

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

Twice before I have urged my colleagues to adopt reasonable regulations that would substantially reduce interstate inmate calling rates and survive judicial scrutiny.¹ Twice they have declined. And so our rules have gone to court again and again, only to be blocked again² and again³ and again.⁴

This is not and should not be hard. We cannot set rate caps that are below the costs of providing inmate calling services. We cannot ignore record evidence regarding those costs. And we cannot exceed the bounds of our jurisdiction. It's really that simple.

Yet—here we go again.

At issue today is a critical piece of record evidence ignored by last year's order. As I pointed out then, "facilities incur actual costs that are directly and incrementally attributable to increased access to inmate calling services."⁵ For example, some enroll inmates into a biometric voice system while others employ real-time call monitoring. The evidence submitted by sheriffs, inmate calling service providers, economists, and state commissions all demonstrated that the costs to facilities—and especially our nation's jails—are real and substantial.⁶

Today, the FCC belatedly recognizes that it made a mistake when it excluded facilities' costs of administration from its calculations entirely. The *Order* finds the National Sheriffs' Association's "cost data to be credible"⁷ and purports to base its cap increases on that data.⁸ The *Order* estimates facility-administration costs to be on average 2 cents a minute for prisons, 5 cents for very large jails and large jails, and 9 cents for medium and small jails.⁹

¹ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14218 (2013) (Dissenting Statement of Commissioner Ajit Pai); *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763, 12960 (2015) (*Second Interstate Inmate Calling Order*) (Dissenting Statement of Commissioner Ajit Pai).

² *Securus Technologies v. FCC*, Case No. 13-1280, Order (D.C. Cir. Jan. 13, 2014) (staying rules 64.6010, 64.6020, 64.6060).

³ *Global Tel*Link v. FCC*, Case No. 15-1461, Order (D.C. Cir. Mar. 7, 2016) (staying rules 64.6010, 64.6020(b)(2)).

⁴ *Global Tel*Link v. FCC*, Case No. 15-1461, Order (D.C. Cir. Mar. 23, 2016) (staying rule 64.6030 "insofar as the FCC intends to apply that provision to intrastate calling services").

⁵ *Second Interstate Inmate Calling Order*, 30 FCC Rcd at 12967 (Dissenting Statement of Commissioner Ajit Pai).

⁶ See, e.g., Letter from Thomas M. Dethlefs, Associate General Counsel, Regulatory for CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 & Attachment B (Sept. 19, 2014); Reply Comments of Global Tel*Link Corp., Attachment 2 at 10 (Jan. 27, 2015); Letter from Timothy G. Nelson, Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 4 (May 8, 2015); Letter from Mary J. Sisak, Attorney for National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (June 12, 2015); Letter from Darrell Baker, Director of Utility Services Division, Alabama Public Service Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (July 1, 2015).

⁷ *Order* at para. 29.

⁸ *Order* at para. 28 ("Our approach is also based on data provided by the NSA, which, as an organization representing sheriffs, is well situated to understand and estimate the costs that facilities face to provide ICS.").

⁹ *Order* at para. 27. For purposes of this proceeding, very large jails have 1,000 or more inmates, large jails have 350–999 inmates, medium jails have 100–349 inmates, and small jails have fewer than 100 inmates.

I agree with my colleagues that the National Sheriffs' Association is "well situated to understand and estimate the costs that facilities face to provide" inmate calling services.¹⁰ And I appreciate their willingness to revisit the evidence we gathered in last year's rulemaking and to increase the FCC's caps to account for facility-administration costs.

I nonetheless cannot support the *Order* because, like its forebears, it ignores the basic principles I outlined earlier regarding costs, evidence, and legal authority—principles that are not and should not be hard to respect.

First, the very cost data that the FCC relies on shows that the rate increases set forth in this *Order* are insufficient to cover the facility-administration costs for *each and every tier of jails*. Here are the numbers. For very large jails, the average cost is 5.9 cents a minute, but the *Order* increases rates by only 5 cents. For large jails, the average cost is 8.8 cents a minute, but the *Order* again increases rates by only 5 cents. For medium jails, the average cost climbs to 20.9 cents a minute, but the *Order* increases rates by only 9 cents. And for small jails, the average cost jumps to 40.9 cents a minute, but the *Order* again increases rates by only 9 cents.¹¹ In total, the cost data from the National Sheriffs' Association that this *Order* says is "credible" shows annual administration costs of \$244,253,292 for jails, whereas the rate increases adopted by the Commission would yield only \$136,704,062 in revenue.¹² There's a word for rate caps set below costs: confiscatory.

Second, even if the *Order* has correctly estimated facility-administration costs—and the cap increases are passed through to prisons and jails to fully offset these newly recognized costs—these cap increases leave untouched many other legal flaws with last year's caps. Inmate calling service will continue to cost providers "about \$61,282,358 more than expected revenues once the rates become permanent."¹³ The caps will continue to be "set based on averages, [which] by definition means a significant number of facilities will face caps set at or below their costs of service."¹⁴ The caps will continue to "fail to compensate inmate calling service providers for the average cost of serving *each and every tier of jails*."¹⁵ And the caps will continue to "cover only about 64% of the cost of serving small jails, which according to our own data account for more than one third of all jails in the country."¹⁶ What does the *Order* do to address these preexisting flaws? Nothing. Instead, it doubles down by refusing to "revisit the rate structure or overall methodology used" in the *Second Interstate Inmate Calling Order*.¹⁷ And so we shouldn't be surprised to see history repeat itself in court.

¹⁰ *Order* at para. 28.

¹¹ See Letter from Mary J. Sisak, Attorney for National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (June 12, 2015) (laying out facility-administration costs for different types of jails).

¹² Our data show inmates each year using 201,694,437 minutes in small jails, 677,123,743 minutes in medium jails, 1,213,917,345 minutes in large jails, and 2,672,372,399 minutes in very large jails. To calculate annual costs, I multiplied the total number of minutes for each facility type by the facility-administration costs per minute estimated by the National Sheriffs' Association. To calculate total head room, I multiplied the total number of minutes for each facility type by the per-minute rate increases adopted in the *Order*.

¹³ *Second Interstate Inmate Calling Order*, 30 FCC Rcd at 12965 (Dissenting Statement of Commissioner Ajit Pai).

¹⁴ *Id.* at 12968.

¹⁵ *Id.* at 12966.

¹⁶ *Id.* The provider-specific portion of the small-jail cap is 22 cents and the average cost to provide service to small jails is 34.4 cents. Factoring in the cap increase and associated facilities costs shows just how far off the mark these new caps still are. The cap increase is only 9 cents, but the average facility cost is 40.9 cents according to National Sheriffs' Association data. That means the new cap (31 cents) only accounts for about 41% of the total costs of service (75.3 cents) in small jails.

¹⁷ *Order* at note 83.

Third, I cannot condone the *Order*'s attempted end-run around the Administrative Procedure Act and the federal courts. The *Order* claims to be a straightforward response to a petition for reconsideration filed by Michael S. Hamden, an attorney with more than 25 years of experience representing prisoners.¹⁸ That's just not true. As Mr. Hamden himself explained in exasperation to the Commission just two weeks ago, his petition asked the Commission to prohibit, or at least limit, site commissions; the last thing he had in mind was an *increase* in the rate caps.¹⁹ The record in response to his petition bears this out. Commenters focused squarely on the question of site commissions, not how much to raise caps to account for facility-administration costs. And the Commission itself struggles to identify *any* new cost data since his petition was filed. Ultimately, the *Order* relies on studies and proposals that have gathered dust in the record for over a year.

In other words, what the Commission is really doing here is reconsidering the *Second Interstate Inmate Calling Order* on its own motion. The problem is that it's doing so 199 days late; the deadline for such reconsideration was January 18, 2016.²⁰ By avoiding the usual notice-and-comment rulemaking that occurs after an agency loss in court—a course the FCC followed after its first court loss in this proceeding—the FCC evades the law.²¹ And the agency further ignores judicial oversight by decreeing that these new caps shall be effective in 90 days, despite not one but two court stays currently in effect.²²

None of this, I fear, is going to end well. Last October, for example, my colleagues voted for regulations they claimed would reduce phone rates for inmates across the country. But that rate reduction never came to pass. Indeed, for many inmates and their families, the situation only got worse. Consider the case of Connie Pratt, who lives in Chico, California. Ms. Pratt's son is incarcerated, and she was looking forward to her phone bill coming down as a result of the FCC's action last year. But on June 20, the date that the FCC's order was supposed to take effect, the cost of a 15-minute phone call with her son increased from \$7.20 to \$9.77. Even before that price increase, Ms. Pratt spent more than 20% of her total monthly income to keep in touch with her son. And after prices went up, she said that it would be even tougher for her to speak with him on a regular basis. So for Ms. Pratt, the Commission's vote last year didn't just represent a false promise. It actually made things worse.²³

What lessons should we learn from our past failures? First, good intentions are not enough, and we cannot substitute emotion for the law and the facts. Second, bipartisan consensus makes for good policy and good law. We wouldn't be in this position had the Commission adopted the evidence-based proposal to substantially reduce rates that I put on the table almost three years ago. Because the agency is simply repeating its mistakes in this deeply troubled rulemaking proceeding, I dissent.

¹⁸ *Order* at para. 1; Petition of Michael S. Hamden for Partial Reconsideration, WC Docket No. 12-375 (Jan. 19, 2016).

¹⁹ Letter from Michael S. Hamden, Attorney and Counselor at Law, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (July 22, 2016).

²⁰ See 47 C.F.R. § 1.108 ("The Commission may, on its own motion, reconsider any action made or taken by it within 30 days from the date of public notice of such action . . .").

²¹ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170 (2014) (proposing reforms after the Commission's first attempt at rules was stayed).

²² *Order* at para. 45.

²³ Eric Markowitz, Why Prison Phone Rates Keep Going Up Even Though The FCC Regulated Them, *International Business Times* (June 30, 2016), available at <http://www.ibtimes.com/why-prison-phone-rates-keep-going-even-though-fcc-regulated-them-2388200>.