforceable, it could then disregard such costs in setting rate caps. But it cannot confirm the legality of site commissions under federal law – however reluctantly – and then bar their recovery in the rates that ICS providers are permitted to charge.

2. The Rate Caps Deny ICS Providers in High-Cost Locations Fair Compensation

a. Even if all site commissions were eliminated, the Commission's capped rates would in some cases deny ICS providers fair compensation and are therefore unlawful. The Commission acknowledged that "the adopted caps are below the costs [that some ICS providers]

[53] *2014 NPRM* ¶ 26 (emphasis added).

[54] *See Order* ¶ 128 n.437.

reported to us under the Mandatory Data Collection."[55] But the Commission concluded that providers whose costs exceed the caps should solve the problem through "increased efficiencies" – which the Commission did not specify.[56] The Commission's assessment of providers' alleged efficiency or inefficiency, like its treatment of site commissions, ignores reality.

For example, in assuming that providers with higher costs are necessarily inefficient, the Commission failed to account for the significant variation in service demands and features across different facilities; the lower-cost providers highlighted in the Commission's analysis may simply serve lower-cost facilities.[57] Likewise, the Commission's attempt to compare rates in different states, and to suggest that low rates in one state mean that costs in another state must be inflated, fails to account for real variation in the services provided in different places.[58] GTL presented an economic analysis to the Commission comparing the Commission's rate caps to the cost data submitted in response to the mandatory data collection.[59] As the record reflects, the rate caps adopted by the Commission will cause 40 percent (40%) of *all* debit/prepaid minutes of use across *all* responding ICS providers and *all* facility types to be provided at below-cost

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[55] *Id.* ¶ 116.

[56] *Id.* ¶ 59; *see also id.* ¶ 62.

[57] *Compare id.* ¶¶ 63-64 *with* Pai Dissent at 203 n.61 ("It's not 'implausibl[e]' that the data don't show average costs falling with the provider's size or that 'roughly similarly situated providers have substantially different costs' "; "the data plausibly suggest such providers serve different institutions.") (citation omitted).

[58] *Compare Order* ¶ 49 *with* Pai Dissent at 203 n.61.

[59] Stephen E. Siwek & Christopher C. Holt, Comments on Wheeler/Clyburn ICS Proposal (Oct. 10, 2015) ("Siwek/Holt Oct. 2015 Analysis"), attached to Letter from Chérie R. Kiser, Counsel for GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Oct. 10, 2015). The Siwek/Holt analysis relied on cost data from 2013, which is consistent with the Commission's approach. *See Order* ¶ 52 ("The debit and prepaid rate caps we adopt are based on 2012 and 2013 data submitted by the 14 responding providers."); *see also 2014 NPRM* ¶ 49 (using a combination of 2012 and 2013 data).

rates.[60] The number of below-cost minutes under the Commission's rate caps becomes even greater when focusing on specific facility categories:

- 60 percent (60%) of all debit/prepaid minutes in jails with 0-99 inmates;
- 46 percent (46%) of all debit/prepaid minutes in jails with 100-349 inmates;
- 63 percent (63%) of all debit/prepaid minutes in jails with 1,000 or more inmates; and
- 88 percent (88%) of all debit/prepaid minutes in prisons with 5,000-19,999 inmates.[61]

b. The Commission's flawed assumptions have resulted in rates that fail to permit recovery of costs even if site commissions are not considered; these rates are unlawful and will not withstand review. The Communications Act is unambiguous: it requires the Commission to ensure that ICS providers are fairly compensated for "*each and every* . . . call using their payphone."[62] A rate cap that is intended to allow providers with average costs (barely) to recover their costs will inevitably deny fair compensation to those providers and in those facilities with higher than average costs. For this reason, a rate cap that fails to account for the real differences in costs among ICS providers ensures that providers with higher costs will be denied fair compensation, in direct contravention of the congressional command.

B. The Commission's Failure To Address Site Commissions Violates the APA

The *Order* will likely be set aside for an additional reason: the Commission failed to address the very problem that it identified as fundamental to ICS rate reform. This failure to

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[60] Siwek/Holt Oct. 2015 Analysis at 3; *see also* Letter from Stephanie A. Joyce, Counsel for Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 12-375 (Oct. 7, 2015) ("the draft rate caps are significantly below Securus's costs even without site commissions").

[61] Siwek/Holt Oct. 2015 Analysis, tbl. 2 & App. 1; *see also* Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Oct. 7, 2015) (explaining that the rate caps for jails with more than 1,000 inmates are below Pay Tel's costs).

[62] 47 U.S.C. § 276(b)(1)(A) (emphasis added).

address the most important aspect of the regulatory issue before it is arbitrary and capricious; the Commission's bait-and-switch violated the APA's notice requirement.

1. In the *2014 NPRM*, the Commission identified site commissions as the "main cause of the dysfunction of the ICS marketplace" and the key obstacle to the use of market forces to drive down ICS rates.[63] Consistent with the goal of ICS reform, the Commission set out to tackle the problem of site commissions. But the *Order* does nothing to address site commissions even prospectively, let alone those required under existing contracts. The Commission could have eliminated or prohibited these payments entirely, as it proposed to do in the *2014 NPRM*. Or it could have accommodated them into the rate cap structure in some logical way. The Commission did neither, instead "leav[ing] providers to decide whether to pay site commissions" – a "decision" that the Commission recognized is in fact constrained by current contractual obligations and, in some cases, by state law.[64]

The Commission's approach is arbitrary and capricious. "Federal administrative agencies are required to engage in 'reasoned decisionmaking.'"[65] "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."[66] Courts will find an agency's rule unlawful if the agency

[63] *2014 NPRM* ¶ 24; *see also id.* ¶ 27 ("Eliminating the competition-distorting role site commissions play in the marketplace should enable correctional institutions to prioritize lower rates and higher service quality as decisional criteria in their RFPs, thereby giving ICS providers an incentive to offer the lowest end-user rates.").

[64] *Order* ¶ 119 & n.379.

[65] *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

[66] *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

has "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency."[67]

Here, the Commission has done both. The Commission cannot credibly claim to have enacted "comprehensive reform of all aspects of ICS"[68] without dealing with the most important aspect demanding reform. The Commission did not alter its view that site commissions are a critical part of any ICS rate reform; on the contrary, it confirmed that these payments "have been a significant driver of rates."[69] But the Commission consciously chose to duck the issue, despite recognizing its importance.

The Commission's explanation for its decision does not hold up. The Commission expressed a "general preference to rely on market forces, rather than regulatory fiat, whenever possible."[70] In the midst of an *Order* that takes an otherwise heavy-handed regulatory approach and pushes the bounds of the Commission's jurisdiction beyond inmate calling and deep into the correctional industry, that statement simply is not credible.

2. Furthermore, the Commission's adoption of ICS rate reform without any meaningful answer to site commissions, and its corresponding substitution of a cost-based regime in place of the market-based solution that was promised, is a violation of the APA's mandate that agencies provide notice and an opportunity for comment before promulgating a rule.[71]

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[67] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[68] *Order* ¶ 9.

[69] *Id.* ¶ 118.

[70] *Id.* ¶ 130.

[71] *See* 5 U.S.C. § 553(b)-(c).

The *2014 NPRM* was clear: the Commission proposed to adopt a market-based approach to ICS reform, eschewing the cost-based approach of the *2013 Order* in favor of a less intrusive regulatory regime, with rate caps acting only as a "backstop" to market forces.[72] The Commission recognized that a market-based approach required it to address the major market failure in the ICS industry: site commission payments.[73] It acknowledged that these payments were driving up ICS rates and that the growth of commissions had not been stopped or slowed by the Commission's prior decree that such payments were not a proper cost.[74] The Commission therefore addressed a prohibition on site commissions first and most extensively among all of its proposals.[75] With the elimination of these payments, the Commission envisioned a system that "better aligns the interests of both ICS providers and correctional institutions with the interests of consumers, allowing market forces to drive rates to competitive levels."[76] It also relied on the promise of a market-based approach to justify the extension of the ICS rules to intrastate calls, explaining that, by comprehensively regulating both intrastate and interstate rates, the Commission would be free to "adopt[ ] a simplified, market-based approach."[77]

[72] *See 2014 NPRM* ¶ 6 (seeking comment on "moving to a market-based approach to encourage competition"), ¶ 47 (reciting goal of a market-based solution to reduce rates and seeking comment on comprehensive reform that would allow for market-based approach with permanent rate caps as a "backstop"), ¶ 48 (stating FCC's preference "to allow market forces to ensure that rates are just and reasonable" and soliciting comment on the advantages and disadvantages of this planned approach "as compared to setting safe harbors or simply requiring cost-based rates").

[73] *See id.* ¶ 24.

[74] *See id.* ¶ 26.

[75] *See id.* ¶¶ 20-46.

[76] *Id.* ¶ 6.

[77] *Id.*

The Commission relied on this planned change of course in convincing the D.C. Circuit to defer its review of the cost-based *2013 Order* (and in convincing petitioners not to oppose that delay). With the "comprehensive inmate calling reform" envisioned by the *2014 NPRM*, the Commission told the court that it would be able to adopt a new, "market-based" approach that relied on permanent rate caps only as a "backstop" to the forces of competition.[78]

The *Order* does not fulfill that promise. The Commission pulled "a surprise switcheroo,"[79] adopting rate caps that are dramatically lower than what could reasonably be called a "backstop," substantially below the interim caps adopted in the *2013 Order*, and (for prisons) even lower than the former cost-based "safe harbor" rates. This is not a "market-based" regime; it is an even more onerous version of the rate-of-return regulation that the Commission tried to impose before. The *2014 NPRM* never even suggested that the Commission was considering tightening its regulatory hold on ICS rates in this manner. Moreover, the Commission's abandonment of a market solution and its return to cost regulation erases its stated justification for capping intrastate rates – that is, to facilitate a market-based approach.[80]

The Commission's reversal of the course contemplated in the *2014 NPRM* deprived GTL and other interested parties of a meaningful opportunity to comment on the rules ultimately adopted.[81] There was no reason for interested parties to anticipate this bait-and-switch. The

[78] *See* FCC Abeyance Mot. at 3.

[79] *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

[80] *See 2014 NPRM* ¶ 48 ("[In 2013], because reform was limited to interstate rates, market forces alone would not bring all rates down to just and reasonable levels because intrastate rates, ancillary charges and site commission payments on intrastate rates would still thwart market forces.").

[81] *See, e.g.*, *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013); *Association of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 461-62 (D.C. Cir. 2012);

Commission's decision to abandon the market-based approach contemplated in the *2014 NPRM* without providing adequate notice of the agency's new plan violated the APA and further supports vacatur of the new rules.[82]

C. The Commission Lacks Jurisdiction To Cap Intrastate ICS Rates

The reviewing court is likely to set aside the caps for intrastate rates because the Commission has no jurisdiction to impose those caps. There is no dispute that the Commission's authority under § 201 to ensure just and reasonable rates is limited to *inter*state ICS calls.[83] The Commission erred in concluding that § 276 confers a comparable power to constrain *intra*state rates.

Congress declared in "sweeping" language that the Commission should be "fence[d] off" from regulating "intrastate matters":[84] "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."[85] That statute "contains not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction."[86] Another statute

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Environmental Integrity Project, 425 F.3d at 996; *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

[82] *See, e.g.*, *International Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1260 (D.C. Cir. 2005); *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

[83] *See Order* ¶¶ 108-113 (claiming authority to regulate intrastate ICS rates only under § 276); *see also* Pai Dissent at 198 ("And there's likewise little doubt that section 201 expressly does *not* authorize the Commission to regulate intrastate rates in the same manner.").

[84] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986).

[85] 47 U.S.C. § 152(b)(1).

[86] *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 373.

cannot be interpreted to confer intrastate regulatory jurisdiction unless it is "so unambiguous or straightforward as to override the command of § 152(b)."[87]

Section 276 gives the Commission some jurisdiction over intrastate rates. But, until now, the Commission has properly "viewed its intrastate authority as strictly limited by the metes and bounds of section 276."[88] The statute authorizes the Commission to "establish a per call compensation plan to ensure that all payphone service providers" – defined to include providers of "inmate telephone service in correctional institutions" – "are fairly compensated for each and every completed intrastate and interstate call using their payphone."[89] But that language – read in light of the history and purpose of § 276 – authorizes the Commission only to ensure that payphone providers receive adequate compensation for each call, not to prevent what the Commission considers to be excessive compensation.

Before that statute was adopted, a patchwork of state and federal restrictions precluded payphone providers from charging compensatory rates – or charging at all – for a variety of local and long-distance calls. Instead, local telephone companies were frequently required to recover the costs of their payphone operations through access charges (both intrastate and interstate, depending on the type of call). In sweeping away that regulatory framework, Congress made clear that the Commission had the power to ensure that payphone providers would receive fair compensation for all calls originated on their payphones. In the context of establishing a competitive regime for all payphone providers, Congress could not have conceived that the authority granted in § 276(b)(1)(A) would be used to *reduce* compensation earned by payphone

[87] *Id.* at 377; *accord Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 561 (D.C. Cir. 1997) (per curiam).

[88] Pai Dissent at 201.

[89] 47 U.S.C. § 276(b)(1)(A), (d).

providers.[90] If Congress had intended, in § 276(b)(1)(A), to authorize the Commission to regulate the rates that payphone providers charge for their services – rather than to establish a plan to ensure that payphone providers receive adequate compensation – it could easily have said so.

In the wake of the Telecommunications Act of 1996, the Commission recognized this fact, concluding that it should use the " 'fair' compensation" mandate "to *prescribe* compensation only when payphone providers are not already 'fairly compensated.' "[91] Section 276 thus operates as a "one-way ratchet," allowing the Commission to preempt state regulation "only when intrastate payphone service rates are *too low* to ensure fair compensation."[92] The Commission has previously adopted rules pursuant to this "fair compensation" mandate only to ensure adequate compensation – not to reduce overcompensation.[93] If, as the Commission now claims, § 276(b)(1)(A) were a mandate to prescribe rates that are no more than compensatory, the Commission has ignored its statutory responsibility for two decades.

The judicial precedent on which the Commission relies in the *Order* is likewise consistent with that limitation. The D.C. Circuit approved of the Commission's use of § 276 to regulate local coin call rates "[b]ecause the only compensation that a [payphone service provider] receives for a local call . . . is in the form of coins deposited into the phone by the

[90] *See, e.g.*, Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, ¶¶ 3, 13 (1996).

[91] Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 6716, ¶ 16 (1996) (emphasis added).

[92] Pai Dissent at 200.

[93] *See id.* at 200-01.

caller."[94] That intervention in intrastate rate regulation was meant to protect the payphone service provider's ability to compete fairly to offer service, thus fulfilling the Commission's mandate to "promote competition among payphone service providers and promote the widespread deployment of payphone services."[95]

In the *Order*, however, the Commission for the first time claims broad authority to set rates for intrastate ICS calls beyond simply ensuring that the provider receives some minimum fair compensation. In doing so, the Commission has exceeded the limited intrastate jurisdiction granted by Congress in § 276(b)(1)(A).

II. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR A STAY

The balance of equities supports a stay of the rate caps pending judicial review.

A. If the rate caps in the *Order* are permitted to take effect as scheduled, GTL will suffer serious and irreparable harm. The Commission acknowledges that the caps are below what many ICS providers actually pay to provide service, particularly if site commissions are taken into account (as they must be). GTL has no mechanism to recover these amounts if (as GTL expects) it ultimately prevails on its petition for review. Such unrecoverable losses constitute irreparable harm.[96]

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[94] *Illinois Pub. Telecomms.*, 117 F.3d at 562. The court also approved the Commission's regulation of the rates charged *to* payphone service providers for intrastate service elements supplied by the Bell Operating Companies. But that regulatory authority was directed to elimination of discrimination against unaffiliated payphone providers prohibited under § 276(a) (which the Commission has the obligation to implement through regulations adopted pursuant to § 276(b)(1)(C)); it has nothing to do with the fair-compensation provision in § 276(b)(1)(A). *See New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69, 75-78 (D.C. Cir. 2003).

[95] 47 U.S.C. § 276(b)(1).

[96] *See, e.g.*, *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) (holding that product distributor would be irreparably harmed by agency's order that would destroy distributor's ability to cover its purchase or production costs); *National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 824 (1st Cir. 1979) (finding irreparable harm when plaintiff would

The Commission's proffered solution to this problem is insufficient. The Commission announces that the rules adopted in the *Order* "constitute changes in law and/or instances of force majeure that are likely to alter or trigger the renegotiation of many ICS contracts."[97] To begin with, while renegotiation might enable ICS providers to eliminate site commission payments, it is not guaranteed to reduce any other costs of providing service. Furthermore, the Commission reaches its conclusion without considering any actual contract language. And the Commission offers no remedy for the substantial percentage of contracts that are not subject to renegotiation based on a change in law.

Even where renegotiation is either required or possible, the process of reviewing and revising hundreds of contracts with hundreds of customers – particularly in the compressed time frame demanded by the *Order* – will consume tremendous resources (if it is even possible). That expense, too, will be unrecoverable. And it will have been wasted if the reviewing court overturns the *Order* and GTL is forced to renegotiate its contracts *again* to adhere to any future rules the Commission may adopt.[98] Furthermore, hasty renegotiation processes surrounded by

incur substantial unrecoverable expenses to comply with regulations that may be invalid); *Brendsel v. Office of Federal Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004) (general rule that economic losses are not irreparable harm "is of no avail . . . where the plaintiff will be unable to sue to recover any monetary damages against [federal agencies]").

[97] *Order* ¶ 132.

[98] *Cf.* Memorandum Opinion and Order, *Ryder Communications, Inc. v. AT&T Corp.*, 18 FCC Rcd 13603, ¶ 24 (2003) ("the integrity of contracts . . . is vital to the proper functioning of any commercial enterprise, including the communications market," and "the long-term health of the communications market depends on the certainty and stability that stems from the predictable performance and enforcement of contracts").

uncertainty will disrupt the budgets and plans of GTL's customers, risking confusion and loss of goodwill. Those effects, too, constitute irreparable injury that justifies a stay.[99]

B. Other interested parties, by contrast, will not suffer material irreparable injury in the event of a stay. The interim rate caps established in the *2013 Order* – which were not stayed by the D.C. Circuit – would remain in effect pending a stay of the *Order*. Petitioners cannot claim to be harmed by rates that comply with those caps, since they are nearly identical to what petitioners requested in the first place.

Absent a stay, GTL and other ICS providers will be forced to reduce their rates to levels that will require them to operate below cost, even assuming they are able to avoid paying site commissions under existing or future contracts. As one dissenting Commissioner recognized, the "ineluctable result" of this situation is a reduction in the availability and quality of ICS, particularly at high-cost facilities.[100] Staying the rate caps for a limited time to allow for judicial review and to ensure that the Commission's regulation of ICS is lawful will not risk any harm.

CONCLUSION

The Commission should issue a stay pending review of the *Order*.

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[99] *See, e.g., Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (finding irreparable harm when FCC order would cause carriers "irreparable losses in customers, goodwill, and revenue"); *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (producer would suffer irreparable injury from labeling rule that would force it either to misbrand its products and damage its reputation or withdraw from the market and face unrecoverable lost profits); *see also Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (affirming preliminary injunction when harm to plaintiff's business-development opportunities and customer goodwill resulting from defendant's conduct would cause an indeterminate amount of loss for years to come).

[100] Pai Dissent at 203; *see also id.* at 204-06 (summarizing record evidence predicting losses and reductions in service, quality, and competition).

Respectfully submitted,

/s/ *Michael K. Kellogg*
Michael K. Kellogg
Courtney S. Elwood
Benjamin S. Softness
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

*Counsel for Global Tel*Link*

December 22, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of December, 2015, the foregoing Petition of Global Tel*Link for Stay Pending Judicial Review was served via electronic mail on the following persons:

Marlene H. Dortch
Secretary
Federal Communications Commission
Marlene.Dortch@fcc.gov

Chairman Tom Wheeler
Federal Communications Commission
Tom.Wheeler@fcc.gov

Commissioner Mignon Clyburn
Federal Communications Commission
Mignon.Clyburn@fcc.gov

Commissioner Jessica Rosenworcel
Federal Communications Commission
Jessica.Rosenworcel@fcc.gov

Commissioner Ajit Pai
Federal Communications Commission
Ajit.Pai@fcc.gov

Commissioner Michael O'Rielly
Federal Communications Commission
Michael.O'Rielly@fcc.gov

Jonathan Sallet
General Counsel
Federal Communications Commission
Jonathan.Sallet@fcc.gov

Matthew DelNero
Chief
Wireline Competition Bureau
Federal Communications Commission
Matthew.DelNero@fcc.gov

/s/ *Michael K. Kellogg*
Michael K. Kellogg