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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15-1461, 15-1498, 16-1012, 16-1029, 16-1038, 16-1046, 16-1057

GLOBAL TEL*LINK, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of an Order
of the Federal Communications Commission

JOINT BRIEF FOR THE ICS CARRIER PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), petitioners Global Tel*Link ("GTL"), Securus Technologies, Inc. ("Securus"), CenturyLink Public Communications, Inc. ("CenturyLink"), Telmate, LLC ("Telmate"), and Pay Tel Communications, Inc. ("Pay Tel") (collectively, "ICS Providers") certify as follows:

A. Parties and Amici

1. The parties participating in the rulemaking proceeding (WC Docket No. 12-375) before the Federal Communications Commission ("FCC" or Commission) are listed in Appendix B to the ruling under review.

2. Petitioners in these consolidated cases are GTL (No. 15-1461), Securus (No. 15-1498), CenturyLink (No. 16-1012), Telmate (No. 16-1029), National Association of Regulatory Utility Commissioners (No. 16-1038), Pay Tel (No. 16-1046), and the State of Oklahoma ex rel. Joseph 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 (No. 16-1057).

Respondents in these consolidated cases are the FCC and the United States of America.

Intervenors for petitioners in these consolidated cases are CenturyLink, the States of Wisconsin, Nevada, Arkansas, Arizona, Louisiana, Missouri, Kansas, and Indiana, the Indiana Sheriffs' Association, the Marion County Sheriff's Office, and the Lake County Sheriff's Department.

Intervenors for respondents in these consolidated cases are Ulandis Forte, Ethel Peoples, Laurie Lamancusa, Dedra Emmons, Charles Wade, Earl J. Peoples, Darrell Nelson, Jackie Lucas, DC Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs, Citizens United for Rehabilitation of Errants, Prison Policy Initiative, Campaign for Prison Phone Justice, Human Rights Defense Center, United Church of Christ, Office of Communication, Inc., and Network Communications International Corp.

B. Rulings Under Review

The ruling under review is the FCC's 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, 30 FCC Rcd 12763 (rel. Nov. 5, 2015) ("*Order*") (JA___-__; JSA___-__).

C. Related Cases

In *Securus Technologies, Inc. v. FCC* ("*Securus I*"), Nos. 13-1280 *et al.* (D.C. Cir. filed Nov. 14, 2013), various petitioners challenged the predecessor

order to the order now under review. That challenge was held in abeyance pending the rulemaking that led to the *Order*.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the ICS Providers respectfully submit the following corporate disclosure statements:

CenturyLink is a direct and wholly owned subsidiary of Embarq Corporation. Embarq Corporation is in turn a direct and wholly owned subsidiary of CenturyLink, Inc., a publicly traded corporation that, through its wholly owned affiliates, provides voice, broadband, video, and communications services to consumers and businesses. CenturyLink, Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

GTL is a privately held and wholly owned subsidiary of GTEL Holdings, Inc. No publicly held company has a 10 percent or greater ownership interest in GTL. Insofar as relevant to this litigation, GTL's general nature and purpose is to provide inmate telephone calling services, solutions, and equipment in correctional facilities throughout the United States.

Pay Tel is a privately held company. No publicly held company has a 10 percent or greater ownership interest in Pay Tel, and Pay Tel has no parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public. For purposes of this proceeding, Pay Tel's general nature and purpose is to

provide inmate telephone calling services, solutions, and equipment in jails in several states across the United States.

Securus is wholly owned by Securus Technologies Holdings, Inc., whose principal investor is Securus Investment Holdings, LLC ("SIH"). SIH is indirectly controlled by ABRY Partners VII, LP ("ABRY"). Neither SIH nor ABRY has stock that is publicly traded. No entity having publicly traded stock owns 10 percent or more of either company. Securus, a Delaware corporation, is a telecommunications service and technology company that provides calling services and call management software to correctional facilities exclusively.

Telmate provides inmate calling services throughout North America using voice over internet protocol technology rather than traditional telephone technology. Telmate is a privately held Delaware limited liability company. Telmate has no parent company, and no publicly held company has a 10 percent or greater ownership interest in Telmate.

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GLOSSARY

Bureau	Wireline Competition Bureau
Communications Act or Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
FCC or Commission	Federal Communications Commission
ICS	Inmate Calling Services
ICS Providers	The ICS provider petitioners in these consolidated cases – CenturyLink Public Communications, Inc., Global Tel*Link, Pay Tel Communications, Inc., Securus Technologies, Inc., and Telmate, LLC
JA	Joint Appendix
JSA	Joint Sealed Appendix
Order	Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, FCC 15-136, 30 FCC Rcd 12763 (2015)
Second FNPRM	Second Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170 (2014)

STATEMENT OF JURISDICTION

This Court has jurisdiction over these petitions under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The *Order* was released on November 5, 2015, and the rules adopted therein were published in the Federal Register on December 18, 2015, at 80 Fed. Reg. 79,136. Petitions were timely filed within 60 days of that publication. *See* 28 U.S.C. § 2344.

STATEMENT OF THE ISSUES

1. Whether, in setting rate caps for Inmate Calling Services ("ICS"), the FCC's determination that site commissions lawfully required by state and local correctional authorities are not costs of providing ICS was arbitrary, capricious, or otherwise unlawful.

2. Whether the adoption of ICS rate caps that the FCC concedes are below many providers' costs violates the requirement in 47 U.S.C. § 276(b)(1)(A) that ICS providers be "fairly compensated for each and every completed intrastate and interstate call," and whether the adoption of such rate caps was arbitrary, capricious, or otherwise unlawful.

3. Whether 47 U.S.C. § 276(b)(1)(A), which requires the FCC to adopt a "per call compensation plan" that ensures that payphone providers are "fairly compensated" for all calls made from their payphones, authorizes the FCC to cap market-based ICS rates.

4. Whether the adoption of caps and restrictions on ancillary fees associated with billing and collecting for ICS calls was arbitrary, capricious, in excess of statutory authority, or otherwise unlawful.

5. Whether reporting requirements related to video visitation services and "Site Commissions" are in excess of statutory authority, vague, or otherwise unlawful.

6. Whether the failure to preempt state ICS rates inconsistent with the *Order*'s rate caps violated the Communications Act or was arbitrary and capricious.

7. Whether depriving Pay Tel of access to, and the opportunity to comment on, data relied upon by the FCC violated due process and the right to counsel.

STATUTES AND REGULATIONS

Pertinent statutes and regulations have been reproduced in the Addendum.

PRELIMINARY STATEMENT

In the order under review,[1] the FCC adopted ICS rate caps that are sharply lower than existing interstate rate caps and providers' proven costs of service. For the first time, those caps apply not only to interstate calls but also to intrastate calls. And the FCC greatly expanded the reach of ICS regulation by banning or strictly limiting fees for billing and collection services and by regulating video services and other advanced services in addition to traditional calling services.

The FCC has overreached. It attempted to justify the dramatic reduction in rate caps by (1) excluding from its calculation of providers' costs the site commissions that state and local correctional authorities require — sometimes pursuant to state statute — even though the FCC declined to restrict states' authority to collect such commissions and (2) dismissing record evidence that ICS providers in many inmate institutions have costs that are higher than the rate caps the FCC established — even excluding site commissions. Both determinations were unlawful. And it incorrectly asserted authority to cap rates — including, for the first time, intrastate rates — based on a 20-year-old statute that has never been

[1] *See* Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 30 FCC Rcd 12763 (2015) ("*Order*") (JA___-__; JSA___-__).

read to confer such authority and despite express statutory provisions limiting the FCC's authority over intrastate matters. In other respects as well, the FCC stretched its authority beyond the boundaries established by the statute in light of settled precedent.

The FCC's belief that lower ICS calling rates reflect desirable social policy cannot justify regulations that exceed its statutory mandate. Section 276 of the Communications Act authorizes the FCC to ensure that ICS providers are not deprived of fair compensation for the use of their payphones; § 201 authorizes it to ensure that rates for and in connection with *interstate* telecommunications services are just and reasonable. The FCC may not ignore these statutory limits to advance its preferred correctional policy.

The Court should vacate the challenged aspects of the *Order*.

STATEMENT OF THE CASE

A. The ICS Providers — CenturyLink, GTL, Pay Tel, Securus, and Telmate — provide inmate calling services in correctional facilities nationwide. Their customers range from municipal and county jails housing fewer than 10 inmates to state correctional systems housing tens of thousands and from minimum-security to maximum-security facilities.[2] The ICS Providers provide

[2] Comments of GTL at 3 (filed Mar. 25, 2013) (JA___).

these services pursuant to exclusive multi-year contracts with correctional authorities, which select their providers through a competitive bidding process. *2013 Order*[3] ¶¶ 21, 98 (JA___, ___-__). Collectively, the ICS Providers have contracts with departments of corrections in nearly all 50 states, and with numerous city and county jails.[4]

The costs of providing these services are substantial and vary widely by institution.[5] Security considerations partly account for the costs.[6] Texas prisons, for example, require voice biometric screening to verify the identity of each inmate caller,[7] and other facilities require a range of additional, often customized security

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

[4] *See* Comments of Human Rights Defense Center, Ex. A (filed Mar. 25, 2013) (JA___) (identifying ICS providers for each state); *see also* Letter from Glenn B. Manishin, Counsel for Telmate, to Marlene H. Dortch, FCC, at 1 (July 26, 2013) (JA___) (noting the "thousands of smaller county and municipal jails served by ICS providers like Telmate").

[5] *See* Comments of GTL at 2-3 (filed Dec. 20, 2013) (JA___-__); Comments of California State Sheriffs' Ass'n at 4 (filed Dec. 19, 2014) ("CA Sheriffs' Comments") (JA___).

[6] *See* Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶ 6 (2012) ("*2012 NPRM*") (JA___-__).

[7] *See* Decl. of Paul Cooper ¶ 16 (filed Jan. 22, 2016) ("Cooper Decl.") (JA___), attached to CenturyLink petition for stay.

features.[8] Other factors, such as facility size and type (*e.g.*, jail versus prison versus juvenile center), also affect costs. *See Order* ¶ 33 (JA___).

Most correctional authorities also require, under their contracts, that ICS providers pay site commissions, which typically are calculated as a percentage of calling revenues. *2013 Order* ¶ 33 (JA___); *see also Order* ¶ 117 (JA___). Correctional authorities often use those fees in part to pay for inmate welfare services. *Order* ¶ 127 (JA___-__); *2013 Order* ¶ 34 (JA___); *see also* Comments of Los Angeles County Sheriff's Dep't at 2 (filed Jan. 9, 2015) ("L.A. Sheriff's Comments") (JA___) (noting that commission payments provide "a crucial funding source for sorely needed rehabilitation programs"). "Some site commissions are mandated by state statute," *2012 NPRM* ¶ 38 (JA___), and many more are mandated by state policy as reflected in contracts with ICS providers, *see Second FNPRM*[9] ¶¶ 23-24 (JA___-__). Owing to these and other costs, inmate

[8] Order on Remand & Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, ¶ 9 (2002) ("*ICS Order on Remand and NPRM*") (listing as examples "periodic voice-overlays," "listening and recording capabilities," and "detailed, customized reports" for prison officials); CA Sheriffs' Comments at 4 (JA___) (calling the "manner" and "cost" of security monitoring "highly variable").

[9] *See* Second Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170 (2014) ("*Second FNPRM*") (JA___-__).

calling rates often exceed, sometimes substantially, rates for ordinary toll calls. *2013 Order* ¶¶ 32-34 (JA___-__); *see also ICS Order on Remand and NPRM* ¶ 72.

B. Because the provision of ICS is subject to unique "concerns and requirements of corrections authorities,"[10] the FCC has historically refrained from intrusive regulation of inmate calling rates. In 1991, the FCC found that "the provision of [inmate-only] phones to inmates presents an exceptional set of circumstances that warrants their exclusion from . . . any requirements under the [Telephone Operator Consumer Services Improvement] Act or the Commission's rules."[11] In 1996, after again finding that ICS was subject to unique concerns and demands of correctional facilities, the FCC "deregulated inmate payphones."[12] In 1998, the FCC opted against "intrusive" regulatory measures for ICS, including

[10] Declaratory Ruling, *Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, 11 FCC Rcd 7362, ¶ 25 (1996) ("*ICS Declaratory Ruling*"); *see also* Second Report and Order and Order on Reconsideration, *Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, ¶ 57 (1998) ("*Billed Party Preference Second Report and Order*") (structure of exclusive ICS contracts driven by "the special security requirements").

[11] Report and Order, *Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd 2744, ¶ 15 (1991).

[12] Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, ¶ 143 (1996); *accord ICS Declaratory Ruling* ¶ 26 ("[Customer premises equipment] used in providing inmate-only services must be provided on an unregulated, unbundled basis by those who provide inmate-only services.").

benchmark rates for outgoing inmate calls, in favor of "less intrusive" disclosure rules. *Billed Party Preference Second Report and Order* ¶ 59.

C. In 2012, the FCC issued a Notice of Proposed Rulemaking to consider several specific proposals to reduce ICS rates. In September 2013, the FCC released its first order governing ICS rates. That order adopted "interim rate caps" of "$0.21 per minute for debit and prepaid interstate calls and $0.25 per minute for collect interstate calls." *2013 Order* ¶ 73 (JA___). But the FCC also went much farther, adopting a sweeping new rule requiring that all interstate ICS rates be based on providers' costs. *Id.* ¶ 12 (JA___). Under that rule, all interstate ICS rates above the rate caps were unlawful (absent a waiver for "extraordinary circumstances," *id.* ¶ 83 (JA___)), and any interstate ICS rate, even if below the caps, was unlawful if not based on a provider's costs to provide interstate ICS. *Id.* ¶ 120 (JA___). The FCC also set, as part of its cost-based regime, "safe harbor" rates (lower than the caps), below which rates would be presumed lawful for certain purposes. *Id.* ¶ 60 (JA___).

Commissioner Pai dissented from the *2013 Order*, stating that he could not support an order which, rather than "instituting simple rate caps, . . . essentially imposes full-scale rate-of-return regulation on ICS providers." *Id.* at 111 (JA___) (Pai, Comm'r, dissenting).

D. Several parties, including many of the ICS Providers, filed petitions for review challenging the *2013 Order*, and some sought a stay of all or part of that order. This Court granted a partial stay of the cost-based-rate requirement, the FCC's safe-harbor rates, and a set of reporting requirements the *2013 Order* imposed. *See* Order, *Securus Techs., Inc. v. FCC*, Nos. 13-1280 *et al.*, Doc. No. 1474764 (D.C. Cir. Jan. 13, 2014) (per curiam). The interim interstate rate caps were allowed to take effect, and they remain in place.

After the case was fully briefed, the FCC successfully moved to have the case held in abeyance pending the completion of further agency-level proceedings. *See* Uncontested Mot. of FCC To Hold Case in Abeyance, *Securus*, Doc. No. 1526582 (D.C. Cir. filed Dec. 10, 2014). The FCC represented that it had begun a further rulemaking that "could moot or significantly alter the scope of" the pending challenges. *See id.* at 3, 4.

The proposed rulemaking — the *Second FNPRM* — proposed "a simplified, market-based approach focused on aligning the interests of ICS providers and facilities." *Second FNPRM* ¶ 6 (JA___). The FCC repeatedly identified site commissions as a factor that "inflate[s] rates and fees," by adding an additional cost ICS providers must recoup through higher rates. *E.g.*, *id.* ¶ 3 (JA___). The FCC surmised that the existence of commissions creates "reverse competition," whereby ICS providers compete to pay the highest commissions, which they in

turn pass on to inmates in the form of higher rates. With commissions out of the picture, the FCC suggested, ICS providers would compete on the basis of price and quality, rendering intrusive rate regulation unnecessary. *See id.* ¶ 27 (JA___) ("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 . . . ."). The FCC accordingly proposed "prohibiting site commissions as a category." *Id.* ¶ 21 (JA___).

E. The FCC adopted the *Order* by a 3-2 vote. With respect to rates, the *Order* departed sharply from the "market-based" approach previewed in the *Second FNPRM*. In particular, the FCC did not bar or limit site commissions, concluding, 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." *Order* ¶ 118 (JA___). And, instead of relying on market mechanisms to set rates, the FCC adopted new rate caps that are dramatically lower than the 2013 interim rate caps. The FCC purportedly relied on cost data submitted by ICS providers, *see id.* ¶ 53 (JA___), but it excluded one of the largest categories of costs — the very site commissions that the agency had declined to restrict. The FCC concluded that site commissions are not a cost of providing ICS "and should not be considered in determining fair compensation for ICS calls." *Id.*

¶ 123 (JA___).[13] The FCC acknowledged that the rates it adopted were accordingly too low to cover ICS providers' actual cost of paying site commissions, *see Order* ¶ 125 (JA___), but asserted that that the rate caps would "likely" trigger change-of-law clauses in existing contracts, *see id.* ¶ 132 (JA___).

The FCC dismissed data indicating it was setting rates too low to cover the costs of serving many correctional institutions, even without commissions. Based on the assumption that smaller jails are generally more costly to serve, on a per-minute basis, than larger jails and prisons, the *Order* adopted tiered rate caps, as low as $0.11 per minute (for debit and prepaid calls in prisons).[14] The FCC noted that the caps were below the costs reported by many ICS providers, *see id.* ¶ 116 (JA___-__), but implied that such providers are "inefficient," *see id.* ¶¶ 52 n.170,

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[13] To this end, the *Order* adopted a broad definition of "site commissions." *See Order* ¶ 117 & n.372 (JA___-__); 47 C.F.R. § 64.6000(t).

[14] *See Order* ¶ 9 tbl.1 (JA___) (adopting the below rates; "MOU" = minutes of use; "ADP" = average daily population).

Facility Type/Size	**Debit/Pre-paid Rate Cap per MOU**	**Collect Rate Cap per MOU as of effective date**	**Collect Rate Cap per MOU as of 7/1/17**	**Collect Rate Cap per MOU as of 7/1/18**
0-349 Jail ADP	$0.22	$0.49	$0.36	$0.22
350-999 Jail ADP	$0.16	$0.49	$0.33	$0.16
1000+ Jail ADP	$0.14	$0.49	$0.32	$0.14
All Prisons	$0.11	$0.14	$0.13	$0.11

53 (JA___). The FCC also established a waiver process for providers seeking relief from the caps. *See id.* ¶ 219 (JA___).

The 2013 rate caps were adopted pursuant to § 201 of the Communications Act and applied only to *interstate* calls. By contrast, the *Order* extends rate caps to *all* inmate calls, including intrastate calls. The FCC justified that dramatic extension of its rate-setting authority by relying on § 276(b)(1)(A), which requires the FCC to adopt (within six months of the adoption of the Telecommunications Act of 1996) a per-call compensation plan to ensure that payphone providers — defined to include ICS providers, *see* 47 U.S.C. § 276(d) — are "fairly compensated" for all "intrastate and interstate call[s] using their payphone[s]." Although the FCC had always read that provision as establishing a floor of adequate compensation, not a limit on market rates, it determined that this language also granted rate-making authority over intrastate inmate calls.

In addition to the rate caps, the *Order* imposes maximum rates for a limited set of ancillary service charges — primarily services related to billing. *See Order* ¶¶ 161-163 & tbl. 4 (JA___-__). And it prohibits ICS providers "from charging *any* ancillary fees not specifically allowed" in the *Order*. *Id.* ¶ 147 (JA___) (emphasis added). The *Order* also "confirm[ed]" the *2013 Order*'s finding that 47 U.S.C. § 276 — which authorizes FCC regulation of "payphone service," including "inmate telephone service" — is "technology neutral," allows the FCC to regulate

inmate calls over voice-over-Internet-protocol, and may extend to video or other technologies. *See id.* ¶ 250 & nn.879-80 (JA___); *see also* 47 C.F.R. § 64.6000(j); *2013 Order* ¶ 14 (JA___).

Commissioners Pai and O'Rielly dissented. Commissioner Pai explained why § 276 does not authorize intrastate rate caps. He explained that Congress passed the provision "for the narrow purpose of empowering independent payphone service providers to compete" against Bell operating company payphones that benefited from legacy subsidies and regulations. *Order* at 199 (JA___) (Pai, Comm'r, dissenting). Because the provision was passed to protect providers, the Commissioner explained, it has been used "only when intrastate payphone service rates are *too low* to ensure fair compensation." *Id.* at 200 (JA___). Section 276 "does not purport to be another iteration of section 201 for payphones" and does not provide "general authority to regulate payphone services." *Id.* at 201 (JA___); *see also id.* at 209 (JA___) (O'Rielly, Comm'r, dissenting).

Commissioner Pai also criticized the *Order*'s rate caps, noting that they unlawfully failed to cover ICS providers' costs and would "ineluctabl[y]" lead to a reduction in available service. *Id.* at 203 (JA___) (Pai, Comm'r, dissenting).

F. Before the new rules took effect, four of the ICS Providers moved this Court to stay aspects of the *Order*. Though not all providers joined all issues, the

ICS Providers collectively argued that the *Order*'s rate caps unlawfully excluded the payment of site commissions as a valid cost; the rates were unlawfully set below reported costs; the FCC lacks jurisdiction to cap intrastate ICS rates; the FCC lacks jurisdiction to regulate ancillary fees; the ancillary and single-call-fee caps were arbitrary and capricious; the FCC lacks jurisdiction over video communications; and the *Order*'s definition of "site commission" was vague and overbroad. The Court granted the motions in part and stayed the *Order*'s new rate caps and its cap on fees for single-call services. *See* Order, *Global Tel*Link v. FCC*, Nos. 15-1461 *et al.*, Doc. No. 1602581 (D.C. Cir. Mar. 7, 2016) (per curiam).

Following this Court's stay order, the FCC announced that it intended to apply the *2013 Order*'s "interim" interstate rate caps — which were unaffected by the stay — to *intra*state ICS when the *Order*'s unstayed rules took effect.[15] The same ICS Providers moved the Court to clarify the scope of the stay, noting that one of the primary arguments supporting the stay was that the FCC lacked authority over intrastate rates. *See, e.g.*, GTL Mot. To Enforce Stay, *Global Tel*Link*, Doc. No. 1604580 (Mar. 17, 2016). On March 23, 2016, the Court

[15] *See* Public Notice, *Wireline Competition Bureau Addresses Applicable Rates for Inmate Calling Services and Effective Dates for Provisions of the* Inmate Calling Services Second Report and Order, 31 FCC Rcd 2026, 2027-28 (2016) (JA___-__).

(Millett, J., dissenting) stayed the interim rate caps "insofar as the FCC intends to apply [those rates] to intrastate calling services." Order, *Global Tel*Link*, Doc. No. 1605455 (D.C. Cir. Mar. 23, 2016) (per curiam).

STANDARD OF REVIEW

The Court holds unlawful agency action that is "in excess of statutory jurisdiction[or] authority." 5 U.S.C. § 706(2)(C). "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Although an administrative agency is granted deference to interpret ambiguous commands in its authorizing statute, "if the intent of Congress is clear, the reviewing court must give effect to that unambiguously expressed intent." *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013).

This Court also holds unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "To survive review under this standard, the FCC must examine and consider the relevant data and factors, 'and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009) (quoting

Motor Vehicles Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

SUMMARY OF ARGUMENT

I. The FCC's exclusion of site commission payments from the costs used to set ICS rate caps was unlawful. ICS providers are required by state and local governments and correctional institutions to pay site commissions; those commissions are accordingly a cost of providing service like other state taxes and fees that the FCC recognizes as recoverable costs. The FCC acknowledged that, taking site commissions into consideration, the rate caps were below providers' costs. This violates the FCC's obligation to "ensure that all payphone service providers are fairly compensated," 47 U.S.C. § 276(b)(1)(A), § 201's "just and reasonable" requirement, and the Constitution's Takings Clause.

II. Even if site commissions are disregarded, the rate caps were set too low to ensure compensation "for each and every completed . . . call." *Id.* The FCC's caps are below average costs documented by numerous ICS providers and would deny cost recovery for a substantial percentage of all inmate calls. The FCC's assertion that ICS providers with costs above the caps operate inefficiently is contrary to the record. The FCC relied on two outlier ICS providers that — combined — represent 0.1 percent of the ICS market. And it ignored evidence showing that the cost to provide ICS varies widely on the basis of regional

differences, such as the age and condition of a given facility or the specific security features that correctional authorities demand.

III. The ICS Providers other than Pay Tel argue that § 276 does not authorize the FCC to cap inmate calling rates — and that the FCC thus cannot cap intrastate rates, or rates for non-telecommunications carriers, at all. Section 276 requires the FCC to "ensure" that payphone providers are "fairly compensated" for both interstate and intrastate calls. That language does not authorize the FCC to *limit* compensatory market-based rates. The provision's history confirms this plain meaning: § 276 was passed to ensure that payphone providers would be compensated for calls for which, to that point, they were receiving no compensation. Furthermore, the Supreme Court has instructed that grants of authority to regulate intrastate communications must be "unambiguous or straightforward." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986). Section 276 provides no rate-capping authority at all — much less with the clarity the Supreme Court requires.

IV. The ICS Providers other than CenturyLink and Pay Tel argue that the *Order*'s restrictions on ancillary service charges exceed the FCC's authority and were arbitrary and capricious. As noted, § 276 does not provide rate-capping authority; in any event, that provision authorizes compensation for calls made using a provider's payphones, not regulation of charges for billing services and

online payments. Section 201 likewise withholds the necessary authority: billing-related charges have long been categorized as outside § 201. Although certain billing services are "in connection with" communications services, that is not so in this context.

In any event, the FCC's rules are arbitrary and capricious because the caps were set below providers' reported costs and will prevent providers from recovering the upfront costs of premium services. The blanket ban on other ancillary charges will stifle, rather than "promote," 47 U.S.C. § 276(b)(1), the development of new services.

V. Securus argues that the requirement that ICS providers report data on "video visitation services" is unlawful because the FCC has never concluded (and could not lawfully conclude) that such services are within its authority to regulate. The requirement for annual reports on "site commissions" likewise should be vacated as vague and overbroad to the extent the definition of that term can be read literally to include any payment from an ICS provider to a state or local entity.

VI. Pay Tel argues that the *Order* unlawfully failed to preempt state ICS rates that are set below the new federal rate caps. The FCC ignored evidence that state rates deny providers fair compensation and the statute's command that the FCC "shall preempt" inconsistent state laws. 47 U.S.C. § 276(c).

Pay Tel's due-process rights and right to counsel were violated by the FCC's denial of access to confidential rate data the FCC relied upon in adopting its rate caps.

STANDING

As entities "continuously burdened by the costs of complying," *Cellco P'ship v. FCC*, 357 F.3d 88, 100 (D.C. Cir. 2004), with the obligations adopted in the *Order*, the ICS Providers have standing. The *Order*'s unlawful rate caps and rules have injured the ICS Providers by, *inter alia*, limiting the rates and fees that the providers can charge and preventing them from recovering the costs of providing service. Vacatur of the *Order*'s unlawful rules would redress the ICS Providers' injuries.

ARGUMENT

I. Rate Caps That Prevent Recovery of Actual Costs of Providing ICS Violate the Communications Act and the Administrative Procedure Act

The FCC's decision to exclude site commissions from the rates it set for inmate calls is unlawful because — as the *Order* acknowledges — it ensures that the rate caps are below ICS providers' actual costs. *See Order* ¶ 125 (JA___) ("If site commissions were factored into the costs . . . , the caps would be significantly higher."). With respect to all calls made using ICS providers' equipment, those rates violate 47 U.S.C. § 276(b)(1)(A), because they fail to "fairly compensate[ ]" ICS providers for all calls made from their phones. With respect to interstate calls,

such rates also violate § 201, which requires that rates be "just and reasonable." Indeed, because the FCC has admitted that it set the rate caps below cost, the caps violate the Constitution's Takings Clause, which forbids "confiscatory" rates. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

The *Order* acknowledges that the rate caps are insufficient to allow ICS providers to recover site commissions that they are "contractually obligated to pay." *Order* ¶ 119 n.379 (JA___); *see id.* ¶¶ 118, 125 (JA___, ___). And the FCC did not contest that below-cost rates are unlawful. Instead, the FCC determined that it could exclude site commissions from the costs of providing ICS because they are not "reasonably related to the provision of ICS." *Id.* ¶ 123 (JA___). That conclusion is incorrect and cannot justify the FCC's determination.

First, the argument that site commissions "have nothing to do with the provision of ICS," *id.* (JA___), cannot be squared with the undisputed evidence that correctional authorities and inmate institutions frequently require the payment of site commissions as a condition in a service contract. In some cases, the commissions are required "by state statute." *2012 NPRM* ¶ 38 (JA___).[16] But whether required by state statute, department of corrections regulation, or policy

[16] *See* Tex. Gov't Code Ann. § 495.027(a)(2). Other state statutes place legislative imprimatur on site commissions by mandating the allocation of the monies received. *See* Miss. Code Ann. § 47-5-158.

decisions of state or local officials taken pursuant to lawful authority, payments required under state law as a condition of providing service are no different from other fees (taxes, licensing fees, excise charges) that a state might choose to impose. If agreeing to pay site commissions is a condition precedent to ICS providers offering their services, those commissions are "related to the provision of ICS."

The *Order* nevertheless asserts that site commissions are not related to ICS because commission proceeds are spent on a "range of activities," *Order* ¶ 127 (JA___), rather than exclusively on costs that inmate institutions incur in connection with ICS. But how correctional facilities spend commission revenues has nothing to do with whether ICS providers are required to incur that cost to provide service. The rent that a business pays is a cost "reasonably related" to its business activities, even if the landlord uses the proceeds for activities that have nothing to do with commercial real estate. The FCC recognized that other regulatory fees and taxes are recoverable costs, *see id.* ¶ 191 (JA___) — even though the government has no obligation to use those revenues for anything related to ICS. Such costs are related to the provision of ICS because they are incurred in connection with the activity — just as site commissions are.

Likewise, in the cable television context, the FCC has ruled that negotiable payments made to a government for the privilege of selling television service are

"external costs" recoverable from customers. *See*, *e.g.*, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 1164, ¶ 89 (1993); Memorandum Opinion and Order, *City of Pasadena, California, City of Nashville, Tennessee, and City of Virginia Beach, Virginia*, 16 FCC Rcd 18192, ¶ 14 (2001). The Commission does not justify its opposite determination here.

Second, the FCC argued that site commissions paid to inmate institutions — like the commissions that a payphone provider might pay to the owner of a retail business to locate a payphone on his premises — are "an apportionment of profits," rather than a "cost." *Order* ¶ 120 (JA___) (relying upon the *1999 Payphone Order*[17]). But this effort to draw an analogy between ICS and ordinary payphone service ignores fundamental differences between the two.

In the *1999 Payphone Order*, the FCC was setting a default rate to be paid to payphone operators for calls for which providers otherwise received no compensation — namely, toll-free and "dial-around" calls. *See American Pub. Communications Council v. FCC*, 215 F.3d 51, 53 (D.C. Cir. 2000). The FCC

[17] Third Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545 (1999) ("*1999 Payphone Order*").

determined that it could adequately promote the widespread deployment of payphones (as the statute requires) by setting a rate that would ensure cost recovery by a hypothetical "marginal" payphone; and it defined that "marginal" payphone as one that just covered the cost of service *without* payment of commissions to the location owner. *See id.* at 54. In the market the FCC constructed in 1999, site commission payments, if any, would come out of the payphone operator's profits — that is, revenues in excess of costs other than site commissions. *See 1999 Payphone Order* ¶ 37.

In the case of ICS, however, the FCC is regulating rates — not authorizing additional per-call compensation — in an existing market. In that market, ICS providers are, in fact, required by state and local authorities to pay commissions as a condition of providing service — as the FCC acknowledged. It is therefore contrary to the evidence to characterize commissions — which are typically calculated as a percentage of "gross revenues," *Second FNPRM* ¶ 26 (JA___) — as an apportionment of profit. Rather, they are an off-the-top cost ICS providers must pay irrespective of other costs.

Third, the FCC predicted that capping rates at a level that denies ICS providers recovery of revenues sufficient to pay existing commissions would force correctional authorities to give up or sharply reduce those commissions. *See Order* ¶ 131 (JA___-__). That prediction is unwarranted because, as the FCC

acknowledged, existing contracts may require commission payments without any applicable change-of-law escape hatch. *See id.* ¶ 131 n.458 (JA___) (regulations "should permit providers to renegotiate many, *if not all*, of their existing contracts") (emphasis added); *id.* ¶ 215 (JA___); *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1024 (D.C. Cir. 1987) (agency prediction may not "assume[ ] away the problem of the uneconomical contracts to which [providers] are presently bound"). To the extent an ICS provider is bound to continue to provide service and to continue to pay commissions, the *Order* forces the provider to operate at a loss or to face potential liability for breach of contract.

More fundamentally, to the extent rate caps preclude state and local governments from enforcing otherwise lawful statutes, regulations, and policies mandating payment of site commissions, they effectively preempt those state laws. The *Second FNPRM* proposed employing the FCC's purported preemptive authority to bar site commissions entirely, suggesting that, with site commissions out of the way, market forces would deliver lower rates and superior service. *Second FNPRM* ¶¶ 21-28 (JA___-__). Yet, although the *Order* caps rates at a level that the FCC acknowledged is insufficient to permit ICS providers to pay the site commissions currently required under state law, the *Order* declined to invoke any supposed authority to ban or restrict site commissions outright. Although the FCC suggested that leaving site commissions in place represented "a less heavy-handed

approach" that relies on "market forces," *Order* ¶ 130 (JA___), adoption of a federal regulation that effectively precludes states from enforcing otherwise valid state laws is the essence of preemption, *see Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (state law is preempted where compliance with both state and federal obligations "is a physical impossibility"); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("[R]egulations of an agency will pre-empt any state or local law that conflicts with such regulations *or frustrates the purposes thereof*.") (emphasis added).

To be sure, the FCC can, when acting pursuant to statutory authority, preempt inconsistent state laws. *See, e.g.*, *Illinois Pub. Telecomms. Ass'n v. FCC*, 752 F.3d 1018, 1025 (D.C. Cir. 2014) ("The Act authorizes the FCC to preempt state law in certain areas . . . ."). What it cannot do, however, is preempt state law without explaining its authority and reasons for doing so. *See Riffin v. Surface Transp. Bd.*, 592 F.3d 195, 198 (D.C. Cir. 2010) (agency determination regarding preemption must include "satisfactory explanation for its action including a rational connection between the facts found and the choice made"); *cf. Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996) (noting that courts are "reluctant to find pre-emption" with respect to "matters of traditional state control"). The FCC never acknowledged that the *Order* preempts state laws and accordingly never attempted to justify such an action or explain

where in the Communications Act it found the authority to override state correctional policy.

The failure to address that issue is particularly glaring because the exclusion of the cost of commissions affects matters close to the heart of state sovereignty. Commission payments "functionally [are]" "a tax." *Arsberry v. Illinois*, 244 F.3d 558, 565 (7th Cir. 2001). "[P]risons are costly to build, maintain, and operate, and . . . the residents are not charged for their room and board." *Id.* at 564. "By what combination of taxes and user charges the state covers the expense of prisons is hardly an issue for the federal courts to resolve." *Id.* In determining that it could exclude site commissions from allowable rates *without* preempting state law, the FCC failed even to "display awareness" of the consequence of its decision. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). At a minimum, the decision must be vacated and remanded to allow the FCC to explain its determination.

II. The Price Caps Unlawfully Prevent ICS Providers from Recovering Their Costs, Even if Site Commissions Are Excluded

The rate caps are unlawful even if site commissions are excluded from the analysis.

A. The *Order*'s Aggregate Rate Structure Fails To Ensure Fair Compensation for "Each and Every" Call

Section 276 unambiguously instructs the FCC to "prescribe regulations that . . . establish a *per call* compensation plan to ensure that all [ICS] providers are fairly compensated *for each and every completed intrastate and interstate call using their payphone[s]*." 47 U.S.C. § 276(b)(1)(A) (emphases added). The *Order* violates that straightforward command, because the FCC did not attempt to show that the rate caps provide fair compensation for "each and every . . . call." Instead, the FCC based its rate caps on cost estimates "calculated using a weighted average per minute cost" of service, with the goal of "allow[ing]" ICS providers, "*in the aggregate*, . . . to recover *average costs*." *Order* ¶ 52 & n.170 (JA___) (emphases added). Thus, rather than provide per-call compensation, the *Order* assumes that providers will lose money on some calls while earning offsetting profits on others. *See id.*

This approach treats § 276 as if it had been amended to read "the Commission shall . . . prescribe regulations that . . . establish a ~~per call~~ compensation plan to ensure that all [ICS] providers are fairly compensated ~~for each and every completed intrastate and interstate call using their payphone~~." By treating the struck out phrases as inoperative, the *Order* violates the rule that agencies must "favor[ ] that interpretation which *avoids* surplusage" and gives

effect to every word in the statute. *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 926 (D.C. Cir. 2013).

This Court's precedent confirms that § 276's "each and every . . . call" language means what it says. In *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) ("*IPTA*") (per curiam), a group of telephone companies challenged a rule that guaranteed compensation for some call types, but provided no "compensation for so-called '0+' calls" or "calls made from inmate payphones." *Id.* at 565-66. The Court held that "the Commission's failure to provide compensation for 0+ calls" was "contrary to the plain language of § 276" and, in particular, "patently inconsistent with § 276's command that fair compensation be provided for 'each and every completed . . . call.'" *Id.* As to inmate calls, the Court held that the rule was "blatantly inconsistent with the language of the statute," which requires "regulations that will ensure that [ICS providers] receive fair compensation 'for each and every completed . . . call.'" *Id.* at 566.

The FCC likewise violates the statute here, because its regulations unfairly prevent providers from recovering their costs of service. Whether compensation is entirely denied (as in *IPTA*) or is reduced below "fair" levels for many calls, § 276 is violated because it requires that "fair compensation be provided for 'each and every completed . . . call,'" *id.*

The FCC is wrong to assert that § 276's "each and every . . . call" mandate requires an "unworkable" "individual rate for every ICS call." Order Denying Stay Petitions, *Rates for Interstate Inmate Calling Services*, 31 FCC Rcd 261, ¶ 24 (WCB 2016) ("*Stay Order*") (JA___). The FCC's role is to implement the statute Congress wrote, not just the parts it thinks are "workable." *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."). In any event, far from requiring "an individual rate for every ICS call," the statute permits generally applicable rates *if* those rates do not result in a huge volume of calls being provided at a loss. For example, the FCC might have satisfied the statute by creating tiers of service more directly tied to the diverse characteristics of facilities (beyond just size), to ensure fair compensation for high-cost jurisdictions. But § 276 does not authorize the FCC to set rates that result in massive numbers of calls being below cost.

B. The *Order*'s Rate Caps Are Unlawful Because They Are Below Cost in a Substantial Number of Jurisdictions

The *Order*'s rate caps fail to provide fair compensation — and are thus invalid — because they are below the documented cost of providing service in a large proportion of facilities.

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1. Industry-Wide Analyses Demonstrate That the Rate Caps Are Below Cost for Nearly Half of All ICS Calls

The record includes two economic analyses, both concluding that the *Order*'s rate caps are below cost for a substantial number of ICS calls even after excluding site commissions. One study concludes that the rate caps would require *40 percent* of all debit/prepaid minutes of use, across all facility types, to be provided below cost, and that *88 percent* of debit/prepaid call minutes would be below cost across all prisons with 5,000 to 19,999 inmates.[18]

A second study, submitted by the Martha Wright Petitioners, finds that five ICS providers, which together represent [**CONFIDENTIAL** ■ **CONFIDENTIAL**] percent of the industry, would be unable to fully recover their costs under the *Order*'s rate caps. *See* Letter from Lee G. Petro, Counsel for Martha Wright Petitioners, to Marlene H. Dortch, FCC, Ex. A (Oct. 15, 2015) (JSA___). According to this study, the caps would allow one firm to recover only [**CONFIDENTIAL** ■ **CONFIDENTIAL**] percent of its costs, while another firm would recover only [**CONFIDENTIAL** ■ **CONFIDENTIAL**] percent of its costs. *Id.*

[18] Stephen E. Siwek & Christopher C. Holt, Comments on Wheeler/Clyburn ICS Proposal at 3 & tbl. A1 (Oct. 10, 2015) (JA___), attached to Letter from Chérie Kiser, Counsel for GTL, to Marlene H. Dortch, FCC (Oct. 10, 2015).

The *Order* does not challenge these studies or their conclusions. On the contrary, it acknowledges that seven of 14 ICS providers that submitted cost data reported per-minute costs of "$0.25 or higher," above the highest prepaid rate cap of $0.22 per minute. *Order* ¶¶ 9, 64 (JA___, ___).

The *Order*'s collect-calling rates compound the problem. The Commission calculates that, after caps for collect calls fully transition from the initial rates to the considerably lower permanent levels,[19] 10 of 14 reporting providers will not fully recover their costs. *Id.* ¶ 65 n.201 (JA___). Those 10 undercompensated providers represent roughly [**CONFIDENTIAL** ■ **CONFIDENTIAL**] percent of the industry's reported minutes. *Id.*[20]

2. Provider-Specific Data Show That the Rate Caps Are Below Cost in a Broad Variety of Circumstances

Analyses submitted by individual ICS providers — data the FCC took at "face value," *Order* ¶ 53 (JA___) (relying on "the cost data . . . as submitted") —

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[19] The cap for collect calls from prisons transitions from $0.14 per minute in the first year to $0.13 per minute in July 2017 and $0.11 per minute in July 2018. *Order* ¶ 9 (JA___). The cap for collect calls from jails transitions from an initial rate of $0.49 per minute to a lower permanent rate, depending on jail size. *Id.*

[20] Similarly, the *Order* subjects jails "in which the majority of inmates are post-conviction or are committed to confinement for sentences of longer than one year," 47 C.F.R. § 64.6000(r), to the lower rate cap applicable to prisons. *Order* ¶¶ 39, 43 (JA___, ___). The Commission imposed this requirement without any evidence of the costs incurred by jails meeting this criteria and despite the *Order*'s findings concerning the higher costs incurred in serving jails.

confirm that the rate caps fail to ensure fair compensation in a broad range of circumstances.[21] Three examples are particularly telling.

a. CenturyLink's cost data show that, nationwide, CenturyLink's average cost of service for prisons in 2014 was [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**] per minute, exclusive of site commissions. Cooper Decl. ¶ 9 (JSA___). CenturyLink's cost of service for prisons in 2014 ranged from [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**], depending on call type and facility, again exclusive of site commissions. *Id.* ¶ 10 (JSA___).[22] Altogether, the *Order*'s rate caps would prevent CenturyLink from recovering its costs for [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**] percent of completed calls. *Id.* ¶ 29 (JSA___).

The Texas prison system — CenturyLink's largest ICS customer and the country's largest state prison system[23] — is instructive. Because Texas had not

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[21] The *Order* suggests that the reported costs are somehow "overstated," *Order* ¶ 53 (JA___), but never substantiates or relies on this suggestion. Consequently, it cannot be a basis for defending the *Order* on appeal. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

[22] After the Commission's data collection ended, CenturyLink contracted to provide service in West Virginia prisons at an end-user rate of $0.03 per minute. Cooper Decl. ¶ 20 (JA___).

[23] *See* United States Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2014*, at 3 tbl. 2 (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf.

previously allowed regular inmate telephone calling, CenturyLink made a significant capital investment of more than [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**] to install wiring and other infrastructure necessary to provide service at 114 facilities. Cooper Decl. ¶ 16 (JSA___). Special security features required by state law, such as voice biometric screening and strict manual processes for pre-registering and verifying each party called by an inmate, further increase the cost of service. *Id.* (JA___).[24] Together, these capital costs and security-related processes cost CenturyLink approximately [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**] per minute in 2014. *Id.* (JSA___). Additional costs of service, including network access, technical support, billing, and customer care brought CenturyLink's total cost of service in Texas prisons (exclusive of site commissions) to [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**] per minute in 2014. *Id.* ¶ 17 (JSA___). That amount does not include a 40 percent site commission mandated by state statute, a cost that CenturyLink has no way of avoiding. *Id.* ¶¶ 6, 18 (JA___ , ___).

[24] The Utah and Arizona Departments of Correction, which CenturyLink began serving in 2015, impose similarly strict security processes. *See* Cooper Decl. ¶ 19 (JA___).

b. The public record shows that Securus's average cost of providing ICS is $0.1776 per minute, excluding site commissions,[25] which far exceeds the *Order*'s caps for calls from prisons and for calls from jails with 350 or more inmates, *see Order* ¶ 9 (JA___). The public record also shows that, in 2013, Securus served 297 prisons and 351 jails with 350 or more inmates; the *Order*'s rate caps would be below its costs for those categories of facilities, which represent 35 percent of the sites served by the company. Securus Cost Data Attach. (JA___, ___), attached to Letter from Stephanie A. Joyce, Counsel for Securus, to Marlene H. Dortch, FCC (July 30, 2014).

c. Pay Tel's cost per minute for jails with fewer than 100 inmates is $0.2432, almost two and a half cents above the Commission's applicable cap of $0.22.[26] Although the Commission declined to create a separate tier for these facilities (lumping them together with other jails housing up to 350 inmates), the record showed that nearly 60 percent of all jails fall into this size range. Pay Tel's data also showed costs of $0.1873 per minute of use in the 350-999 inmate tier.

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[25] FTI Consulting, Inc., Report on Price Elasticity of Demand for Interstate Inmate Calling Services at 3 (filed Jan. 12, 2015) ("Securus FTI Elasticity Study") (JA___), attached to Comments of Securus (filed Jan. 12, 2015) ("Securus Comments").

[26] Don J. Wood, Cost Analysis of Inmate Calling Services at 2 (filed Aug. 18, 2014) ("Pay Tel Cost Study") (JA___), attached to Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, FCC (Aug. 18, 2014).

Pay Tel Cost Study at 2 (JA___). This cost is almost 3 cents per minute higher than the rate cap of $0.16 per minute adopted by the Commission. *Order* ¶ 9 (JA___). And Pay Tel's analysis demonstrates a cost of $0.1781 per minute in jails with more than 1,000 inmates. Pay Tel Cost Study at 2 (JA___). This cost is almost 4 cents higher than the Commission's adopted rate cap of $0.14 per minute. *Order* ¶ 9 (JA___).

3. The *Order*'s Imposition of Below-Cost Rates Is Arbitrary and Capricious

The Commission's effort to defend the *Order*'s below-cost rate caps does not withstand scrutiny.

a. The Commission's primary argument — that most of the ICS industry is "inefficient," *Order* ¶¶ 53-54 & n.173, 58 (JA___, ___) — fails for three reasons. *First*, the FCC ignores uncontroverted record evidence that higher costs result not from inefficiency, but from local variables such as security measures, called-party verification requirements, wages, and capital-investment needs. The Idaho Department of Correction, for example, explained that the primary driver of cost variation is "the location, age and infrastructure of the facility." Comments of Idaho Department of Correction at 1 (filed Nov. 20, 2014) (JA___). The California State Sheriffs' Association agreed that a facility's physical characteristics — "[t]he type of building, the facility's age, the type of equipment, [and] the equipment's maintenance needs" — significantly affect costs. CA

Sheriffs' Comments at 4 (JA___). Praeses, a consulting firm that works with facilities nationwide, observed that "it is less expensive to provision ICS at urban Facilities and Facilities close to urban centers than it is to provision ICS at rural and remote Facilities." Comments of Praeses at 32 (filed Jan. 12, 2015) (JA___).

Second, varying demands from facilities affect costs. Praeses noted divergent costs based on different security features. *See id.* at 33 (JA___). Call-monitoring practices are "highly variable and therefore the cost of such will also vary widely." CA Sheriffs' Comments at 4 (JA___); *accord* L.A. Sheriff's Comments 2 (JA___); Comments of Florida Sheriffs Ass'n at 3 (filed Jan. 9, 2015) (some facilities require providers to create "inmate account[s]" and "monitor[ ] phone conversations," while others do not).

Third, as Commissioner Pai pointed out, the record shows that CenturyLink, a mid-sized provider with overall costs close to the industry average, reported costs at different facilities that accounted for both the *highest* and *lowest* costs for serving prisons in the record. *Order* at 203 n.61 (JA___) (Pai, Comm'r, dissenting). It is implausible that CenturyLink is a model of efficiency in West Virginia and grossly inefficient in Texas.

The FCC nevertheless attempts to show that above-average costs are the result of inefficiency by focusing on two outlier data points. Specifically, the *Order* focuses on [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**],

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which have reported per-minute costs of [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**], respectively. *Id.* ¶ 63 & nn.194-95 (JSA___). From this data, the *Order* reasons that "all of th[e] providers [with higher costs] would be highly profitable if their cost structures resembled those of the two small efficient firms." *Id.* ¶ 64 (JA___).

This reasoning fails because these two companies represent far too small a sample to be statistically significant. Measured by costs, [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**] together account for approximately 0.1 percent of the ICS industry — 99.9 percent of ICS is offered by others. So [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**] — just like [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**], which each reported per-minute costs of [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**] or more but which make up just over [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**] percent of the industry — cannot establish an efficient industry-wide cost structure.

Analysis of the smallest providers' data confirms that regional variation, not efficiency, accounts for cost discrepancies. Very small providers reported *both* the highest and lowest costs in the record. *See id.* App. C (JA___). Because small providers serve relatively few facilities, their costs are more susceptible to local variations. Indeed, the record shows that the smaller the provider, the more likely it is to be an outlier *either above or below* median costs. *Id.* Petitioners warned

the FCC that the cost data reported by [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**] were unreliable. *See* Expert Report of Don J. Wood at 15 (filed Jan. 12, 2015) (JA___).[27]

The FCC ignores this evidence, claiming instead that greater efficiencies should permit other ICS providers to have the same company-wide costs as [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**]. The FCC's failure to acknowledge the limitations on data provided by [**CONFIDENTIAL** [redacted] **CONFIDENTIAL**], and to account for the extensive evidence of local variation outlined above, is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

b. The possibility that the *Order*'s reduced rate caps will lead to increased call volume, *see Order* ¶ 34 n.108 (JA___), cannot sustain the rate caps because the *Order* does not rely on it, *see Chenery*, 318 U.S. at 95. As the *Order* emphasizes, its analysis "does not take into account the demand stimulation from lower rates." *Order* ¶ 67 (JA___); *see also id.* ¶ 57 (JA___). Moreover, an

[27] *See* Ex Parte Comment of Correct Solutions, LLC at 1 (filed Jan. 19, 2016) (JA___) (explaining that neither provider offers a "complete end-to-end ICS service"); *id.* (information submitted "*does not* represent all of the costs necessary to provide a complete ICS service"); *accord* Letter from William L. Perna, Custom Teleconnect, Inc., to Marlene H. Dortch, FCC, at 1 (Jan. 27, 2016) (JA___) (cost data submitted does not "illustrate the total cost elements required to deliver a complete ICS solution").

economic analysis in the record shows that the *2013 Order*'s interim rate caps, which substantially reduced calling rates in many jurisdictions, resulted in a modest 15.5 percent increase in call volumes. Securus FTI Elasticity Study at 19 (JA___).

c. The FCC's suggestion that its caps are valid because providers can seek a waiver fails for two reasons. *First*, the Commission has clarified that the *Order* does not "rely[ ] on a waiver process to ensure fair compensation." *Stay Order* ¶ 19 n.60 (JA___). *Second*, when the Commission is "on record that it will not freely grant waivers," the lawfulness of its rule "must be assessed without reference to the waiver provisions." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977) (per curiam). The *Order* indicates that waivers will be granted only in "extraordinary circumstances," and only then "at the holding company level." *Order* ¶¶ 217 & nn.775-76, 219 (JA___, ___). The *Order*'s holding-company standard likely precludes relief for integrated, nationwide providers that have numerous business lines and serve prisons and jails with varying costs of service. *See* Cooper Decl. ¶ 25 (JA___).

III. The FCC Lacks Jurisdiction To Set Intrastate Rate Caps[28]

The FCC's imposition of caps on intrastate ICS rates exceeds the Commission's authority under § 276(b)(1)(A). With respect to *interstate* rates, § 201 authorizes the FCC to ensure that rates for telecommunications services are "just and reasonable"; accordingly, the FCC's authority to set reasonable and lawful rate caps "for *interstate* ICS" — when ICS is offered as a telecommunications service[29] — "is not in dispute." *Order* ¶ 107 (JA___) (emphasis added). But interstate rate regulation is where the FCC's authority typically ends. *See* 47 U.S.C. § 152(b). The FCC's attempt to justify intrastate rate caps by relying on § 276(b)(1)(A) fails because that provision provides no authority to cap compensatory rates.[30]

The most evident reading of § 276(b)(1)(A) — which, as noted, requires the FCC to adopt a "per call compensation plan" to "ensure that all payphone service providers are fairly compensated" for all calls made "using their payphone" — is that it requires the FCC to see to it that payphone service providers receive *at least*

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[28] Pay Tel does not join Part III of this brief.

[29] So-called "enhanced" or "information" services are not subject to the Communications Act's common-carrier provisions, such as § 201. *See Verizon v. FCC*, 740 F.3d 623, 629-30 (D.C. Cir. 2014).

[30] In September 2014, three ICS providers proposed a compromise whereby the rate for interstate and intrastate calls would be capped. That proposal was an effort to achieve consensus without the need for prolonged litigation and did not constitute a concession that the FCC had the authority it asserts here.

adequate compensation for all payphone calls (including intrastate calls); it does not suggest that the FCC is empowered to regulate market rates that are already compensatory. That evident reading is confirmed by the legislative history and the FCC's own prior implementation of the provision. And, even if that meaning were less clear, the FCC could not impose caps on intrastate rates in light of the principle that the Communications Act will be read to confer authority over intrastate communications only when the statute does so in terms that are "unambiguous or straightforward," *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 377 — which § 276(b)(1)(A) does not.

A. Section 276(b)(1)(A) cannot be reasonably read to confer authority on the FCC to regulate existing intrastate rates on the grounds that they are unreasonably high. Section 276(b)(1) requires the Commission to "prescribe regulations" for two purposes: to "promote competition among payphone service providers" and to "promote the widespread deployment of payphone services to the benefit of the general public." Especially in light of those express statutory goals, the requirement that the FCC establish a "per call compensation plan" to "ensure" fair compensation for all calls is most naturally read to require the agency to act where payphone providers do not otherwise receive compensation pursuant to market mechanisms. A statute directing an agency to "ensure" that employees are "fairly compensated" would not authorize pay cuts.

That authority extends to both intrastate and interstate calls. But it does not encompass the power to reduce rates that are fairly compensatory on the ground that they are excessive. On the contrary, when the statute authorizes regulators to reduce rates that are unreasonably high, it does so in clear terms. *See, e.g.*, 47 U.S.C. § 205(a) (authorizing the Commission to "determine and prescribe what will be the just and reasonable charge"); *id.* § 224(b) (authorizing the Commission to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable"); *id.* § 252(d)(1) (authorizing state commissions to set "just and reasonable rate[s]"). Section 276, by contrast, requires the FCC to ensure that payphone providers *receive* fair compensation — not to set rates that consumers pay. As Commissioner Pai explained in dissent, § 276 "does not purport to be another iteration of section 201 for payphones." *Order* at 201 (JA___).

That understanding of the statute makes particular sense in light of the context in which it was adopted. The Communications Act requires payphone providers to permit callers to "dial around" the operator services provider presubscribed to the payphone to reach the long-distance carrier of the caller's choice without prior payment to the payphone provider. *See* 47 U.S.C. § 226(c). As a result, payphone providers must allow callers to dial all toll-free numbers without charge. *See IPTA*, 117 F.3d at 559. "Congress recognized that the 'free'

call would impose a cost upon the payphone operator; and it consequently required the FCC 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.'" *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 51 (2007); *accord American Pub. Communications*, 215 F.3d at 53 (explaining that Congress enacted § 276 to solve "the problem of uncompensated calls").

By contrast, the statute does not direct the FCC to regulate payphone rates to ensure that such rates are just and reasonable. Where payphone providers receive compensation pursuant to market mechanisms free of regulatory distortions that hold down rates, § 276(b)(1)(A) does not come into play.

That is how the FCC has always understood its statutory mandate. "The Commission decided that the Act's broad directive to promulgate regulations that would ensure that [payphone service providers] are 'fairly compensated for each and every intrastate and interstate call' required the Commission to act only with respect to those types of calls for which a [payphone service provider] does not already receive fair compensation." *IPTA*, 117 F.3d at 559; *see also* Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, ¶ 60 (1996) ("*First Payphone Order*") (contrasting the tasks of "ensuring that

[payphone service providers] are fairly compensated . . . and protecting consumers from excessive rates").

The *Order* offered no response to this account of the purpose, history, and meaning of § 276. Its sole reference to § 276's statutory history and purpose was a footnote quoting, but failing to rebut, one of many comments raising this point. *See Order* ¶ 111 n.348 (JA___-__). "An agency's failure to respond to relevant and significant public comments generally demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014); *see also IPTA*, 117 F.3d at 564 (holding that the FCC's "*ipse dixit* conclusion, coupled with its failure to respond to contrary arguments . . . , epitomizes arbitrary and capricious decisionmaking").

For ICS providers that offer voice-over-Internet-protocol and other non-telecommunications services, § 276's failure to provide rate-cap authority has broad consequences. Those non-telecommunications providers are not subject to § 201, as the FCC implicitly acknowledged. *See Order* ¶ 250 & n.878 (JA___); *2013 Order* ¶ 14 (JA___) (asserting that the "use of VoIP or any other technology . . . does not affect our authority *under section 276*") (emphasis added); *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) (FCC has interpreted "common carrier" to exclude information service providers). As a result, the *only* possible

source for rate-capping authority over these providers — interstate or intrastate — would be § 276, and, as demonstrated, no such authority exists. Because § 276 does not permit rate caps, the intrastate caps applied to telecommunications are invalid, as are the *interstate and intra*state rate caps applied to voice-over-Internet-protocol and other non-telecommunications providers.

B. It is true that the FCC has asserted jurisdiction over local coin rates and preempted state regulations regulating those rates. *Cf. Order* ¶ 110 (JA___). But the FCC deregulated local coin rates because it determined that existing state-mandated rates potentially deprived payphone providers of "fair" compensation — that is, existing state-regulated rates prevented payphone providers from charging market rates. *See First Payphone Order* ¶¶ 56, 61. The FCC did not attempt to determine a particular "fair" local coin rate and impose that — it relied on the market.

This Court's decision in *IPTA* does not support the FCC's assertion of authority to cap intrastate rates either. *Cf. Order* ¶ 110 (JA___). In *IPTA*, the Court concluded that the FCC had authority to preempt local regulations limiting local coin call rates precisely because the FCC had to ensure that payphone operators "be 'fairly compensated'" and "the only compensation that a PSP receives . . . is in the form of coins." 117 F.3d at 562. The Court found that the FCC had properly exercised its authority without determining that unregulated coin

rates were "fair" in the sense of being close to costs. Far from authorizing the FCC to *cap* coin-call rates, the Court read § 276 as authorizing the FCC to ensure that payphone operators were compensated adequately.[31]

C. The conclusion that § 276(b)(1)(A) is not intended to confer rate-making authority over intrastate rates is reinforced by 47 U.S.C. § 152(b)(1), which provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio of any carrier." That provision is "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction." *New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003). Another provision cannot be interpreted to grant the FCC intrastate regulatory authority unless it is "so unambiguous or straightforward as to override the command of § 152(b)." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 377.

Section 276(b)(1)(A), by authorizing the FCC to ensure fair compensation for payphone providers, does not displace state authority to regulate intrastate

[31] The Court also noted the Commission's statement that it might "limit[ ] the number of compensable calls from each payphone." *IPTA*, 117 F.3d at 563. But FCC authority to adjust the per-call compensation scheme that the FCC itself put in place to ensure fair compensation — which is the only authority the FCC claimed (but did not exercise) in the *Payphone Orders* — does not imply authority to regulate existing market rates.

communications in circumstances where, as here, payphone providers receive market-based compensation for the service they provide. The rates that ICS providers charge for intrastate calls are subject to regulation by the states; the states can appropriately strike whatever balance they choose between relying on commissions to offset costs or fund prisoner welfare activities and reducing the rates that prisoners and their families and friends pay for intrastate calls. Section 276(b)(1)(A) does not grant the FCC authority to make that policy choice.

IV. The *Order*'s Ancillary Service Fee Restrictions Violate the Communications Act and the Administrative Procedure Act[32]

The *Order*'s restrictions on what the FCC termed "ancillary service charges," *see Order* ¶¶ 144-196 (JA___-__), exceed the FCC's statutory authority, lack record support, and are arbitrary and capricious. They should be vacated.

A. Neither Section 276 Nor Section 201 Authorizes the FCC To Cap Charges for Services Related to Billing

The FCC claims the authority to regulate ancillary service charges under both § 276(b)(1)(A) — which it believes authorizes regulation of such charges associated with both interstate and intrastate calls — and § 201(b) — which it believes provides additional authority over interstate calls. *Order* ¶ 193 & n.690 (JA___-__). Neither provision provides the necessary authority.

[32] CenturyLink and Pay Tel do not join Part IV of this brief.

1. As explained, § 276(b)(1)(A) does not provide the FCC the authority to impose rate caps because it was passed to ensure *sufficient* compensation for payphone providers, not to limit rates. *See supra* pp. 40-44. For the same reasons, it does not authorize the FCC to cap ancillary charges either.

The attempt to regulate ancillary fees under § 276(b)(1)(A) also fails for additional reasons. New rule 64.6000(a) defines "Ancillary Service Charge" as "any charge" assessed "for the use of Inmate Calling services that are not included in the per-minute charges assessed for individual calls." The rule then enumerates five permitted ancillary charges — (1) Automated Payment Fees, (2) Fees for Single-Call and Related Services,[33] (3) Live Agent Fee, (4) Paper Bill/Statement Fees, and (5) Third-Party Financial Transaction Fees — and prohibits any others.

The fees that the FCC purports to regulate (or bar) are for *financial transactions* — not calling services — and are therefore outside the scope of § 276(b)(1)(A) altogether. As noted, that provision authorizes the FCC to establish a "per call compensation plan" to ensure that payphone providers are fairly compensated for call made using their payphones; it does not authorize the FCC to regulate transaction fees that payphone service providers might charge in connection with billing. The *Order*'s ancillary-charge regulations — which deal

[33] The Court stayed the new caps for single-call services in its stay order.

with periodic "billing statements," *Order* ¶ 169 (JA___), "money transfer service[s]," *id.* ¶ 170 (JA___), and automated payments by web, *id.* ¶ 163 & n.577 (JA___) — do not deal with compensations for calls.

That § 276(d) defines "payphone service" to include "inmate telephone services" and "any ancillary services" does not support the FCC's assertion of authority to regulate financial transaction fees. *Cf. id.* ¶ 196 (JA___). By including "ancillary services" within the definition of "payphone service," Congress made sure that the FCC had adequate authority to eliminate all subsidies and discrimination that had characterized markets prior to the adoption of the 1996 Act. *See, e.g.*, 47 U.S.C. § 276(a)(2) (no Bell operating company "shall . . . prefer or discriminate in favor of its payphone service"). But it does not change the fact that § 276(b)(1)(A) addresses "compensat[ion] for . . . completed . . . call[s]" — not compensation for credit card processing fees, billing statement fees, and other fees relating to funding of a payment account rather than for making a telephone call.

2. With respect to interstate calls, § 201 provides the FCC no additional authority.[34] As the FCC has long held, "billing and collection is a financial and administrative service," not a communications service. Report and Order, *Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150, ¶ 32 (1986);

[34] As explained, § 201 provides no authority for *any* fees, interstate *or* intrastate, charged by information service providers. *See supra* Part III.A.

accord Chladek v. Verizon N.Y. Inc., 96 F. App'x 19, 22 (2d Cir. 2004). To be sure, § 201(b) allows the FCC to regulate a carrier's charges "for and in connection with [its] communication service." But the regulations at issue regulate prices for financial services that do not depend on the use of any particular communications service. Setting up a prepaid account, sending a paper statement, and authorizing payment via credit card or Western Union are financial transactions, clearly separable from the purchase of phone service. *See* Comments of GTL at 19 (filed Jan. 12, 2015) (JA___) (explaining that these "ancillary charges reflect an ICS customer's choice to pay for ICS in a certain manner"). The FCC has never before asserted the authority to regulate such charges under § 201(b), and the statute does not extend so far. *See Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) ("[T]he phrase 'in connection with' provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions.").

The FCC claims that it has previously relied on § 201 to "regulate the manner in which a carrier bills and collects for its own interstate offerings." *Order* ¶ 194 (JA___). But the orders it cites,[35] assuming they correctly interpreted § 201,

[35] Report and Order, *Empowering Consumers To Prevent and Detect Billing for Unauthorized Charges ("Cramming")*, 27 FCC Rcd 4436 (2012) ("*2012 Cramming Order*"); First Report and Order, *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492 (1999) ("*1999 Truth-in-Billing Order*").

asserted the authority to regulate the presentation of information on a telephone bill and expressly declined to regulate charges directly. *See 2012 Cramming Order* ¶ 128 (adopting "disclosure" and "formatting rules"); *1999 Truth-in-Billing Order* ¶ 5 (requiring that bills be "clearly organized").[36] It is a significant additional step — one far less "connect[ed] with" telecommunications service, 47 U.S.C. § 201(b), and one the FCC cannot support — to impose price controls on non-communications line items.

B. The FCC's Caps on Ancillary Fees Are Arbitrary and Capricious

The FCC's caps on ancillary fees are, in any event, unlawful because they deny ICS providers recovery of costs and discourage development of new services that benefit consumers.

First, the FCC's maximum credit-card and debit-card processing fees — $3.00 per transaction or $5.95 for processing by a live agent, *see* 47 C.F.R. §§ 64.6000(a)(1), (3), 64.6020(b)(1), (3) — lack any supporting cost evidence. The *Order* primarily relies on comments of parties who asserted that these rates were reasonable, *see Order* ¶¶ 167-168 (JA___-__), but such assertions are not evidence. Moreover, the scant cost evidence the FCC did consider shows that the

[36] In the Further Notice of Proposed Rulemaking attached to the *2012 Cramming Order*, the FCC questioned its authority to adopt rules that "go beyond bill formatting and transparency." *2012 Cramming Order* ¶ 149.

new caps fail to cover providers' costs. The *Order* states that providers' Mandatory Data Collection submissions showed that the cost of automated payments "rang[es] from $0.10 to $6.58." *id.* ¶ 164 (JA___). It gives no more analysis than that, but even these numbers show that at least one provider's costs are more than double the $3.00 cap. Without explanation, moreover, the FCC dismissed Securus, one of the leading providers of inmate services, which documented costs greater than $3.00, as an "outlier." *Id.* ¶ 167 (JA___).[37] The FCC's conclusion that the credit-card caps "will allow ICS providers to recover the costs incurred" thus cannot be squared with the record. *See id.* ¶ 166 (JA___) (acknowledging that "prohibiting ICS providers from recovering their costs reasonably and directly related to making available an ancillary service would not allow ICS providers to receive fair compensation").

Second, the rule unlawfully bars providers from charging more than the ordinary rate caps for premium billing options — which the *Order* and rules refer to as "single-call and related services" — except for a pass-through (without markup) of third-party transaction fees. *id.* ¶¶ 182-189 (JA___-__); 47 C.F.R. §§ 64.6000(a)(2), 64.6020(b)(2). As the *Order* explains, these services are "billing arrangements whereby an ICS provider's collect calls are billed through third-party

[37] The separate brief of Securus addresses the FCC's rejection of the confidential cost evidence submitted by that company via affidavit.

billing entities on a call-by-call basis to parties whose carriers do not bill collect calls." *Order* ¶ 182 (JA___-__). Such services are extremely valuable where (1) the inmate does not have a prepaid account (for example, a recent arrestee) and (2) the recipient of the call cannot accept collect calls (for example, on a wireless phone). This third-party billing arrangement is optional; and even the FCC acknowledged that "some efficiencies may derive from" these services. *Id.*

The record evidence — including sworn declarations — demonstrates that providers incur both external and internal costs for single-call service and must make large, up-front investments to add these services to their call options.[38] Recovering these upfront development costs requires a "markup" of the type the *Order* prohibited. The FCC improperly disregarded this evidence and allowed only a pass-through charge of third-party fees without markup — a limitation it failed to justify.[39]

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[38] *See supra* note 37.

[39] To the extent the FCC believes that disclosures for single-call services are confusing or inadequate, it is mistaken. *See, e.g.*, Letter from Stephanie Joyce, Counsel for Securus, to Tom Wheeler, Chairman, FCC, at 5 (Oct. 6, 2014) (JA___) ("In every case, the customer is quoted the applicable rate and must positively accept the charges ***before*** the call is completed; they may terminate the call before completion without the application of any fees."). In any event, the solution to lack of disclosure is to require disclosure, not to bar charges that are otherwise lawful.

Third, the *Order*'s blanket *ban* on all fees not specifically listed, *see Order* ¶ 173 (JA___), is arbitrary, capricious, and unlawful. Ancillary charges are necessary to recoup the costs ICS providers incur to provide optional, premium services. *See, e.g.*, Securus Comments at 26 (JA___). Banning all such charges (because of misgivings about a few) will prevent development of new and better services because providers will not be able to recoup their costs. The rule thus conflicts with the FCC's obligation to "*promote* competition" and the "widespread deployment of payphone services." 47 U.S.C. § 276(b)(1) (emphasis added).

V. The Commission's Reporting Requirements Are Unlawful[40]

At least two provisions of 47 C.F.R. § 64.6060 — which impose reporting requirements on ICS providers — are unlawful because they exceed the FCC's statutory authority.

Video Visitation Services: The FCC has no authority to require ICS providers to report data on "video visitation services," which are not subject to FCC regulation. By its terms, § 64.6060 requires reporting on "interstate, intrastate, and international *Inmate Calling Services*." (Emphasis added.) But, as the *Order* makes clear, the FCC has never ruled that "video visitation services" are "inmate calling services" (as the FCC defined the term in § 64.6000), much less

[40] Only Securus joins Part V of this brief.

"inmate telephone services" (the statutory term, *see* 47 U.S.C. § 276(d)). On the contrary, the FCC has indicated that at least some (if not all) video visitation services "do *not* meet the definition" of inmate calling services. *Order* ¶ 296 & n.1029 (JA___) (emphasis added). Yet the FCC insisted that its reporting requirement applied whether "video visitation services" are "a form of ICS or not." *Id.* ¶ 267 (JA___-__).

This is indefensible. Reporting obligations are a form of regulation, *e.g.*, *Cellco P'ship*, 357 F.3d at 101-02, as the Bureau conceded, *see Stay Order* ¶ 57 (JA___) ("not in dispute"). And, although the Bureau claimed that the reason the Commission required reporting on video visitation services was to obtain information about "'the marketplace,'" *id.* (quoting *Cellco P'ship*, 357 F.3d at 102), the Commission offered no such justification (which is why the Bureau cited to nothing in the *Order* to support that claim). And, in any event, in *Cellco Partnership*, the reporting requirement at issue was pursuant to express regulatory authority to "'review competitive market conditions with respect to commercial mobile services.'" 357 F.3d at 102 (quoting 47 U.S.C. § 332(c)(1)(C)). The FCC has no such authority here.

As Commissioner O'Rielly pointed out in his dissent, video visitation cannot be characterized as "inmate telephone service" — which is the statutory term and the only basis for the FCC's assertion of regulatory authority. *See Order* at 209

(JA___) (O'Rielly, Comm'r, dissenting) ("[a] video call is not a telephone service much less a payphone service").[41] In any event, the FCC never purported to reach any contrary conclusion in the *Order*. Accordingly, the requirement that ICS providers report on those non-ICS services is unlawful.

Site Commissions: The requirement for reporting on "Site Commissions" is unlawful to the extent the statutory definition of that term is read to encompass anything that an ICS provider or its affiliate gives "to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide ICS, a governmental agency that oversees a correctional facility, the city, county, or state where a facility is located, or an agent of any such facility." 47 C.F.R. § 60.6000(t). That definition is nonsensical — under its literal terms, if an ICS provider bought coffee and donuts for its own employees and paid sales tax, that would constitute a site commission.

The *Order* itself makes clear that site commissions are limited to payments that constitute a "part of . . . ICS revenues" that an ICS provider "share[s] . . . with the correctional facility." *Order* ¶ 117 (JA___). To the extent the FCC intends to

[41] The FCC has made clear that video conferencing is an unregulated information service. Notice of Inquiry, *Framework for Broadband Internet Service*, 25 FCC Rcd 7866, ¶ 107 (2010) ("[W]e do not intend to address in this proceeding the classification of information services such as . . . video conferencing . . . .).

take the position that the definition is broader, the definition would reach payments that have no connection to the provision of ICS and that are accordingly well outside any legitimate FCC regulatory interest. Accordingly, the Court should vacate the requirement.

VI. The *Order* Failed To Preempt Non-Compensatory Rate Caps and Violated Pay Tel's Fundamental Rights[42]

A. Failing To Preempt Inconsistent and Non-Compensatory State Regulations Violates Section 276

The *Order* violates § 276 because it fails to preempt inconsistent state rate regulations, including those that impose below cost rate caps. *Order* ¶ 204 (JA___). This decision results in unlawful non-compensatory rates because, as discussed, § 276 requires that the FCC "ensure that all payphone service providers are fairly compensated" and that it "shall preempt" inconsistent state regulations in order to do so. 47 U.S.C. § 276(b)(1)(A), (c).

For example, Pay Tel presented evidence of a flat rate cap on local calls in North Carolina of $1.71. *See*, *e.g.*, Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, FCC, Attach. at 1, 8 ("Intrastate Rate Caps for Local Calls") (Dec. 9, 2013) ("Pay Tel Dec. 9, 2013 Letter") (JA___, ___). Yet the *Order* prohibits flat-rate calling, *see Order* App. A, § 9 (JA___) (adopting 47

[42] Only Pay Tel joins Part VI of this brief.

C.F.R. § 64.6090), resulting in a situation where providers are subject to inconsistent per-minute and per-call caps.

Even more problematic, these state rate structures result in non-compensatory rates. In the North Carolina example, assuming a 15-minute call (as the Commission did, *see 2013 Order* ¶ 63 (JA___)), the effective per-minute rate is below the *Order*'s prescribed rate caps for every tier of service in jails. Because inmates in jails primarily make local calls, *Order* ¶ 7 n.27 (JA___), below-cost local rates jeopardize the ability to serve jails.

Pay Tel demonstrated that the below-cost rate caps in its service area would prevent Pay Tel from recovering its costs on a holding-company level. *See, e.g.*, Pay Tel Petition for Waiver at 12-19 & Exs. A-H (filed Jan. 8, 2014) (JA___-__, ___-__); Pay Tel Dec. 9, 2013 Letter (JA___-__) (citing filings in predecessor docket dating back to 2007 providing evidence of non-compensatory rates; attaching tariffs, regulations, and analysis showing intrastate rates below *2013 Order*'s interim interstate rate caps); Pay Tel Petition for Partial Stay at 13-16 & Attachs. (Decl. of Vincent Townsend ¶¶ 5-7; Decl. of Don J. Wood ¶¶ 8-18) (filed Nov. 26, 2013) (JA___-__, ___, ___-__) (petition for partial stay of *2013 Order*). That evidence led the Bureau to grant a temporary waiver to Pay Tel in 2014 because Pay Tel had demonstrated that, in light of the below-average-cost state ICS rates, it could not recover its costs on a holding-company level. *Order* ¶ 14

n.43 (JA___); *see* Order, *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 1302, ¶ 15 (2014) (JA___). The *Order*'s assertion that there is "no credible record evidence" of state rate caps that result in non-compensatory rates disregards the record before it and the Bureau's own findings and is thus arbitrary and capricious. *Order* ¶ 210 (JA___); *see State Farm*, 463 U.S. at 43.

It is no answer that a party may seek relief from non-compensatory state rate caps in that state, or by further petition to the FCC for a waiver of the FCC's rates. *Order* ¶¶ 211, 217-219 (JA___, ___-__). Such buck-passing abdicates the FCC's obligation under § 276 to ensure fair compensation. *See*, *e.g.*, *id.* ¶ 211 (JA___). This Court has confirmed that the FCC has authority to preempt state rates that fail to provide adequate compensation, *see IPTA*, 117 F.3d at 562, yet the *Order* fails to take the step that § 276 requires.

Nor is the alternative — filing for a waiver — a lawful means of satisfying § 276. First, the FCC cannot rely on a waiver process to evade its obligations under § 276. *See HBO*, 567 F.2d at 50. Second, the process has proven unworkable. Pay Tel petitioned for an extension of its nine-month waiver in October 2014, and its petition has lain dormant for 18 months. Pay Tel Petition for Extension of Waiver (filed Oct. 31, 2014) (JA___-__). This inaction has caused direct harm to Pay Tel, which had to eliminate five full-time positions and institute several other unsustainable cost-saving measures because it did not receive the fair

compensation that § 276 requires. *See* Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, FCC, at 2-3 (July 2, 2015) (JA___-__). Thus, the FCC's contention in the *Order* that the waiver process will be available to restore fair compensation "in certain limited circumstances [where] our rate caps may not be sufficient for certain providers," *Order* ¶ 219 (JA___), is factually and legally untenable.

B. The Administrative Process Surrounding the Commission's Treatment of Confidential Information Was Infected with Prejudicial Error

The FCC's processes leading to the adoption of the *Order* violated Pay Tel's due-process rights and right to counsel. The FCC denied Pay Tel's counsel access to confidential information expressly relied upon by the FCC as the basis for its rate caps until after the *Order* was issued, when it was too late for counsel to evaluate and respond.

The Bureau — "mindful of the right of the public to participate in this proceeding in a meaningful way" — issued a protective order setting forth procedures governing access to confidential cost information. Protective Order, *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 16954, ¶ 1 (WCB 2013) ("*Protective Order*") (JA___). Pay Tel's outside regulatory counsel in July and August 2014 sought access to confidential information following the procedures set forth in the *Protective Order*. Its outside economic consultant received the data

in August 2014; yet, due to the Commission's failure to adjudicate in a timely fashion objections to counsel's review, counsel did not obtain access to the information until *after* the issuance of the *Order*. Memorandum Opinion and Order, *Rates for Interstate Inmate Calling Services*, 31 FCC Rcd 2352, ¶¶ 14, 17 (2016) ("*March 2016 Order*") (JA___, ___) (concluding that the objections to disclosure were "untenable" and "incorrect"). The FCC's failure to act until March 2016 denied Pay Tel's outside counsel access to critical cost information, in a cost proceeding, relied upon by the Commission in its *Order*.

The FCC acknowledges that access to the information is necessary for effective participation in the proceeding: "We will not prevent or deprive parties from utilizing counsel before the Commission, or tie one hand behind counsels' backs." "Consistent with the general restrictions of a protective order, Pay Tel is entitled to have the representation it desires, and its outside counsel is entitled to have access to all the information it needs to zealously represent its client." *Id.* ¶¶ 23, 26 (JA___-__). But these principles are empty words if zealous representation is permitted only *after* the Commission decision is issued. *See, e.g.*, *id.* at 13 (Pai, Comm'r) (noting that the "high-minded rhetoric" came too late).

The FCC's failure to discharge its obligations under the *Protective Order* in a timely fashion resulted in a serious breach of due process, denial of Pay Tel's right to counsel, and significant prejudice to Pay Tel's ability to fully participate in

the proceeding.[43] *See, e.g.*, *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 341 (D.C. Cir. 1980) ("[D]elay in the resolution of administrative proceedings can . . . deprive regulated entities . . . of rights . . . without the due process the Constitution requires."); Order, *Open Network Architecture Tariffs of Bell Operating Companies*, 10 FCC Rcd 1619, ¶ 13 (1995) ("The Administrative Procedure Act and the Due Process Clause of the Constitution generally entitle parties in administrative proceedings to have access to the documents necessary for effective participation in those proceedings."); *cf. Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471, 1484 (Fed. Cir. 1986) (finding no Administrative Procedure Act violation where confidential information is available to outside counsel).

The data in question were submitted by the three dominant providers of ICS, which represent over 85 percent of the ICS market. *Order* ¶ 51 n.169 (JA___). The harm was especially acute given that the Commission based its rate caps on an averaging of all providers' costs. *Id.* ¶¶ 51-52 (JA___-__). Pay Tel, accordingly, was forced to make decisions concerning its legal rights in a vacuum — without the benefit of its counsel having seen and reviewed the information on which the FCC based its decision. The FCC's inaction violated due process and the right to counsel.

[43] *See March 2016 Order* at 13 (JA___) (Pai, Comm'r) ("I am disturbed that we may have deprived a party of its administrative rights through inaction.").

CONCLUSION

The *Order* should be vacated in part and remanded.

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Respectfully submitted,

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CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this joint brief is submitted concur in the brief's content.

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

June 6, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), this brief contains 13,967 words, which, when combined with the word count of the separate brief for petitioner Securus, is under the 15,500 word limit set by the Court in its April 18, 2016 briefing order. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2013) used to prepare this brief.

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

June 6, 2016

ADDENDUM

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47 U.S.C. § 201

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 276

§ 276. Provision of payphone service

(a) Nondiscrimination safeguards

After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service—

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) Regulations

(1) Contents of regulations

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—

(A) 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;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on February 8, 1996, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms

of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) Public interest telephones

In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(3) Existing contracts

Nothing 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 February 8, 1996.

(c) State preemption

To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

(d) "Payphone service" defined

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.

47 C.F.R. § 64.6000

§ 64.6000 Definitions.

As used in this subpart:

(a) *Ancillary Service Charge* means any charge Consumers may be assess for the use of Inmate Calling services that are not included in the per-minute charges assessed for individual calls. Ancillary Service Charges that may be charged include the following. All other Ancillary Service Charges are prohibited.

(1) *Automated Payment Fees* means credit card payment, debit card payment, and bill processing fees, including fees for payments made by interactive voice response (IVR), web, or kiosk;

(2) *Fees for Single-Call and Related Services* means billing arrangements whereby an Inmate's collect calls are billed through a third party on a per-call basis, where the called party does not have an account with the Provider of Inmate Calling Services or does not want to establish an account;

(3) *Live Agent Fee* means a fee associated with the optional use of a live operator to complete Inmate Calling Services transactions;

(4) *Paper Bill/Statement Fees* means fees associated with providing customers of Inmate Calling Services an optional paper billing statement;

(5) *Third-Party Financial Transaction Fees* means the exact fees, with no markup, that Providers of Inmate Calling Services are charged by third parties to transfer money or process financial transactions to facilitate a Consumer's ability to make account payments via a third party.

(b) *Authorized Fee* means a government authorized, but discretionary, fee which a Provider must remit to a federal, state, or local government, and which a Provider is permitted, but not required, to pass through to Consumers. An Authorized Fee may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation.

(c) *Average Daily Population (ADP)* means the sum of all inmates in a facility for each day of the preceding calendar year, divided by the number of days in the year. ADP shall be calculated in accordance with §64.6010(e) and (f);

(d) *Collect Calling* means an arrangement whereby the called party takes affirmative action clearly indicating that it will pay the charges associated with a call originating from an Inmate Telephone;

(e) *Consumer* means the party paying a Provider of Inmate Calling Services;

(f) *Correctional Facility or Correctional Institution* means a Jail or a Prison;

(g) *Debit Calling* means a presubscription or comparable service which allows an Inmate, or someone acting on an Inmate's behalf, to fund an account set up though a Provider that can be used to pay for Inmate Calling Services calls originated by the Inmate;

(h) *Flat Rate Calling* means a calling plan under which a Provider charges a single fee for an Inmate Calling Services call, regardless of the duration of the call;

(i) *Inmate* means a person detained at a Jail or Prison, regardless of the duration of the detention;

(j) *Inmate Calling Service* means a service that allows Inmates to make calls to individuals outside the Correctional Facility where the Inmate is being held, regardless of the technology used to deliver the service;

(k) *Inmate Telephone* means a telephone instrument, or other device capable of initiating calls, set aside by authorities of a Correctional Facility for use by Inmates;

(l) *International Calls* means calls that originate in the United States and terminate outside the United States;

(m) *Jail* means a facility of a local, state, or federal law enforcement agency that is used primarily to hold individuals who are;

(1) Awaiting adjudication of criminal charges;

(2) Post-conviction and committed to confinement for sentences of one year or less; or

(3) Post-conviction and awaiting transfer to another facility. The term also includes city, county or regional facilities that have contracted with a private company to manage day-to-day operations; privately-owned and operated facilities primarily engaged in housing city, county or regional inmates; and facilities used to detain individuals pursuant to a contract with U.S. Immigration and Customs Enforcement;

(n) *Mandatory Tax or Mandatory Fee* means a fee that a Provider is required to collect directly from Consumers, and remit to federal, state, or local governments;

(o) *Per-Call, or Per-Connection Charge* means a one-time fee charged to a Consumer at call initiation;

(p) *Prepaid Calling* means a presubscription or comparable service in which a Consumer, other than an Inmate, funds an account set up through a Provider of Inmate Calling Services. Funds from the account can then be used to pay for Inmate Calling Services, including calls that originate with an Inmate;

(q) *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;

(r) *Prison* means a facility operated by a territorial, state, or federal agency that is used primarily to confine individuals convicted of felonies and sentenced to terms in excess of one year. The term also includes public and private facilities that provide outsource housing to other agencies such as the State Departments of Correction and the Federal Bureau of Prisons; and facilities that would otherwise fall under the definition of a Jail but in which the majority of inmates are post-conviction or are committed to confinement for sentences of longer than one year;

(s) *Provider of Inmate Calling Services, or Provider* means any communications service provider that provides Inmate Calling Services, regardless of the technology used;

(t) *Site Commission* means any form of monetary payment, in-kind payment, gift, exchange of services or goods, fee, technology allowance, or product that a Provider of Inmate Calling Services or affiliate of an Provider of Inmate Calling Services may pay, give, donate, or otherwise provide to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide ICS, a governmental agency that oversees a correctional facility, the city, county, or state where a facility is located, or an agent of any such facility.

47 C.F.R. § 64.6010

§ 64.6010 Inmate Calling Services rate caps.

(a) No Provider shall charge, in the Jails it serves, a per-minute rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of:

(1) $0.22 in Jails with an ADP of 0-349;

(2) $0.16 in Jails with an ADP of 350-999; or

(3) $0.14 in Jails with an ADP of 1,000 or greater.

(b) No Provider shall charge, in any Prison it serves, a per-minute rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of:

(1) $0.11;

(2) [Reserved]

(c) No Provider shall charge, in the Jails it serves, a per-minute rate for Collect Calling in excess of:

Size and type of facility	Debit/prepaid rate cap per MOU	Collect rate cap per MOU as of June 20, 2016	Collect rate cap per MOU as of July 1, 2017	Collect rate cap per MOU as of July 1, 2018
0-349 Jail ADP	$0.22	$0.49	$0.36	$0.22
350-999 Jail ADP	0.16	0.49	0.33	0.16
1,000+ Jail ADP	0.14	0.49	0.32	0.14

(d) No Provider shall charge, in the Prisons it serves, a per-minute rate for Collect Calling in excess of:

(1) $0.14 after March 17, 2016;

(2) $0.13 after July 1, 2017; and

(3) $0.11 after July 1, 2018, and going forward.

(e) For purposes of this section, the initial ADP shall be calculated, for all of the Correctional Facilities covered by an Inmate Calling Services contract, by summing the total number of inmates from January 1, 2015, through January 19, 2016, divided by the number of days in that time period;

(f) In subsequent years, for all of the correctional facilities covered by an Inmate Calling Services contract, the ADP will be the sum of the total number of inmates from January 1st through December 31st divided by the number of days in the year and will become effective on January 31st of the following year.

47 C.F.R. § 64.6020

§ 64.6020 Ancillary Service Charge.

(a) No Provider shall charge an Ancillary Service Charge other than those permitted charges listed in §64.6000.

(b) No Provider shall charge a rate for a permitted Ancillary Service Charge in excess of:

(1) For Automated Payment Fees—$3.00 per use;

(2) For Single-Call and Related Services—the exact transaction fee charged by the third-party provider, with no markup, plus the adopted, per-minute rate;

(3) For Live Agent Fee—$5.95 per use;

(4) For Paper Bill/Statement Fee—$2.00 per use;

(5) For Third-Party Financial Transaction Fees—the exact fees, with no markup that result from the transaction.

47 C.F.R. § 64.6030

§ 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. These interim rate caps shall sunset upon the effectiveness of the rates established in §64.6010.

47 C.F.R. § 64.6060

§ 64.6060 Annual reporting and certification requirement.

(a) Providers must submit a report to the Commission, by April 1st of each year, regarding interstate, intrastate, and international Inmate Calling Services for the prior calendar year. The report shall be categorized both by facility type and size and shall contain:

(1) Current interstate, intrastate, and international rates for Inmate Calling Services;

(2) Current Ancillary Service Charge amounts and the instances of use of each;

(3) The Monthly amount of each Site Commission paid;

(4) Minutes of use, per-minute rates and ancillary service charges for video visitation services;

(5) The number of TTY-based Inmate Calling Services calls provided per facility during the reporting period;

(6) The number of dropped calls the reporting Provider experienced with TTY-based calls; and

(7) The number of complaints that the reporting Provider received related to *e.g.*, dropped calls, poor call quality and the number of incidences of each by TTY and TRS users.

(b) An officer or director of the reporting Provider must certify that the reported information and data are accurate and complete to the best of his or her knowledge, information, and belief.

Miss. Code Ann. § 47-5-158

§ 47-5-158. Inmate Welfare Fund

(1) The department is authorized to maintain a bank account which shall be designated as the Inmate Welfare Fund. All monies now held in a similar fund or in a bank account or accounts for the benefit and welfare of inmates shall be deposited into the Inmate Welfare Fund. This fund shall be used for the benefit and welfare of inmates in the custody of the department and shall be expended in accordance with any provisions or restrictions in the regulations promulgated under subsection (7) of this section.

(2) There shall be deposited into the Inmate Welfare Fund interest previously earned on inmate deposits, all net profits from the operation of inmate canteens, performances of the Penitentiary band, interest earned on the Inmate Welfare Fund and other revenues designated by the commissioner. All money shall be deposited into the Inmate Welfare Fund as provided in Section 7-9-21.

(3) All inmate telephone call commissions shall be paid to the department. Monies in the fund may be expended by the department, upon requisition by the commissioner or his designee, only for the purposes established in this subsection.

(a) Twenty-five percent (25%) of the inmate telephone call commissions shall be used to purchase and maintain telecommunication equipment to be used by the department.

(b) Until July 1, 2008, twenty-five percent (25%) of the inmate telephone call commissions shall be deposited into the Prison Agricultural Enterprise Fund. Beginning on July 1, 2008, thirty-five percent (35%) of the inmate telephone call commissions shall be deposited into the Prison Agricultural Enterprise Fund. The department may use these funds to supplement the Prison Agricultural Enterprise Fund created in Section 47-5-66.

(c) Forty percent (40%) of the inmate telephone call commissions shall be deposited into the Inmate Welfare Fund.

* * * * *

Tex. Gov't Code Ann. § 495.027

§ 495.027. Inmate Pay Telephone Service

(a) The board shall request proposals from private vendors for a contract to provide pay telephone service to eligible inmates confined in facilities operated by the department. The board may not consider a proposal or award a contract to provide the service unless under the contract the vendor:

(1) provides for installation, operation, and maintenance of the service without any cost to the state;

(2) pays the department a commission of not less than 40 percent of the gross revenue received from the use of any service provided;

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that, on June 6, 2016, I electronically filed the Redacted Joint Brief for the ICS Carrier Petitioners with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Michael K. Kellogg*
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