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

GLOBAL TEL*LINK, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 15-1461 (and consolidated cases)

MOTION OF GLOBAL TEL*LINK FOR PARTIAL STAY PENDING JUDICIAL REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, petitioner Global Tel*Link Corp. ("GTL") submits the following corporate disclosure statement:

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

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Petitioner Global Tel*Link ("GTL")[1] provides telephone calling services to inmates of correctional facilities — prisons and jails — across the country. The nature of these inmate calling services ("ICS") makes them more costly to provide than ordinary toll service. For example, ICS include enhanced security features to prevent phone-based criminal activity or prohibited inmate communications. In addition, correctional facilities typically require ICS providers to pay "site commissions" — essentially, rent — in exchange for the right to provide service within a given facility. These costs mean that, despite fierce competition among ICS providers, rates for ICS are typically higher than rates for ordinary toll service and can be difficult for inmates and their families to afford.

GTL supports the goal of the Federal Communications Commission ("FCC") to make ICS more affordable. But the FCC's two attempts to do so have ignored the realities of the ICS market, threatened ICS providers with significant losses, and exceeded the FCC's statutory authority. In 2013, the FCC promulgated a rate-cap regime[2] that was challenged in, and partially stayed by, this Court. *See* Order, *Securus Techs., Inc. v. FCC*, Nos. 13-1280 *et al.* (D.C. Cir. Jan. 13, 2014) (per curiam). Before those petitions for review were resolved, the FCC announced

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

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

that it was drafting new rules and successfully moved this Court to hold the petitions challenging the *2013 Order* in abeyance. *See* Order, *Securus*, Nos. 13-1280 *et al.* (Dec. 16, 2014) (per curiam). In so doing, the FCC promised to seek "a simplified, market-based approach focused on aligning the interests of ICS providers and facilities."[3]

The resulting order,[4] released November 5, 2015, makes no pretense of seeking such a market-based solution and instead imposes dramatically reduced rate caps that *the FCC admits* are below providers' lawfully incurred costs. This *Order*, like its predecessor, should be stayed. *See* D.C. Cir. R. 18(a)(1).[5]

1. GTL will likely prevail on the merits, first of all, because the rate caps do not allow ICS providers to recover the cost of the site commissions they are required to pay — even though the FCC recognized that those payments are both a

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[3] Second Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170, ¶ 6 (2014) ("*2014 NPRM*").

[4] Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 30 FCC Rcd 12763 (2015) ("*Order*") (Ex. A). Among other things, the regulations in the *Order* "supersede . . . the *2013 Order*," *Order* ¶ 10, rendering the challenges in *Securus* now moot. *See Alaska v. U.S. Dep't of Agric.*, 772 F.3d 899, 900 (D.C. Cir. 2014) (where agency rule repealed or replaced, right to challenge rule is "extinguished").

[5] Pursuant to Fed. R. App. P. 18(a)(2)(A)(ii), GTL moved for a stay before the FCC, and the agency denied the motion. Order Denying Stay Petitions, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, DA 16-83 (Wireline Comp. Bur. Jan. 22, 2016) ("*Stay Order*") (Ex. B). And pursuant to D.C. Cir. R. 18(a)(2), counsel for GTL notified counsel for the FCC by telephone in advance of the filing of this motion.

substantial cost incurred by ICS providers and permitted by federal law. Indeed, the FCC acknowledged that, if commissions are taken into account, the rate caps are below cost. This violates 47 U.S.C. § 276(b)(1)(A), which requires the FCC to ensure that ICS providers "are fairly compensated for each and every completed . . . call using their payphone." And it violates the Constitution's Takings Clause, which bars confiscatory rates. By the same token, the FCC's failure to address site commissions in the *Order* — when it had recognized that those commissions are the primary driver of high ICS rates — was arbitrary and capricious.

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

3. Even more fundamentally, the *Order* is unlawful because the FCC lacks authority to set rate caps for *intrastate* ICS calls. The FCC relied on § 276(b)(1)(A), but that provision requires the FCC to "ensure that all payphone service providers are fairly compensated" — *i.e.*, that they receive fair payment in circumstances where pre-existing regulations forced them to provide service without receiving fair (or any) compensation. The provision does not address authority to regulate rates, and it cannot reasonably be read to grant the FCC general regulatory authority to *reduce* market-based, intrastate rates.

4. The equities favor a stay. GTL will suffer irreparable harm if the *Order* is not stayed, because it will be forced to charge unlawful, confiscatory rates; the revenues lost cannot be recovered. By contrast, there will be no cognizable harm if the *Order* is stayed, because the existing rate caps from the *2013 Order* will remain in place, and state authorities remain free to mandate reduction of intrastate rates. The public will be harmed if the dramatically lower rate caps imposed by the *Order* lead to loss of or reduction in available services.

BACKGROUND

The *Order* marks the FCC's latest action on two administrative petitions, both filed in the mid-2000s, that asked for rulemaking related to interstate ICS rates.[6] The *2013 Order* adopted interim rate caps of $0.21 per minute for debit and prepaid interstate ICS calls and $0.25 per minute for collect interstate ICS calls; it also required that both interstate rates and "ancillary charges" be "cost-based" or subject to invalidation. *See 2013 Order* ¶¶ 12, 48. Several parties, including GTL,

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

filed petitions for review challenging the *2013 Order*[7] and some sought a stay of all or part the *2013 Order*; GTL sought a stay of those portions of the *2013 Order* that imposed cost-based regulation. *See* Mot. of Global Tel*Link for Partial Stay Pending Judicial Review at 8-16, *Securus*, Nos. 13-1280 *et al.* (filed Nov. 25, 2013). This Court granted GTL's stay request; one panel member would have stayed the entire order. *See* Order, *Securus*, Nos. 13-1280 *et al.* (Jan. 13, 2014).

After the case was fully briefed, the FCC successfully moved to have the case held in abeyance pending the completion of further agency-level proceedings. *See* Uncontested Mot. of FCC To Hold Case in Abeyance, *Securus*, Nos. 13-128 *et al.* (filed Dec. 10, 2014). The FCC represented that it had proposed a rulemaking that "could moot or significantly alter the scope of" the pending challenges to the *2013 Order*. *See id.* at 3, 4.

The *2014 NPRM* signaled a change in approach, proposing "a simplified, market-based approach focused on aligning the interests of ICS providers and facilities." *2014 NPRM* ¶ 6. The *2014 NPRM* repeatedly identified location rents or site commissions — "fees paid by ICS providers to correctional facilities or departments of corrections to win the exclusive right to provide inmate calling

[7] *See*, *e.g.*, Pet. for Review, *Global Tel*Link v. FCC*, No. 13-1281 (filed Nov. 14, 2013).

service at a facility" — as the primary factor driving high ICS rates. *Id.* ¶ 3.[8] The centerpiece of the FCC's proposed "comprehensive solution" was the elimination of such rent payments. *Id.* ¶ 6; *see id.* ¶ 19.

The FCC explained that its intended reform would allow for "a more market-based approach," reflecting its "prefer[ence] to allow market forces to ensure that rates are just and reasonable." *Id.* ¶¶ 47-48. Instead of the cost-based rates of the *2013 Order*, the FCC sought comment on adopting permanent rate caps for both interstate and intrastate ICS calls as a "backstop" to market forces; capping certain ancillary fees and prohibiting others. *Id.* ¶ 47.

The *Order* departed sharply, however, from the plan laid out in the *2014 NPRM*. Foremost, the FCC took no action to eliminate or reduce site commissions, despite having concluded that they are a primary driver of costly ICS rates. The FCC did not retract its criticisms of site commissions; it concluded, without elaboration, that "we do not need to prohibit site commissions in order to ensure that interstate rates for ICS are fair, just, and reasonable and that intrastate rates are fair." *Order* ¶ 118. Yet, despite allowing site commissions to continue, the FCC concluded that such payments are not a cost of providing ICS "and should not be considered in determining fair compensation for ICS calls." *Id.* ¶ 123.

[8] *See also*, *e.g.*, *2014 NPRM* ¶ 3 ("Excessive rates are primarily caused by the widespread use of site commission payments . . . ."); *id.* ¶ 24 (deeming site commission payments "the main cause of the dysfunction of the ICS marketplace").

After excluding a significant real cost of providing service, the *Order* set tiered rate caps that, instead of serving as a "backstop" to market forces, impose an even more stringent cost-based regime than the one adopted in the *2013 Order*. For example, the FCC slashed the former rate caps for prisons in half to $0.11 per minute for debit and prepaid calls and $0.14 per minute for collect. *See id.* ¶ 9, tbl. 1.[9] Furthermore, unlike the rate caps and other regulations adopted in 2013 — which were limited to interstate calls — the rate regulations in the *Order* apply to both interstate and intrastate rates.

The *Order* acknowledged that (1) the caps were not high enough to cover site commission payments that many ICS providers are contractually obligated to make, *see id.* ¶ 125 ("If site commissions were factored into the costs we used to set the rate caps, the caps would be significantly higher."), and (2) even excluding site commissions, the caps were below the costs reported by some ICS providers, *see id.* ¶ 116. As to site commissions, the *Order* asserted, with no evidentiary analysis, that the rate caps would "likely" trigger change-of-law clauses in existing contracts. *See id.* ¶ 132. With respect to providers whose contracts and costs would not change and would remain above the FCC's rates, the FCC simply asserted that such providers are not "efficient." *See id.* ¶ 52 n.170. The FCC also

[9] Unlike the caps in the *2013 Order*, which did not vary based on the size of the correctional facility, the *Order* set rate caps for different facility "tiers" based on the assumption that smaller institutions are generally more costly to serve.

established a waiver process for ICS providers seeking relief from the rate caps. *See id.* ¶ 219.[10]

Notice of the FCC's new rules was published in the Federal Register on December 18, 2015. The rules are scheduled to take effect 90 days after publication for prisons and six months after publication for jails. *See Order* ¶ 251.

ARGUMENT

A petitioner seeking a stay must show that (1) it is likely to prevail on the merits;[11] (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the

[10] In addition to the rate caps, the FCC set caps and rules governing a list of ancillary service charges, *see Order* ¶¶ 161-163 & tbl. 4, and established a periodic review process for ICS cost data, *see id.* ¶ 201, annual reporting requirements for ICS rates and traffic volumes, *see id.* ¶ 267, and consumer disclosure requirements for ICS rates and charges, *see id.* ¶ 278. The *Order* also "confirm[ed]" the FCC's finding in the *2013 Order* that 47 U.S.C. § 276 — which authorizes the FCC to regulate "payphone service" — is "technology neutral" and allows the FCC to regulate inmate calls over VoIP or other technologies. *See id.* ¶ 250 & nn.879-880; *see also* 47 C.F.R. § 64.6000(j); *2013 Order* ¶ 14. Finally, the FCC issued a Further Notice of Proposed Rulemaking seeking comment on several matters, including exclusivity of ICS contracts, video calls and other enhanced services, data collection and disclosure requirements, international calling rates, and third-party financial transaction fees. *See Order* ¶¶ 291-327.

[11] Although GTL seeks a stay only as to the rate caps, GTL believes that the *Order* is unlawful and will not survive judicial review in several respects, including the FCC's expansion of the term "inmate calling service" well beyond the statutory bounds of § 276. *See also* O'Rielly Dissent to *Order* at 209. GTL has challenged this and other portions of the *Order* in its petition for review. Given space limitations, GTL develops in this motion only some of the arguments on which it believes it is likely to prevail.

public interest favors granting a stay. *See Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); D.C. Cir. R. 18(a)(1). Those factors are satisfied here.

I. GTL IS LIKELY TO PREVAIL ON THE MERITS

A. The *Order*'s Rate Caps Violate the Communications Act and the Constitution Because They Deliberately Set Rates Below the Lawful Cost of Providing Service

1. The *Order* acknowledged that its rate caps will not allow ICS providers to recoup the site commission payments that they are contractually obligated to make. *See Order* ¶ 54 (describing caps as sufficient to allow recovery of "efficiently-incurred ICS costs (*excluding reported commissions*)") (emphasis added). In fact, the FCC admitted that the caps "would be significantly higher" if these necessary payments were factored in. *Id.* ¶ 125. This admission is fatal to the *Order* because federal law requires the FCC "to ensure that all payphone service providers are fairly compensated for *each and every* completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A) (emphasis added). The FCC cannot lawfully set rates that, by its own admission, fail to compensate ICS providers for the costs they actually incur to provide service.

The FCC insisted that site commissions "are not reasonably related to the provision of ICS and should not be considered in determining fair compensation for ICS calls." *Order* ¶ 123. There is no factual or legal basis for that assertion.

Site commission payments are, in effect, the rent that ICS providers pay for permission to locate their equipment within a correctional institution. Correctional authorities and institutions frequently require such payments, sometimes pursuant to express statutory mandate.[12] Where required, location rental payments — no less than the purchase of telephone equipment or the lease of local telephone lines — are a real cost of providing ICS.[13] As a result of excluding this recognized cost, the FCC has set rate caps that will cause ICS providers to lose money — a fact the FCC acknowledged. *See Order* ¶ 116.

In denying GTL's stay request, the Wireline Competition Bureau defends the *Order*'s claim that site commissions are "'not reasonably related to the provision of ICS'" on the grounds that state authorities often use the funds to pay for inmate welfare programs. *Stay Order* ¶¶ 14-15 (quoting *Order* ¶ 123). That is a *non sequitur*. How states use the funds they receive in commissions does nothing

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[12] *See*, *e.g.*, Tex. Gov't Code Ann. § 495.027(a)(2). The proceeds of commissions often support inmate health and welfare programs and other prison initiatives, *see Order* ¶ 123 & n.400, and these allocations, too, are sometimes mandated by statute. *See*, *e.g.*, Miss. Code Ann. § 47-5-158. Contrary to the Bureau (*Stay Order* ¶ 19), the fact that more states do not mandate the payment of commissions by statute or regulation does not change the reality that most state and local officials require them. Nor does the fact that a couple of states set rates below the caps and still require commissions (*id.* ¶ 19 n.58) save the current rate caps in the face of the FCC's own admission that those caps would have to be "significantly higher" if commission payments were treated as costs. *Order* ¶ 125.

[13] And a substantial cost. "ICS providers paid over $460 million in site commissions in 2013 alone," and such payments "can amount to as much as 96 percent of gross ICS revenues." *Order* ¶ 122.

to change the fact that *ICS providers* incur these costs. If ICS providers had to pay state licensing fees, how the states employed those funds would not change the fact that the fees were a cost of doing business.[14] The FCC cannot allow such payments, acknowledge their effect on the cost of providing ICS, and yet fail to account for them in setting rate caps.

Because the FCC has admitted that it set the rate caps below cost, the caps violate the statute and the Constitution. Section 276 directs the FCC "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). By setting rate caps that admittedly do not cover the costs of providing ICS service, the FCC has violated that statutory mandate.[15]

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[14] The Bureau cites a 2002 order in claiming that "longstanding precedent" establishes that site commission payments are not legitimate costs. *Stay Order* ¶ 15 & n.38. In fact, the 2002 order was describing an earlier 1999 order that was addressing a different problem altogether – that is, the costs of a "marginal payphone location," which was expressly defined to exclude any payment of location rents. *See* Third Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545 (1999). The FCC had no need to include commission payments in the rates it set for per-call payphone compensation, because such commissions would be paid only in locations where revenues exceed costs; commissions in that context are a share of profits. Where ICS providers are required to pay commissions as a matter of (unpreempted) state law, rate caps set at costs excluding commissions will necessarily put ICS providers under water.

[15] The Bureau argues that the "each and every call" requirement cannot really mean "each and every call." *Stay Order* ¶ 24. Textual problems aside, the *Stay Order* attacks a straw man. GTL is not contending that the FCC had to establish "an individual rate for every ICS call." *Id.* Rather, GTL argues that a

Furthermore, because the rates, by the FCC's own admission, deny ICS providers the ability to recover the costs that they actually incur, they violate the Fifth Amendment. *See*, *e.g.*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (Fifth Amendment to the Constitution protects regulated entities from rates that are "so 'unjust' as to be confiscatory").

2. The *Order*'s unlawful rate caps are not saved by the suggestion that correctional institutions may cease charging site commissions on their own given ICS providers' limited "ability to pass site commissions through to ICS consumers." *Order* ¶ 128. This still risks exposing ICS providers to below-cost rates, because whether or not state and local governments demand site commissions is not within the control of ICS providers. That is precisely why the FCC proposed to deal with the problem affirmatively in the current rulemaking.

This is particularly clear in the case where existing contracts with correctional institutions require providers to make such payments. Despite the new rate caps, ICS providers cannot simply walk away from a money-losing contract without risking serious liability. To be sure, if the FCC (assuming it has the authority) had barred the payment of commissions and rendered existing contracts unenforceable, it could then disregard such costs in setting rate caps. But it cannot

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rate that is deliberately set to force providers to operate at a loss is not lawful. That is something that it is perfectly "feasible" for the FCC to avoid.

confirm the legality of site commissions under federal law — however begrudgingly — and then ignore that cost in calculating rates.

3. The FCC's approach to site commissions also violates the APA, because the FCC failed to address the very problem it identified as fundamental to ICS rate reform. In the *2014 NPRM*, the FCC identified site commissions as the "main cause of the dysfunction of the ICS marketplace" and the key obstacle to the use of market forces to drive down ICS rates. *2014 NPRM* ¶ 24; *see also id.* ¶ 27. The *Order*, however, failed to address site commissions even prospectively, let alone those required under existing contracts.

This was arbitrary and capricious. "Federal administrative agencies are required to engage in 'reasoned decisionmaking.'" *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). And "this court is bound to reverse an administrative action if the agency has 'entirely failed to consider an important aspect of the problem' or has 'offered an explanation for its decision that runs counter to the evidence before the agency.'" *Saad v. SEC*, 718 F.3d 904, 910-11 (D.C. Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Here, the agency claimed to have enacted "comprehensive reform of all aspects of ICS," *Order ¶* 9, without dealing with the most important aspect demanding reform. Identifying the key issue and then doing nothing to address it cannot be termed "reasoned decisionmaking." Nor does a "general preference to rely on

market forces," *id.* ¶ 130, rationally justify ignoring a problem that, per the FCC's own reasoning, the market has shown itself unable to solve.

The Bureau claims it is "demonstrably incorrect" that the FCC failed to address site commissions because the FCC dealt with the problem "indirectly" by refusing to allow commissions to count as legitimate costs. *Stay Order* ¶ 16. But this makes GTL's point: the FCC recognized that site commissions are the single biggest obstacle to ICS reform but then not only refused to ban such commissions; it also proceeded to set rates as if site commissions did not exist. That is not dealing with the problem "indirectly"; it is ignoring it altogether and then putting the onus of that regulatory failure on ICS providers dealing with state mandates and existing contractual requirements. Even if the market eventually deals with the problem when contracts are renegotiated, the FCC has not mandated any such renegotiation nor preempted state and local rules requiring commissions. Nor did the FCC make its rate caps applicable only to new contracts. The Bureau stresses repeatedly that the FCC did not "endorse" site commissions, but its failure to deal with them directly precludes the FCC from putting ICS providers to the Hobson's choice of breaching their contracts or providing service at a loss.

In the *Order* (¶ 130), the FCC insisted that it did not have "to determine whether we have authority to ban site commission payments," and the Bureau argues (*Stay Order* ¶ 16) that, by declining to address site commissions directly,

the FCC "avoid[ed] potentially impinging on state sovereignty." But this emphasizes the infirmity of the FCC's approach. If the FCC lacks authority to regulate site commission payments — a challenge it did not resolve — it cannot regulate them indirectly by prohibiting ICS providers from recovering them. Put simply, the FCC cannot permit states to continue to require payment of site commissions but deny ICS providers the ability to recover them.

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

Even ignoring site commissions, the *Order*'s flawed assumptions have resulted in rates that deny recovery of costs for many inmate calls. As the FCC acknowledged, "the adopted caps are below the costs [that some ICS providers] reported to us." *Order* ¶ 116. A rate cap that prevents some providers from recovering their costs denies those providers fair compensation and fails to compensate "each and every" call. 47 U.S.C. § 276(b)(1)(A).

The agency concluded that providers whose costs exceed the caps should solve the problem through unspecified "increased efficiencies." *Order* ¶ 59; *see also id.* ¶ 62. But the assertion that such efficiencies are available is unsupported by substantial evidence in the record. *See* 5 U.S.C. § 706(2)(E). For example, the FCC failed to account for the fact that different states or localities demand different security features, and these differences affect costs. Lower-cost providers highlighted in the *Order*'s analysis may simply serve lower-cost facilities.

Compare Order ¶¶ 63-64 *with* Pai Dissent at 203 n.61 ("It's not 'implausibl[e]' that the data don't show average costs falling with the provider's size or that 'roughly similarly situated providers have substantially different costs'"). The record showed that the *Order*'s rate caps would force 40% of *all* debit/prepaid minutes of use across *all* responding ICS providers and *all* facility types to be provided at below-cost rates.[16] The Bureau contends that it simply does not matter if rates are below provider costs "on some calls or from some locations." *Stay Order* ¶¶ 23-24. But not only is that argument contrary to the statutory language, which requires fair compensation "for each and every" call; it provides no defense for a system that puts 40% of all calls and locations under water.

C. The FCC Lacks Jurisdiction To Cap Intrastate ICS Rates

The *Order* went beyond the FCC's traditional jurisdiction over interstate rates and asserted the power to cap *intra*state ICS rates as well. *See Order* ¶¶ 108-113. The FCC has no such authority. The FCC purported to rely on § 276(b)(1)(A), which applies to both intrastate and interstate calls. *See id.* But

[16] Stephen E. Siwek & Christopher C. Holt, Comments on Wheeler/Clyburn ICS Proposal at 3 (Oct. 10, 2015), attached to Letter from Chérie R. Kiser, Counsel for GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Oct. 10, 2015); *see also* Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Oct. 7, 2015) (explaining that the rate caps for jails with more than 1,000 inmates are below Pay Tel's costs). The Siwek/Holt analysis relied on cost data from 2013, which is consistent with the FCC's approach. *See Order* ¶ 52 (relying on 2012 and 2013 data); *2014 NPRM* ¶ 49 (same).

the FCC erred in concluding that § 276 confers the power to require reduction of market-based intrastate rates.

The Communications Act declares in "sweeping" language that the FCC is "fence[d] off" from regulating "intrastate matters." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986). "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b)(1). Moreover, as "a rule of statutory construction," *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 373, another provision cannot be interpreted to confer intrastate regulatory authority unless it is "so unambiguous or straightforward as to override the command of § 152(b)." *Id.* at 377. No such authorization exists here.

To be sure, § 276 requires the FCC to "establish a per call compensation plan to ensure that all payphone service providers" — including providers of "inmate telephone service in correctional institutions" — "are fairly compensated for each and every completed intrastate and interstate call." 47 U.S.C. § 276(b)(1)(A), (d). But that language does not address the rates that payphone providers charge. Moreover, read in light of the history and purpose of § 276, it authorizes the FCC only to ensure that payphone providers receive *adequate* compensation for each call, not to prevent supposedly excessive compensation.

Congress enacted § 276 to sweep away a patchwork of state and federal restrictions that prevented payphone providers from charging compensatory rates — or charging at all — for a variety of local and long-distance calls. It makes little sense to read § 276(b)(1)(A) to include the power to *reduce* market-based rates. The FCC itself concluded that it should deploy § 276 "to prescribe compensation *only when* payphone providers are not already 'fairly compensated.'"[17]

The *Order* claims support from this Court's decision in *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) ("*IPTA*") (per curiam). But in *IPTA*, this Court approved the FCC's authority under § 276 to preempt local regulations *capping* local coin call rates and to allow the market to set rates. *Id.* at 562. That allowed local rates to increase to any rate that the market would bear, and thereby assured *fair* — *i.e.*, market-based — compensation. The FCC never suggested that it could exercise that authority to *reduce* market-based coin rates that it deemed excessive in relation to costs.[18]

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[17] Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 6716, ¶ 16 (1996) (emphasis added); *see* Pai Dissent at 200 (calling § 276 a "one-way ratchet" that applies "only when intrastate payphone service rates are *too low* to ensure fair compensation").

[18] The Bureau argues that if Congress intended to limit the FCC's authority in this way, it could have adopted language to "ensure[] that ICS rates were 'adequate' or 'sufficient.'" *Stay Order* ¶ 37. But the statute does not address *rates* at all. It addresses *compensation* — that is, it regulates to protect the interests of (in the Bureau's terms) the ICS "payee." *Id.*

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

If the rate caps in the *Order* take effect, GTL will suffer serious and irreparable harm. The FCC acknowledges that the caps are below what many ICS providers actually pay to provide service, particularly taking site commissions into account. GTL has no mechanism to recover these amounts if it ultimately prevails on its petition for review. Such unrecoverable losses constitute irreparable harm. *See*, *e.g.*, *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010).

It is no answer to say that the rules adopted in the *Order* "constitute changes in law and/or instances of force majeure that are likely to alter or trigger the renegotiation of many ICS contracts." *Order* ¶ 132. The FCC reached that conclusion without considering any contract language and offered no remedy for the substantial percentage of contracts that are not subject to renegotiation based on a change in law. And, even where renegotiation is possible, reviewing and revising hundreds of contracts with hundreds of customers would consume tremendous resources and potentially confuse customers and risk the providers' goodwill, all of which constitutes irreparable harm. *See*, *e.g.*, *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996).

Other interested parties, by contrast, will not suffer cognizable irreparable injury in the event of a stay. The interim rate caps on interstate calls established in the *2013 Order*, which this Court did not stay in the *Securus* proceeding, would

remain in effect pending a stay of the *Order*. Petitioners cannot claim to be harmed by rates that comply with those caps, since they are nearly identical to what petitioners requested in the first place. *Compare 2013 Order* ¶ 73 (adopting rates of $0.21 per minute for debit and prepaid interstate calls and $0.25 per minute for collect), *with Alternative Wright Petition* at 16 (advocating $0.20 per minute for debit calls and $0.25 per minute for collect). As for intrastate calls, states retain the authority to constrain intrastate rates at any time, and many states have done so.

Absent a stay, the public will be harmed. GTL and other ICS providers will be forced to reduce their rates to levels that will require them to operate below cost, even assuming they are able to avoid paying site commissions under existing or future contracts. As one dissenting Commissioner recognized, the "ineluctable result" of this situation is a reduction in the availability and quality of ICS, particularly at high-cost facilities. Pai Dissent at 203. Staying the rate caps for a limited time to allow for judicial review and to ensure that the FCC's regulation of ICS is lawful will not risk any harm.

CONCLUSION

Prior to their effective dates — March 17, 2016 (for prisons), and June 18, 2016 (for jails) — the *Order*'s rate caps, 47 C.F.R. § 64.6010, should be stayed pending judicial review.

Respectfully submitted,

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