

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA ex rel. JOE M. ALLBAUGH,
INTERIM DIRECTOR OF THE OKLAHOMA
DEPARTMENT OF CORRECTIONS,

JOHN WHETSEL, SHERIFF OF OKLAHOMA
COUNTY, OKLAHOMA, and

THE OKLAHOMA SHERIFFS' ASSOCIATION, on
behalf of its members,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
and

THE UNITED STATES OF AMERICA,

Respondents.

Case No. _____

PETITION FOR REVIEW

The State of Oklahoma ex rel. Joe M. Allbaugh, Interim Director of the Oklahoma Department of Corrections; John Whetsel, Sheriff of Oklahoma County, Oklahoma; and the Oklahoma Sheriffs' Association hereby petition this Court for review of the order of the Federal Communications Commission ("FCC") issued in the proceeding *In re Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 12-167 (Nov. 5, 2015) ("the Order") (attached), which imposes new regulations on wholly intrastate phone calls made by inmates at the State of Oklahoma's prisons and jails.

- I. **The Order exceeds the FCC's statutory authority to prevent unfair practices by infrastructure providers against payphone service providers and ignores record evidence of the costs to prisons and jails of allowing inmate calling services.**

The Order suffers from two problems: first, Sections 201, 202, and 276 of the Communications Act—the FCC's primary claimed source of authority—cannot be read to authorize

the kind of regulations imposed by the Order. Section 276 plainly authorizes regulations that protect payphone service providers from state or local laws and unfair practices by infrastructure providers that render payphones not financially viable; it does not authorize regulations to benefit prison inmates at the expense of taxpayers and phone service providers. *Compare* 47 U.S.C. § 276 (authorizing FCC to ensure payphone service providers receive “fair compensation”) *with* Order at ¶¶ 106–113 (asserting authority to set maximum compensation by inmate calling service providers). Further, Section 152 *disclaims* FCC authority over intrastate communications except where an agency has an “unambiguous or straightforward” grant of authority to preempt state policy choices. 47 U.S.C. § 152(b)(1); *La. Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 376–77 (1986). Nothing in Section 276 unambiguously authorizes the FCC to override state choices about wholly intrastate inmate calling services.

By seeking to provide benefits to inmates rather than simply ensuring a level playing field between payphone service providers, *e.g.*, Order at ¶¶ 93–94, the Order exceeds the FCC’s statutory authority and “rel[ies] on factors which Congress has not intended [the FCC] to consider” when regulating under Section 276, *see Council Tree Investors, Inc. v. F.C.C.*, 739 F.3d 544, 555 (10th Cir. 2014) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Second, the FCC ignored record evidence revealing the costs of providing inmate calling services. Prisons and jails regularly undertake several responsibilities with respect to inmate calling services, including personnel time spent escorting inmates to and from phone areas and accessing recorded calls when law enforcement demands require it. Although it acknowledges that prisons and jails undertake these responsibilities and at other times contract certain responsibilities to service providers, the FCC simply decided that prisons and jails never bear any costs and ignored consideration of payments to prisons and jails when setting calling rate maximums for service providers. *See* Order at ¶¶ 133–140. In other words, given conflicting evidence as to the *range* of

costs, the FCC decided that such costs must actually be *zero*. This decision, flatly contradicted by record evidence, presents a serious flaw with the Order. Further, the FCC's related decision to disallow any cost to service providers that would be paid to a prison or jail for inmate welfare services—a public policy decision properly entrusted to state and local governments—similarly lacks any reasonable basis in the record, particularly given its analogy to site lease costs that any payphone service provider might bear.

Each of these problems renders the Order “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and/or “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(A), (C).

II. This Court may properly review the FCC's new regulations.

This Court may properly review the regulations and grant relief to Petitioners. The FCC gave public notice of the Order on December 18, 2015, with its publication in the Federal Register. Rates for Interstate Inmate Calling Services, 80 Fed. Reg. 79,136 (Dec. 18, 2015) (to be codified at 47 C.F.R. pt. 64); *see also* 47 C.F.R. § 1.4(b). This petition has been filed within 60 days of December 18, 2015. *Cf.* 28 U.S.C. § 2344. This Court has jurisdiction to hear the case, 28 U.S.C. § 2342(1), and venue is proper in this Court because Petitioners reside within the Tenth Circuit, *see* 28 U.S.C. § 2343.

III. The FCC's new regulations should be set aside and enjoined.

For the foregoing reasons, Petitioners request that the Court declare invalid, set aside, and enjoin enforcement of the Order and provide such additional relief as may be appropriate.

Respectfully submitted,

s/Jared B. Haines

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2016, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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