[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 13-1280, 13-1281, 13-1291, 13-1300, 14-1006

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARIZONA DEPARTMENT OF CORRECTIONS, MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND SOUTH DAKOTA DEPARTMENT OF CORRECTIONS,

Petitioners,

ARKANSAS DEPARTMENT OF CORRECTION, INDIANA DEPARTMENT OF CORRECTION, AND BARNSTABLE COUNTY SHERIFF'S OFFICE,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For Review From A Final Order
Of The Federal Communications Commission

JOINT BRIEF FOR CORRECTIONAL FACILITY PETITIONERS AND SUPPORTING INTERVENORS

Fred William Stork, III
Assistant Attorney General
OFFICE OF THE
ARIZONA ATTORNEY GENERAL
1275 West Washington
Phoenix, AZ 85007
(602) 542-8350
Fred.Stork@azag.gov

Helgi C. Walker
Counsel of Record
Scott G. Stewart
Philip S. Alito
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3599
(202) 530-9595 (fax)
HWalker@gibsondunn.com

C. Joseph Cordi, Jr.
Senior Assistant Attorney General
323 Center Street
Suite 200
Little Rock, AR 72201
(501) 682-1317
joe.cordi@arkansasag.gov

Timothy J. Junk
Jefferson S. Garn
Deputy Attorneys General
OFFICE OF THE ATTORNEY GENERAL
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6247
tim.junk@atg.in.gov

Matthew J. Murphy
General Counsel
BARNSTABLE COUNTY
SHERIFF'S OFFICE
600 Sheriff's Place
Bourne, MA 02532
(508) 563-4311
mmurphy@bsheriff.net

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), petitioners Arizona Department of Corrections, Mississippi Department of Corrections, and South Dakota Department of Corrections, and supporting intervenors Arkansas Department of Correction, Indiana Department of Correction, and Barnstable County Sheriff's Office, certify as follows:

A. Parties And Intervenors

1. Parties Before This Court

Petitioners in these consolidated cases are the Arizona Department of Corrections (No. 14-1006); the Mississippi Department of Corrections and South Dakota Department of Corrections (No. 13-1300); Securus Technologies, Inc. (No. 13-1280); Global Tel*Link Corp. (No. 13-1281); and CenturyLink Public Communications, Inc. (No. 13-1291).

Respondents in these consolidated cases are the Federal Communications Commission ("FCC" or "Commission") and the United States of America.

The intervenors supporting petitioners in these consolidated cases are the Arkansas Department of Correction, the Indiana Department of Correction, the Barnstable County Sheriff's Office, and Telmate, LLC.

The intervenors supporting respondents in these consolidated cases are Peter Bliss, Winston Bliss, Ulandis Forte, Gaffney & Schember, Katharine Goray, David

Hernandez, Lisa Hernandez, M. Elizabeth Kent, Jackie Lucas, Mattie Lucas, Darrell Nelson, Laurie Nelson, Vendella F. Oura, Earl J. Peoples, Ethel Peoples, Melvin Taylor, Sheila Taylor, Annette Wade, Charles Wade, Dorothy Wade, and Martha Wright.

2. Parties To The Proceeding Below

The parties that participated in the agency proceeding below—*Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375—are listed in Appendix B of the order under review.

B. Ruling Under Review

The order under review is the Commission's Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, FCC 13-113, 28 FCC Rcd 14107, 78 Fed. Reg. 67,956 (Nov. 13, 2013) ("*Order*") (JA__).

C. Related Cases

The *Order* has not previously been the subject of a petition for review by this Court or any other court. Petitioners are unaware of any related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, petitioners Arizona Department of Corrections, Mississippi Department of Corrections, and South Dakota Department of Corrections, and supporting intervenors Arkansas Department of Correction, Indiana Department of Correction, and Barnstable County Sheriff's Office, submit the following disclosure statement:

Petitioners and their supporting intervenors are governmental entities and not subsidiaries of any parent corporation.

Respectfully submitted,

/s/ Helgi C. Walker

Helgi C. Walker
Counsel of Record
Scott G. Stewart
Philip S. Alito
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3599
(202) 530-9595 (fax)
HWalker@gibsondunn.com

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GLOSSARY

Commission	Federal Communications Commission
FCC	Federal Communications Commission
ICS	Inmate Calling Services
Order	Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 13-113

INTRODUCTION

On January 13, 2014, this Court stayed key elements of the Commission's new rules for interstate prisoner telephone calls, *see* Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 13-113 ("*Order*"), finding that "the stringent requirements for a stay pending court review" were met.[1] Now, petitioners Arizona Department of Corrections, Mississippi Department of Corrections, and South Dakota Department of Corrections, and their supporting intervenors Arkansas Department of Correction, Indiana Department of Correction, and Barnstable County Sheriff's Office (collectively, the "Correctional Facilities"), respectfully ask this Court to vacate the *Order*.

The providers of inmate calling services well explain the various legal problems with the *Order*—including the flaws in the cost-based rate-making requirement. *See* Joint Brief for the ICS Provider Petitioners and Supporting Intervenor ("Provider Brief"). The Correctional Facilities adopt those arguments and expand on the case from the unique perspective of law enforcement, demonstrating the ways in which the *Order* invades and upends their governmental authority over prison management.

[1] Stay Order at 1, *Securus Techs., Inc. v. FCC*, No. 13-1280 (Jan. 13, 2014) (granting motions for stay as to cost-based rule, 47 C.F.R. § 64.6010, safe harbor rule, *id.* § 64.6020, and annual reporting requirement, *id*. § 64.6060).

The *Order* intrudes far into the core domain of state and local correctional facilities, state legislatures, and local governments to craft and administer their own penal, rehabilitative, and budgetary policy. Although the Commission will likely defend the *Order*, as it did in the stay proceedings, as a routine exercise of its authority over interstate telephone rates, the *Order* belies that contention: It is explicitly premised on the breathtakingly sweeping purpose of "promot[ing] the general welfare of our nation," JA__ [*Order*_¶_2], and unabashedly takes up and resolves questions of penological policy based on its own normative judgments about who should pay for the costs of prisoner calls and inmate welfare programs, and how much security is really needed for such calls, *see* JA__ [*Order*_¶¶_3,_7,_54].

Specifically, in imposing unreasonably low rate caps and mandating cost-based rates beneath those caps for prisoners' interstate calls, the *Order* claims to ease the way for prisoners to communicate with family and friends—in order to, among other things, reduce recidivism, strengthen prisoners' legal representation, and save money for the criminal justice system. Those goals fall well outside the Commission's delegated authority and technical expertise over interstate telecommunications.

Moreover, the *Order* will have the *opposite* effect than that claimed by the Commission. The new rate caps and rate-of-return regulations will make it

difficult if not impossible for service providers to cover their costs at many facilities, and will thus threaten their ability and the ability of correctional facilities to provide the costly security measures for prisoner calls needed to ensure the safety of the public. The *Order* will jeopardize inmate calling services altogether at many facilities. And to the extent that facilities maintain such services, many will be saddled with outmoded, substandard security equipment.

On top of imperiling the phone service that the *Order* deems so critical and imperiling public safety, the *Order* sounds the death knell for many programs designed by state and local governments to assist inmates. The *Order* does so by effectively eliminating site commissions—legitimate payments made to many correctional facilities as part of phone-service contracts—that are necessary to fund a wide array of programs and services that benefit prisoners. In doing so, the Commission arrogates to *itself* the policy judgments of how to properly fund such programs and whether those programs should exist at all. Those questions are for state and local correctional officials, not a federal agency charged with regulating interstate telecommunications. As Commissioner Pai emphasized in dissent, the Commission's intrusion into the rehabilitative process will inflict wide-reaching harm—on the public, the officials who manage the Nation's correctional facilities, the prisoners whose interests the *Order* purports to advance, and the traditional balance of authority between the federal government and state authorities.

Accordingly, in addition to the reasons set forth in the Provider Brief, the *Order* should be vacated on the following independent grounds. *First*, the *Order* exceeds the Commission's authority by substituting the Commission's opinions about sound prison administration for the considered judgments of the state and local officials responsible for overseeing the Nation's inmate populations. *Second*, the *Order* is arbitrary and capricious because the Commission failed to consider the materially different circumstances that various facilities face when attempting to keep prisoners and the public safe, the significant costs of essential security measures, and record evidence demonstrating that the rate caps and safe harbors imposed by the *Order* are unrealistically low. *Third*, the *Order* impermissibly abrogates existing contracts between inmate calling service providers and correctional facilities that provide for site commissions.

If the *Order* is not vacated, it will inflict sweeping harm on correctional facilities, the public, and prisoners. The *Order* stands to disrupt critical and ever-evolving security measures that protect the public and will halt many programs that actually help to rehabilitate criminal offenders. It will also cause upheaval in the budgets of those States that have long relied on site-commission revenue to pursue rehabilitative goals and other legitimate objectives. And by making it economically infeasible—or too dangerous—to provide inmate calling services at all in many facilities, the *Order* is ultimately self-defeating.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). This venue is proper under 28 U.S.C. § 2343.

The *Order* was published in the Federal Register on November 13, 2013. *See* 78 Fed. Reg. 67,956 (Nov. 13, 2013). The Mississippi Department of Corrections and South Dakota Department of Corrections filed timely petitions for review on December 9, 2013, and the Arizona Department of Corrections filed a timely petition for review on January 13, 2014. *See* 28 U.S.C. § 2344. Because the Arizona Department of Corrections filed its petition for review on January 13, 2014, the period to file a motion for leave to intervene ran through February 12, 2014. *See* Fed. R. App. P. 15(d). The Arkansas Department of Correction filed a timely motion to intervene on December 13, 2013; the Indiana Department of Correction filed a timely motion to intervene on February 11, 2014; and the Barnstable County Sheriff's Office filed a timely motion to intervene on January 28, 2014.[2]

STATEMENT OF THE ISSUES

1. Whether the *Order*, by effectively prohibiting site commissions and by mandating rates at levels that threaten to make critical security features for

[2] This Court granted all of these motions. *See* Order at 1, *Securus Techs., Inc. v. FCC*, No. 13-1280 (Mar. 10, 2014) (Indiana Department of Correction and Barnstable County Sheriff's Office); Order at 1, *Securus Techs., Inc. v. FCC*, No. 13-1280 (Jan. 7, 2014) (Arkansas Department of Correction).

inmate calls cost-prohibitive, unlawfully intrudes on the prerogatives of state and local authorities to manage correctional facilities and thereby exceeds the Commission's authority.

2. Whether the *Order* is arbitrary, capricious, or contrary to law because the Commission failed to adequately consider the costs of providing inmate calling services.

3. Whether the *Order* is arbitrary, capricious, or contrary to law in its application to existing contracts between correctional facilities and providers of inmate calling services.

STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief. Pertinent regulations appear in the *Order*.

STATEMENT OF THE CASE

The background of this case is set forth in the Statement of the Case in the Provider Brief. The Correctional Facilities adopt that Statement and focus here on additional background relevant to their challenges to the *Order*.

A. Inmate Calling Services Require States And Localities To Deploy Sophisticated Security Measures In Order To Keep The Public Safe.

Inmate calling services present unique and complex security challenges. The record establishes that inmates use their calling privileges to "plot and plan

criminal enterprises . . . literally every day." JA__ [National_Sheriffs' _Ass'n_3/25/2013_Comment]. In some facilities, inmates have used calling privileges to smuggle in drugs and weapons and to plot crimes with outside confederates. JA__ [Epps_Decl._¶_5;_Kaemingk_Decl._¶_5]. At others, prisoners have used phone calls to coordinate gang activity with inmates housed at other facilities, organize large-scale drug deals and violent crimes, and improperly contact victims, witnesses, and judges. JA__ [*Order*_¶_58_n.216]. As the National Sheriffs' Association explained here, "[t]here are dangerous individuals in local jails who, via ICS, try to continue their criminal activities on the outside while they are incarcerated." JA__ [National_Sheriffs'_Ass'n_3/25/2013_Comment]. All of this happens with "startling regularity." JA__ [National_Sheriffs'_Ass'n_3/25/2013_Comment].

Faced with these dangers, law enforcement officials have deployed a broad arsenal of sophisticated security measures to protect the public, prison personnel, and inmates themselves. Correctional facilities record inmate calls to monitor illicit activity. JA__ [National_Sheriffs'_Ass'n_Opening_Testimony]. To ensure that inmates communicate only with approved persons, facilities must install technology that blocks inmates from calling unapproved numbers, must disable call forwarding and call transferring, and must prevent those communicating with inmates from using conference-call capabilities to include unauthorized

participants. Order on Remand & Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd. 3248, 3252; JA__ [*Order*_¶_85_&_n.321]. Correctional facilities use voice identification technology to verify the identity of the person speaking. JA__ [Dissent_at_124]. Officials prepare and analyze detailed reports documenting inmates' phone use to detect patterns indicating that inmates are using their calling privileges for improper purposes. Order on Remand & Notice of Proposed Rulemaking, 17 FCC Rcd. at 3252. And law enforcement officials must frequently update security systems to ensure that they remain effective against inmates who continually attempt to circumvent existing security measures. JA__ [National_Sheriffs'_Ass'n_3/25/2013_Comment].

These security measures make inmate phone calls considerably more costly than ordinary calls for the general public. Although costs vary by facility, charges for inmate phone calls can cost up to $0.89 per minute and may include further per-call charges up to $3.95. JA__ [*Order*_¶_85]. The security technology itself is expensive, and providers also incur costs for setting up and administering payment features for each inmate who uses phone service. JA__ [*Ex_Parte*_Presentation_of PayTel_Telecomms._at_3]. Correctional facilities must also hire additional personnel to monitor calls. JA__

[National_Sheriffs'_Ass'n_Opening_Testimony]. The set-up and administration costs of phone service are even higher at smaller facilities because they have higher turnover rates than larger facilities. JA__ [*Ex_Parte*_Presentation_of_PayTel_Telecomms._at_3]. And small facilities must install many of the same expensive security features as large facilities, causing them to incur the same costs as large facilities but with less call volume to defray those costs. *See* JA__ [*Order*_¶_77].

Although expensive, these security measures are essential. Law enforcement officials describe them as "a vital tool in our effort to combat continued criminal enterprise[s], smuggling of contraband, witness intimidation, narcotics trafficking, violent crime, recapture of escaped inmates, and even inter-facility communications between prison gangs." JA__ [Epps_Decl._¶_5;_Kaemingk_Decl._¶_5].

B. In Accordance With Their Authority To Administer Correctional Facilities, Many States And Localities Require Inmate Calling Service Providers To Pay Site Commissions In Order To Fund Correctional Budgets.

Just as States and localities have determined that extensive security measures are necessary to providing inmate calling services, they have also determined that they should, through inmate calling service contracts, recover some of the substantial costs of maintaining correctional facilities, housing and providing for prisoners, and rehabilitating inmates. JA__

[Miss._Dep't_of_Corrections_3/5/2013_Comment;_Louisiana_Dep't_of_Public_Safety_&_Corrections_3/22/2013_Comment,_at_3-5]. Correctional facilities have implemented this judgment by requiring inmate calling service providers to pay site commissions—payments made to many correctional facilities as part of phone-service contracts. JA__ [*Order*_¶_33].

States and localities use site-commission funds to recover costs associated with inmate programs and with providing inmate calling services. Among other goals, the funds help States and localities "to recoup the administration costs of inmate calling services," including the cost of maintaining security features and of buying new phone equipment. JA__ [National_Sheriffs'_Ass'n_Opening_Testimony;_Epps_Decl._¶_11]. Funds from site commissions are also used to maintain correctional facilities, to hire and train prison personnel, and to buy athletic supplies, recreational equipment, library resources, and subscriptions to periodicals—all to benefit inmates. JA__ [Epps_Decl._¶_8;_Kaemingk_Decl._¶_ 8;_National_Sheriffs'_Ass'n_Opening_Testimony]. Site commissions are also a crucial—and sometimes the sole—source of funding for inmate welfare programs, including life-skills programs, GED programs, vocational training and reentry programs, and mental counseling programs. JA__ [Epps_Decl._¶_8;_Kaemingk_Decl._¶_8]. If correctional facilities were unable to collect these commissions, law enforcement officials

would need to find alternative sources of funding (likely by raising taxes), cut their budgets, or scale back or eliminate these valuable programs. JA__ [Epps_Decl._¶ 12;_Kaemingk_Decl._¶ 12].

In keeping with their broad discretion "to experiment with solutions to difficult problems of policy," *Smith v. Robbins*, 528 U.S. 259, 273 (2000), States have reached different judgments on the propriety and necessity of site commissions. Most States have concluded that site commissions are important to their objectives and that correctional facilities may properly insist upon them—on the judgment, for example, that offenders and their families benefit from services funded by site commissions. JA__ [Louisiana_Dep't_of_Public_Safety_&_Corrections_3/22/2013_Comment,_at_3].[3] Several States have, by contrast, regulated site commissions more extensively. Some States have capped the amount facilities may collect in site commissions, and seven States have banned site commissions completely. JA__

[3] *See* Ariz. Rev. Stat. Ann. § 41-1604.03 (inmate calling services funds used for "building renewal" and "[t]he benefit, education and welfare of committed offenders" including "operation of canteens and hobby shops"); Cal. Penal Code § 4025 (inmate welfare fund used "for the benefit, education, and welfare of . . . inmates" and "for the maintenance of county jail facilities"); Ind. Code § 5-22-23-7(a) (inmate calling services funds aimed at "improving, repairing, rehabilitation, and equipping department of correction facilities"); Ohio Rev. Code Ann. § 5120.132 (inmate calling services money used for education, building maintenance, salary, and paying vendors who participate in inmate welfare programs). For a list of state statutes in the record, see JA__ [Reply_Comment_of_Martha_Wright,_Ex._H_4/22/2013].

[*Order*_¶_33,_37]. Still other States have reached different judgments about the role of site commissions in their budgetary and penal objectives. Texas, for example, *requires* that its correctional facilities collect site commissions. *See* Tex. Gov't Code Ann. § 495.027(a).

In all events, States are mindful that inmate phone calls involve higher costs, and thus some States that permit site commissions have sought to reduce the price of these calls while maintaining security. JA__ [South_Dakota_Dep't_of_Corrections_3/21/2013_Comment] (noting that South Dakota added debit calling options to reduce the price of calls). States' "experiment[s]" with potential "solutions" to these "difficult problems" thus continue. *Robbins*, 528 U.S. at 273.

C. The *Order* Displaces The Judgments Of States And Localities Regarding Sound Prison Management.

In 2003 and again in 2007, public interest groups and people with incarcerated family members petitioned the Commission to issue regulations reducing the costs of inmates' interstate phone calls. JA__ [*Order*_¶_9]. The Commission provided notice and received comment on both petitions, 78 Fed. Reg. 4,369, 4,371 (Jan. 22, 2013), but did not act further on either. Although no new factual developments warranted reconsidering this issue, in late 2012 the Commission revived these rulemaking petitions on its own. *See id.* at 4,369-70.

From the start, the Commission was apparently driven by its own view of appropriate penal policy. In its Notice of Proposed Rulemaking, for example, the Commission ventured that "regular telephone contact between inmates and their families is an important public policy matter," and that, in determining whether to issue a final rule, it would "consider the impact that interstate ICS rates have" on the ability of inmates to stay in touch with family members and friends. 78 Fed. Reg. at 4,370; *see also* JA__ [*Order*_¶¶_3-4].

When it adopted the *Order*, the Commission asserted that its action "will promote the general welfare of our nation by making it easier for inmates to stay connected," which would "lower recidivism rates" and, in turn, produce "fewer crimes, decreas[e] the need for additional correctional facilities, and reduc[e] . . . overall costs to society." JA__ [*Order*_¶_2]. The Commission catalogued "the societal impacts" of high rates for inmate calling services, JA__ [*Order*_¶¶_20,_42-44], and relied upon sociological studies (of dubious validity to begin with) and data about attorney-client phone use, JA__ [*Order*_¶¶ 32,_43,_131]. The Commission claimed that the *Order* would save the criminal justice system "between $60 and $70 billion per year nationwide" based on reduced rates of recidivism. JA__ [*Order*_¶_43].

"[T]o ensure that these benefits . . . are realized," JA__ [*Order*_¶_44], the Commission established rate caps for interstate debit and collect calls and required

that rates below the caps be cost-based. JA__ [*Order*_¶¶_5,_53-60,_73,_90]. Beneath the caps, the *Order* establishes what it describes as "safe harbor" rates. JA__ [*Order*_¶_60]. The Commission was clear, however, that rates at or below the "safe harbors" are only *presumed* reasonable, and thus a provider has no guarantee that the Commission would not find its rates unreasonable if challenged—a finding that would purportedly subject a provider to significant penalties. JA__ [*Order*_¶¶_5,_119].

Although the *Order* purports to account for security costs necessary to ensure that inmates do not use their phone privileges for ill, the *Order* states only that providers will *likely* be able to recover certain costs for "[s]ecurity features inherent in the ICS providers' network," such as call recording and call blocking. JA__ [*Order*_¶ 53_&_n.196]. Critically for correctional institutions, moreover, the *Order* provides that the cost of site commissions must not be included in rates for interstate calls. JA__ [*Order*_¶_54]. The Commission maintained that this prohibition would not technically bar correctional facilities from collecting site commissions. JA__ [*Order*_¶_56]. The Commission acknowledged, however, that the *Order* would have the effect of eliminating "some or all" of the programs funded by site commissions. JA__ [*Order*_¶_57]. It also recognized the need for "renegotiat[ing]" existing contracts or "terminat[ing] existing contracts so they can

be rebid based on revised terms that take into account the Commission's requirements" under the *Order*. JA__ [*Order*_¶_102].

D. This Court Stays Key Elements Of The *Order*.

With the *Order* poised to take effect on February 11, 2014, the Mississippi Department of Corrections and South Dakota Department of Corrections, together with certain service providers (CenturyLink Public Communications, Inc., Global Tel*Link Corp., and Securus Technologies, Inc.), moved to stay the *Order* pending judicial review. On January 13, 2014, a panel of this Court stayed key elements of the *Order*, finding that "the stringent requirements for a stay pending court review" were met. Stay Order at 1, *Securus Techs., Inc. v. FCC*, No. 13-1280 (Jan. 13, 2014). The Court halted implementation of the "safe harbor" rates, the requirement that rates be cost-based, and the prohibition on recovering site commissions. *Id.* The Court left in place the rate caps, which are now in effect; Judge Brown would have stayed those caps too. *Id.*

STANDARD OF REVIEW

In evaluating whether the Commission exceeded its authority, this Court applies the *Chevron* framework. The Commission is bound by Congress's clearly expressed intent. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If Congress has not spoken to the precise question at issue, "the

question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Where the proffered interpretation of a federal statute would infringe rights traditionally reserved to the States, however, congressional intent must be "unmistakably clear." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted). The Commission therefore may not rely on generalized statutory terms to "invad[e] . . . firmly established state jurisdiction." *Business Roundtable v. SEC*, 905 F.2d 406, 413 (D.C. Cir. 1990) (internal quotation marks omitted); *see also NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976).

This Court will vacate a Commission order that is contrary to law, arbitrary and capricious, or unsupported by evidence. *See* 5 U.S.C. § 706(2). An order is arbitrary or capricious if the Commission has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Any deference afforded to the Commission's factual findings "is tempered" when the agency lacks expertise in the area that it has sought to regulate. *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006).

SUMMARY OF ARGUMENT

Inmate phone calls are a privilege, not a right. They can be used for ill—for instance, to plot crimes with outside confederates or coordinate gang activity at other prisons—as well as for good. Managing these communications lies at the heart of the Correctional Facilities' authority and obligations under state and local law. The Commission had no warrant to interfere with those legitimate interests by interjecting itself into prison administration under the guise of regulating interstate telephone rates. The legal impropriety of that interference is traceable to three fatal flaws in the *Order*.

First, the *Order* exceeds the Commission's authority by intruding on the prerogatives of state and local authorities. State and local authorities are entrusted with managing their own correctional facilities. In exercising that authority to provide inmate calling services, many States and localities have deemed it necessary to charge site commissions to fund inmate welfare programs, and to employ extensive but costly security measures to protect the public, prison personnel, and inmates themselves. These are legitimate judgments that state and local officials are entitled to make. By contrast, the Commission enjoys no authority, experience, or expertise in administering correctional facilities but instead is tasked with "regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151.

The *Order* upends the valid penal and budgetary policy judgments reached by States and localities. The *Order* displaces state and local law enforcement officials' judgments as to the appropriate manner of funding inmate welfare programs, thereby making it more difficult for correctional institutions to make those programs available at all. States and localities have authority to decide whether and how prisoner welfare programs are to be funded, and many, acting through their legislative process, have chosen to fund such programs through site commissions. But the Commission excluded site commissions from the costs that can be recovered from inmate calling services based on the normative and conflicting policy judgment that prisoners should *not* bear those costs. Further, the *Order* undermines the determination of state and local authorities that advanced security measures are essential to protecting the public, prison officials, and prisoners. The unreasonably low rate caps and rate-of-return regulation imposed by the *Order* do not account for the staggering and increasing costs of ensuring that inmate calling services can be provided safely.

None of the statutory provisions invoked by the Commission supports its assertion of authority to displace state and local policy judgments on penal administration. To justify the *Order*, the Commission would need to point to an "unmistakably clear" grant of statutory authority to alter the customary balance of power between the federal government and the States. None of the provisions

invoked by the Commission—Section 201(b), Section 276, or Title I of the Communications Act—makes such an unmistakably clear statement. This confirms that Congress never envisioned that the Commission would attempt to use its authority under the Communications Act to meddle in an area as fundamental to States and localities as prison management and related budgetary policy. Contrary to the explicit premise of the *Order*, the Communications Act contains no "general welfare clause," much less a provision that allows the Commission to substitute its judgment on matters of penal policy for that of state and local governments.

Second, the *Order* is arbitrary and capricious in several respects. The *Order* fails to account for material differences across correctional facilities and, in doing so, defeats two of the Commission's primary goals in issuing the *Order*. The record establishes that the cost of phone calls varies dramatically across facilities of different sizes. By imposing uniform rate requirements for all facilities, the *Order* ignores these material differences, and ensures that—contrary to the Commission's own stated purpose—the rates imposed by the *Order* are not cost-based. And by mandating below-cost rates at some facilities, the *Order* will cause providers to stop offering phone service at those facilities. This will ensure that—again contrary to the Commission's avowed purpose—the *Order* will actually impede inmate access to phone service at these facilities.

The *Order* also fails to reasonably account for the costs of security measures associated with inmate calling services. The unreasonably low rates established by the *Order* will prevent state and local officials from deploying advanced security measures that are essential to ensuring the safety of the public, prison personnel, and inmates themselves. And the *Order* will deter the development of new, more advanced security measures because they will be too expensive under the *Order*.

Finally, the *Order* conflicts with the record, which demonstrates that the rate caps imposed by the Commission's regulations are unreasonably low. The record establishes that the public pays more for collect calls than prisoners would under the *Order*—even though ordinary collect calls do not demand the sophisticated and higher-cost security measures that inmate calls require. The Commission ignored this evidence.

Third, the *Order* exceeds the Commission's authority by abrogating existing contracts. It does so by effectively prohibiting site commissions, which renders existing contracts between providers and correctional facilities impossible to honor and economically infeasible to continue.

For these reasons, the *Order* should be vacated.

STATEMENT OF STANDING

The *Order* aggrieves and otherwise injures the Correctional Facilities. The *Order* effectively bans site commissions by prohibiting inmate calling service

providers from recovering those costs, thus decreasing or eliminating this revenue for the Correctional Facilities. JA__ [*Order*_¶_54]. The loss of revenue from site commissions will make it more difficult for the Correctional Facilities to maintain the safety of their facilities, hire and train law enforcement personnel, and provide vocational training and rehabilitation programs to their inmates. JA__ [Epps_Decl._¶_12;_Kaemingk_Decl._¶_12]. The *Order* also threatens the availability of critical security features for inmate calling services. JA__ [Epps_Decl._¶_5;_Kaemingk_Decl._¶_5]. Finally, the *Order* affects existing and future contracts for inmate calling services between the Correctional Facilities and service providers. The Correctional Facility petitioners have statutory standing because each participated in, and thus was a party to, the agency proceedings below. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2344.

ARGUMENT

The *Order* should be vacated. *First*, the *Order* exceeds the Commission's authority by intruding on the prerogatives of state and local authorities to manage their prisons and related budgetary affairs and by displacing their legitimate judgments on those questions. *Second*, the *Order* is arbitrary and capricious because the Commission failed to consider the materially different circumstances that different correctional facilities face when attempting to keep prisoners and the public safe, the significant costs of essential security measures, and record

evidence demonstrating that the rate caps and safe harbors imposed by the *Order* are unrealistically low. *Third*, the *Order* exceeds the Commission's authority because it impermissibly abrogates existing contracts between inmate calling service providers and correctional facilities.

I. The *Order* Exceeds The Commission's Authority By Intruding On The Prerogatives Of State And Local Authorities.

Charged with "regulating interstate and foreign commerce in communication by wire and radio," 47 U.S.C. § 151, the Commission lacks authority to intrude on an area so fundamental to state and local governments as managing their own correctional facilities and budgets, *see*, *e.g.*, *California v. FCC*, 798 F.2d 1515, 1520 (D.C. Cir. 1986). But the *Order* does just that. By setting rate caps that are unreasonably low and barring providers from recovering the cost of site commissions in the rates they charge for interstate calls, as well as failing to clearly permit recovery for basic security measures, the *Order* impermissibly interferes with state and local judgments regarding prison administration and security.

A. State And Local Authorities—Not The Commission—Are Entrusted With Administering Their Own Correctional Facilities.

State and local authorities—not the Commission—are entrusted with managing their own correctional facilities. As the Supreme Court has emphasized, "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures,

than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). State and local law enforcement officials—not the Commission—"are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating . . . the inmates placed in their custody." *Bell v. Wolfish*, 441 U.S. 520, 548 n.30 (1979) (internal quotation marks omitted).

Prison administrators are thus entitled to "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security" (*Bell*, 441 U.S. at 547), particularly because the "internal problems of state prisons involve issues [that are] so peculiarly within state authority and expertise" (*Preiser*, 411 U.S. at 492). When a federal agency tramples on state and local authorities' decisions on prison administration, it undermines their "important interest in not being bypassed in the correction of those problems." *Id.*; *cf. Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977) (emphasizing the particular need for federal court "deference to the appropriate prison authorities" "where *state* penal institutions are involved" (emphasis added; internal quotation marks omitted)). Indeed, "[t]here is no authority . . . for the [Commission] to set aside" judgments that are "commit[ted]" to the States, or to "remov[e]" from the States' "reach" the authority to address "sensitive issues" of policy, *Schuette v.*

BAMN, 134 S. Ct. 1623, 1638 (2014) (plurality opinion)—such as those involving prison administration, which lie at the heart of the States' traditional police powers.

In keeping with their broad discretion "to experiment with solutions to difficult problems of policy," *Smith v. Robbins*, 528 U.S. 259, 273 (2000), many States have made the policy judgments that: (1) they should provide welfare programs to rehabilitate inmates, and that the costs of those programs—as well as the substantial costs of maintaining prisons and offering inmate calling services—should be recovered in part through site commissions; and (2) although inmate calling services are important, they demand extensive security measures to protect the public, prison personnel, and inmates. JA__ [National_Sheriffs'_Ass'n_Opening_Testimony].

Many States grant state correctional departments sole authority over correctional facilities, including responsibility for rehabilitating prisoners and for security. *See*, *e.g.*, Miss. Code Ann. § 47-5-23 (granting "the exclusive responsibility for management and control of the correctional system" to the Department of Corrections); Mass. Gen. Laws ch. 127, § 3 ("Any monies . . . generated by the sale or purchase of goods or services to persons in the correctional facilities may be expended for the general welfare of all the inmates at the discretion of the superintendent [of the facility]."); *see also* N.H. Rev. Stat. Ann. § 30-B:4; S.C. Code Ann. § 24-5-80; S.D. Codified Laws § 24-1-4; Va. Code

Ann. § 53.1-68(A). To rehabilitate prisoners, many correctional facilities fund a wide array of inmate welfare programs—such as life-skills programs, GED programs, vocational training and reentry programs, and mental health counseling. *See* JA__ [Epps_Decl._¶_8;_Kaemingk_Decl._¶_8].

Because of budget constraints, many of these programs are funded largely—if not solely—through site commissions. *See*, *e.g.*, Miss. Code Ann. § 47-5-158 (providing that "[a]ll inmate telephone call commissions shall be paid to the department" and that "[f]orty percent (40%) of [such] commissions shall be deposited into the Inmate Welfare Fund"). The costs of site commissions are passed on, at least in part, to inmates and users of inmate calling services. Correctional facilities have deemed this appropriate on the judgment that "user[s]" of prisons—inmates—ought to help "cove[r] the expense[s]" of prison life and the services that correctional facilities provide, *Arsberry v. Illinois*, 244 F.3d 558, 564 (7th Cir. 2001) (Posner, J.); in other words, the citizens of these States, acting through their legislatures, have made the policy choice that these programs should be funded through revenues generated by the inmate institutions, not supported by the general taxpayer.

Because of that budgetary and penal judgment, the loss of site commissions would jeopardize inmate welfare programs. It would also imperil other benefits to inmates. Site commissions are also used to buy supplies for inmates, including

library resources, athletic and recreational equipment, and subscriptions to periodicals. Finally, site commissions are used to defray the costs of providing calling services, including the cost of administering phone systems, maintaining security, and buying new phone equipment. JA__ [National_Sheriffs'_Ass'n_Opening_Testimony;_Epps_Decl._¶_11].

Correctional facilities have also reached considered policy judgments on security related to inmate calling services. To ensure that their facilities remain safe, state and local prisons have adopted extensive security measures to prevent inmates from using their calling privileges to commit more crimes. At some facilities, inmates have attempted to use their calling privileges to smuggle in drugs and weapons and plot crimes with criminal confederates. JA__ [Epps_Decl._¶_5;_Kaemingk_¶_5]. At others, inmates have used calling privileges to coordinate gang activity with prisoners housed at other facilities, organize large-scale drug deals and violent crimes, and improperly contact victims, witnesses, and judges. JA__ [*Order*_¶_58_n.216]. The record establishes that inmates attempt to use their phone privileges to "plot and plan criminal enterprises . . . literally every day," JA__ [National_Sheriffs'_Ass'n_3/25/2013_Comment]. The security measures chosen and installed by state and local officials prevent these efforts from succeeding—but add to the expense of inmate calls. *See supra* Statement of the Case, Part A.

B. The *Order* Intrudes On The Prerogatives Of State And Local Authorities By Substituting The Commission's Views On Prison Management For The Judgments Of Law Enforcement.

The *Order* tramples on these legitimate, carefully calibrated choices of state and local law enforcement officials and of state legislatures.

First, the *Order* displaces state and local law enforcement officials' judgments about the availability of inmate welfare programs. States and localities have authority to decide how prisoner welfare programs are to be funded and many have chosen to fund such programs through site commissions. But the Commission excluded site commissions from the costs that can be recovered from inmate calling services, based on the purely normative policy judgment that prisoners should not bear those costs. JA__ [*Order*_¶_3] ("[S]ite commission payments, which are often taken directly from provider revenues, have caused inmates and their friends and families to subsidize . . . inmate welfare"); JA__ [*Order*_¶_7] ("[W]e find that site commission payments and other provider expenditures that are not reasonably related to the provision of ICS are not recoverable through ICS rates, and therefore may not be passed on to inmates and their friends and families.").[4]

[4] Although the Commission has maintained that correctional facilities may still collect site commissions for the interstate calls at issue, JA__ [*Order*_¶_100], the *Order* makes doing so economically infeasible. The Commission recognized this when it: (1) acknowledged that the *Order* would imperil "some or all" of the programs funded by site commissions; and (2) called for "voluntary renegotiation"

To begin with, the Commission is wrong to contend that site commissions are unrelated to the cost of providing inmate calling services or to suggest that they "are a free revenue stream" to correctional facilities or somehow inappropriate. *Holloway v. Magness*, 666 F.3d 1076, 1080 (8th Cir. 2012). Rather, site-commission revenues "are a portion of the total cost of the telephone service [that correctional departments choose] to provide." *Id*. Site commissions are legitimate payments that providers make to correctional facilities for the opportunity to provide inmate calling services, and are used partly "to recoup the administration costs of inmate calling services." JA__ [National_Sheriffs' _Ass'n_Opening_Testimony].

In any event, whatever one may think of the merits of site commissions, that is a policy judgment that state and local officials—who are charged with managing their jurisdictions' correctional facilities, *see supra* Part I-A—are entitled to make. The decision of how to "cove[r] the expense of prisons"—"[b]y what[ever] combination of taxes and user charges" might be deemed best—is not for a federal agency to make, but is instead one for States and localities "to resolve" for themselves. *Arsberry*, 244 F.3d at 566. Those entities have answered the question in different ways, with many deciding that prisoner calls and other inmate benefits

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of contracts. JA__ [*Order*_¶¶_57,_102]. There would be no reason for site-commission-funded programs to end—or for parties to renegotiate contracts requiring site commissions—if correctional facilities could still collect site commissions.

should be self-funding. *See*, *e.g.*, JA__ [Louisiana_Dep't_of_Public_Safety_&_Corrections_3/22/2013_Comment_at_3] ("[O]ffenders and their families benefit [from] services [funded by site commissions] and as it was the actions of the offenders that caused their incarceration, it is only fair that the cost of providing telephone services . . . be borne by the offenders and their families and not the tax payers at large."). The Commission had no authority to decide who should bear the costs of inmate welfare programs or to otherwise "remov[e]" from the States' "reach" the authority to address this "sensitive issu[e]" for themselves, much less overturn their considered judgments. *BAMN*, 134 S. Ct. at 1638 (plurality opinion).

In effectively barring payment of site commissions (or large portions of them) associated with interstate calls by making them unrecoverable, the *Order* will deprive correctional institutions of substantial revenues—thereby overriding state and local budgetary judgments. For example, the South Dakota and Mississippi Departments of Corrections receive about $550,000 and $2.3 million per year, respectively, from site commissions. *See* JA__ [Epps_Decl._¶_10;_Kaemingk_Decl._¶_10]; *see also* JA__ [Global_Tel*Link_Stay_Petition,_Yow_Decl._¶_7]. The loss of these commissions, at least for interstate calls, would hobble the programs that many States have deemed desirable or necessary to managing their prisons. And nothing

guarantees that these funds will be—or can be—replaced. As the South Dakota Department of Corrections explained, "[w]ith federal sequestration and current economic times in our state, the [Department] has no assurance that our Legislature would replace the revenue lost by this proposal with taxpayer money." JA__ [South_Dakota_Dep't_of_Corrections_3/21/2013_Comment]. What is more, the Commission never considered the conflict between the *Order* and state laws *requiring* officials to obtain site commissions. *E.g.*, Tex. Gov't Code Ann. § 495.027(a).

Second, the *Order* undermines the determination of state and local authorities that advanced security measures are essential to protecting the public, prison officials, and prisoners. The unreasonably low rate caps and rate-of-return regulation imposed by the *Order* fail to account for the costs of ensuring safety from the Nation's inmates. Correctional facilities must not only install advanced security features but must also hire staff to monitor calls (JA__ [National_Sheriffs'_Ass'n_Opening_Testimony]), and they must continually update security systems to keep them effective against inmates determined to circumvent existing security measures (JA__ [National_Sheriffs'_Ass'n_3/25/2013_Comment]). Yet "th[e] rate reduction" effected by the *Order* risks making needed security features "cost-prohibitive." JA__ [Epps_Decl._¶_6]. The rate reduction may, in particular, "forc[e] ICS

Providers to cap their rates at a level below what is required to cover the provision of an integrated ICS/security package that correctional facilities have determined is necessary"—which could cause many facilities to go without "essential security features" (JA__ [Epps_Decl._¶_6;_Kaemingk_Decl._¶ _6]) or to reduce prisoners' phone access to cut costs. The *Order* makes this clear by providing only a list of security costs that providers will *likely* be permitted to recover. JA__ [*Order*_¶_53_&_n.196]. Those costs are not clearly recoverable, and any security measure not enumerated by the *Order*—such as new and improved technology that the Correctional Facilities might deem effective—is presumptively not recoverable.

It is up to "individual jurisdictions to best serve the needs of their inmates, their families and the public at large." JA__ [South_Dakota_Dep't_of_Corrections_3/21/2013_Comment]. The Commission lacks the authority or expertise to upset the decisions of state and local officials striking what they have judged to be the proper balance between prison security and inmate phone privileges. And the Commission's foray into regulating state and local prisons was all the more unwarranted here, in light of ongoing efforts by States and localities to decrease the price of inmate phone calls while maintaining what is, in their judgment, adequate security. JA__ [South_Dakota_Dep't_of_Corrections_3/21/2013_Comment].

C. The Communications Act Does Not Authorize The Commission To Interfere With State And Local Prison Management.

The Communications Act does not confer—let alone confer with the necessary clarity—authority on the Commission to interfere with state and local correctional policy. As the Supreme Court has emphasized, when congressional interference with traditional state authority "would upset the usual constitutional balance of federal and state powers," "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted). Congress must therefore make its intent to "alter the usual constitutional balance between the States and the Federal Government . . . unmistakably clear." *Id.* (internal quotation marks omitted); *see*, *e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989).

In harmony with that clear statement rule, this Court has refused to allow federal agencies to "invad[e] . . . firmly established state jurisdiction" based on generalized statutory language that does not on its face confer any authority to invade traditional state prerogatives. *Business Roundtable v. SEC*, 905 F.2d 406, 413 (D.C. Cir. 1990) (internal quotation marks omitted); *see also NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976) ("This Court's cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad

license [to a federal agency] to promote the general public welfare."). As a result, the Commission may not rely on generalized statutory terms to claim for itself authority traditionally reserved to state and local governments. *See Business Roundtable*, 905 F.2d at 413.

The *Order* triggers this clear statement rule because it would dramatically upset the balance of federal and state power—arrogating to a federal agency matters of state and local penal and budgetary policy. *See supra* Parts I-A, I-B. And none of the Communications Act provisions relied on by the Commission—Section 201(b), Section 276, or Title I—contains "unmistakably clear" evidence that "Congress intend[ed] to alter the usual constitutional balance between the States and the Federal Government." *Gregory*, 501 U.S. at 460 (internal quotation marks omitted). Even setting aside the federalism problems presented by the *Order*, certainly nothing in the Communications Act authorizes the Commission to "promote the general welfare of our nation," JA__ [*Order*_¶_2], or to sit as a prison reform board.

1. Section 201. Section 201(b), invoked repeatedly in the *Order*, provides in relevant part: "All charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b).

Section 201(b) contains no clear statement that the Commission may regulate the inner workings of state and local correctional facilities or make decisive judgments about the proper administration of state budgets. It provides instead that rates for *interstate* and *foreign* communications services must be "just and reasonable." 47 U.S.C. § 201(b). While this grant of authority—to ensure that rates for interstate and foreign phone service are "just and reasonable"—may be *broad*, that does not mean that it is sufficiently *clear* to allow the Commission to intrude on state and local decisions regarding "the general public welfare." *Fed. Power Comm'n*, 425 U.S. at 669. Indeed, far from suggesting an intention to authorize the Commission to "invad[e] . . . firmly established" areas of traditional state authority, *Business Roundtable*, 905 F.2d at 413 (internal quotation marks omitted), Section 201's language confirms that Congress sought to confine the Commission to *interstate* and *foreign* regulation of communications services—a matter typically within federal authority.

Although conceding that the *Order* affects the daily management of the correctional facilities, the Commission previously contended that the *Order* "simply implements" its authority under Section 201 to ensure just and reasonable rates. Opp. of FCC to Mot. for Stay of Miss. & S.D. Dep'ts of Correction at 5-6; JA__ [*Order*_¶_13]. But the *Order* itself belies any suggestion that the Commission engaged in a routine assessment of whether ICS rates are "just and

reasonable." Rather, as the *Order* makes clear, the Commission simply believed that it was wrong, as a matter of social policy, for prisoners and those they call to pay rates that include the costs of inmate welfare programs. As explained above, the *Order* rests on the Commission's opinion that: (1) the general public should bear the costs of maintaining correctional facilities, programs, and services, JA__ [*Order*_¶¶_3,_7,_54]; and (2) only certain features of inmate calling systems are important enough to be cost-recoverable, JA__ [*Order*_¶_53_n.196]—a question implicating core correctional policy and expertise. Likewise, the *Order*'s other self-described goals—reducing recidivism, lowering the costs of incarcerating prisoners, and improving prisoners' attorney-client relationships—are policy matters far afield of the Commission's statutory authorization or expertise. JA__ [*Order*_¶_2,_42-44]. They are not bona fide attempts to ensure that phone rates are "just and reasonable," but penological ends that the *Order*, reasoning backwards, tries to shoehorn into Section 201.

2. **Section 276.** Section 276 also does not support the *Order*. Subject to exceptions not relevant here, Section 276 authorizes the Commission to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated" for each completed call if two conditions are satisfied. Such a compensation plan must "promote competition among payphone service

providers" and must "promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1).

Like Section 201, Section 276 contains no clear statement that the Commission may regulate the inner workings of state and local correctional facilities or make judgments about the proper administration of state budgets. *See Gregory*, 501 U.S. at 460-61.[5] It provides that providers be "fairly compensated" for providing phone service, but does not remotely suggest a clear intention to authorize the Commission to "invad[e] . . . firmly established state jurisdiction." *Business Roundtable*, 905 F.2d at 413 (internal quotation marks omitted).

Section 276 also cannot support the *Order* because the *Order* does not satisfy the two prerequisites for Commission action. *First*, the *Order* will not "promote competition among" inmate calling service providers. 47 U.S.C. § 276(b)(1). The Commission maintained that, in the inmate calling services market, providers are awarded monopolistic contracts that allow them to charge supposedly excessive rates. JA__ [*Order*_¶¶_40-41]. The Commission purported to resolve this issue by imposing rate caps and requiring that all rates be cost-

[5] Although Section 276 includes an express preemption provision for inconsistent state payphone regulation, *see* 47 U.S.C. § 276(c), that provision necessarily applies only to lawfully promulgated FCC regulations. As explained above, the *Order* exceeds the substantive grant of authority in Section 276. In any event, despite citing Section 276(c), the *Order* never indicates actual reliance on it. *See, e.g.*, JA__ [*Order*_¶ _46]. Thus, the Commission is precluded from relying on Section 276(c) in defense of the *Order*. *See SEC v. Chenery*, 318 U.S. 80, 87 (1943).

based. But such measures will not "promote competition" among providers. Rather, the *Order* simply *standardizes* the rates that providers will be permitted to charge. JA__ [*Order*_¶_5] (adopting rate caps and safe harbor rates applicable to all correctional facilities). *Second*, the *Order* will not "promote the widespread deployment of payphone services." 47 U.S.C. § 276(b)(1). By decreasing allowable rates, the *Order* will *inhibit* facilities that now lack calling systems from deploying such systems. The *Order*'s unreasonably low rates will likewise decrease access to calling services at many facilities that now have them.

Rather than explaining how the *Order* satisfies the two prerequisites under Section 276, the Commission spilled considerable ink arguing why the *Order* will benefit the general public. JA__ [*Order*_¶_51] (explaining that the *Order* satisfies the requirements of Section 276 because "cost-based rates help avoid . . . negative consequences" associated with existing rates for inmate calls). But that just backs into the problem identified above: the Commission's unauthorized pursuit of "the general welfare of our nation" and various "societal" benefits. Section 276's language ("fairly compensated") cannot be read to provide the Commission with "a broad license to promote the general public welfare" in a way that is disconnected from the agency's statutory mandate. *Fed. Power Comm'n*, 425 U.S. at 669. An agency never has an "unbounded" mandate to pursue the public interest. *Business Roundtable*, 905 F.2d at 413. Even broad statutory language must be tethered to

the Communications Act's purposes, *see Fed. Power Comm'n*, 425 U.S. at 669—which patently do not include day-to-day prison management.

3. Title I of the Communications Act, 47 U.S.C. §§ 151-162. The Commission also ventured that its "exercise of authority under sections 201 and 276 is further informed by the principles of Title I of the Act," which "states that it is the Commission's purpose 'to make available, so far as possible, to *all* the people of the United States' communications services 'at reasonable charges.'" JA__ [*Order*_¶_15] (quoting 47 U.S.C. § 151). "The regulation of interstate ICS adopted in this Order," the Commission maintained, "advances those objectives." JA__ [*Order*_¶_15].

As with Sections 201 and 276, Title I provides no "unmistakably clear" evidence that the Commission has authority to interfere with state and local decisions on prison management. *Gregory*, 501 U.S. at 460 (internal quotation marks omitted). The Commission's view of Title I's "objectives" does not make up for the Act's failure to express a clear congressional intention to authorize the Commission to "invad[e] . . . firmly established state jurisdiction." *Business Roundtable*, 905 F.2d at 413 (internal quotation marks omitted).

* * *

In our federal system, state and local prison authorities—not the Commission—set the "policies and practices that in their judgment are needed to

preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547. Because nothing in the statutory provisions invoked by the Commission provides "unmistakably clear" evidence that Congress sought to alter the usual federal-state balance of power, the *Order* exceeds the Commission's statutory authority.

II. The *Order* Is Arbitrary And Capricious Because It Does Not Account For Significant Costs And Disregards The Record.

An agency rule is invalid when the agency "entirely fail[s] to consider an important aspect of the problem" or "offer[s] an explanation for its decision that runs counter to the evidence before [it]." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009). The *Order* flunks these criteria.

A. The *Order* Fails To Account For Differences Across Correctional Facilities Of Different Sizes.

In imposing rate caps and "safe harbors," the Commission failed to account for the fact that calls at small correctional facilities cost more than calls at large correctional facilities. JA__ [American_Correctional_Ass'n__10/30/2013_Letter]. Providers incur costs for setting up and administering payment features for each inmate who uses phone service. JA__ [*Ex_Parte*_Presentation_of_PayTel_Telecomms._at_3]. These costs are higher at small correctional facilities because of their higher inmate turnover rates, which in

turn require providers to perform more account maintenance for these facilities. JA__ [*Ex_Parte*_Presentation_of_PayTel_Telecomms._at_3]. And providers must install costly security measures at all facilities they serve, but because smaller facilities have fewer calls to defray those costs, costs per call are higher.

In imposing rate caps and "safe harbors," the Commission failed to consider the significant differences across correctional facilities and how those differences materially affect the cost structures of service at different facilities. Correctional facilities vary by size, security levels, and population characteristics (such as average duration of incarceration). Some facilities are located in rural locations far from prisoners' homes, while others impose security procedures that make it difficult or nearly impossible for inmates to receive regular visitors. JA__ [South_Dakota_Dep't_of_Corrections_3/21/2013_Comment_at_1]. These and other factors affect the level of phone use at a facility (both in the number and duration of calls) and thus the revenue that will be generated to offset costs. *See* JA__ [Dissent_at_117]. Indeed, costs at some small facilities far exceed the rate caps required by the *Order*, even excluding the cost of site commissions. *See* Provider Brief, Part II-A-1. Although the Commission recognized that calls are more expensive at smaller facilities, JA__ [*Order*_¶¶_26,_81], the *Order* nonetheless imposes across-the-board rate requirements without regard to facility size.

The failure to take this material record evidence into account is arbitrary and capricious, *State Farm*, 463 U.S. at 43, particularly because this deficiency prevents the *Order* from achieving two of its professed objectives.

First, the *Order* is meant to improve access to phone service. But the *Order* will have the opposite effect at small correctional facilities to the extent that providers will be unable to afford the costs of providing service at those facilities. The Commission tried to paper over this problem by explaining that even if a provider does not recover its costs at small facilities, its losses will be offset by profits at large facilities. JA__ [*Order*_¶_80_n.301] (explaining that "even if a provider may under-recover [costs] at some facilities, it may over-recover [costs] at others"). That is, the Commission assumed that providers will *voluntarily* absorb losses at small facilities. The Commission gave no reason to support that implausible assumption, or to overcome the obvious objection: that providers may simply stop providing phone service at facilities where they lose money. *See* Provider Brief, Part II-B.

Second, the Commission's one-size-fits-all approach defeats its stated (though, as the providers explain, improper) goal that rates be cost-based. *See*, *e.g.*, JA__ [*Order*_¶¶_5_&_n.19,_7,_12,_47,_50]. If, as the Commission imagines, the *Order* does not reduce phone access at some small facilities, then inmates at larger facilities will effectively subsidize calls made by inmates at

smaller facilities. That is not the cost-based approach that the Commission insisted that it was providing—and the Commission thus failed to make "a rational connection" between the record evidence and "the choice" it "made." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted).

B. The *Order* Fails To Account For The Costs Of Adequate Security Measures.

The Commission also failed to adequately consider the significant costs of necessary security measures. The *Order* assumes, for example, that the cost of security features will decline. JA__ [*Order*_¶_71] (assuming, without evidence, that "innovation will continue to drive down costs through automation and centralization"). But the Commission's analysis fails to consider the broader effect of its low rates. The low rates set by the *Order* will make it impossible for many prisons to deploy more advanced—and costlier—measures that already exist. JA__ [Dissent_at_129]. Such technologies are designed to combat specific practices used by inmates to circumvent common security measures. JA__ [Dissent_at_129]. But the rate caps imposed by the *Order* will, in many cases, fail to cover these costs. Law enforcement commenters thus emphasized the need to fully account for the "security costs associated with the provision of ICS" and "the security risks posed by" failing to do so. JA__ [National_Sheriffs'_Ass'n_7/31/2013_Letter;_Alabama_Sheriffs_Ass'n_ Comment_Apr._22,_2013] ("The revenue from inmate phone calls pays for the

additional security measures necessary to maintain institutional security. . . . Without these security measures, the risks to institutional security and public safety would quickly outweigh the benefits of allowing inmate telephone access."). The Commission did not adequately account for these costs.

The *Order* will also deter providers from investing to develop better security measures because they will have no assurance of a return on that investment. The resulting blow to security will harm the Correctional Facilities' ability to protect the public. The Commission responded that the *Order* permits providers to include security costs in setting rates and that providers can seek waivers. JA__ [*Order*_¶_53]. But the rate caps prohibit providers from raising rates beyond a certain level, and the waiver process means only that the Commission holds a veto over which security features are proper. And, as noted above, the *Order* says only that "[s]ecurity features inherent in the ICS providers' network would . . . *likely* constitute recoverable costs." JA__ [*Order*_¶_53_n.196] (emphasis added). The *Order* thus does not guarantee that such security features may be included in setting rates—even though, as the record established, costly security features are necessary to providing inmate calling services while ensuring safety. *E.g.*, JA__ [Epps_Decl._¶_ 6;_Kaemingk_Decl._¶_ 6;_National_Sheriffs'_Ass'n_3/25/2013_ Comment;_South_Dakota_Dep't_of_Corrections_3/21/2013_Comment]. All of this reinforces that the Commission is unqualified to measure the trade-offs in

administering sound correctional policy, and that any of the Commission's purported findings regarding those trade-offs are entitled to no deference. *See Gonzales v. Oregon*, 546 U.S. 243, 269 (2006).

C. The *Order* Conflicts With Record Evidence Establishing That The Commission's Rates Are Unreasonably Low.

The record also demonstrates that the Commission's rate cap is unreasonably low when compared to non-inmate, interstate collect calling offered to the public. *See*, *e.g.*, JA__ [Corrections_Corp._of_America_5/2/2007_Comment_at_9] (explaining that "[t]he most appropriate evaluation of inmate calling rates . . . would be to compare the rates charged for calls from correctional facilities with the rates charged for person-to-person collect calls that are available to the general public").

The record shows that carriers charge rates for non-inmate interstate collect calling that far exceed the collect call rate caps set by the *Order*. *See*, *e.g.*, JA__ [Corrections_Corp._of_America_5/2/2007_Comment_at 9]. For example, one carrier charges $0.45 per minute for interstate collect calling,[6] while another charges $0.89 per minute,[7] with both carriers imposing additional per-call charges.

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[6] JA__ [Global_Crossing_Companies,_Domestic_Informational_Price_List_No. 1,_at_204_(effective_Feb._1,_2001),_http://www.level3.com/en/legal/global-crossing-tariffs/~/media/96EE3A0624F24E50BC1AC03CC6038617.ashx].

[7] JA__ [XO_Communications,_Rates_for_Operator_and_Directory_Assistance,_at_1,_http://www.xo.com/uploadedFiles/_Site_Documents/XORates_ChargesDA4.pdf].

These non-inmate collect calling services do not include expensive security features, yet they are much more expensive than what the Commission deemed reasonable for inmates who make the same type of calls with those features. The Commission ignored this evidence. By setting safe harbors and caps that are unreasonably low for correctional facilities—especially smaller ones, *see supra* Part II-A—the *Order* "'runs counter to the evidence' in the record." JA__ [Dissent_at_122] (quoting *State Farm*, 463 U.S. at 43).

III. The *Order* Impermissibly Abrogates Existing Contracts For Inmate Calling Services.

The *Order* is also unlawful because it abrogates existing contracts between inmate calling service providers and correctional facilities.[8]

In *Regents of University System of Georgia v. Carroll*, the Supreme Court made clear that the Commission lacks authority to abrogate existing contracts. *See* 338 U.S. 586, 602 (1950) ("[T]he Communications Act [does not] give authority to the Commission to determine the validity of contracts between licensees and others."). Although this Court has described *Carroll*'s scope as "modest," it has recognized that the Commission may not void contracts between licensees and third parties—like the state and local correctional facilities affected by the *Order*. *Cellco P'ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012). This Court has

[8] The Commission also disregarded evidence that abrogating existing contracts disserves the public interest. *See* Provider Brief, Part V.

explained that, under *Carroll*, "the Commission lacks authority to invalidate licensees' contracts with third parties," "to abrogate state-law contract remedies," or to otherwise "void third-party contracts." *Id.*

The *Order* defies *Carroll* and *Cellco* because it renders nugatory existing contracts between providers and correctional facilities by effectively prohibiting the site commissions that many of those contracts demand. To be sure, the Commission insisted that the *Order* does not "directly overrid[e]" these contracts and that *the Order* "relate[s] only to the relationship between ICS providers and end users." JA__ [*Order*_¶_100]. That position disregards the reality that the *Order* effectively bans site commissions. The Commission recognized as much when it conceded that the *Order* would end "some or all" of the programs funded by site commissions—a result that would occur only if site commissions were no longer available. JA__ [*Order*_¶_57]. The Commission also conceded the need for "renegotiat[ing]" existing contracts or "terminat[ing] existing contracts so they can be rebid based on revised terms that take into account the Commission's requirements" under the *Order*. JA__ [*Order*_¶_102]; *see* JA__ [*Order*_¶_102] ("To the extent that any contracts are affected by our reforms, we *strongly encourage parties to work cooperatively to resolve any issues*." (emphasis added)). But these are just candy-coated admissions that the *Order* renders unlawful existing contracts involving third parties: There would be no need to

"renegotiat[e]" or "terminate" existing contracts if correctional facilities could still insist on site commissions. And, as noted above, some States *require* commissions in contracts for inmate calling services. Existing contracts that contain such requirements cannot be performed without running afoul of the *Order* or can be performed only at a substantial financial loss that no rational provider would accept. Because the *Order* conflicts with *Carroll* and *Cellco*, it must be vacated.

CONCLUSION

For the foregoing reasons, as well as those given in the Provider Brief, this Court should vacate the *Order*.

Respectfully submitted,

/s/ Helgi C. Walker

Helgi C. Walker
Counsel of Record
Scott G. Stewart
Philip S. Alito
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3599
(202) 530-9595 (fax)
HWalker@gibsondunn.com

May 22, 2014

RULE ECF-3(B) ATTESTATION

In accordance with D.C. Circuit Rule ECF-3(B), I hereby attest that all other parties on whose behalf this joint brief is submitted concur in the brief's content.

Respectfully submitted,

/s/ Helgi C. Walker

Helgi C. Walker
Counsel of Record
Scott G. Stewart
Philip S. Alito
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3599
(202) 530-9595 (fax)
HWalker@gibsondunn.com

May 22, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), as modified by the Court's April 22, 2014 briefing order granting the Correctional Facility Petitioners and Supporting Intervenors 10,200 words, the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), this brief contains 10,077 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Respectfully submitted,

/s/ Helgi C. Walker

Helgi C. Walker
Counsel of Record
Scott G. Stewart
Philip S. Alito
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3599
(202) 530-9595 (fax)
HWalker@gibsondunn.com

May 22, 2014

ADDENDUM OF STATUTORY PROVISIONS

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5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 151

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 201

§ 201. Service and charges

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

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

47 U.S.C. § 276

§ 276. Provision of payphone service

(a) Nondiscrimination safeguards

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

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

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

(b) Regulations

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that—

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

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

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

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

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) Public interest telephones

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

(3) Existing contracts

Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of February 8, 1996.

(c) State preemption

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

(d) "Payphone service" defined

As used in this section, the term "payphone service" means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

Ariz. Rev. Stat. § 41-1604.03

§ 41-1604.03. Special services fund; uses; report

A. A special services fund is established in the state department of corrections. The department shall administer the fund.

B. The director shall transfer five hundred thousand dollars from the special services fund annually to the department of corrections building renewal fund established by § 41-797. Any remaining monies in the special services fund, including the inmate recreation fund, may be used for the following purposes:

1. The benefit, education and welfare of committed offenders, including the establishment, maintenance, purchase of items for resale and other necessary expenses of operation of canteens and hobby shops.

2. To pay the costs of a telephonic victim notification system. Revenues that are generated by the inmate telephone system and the automated public access program shall be deposited in the special services fund.

C. On or before August 1 of each year, the department shall submit to the president of the senate and the speaker of the house of representatives a report that contains a full and complete account of special services fund transactions relating to the inmate telephone system and the telephonic victim notification system for the preceding fiscal year.

Cal. Penal Code § 4025

§ 4025. Store in county jail; authorization; prices; disposition of profit; inmate welfare fund, deposits, expenditures, reports; stores not under jurisdiction of sheriff

(a) The sheriff of each county may establish, maintain and operate a store in connection with the county jail and for this purpose may purchase confectionery, tobacco and tobacco users' supplies, postage and writing materials, and toilet articles and supplies and sell these goods, articles, and supplies for cash to inmates in the jail.

(b) The sale prices of the articles offered for sale at the store shall be fixed by the sheriff. Any profit shall be deposited in an inmate welfare fund to be kept in the treasury of the county.

(c) There shall also be deposited in the inmate welfare fund 10 percent of all gross sales of inmate hobbycraft.

(d) There shall be deposited in the inmate welfare fund any money, refund, rebate, or commission received from a telephone company or pay telephone provider when the money, refund, rebate, or commission is attributable to the use of pay telephones which are primarily used by inmates while incarcerated.

(e) The money and property deposited in the inmate welfare fund shall be expended by the sheriff primarily for the benefit, education, and welfare of the inmates confined within the jail. Any funds that are not needed for the welfare of the inmates may be expended for the maintenance of county jail facilities. Maintenance of county jail facilities may include, but is not limited to, the salary and benefits of personnel used in the programs to benefit the inmates, including, but not limited to, education, drug and alcohol treatment, welfare, library, accounting, and other programs deemed appropriate by the sheriff. Inmate welfare funds shall not be used to pay required county expenses of confining inmates in a local detention system, such as meals, clothing, housing, or medical services or expenses, except that inmate welfare funds may be used to augment those required county expenses as determined by the sheriff to be in the best interests of inmates. An itemized report of these expenditures shall be submitted annually to the board of supervisors.

(f) The operation of a store within any other county adult detention facility which is not under the jurisdiction of the sheriff shall be governed by the

provisions of this section, except that the board of supervisors shall designate the proper county official to exercise the duties otherwise allocated in this section to the sheriff.

(g) The operation of a store within any city adult detention facility shall be governed by the provisions of this section, except that city officials shall assume the respective duties otherwise outlined in this section for county officials.

(h) The treasurer may, pursuant to Article 1 (commencing with Section 53600), or Article 2 (commencing with Section 53630) of Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code, deposit, invest, or reinvest any part of the inmate welfare fund, in excess of that which the treasurer deems necessary for immediate use. The interest or increment accruing on these funds shall be deposited in the inmate welfare fund.

(i) The sheriff may expend money from the inmate welfare fund to provide indigent inmates, prior to release from the county jail or any other adult detention facility under the jurisdiction of the sheriff, with essential clothing and transportation expenses within the county or, at the discretion of the sheriff, transportation to the inmate's county of residence, if the county is within the state or within 500 miles from the county of incarceration. This subdivision does not authorize expenditure of money from the inmate welfare fund for the transfer of any inmate to the custody of any other law enforcement official or jurisdiction.

Ind. Code § 5-22-23-7

§ 5-22-23-7. Correctional facilities calling system fund

(a) The correctional facilities calling system fund is established for the purposes of improving, repairing, rehabilitating, and equipping department of correction facilities. The fund consists of the following:

(1) Money deposited in the fund under section 5(d) of this chapter.

(2) Money appropriated by the general assembly.

(3) Money received from any other source.

(b) The department of correction shall administer the fund.

(c) The expenses of administering the fund shall be paid from money in the fund.

(d) Money in the fund may not be spent unless the general assembly includes a specific line item appropriation in the budget bill or otherwise specifically appropriates the money in the fund.

(e) The treasurer of state shall invest the money in the fund not currently needed to meet the obligations of the fund in the same manner as other public money may be invested.

(f) Money in the fund at the end of a state fiscal year does not revert to the state general fund.

Mass. Gen. Laws ch. 127, § 3

§ 3. Money and property of prisoners; records; custody and return; transmission to court; interest on deposits

They shall keep a record of all money or other property found in possession of prisoners committed to such institutions, and shall be responsible to the commonwealth for the safe keeping and delivery of said property to said prisoners or their order on their discharge or at any time before. The superintendents of correctional institutions of the commonwealth and the superintendents and keepers of jails, houses of correction and of all other penal or reformatory institutions shall, upon receipt of an outstanding victim and witness assessment, transmit to the court any part or all of the monies earned or received by any inmate and held by the correctional facility, except monies derived from interest earned upon said deposits and revenues generated by the sale or purchase of goods or services to persons in correctional facilities, to satisfy the victim witness assessment ordered by a court pursuant to section eight of chapter two hundred and fifty-eight B. Any monies derived from interest earned upon the deposit of such money and revenue generated by the sale or purchase of goods or services to persons in the correctional facilities may be expended for the general welfare of all the inmates at the discretion of the superintendent.

Miss. Code § 47-5-23

§ 47-5-23. Exclusive management and control; department responsibilities

The department shall be vested with the exclusive responsibility for management and control of the correctional system, and all properties belonging thereto, subject only to the limitations of this chapter, and shall be responsible for the management of affairs of the correctional system and for the proper care, treatment, feeding, clothing and management of the offenders confined therein. The commissioner shall have final authority to employ and discharge all employees of the correctional system, except as otherwise provided by law.

Miss. Code § 47-5-158

§ 47-5-158. Inmate Welfare Fund

(1) The department is authorized to maintain a bank account which shall be designated as the Inmate Welfare Fund. All monies now held in a similar fund for the benefit and welfare of inmates shall be deposited into the Inmate Welfare Fund. This fund shall be used for the benefit and welfare of inmates in the custody of the department.

(2) There shall be deposited into the Inmate Welfare Fund interest previously earned on inmate deposits, all net profits from the operation of inmate canteens, the annual prison rodeo, performances of the Penitentiary band, interest earned on the Inmate Welfare Fund and other revenues designated by the commissioner. All money shall be deposited into the Inmate Welfare Fund as provided in Section 7-9-21, Mississippi Code of 1972.

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

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

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

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

(4) The commissioner may invest in the manner authorized by law any money in the Inmate Welfare Fund that is not necessary for immediate use, and the interest earned shall be deposited in the Inmate Welfare Fund.

(5) The Deputy Commissioner for Administration and Finance shall be the custodian of the Inmate Welfare Fund. He shall establish and implement internal

accounting controls that comply with generally accepted accounting principles. The Deputy Commissioner for Administration and Finance shall prepare and issue quarterly consolidated and individual facility financial statements to the prison auditor of the Joint Legislative Committee on Performance Evaluation and Expenditure Review. The deputy commissioner shall prepare an annual report which shall include a summary of expenditures from the fund by major categories and by individual facility. This annual report shall be sent to the prison auditor, the Legislative Budget Office, the Chairman of the Corrections Committee of the Senate, and the Chairman of the Penitentiary Committee of the House of Representatives.

(6) A portion of the Inmate Welfare Fund shall be deposited in the Discharged Offenders Revolving Fund, as created under Section 47-5-155, in amounts necessary to provide a balance not to exceed One Hundred Thousand Dollars ($100,000.00) in the Discharged Offenders Revolving Fund, and shall be used to supplement those amounts paid to discharged, paroled or pardoned offenders from the department. The superintendent of the Parchman facility shall establish equitable criteria for the making of supplemental payments which shall not exceed Two Hundred Dollars ($200.00) for any offender. The supplemental payments shall be subject to the approval of the commissioner. The State Treasurer shall not be required to replenish the Discharged Offenders Revolving Fund for the supplemental payments made to discharged, paroled or pardoned offenders.

(7) The Inmate Welfare Fund Committee is hereby created and shall be composed of seven (7) members: The Deputy Commissioner for Community Corrections, the Deputy Commissioner of Institutions, the Superintendent of the Parchman facility, the Superintendent of the Rankin County facility, the Superintendent of the Greene County facility, and two (2) members to be appointed by the Commissioner of Corrections. The commissioner shall appoint the chairman of the committee. The committee shall administer and supervise the operations and expenditures from the Inmate Welfare Fund and shall maintain an official minute book upon which shall be spread its authorization and approval for all such expenditures. The committee may promulgate regulations governing the use and expenditures of the fund.

(8) The Department of Audit shall conduct an annual comprehensive audit of the Inmate Welfare Fund.

N.H. Rev. Stat. § 30-B:4

§ 30-B:4. Superintendent; General Duties and Powers.

The superintendent of the county department of corrections, as an agent of the county commissioners, shall be vested with all of the powers and subject to all the duties and limitations provided in this and other chapters relative to the management of county correctional facilities. These shall include, but are not limited to, the following:

I. The superintendent shall report to the board of county commissioners of his county and be answerable to it for the efficient and effective operation of county correctional facilities.

I-a. The superintendent shall manage all operations of the department and administer and enforce the laws with which the department is charged.

I-b. The superintendent shall have every power enumerated in the laws, whether granted to the superintendent, the department, or any administrative unit of the department. In accordance with these provisions, the superintendent shall:

(a) Annually compile a budget which reflects all fiscal matters related to the operation of the department and each program and activity of the department.

(b) Exercise general supervisory authority over all department employees, in accordance with applicable personnel statutes and rules.

I-c. The superintendent shall adopt such reasonable policies and procedures necessary to carry out the duties of the department consistent with this chapter.

I-d. The superintendent shall not accept, on behalf of the department, any grants of money without first obtaining the express consent of the board of commissioners.

II. The superintendent shall, under the supervision of the county commissioners, have custody of all the inmates confined to those facilities.

III. (a) The superintendent shall, in person or by agent, receive all persons sent by lawful authority to the county department of corrections and retain them until they are released by process appropriate under law, except as provided in subparagraph (b).

(b) Whenever a person in the custody of the superintendent under subparagraph (a) is transported to a state court, the sheriff through the sheriffs deputies and bailiffs shall be responsible for custody and control of such person during the time period such person is in the courthouse.

IV. The superintendent shall monthly present to the presiding or designated justice and the clerk of the superior court in the county a certified list of all pretrial prisoners who are or have been in custody with the times and causes of their confinements or discharges.

V. The superintendent shall provide each prisoner in his or her custody with necessary sustenance, clothing, bedding, shelter, and medical care.

VI. The superintendent of the county department of corrections shall cause to be kept a correct and itemized account of each employed prisoner's earnings and debits made and incurred on their account, and shall retain the balance of those earnings in escrow until the prisoner is discharged from the county department of corrections, whereupon the superintendent shall cause the prisoner to be paid the amount due and take a receipt.

Ohio Rev. Code § 5120.132

§ 5120.132. Prison programs fund

(A) There is hereby created in the state treasury the prisoner programs fund. The director of rehabilitation and correction shall deposit in the fund all moneys received by the department from commissions on telephone systems and services provided to prisoners in relation to electronic mail, prisoner trust fund deposits, and the purchase of music, digital music players, and other electronic devices. The money in the fund shall be used only to pay for the costs of the following:

(1) The purchase of material, supplies, and equipment used in any library program, educational program, religious program, recreational program, or pre-release program operated by the department for the benefit of prisoners;

(2) The construction, alteration, repair, or reconstruction of buildings and structures owned by the department for use in any library program, educational program, religious program, recreational program, or pre-release program operated by the department for the benefit of prisoners;

(3) The payment of salary, wages, and other compensation to employees of the department who are employed in any library program, educational program, religious program, recreational program, or pre-release program operated by the department for the benefit of prisoners;

(4) The compensation to vendors that contract with the department for the provision of services for the benefit of prisoners in any library program, educational program, religious program, recreational program, or pre-release program operated by the department;

(5) The payment of prisoner release payments in an appropriate amount as determined pursuant to rule;

(6) The purchase of other goods and the payment of other services that are determined, in the discretion of the director, to be goods and services that may provide additional benefit to prisoners.

(B) The director shall establish rules for the operation of the prisoner programs fund.

S.C. Code § 24-5-80

§ 24-5-80. Governing body to furnish certain items and services to all persons confined in jail.

The governing body of each county in this State shall furnish, at all times, sufficient food, water, clothing, personal hygiene products, bedding, blankets, cleaning supplies, and shelter from extreme heat or cold or rain for all persons confined in a jail and access to medical care.

S.D. Codified Laws § 24-1-4

§ 24-1-4. Government of penitentiary by Department of Corrections.

The state penitentiary and its ancillary facilities shall be under the direction and government of the Department of Corrections.

Tex. Gov't Code § 495.027

§ 495.027. Inmate Pay Telephone Service.

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

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

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

(3) provides a system with the capacity to:

(A) compile approved inmate call lists;

(B) verify numbers to be called by inmates, if necessary;

(C) oversee entry of personal identification numbers;

(D) use a biometric identifier of the inmate making the call;

(E) generate reports to department personnel on inmate calling patterns; and

(F) network all individual facility systems together to allow the same investigative monitoring from department headquarters that is available at each facility;

(4) provides on-site monitoring of calling patterns and customizes technology to provide adequate system security;

(5) provides a fully automated system that does not require a department operator;

(6) provides for periodic review by the state auditor of documents maintained by the vendor regarding billing procedures and statements, rate structures, computed commissions, and service metering;

(7) ensures that a ratio of not greater than 30 eligible inmates per communication device is maintained at each facility;

(8) ensures that no charge will be assessed for an uncompleted call and that the charge for local calls will not be greater than the highest rate for local calls for inmates in county jails; and

(9) ensures that each eligible inmate or person acting on behalf of an eligible inmate may prepay for the service.

(b) The board shall award a contract to a single private vendor to install, operate, and maintain the inmate pay telephone service. The initial term of the contract may not be less than seven years. The contract must provide the board with the option of renewing the contract for additional two-year terms.

(c) The department shall transfer 50 percent of all commissions paid to the department by a vendor under this section to the compensation to victims of crime fund established by Subchapter B, Chapter 56, Code of Criminal Procedure[1], and the other 50 percent to the credit of the undedicated portion of the general revenue fund, except that the department shall transfer the first $10 million of the commissions collected in any given year under a contract awarded under this section to the compensation to victims of crime fund established by Subchapter B, Chapter 56, Code of Criminal Procedure. This section does not reduce any appropriation to the department.

(d) Subject to board approval, the department shall adopt policies governing the use of the pay telephone service by an inmate confined in a facility operated by the department, including a policy governing the eligibility of an inmate to use the service. The policies adopted under this subsection may not unduly restrict calling patterns or volume and must allow for an average monthly call usage rate of eight calls, with each call having an average duration of not less than 10 minutes, per eligible inmate.

(e) The department shall ensure that the inmate is allowed to communicate only with persons who are on a call list that is preapproved by the department. Except as provided by Subsection (f), the department shall ensure that all communications under this section are recorded and preserved for a reasonable

[1] Vernon's Ann. Texas C.C.P. Art. 56.31 et. seq.

period of time for law enforcement and security purposes. A recording under this subsection is excepted from disclosure under Chapter 552.

(f) The department shall ensure that no confidential attorney-client communication is monitored or recorded by the department or any person acting on the department's behalf and shall provide to the vendor the name and telephone number of each attorney who represents an inmate to ensure that communication between the inmate and the attorney is not monitored or recorded.

Va. Code § 53.1-68

§ 53.1-68. Minimum standards for local correctional facilities, lock-ups and personnel, health inspections.

A. The Board shall establish minimum standards for the construction, equipment, administration and operation of local correctional facilities, whether heretofore or hereafter established. However, no minimum standard shall be established that includes square footage requirements in excess of accepted national standards. The Board or its agents shall conduct at least one unannounced inspection of each local facility annually. However, in those years in which a certification audit of a facility is performed and the facility is in compliance with all the standards, the Board may elect to suspend the unannounced inspection based upon that certification audit and the history of compliance of the facility with the standards promulgated in accordance with this section, except in any year in which there is a change in the administration of a local or regional jail. The Board shall also establish minimum standards for the construction, equipment and operation of lock-ups, whether heretofore or hereafter established. However, no minimum standard shall be established that includes square footage requirements in excess of accepted national standards.

B. Standards concerning sanitation in local correctional facilities and procedures for enforcing these standards shall be promulgated by the Board with the advice and guidance of the State Health Commissioner. The Board, in conjunction with the Board of Health, shall establish a procedure for the conduct of at least one unannounced annual health inspection by the State Health Commissioner or his agents of each local correctional facility. The Board and the State Health Commissioner may authorize such other announced or unannounced inspections as they consider appropriate.

C. The Department of Criminal Justice Services, in accordance with § 9.1-102, shall establish minimum training standards for persons designated to provide courthouse and courtroom security pursuant to the provisions of § 53.1-120 and for persons employed as jail officers or custodial officers under the provisions of this title. The sheriff shall establish minimum performance standards and management practices to govern the employees for whom the sheriff is responsible.

D. The superintendent of a regional jail or jail farm shall establish minimum performance standards and management practices to govern the employees for whom the superintendent is responsible.

CERTIFICATE OF SERVICE

I hereby certify that, on May 22, 2014, I electronically filed the Joint Brief for Correctional Facility Petitioners and Supporting Intervenors with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that, on this date, two copies of the foregoing brief were served by U.S. first class mail on the following:

Donald B. Verrilli, Jr.
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Respectfully submitted,

/s/ Helgi C. Walker

Helgi C. Walker
Counsel of Record
Scott G. Stewart
Philip S. Alito
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3599
(202) 530-9595 (fax)
HWalker@gibsondunn.com

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