

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

STATE OF OKLAHOMA ex rel. JOE M.  
ALLBAUGH, INTERIM DIRECTOR OF THE  
OKLAHOMA DEPARTMENT OF  
CORRECTIONS; THE STATES OF ARIZONA,  
ARKANSAS, KANSAS, INDIANA, LOUISIANA,  
MISSOURI, NEVADA and WISCONSIN;  
NATIONAL ASSOCIATION OF REGULATORY  
UTILITY COMMISSIONERS, on behalf of its  
members; JOHN WHETSEL, SHERIFF OF  
OKLAHOMA COUNTY, OKLAHOMA;  
OKLAHOMA SHERIFFS' ASSOCIATION, on  
behalf of its members; INDIANA SHERIFFS'  
ASSOCIATION, on behalf of its members;  
MARION COUNTY SHERIFF'S OFFICE; and  
LAKE COUNTY SHERIFF'S DEPARTMENT,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION  
and the UNITED STATES OF AMERICA,

Respondents.

Case No. 16-1339  
consolidated with  
Case No. 16-1321

**STATE AND LOCAL GOVERNMENT PETITIONERS'  
MOTION FOR STAY PENDING REVIEW**

(Counsel listed on the following pages)

**James Bradford Ramsay***General Counsel***Jennifer Murphy***Assistant General Counsel*

National Association of Regulatory

Utility Commissioners

1101 Vermont Avenue, N.W., Suite 200

Washington, D.C. 20005

P: (202) 898-2207

E: jramsay@naruc.org

COUNSEL FOR NATIONAL ASSOCIATION  
OF REGULATORY UTILITY COMMISSIONERS**Danny Honeycutt**

Oklahoma County Sheriff's Office

201 N. Shartel Ave.

Oklahoma City, OK 73102

P: (405) 713-2050

E: sodanhon@okcounty.org

COUNSEL FOR JOHN WHETSEL, SHERIFF  
OF OKLAHOMA COUNTY, OKLAHOMA**Mark Brnovich***Attorney General of Arizona***Dominic E. Draye***Deputy Solicitor General*

Arizona Office of the Attorney General

1275 West Washington

Phoenix, AZ 85007

P: (602) 542-5025

E: dominic.draye@azag.gov

COUNSEL FOR STATE OF ARIZONA

**E. Scott Pruitt***Attorney General of Oklahoma***Patrick R. Wyrick***Solicitor General***Mithun Mansinghani***Deputy Solicitor General***Nathan B. Hall***Assistant Solicitor General*

Oklahoma Office of the Attorney General

313 NE 21st Street

Oklahoma City, OK 73105

P: (405) 521-3921

E: Mithun.Mansinghani@oag.ok.gov

COUNSEL FOR STATE OF OKLAHOMA

**Christopher J. Collins**

Collins, Zorn &amp; Wagner

429 NE 50th Street, 2nd Floor

Oklahoma City, OK 73105

P: (405) 524-2070

E: cjc@czwglaw.com

COUNSEL FOR OKLAHOMA SHERIFFS'  
ASSOCIATION**Leslie Rutledge***Attorney General of Arkansas***Nicholas Bronni***Deputy Solicitor General*

Arkansas Attorney General

323 Center Street, Suite 200

Little Rock, AR 72201

P: (501) 682-8090

E: lee.rudofsky@arkansasag.gov

COUNSEL FOR STATE OF ARKANSAS

**Karla L. Palmer**

Hyman, Phelps & McNamara, P.C.  
700 13th Street, N.W., Suite 1200  
Washington, D.C. 20005  
P: (202) 737-5600  
E: kpalmer@hpm.com

**Tonya J. Bond****Joanne T. Rouse**

Plews Shadley Racher & Braun LLP  
1346 N. Delaware Street  
Indianapolis, IN 46202  
P: (317) 637-0781  
E: tbond@psrb.com  
E: jrouse@psrb.com

COUNSEL FOR THE INDIANA SHERIFFS'  
ASSOCIATION, MARION COUNTY  
SHERIFF'S OFFICE, AND LAKE COUNTY  
SHERIFF'S DEPARTMENT

**Derek Schmidt**

*Attorney General of Kansas*

**Jeffrey A. Chanay**

*Chief Deputy Attorney General*

Kansas Office of the Attorney General  
Memorial Hall, 3rd Floor  
120 SW 10th Avenue  
Topeka, KS 66612-1597  
P: (785) 368-8435  
E: jeff.chanay@ag.ks.gov

COUNSEL FOR STATE OF KANSAS

**Gregory F. Zoeller**

*Attorney General of Indiana*

**Thomas M. Fisher**

*Solicitor General*

Office of the Indiana Attorney General  
302 W. Washington Street, IGC-South, Fifth  
Floor  
Indianapolis, IN 46204  
P: (317) 232-6255  
E: Tom.Fisher@atg.in.gov

COUNSEL FOR STATE OF INDIANA

**Jeff Landry**

*Attorney General of Louisiana*

**Patricia H. Wilton**

*Assistant Attorney General*

Louisiana Department of Justice  
1885 North Third Street  
Baton Rouge, LA 70802  
P: (225) 326-6006  
E: wiltonp@ag.louisiana.gov

COUNSEL FOR STATE OF LOUISIANA

**Chris Koster**

*Attorney General of Missouri*

**J. Andrew Hirth**

*Deputy General Counsel*

Missouri Office of the Attorney General  
P.O. Box 899  
207 W. High Street  
Jefferson City, MO 65102  
P: (573) 751-0818  
E: andy.hirth@ago.mo.gov

COUNSEL FOR STATE OF MISSOURI

**Adam Paul Laxalt**

*Attorney General of Nevada*

**Lawrence VanDyke**

*Solicitor General*

Office of the Nevada Attorney General

100 N. Carson Street

Carson City, NV 89701-4717

P: (775) 684-1100

E: LVanDyke@ag.nv.gov

COUNSEL FOR STATE OF NEVADA

**Brad D. Schimel**

*Attorney General of Wisconsin*

**Misha Tseytlin**

*Solicitor General*

**Daniel P. Lennington**

*Deputy Solicitor General*

Wisconsin Department of Justice

Post Office Box 7857

Madison, WI 53707-7857

P: (608) 267-9323

E: tseytlinm@doj.state.wi.us

COUNSEL FOR STATE OF WISCONSIN

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit rule 26.1, the following parties submit these disclosure statements. National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC is a “trade association” as that term is defined in Circuit Rule 26.1(b). NARUC has no parent company. No publicly held company has any ownership interest in NARUC. NARUC represents those government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, among other things, the telecommunications within their respective borders.

The Indiana Sheriffs’ Association (ISA) submits that it was established in 1930 and incorporated as a nonprofit organization in the State of Indiana in 1977. The ISA is a “trade association” as that term is defined in Circuit Rule 26.1(b). The ISA acts as the representative for the ninety-two Indiana county sheriff’s offices to promote and improve the delivery of county sheriffs’ services, foster professionalism through the criminal justice system, and to encourage the appreciation and practice of law enforcement in the State in Indiana. The ISA has no parent company. No publicly held company has any ownership interest in the ISA.

The Oklahoma Sheriffs’ Association (OSA) is a nonprofit 501(c)(3) registered with the Oklahoma Secretary of State since 1991. The OSA is a “trade association” as that term is defined in Circuit Rule 26.1(b). The OSA’s mission is to represent the

elected Sheriffs in all 77 counties of Oklahoma. The OSA has no parent company. No publicly held company has any ownership interest in the OSA.

All other Petitioners are State or local government entities and are not required to file a disclosure statement.

Respectfully submitted,

/s/ Tonya J. Bond  
Tonya J. Bond  
COUNSEL FOR THE INDIANA  
SHERIFFS' ASSOCIATION

/s/ James B. Ramsay  
James Bradford Ramsay  
COUNSEL FOR NATIONAL ASSOCIATION OF  
REGULATORY UTILITY COMMISSIONERS

/s/ Christopher J. Collins  
Christopher J. Collins  
COUNSEL FOR OKLAHOMA SHERIFFS'  
ASSOCIATION

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## INTRODUCTION

After the Federal Communications Commission (“the Commission”) issued a rule that, for the first time in its history, attempted to use Section 276 of the Telecommunications Act to limit the rates payphone providers charge for the use of Inmate Calling Services (“ICS”) in intrastate calls, this Court issued a stay of that rule while challenges to the Commission’s intrastate jurisdiction were being litigated. The Commission then attempted to enforce earlier rate caps, which it had previously imposed on interstate calls, on intrastate calls as well, claiming that this Court’s stay did not apply to those rate caps. The Court issued a second stay, ordering those rate caps also enjoined as applied to intrastate calls, but not as to interstate calls.

Now, the Commission is engaged in its third attempt to impose rate caps on intrastate ICS calls. Rather than accepting the third request by those challenging the Commission’s action to stay the newest rule—especially in light of this Court’s two previous stays—the Commission issued an order denying the stay request, forcing Petitioners to once again expend time and resources asking this Court to stay the Commission’s rate caps on intrastate ICS calls while its authority to do so is litigated.

The Commission’s newest order repeats the same fundamental flaw alleged by Petitioners—it attempts to set intrastate rates outside of its statutory jurisdiction. As it has twice before, this Court should again stay the Order challenged in this action until its validity is fully and finally litigated on the merits.

## BACKGROUND

In its *First Report and Order*, adopted August 9, 2013, the Commission imposed caps on interstate ICS rates.<sup>1</sup> This Order did not purport to address intrastate rates. Several private ICS providers petitioned this Court for review and asked the court for a stay pending review. The Court issued a partial stay of the Commission's rules.<sup>2</sup> After briefing on the merits was completed, the Commission moved the Court to hold the case in abeyance based on its decision to reconsider and potentially revise its rules, which was granted in December 2014.

Ten months later, while the cases challenging the *First Report and Order* were still being held in abeyance, the Commission adopted its *Second Report and Order*, which set new rate caps and, most importantly for Petitioners, extended the reach of those rate caps to both interstate and intrastate ICS calls.<sup>3</sup> The undersigned State and Local Government Petitioners were not parties to the first case challenging the *First Report and Order*, which regulated only interstate ICS call rates. However, because the *Second Report and Order* sought to regulate areas traditionally and statutorily left to the States, the State and Local Government Petitioners filed suit to challenge the *Second Report*

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<sup>1</sup> Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, FCC 13-113, 78 Fed. Reg. 67956 (2013).

<sup>2</sup> Order, *Securus Techs., Inc. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014).

<sup>3</sup> Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, FCC 15-136, 80 Fed. Reg. 79135 (2015).

*and Order* along with the ICS providers.<sup>4</sup> The State and Local Government Petitioners' challenge is based primarily on the argument that the Commission's Order setting intrastate ICS rate caps simultaneously exceeds the Commission's authority and infringes upon the States' authority to regulate intrastate calls.<sup>5</sup>

Again, the parties challenging the Commission's *Second Report and Order* filed motions for stay pending review in this Court. The Petitioners' various motions for stay were premised on different arguments. The ICS providers argued that a stay was warranted because (1) the new rate caps would not adequately compensate providers for costs they incur *as providers*, (2) the Commission did not have the statutory authority or jurisdiction to impose rate caps on intrastate ICS, and (3) the Commission lacked authority to regulate certain ancillary services, video services, and VoIP services.<sup>6</sup> Later, the State of Oklahoma moved for leave to file a motion for a stay, agreeing with the ICS providers that the Commission lacked the statutory authority to impose intrastate rate caps, but adding that another argument justified a

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<sup>4</sup> See *Global Tel\*Link v. FCC*, No. 15-1461 and consolidated cases (D.C. Cir.).

<sup>5</sup> See Brief of State and Local Government Petitioners, *Global Tel\*Link v. FCC*, No. 15-1461, at 5-11, 24-47 (D.C. Cir. June 6, 2016).

<sup>6</sup> See Motion of Global Tel\*Link for Partial Stay, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Jan. 27, 2016); Emergency Motion of Securus for Partial Stay, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Jan. 27, 2016); Motion of Telmate, LLC for Stay Pending Judicial Review, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Jan. 29, 2016); Motion of CenturyLink Public Communications, Inc. for Partial Stay Pending Judicial Review, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Feb. 5, 2016).

stay: the challenged rate caps failed to account for any costs incurred by *correctional facilities* in the provision of ICS.<sup>7</sup>

This Court again granted a partial stay, holding that “petitioners have satisfied the stringent requirements for a stay pending court review,” but denying Oklahoma’s motion for leave to file a motion for stay.<sup>8</sup> Although the Court did not give its reasons for granting the stay, because Oklahoma’s motion for leave was denied, the reasons could not have been that correctional facilities were being undercompensated by the stayed rate caps or because they would suffer irreparable harm, since such arguments were presented by Oklahoma and not the ICS providers.<sup>9</sup>

The Court provided further clarification of its reasons for the stay after the Commission took the position that the stay applied only to the order’s permanent intrastate rate caps, and not to higher, interim rate caps that the order newly imposed on intrastate calls.<sup>10</sup> When the Petitioners objected to this position, arguing that the stay was premised on the argument that the Commission lacked authority to set

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<sup>7</sup> See Oklahoma’s Motion for Stay of FCC Rule, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Feb. 22, 2016)

<sup>8</sup> Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016).

<sup>9</sup> Although Telmate did note that the Commission was arbitrary in failing to account for the legitimacy of facility costs, this was in the context of its argument that the Order was arbitrary and capricious for failing either to prohibit site commissions or to account for them as a cost to *providers* in calculating its rate caps. Motion of Telmate, LLC for Stay Pending Judicial Review, pp. 10-13, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Jan. 29, 2016).

<sup>10</sup> See Opp. of FCC to Mot. to Modify, Reconsider, or Enforce Stay, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 22, 2016).

intrastate rate caps altogether (no matter the rate), this Court for a third time granted the Petitioners' motions. This stay made clear that the interim rate caps are also stayed "insofar as the FCC intends to apply that provision to intrastate calling services," but that the cap on "interstate calling services is not affected by this Order."<sup>11</sup> The case then proceeded to merits briefing pursuant to an agreed scheduling order.

Over a month after the Petitioners filed their briefs on the merits, the Commission announced that, at its next meeting, it would vote on an order for reconsideration of its *Second Report and Order* that would modify the rate caps by accounting for costs incurred by correctional facilities. The Commission then asked the Court to hold the challenges to the *Second Report and Order* in abeyance while the Commission voted on reconsideration, arguing that because the order on reconsideration might increase the rate caps, central issues in the case would be mooted or their scope substantially altered.<sup>12</sup> The State and Local Government Petitioners objected to holding the case in abeyance, arguing that an increase in the challenged intrastate rate caps did not address the primary reason the State and Local Government Petitioners sought review: the Commission lacks the authority and jurisdiction to set intrastate rate caps at all.<sup>13</sup> On August 4, 2016, the Commission

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<sup>11</sup> See Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 23, 2016).

<sup>12</sup> See Mot. of Resp. to Hold Cases in Abeyance, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. July 20, 2016).

<sup>13</sup> Opposition to Motion to Hold in Abeyance, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. July 29, 2016).

voted to adopt the *Order on Reconsideration*, which was released on August 9, 2016.<sup>14</sup> Ten days later, the Court once again agreed with Petitioners and denied the motion to hold the case in abeyance.<sup>15</sup>

Despite the stays put in place by this Court, the Commission set the effective date for its *Order on Reconsideration* on December 12, 2016 (90 days after publication).<sup>16</sup> The undersigned Petitioners, as well as other parties, asked the Commission to stay enforcement of the *Order on Reconsideration* out of respect for this Court's previous stays of its ICS Orders.<sup>17</sup> On September 30, 2016, the Commission issued an order denying the stay requests.<sup>18</sup> Petitioners now ask this Court to once again stay enforcement of the Commission's intrastate ICS rate-setting until challenges to that authority can be fully and finally litigated on the merits. Pursuant to Circuit Rule 18(a)(2), counsel for Petitioners has contacted by telephone counsel for the Commission with notification of this motion in advance of filing.

### LEGAL STANDARD

This Court applies the traditional factors in deciding whether to grant a stay pending review, considering whether: (1) petitioners are likely to prevail on appeal; (2)

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<sup>14</sup> Order on Reconsideration, *Rates for Interstate Inmate Calling Services*, FCC 16-102, 81 Fed. Reg. 62818 (2016).

<sup>15</sup> Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Aug. 19, 2016).

<sup>16</sup> Order on Reconsideration, *supra* n.14, at ¶ 3 n.11, ¶ 45.

<sup>17</sup> See Exhibit A, State and Local Government Petitioners' Petition for Stay Pending Judicial Review (Sep. 2, 2016).

<sup>18</sup> See Exhibit B, Order Denying Stay Petitions, DA-16-1119 (Sep. 30, 2016).

petitioners will suffer irreparable harm absent a stay; (3) other parties will not be substantially harmed if a stay is granted; and (4) the public interest favors a stay.<sup>19</sup>

## **ARGUMENT**

This Court has ruled three times in Petitioners' favor in their challenge to the Commission's authority to set intrastate rate caps: twice when Petitioners argued they were likely to succeed on the merits of their argument that the Commission lacked jurisdiction to regulate intrastate rates and once when Petitioners argued that this question is the central issue in their challenge, regardless of whether the Commission later raises those rate caps in an attempt to accommodate facilities' costs in providing ICS. Petitioners ask that this Court again maintain the status quo by staying implementation of the Commission's repeated attempts to regulate outside of its jurisdiction while these issues are fully and finally litigated.

### **I. Petitioners are likely to succeed on the merits of their jurisdictional challenge.**

#### **A. The Commission lacks authority to set rate caps on intrastate ICS.**

The State and Local Government Petitioners argue in their suit challenging the *Second Report and Order* that the Commission lacks the statutory authority to create intrastate ICS rate caps. As they exhaustively explain in their brief on the merits, the text, context, history, purpose, and long-standing interpretations of the Telecommunications Act of 1996 all lead to the conclusion that the Commission does

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<sup>19</sup> See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).



*not* have plenary authority to regulate intrastate ICS rates to ensure that they are “just, reasonable, and fair,” as they attempt to do in both the *Second Report and Order* and the new *Order on Reconsideration*.<sup>20</sup> The State and Local Government Petitioners offer a brief summary of those arguments below to show that they are likely to succeed on the merits in their challenges to both the *Order on Reconsideration* and the *Second Report and Order*.

The Commission’s attempt to impose rate caps on ICS providers is premised on two grants of statutory authority. First, it relies on Section 201(b) of the Communications Act, which allows the Commission to ensure that communication charges are “just and reasonable.”<sup>21</sup> But that authority is explicitly limited to “interstate and foreign communication.”<sup>22</sup>

To justify its imposition of intrastate rate caps, the Commission attempts to rely on a far different provision: Section 276(b)(1)(A) of the Telecommunications Act of 1996, which requires that payphone providers be “fairly compensated” for their services.<sup>23</sup> This provision was passed in response to the problem that independent payphone providers were unable to compete with the payphone services of telecommunication carriers, because the carriers discriminated against independent

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<sup>20</sup> State and Local Government Petitioners’ Brief, *Global Tel\*Link v. FCC*, No. 15-1461, pp. 5-11, 24-47 (D.C. Cir. June 6, 2016).

<sup>21</sup> 47 U.S.C. § 201(b).

<sup>22</sup> *Id.* at § 201(a).

<sup>23</sup> 47 U.S.C. § 276(b)(1)(A).

providers in the rates they would charge and because, unlike carriers, independent providers were not compensated for certain toll-free calls.<sup>24</sup> Thus, Section 276(b)(1)(A) “addressed the problem of uncompensated calls” by mandating that payphone providers be fairly compensated for each and every call.<sup>25</sup> Specifically, the “provision responded to the development of long-distance access codes and 800 numbers that allowed callers to use payphones without depositing coins, thereby depriving payphone operators of revenue,” and the FCC implemented that provision by mandating that “the long-distance carriers who benefited from such ‘dial-around’ calls ... compensate payphone providers.”<sup>26</sup> In short, Section 276(b)(1)(A) empowers the FCC “[t]o ensure fair competition in the payphone market” by ensuring that payphone providers are not undercompensated.<sup>27</sup>

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<sup>24</sup> *Illinois Pub. Telecommunications Ass’n v. F.C.C.*, 117 F.3d 555, 558-59 (D.C. Cir. 1997), *decision clarified on reh’g*, 123 F.3d 693 (D.C. Cir. 1997).

<sup>25</sup> *Am. Pub. Commc’ns Council v. F.C.C.*, 215 F.3d 51, 53 (D.C. Cir. 2000).

<sup>26</sup> *Illinois Pub. Telecommunications Ass’n v. F.C.C.*, 752 F.3d 1018, 1026 (D.C. Cir. 2014); *see also Glob. Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 51 (2007) (stating that “Congress recognized that the ‘free’ call would impose a cost upon the payphone operator; and it consequently” enacted Section 276(b)(1)(A) to remedy that problem); *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 118 (D.C. Cir. 2008) (noting that “[t]he concept [of Section 276(b)(1)(A)] is simple: Telecommunications carriers must compensate [payphone providers] for calls made from payphones,” including for calls that don’t require the consumer to deposit a coin, such as calls with calling cards).

<sup>27</sup> *Illinois Pub. Telecommunications Ass’n*, 752 F.3d at 1020; *see also New England Pub. Commc’ns Council v. F.C.C.*, 334 F.3d 69, 71 (D.C. Cir. 2003).

In the context of its recent ICS regulation, the Commission for the first time asserts that Section 276 provides it not simply with the authority to prevent undercompensation of independent payphone operators to ensure robust competition with carrier payphone operations, but also with the far-broader authority to set intrastate rate caps to levels it deems “fair, just, and reasonable.”<sup>28</sup> But as the statutory history and case law of Section 276(b)(1)(A) described above makes clear, that provision does not provide the Commission with the authority to limit the compensation given to payphone providers or plenary power to regulate intrastate payphone rates.

Other evidence of statutory meaning confirms this conclusion. In enacting Section 276(b)(1)(A), Congress deliberately chose different language than the well-established “just and reasonable” authority provided to regulate interstate rates in Section 201(b).<sup>29</sup> Accordingly, Section 276(b)(1)(A) does not provide the Commission the claimed authority to regulate intrastate payphone rates in the same manner as it regulates interstate rates, for “when Congress uses different language in different sections of a statute, it does so intentionally.”<sup>30</sup> Thus, the Commission interprets

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<sup>28</sup> See, e.g., Order on Reconsideration, *supra* n.14, at ¶¶ 13, 14, 33.

<sup>29</sup> See 47 U.S.C. § 201(b).

<sup>30</sup> *Florida Pub. Telecommunications Ass’n, Inc. v. F.C.C.*, 54 F.3d 857, 860 (D.C. Cir. 1995) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Section 276 unreasonable when it justifies its rate caps by claiming the authority to regulate intrastate ICS rates to ensure they are “fair, just, and reasonable.”<sup>31</sup>

Other portions of the text of Section 276 confirm the conclusion that the statute gives the authority to prevent undercompensation of payphone providers, not the authority to broadly ensure rates are not excessive. The exceptions to Section 276’s “fair compensation” mandate—such as for emergency calls<sup>32</sup>—make sense only if the mandate is designed to ensure providers are not *under*compensated rather than also designed to prevent excessive charges. If what Congress was trying to prevent was excessive charges to consumers (rather than underpayments to independent payphone operators), explicitly exempting emergency calls to allow for exorbitant rates in those situations would be contrary to all notions of the public good; meanwhile, carving out a deliberate exception for emergency situations in a rule that prevents undercompensation of payphone operators comports with sound notions of public policy.

And contemporaneous interpretations of Section 276(b)(1)(A) by all three branches of government show that the original intent and public meaning of the provision comports with Petitioners’ interpretation. In addition to legislative committee reports,<sup>33</sup> the Commission itself had always interpreted Section

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<sup>31</sup> See, e.g., Order on Reconsideration, *supra* n.14, at ¶¶ 13, 14, 33.

<sup>32</sup> *Id.* at § 276(b)(1)(A).

<sup>33</sup> See H.R. REP. 104-204, 88 (1995); H.R. CONF. REP. 104-458, 158 (1996).

276(b)(1)(A) as preventing undercompensation and had always wielded its authority in that way<sup>34</sup>—and the courts (including this Court) agreed.<sup>35</sup> In fact, the Commission previously *disclaimed* the authority to regulate inmate calling compensation levels that were established pursuant to contract.<sup>36</sup>

To the extent that there is any question about whether the Commission has plenary authority to regulate intrastate payphone rates as “just, reasonable, and fair”—as opposed to merely preventing undercompensation of payphone providers—the Communications Act and precedent require the Commission’s intrastate regulatory authority to be construed narrowly. This Court has held that Section 276 does not confer jurisdiction over intrastate rates unless it is “so unambiguous or straightforward so as to override” the Act’s directive in Section 152(b) retaining that authority exclusively in the States.<sup>37</sup> Thus, *Chevron* deference is inapplicable and any

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<sup>34</sup> See *Illinois Pub. Telecommunications Ass’n*, 117 F.3d at 559.

<sup>35</sup> See *APCC Servs., Inc.*, 418 F.3d 1238, 1241 (D.C. Cir. 2005); *New England Pub. Commc’ns Council*, 334 F.3d at 71, 75-76; *Am. Pub. Commc’ns Council*, 215 F.3d at 53; *Illinois Pub. Telecommunications Ass’n*, 117 F.3d at 559.

<sup>36</sup> See *In the Matter of Implementation of the Pay Tel. Reclassification & Comp. Provisions of the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 21233, ¶ 72 (1996) (“[W]henver a [provider] is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied.”); see also *id.* at ¶ 52 (ruling that “[t]he level of 0+ commissions paid pursuant to contract on operator service calls is beyond the scope of both Section 276 and this proceeding”).

<sup>37</sup> *Illinois Pub. Telecomms. Ass’n*, 117 F.3d at 561 (citing 47 U.S.C. § 152(b)); see also *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 360 (1986); *New England Publ. Commc’ns Council*, 334 F.3d at 73, 78.

deference given by this Court should be towards any reasonable interpretation which most limits the Commission's intrastate authority.

For these reasons, Petitioners are likely to succeed on the merits of their argument that the Commission is without statutory authority to impose rate caps on intrastate ICS calls.

**B. This Court's previous stays of the *Second Report and Order* should be extended to the *Order on Reconsideration*, which contains the same flaws that justified this Court's earlier stays.**

Given the strength of Petitioners' jurisdictional arguments summarized above, it is not surprising that this Court has already twice stayed the Commission's intrastate rate caps, while leaving certain interstate rate caps in place. Thus, this Court has already indicated that Petitioners' are likely to succeed on the merits of their jurisdictional arguments, and the Court need not re-decide that issue. Because the *Order on Reconsideration* continues to attempt to cap intrastate rates, this Court's previous stays should be extended to stay the *Order on Reconsideration*.

As detailed above, in issuing its first stay of the *Second Report and Order*, this Court held that "petitioners have satisfied the stringent requirements for a stay pending court review."<sup>38</sup> And when the Commission attempted to impose its interim intrastate rate caps despite the stay, the Court issued a second stay, enjoining enforcement of the interim rate caps "insofar as the FCC intends to apply that

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<sup>38</sup> Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016).

provision to *intrastate* calling services,” while noting that “interstate calling services is not affected by this Order.”<sup>39</sup> Thus, this Court has already indicated that those challenging the rate caps are likely to succeed on the merits of their argument that the intrastate aspects of the Commission’s attempted ICS regulation are unlawful—and that Petitioners have otherwise “satisfied the stringent requirements for a stay.”

It is also clear that the Commission’s *Order on Reconsideration* does not differ from the enjoined *Second Report and Order* in this respect. Both Orders attempt to establish intrastate rate caps. That the numerical rate of those caps differs in the *Order on Reconsideration* does not change the issues underlying the Commission’s authority to set intrastate caps in the first place. It is for precisely this reason that the State and Local Government Petitioners opposed holding the suit challenging the *Second Report and Order* in abeyance pending adoption of the *Order on Reconsideration*,<sup>40</sup> which resulted in the Court denying the Commission’s motion for an abeyance.<sup>41</sup>

In light of these facts, and knowing that this Court does not grant stays lightly, one might have expected the Commission to proceed cautiously and stay implementation of its *Order on Reconsideration* sua sponte (or when requested by Petitioners) in an attempt to give full effect to both the letter and spirit of this Court’s

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<sup>39</sup> See Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 23, 2016) (emphasis added).

<sup>40</sup> See Opposition to Motion to Hold in Abeyance, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. July 29, 2016).

<sup>41</sup> Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Aug. 19, 2016).

dual stays of the *Second Report and Order*. Instead, the Commission denied various Petitioners' requests for a stay of the *Order on Reconsideration*, again looking for every excuse to avoid this Court's stay and push forward with enforcing its intrastate rate caps. However, none of those excuses proffered by the Commission in defense of a denial of a stay are persuasive.

*First*, the Commission denied the stay requests because "Petitioners largely reiterate arguments they raised previously and which [the Commission] disposed of in our order denying petitions seeking stays of the [*Second Report and Order*]," relying on its "previous analysis."<sup>42</sup> But this Court *granted* two stays based on those same arguments. The fact that this Court effectively reversed the Commission's denial of stays, implicitly rejecting the Commission's "previous analysis," should have given the Commission some pause in taking the same action for the same reason. The Commission's reliance on its previous analysis is insufficient to justify reversing course on staying the Commission's attempts to cap intrastate ICS rates.

*Second*, the Commission appears to argue that the previous stays are irrelevant to the *Order on Reconsideration* because they might not have been based on Petitioners' jurisdictional arguments, but rather on the arguments that "the rate caps were too low to cover [providers'] costs" or "that the Commission acted unreasonably when it recognized the possibility that facilities incur legitimate costs in providing access to

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<sup>42</sup> See Exhibit B, Order Denying Stay Petitions at ¶ 10.



ICS.”<sup>43</sup> But this ignores the fact that the Court’s second stay was explicitly limited to the interim rate caps as applied to *intrastate* calls, and not as to interstate calls—an action that accords with Petitioners’ jurisdictional arguments, not with the arguments challenging the methods of calculating the caps (which are the same for both intrastate and interstate calls). Moreover, as explained above, because the Court denied leave for Oklahoma to file its motion for stay, the Court’s grant of a stay is unlikely to have been premised on the arguments made only by Oklahoma and purportedly addressed by the *Order on Reconsideration*—that the Commission arbitrarily failed to recognize the legitimate costs incurred by facilities in providing ICS. Thus, the Commission’s attempt to avoid the necessary implications of this Court’s previous stays is ostrich-like, at best.

*Third*, the Commission argues that the *Order on Reconsideration* allows providers additional funds to recover their costs in providing ICS by accounting for costs incurred by facilities, thus purporting to address the other potential justification for the stay.<sup>44</sup> But the *Order on Reconsideration* is plain on its face that its increase of the rate caps is intended to account for costs incurred by *facilities*, not the undercompensation to providers in providing ICS alleged by the providers.<sup>45</sup> Specifically, the *Order on*

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<sup>43</sup> *Id.* at ¶ 21.

<sup>44</sup> *Id.* at ¶¶ 12-15.

<sup>45</sup> *See, e.g.,* Order on Reconsideration, *supra* n.14, at ¶ 3 (stating that “we have decided . . . to . . . expressly account for facilities’ ICS-related costs when calculating our rate caps”);

*Reconsideration* does not address the providers' two arguments that the rate caps are too low (1) because they rely on cost "averages" rather than ensuring that providers are fairly compensated for "each and every call,"<sup>46</sup> and (2) because the rate caps should have included the full amount of site commissions as costs incurred by providers in providing ICS.<sup>47</sup> Indeed, the Commission in its denial of the stay reiterates its adamant position that site commissions are *not* a cost of providing ICS, and thus should not "be included as costs under the rate caps."<sup>48</sup> Thus, it simply cannot be that the Commission's increase in rate caps to account for facility costs addresses what the Commission hopes was this Court's non-jurisdictional basis for a stay, namely, the lack of ability of ICS providers to recover the costs of paying site commissions. And to the extent the Commission attempts to claim that the increase in rate caps was to allow *both* providers and facilities to recoup their costs, this is yet another species of double-counting that the State and Local Government Petitioners' criticized in their brief,<sup>49</sup> and which the Commission itself noted in the *Order on Reconsideration*.<sup>50</sup>

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<sup>46</sup> See Motion of Global Tel\* Link for Partial Stay, *supra* n.6, at 15-16; Motion of Telmate for Partial Stay, *supra* n.6, at 14-16; Motion of CenturyLink for Partial Stay, *supra* n.6, at 8-13.

<sup>47</sup> See Motion of Global Tel\* Link for Partial Stay, *supra* n.6, at 9-12; Motion of Telmate for Partial Stay, *supra* n.6, at 10-13; Motion of CenturyLink for Partial Stay, *supra* n.6, at 13-14.

<sup>48</sup> Order on Reconsideration, *supra* n.14, at ¶¶ 16-20.

<sup>49</sup> State and Local Government Petitioners' Brief, *Global Tel\*Link v. FCC*, No. 15-1461, pp. 5-11, 57-58 (D.C. Cir. June 6, 2016).

<sup>50</sup> Order on Reconsideration, *supra* n.14, at ¶ 17 & n.69.

Accordingly, Petitioners' arguments concerning the Commission's lack of statutory authority to promulgate the *Order on Reconsideration* and this Court's previous stays of the Commission's earlier intrastate ICS rate caps both demonstrate that Petitioners are likely to succeed on the merits of their claims against the *Order on Reconsideration*.

## **II. The balance of equities favors a stay of the *Order on Reconsideration*.**

As noted above, this Court has already held that at least some of the various challenges to the Commission's intrastate ICS rate caps meet "the stringent requirements for a stay pending court review."<sup>51</sup> This necessarily includes a determination of the fact that, when considered in light of the Petitioners' likelihood of success on the merits, the balance of equities favors a stay.<sup>52</sup>

Those equitable considerations also warrant a stay of the Commission's *Order on Reconsideration*. For example, as stated in the attached affidavit of Tina Hicks, the Oklahoma Department of Corrections estimates it will lose \$1.2 million per year if the intrastate rate caps are not stayed—money that is not recoverable from the Commission even if Petitioners prevail on their challenge.<sup>53</sup> As the affidavit also

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<sup>51</sup> Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016).

<sup>52</sup> See *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008); *Lead Indus. Ass'n, Inc. v. Emtl. Prot. Agency*, 647 F.2d 1184, 1187 (D.C. Cir. 1980).

<sup>53</sup> Exhibit C, Affidavit of Tina Hicks, ¶¶ 11, 22.

explains, this loss of revenue will, in turn, undermine critical correctional and rehabilitative programs in jails and prisons—causing yet more irreparable harm.<sup>54</sup>

Nor will a stay cause increased harm to other parties; it would only maintain the status quo as it existed before the *Order on Reconsideration* (and before the *Second Report and Order*), pursuant to this Court’s partial stay of the *Second Report and Order*.<sup>55</sup> And the public interest is best served by ensuring that the Commission’s *Order on Reconsideration* is lawful and permitting judicial review before enforcement rather than by allowing it to go forward in the face of a high risk that it will be invalidated by this Court.<sup>56</sup>

## CONCLUSION

For the foregoing reasons, the undersigned State and Local Government Petitioners respectfully request that this Court stay the Commission’s implementation of 47 C.F.R. § 64.6010 as promulgated by the *Order on Reconsideration* (FCC 16-102) pending judicial review.

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<sup>54</sup> *Id.* at ¶¶ 20-23.

<sup>55</sup> *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (noting that a stay “seeks to maintain the status quo pending a final determination of the merits of the suit”).

<sup>56</sup> *See N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) (granting a temporary injunction of an agency rule in part because “the general public interest [is] served by agencies’ compliance with the law”).

DATED: October 4, 2016

Respectfully submitted,

**James Bradford Ramsay**

*General Counsel*

**Jennifer Murphy**

*Assistant General Counsel*

National Association of Regulatory

Utility Commissioners

1101 Vermont Avenue, N.W., Suite 200

Washington, D.C. 20005

P: (202) 898-2207

E: jramsay@naruc.org

COUNSEL FOR NATIONAL ASSOCIATION  
OF REGULATORY UTILITY COMMISSIONERS

**Danny Honeycutt**

Oklahoma County Sheriff's Office

201 N. Shartel Ave.

Oklahoma City, OK 73102

P: (405) 713-2050

E: sodanhon@okcounty.org

COUNSEL FOR JOHN WHETSEL, SHERIFF  
OF OKLAHOMA COUNTY, OKLAHOMA

**Mark Brnovich**

*Attorney General of Arizona*

**Dominic E. Draye**

*Deputy Solicitor General*

Arizona Office of the Attorney General

1275 West Washington

Phoenix, AZ 85007

P: (602) 542-5025

E: dominic.draye@azag.gov

COUNSEL FOR STATE OF ARIZONA

/s/ Mithun Mansinghani

**E. Scott Pruitt**

*Attorney General of Oklahoma*

**Patrick R. Wyrick**

*Solicitor General*

**Mithun Mansinghani**

*Deputy Solicitor General*

**Nathan B. Hall**

*Assistant Solicitor General*

Oklahoma Office of the Attorney General

313 NE 21st Street

Oklahoma City, OK 73105

P: (405) 521-3921

E: Mithun.Mansinghani@oag.ok.gov

COUNSEL FOR STATE OF OKLAHOMA

**Christopher J. Collins**

Collins, Zorn & Wagner

429 NE 50th Street, 2nd Floor

Oklahoma City, OK 73105

P: (405) 524-2070

E: cjc@czwglaw.com

COUNSEL FOR OKLAHOMA SHERIFFS'  
ASSOCIATION

**Leslie Rutledge**

*Attorney General of Arkansas*

**Nicholas Bronni**

*Deputy Solicitor General*

Arkansas Attorney General

323 Center Street, Suite 200

Little Rock, AR 72201

P: (501) 682-8090

E: lee.rudofsky@arkansasag.gov

COUNSEL FOR STATE OF ARKANSAS

**Karla L. Palmer**

Hyman, Phelps & McNamara, P.C.  
700 13th Street, N.W., Suite 1200  
Washington, D.C. 20005  
P: (202) 737-5600  
E: kpalmer@hpm.com

**Tonya J. Bond****Joanne T. Rouse**

Plews Shadley Racher & Braun LLP  
1346 N. Delaware Street  
Indianapolis, IN 46202  
P: (317) 637-0781  
E: tbond@psrb.com  
E: jrouse@psrb.com

COUNSEL FOR THE INDIANA SHERIFFS'  
ASSOCIATION, MARION COUNTY  
SHERIFF'S OFFICE, AND LAKE COUNTY  
SHERIFF'S DEPARTMENT

**Derek Schmidt**

*Attorney General of Kansas*

**Jeffrey A. Chanay**

*Chief Deputy Attorney General*

Kansas Office of the Attorney General  
Memorial Hall, 3rd Floor  
120 SW 10th Avenue  
Topeka, KS 66612-1597  
P: (785) 368-8435  
E: jeff.chanay@ag.ks.gov

COUNSEL FOR STATE OF KANSAS

**Gregory F. Zoeller**

*Attorney General of Indiana*

**Thomas M. Fisher**

*Solicitor General*

Office of the Indiana Attorney General  
302 W. Washington Street, IGC-South, Fifth  
Floor  
Indianapolis, IN 46204  
P: (317) 232-6255  
E: Tom.Fisher@atg.in.gov

COUNSEL FOR STATE OF INDIANA

**Jeff Landry**

*Attorney General of Louisiana*

**Patricia H. Wilton**

*Assistant Attorney General*

Louisiana Department of Justice  
1885 North Third Street  
Baton Rouge, LA 70802  
P: (225) 326-6006  
E: wiltonp@ag.louisiana.gov

COUNSEL FOR STATE OF LOUISIANA

**Chris Koster**

*Attorney General of Missouri*

**J. Andrew Hirth**

*Deputy General Counsel*

Missouri Office of the Attorney General  
P.O. Box 899  
207 W. High Street  
Jefferson City, MO 65102  
P: (573) 751-0818  
E: andy.hirth@ago.mo.gov

COUNSEL FOR STATE OF MISSOURI

**Adam Paul Laxalt**

*Attorney General of Nevada*

**Lawrence VanDyke**

*Solicitor General*

Office of the Nevada Attorney General

100 N. Carson Street

Carson City, NV 89701-4717

P: (775) 684-1100

E: LVanDyke@ag.nv.gov

COUNSEL FOR STATE OF NEVADA

**Brad D. Schimel**

*Attorney General of Wisconsin*

**Misha Tseytlin**

*Solicitor General*

**Daniel P. Lennington**

*Deputy Solicitor General*

Wisconsin Department of Justice

Post Office Box 7857

Madison, WI 53707-7857

P: (608) 267-9323

E: tseytlinm@doj.state.wi.us

COUNSEL FOR STATE OF WISCONSIN

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 4, 2016, a true and correct copy of the foregoing Motion for Stay was served via the Court's CM/ECF system on counsel of record for all parties.

/s/ Mithun Mansinghani  
Mithun Mansinghani



**A**

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

In the Matter of

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**PETITION FOR STAY PENDING JUDICIAL REVIEW  
OF ORDER ON RECONSIDERATION (FCC 16-102) BY**

**THE STATES OF OKLAHOMA, ARIZONA, ARKANSAS, INDIANA,  
LOUISIANA, KANSAS, MISSOURI, NEVADA, AND WISCONSIN,**

**THE OKLAHOMA SHERIFFS' ASSOCIATION, THE INDIANA SHERIFFS'  
ASSOCIATION, OKLAHOMA COUNTY SHERIFF JOHN WHETSEL, MARION  
COUNTY SHERIFF'S OFFICE, LAKE COUNTY SHERIFF'S DEPARTMENT, AND**

**THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

**James Bradford Ramsay**

*General Counsel*

**Jennifer Murphy**

*Assistant General Counsel*

National Association of Regulatory

Utility Commissioners

1101 Vermont Avenue, N.W., Suite 200

Washington, D.C. 20005

P: (202) 898-2207

E: jramsay@naruc.org

COUNSEL FOR NATIONAL ASSOCIATION OF  
REGULATORY UTILITY COMMISSIONERS

**Danny Honeycutt**

Oklahoma County Sheriff's Office

201 N. Shartel Ave.

Oklahoma City, OK 73102

P: (405) 713-2050

E: sodanhon@okcounty.org

COUNSEL FOR JOHN WHETSEL, SHERIFF  
OF OKLAHOMA COUNTY, OKLAHOMA

**E. Scott Pruitt**

*Attorney General of Oklahoma*

**Patrick R. Wyrick**

*Solicitor General*

**Mithun Mansinghani**

*Deputy Solicitor General*

Oklahoma Office of the Attorney General

313 NE 21st Street

Oklahoma City, OK 73105

P: (405) 521-3921

E: Mithun.Mansinghani@oag.ok.gov

COUNSEL FOR THE STATE OF OKLAHOMA

**Christopher J. Collins**

Collins, Zorn & Wagner

429 NE 50th Street, 2nd Floor

Oklahoma City, OK 73105

P: (405) 524-2070

E: cjc@czwglaw.com

COUNSEL FOR OKLAHOMA SHERIFFS' ASSOCIATION

**Mark Brnovich***Attorney General of Arizona***Dominic E. Draye***Deputy Solicitor General*

Arizona Office of the Attorney General

1275 West Washington

Phoenix, AZ 85007

P: (602) 542-5025

E: dominic.draye@azag.gov

COUNSEL FOR STATE OF ARIZONA

**Karla L. Palmer**

Hyman, Phelps &amp; McNamara, P.C.

700 13th Street, N.W., Suite 1200

Washington, D.C. 20005

P: (202) 737-5600

E: kpalmer@hpm.com

**Tonya J. Bond****Joanne T. Rouse**

Plews Shadley Racher &amp; Braun LLP

1346 N. Delaware Street

Indianapolis, IN 46202

P: (317) 637-0781

E: tbond@psrb.com

E: jrouse@psrb.com

COUNSEL FOR THE INDIANA SHERIFFS'  
ASSOCIATION, MARION COUNTY SHERIFF'S  
OFFICE, AND LAKE COUNTY SHERIFF'S  
DEPARTMENT

**Derek Schmidt***Attorney General of Kansas***Jeffrey A. Chanay***Chief Deputy Attorney General*

Kansas Office of the Attorney General

Memorial Hall, 3rd Floor

120 SW 10th Avenue

Topeka, KS 66612-1597

P: (785) 368-8435

E: jeff.chanay@ag.ks.gov

COUNSEL FOR STATE OF KANSAS

**Leslie Rutledge***Attorney General of Arkansas***Lee Rudofsky***Solicitor General*

Arkansas Attorney General

323 Center Street, Suite 200

Little Rock, AR 72201

P: (501) 682-8090

E: lee.rudofsky@arkansasag.gov

COUNSEL FOR STATE OF ARKANSAS

**Gregory F. Zoeller***Attorney General of Indiana***Thomas M. Fisher***Solicitor General*

Office of the Indiana Attorney General

302 W. Washington Street, IGC-South, Fifth Floor

Indianapolis, IN 46204

P: (317) 232-6255

E: Tom.Fisher@atg.in.gov

COUNSEL FOR STATE OF INDIANA

**Jeff Landry***Attorney General of Louisiana***Patricia H. Wilton***Assistant Attorney General*

Louisiana Department of Justice

1885 North Third Street

Baton Rouge, LA 70802

P: (225) 326-6006

E: wiltonp@ag.louisiana.gov

COUNSEL FOR STATE OF LOUISIANA

**Chris Koster***Attorney General of Missouri***J. Andrew Hirth***Deputy General Counsel*

Missouri Office of the Attorney General

P.O. Box 899

207 W. High Street

Jefferson City, MO 65102

P: (573) 751-0818

E: andy.hirth@ago.mo.gov

COUNSEL FOR STATE OF MISSOURI

**Adam Paul Laxalt**

*Attorney General of Nevada*

**Lawrence VanDyke**

*Solicitor General*

Office of the Nevada Attorney General

100 N. Carson Street

Carson City, NV 89701-4717

P: (775) 684-1100

E: LVanDyke@ag.nv.gov

COUNSEL FOR STATE OF NEVADA

**Brad D. Schimel**

*Attorney General of Wisconsin*

**Misha Tseytlin**

*Solicitor General*

**Daniel P. Lennington**

*Deputy Solicitor General*

Wisconsin Department of Justice

Post Office Box 7857

Madison, WI 53707-7857

P: (608) 267-9323

E: tseytlinm@doj.state.wi.us

COUNSEL FOR STATE OF WISCONSIN

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## SUMMARY

The D.C. Circuit has twice partially stayed implementation of the Commission's *Second Report and Order* in this matter "insofar as the FCC intends to apply that provision to intrastate calling services," because it determined that "petitioners have satisfied the stringent requirements for a stay pending court review." The stays were issued after petitioners challenging the *Second Report and Order* argued that the Commission is without statutory authority and jurisdiction to set caps on intrastate (as distinguished from interstate) Inmate Calling Services ("ICS") rates. The necessary implication of the D.C. Circuit's multiple stays is that the undersigned State and Local Government Petitioners are likely to succeed on the merits of their jurisdictional argument, and that a stay pending resolution of the case would be equitable.

Now that the Commission has adopted its *Order on Reconsideration*, it may desire to enforce that new Order despite the stays imposed on the previous Orders in this matter. But because that Order again seeks to impose intrastate rate caps, enforcement of that Order before judicial review is completed would be a sign of disrespect to the D.C. Circuit. The D.C. Circuit intended to maintain the status quo of exclusive State regulation of intrastate ICS rates because of the serious jurisdictional questions raised by the Commission's attempt to cap intrastate rates. The Court's concern extends to the continued attempt to cap intrastate rates by the *Order on Reconsideration*, irrespective of the level of the rates. Any attempt by the Commission to upend this status quo or circumvent the stays issued by the D.C. Circuit by enforcing the *Order on Reconsideration* will be taken as an act of defiance towards the Court. Moreover, because the Order continues the jurisdictional dispute between the Commission and the States, considerations of comity and federalism weigh in favor of the Commission staying enforcement of the *Order on Reconsideration* until the courts validate its claim of jurisdiction. For these reasons, the Commission should stay enforcement of its *Order on Reconsideration* pending judicial review.

## BACKGROUND

The *Order on Reconsideration* that is the subject of this Petition is the Commission's third attempt to set rate caps on inmate calling services. The first two are the subject of stays issued by the Court of Appeals for the District of Columbia Circuit. In its *First Report and Order*, adopted August 9, 2013, the Commission imposed caps on interstate ICS rates. Several private parties petitioned the D.C. Circuit for review and asked the court for a stay pending review. The D.C. Circuit issued a partial stay of the Commission's rules.<sup>1</sup> After briefing on the merits was completed, the Commission moved the court to hold the case in abeyance based on its decision to reconsider and potentially revise its rules. The D.C. Circuit granted this motion in December 2014.

Ten months later, while the cases challenging the *First Report and Order* were still being held in abeyance, the Commission adopted its *Second Report and Order*, which set new rate caps and, most importantly for present purposes, extended the reach of those rate caps to both interstate and intrastate ICS calls. The undersigned State and Local Government Petitioners were not parties to the first case challenging the *First Report and Order*, which regulated only interstate ICS call rates. However, because the *Second Report and Order* sought to regulate areas traditionally and statutorily left to the States, the State and Local Government Petitioners filed suit to challenge the *Second Report and Order*. The challenge is based primarily on the argument that the Commission's Order setting intrastate ICS rate caps simultaneously exceeds the Commission's authority and infringes upon the States' authority to regulate intrastate calls.<sup>2</sup>

Again, the parties challenging the Commission's *Second Report and Order* filed motions for stay pending review in the D.C. Circuit, arguing that a stay was warranted in part because the Commission did not have the statutory authority or jurisdiction to impose rate caps on intrastate

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<sup>1</sup> Order, *Securus Techs., Inc. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014).

<sup>2</sup> See *Global Tel\*Link v. FCC*, No. 15-1461 and consolidated cases (D.C. Cir.).

ICS.<sup>3</sup> The D.C. Circuit again granted a partial stay, holding that “petitioners have satisfied the stringent requirements for a stay pending court review.”<sup>4</sup> Nevertheless, after the court granted the stay, the Commission took the position that the stay applied only to the order’s permanent intrastate rate caps, and not to the higher, interim intrastate rate caps.<sup>5</sup> When the petitioners objected to this position, arguing that the stay was premised on the argument that the Commission lacked authority to set intrastate rate caps altogether (no matter the rate), the D.C. Circuit for a third time granted the petitioners’ motions. This third stay made clear that the interim rate caps are also stayed “insofar as the FCC intends to apply that provision to intrastate calling services,” but that the cap on “interstate calling services is not affected by this Order.”<sup>6</sup> The case then proceeded to merits briefing pursuant to an agreed scheduling order.

Over a month after the petitioners filed their briefs on the merits, the Commission announced that, at its next meeting, it would vote on an order for reconsideration of its *Second Report and Order*. The Commission then asked the D.C. Circuit to hold the challenge to the *Second Report and Order* in abeyance while the Commission voted on reconsideration, arguing that because the order on reconsideration might increase the rate caps, central issues in the case would be mooted or their scope substantially altered.<sup>7</sup> The State and Local Government Petitioners objected to holding the case in abeyance, arguing that an increase in the challenged intrastate rate caps did not address the primary reason the State and Local Government Petitioners sought review: the Commission lacks

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<sup>3</sup> See, e.g., Mot. of Global Tel\*Link for Partial Stay, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Jan. 27, 2016).

<sup>4</sup> Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016).

<sup>5</sup> See Opp’n of FCC to Mot. to Modify, Reconsider, or Enforce Stay, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 22, 2016).

<sup>6</sup> See Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 23, 2016).

<sup>7</sup> See Mot. of Resp. to Hold Cases in Abeyance, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. July 20, 2016).



the authority and jurisdiction to set intrastate rate caps at all.<sup>8</sup> On August 4, 2016, the Commission voted to adopt the *Order on Reconsideration*, which was released on August 9, 2016. Ten days later, the Court once again agreed with petitioners and denied the motion to hold the case in abeyance.<sup>9</sup>

The State and Local Government Petitioners now request that the Commission stay its *Order on Reconsideration* while the issues common to both that Order and the *Second Report and Order*—which have already led to multiple stays by the D.C. Circuit—are fully and finally litigated.

### LEGAL STANDARD

The Commission applies the traditional factors in deciding whether to grant a stay pending review, considering whether: (1) petitioners are likely to prevail on appeal; (2) petitioners will suffer irreparable harm absent a stay; (3) other parties will not be substantially harmed if a stay is granted; and (4) the public interest favors a stay.<sup>10</sup>

### ARGUMENT

The D.C. Circuit has ruled three times in the petitioners' favor in their challenge to the Commission's intrastate rate caps: twice when the petitioners argued they were likely to succeed on the merits of their argument that the Commission lacked jurisdiction to regulate intrastate rates and once when the petitioners argued that this question is the central issue in their challenge. It is time for the Commission to acknowledge that the State and Local Government Petitioners raise serious questions about the Commission's authority to set intrastate ICS rate caps, and that the courts have expressed grave reservations about the intrastate caps' legality. The appropriate response is for the Commission to now preserve the status quo on those rate caps by staying its *Order on Reconsideration* until its legal validity can be fully and finally litigated. Refusing to do so would be to cast disrespect

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<sup>8</sup> Opp'n to Mot. to Hold in Abeyance, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. July 29, 2016).

<sup>9</sup> Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Aug. 19, 2016).

<sup>10</sup> See *Virginia Petrol. Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

on both the federal courts and on the States as sovereigns whose authority to regulate intrastate rates has never been questioned.

**I. Petitioners are likely to succeed on the merits of their jurisdictional challenge.**

The State and Local Government Petitioners argue in their suit challenging the *Second Report and Order* that the Commission lacks the statutory authority to create intrastate ICS rate caps. As they exhaustively explain in their brief on the merits, the text, context, history, purpose, and long-standing interpretations of the Telecommunications Act of 1996 all lead to the conclusion that the Commission does **not** have plenary authority to regulate intrastate ICS rates to ensure that they are “just, reasonable, and fair,” as they attempt to do in both the *Second Report and Order* and the *Order on Reconsideration*.<sup>11</sup> The State and Local Government Petitioners need not repeat those extensive arguments here.

But even putting aside the persuasiveness of the Government Petitioners’ arguments made in their brief, it is clear that the D.C. Circuit believes that they are likely to succeed on the merits of this argument. As detailed above, in issuing its first stay of the *Second Report and Order*, the D.C. Circuit held that “petitioners have satisfied the stringent requirements for a stay pending court review.”<sup>12</sup> And when the Commission attempted to impose its interim intrastate rate caps despite the stay, the D.C. Circuit issued a second stay, enjoining enforcement of the interim rate caps “insofar as the FCC intends to apply that provision to **intrastate** calling services,” while noting that “interstate calling services is not affected by this Order.”<sup>13</sup> Thus, it is beyond argument that the State and Local Government Petitioners are likely to succeed on the merits of their argument that the intrastate

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<sup>11</sup> State and Local Gov’t Pet’rs Br., *Global Tel\*Link v. FCC*, No. 15-1461, pp. 5-11, 24-47 (D.C. Cir. June 6, 2016).

<sup>12</sup> Order, *Global Tel\*Link v. FCC*, No. 15-1461 and consolidated cases (D.C. Cir. Mar. 7, 2016).

<sup>13</sup> See Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 23, 2016) (emphasis added).

aspects of the Commission's attempted ICS regulation is unlawful—and that Petitioners have otherwise “satisfied the stringent requirements for a stay.”

It is equally clear that the Commission's *Order on Reconsideration* does not differ from the enjoined *Second Report and Order* in this respect. Both Orders attempt to establish intrastate rate caps. The fact that the numerical rate of those caps differs in the *Order on Reconsideration* does not change the issues underlying the Commission's authority to set intrastate caps in the first place. It is for precisely this reason that the State and Local Government Petitioners opposed holding the suit challenging the *Second Report and Order* in abeyance, which resulted in the Court denying the Commission's motion.

In light of this, the Commission must acknowledge that the Government Petitioners have a substantial likelihood of prevailing on the merits of their jurisdictional arguments and that the D.C. Circuit has grave concerns about the legality of the Commission's attempt at intrastate ICS-rate regulation. At the very least, the Commission should recognize that its intrastate rate caps raise “an admittedly difficult legal question” that merits a stay of its own Order.<sup>14</sup> To do otherwise would defy the D.C. Circuit's intent to maintain the status quo that existed before the *Second Report and Order* with respect to intrastate-rate regulation, and to disparage that Court as incorrectly ruling on a question the Commission doesn't believe is at all “difficult.” Such outright disrespect of the Court's decrees managing the enforcement of regulations while it fully considers their merits risks the Commission being reprimanded or sanctioned by the court.<sup>15</sup> The Commission should avoid that

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<sup>14</sup> *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977).

<sup>15</sup> *See Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960) (sanctions are necessary to ensure that it is understood that “[t]he executive branch of government has no right to treat with impunity the valid orders of the judicial branch.”); *Am. Rivers v. U.S. Army Corps of Engineers*, 274 F. Supp. 2d 62, 69-70 (D.D.C. 2003) (holding Army Corps of Engineers in civil contempt for failing to comply with injunction and imposing fines of \$500,000 per day of non-compliance, noting that “Litigants may not defy court orders because their commands are not to the litigants' liking. If the rule of law is to

result, and the perception that it is attempting to skirt the D.C. Circuit's previous stays of its ICS Orders, by deciding to itself stay its *Order on Reconsideration* pending judicial review.

## II. The balance of equities favors a stay of the *Order on Reconsideration*.

As noted above, the D.C. Circuit has already held that the petitioners' challenge to the Commission's intrastate ICS rate caps meets "the stringent requirements for a stay pending court review."<sup>16</sup> This necessarily includes a determination of the fact that, when considered in light of the petitioners' likelihood of success on the merits, the balance of equities favors a stay.<sup>17</sup> The D.C. Circuit's decision on this matter is enough for the Commission to stay its *Order on Reconsideration*.

In any event, equitable considerations warrant a stay of the Commission's *Order on Reconsideration*. As stated in the State and Local Government Petitioners' brief on the merits, and as shown by the affidavits attached thereto, the Government Petitioners stand to lose millions of dollars if the intrastate rate caps are not stayed—money that is not recoverable from the Commission even if Petitioners prevail on their challenge.<sup>18</sup> This loss of revenue will, in turn, undermine critical correctional and rehabilitative programs in jails and prisons.<sup>19</sup> While the *Order on Reconsideration*'s increased rate caps might lessen the magnitude of that harm, because the Order's maximum rates are still well-below the status quo, the existence of irreparable harm remains.

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be upheld, it is essential that the judiciary takes firm action to vindicate its authority and to compel compliance with lawfully issued directives."); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 903 (N.D. Cal. 1984) (holding Administrator of the Environmental Protection Agency in contempt for failing to comply with court order).

<sup>16</sup> Order, *Global Tel\*Link v. FCC*, No. 15-1461 and consolidated cases (D.C. Cir. Mar. 7, 2016).

<sup>17</sup> See *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008); *Lead Indus. Ass'n, Inc. v. E.P.A.*, 647 F.2d 1184, 1187 (D.C. Cir. 1980) (per curiam).

<sup>18</sup> State and Local Gov't Pet'rs Br., *Global Tel\*Link v. FCC*, No. 15-1461, pp. 22-23 (D.C. Cir. June 6, 2016).

<sup>19</sup> *Id.*

Nor will a stay cause increased harm to other parties; it would only maintain the status quo as it existed before the *Order on Reconsideration* (and before the *Second Report and Order*), pursuant to the D.C. Circuit's partial stay of the *Second Report and Order*.<sup>20</sup> And the public interest is best served by ensuring that the Commission's *Order on Reconsideration* is lawful and awaiting judicial review rather than by enforcing it in the face of a high risk that it will be invalidated by the courts.<sup>21</sup>

Finally, the Commission should be cognizant that this case represents a jurisdictional dispute between the Commission on the one hand and the States on the other. Section 152(b) of the Communications Act undoubtedly leaves regulation of intrastate telephone calls to the States.<sup>22</sup> Even if the Commission disagrees with the States' argument that the Commission does not have the authority to impose intrastate ICS rate caps, as a matter of comity and cooperation between governmental powers, the Commission should await formal approval by the courts before it uses a novel legal theory to seize power away from the States in an area that has traditionally been regulated by the States.<sup>23</sup> The absence of such respect for States as sovereigns makes our federal system more difficult.<sup>24</sup>

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<sup>20</sup> *Holiday Tours*, 559 F.2d at 844 (noting that a stay “seeks to maintain the status quo pending a final determination of the merits of the suit”).

<sup>21</sup> See *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21-22 (D.D.C. 2009) (granting a temporary injunction of an agency rule in part because “the general public interest [is] served by agencies’ compliance with the law”).

<sup>22</sup> See 47 U.S.C. § 152(b); see also *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 360 (1986).

<sup>23</sup> Cf. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010) (comity requires “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways”) (citations omitted).

<sup>24</sup> Cf. *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“Our Federalism” requires “sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.”); cf. also *Alden v. Maine*, 527 U.S. 706, 748 (1999) (“[O]ur federalism requires that Congress

## CONCLUSION

For the foregoing reasons, the undersigned State and Local Government Petitioners respectfully request that the Commission stay its *Order on Reconsideration* (FCC 16-102) pending judicial review.

DATED: September 2, 2016

Respectfully submitted,

**James Bradford Ramsay**

*General Counsel*

**Jennifer Murphy**

*Assistant General Counsel*

National Association of Regulatory  
Utility Commissioners

1101 Vermont Avenue, N.W., Suite 200

Washington, D.C. 20005

P: (202) 898-2207

E: jramsay@naruc.org

COUNSEL FOR NATIONAL ASSOCIATION OF  
REGULATORY UTILITY COMMISSIONERS

**Danny Honeycutt**

Oklahoma County Sheriff's Office

201 N. Shartel Ave.

Oklahoma City, OK 73102

P: (405) 713-2050

E: sodanhon@okcounty.org

COUNSEL FOR JOHN WHETSEL, SHERIFF  
OF OKLAHOMA COUNTY, OKLAHOMA

/s/ Mithun Mansinghani

**E. Scott Pruitt**

*Attorney General of Oklahoma*

**Patrick R. Wyrick**

*Solicitor General*

**Mithun Mansinghani**

*Deputy Solicitor General*

Oklahoma Office of the Attorney General

313 NE 21st Street

Oklahoma City, OK 73105

P: (405) 521-3921

E: Mithun.Mansinghani@oag.ok.gov

COUNSEL FOR THE STATE OF OKLAHOMA

**Christopher J. Collins**

Collins, Zorn & Wagner

429 NE 50th Street, 2nd Floor

Oklahoma City, OK 73105

P: (405) 524-2070

E: cjc@czwglaw.com

COUNSEL FOR OKLAHOMA SHERIFFS' ASSOCIATION

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treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”).

**Mark Brnovich***Attorney General of Arizona***Dominic E. Draye***Deputy Solicitor General*

Arizona Office of the Attorney General

1275 West Washington

Phoenix, AZ 85007

P: (602) 542-5025

E: dominic.draye@azag.gov

COUNSEL FOR STATE OF ARIZONA

**Karla L. Palmer**

Hyman, Phelps &amp; McNamara, P.C.

700 13th Street, N.W., Suite 1200

Washington, D.C. 20005

P: (202) 737-5600

E: kpalmer@hpm.com

**Tonya J. Bond****Joanne T. Rouse**

Plews Shadley Racher &amp; Braun LLP

1346 N. Delaware Street

Indianapolis, IN 46202

P: (317) 637-0781

E: tbond@psrb.com

E: jrouse@psrb.com

COUNSEL FOR THE INDIANA SHERIFFS'  
ASSOCIATION, MARION COUNTY SHERIFF'S  
OFFICE, AND LAKE COUNTY SHERIFF'S  
DEPARTMENT

**Derek Schmidt***Attorney General of Kansas***Jeffrey A. Chanay***Chief Deputy Attorney General*

Kansas Office of the Attorney General

Memorial Hall, 3rd Floor

120 SW 10th Avenue

Topeka, KS 66612-1597

P: (785) 368-8435

E: jeff.chanay@ag.ks.gov

COUNSEL FOR STATE OF KANSAS

**Leslie Rutledge***Attorney General of Arkansas***Lee Rudofsky***Solicitor General*

Arkansas Attorney General

323 Center Street, Suite 200

Little Rock, AR 72201

P: (501) 682-8090

E: lee.rudofsky@arkansasag.gov

COUNSEL FOR STATE OF ARKANSAS

**Gregory F. Zoeller***Attorney General of Indiana***Thomas M. Fisher***Solicitor General*

Office of the Indiana Attorney General

302 W. Washington Street, IGC-South, Fifth Floor

Indianapolis, IN 46204

P: (317) 232-6255

E: Tom.Fisher@atg.in.gov

COUNSEL FOR STATE OF INDIANA

**Jeff Landry***Attorney General of Louisiana***Patricia H. Wilton***Assistant Attorney General*

Louisiana Department of Justice

1885 North Third Street

Baton Rouge, LA 70802

P: (225) 326-6006

E: wiltonp@ag.louisiana.gov

COUNSEL FOR STATE OF LOUISIANA

**Chris Koster***Attorney General of Missouri***J. Andrew Hirth***Deputy General Counsel*

Missouri Office of the Attorney General

P.O. Box 899

207 W. High Street

Jefferson City, MO 65102

P: (573) 751-0818

E: andy.hirth@ago.mo.gov

COUNSEL FOR STATE OF MISSOURI

**Adam Paul Laxalt**

*Attorney General of Nevada*

**Lawrence VanDyke**

*Solicitor General*

Office of the Nevada Attorney General

100 N. Carson Street

Carson City, NV 89701-4717

P: (775) 684-1100

E: LVanDyke@ag.nv.gov

COUNSEL FOR STATE OF NEVADA

**Brad D. Schimel**

*Attorney General of Wisconsin*

**Misha Tseytlin**

*Solicitor General*

**Daniel P. Lennington**

*Deputy Solicitor General*

Wisconsin Department of Justice

Post Office Box 7857

Madison, WI 53707-7857

P: (608) 267-9323

E: tseytlinm@doj.state.wi.us

COUNSEL FOR STATE OF WISCONSIN



**CERTIFICATE OF SERVICE**

I hereby certify that, on September 2, 2016, a true and correct copy of the foregoing Petition for Stay Pending Judicial Review was served via electronic mail on the following persons:

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

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

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

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

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

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

/s/ Mithun Mansinghani  
Mithun Mansinghani

**B**

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**ORDER DENYING STAY PETITIONS**

**Adopted: September 30, 2016**

**Released: September 30, 2016**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. Three inmate calling service (ICS) providers, Securus Technologies, Inc. (Securus), Telmate, LLC (Telmate), and Global Tel\*Link Corporation (GTL), have each filed petitions for stay of the *Reconsideration Order*.<sup>1</sup> Additionally, the National Association of Regulatory Utility Commissioners, along with a number of states and sheriffs (collectively, State Petitioners) filed a petition for stay.<sup>2</sup> Two ICS providers and the Wright Petitioners have filed separate oppositions to the Petitions.<sup>3</sup>

<sup>1</sup> See Securus Technologies, Inc. Petition for Partial Stay of Order on Reconsideration Pending Appeal, WC Docket No. 12-375 (filed Aug. 25, 2016), <https://www.fcc.gov/ecfs/filing/1082584697325/document/1082584697325ba5d> (Securus Stay Petition); Petition of Telmate, LLC for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Aug. 29, 2016), <https://www.fcc.gov/ecfs/filing/10829590427949/document/1082959042794985fe> (Telmate Stay Petition); Petition of Global Tel\*Link for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Sept. 1, 2016), <https://www.fcc.gov/ecfs/filing/10901346524862/document/10901346524862d3b4> (GTL Stay Petition); see also *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order on Reconsideration, FCC 16-102 (2016) (*Reconsideration Order*).

<sup>2</sup> Petition for Stay Pending Judicial Review of Order on Reconsideration by the States of Oklahoma, Arizona, Arkansas, Indiana, Louisiana, Kansas, Missouri, Nevada, Wisconsin, The Oklahoma Sheriffs' Association, The Indiana Sheriffs' Association, Oklahoma County Sheriff John Whetsel, Marion County Sheriff's Office, Lake County Sheriffs' Department, and The National Association of Regulatory Utility Commissioners, WC Docket No. 12-375 (filed Sept. 2, 2016), <https://www.fcc.gov/ecfs/filing/1090279096421/document/10902790964217a75> (State Petitioners Stay Petition).

<sup>3</sup> See Inmate Calling Solutions, LLC Opposition to Securus Technologies, Inc.'s Petition for Stay, WC Docket No. 12-375 (filed Sept. 1, 2016), <https://www.fcc.gov/ecfs/filing/10901942828738/document/1090194282873896c4> (ICSolutions Opposition); Network Communications International Corp. Opposition to Petitions for Stay, WC Docket No. 12-375 (filed Sept. 14, 2016) (NCIC Opposition), <https://www.fcc.gov/ecfs/filing/1091461041225/document/10914610412251fe4>; Wright Petitioners' Opposition to Petition for Partial Stay, WC Docket No. 12-375 (filed Sept. 1, 2016), <https://www.fcc.gov/ecfs/filing/10901065457517/document/10901065457517aa39> (Wright Opposition to Securus Petition); Wright Petitioners' Opposition to Petition for Partial Stay, WC Docket No. 12-375 (filed Sept. 6, 2016), <https://www.fcc.gov/ecfs/filing/1090673344753/document/1090673344753998d> (Wright Opposition to Telmate Petition); Wright Petitioners' Opposition to Petition for Partial Stay, WC Docket No. 12-375 (filed Sept. 8, 2016), <https://www.fcc.gov/ecfs/filing/109081995804638/document/109081995804638456a> (Wright Opposition to GTL Petition); Wright Petitioners' Opposition to Petition for Partial Stay by State and Local Government Petitioners, WC Docket No. 12-375 (filed Sept. 9, 2016), <https://www.fcc.gov/ecfs/filing/109091858522281/document/1090918585222811782> (Wright Opposition to States' Petition).

After considering the Petitions and the Oppositions, we deny all four petitions for the reasons set forth below.<sup>4</sup>

## II. BACKGROUND

2. In 2015, the Commission adopted the *2015 ICS Order*, relying on its core authority over ICS rates to provide inmates and their families long-awaited relief from unfair, unjust, and unreasonable charges as part of its comprehensive reform of ICS.<sup>5</sup> The Commission's approach included, *inter alia*: adopting tiered rate caps for both interstate and intrastate ICS calls; limiting and capping ancillary service charges; and establishing a periodic review of ICS reforms.<sup>6</sup> Notably, and most relevant to this Order, the Commission also declined to adopt a per-minute rate additive specifically to account for costs that facilities incur in connection with ICS.<sup>7</sup>

3. Following the release of the *2015 ICS Order*, four ICS providers filed petitions asking the Commission to stay various provisions of the *Order*.<sup>8</sup> On January 22, 2016, the Wireline Competition Bureau (Bureau) issued an order denying the stay petitions of GTL, Securus, and Telmate.<sup>9</sup> After the Bureau issued its order denying the stay petitions, the providers sought a stay from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). On March 7, 2016, the court stayed two provisions of the Commission's ICS rules: 47 CFR § 64.6010 (setting caps on ICS calling rates that vary based on the size and type of facility being served) and 47 CFR § 64.6020(b)(2) (setting caps on charges and fees for single call services).<sup>10</sup> The D.C. Circuit's *March 7 Order* denied motions for stay of

<sup>4</sup> Securus filed a Motion to Strike the NCIC Opposition with regard to "any statements or arguments directed to the Securus Petition." Securus Technologies, Inc. Motion to Strike, In Part, Opposition to Petitions for Stay, WC Docket No. 12-375 (filed Sept. 14, 2016),

<https://www.fcc.gov/ecfs/filing/10914025510873/document/10914025510873c0bc> (Motion to Strike). We deny Securus's Motion to Strike for reasons explained below.

<sup>5</sup> See *2015 ICS Order*, 30 FCC Rcd at 12769, para. 9; *id.* at 12822, para. 124 (noting the Commission was focusing on its "core ratemaking authority in reforming ICS . . .").

<sup>6</sup> See generally *id.* The *2015 ICS Order* provides a detailed history of this proceeding through October 2015. See *id.* at 12771-74, paras. 12-19. We do not repeat this history here, but incorporate that description by reference.

<sup>7</sup> See *Reconsideration Order* at para. 7; see also *2015 ICS Order*, 30 FCC Rcd at 12853, para. 139 (explaining that facilities' legitimate ICS-related costs were "already built into our rate cap calculations and should not be recovered through an 'additive' to the ICS rates."). The Commission excluded site commission payments from the costs used to set the rate caps, but left it up to individual providers to decide whether, and, how much, to pay facilities in connection with ICS. The only limitation was that providers' rates had to comply with the applicable rate caps, regardless of whether they paid any site commissions. See *id.* at 12827, para. 128.

<sup>8</sup> See Petition of Global Tel\*Link for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Dec. 22, 2015), <http://apps.fcc.gov/ecfs/comment/view?id=60001361606> (GTL 2015 Stay Petition); Securus Technologies, Inc. Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136), WC Docket No. 12-375 (filed Dec. 22, 2015) <http://apps.fcc.gov/ecfs/comment/view?id=60001361748> (Securus 2015 Stay Petition); Petition of Telmate, LLC for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Jan. 6, 2016), <http://apps.fcc.gov/ecfs/comment/view?id=60001372226> (Telmate 2015 Stay Petition); Petition of CenturyLink for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Jan. 22, 2016), <http://apps.fcc.gov/ecfs/comment/view?id=60001389462> (CenturyLink 2015 Stay Petition).

<sup>9</sup> *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order Denying Stay Petitions, 31 FCC Rcd 261 (WCB 2016) (*Order Denying 2015 Stay Petitions*). CenturyLink did not file its petition until the day the Bureau released its order, and filed suit in federal court shortly thereafter. See CenturyLink Stay Petition (filed January 22, 2016); Motion of CenturyLink Public Communications, Inc. for Partial Stay Pending Judicial Review, USCA Case #15-1461, Document #1597573 (filed Feb. 5, 2016).

<sup>10</sup> See *Global Tel\*Link v. FCC*, No. 15-1451 (D.C. Cir. Mar. 7, 2016) (*March 7 Order*); see also *Wireline Competition Bureau Addresses Applicable Rates for Inmate Calling Services and Effective Dates for Provisions of the Inmate Calling Services Second Report and Order*, Public Notice, DA 16-280 (WCB 2016).

the Commission's ICS rules "in all other respects,"<sup>11</sup> permitting the bulk of the Commission's reforms to become effective. On March 23, 2016, the D.C. Circuit modified the stay imposed in the *March 7 Order* to provide that "47 CFR § 64.6030 (imposing interim rate caps)" be stayed as applied to "intrastate calling services."<sup>12</sup>

4. On January 19, 2016, Michael S. Hamden, an attorney who has represented prisoners and served as a corrections consultant, filed a Petition for Partial Reconsideration, seeking reconsideration of certain aspects of the 2015 *ICS Order*.<sup>13</sup> In particular, Hamden asked the Commission to reconsider its decision not to prohibit providers from paying site commissions<sup>14</sup> or, in the alternative, to mandate a "modest, per-minute facility cost recovery fee that would be added to the rate caps."<sup>15</sup> Multiple parties submitted responses and oppositions to the Hamden Petition, including ICS providers, facilities, and the Wright Petitioners.<sup>16</sup>

5. On August 4, 2016, the Commission addressed the Hamden Petition, granting it in part and denying it in part.<sup>17</sup> Specifically, the Commission granted the Hamden Petition to the extent that it sought an increase in the ICS rate caps to expressly account for reasonable facility costs and to the extent that it sought clarification of the definitions of the terms "Mandatory Taxes" and "Mandatory Fees."<sup>18</sup> The Commission denied Hamden's Petition in all other respects.<sup>19</sup>

6. In granting Hamden's request to expressly account for reasonable facility costs, the Commission carefully considered the record developed in response to the Hamden Petition, as well as the

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<sup>11</sup> *March 7 Order* at 2.

<sup>12</sup> See *Global Tel\*Link v. FCC*, No. 15-1451 (D.C. Cir. Mar. 23, 2016) (*March 23 Order*); see also *Wireline Competition Bureau Updates Applicable Rates for Inmate Calling Services*, Public Notice, DA 16-332 (WCB Mar. 29, 2016). Petitioners filed opening briefs with the D.C. Circuit on June 6, 2016. See Joint Br. For ICS Carrier Pet'rs, *Global Tel\*Link*, Doc. No. 1617174 (D.C. Cir. filed June 6, 2016); Br. Of State and Local Gov't Pet'rs, *Global Tel\*Link*, Doc. No. 1617181 (D.C. Cir. filed June 6, 2016). On July 20, the Commission moved the Court to place the appeal in abeyance pending the adoption of the *Reconsideration Order*. Mot. of Resp'ts to Hold Cases in Abeyance, *Global Tel\*Link*, No. 1625782 (D.C. Cir. filed July 20, 2016). On August 19, the Court denied the Commission's abeyance motion and ordered that briefing resume. Order, *Global Tel\*Link*, Doc. No. 1631184 (D.C. Cir. Aug. 19, 2016). The Commission filed its brief with the Court on September 12, 2016. Respondents' Br., *Global Tel\*Link*, Doc. No. 1635294 (D.C. Cir. filed Sept. 12, 2016).

<sup>13</sup> Petition of Michael S. Hamden for Partial Reconsideration, WC Docket No. 12-375 (filed Jan. 19, 2016), <http://apps.fcc.gov/ecfs/document/view?id=60001408060> (Hamden Petition); see also *Reconsideration Order*, FCC 16-102 at para. 11.

<sup>14</sup> See Hamden Petition at 2.

<sup>15</sup> See *Reconsideration Order* at para. 11; Hamden Petition at ii. The *Reconsideration Order* discussed the Hamden Petition in further detail. We do not repeat those details here, but incorporate that description by reference.

<sup>16</sup> See *Reconsideration Order* at para. 11, n. 47-49 (providing a complete list of parties that filed in response to the Hamden Petition).

<sup>17</sup> See generally *id.*

<sup>18</sup> See *id.* at paras. 5, 13 (amending the Commission's rules to mirror the definitions stated in the text of the 2015 *ICS Order*).

<sup>19</sup> See *id.* at paras. 13, 31-41 (denying Hamden Petition for Reconsideration in all other respects, including the request to reconsider the treatment of site commissions and the request to clarify that ICS providers cannot use unregulated subsidiaries to circumvent the rule regarding charges for single-call services). In reaching these decisions, the Commission considered the record developed in response to the Hamden Petition and was not persuaded, in either case, of the necessity to reconsider the decisions made in the 2015 *ICS Order*. See *Reconsideration Order* at paras. 34-41.

record in the underlying proceeding, and arguments presented in the litigation before the D.C. Circuit.<sup>20</sup> As a result of this review, the Commission increased the rate caps for debit and prepaid ICS calls to \$0.31 per minute for jails with an average daily population (ADP) below 350, \$0.21 per minute for jails with an ADP between 350 and 999, \$0.19 per minute for jails with an ADP of 1,000 or more, \$0.13 per minute for prisons.<sup>21</sup> It also increased the rate caps for collect calls by a commensurate amount.<sup>22</sup> The Commission found that the revised rate caps will “adequately ensure that rates for ICS consumers will be fair, just, and reasonable.”<sup>23</sup> The *Reconsideration Order* does not limit providers’ flexibility to decide whether to pay site commissions and, if so, how much to pay.<sup>24</sup>

7. On August 25, 2016, Securus filed a petition for stay of the *Reconsideration Order*.<sup>25</sup> Telmate, GTL, and the State Petitioners filed petitions shortly thereafter, on August 29, September 1, and September 2, 2016 respectively.<sup>26</sup> The Petitioners generally challenge the procedural soundness of the *Reconsideration Order*,<sup>27</sup> the sufficiency of the revised rate caps,<sup>28</sup> the Commission’s authority to set intrastate rate caps,<sup>29</sup> and the Commission’s treatment of site commissions,<sup>30</sup> among other things. The Wright Petitioners, ICSolutions, and NCIC oppose the stay petitions, arguing that the Petitioners have failed to meet any of the requirements needed to justify a stay.<sup>31</sup>

8. As described below, we find that the Petitioners have failed to demonstrate that they will suffer irreparable harm if the *Reconsideration Order* is not stayed. Nor have they persuaded us that they are likely to succeed on the merits or that a stay would be in the public interest. To the contrary, we find that other parties—particularly ICS consumers—will be harmed if the *Reconsideration Order* is stayed. Accordingly, we deny Petitioners’ requests.

### III. DISCUSSION

9. To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.<sup>32</sup> For the reasons described below, the Petitioners have failed to carry their burden of proving any of the relevant factors.

<sup>20</sup> See *Reconsideration Order* at para. 3.

<sup>21</sup> See *id.* at para. 12.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at para. 13.

<sup>24</sup> See *id.* at para. 38; *id.* at n. 151 (explaining that nothing in the Commission’s rules “restricts a provider’s ability to distribute as it chooses whatever revenue it collects . . .”).

<sup>25</sup> See Securus Stay Petition (seeking a stay of the new ICS rates).

<sup>26</sup> See Telmate Stay Petition; GTL Stay Petition; State Petitioners Stay Petition. For purposes of this Order, we refer to Securus, Telmate, GTL, and the State Petitioners collectively, as “Petitioners.”

<sup>27</sup> See Telmate Stay Petition at 4-5; 15.

<sup>28</sup> See Securus Stay Petition at 4-6; Telmate Stay Petition at 13-14.

<sup>29</sup> See Telmate Stay Petition at 9-11; GTL Stay Petition at 11-15; State Petitioners Stay Petition at 5-7.

<sup>30</sup> See Securus Stay Petition at 7-10; Telmate Stay Petition at 12-13; GTL Stay Petition at 15-18.

<sup>31</sup> See generally Wright Opposition to Securus Petition; Wright Opposition to Telmate Petition; Wright Opposition to GTL Petition; Wright Opposition to States’ Petition; ICSolutions Opposition; NCIC Opposition.

<sup>32</sup> See *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*VA Petroleum Jobbers*).



### A. Petitioners Are Unlikely to Prevail on the Merits

10. Petitioners have failed to demonstrate that they are likely to succeed on the merits. As an initial matter, we note that Petitioners largely reiterate arguments they raised previously and which we disposed of in our order denying petitions seeking stays of the *2015 ICS Order*. We do not address those arguments again here, but instead rely on our previous analysis.<sup>33</sup> Moreover, despite the Petitioners' claims to the contrary, the *Reconsideration Order* is procedurally sound; the *Reconsideration Order* does not dictate how providers spend their ICS revenues; the Commission relied on data from credible sources to determine facilities' ICS-related costs; the revised rate caps allow providers to collect significantly more revenue than they could under the original rate caps; site commissions are clearly distinguishable from taxes and mandatory fees; and the Court's previous stay orders are not determinative of the Petitioners' likelihood of success in appealing the *2016 Reconsideration Order*. Accordingly, the Petitioners are unlikely to prevail on the merits of any of their claims.

#### 1. The *Reconsideration Order* is Procedurally Sound

11. Telmate contends that the *Reconsideration Order* is "procedurally defective."<sup>34</sup> Specifically, Telmate argues Hamden did not explicitly request the actions the Commission took in the Order, rendering it "invalid."<sup>35</sup> Telmate's argument appears to be premised on the flawed notion that, in considering a petition for reconsideration, the Commission must either adopt the precise relief the petitioner has requested or deny the petition. Not so. Nothing in the Commission's rules restricts it to such a binary choice.<sup>36</sup> Hamden's Petition for Reconsideration requested that the Commission prohibit providers from paying site commissions, or, in the alternative, impose a "modest, per-minute facility cost recovery fee that would be added to the rate caps."<sup>37</sup> As discussed above, the Commission considered Hamden's request and other relevant evidence, and ultimately decided to amend the ICS rate caps to "better allow providers to cover costs facilities may incur that are reasonably related to the provision of ICS."<sup>38</sup> The Commission did not prohibit site commissions;<sup>39</sup> it also did not restrict payments by ICS providers to correctional facilities to a specific amount mandated by the Commission, as Hamden and others may have preferred. The Commission's action nevertheless responded to Hamden's proposal that the Commission allow providers to collect additional revenue from consumers of ICS to ensure that rates for inmate calls are high enough to cover facility-incurred costs.<sup>40</sup> Furthermore, the Commission clearly

<sup>33</sup> See, e.g., *Order Denying Stay Petitions*, 31 FCC Rcd at 278-79, paras. 34-35 (addressing Telmate's contention that it is not subject to section 201 because the service it provides is a one-way VoIP service); *id.* at 271-72, paras. 21-26 (explaining that it was reasonable for the Commission to use average costs as a basis for calculating the rate caps); *id.* at 279-281, paras. 36-39 (responding to arguments that section 276 is a "one-way ratchet" that only allows the Commission to establish a floor, but not a ceiling, on ICS rates); *id.* at 295-96, paras. 71-73 (explaining why continued reliance on the interim rate caps is insufficient to satisfy the Commission's statutory obligations).

<sup>34</sup> See Telmate Stay Petition at 15.

<sup>35</sup> See *id.* at 15 (arguing that the Commission "crafted a rule that no party . . . 'presented' or 'requested,' on reconsideration). Securus raises a related concern, noting that that "[s]everal parties, including Mr. Hamden, wrote the Commission urging it not to take the proposed action." Securus Stay Petition at 2.

<sup>36</sup> To the contrary, Section 405 of the Communications Act and the Commission's associated rules explicitly afford the Commission the discretion to grant a petition for reconsideration "in whole or in part." 47 U.S.C. § 405(a); see 47 CFR § 1.429(i). The only requirement is that the Commission provide an explanation for its decision, which the Commission did in the *Reconsideration Order*. *Id.* (requiring that an order on reconsideration contain "a concise statement of the reason" for the actions taken.).

<sup>37</sup> See Hamden Petition at ii.

<sup>38</sup> *Reconsideration Order*, FCC 16-102, at para. 1.

<sup>39</sup> *Id.* at paras. 22-30; *id.* at n. 54 (explaining the decision to not prohibit site commission payments).

<sup>40</sup> See Wright Opposition to Telmate Petition at 6.

had the discretion to modify its rates in response to the Hamden Petition, because the revised rates are a “logical outgrowth” of the Hamden Petition as well as the underlying rulemaking that resulted in the previous rates, and the Commission gave a reasoned explanation for its action that was supported by the record in the broader, ongoing inmate calling proceeding. In any event, the Commission’s decision to consider the Hamden Petition but grant only part of the relief requested does not render the Commission’s order procedurally improper. Thus, Telmate is unlikely to prevail on its claim that the *Reconsideration Order* is “procedurally defective.”

## **2. The Revised Rate Caps Better Allow ICS Providers to Recover their Costs of Providing ICS**

12. The Petitioners generally argue that the FCC’s rate caps are impermissibly below providers’ costs.<sup>41</sup> To the extent that Petitioners reassert their opposition to the Commission’s decision to set rate caps in the *2015 ICS Order* based on providers’ average costs, we note that the Bureau has already addressed these arguments, and do not address them here again here.<sup>42</sup> We do, however, address three versions of this argument that are relevant to the revised rate caps adopted in the *Reconsideration Order*, including arguments that the rate caps are too low because: (1) all of the increased revenue permitted under the revised rate caps will go to facilities; (2) the Commission never asked providers for data on ICS-related costs incurred by facilities; and (3) the revised rate caps add “mere pennies” to the 2015 rates.

13. *The Reconsideration Order Does Not Dictate How Providers Spend Their ICS Revenues.* Securus and Telmate argue that “all” additional revenue from the rate cap increases adopted in the *Reconsideration Order* will go to facilities, not the providers.<sup>43</sup> These arguments ignore the plain language of the *Reconsideration Order*, which made clear that nothing in the Commission’s rules restricts a provider’s discretion to distribute or keep “whatever revenue it collects under the adopted rate caps.”<sup>44</sup> The Commission did not mandate that any – much less all – of the rate increases permitted under the revised caps must be shared with facilities. Instead, the Commission continued to leave it to the parties to negotiate any payments to facilities. Thus, if “all of the ‘new’ revenue under the 2016 rates” goes to facilities, as Telmate contends,<sup>45</sup> that will be because a provider chose to make such payments as part of its negotiations with the facilities, and not because of any Commission action or requirement.

14. *The Commission Relied on Credible Data in Determining Facilities’ ICS-related Costs.* Telmate and Securus question the credibility of the data the Commission relied on in setting the revised rate caps.<sup>46</sup> Telmate asserts that the Commission’s analysis of providers’ ability to meet their costs under the revised rate caps is flawed, in part because providers did not report the portion, if any, of site commission payments that directly reimburse facilities for their ICS costs.<sup>47</sup> This argument ignores the fact that the Commission received data on the costs facilities incur in connection with ICS from multiple

<sup>41</sup> See, e.g., Securus Stay Petition at 5-7; Telmate Stay Petition at 13-14.

<sup>42</sup> See *Order Denying 2015 Stay Petitions*, 31 FCC Rcd 261, 271-73, paras. 21-24.

<sup>43</sup> See Securus Stay Petition at 6 (arguing the “extra pennies that the Commission has doled out ‘for reasonable facility costs’ are not meant for ICS carriers. ICS carriers will receive the same per-minute rates that were adopted last year”); Telmate Stay Petition at 14.

<sup>44</sup> See *Reconsideration Order*, FCC 126-102, at para. 38, n. 151.

<sup>45</sup> Telmate Stay Petition at 14.

<sup>46</sup> See *id.* at 13-14; see also Securus Stay Petition at 7 (claiming that the Commission does not have “any basis to predict that the earmarked rate increases will indeed ‘expressly account for reasonable facility costs related to ICS.’”).

<sup>47</sup> Telmate Stay Petition at 14 (arguing that “[p]roviders reported their costs to the FCC both with and without site commission payments, but they never reported costs that included only the portion of commission payments that directly reimburses facilities for their inmate calling costs.”).



sources, including providers and – notably – the facilities themselves.<sup>48</sup> As the Commission explained, it took this information into account when it reconsidered its rate caps in order to “better reflect the costs that facilities incur that are reasonably related to the provision of ICS.”<sup>49</sup> Securus further disputes the Commission’s reliance on NSA’s proposal in setting the revised rate caps, arguing that the “NSA proposal was a good deal higher than what the FCC has adopted. . . .”<sup>50</sup> Securus’s argument relies on raw data from the NSA survey.<sup>51</sup> As the Commission noted in the *Reconsideration Order*, NSA itself reasonably elected to discount its raw survey data in estimating jails’ actual costs.<sup>52</sup> After explaining that NSA treated its survey data as “inputs” that it refined to generate more reliable estimates of facilities’ reasonable costs, the Commission found NSA’s ranges credible, particularly given that the NSA and Baker/Wood analyses arrived at similar conclusions.<sup>53</sup> Thus, contrary to Telmate and Securus’s assertions, the Commission reasonably relied on data from NSA and other credible sources to determine the costs that facilities may incur in connection with ICS.

15. *The Revised Rate Caps Allow Providers to Collect Significant Additional Revenue.* Finally, Securus and Telmate argue that the revised rate caps remain too low and do not cover providers’ costs, despite the fact that the revised rate caps are higher than those adopted in the *2015 ICS Order*.<sup>54</sup> Securus contends that “with respect to ICS providers, the FCC has simply re-adopted” the 2015 rate caps.”<sup>55</sup> These arguments are based on an apparent misreading of the *Reconsideration Order*.<sup>56</sup> The *Reconsideration Order* increased the 2015 rate caps by \$0.02 per minute for prisons, by \$0.05 per minute for larger jails, and by \$0.09 per minute for the smallest jails.<sup>57</sup> These increases may be measured in “mere pennies” per minute, but they are substantial percentage increases over the previously adopted rate caps and add up to more than \$150 million dollars per year in increased revenues for ICS providers.<sup>58</sup>

<sup>48</sup> See *Reconsideration Order* at para. 26 (explaining that the NSA Proposal is based on “the NSA’s cost survey, which gathered information on the costs to sheriffs of providing security and administrative functions necessary to allow ICS in jails, including the salaries and the benefits of the officers and employees performing the ICS-related duties.”). The Commission also analyzed data from other sources, most notably from Baker and Wood, in assessing the costs that facilities are likely to incur in connection with ICS. See *id.* (explaining that “the rate caps we adopt today are based on a hybrid of the Baker/Wood and NSA Proposals.”); see also *id.* at n. 106 (noting that the “Pay Tel Proposal . . . closely mirrors the rate increases we adopt in this Order.”).

<sup>49</sup> *Id.* at para. 22. In fact, there was no reason to believe that providers “necessarily had access to the information needed to determine facility costs.” *Id.* at para. 24.

<sup>50</sup> Securus Stay Petition at 7.

<sup>51</sup> See Letter from Mary J. Sisak, Attorney for National Sheriffs’ Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed June 12, 2015) (NSA Proposal).

<sup>52</sup> *Reconsideration Order* at para. 29, n. 115 (citing the NSA proposal at 3-5).

<sup>53</sup> *Id.*

<sup>54</sup> See Securus Stay Petition at 4-7; Telmate Stay Petition at 13-14.

<sup>55</sup> See Securus Stay Petition at 6; see also *id.* at 4 (“[T]he 2015 and 2016 rate[ caps] are, for all practical purposes, the same.”); Telmate Stay Petition at 13-14 (arguing that the “new rates—like the old rates—are well below the cost of providing approximately half of all calls in the industry, and are therefore unlawful.”).

<sup>56</sup> Additionally, as NCIC notes in its Opposition, Securus’s calculation of its average cost per minute (which it cites to demonstrate that its per-minute costs are greater than the revised rates) does not include ancillary fee revenue, which NCIC claims can amount to \$0.03-\$0.10 per minute using the Commission’s new ancillary fee structure. NCIC Opposition at 3.

<sup>57</sup> *Reconsideration Order* at para. 22.

<sup>58</sup> Indeed, the new rate cap for the smallest jails is over 40 percent higher than the previous cap, the rate caps for medium and larger jails increased by approximately 30 percent and even the rate caps for prisons increased by over 18 percent. Compare *Reconsideration Order*, FCC 16-102, at para. 3 (listing the revised rate caps) with *2015 ICS Order*, 30 FCC Rcd 12770, para. 9 (listing the rate caps for each tier). An economic analysis by the Wright

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Regardless of the way the increased revenue is allocated between providers and facilities, the revised rate caps allow for a substantial new pool of money for providers to recoup their costs.<sup>59</sup> To the extent Securus and Telmate are arguing that the rate cap increase must go to facilities, this is incorrect for the reasons previously stated.<sup>60</sup> The indisputable fact is that the revised rate caps adopted in the *Reconsideration Order* enable providers to generate more revenue than they could have under the rate caps adopted in the *2015 ICS Order*.<sup>61</sup> Accordingly, claims that providers are no better off under the revised rate caps are baseless.

### 3. Site Commissions Are Negotiated Payments, Not Mandatory Taxes or Fees

16. Several Petitioners raise various objections to the Commission's treatment of site commissions.<sup>62</sup> Most of these objections are not new and were already addressed in the *Order Denying 2015 Stay Petitions* and, therefore, are not addressed here.<sup>63</sup> Insofar as GTL now argues, however, that ICS providers should be allowed to recover site commission payments from consumers, in part because state and local governments often require site commission payments as "a condition precedent to a service arrangement between the facilities they govern and an ICS provider,"<sup>64</sup> we address that contention below.

17. We are unpersuaded by GTL's argument. GTL attempts to equate site commissions with mandatory taxes and fees, which providers are permitted to pass through to consumers.<sup>65</sup> This is a false equivalency, however. Taxes and regulatory fees are binding legal requirements that compel a class of entities to remit specified amounts to governmental bodies.<sup>66</sup> Site commissions, on the other hand, are *not*

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Petitioners shows that "the revised ICS rate caps eliminate *any basis* for ICS providers and correctional facilities to argue that *any aspect* of their costs to provide ICS . . . will not be reimbursed." Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed July 29, 2016) (discussing the "enormous increase in revenue for ICS providers" produced by the rate cap increases adopted in the *Reconsideration Order*) (emphasis in original).

<sup>59</sup> In fact, the rates adopted in the *Reconsideration Order* "ensure that all providers can earn sufficient revenues to cover their ICS-related costs while also compensating facilities for reasonable costs incurred directly as a result of providing ICS." *Reconsideration Order*, FCC 16-102, at para. 4; *see also id.* n. 12 (explaining that "only one small provider may not be able to recover all of its ICS-related costs under the new rates. That provider offered no explanation for its costs, which appear to be a significant outlier among our data set, and has not objected to our rate caps at any stage of this proceeding.").

<sup>60</sup> *See supra* para. 13.

<sup>61</sup> *See supra* n. 58.

<sup>62</sup> *See* GTL Stay Petition at 15-18; Securus Stay Petition at 7-10; Telmate Stay Petition at 12-13.

<sup>63</sup> *See, e.g.,* GTL Stay Petition at 15-18 (arguing that the Commission's refusal to allow ICS providers to recover site commissions is unlawful); Telmate Stay Petition at 12-15 (arguing that the Commission's decision not to prohibit providers from paying site commissions, without including site commissions when setting the rate caps, is unlawful). The Commission addressed these arguments in the *Order Denying 2015 Stay Petitions*, 31 FCC Rcd at 266-273, paras. 14-26.

<sup>64</sup> GTL Stay Petition at 16.

<sup>65</sup> The Commission has defined mandatory taxes and fees as fees that "a Provider is required to collect directly from consumers, and remit to federal, state, or local governments." A Mandatory Tax or Fee that is passed through to a Consumer may not include a markup, unless the markup is specifically authorized by "a federal, state, or local statute, rule, or regulation." *Reconsideration Order*, FCC 16-102, para. 31.

<sup>66</sup> Taxes are levied by state legislatures and are not subject to negotiation. Even in the one state where the legislature has mandated site commissions, those payments cannot be properly categorized as "taxes," because ICS providers remain free to negotiate the amount of their site commission payments, as long as the payments are above 40 percent of gross ICS revenue. *See* Tex. Gov't Code Ann. § 495.027(a)(2). GTL's reliance on cable franchise fees as evidence that the Commission must allow providers to pass the costs of site commissions through to consumers is also misplaced. The Commission is subject to a statutory mandate to account for cable franchise fees

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mandated by law, except in one state.<sup>67</sup> Rather, site commissions are an invention of the ICS industry,<sup>68</sup> offered as an incentive to encourage facilities to enter a contract with a particular provider – usually the one willing to offer the highest payment.<sup>69</sup> These negotiated payments – originally initiated by the providers themselves – are clearly distinguishable from taxes and fees that are unilaterally imposed by a government body.<sup>70</sup> It is well established that “the obligation to pay taxes does not rest on any contract.”<sup>71</sup> Providers should not be able to pass the costs of site commissions – which some parties refer to as “kickbacks”<sup>72</sup> – on to consumers, particularly given that ICS consumers generally have no alternative to the single ICS provider serving an inmate’s facility.<sup>73</sup>

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in setting cable rates. *See City of Pasadena, et al*, 16 FCC Rcd 18192, 18198, para. 14 (explaining that the rules related to cable franchise fees “have their origin in Section 623(b)(2)(C)(v) of the Communications Act, which provides that in establishing rate rules the Commission shall take into account ‘the reasonably and properly allocable portion of any amount assessed as a franchise fee . . .’”). No similar statutory provision exists regarding site commission payments. Even if the Commission’s treatment of cable franchise fees had not been dictated by statute, a decision to take such fees into account in regulating cable rates would not have required the Commission to allow providers of a different service (ICS) to pass through a different cost (site commission payments) to end users as part of its regulation of a totally different industry. At most, the cable franchise fee precedent – absent the statutory mandate cited above – would have established that the Commission has the *discretion* to allow providers to pass site commission payments through to consumers, not that it had an *obligation* to do so.

<sup>67</sup> *See Order Denying 2015 Stay Petitions*, 31 FCC Rcd at 270, para. 19 (citing Tex. Gov’t Code Ann. § 495.027(a)(2) (West 2009) (prohibiting the corrections board from awarding a contract to an ICS vendor unless the provider pays a commission based on gross revenues received from the use of the services provided)). Although ICS providers are contractually obligated to pay site commissions in certain other states, those states do not have statutory provisions requiring the payment of site commissions. *Id.*

<sup>68</sup> The record indicates that a provider called Evercom “invented the kickback model of giving money to corrections officials in exchange for monopoly contracts.” *See* Letter from Paul Wright, Executive Director, Human Rights Defense Center (HRDC), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 10 (filed Jul. 29, 2015) (explaining that until Evercom launched the practice of paying site commissions, ICS was “high quality and affordable.”).

<sup>69</sup> *See, e.g.*, HRDC Jan. 12, 2015 Comments at 6 (HRDC Comments) (describing site commissions as “legal bribes to induce correctional agencies to provide ICS providers with lucrative monopoly contracts.”).

<sup>70</sup> Another distinction between site commission payments and taxes is that site commissions vary based on the negotiations between providers and facilities, while taxes and regulatory fees are established at particular levels that apply uniformly to anyone in a given class. For example, all carriers are subject to the same contribution rate for Universal Service and no carrier can negotiate a lower (or higher) contribution level.

<sup>71</sup> 84 C.J.S. *Taxation* § 2 (2010). Rather, “[t]axation is a legislative function.” *Nat’l Cable Television Ass’n v. U.S.*, 415 U.S. 336, 340 (1974); *accord* 84 C.J.S. *Taxation* §§ 13, 14; 71 Am. Jur. 2d *State and Local Taxation* §§ 95, 97 (May 2016 Update). Although a “legislature may, within constitutional limitations, delegate the power of taxation for local purposes to political subdivisions of the state,” 84 C.J.S. *Taxation* § 14, “[s]uch delegation is kept within defined lines, with supervisory control always vested in elective bodies.” 71 Am. Jur. 2d *State and Local Taxation* § 97.

<sup>72</sup> *See, e.g.*, HRDC Jan. 12, 2015 Comments at 6; Prison Policy Initiative 2012 NPRM Comments, Attach. at 2 (describing site commissions as “kickbacks”); Wright Petitioners Jan. 12, 2015 Comments at 7 (filed Jan. 12, 2015) (discussing the “ICS kickback regime”); Letter from Bernadette Rabuy, Prison Policy Initiative Policy and Communications Associate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed June 12, 2015) (attaching Bucyrus Telegraph Forum discussing “prison phone commissions kickbacks.”).

<sup>73</sup> *See, e.g.*, Letter from Andrew D. Lipman, Attorney, Morgan Lewis & Bockius, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 5 (filed July 6, 2015) (explaining that “site commission [are] not related in any way to cost, nor [are] they restrained by any market forces. ICS providers [have] an incentive to offer increased site commissions . . . and consumer [have] no influence” on the site commission payments, even though the costs are being passed through to consumers in the form of higher rates).

#### 4. Site Commissions Are Contractual Payments that Providers Enter into Willingly

18. Securus contends that the Commission acted unreasonably by failing to take providers' existing "contractual site commission" obligations into consideration when setting the revised rate caps in the *Reconsideration Order*.<sup>74</sup> Securus's position can be distilled into two basic arguments: first, that the revised rate caps should have covered Securus's fixed site commission payments, known as "Minimum Annual Guarantees"; and second, that it was unreasonable for the Commission to "ignore the market reality" that Securus has been unable to reduce or eliminate its Minimum Annual Guarantee payments because correctional facilities refuse to renegotiate site commissions.<sup>75</sup> Securus is unlikely to prevail on the merits of either of these arguments.

19. With respect to Securus's first argument, we have already addressed claims that site commissions should be included as costs under the rate caps,<sup>76</sup> and note that the revised rate caps allow providers to collect significant additional revenue, which Securus could choose to put towards covering the costs of its existing Minimum Annual Guarantee payments.<sup>77</sup> Moreover, Securus likely has additional revenue from permissible ancillary fees that Securus did not include in its analysis,<sup>78</sup> which may also offset some of the costs of covering the costs of fixed site commission payments.

20. With respect to Securus's second argument, there is evidence in the record that Securus itself ignores the "reality" of the ICS market. As Securus explains, in negotiating Minimum Annual Guarantees, it must contractually guarantee that a facility will receive a certain amount of money annually, regardless of the amount of revenue generated at that facility.<sup>79</sup> In other words, Securus has been entering into contracts with facilities for fixed payments even though it has known, or should have known, since at least 2012, that ICS rates, and thus ICS-derived revenues, could change at any time.<sup>80</sup> Securus claims that it has not been able to reduce or eliminate those terms,<sup>81</sup> but this is simply a contractual dispute between the parties. Securus also suggests that it may be unable to meet contractually binding Minimum Annual Guarantees.<sup>82</sup> Yet, evidence in the record suggests that Securus continues to offer substantial Minimum Annual Guarantees.<sup>83</sup> For example, just 14 days before Securus filed its Stay Petition, it submitted a response before the Georgia Department of Administrative Services defending the award of a contract in which Securus committed to make guaranteed payments of \$19.6 million over four

<sup>74</sup> See Securus Stay Petition at 10.

<sup>75</sup> See *id.* at 7-10.

<sup>76</sup> See *2015 ICS Order*, 30 FCC Rcd at 12821-1830; *Order Denying 2015 Stay Petitions*, 31 FCC Rcd at 268-273, paras. 16-26.

<sup>77</sup> See *supra* para. 15.

<sup>78</sup> See NCIC Opposition at 3; see also Wright Opposition to Telmate Petition at 5 (arguing that providers will be fairly compensated under the Commission's rate caps and permissible ancillary fees).

<sup>79</sup> See Securus Stay Petition at 8-9.

<sup>80</sup> See *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012); *2015 ICS Order*, 30 FCC Rcd at 12837, para. 143 (explaining that "providers have been on notice for years that the Commission might adopt rate caps, or even eliminate site commissions. Thus, any claims that our actions today upset 'investment-back expectations of ICS providers' are likely to fail, particularly claims from providers that recently entered into new contracts with high site commissions. . .").

<sup>81</sup> Securus Stay Petition at 9. ICSolutions contends that Securus is disingenuous when it claims that it cannot renegotiate its contracts. See ICSolutions Opposition at 6 (explaining that "[n]ine days before the implementation date, Securus renegotiated all of their contracts to exclude site commissions as a result of the *2013 Order*.").

<sup>82</sup> Securus Stay Petition at 9-10.

<sup>83</sup> See ICSolutions Opposition at 7.



years.<sup>84</sup> Given that Securus's obligations to pay Minimum Annual Guarantees appear to be a "problem" of its own making, it is unlikely to prevail on claims that such guaranteed payments support a stay of the Commission's revised rate caps.

## **5. The Court's Previous Stay Orders Are Not Determinative of the Petitioners' Likelihood of Success**

21. Petitioners argue that the D.C. Circuit's previous actions signal that it is likely to stay the *2016 ICS Reconsideration*.<sup>85</sup> The State Petitioners even go as far as to claim that the court has expressed "grave reservations" about aspects of the Commission's *2015 ICS Order*, and argue that if the Commission does not stay the *Reconsideration Order*, it will "cast disrespect on both the federal courts and on the States as sovereigns."<sup>86</sup> Petitioners are correct that the D.C. Circuit stayed three provisions of the Commission's 2015 ICS rules in two separate orders.<sup>87</sup> Contrary to Petitioners' arguments, however, the Court provided no comment or explanation "to suggest the rationale behind the stay of the rates in the *2015 Order*."<sup>88</sup> Moreover, the Court declined to stay any other portion of the Commission's ICS reforms.<sup>89</sup> Thus, as the Wright Petitioners aptly explain, it is "impossible to accurately determine why the Court of Appeals granted a stay."<sup>90</sup> Petitioners' prior success in obtaining a stay of a different, but related, order does not mean they are likely to succeed on the merits of the arguments presented in the newest stay petitions. The Petitioners previously complained that the rate caps were too low to cover their costs, and that the Commission acted unreasonably when it recognized the possibility that facilities incur legitimate costs in providing access to ICS but then declined to separately account for such costs when calculating the rate caps.<sup>91</sup> Those may have been the arguments that moved the Court of Appeals to grant a stay, but they lack force against the *Reconsideration Order*.<sup>92</sup>

### **B. Petitioners Will Not Suffer Irreparable Injury Absent a Stay**

22. The Petitioners have failed to prove that they will suffer irreparable injury absent a grant of their stay petitions. Many of the Petitioners' arguments were already addressed in the *Order Denying*

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<sup>84</sup> Wright Opposition to Securus Petition at 6 (describing Securus' bid and noting that if Securus was "truly concerned about the impact of MAGs on its bottom line, it could have simply walked away from its offer during the Georgia proceedings").

<sup>85</sup> See State Petitioners Stay Petition at 4-5; GTL Stay Petition at 21 (arguing that the rates adopted in the *Reconsideration Order* will be invalidated, as "the D.C. Circuit's stay orders suggest is likely."); Securus Stay Petition at 4 (arguing that Petitioners' previous challenges were "well received by the D.C. Circuit . . . and the Order on Reconsideration has very low chances of survival"); Telmate Stay Petition at 9.

<sup>86</sup> State Petitioners Stay Petition at 4-5.

<sup>87</sup> See *supra* para. 3.

<sup>88</sup> ICSolutions Opposition at 3; see also Wright Opposition to States' Petition at 3.

<sup>89</sup> See, e.g., Wright Opposition to Telmate Petition at 3 (arguing that the fact that the court allowed the caps on ancillary fees to go into effect for both inter- and intra-state calling suggests that the court did not believe the appellants were likely to succeed on the merits of their claims that section 276 does not give the Commission sufficient authority to regulate rates for intrastate ICS.); ICSolutions Opposition at 3 (arguing that "Securus grasps at straws when it suggests that the Court's stay of the rates in the *2015 [ICS] Order*" indicates that Securus is likely to prevail in appealing the *Reconsideration Order*.)

<sup>90</sup> Wright Opposition to GTL Petition at 2 (noting that the standard applied by the Court requires a balancing test of four factors and parties cannot know why the Court acted as it did "without being provided further information from the Court of Appeals.").

<sup>91</sup> See, e.g., GTL 2015 Stay Petition at 9-13; Telmate 2015 Stay Petition at 9-10.

<sup>92</sup> See *Order on Reconsideration* at para. 13 (increasing the rate caps substantially and expressly accounting for reasonable facility costs),

2015 Stay Petitions and, therefore, are not addressed here.<sup>93</sup> We reject Petitioners' additional claims of irreparable harm for the reasons described below.

23. *Petitioners Failed to Carry Their Burden of Proving Irreparable Harm.* The Petitioners all claim that they will suffer irreparable harm if the *Reconsideration Order* is not stayed.<sup>94</sup> None of them have carried their burden of proving they will suffer irreparable injury, however.

24. First, unspecific and unsupported claims of potential lost revenue do not constitute irreparable harm.<sup>95</sup> Here, Securus and Telmate each offer conclusory affidavits from executives of their respective companies stating that they will experience unrecoverable revenue losses if the *Reconsideration Order* takes effect.<sup>96</sup> Their affidavits, however, provide no analysis or supporting evidence of their costs to support their arguments that they will not be fairly compensated.<sup>97</sup> GTL and the State Petitioners' arguments are even less convincing.<sup>98</sup> Neither GTL nor the State Petitioners provide affidavits, or any details about the extent of the harm that they expect to face. Instead, they offer only generalized statements that amount to nothing more than speculation.<sup>99</sup> Without providing access to the Petitioners' underlying calculations or an explanation of their analysis, Petitioners fail to demonstrate that their alleged injury is "certain" or "great."

25. Second, even if the Petitioners had submitted specific and supported claims proving they will face revenue losses as a result of the *Reconsideration Order*, the harms they allege do not constitute irreparable harm. The Petitioners essentially argue that because the *Reconsideration Order* did not adopt the relief they would have preferred, they will suffer irreparable harm.<sup>100</sup> Moreover, as the Wright Petitioners point out, the Petitioners attempt to stay an order curbing excessive ICS rates by pointing to the decrease in their excessive ICS profits as their justification for the stay.<sup>101</sup> These arguments are insufficient to demonstrate irreparable harm. The Commission is tasked with the responsibility of ensuring that ICS rates are fair, just, and reasonable.<sup>102</sup> The actions necessary to accomplish this, as ICSolutions notes, will rarely "satisfy all interested participants."<sup>103</sup> However, a potential loss of revenue

<sup>93</sup> See *Order Denying 2015 Stay Petitions*, 31 FCC Rcd at 290-295, paras. 60-69.

<sup>94</sup> See Securus Stay Petition at 11; Telmate Stay Petition at 6; GTL Stay Petition at 21; State Petitioners Stay Petition at 7.

<sup>95</sup> See, e.g., *Wisc. Gas*, 758 F.2d at 674 (to demonstrate irreparable harm "the injury must be both certain and great").

<sup>96</sup> See Securus Stay Petition at 11; Telmate Stay Petition at 6.

<sup>97</sup> See Wright Opposition to Telmate Petition at 4. For example, Telmate argues that it will lose revenue absent a stay, but does not argue that the loss in revenue will cause Telmate to operate at a loss. See Telmate Stay Petition at 7. The magnitude of Telmate's harm is thus neither "certain" nor "great" enough to justify a stay. See *supra* n.[95] (citing *Wisc. Gas*, 758 F.2d at 674). We also note that Securus did not seek to stay the 2015 rate caps, which were lower than the ones adopted in the *Reconsideration Order*. See generally Securus Technologies, Inc. Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136), WC Docket No. 12-375 (filed Dec. 22, 2015), <http://apps.fcc.gov/ecfs/comment/view?id=60001361748>.

<sup>98</sup> See GTL Stay Petition at 21; State Petitioners Stay Petition at 7.

<sup>99</sup> See Wright Opposition to GTL Petition at 7 ("GTL's Petition also failed to include any analysis to support its claim that it will suffer irreparable injury as the result of the new ICS rate caps. Unlike Securus and Telmate, GTL apparently could not be bothered to even submit a self-serving affidavit from one of its executives to make the argument that GTL has lost \$X million in renegotiating its monopoly contracts.").

<sup>100</sup> See ICSolutions Oppositions at 8.

<sup>101</sup> See Wright Opposition to Securus Petition at 5.

<sup>102</sup> See 47 U.S.C. §§ 201, 276.

<sup>103</sup> See ICSolutions Opposition at 8.

alone does not entitle a party to a stay of a regulation, particularly when the regulation in question is aimed at curbing the party's excessive rates.<sup>104</sup>

26. *Providers Entered Into Contracts Willingly.* Securus, Telmate, and GTL also argue that the revised rate caps adopted in the *Reconsideration Order* will require them to renegotiate their contracts with facilities, and claim that various costs associated with this process will cause irreparable harm.<sup>105</sup> We reject these claims for the reasons explained below.

27. Securus, Telmate, and GTL argue that renegotiating contracts will cause them to incur unreimbursable compliance costs, loss of goodwill, and “deal fatigue.”<sup>106</sup> Similar to Petitioners' claims of lost revenues, discussed above, Securus, Telmate, and GTL's arguments that renegotiating contracts will lead to compliance and negotiation costs are neither specific enough nor sufficiently supported to justify a claim of irreparable harm.<sup>107</sup> These claims are speculative, at best, and are the type of “blanket, unsubstantiated allegations of harm” that may not be used to grant a stay.<sup>108</sup> We also note that providers willingly entered into their contracts with facilities, with the knowledge that the Commission was undertaking comprehensive ICS reform and that regulations could change, in ways that might affect those contracts.<sup>109</sup>

### C. Granting the Requested Stays Would Result in Harm to Third Parties

28. The Petitioners argue that third parties will not be harmed if the Commission grants their stay petitions because those parties will be protected by the interim rate caps currently in effect. We reject these claims, however, and find that staying the *Reconsideration Order* would harm third parties, including inmates and their families, who rely on ICS to communicate with each other.<sup>110</sup> Although the interim rate caps adopted in the 2013 ICS Order ameliorated some of the harm caused by unfair, unjust, and unreasonable ICS calling rates, those interim caps apply only to interstate traffic. This severely limits

<sup>104</sup> See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (explaining that it is “well settled that economic loss does not, in and of itself, constitute irreparable harm”; to demonstrate irreparable harm “the injury must be both certain and great”); *Holiday Tours*, 559 F.2d at 843 n.2 (holding that “‘mere’ economic injuries” are not sufficient for a stay). See also Wright Opposition to Telmate Petition at 7; ICSolutions Opposition at 8. Moreover, it is unclear whether any of the Petitioners' “analyses” took into account the increased demand that is likely to result from lower rates. See, e.g., Telmate Mar. 25, 2013 Comments at 12 (“Telmate's experience proves the . . . economic truism that lower prices stimulate demand . . . [w]hen there are lower rates . . . volume goes up and everyone wins.”); Wright Opposition to Telmate Petition at 5 (discussing “undisputed evidence that call volume increases when rates are lowered.”). Nor do any of the Petitioners even mention their continuing revenue streams from various ancillary services and fees.

<sup>105</sup> See Securus Stay Petition at 11-12; Telmate Stay Petition at 6; GTL Stay Petition at 22.

<sup>106</sup> For example, Telmate states that without a stay, it will incur compliance costs, including “performing tasks such as negotiating amendments to all of its contracts, traveling to meet with customers to explain the changes, and altering its billing and internal systems.” Telmate Stay Petition at 7. Securus and GTL further allege that renegotiating contracts will cause the loss of customer goodwill arising from the ‘deal fatigue’ of having to renegotiate contracts twice in less than a year. Securus Stay Petition at 12; GTL Stay Petition at 22.

<sup>107</sup> See *supra* n. 104; *Holiday Tours*, 559 F.2d at 843 n.2 (referring to a “severe” injury as “destruction of a business”).

<sup>108</sup> *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 77 (D.D.C. 2013) (subsequent history omitted).

<sup>109</sup> See *supra* para. 20. In addition, providers were not required to renegotiate their contracts after the 2015 rate caps were stayed. Any contracts that complied with the 2015 rate caps would also comply with the revised regulations adopted in the *Reconsideration Order*. If providers were truly concerned about the “harms” of renegotiating such contracts, they could have waited for the final disposition of all of the ICS-related appeals before approaching their customers again.

<sup>110</sup> See *Order Denying 2015 Stay Petitions*, 31 FCC Rcd 261, 295, at para. 72 (noting that a stay of the Commission's rate caps would delay relief to millions of ICS customers).

the scope of the relief, because over 80 percent of ICS calls are *intrastate*.<sup>111</sup> Moreover, the interim rate caps are still higher than the rate caps for most tiers, even after the Commission's decision to increase those rate caps in the *Reconsideration Order*.<sup>112</sup> Thus, many consumers are paying rates above what the Commission has found to be fair, just, and reasonable even for those calls that are currently subject to the interim rate caps.<sup>113</sup>

#### **D. The Public Interest Does Not Support a Grant**

29. The Petitioners have failed to prove that the public interest supports grants of their stay petitions. We reject their arguments for the reasons described below.

30. *The Adopted Rate Caps Serve the Public Interest.* Petitioners' contentions that a stay will benefit the public interest contradict evidence in the record of the urgent need to reform the ICS market.<sup>114</sup> Staying the reforms adopted in the *Reconsideration Order* would delay relief to inmates, their families, and loved ones, who depend on ICS to maintain contact and who would continue to be harmed by excessive ICS rates. As noted, the interim rates currently in effect do not apply to intrastate calls. Thus, without the reforms adopted in the *Reconsideration Order*, intrastate rates in most states will remain at egregiously high levels in most of the country.<sup>115</sup> Accordingly, we agree with the Wright Petitioners that there will be "overwhelmingly positive public interest benefits arising from" implementation of the *Reconsideration Order* and "[a]ny delay ... would be, in fact, counter to the public interest."<sup>116</sup>

31. *The Public Interest Extends Beyond the Conservation of Judicial Resources.* Securus and Telmate argue that the public interest is served by the conservation of judicial resources.<sup>117</sup> While conserving judicial resources is an important public interest consideration, so too is ensuring that consumers have access to fair, just, and reasonable rates under sections 201 and 276 of Communications Act. Moreover, the latter involves statutory mandates that the Commission is charged with enforcing.<sup>118</sup> If the *Reconsideration Order* is stayed, intrastate rates, in particular, will be unfairly high.<sup>119</sup> As the Wright Petitioners point out, "[a]ny delay in the effectiveness of the Recon Order would delay immediate relief to millions of ICS customers currently being charged excessive ICS intrastate rates, who have seen

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<sup>111</sup> *Id.* at para. 71 (citing *2015 ICS Order*, 30 FCC Rcd at 12768, para. 7).

<sup>112</sup> See *Reconsideration Order* at n. 2 (explaining that the weighted average for all calls under the revised rate caps were "well below" the interim rate caps currently in effect).

<sup>113</sup> GTL further contends that third parties will not be harmed if the Commission grants GTL's Petition because the interim rate caps are similar to the rate caps the Wright Petitioners requested in their original filing over a decade ago. GTL Stay Petition at 23. We addressed those arguments in the *Order Denying 2015 Stay Petitions* and incorporate that response by reference. See *Order Denying 2015 Stay Petitions*, 31 FCC Rcd 261, 295, at para. 72 (noting that "[t]elecommunications costs have fallen . . . and ICS rates that might have been fair, just, and reasonable in 2002 [when the Wright Petitioners filed their original request] may be excessive now.").

<sup>114</sup> See *id.* at 297, para. 78 (citing *2015 ICS Order*, 30 FCC Rcd at 12768, para. 7).

<sup>115</sup> See *2015 ICS Order*, 30 FCC Rcd at 12768, para. 7. In addition, as ICSolutions points out, "[t]he failure of the market to effectively control rates is hindering competition. Whenever one charge is controlled, the industry finds another charge to manipulate, forcing all providers to choose between fair, just, and reasonable rates or charging exorbitant rates." ICSolutions Opposition at 10.

<sup>116</sup> Wright Opposition to Securus Petition at 8.

<sup>117</sup> See Securus Stay Petition at 13; Telmate Stay Petition at 8 (contending the FCC should "preserve the D.C. Circuit's (and the parties') resources" because in the absence of an administrative stay, "the parties will proceed to the D.C. Circuit").

<sup>118</sup> See 47 U.S.C. §§ 201, 276.

<sup>119</sup> See *supra* para. 28; see also *Order Denying 2015 Stay Petitions*, 31 FCC Rcd at 295, para. 71 (citing *2015 ICS Order*, 30 FCC Rcd at 12775, para. 21).



their ICS expenses increase due to the actions of Telmate and other ICS providers.”<sup>120</sup> Thus, while we agree that judicial resources are a public interest concern, the record before us demonstrates that the public interest would be served best by capping ICS rates at fair, just, and reasonable levels without delay.<sup>121</sup>

#### IV. SECURUS’S MOTION TO STRIKE

32. Securus has filed a motion to strike those parts of NCIC’s Opposition that address Securus’s Stay Petition.<sup>122</sup> In support of its motion, Securus points out that NCIC’s Opposition was filed “out of time.”<sup>123</sup> While Securus is correct that NCIC filed its Opposition after the deadline for oppositions had passed, we note that this proceeding has been designated “permit but disclose,” meaning that parties are permitted to submit *ex parte* presentations into the record.<sup>124</sup> We find that treating NCIC’s late-filed Opposition as a permissible *ex parte* filing would “best conduce to the proper dispatch of business and to the ends of justice.”<sup>125</sup> In making this finding, we recognize that NCIC’s Opposition is not limited to Securus’s Stay Petition. Rather, NCIC’s filing is explicitly directed at all four stay petitions.<sup>126</sup>

33. We agree with Securus that it would have been better for NCIC to acknowledge that its filing was “out of time” and provide an explanation for its untimely filing.<sup>127</sup> We also recognize, however, that NCIC could have entered its arguments into the record without any dispute if it had simply styled its submission as an *ex parte* filing rather than an Opposition. In this particular instance, we find that “the ends of justice” would not be served by letting form trump substance. In reaching this decision, we consider the fact that Securus had sufficient time to file a substantive response to NCIC’s filing, had it chosen to do so.<sup>128</sup> We also consider the benefit of having as fulsome a record as possible regarding the issues raised in the stay petitions, particularly given the relatively small number of parties that weighed in on either side of the issue. Finally, we note that Securus is not prejudiced by our decision not to strike NCIC’s Opposition, because even if we were to grant the Motion to Strike, we still would deny all of the stay petitions, including the one filed by Securus.<sup>129</sup> We therefore deny Securus’s Motion to Strike.

#### V. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 201, 225, 276, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 201, 225, 276, and 303(r) and the authority delegated pursuant to section 0.91 and 0.291 of the

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<sup>120</sup> Wright Opposition to Telmate Petition at 8.

<sup>121</sup> See ICSolutions Opposition at 3 (explaining that Securus’s argument is “baseless” and pointing out that “it is axiomatic that it would save resources for the Court and all parties to consider the merits of the [*Reconsideration Order*] in the [context of] the current Appeal [of the 2015 ICS Order].”)

<sup>122</sup> See Motion to Strike at 1.

<sup>123</sup> *Id.* (explaining that NCIC’s response to the Securus Petition was due September 6, 2016, but the NCIC Opposition “was not filed until September 14.”). Securus also notes that NCIC never requested the confidential version of the Securus Stay Petition. *Id.*

<sup>124</sup> See *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170, 13233, para. 161 (2014); 47 CFR §§ 1.1200 *et seq.*

<sup>125</sup> 47 U.S.C. 154(j).

<sup>126</sup> NCIC Opposition at 1.

<sup>127</sup> Motion to Strike at 1.

<sup>128</sup> Securus had sufficient time to draft and file a Motion to Strike.

<sup>129</sup> Put another way, our decision to deny the petitions does not depend on any arguments or facts that were presented solely in the NCIC Opposition.

Commission's rules, 47 CFR §§ 0.91 and 0.291, this Order Denying Stay Petitions in WC Docket No. 12-375 IS ADOPTED.

35. IT IS *FURTHER* ORDERED, that the Securus Technologies, Inc. Petition for Partial Stay of Order on Reconsideration Pending Appeal, the Petition of Telmate, LLC for Stay Pending Judicial Review, the Petition of Global Tel\*Link for Stay Pending Judicial Review, and the Petition for Stay Pending Judicial Review of Order on Reconsideration by the States of Oklahoma, Arizona, Arkansas, Indiana, Louisiana, Kansas, Missouri, Nevada, Wisconsin, The Oklahoma Sheriffs' Association, The Indiana Sheriffs' Association, Oklahoma County Sheriff John Whetsel, Marion County Sheriff's Office, Lake County Sheriffs' Department, and The National Association of Regulatory Utility Commissioners ARE DENIED.

36. It is FURTHER ORDERED, that Securus's Motion to Strike, In Part, Opposition to Petitions for Stay is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Matthew S. DelNero  
Chief  
Wireline Competition Bureau

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5. Value-Added Communications, Inc., was awarded the contract to provide inmate calling services after participating in a competitive bidding process governed by Oklahoma's public purchasing laws.

6. In 2011, Global Tel\*Link Corporation purchased Value-Added Communications, Inc., which continues to operate as an independent subsidiary and to provide inmate calling services in Oklahoma prisons.

7. The contract between the Oklahoma Department of Corrections and Value-Added Communications, Inc., whose terms were set in 2011 to begin in effect on January 1, 2012 (the "2012 contract"), and were in effect at the time the Federal Communications Commission (FCC) released its Second Report and Order and Third Further Notice of Proposed Rulemaking on Rates for Interstate Inmate Calling Services (Nov. 15, 2015) (the "Order"), sets the rates that inmates pay for telephone service and for other services. After the FCC released its Order and that Order was partially stayed by the U.S. Court of Appeals for the District of Columbia Circuit, the Department of Corrections and Value-Added Communications agreed to an amendment of the contract on March 22, 2016 (the "2016 amendment").

8. The rates set out in the 2012 contract include a \$3.00 flat charge for a 15-minute phone call. The contract also allows a \$4.75 transaction fee for using a credit card, debit card, or electronic check to deposit money. The contract prohibits all other ancillary charges, although taxes or fees mandated by a government entity can be added to the cost of a call. The contract also specifies that the Oklahoma Department of Corrections would receive \$2.30 of revenue for each \$3.00 phone call charge.

9. The average call length since the contract went into effect has been about 13.49 minutes. Under the 2012 contract, that means that inmates paid an average of about \$0.22 per minute

for calls, the Oklahoma Department of Corrections received about \$0.17 per minute, and Value-Added Communications, Inc., retained about \$.05 per minute.

10. Under the 2016 amendment, the calling rates for both intrastate and interstate calls is \$0.20/minute (exclusive of taxes). The amendment also specifies a \$3.00 transaction fee for using a credit card, debit card, or electronic check to deposit money, as well as other fees for other services. The contract allocates \$0.15 per minute for intrastate phone calls to the Department of Corrections.

11. If the Order on Reconsideration went into effect, the rate applicable in Oklahoma prisons would be \$0.13 per minute. If Value-Added Communications, Inc., retained the same amount per minute that it currently does, approximately \$.05 per minute, the Oklahoma Department of Corrections could only receive—at most—about \$.08 per minute for intrastate calls under rates that comply with the Order on Reconsideration. Should the caps in the Order on Reconsideration go into effect, the Oklahoma Department of Corrections expects to see its revenue drop from around \$2,500,000 per year to approximately \$1,300,000, assuming call volume remains approximately the same as it did in 2015—a loss of \$1,200,000.<sup>1</sup>

12. It is unlikely that increased call volume due to lower rates will make up for the lost funding to the Department of Corrections. First, it does not appear that the FCC's interstate rate caps, which went into effect in March 2014, corresponds with any significant long-term impact on call volume, despite any short-term spikes. Many factors impact call volume at DOC facilities, including the size of the inmate population and the facility policies on phone use, which were modified in March 2016. Thus, the best measure of the impact of the FCC's Orders on call volume is call minutes per inmate in years prior to substantial inmate call policy changes (years 2012-2015).

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<sup>1</sup> These estimates were created using the estimated revenue per minute noted above multiplied by the total intrastate minutes last year (2015), which was 16,707,248.

13. DOC's original contract operated during the entirety of 2012 and 2013 without the effects of Federal Communications Commission interstate rate setting. During 2012, Oklahoma facilities produced, on average, 1,494,074 ICS minutes per month. That number translates into each inmate spending about 83 minutes on the phone during any given month. Those numbers decreased slightly in 2013, with facilities accounting for an average of 1,466,743 ICS minutes per month, and per-inmate averages falling to around 82 minutes per month. The Oklahoma Department of Corrections received an average of \$3,037,883.525 per year in revenue during each of those years.

14. In March 2014, the Federal Communications Commission's interim rates for interstate calls went into effect. Monthly ICS minutes rose that year to 1,696,993 minutes per month, with a corresponding increase in average monthly minutes per inmate to about 91 minutes. The majority of the increase can be attributed to a spike that occurred in the three months immediately following the FCC's Order (April, May, and June of 2014), with inmates spending around 98, 97, and 93 minutes per month on the phone, respectively. But despite the increase in ICS activity, the Department's 2014 revenues fell from the prior years' average to \$3,030,112.76.

15. The increased ICS activity in 2014 was only temporary. In 2015, with the interstate rate caps in effect for the whole year, average ICS minutes dropped to 1,629,320 minutes per month, and the per-inmate average fell to 83 minutes per month. This is approximately the same per-inmate monthly minute average from years 2012 and 2013, before the FCC's interstate rate caps went into effect. Thus, it does not appear that the FCC's interstate rate caps were associated with any long-term increase in call volume. The Oklahoma Department of Corrections received \$2,850,983.15 in revenue in 2015, in addition to a \$250,000 signing bonus received after renewing the contract for that year.

16. Second, it is unlikely that the interstate rate caps had impact on call volume because it appears that most of the fluctuation in call volume during 2014 and 2015 was due to changes in intrastate call activity (which was not subject to the FCC's original rate caps), not interstate call activity.

It is difficult to determine whether interstate calls increased after imposition of the interstate rate caps, because the Department of Corrections only began to keep separate accounts of interstate and intrastate ICS activity in response to the FCC Order setting interstate rate caps in March 2014. But from March 2014 through the end of 2014, interstate ICS minutes stayed roughly the same, ranging from a low of 222,384 minutes in July to a high of 268,725 minutes in December (a maximum deviation of 46,341 minutes). Intrastate minutes fluctuated more, with a range from as low as 1,388,745 minutes in March to as high as 1,565,409 minutes in May (a maximum deviation of 176,664 minutes).

17. Similarly, the average interstate minutes per month in 2014 during and after March was 242,636, while in 2015 (when total minutes regressed to the mean) that same figure was 237,049 (a difference of only 5,587 minutes); meanwhile, intrastate minutes for those time period fluctuated more meaningfully from 1,469,876 minutes per month in 2014 during and after March to 1,392,271 minutes per month in 2015 (a difference of 77,605 minutes). Minutes per inmate reflected a similar pattern, with intrastate minutes shifting from 78 in 2014 during and after March to 71 minutes per month in 2015, and interstate minutes changing from 13 to 12 minutes per month for the same periods. The graph attached to this Affidavit plots the monthly minutes per inmate figures and shows that the fluctuation in minutes is primarily due to intrastate, not interstate, calls. In total, intrastate ICS minutes made up for an average of 85.8% of DOC's total ICS activity in 2014; interstate minutes made up for only 14.2%. The allocation in 2015 was almost identical (85.5% and 14.5%). Thus, it is likely that any differences in call volume in 2014 were the result of increases in intrastate call minutes rather than a result of the FCC's interstate rate caps.

18. Third, even if some increase in volume can be expected as a result of the FCC's rate caps, such an increase will have a smaller impact on the loss of funds due to the rate caps because increased call volume also increases the Department of Corrections' costs in allowing ICS services.



The Oklahoma Department of Corrections is critical in the delivery of the inmate calling service to the inmates incarcerated in its correctional facilities. The Department has seventeen correctional facilities with security levels ranging from minimum to maximum security. As a result, there are varying levels of staff involvement and time that must be invested by the Department in order for the inmate calling service to be provided to the inmates. Without this investment by the Department, inmates would not be able to utilize the inmate calling service.

19. The Oklahoma Department of Corrections expends resources in time and money in efforts designed to interdict contraband entering into its correctional facilities and investigating other forms of criminal activity conducted by inmates through the use of inmate calling services. One tool currently available to the Department is the ability to monitor telephone calls made by inmates using the inmate calling service. The fact that the phone calls are monitored also helps as a deterrent to inmates using the inmate calling service to conduct criminal activity. Because the safety and security of its correctional facilities are vital to the Department's mission of protecting the public, the Department's employees, and the inmates, the monitoring of inmate phone calls by Department staff is absolutely a necessity so long as inmates are allowed to use an inmate calling service.

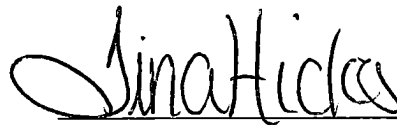
20. The Oklahoma Department of Corrections must use the revenue it receives from inmate calling services for the benefit of inmates as part of the Department's canteen system according to Title 57, Section 537 of the Oklahoma Statutes.

21. Benefits provided to inmates from the canteen system in Oklahoma include, among other things, substance abuse treatment, mental health treatment programs, counseling programs, health services, legal resources including Westlaw access and copying machines, job training, inmate clothing, and recreational equipment including sporting equipment, board games, exercise equipment, and more.

22. The Oklahoma Department of Corrections would not be able to fund all of the benefits currently provided through the canteen system if revenue from inmate calling services dropped from approximately \$2,500,000 per year to somewhere less than \$1,300,000 per year. Indeed, this loss of \$1,200,000. To put this in perspective, this \$1,200,000 shortfall represents the Department's entire operational budget for substance abuse treatment during Fiscal Year 2016.<sup>2</sup>

23. If the Order goes into effect, then, the Oklahoma Department of Corrections would be forced to change its policy goals by reducing programming provided with canteen system revenues or by diverting funds that currently achieve other policy goals in order to pay for programs currently funded by canteen system revenues.

FURTHER AFFIANT SAITH NOT.



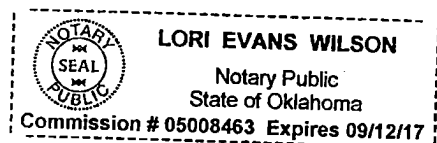
Tina Hicks

SUBSCRIBED AND SWORN before me, the undersigned Notary Public, on this 4th  
day of October, 2016.



Notary Public

My Commission Expires on 9/12/17



<sup>2</sup> FY-2017 Executive Budget – Historical Document, Oklahoma Office Of Management And Enterprise Services at 224, [https://www.ok.gov/OSF/documents/bud17hd\\_tagged.pdf](https://www.ok.gov/OSF/documents/bud17hd_tagged.pdf) (figures for Residential Substance Abuse Treatment (“RSAT”) and “Substance Abuse BJCC,” a facility that is dedicated to substance abuse and cognitive behavior programs).

