ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1461 and Consolidated Cases

In the United States Court of Appeals for the District of Columbia Circuit

GLOBAL TEL*LINK, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, AND THE UNITED STATES OF AMERICA,

Respondents.

CENTURYLINK PUBLIC COMMUNICATIONS, ET AL.,

Intervenors.

On Petition for Review of Final Agency Action
of the Federal Communications Commission
80 Fed. Reg. 79,136 (Dec. 18, 2015)

BRIEF OF STATE AND LOCAL GOVERNMENT PETITIONERS

James Bradford Ramsay
General Counsel
Jennifer Murphy
Assistant General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, N.W., Suite 200
Washington, D.C. 20005
P: (202) 898-2207
E: jramsay@naruc.org

COUNSEL FOR NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

E. Scott Pruitt
Attorney General of Oklahoma
Patrick R. Wyrick
Solicitor General
Mithun Mansinghani
Deputy Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
P: (405) 521-3921
E: Mithun.Mansinghani@oag.ok.gov

COUNSEL FOR THE STATE OF OKLAHOMA

Danny Honeycutt
Oklahoma County Sheriff's Office
201 N. Shartel Ave.
Oklahoma City, OK 73102
P: (405) 713-2050
E: sodanhon@okcounty.org

COUNSEL FOR JOHN WHETSEL, SHERIFF OF OKLAHOMA COUNTY, OKLAHOMA

Christopher J. Collins
Collins, Zorn & Wagner
429 NE 50th Street, 2nd Floor
Oklahoma City, OK 73105
P: (405) 524-2070
E: cjc@czwglaw.com

COUNSEL FOR OKLAHOMA SHERIFFS' ASSOCIATION

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

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

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

Mark Brnovich
Attorney General of Arizona
Dominic E. Draye
Deputy Solicitor General
Arizona Office of the Attorney General
1275 West Washington
Phoenix, AZ 85007
P: (602) 542-5025
E: dominic.draye@azag.gov

COUNSEL FOR STATE OF ARIZONA

Leslie Rutledge
Attorney General of Arkansas
Lee Rudofsky
Solicitor General
Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
P: (501) 682-8090
E: lee.rudofsky@arkansasag.gov

COUNSEL FOR STATE OF ARKANSAS

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

COUNSEL FOR STATE OF INDIANA

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

COUNSEL FOR STATE OF KANSAS

Jeff Landry
Attorney General of Louisiana
Patricia H. Wilton
Assistant Attorney General
Louisiana Department of Justice
1885 North Third Street
Baton Rouge, LA 70802
P: (225) 326-6006
E: wiltonp@ag.louisiana.gov

COUNSEL FOR STATE OF LOUISIANA

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

COUNSEL FOR STATE OF MISSOURI

Adam Paul Laxalt
Attorney General of Nevada
Lawrence VanDyke
Solicitor General
Office of the Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701-4717
P: (775) 684-1100
E: LVanDyke@ag.nv.gov

COUNSEL FOR STATE OF NEVADA

Brad D. Schimel
Attorney General of Wisconsin
Misha Tseytlin
Solicitor General
Daniel P. Lennington
Deputy Solicitor General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
P: (608) 267-9323
E: tseytlinm@doj.state.wi.us

COUNSEL FOR STATE OF WISCONSIN

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the State and Local Government Petitioners certify as follows:

A. Parties and Amici

The parties participating in the proceeding below are listed in Appendix B to the challenged Order. These cases involve the following parties:

1. Petitioners

No. 15-1461: Global Tel*Link

No. 15-1498: Securus Technologies, Inc.

No. 16-1012: Centurylink Public Communications, Inc.

No. 16-1029: Telmate, LLC

No. 16-1038: National Association of Regulatory Utility Commissioners

No. 16-1046: Pay Tel Communications, Inc.

No. 16-1057: State of Oklahoma, *ex rel.* Joseph M. Allbaugh, Interim Director of the Oklahoma Department of Corrections; John Whetsel, Sheriff of Oklahoma County, Oklahoma; The Oklahoma Sheriffs' Association, on behalf of its members.

2. Respondents

Federal Communications Commission and the United States of America.

3. Intervenors and Amici Curiae

No. 15-1461: *Intervenor for Petitioners*: Centurylink Public Communications, Inc.; Indiana Sheriff's Association; Lake County Sheriff's Department; Marion County Sheriff's Office.

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

Amicus Curiae for Respondents: Network Communications International Corp. (terminated 03/07/2016).

No. 16-1057: *Intervenor for Petitioners*: State of Arizona; State of Arkansas; State of Indiana; State of Kansas; State of Louisiana; State of Missouri; State of Nevada; State of Wisconsin.

B. Rulings Under Review

These consolidated appeals challenge an Order of the Federal Communications Commission, *In the Matter of Rates for Interstate Inmate Calling Services*, "Second Report and Order and Third Further Notice of Proposed Rulemaking," 30 FCC Rcd. 12763, FCC 15-136, WC Dkt. No. 12-375 (released November 5, 2015), published December 18, 2015, at 80 Fed. Reg. 79,136.

C. Related Cases

The cases consolidated before this Court in this action are Case Nos. 15-1461, 15-1498, 16-1012, 16-1029, 16-1038, 16-1046, and 16-1057. In addition, a prior related action involves some of the same parties and similar issues: *Securus Technologies, Inc v. FCC*, No. 13-1280 and consolidated cases (D.C. Cir.).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the National Association of Regulatory Utility Commissioners (NARUC) respectfully submits this disclosure statement. All other petitioners are State or local government entities and are not required to file a disclosure statement. NARUC is a quasi-governmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC is a "trade association" as that term is defined in Circuit Rule 26.1(b). NARUC has no parent company. No publicly held company has any ownership interest in NARUC. NARUC represents those government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the regulated electric utilities within their respective borders.

Respectfully submitted,

/s/ James Bradford Ramsay

James Bradford Ramsay
General Counsel
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
1101 Vermont Ave., N.W., Suite 200
Washington, D.C. 20005

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

STATUTES AND REGULATIONS 2

INTRODUCTION 3

STATEMENT OF THE CASE 5

A. Section 276 of the Telecommunications Act of 1996. 5

B. Inmate Calling Services. 11

SUMMARY OF THE ARGUMENT 18

STANDING 22

STANDARD OF REVIEW 23

ARGUMENT 24

I. The Commission lacks authority to regulate intrastate ICS rates as the Order provides. 24

A. Section 276 requires the Commission to allow independent payphone providers to compete with Bell companies by ensuring they are not undercompensated; it does not provide the FCC with plenary authority to set intrastate payphone rate caps that it deems "just, reasonable, and fair" to the consumer. 24

1. The statutory text. 25

2. The statutory context and structure. 27

3. The statute's history and purpose. 31

4. The original intent and understanding. 33

B. This Court owes no deference to the FCC's interpretation of Section 276, which is unreasonable and attempts to infringe on State authority 36

1. Deference is not owed because any ambiguity in the statute should be resolved against interpretations that infringe on State authority to regulate intrastate rates. 37

2. Deference is not owed because the meaning of the statute can be discerned after application of traditional tools of statutory construction. 41

3. Deference is not owed because the Commission's interpretation is unreasonable. 42

II. The Order is unlawful because the Commission's refusal to include the costs of ICS to jails and prisons in its calculations is arbitrary and capricious. 47

A. Jails and prisons incur substantial costs directly related to the provision of ICS. 48

B. The Commission failed to provide a reasoned basis for excluding all facility-borne costs in its calculation of rate caps. 54

C. Because Section 276 requires the Commission to ensure fair compensation to payphone service providers for all costs, exclusion of the cost of site commissions is arbitrary and capricious. 59

CONCLUSION 60

TABLE OF AUTHORITIES

CASES

Alexander v. Marion Cnty. Sheriff,
891 N.E.2d 87 (Ind. Ct. Appeals 2008) 14

Am. Bar Ass'n v. F.T.C.,
430 F.3d 457 (D.C. Cir. 2005) 39

*Am. Pub. Commc'ns Council v. F.C.C.,
215 F.3d 51 (D.C. Cir. 2000) 8, 9, 35

Americans for Safe Access v. Drug Enf't Admin.,
706 F.3d 438 (D.C. Cir. 2013) 23

APCC Servs., Inc. v. Sprint Commc'ns Co.,
418 F.3d 1238 (D.C. Cir. 2005) 10, 35

AT & T Corp. v. Iowa Utilities Bd.,
525 U.S. 366 (1999) 5, 6, 39

Bond v. United States,
134 S. Ct. 2077 (2014) 38

Brooks v. United States,
337 U.S. 49 (1949) 27

Brown v. Gardner,
513 U.S. 115 (1994) 41

Bus. Roundtable v. S.E.C.,
647 F.3d 1144 (D.C. Cir. 2011) 56

California Indep. Sys. Operator Corp. v. F.E.R.C.,
372 F.3d 395 (D.C. Cir. 2004) 42

Chapman v. Houston Welfare Rights Org.,
441 U.S. 600 (1979) 31

(*Authorities upon which we chiefly rely are marked with asterisks*)

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 23, 41

Cobell v. Norton,
240 F.3d 1081 (D.C. Cir. 2001) 37

Comcast Corp. v. F.C.C.,
579 F.3d 1 (D.C. Cir. 2009) 60

Cont'l Air Lines, Inc v. C. A. B.,
519 F.2d 944 (D.C. Cir. 1975) 34

Davel Commc'ns, Inc. v. Qwest Corp.,
460 F.3d 1075 (9th Cir. 2006) 10

Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp.,
642 F.2d 527 (D.C. Cir. 1980) 42

Ebert v. Poston,
266 U.S. 548 (1925) 33

F.C.C. v. ITT World Commc'ns, Inc.,
466 U.S. 463 (1984) 1

Fin. Planning Ass'n v. S.E.C.,
482 F.3d 481 (D.C. Cir. 2007) 32

Florence v. Bd. of Chosen Freeholders,
132 S. Ct. 1510 (2012) 37

Florida Pub. Telecommunications Ass'n, Inc. v. F.C.C.,
54 F.3d 857 (D.C. Cir. 1995) 29

*Glob. Crossing Telecommunications, Inc. v. Metrophones
Telecommunications, Inc., 550 U.S. 45 (2007) 11, 29, 31, 34

Glob. Crossing Telecommunications, Inc. v. F.C.C.,
259 F.3d 740 (D.C. Cir. 2001) 10, 43

Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,
559 U.S. 280 (2010) 27

Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy,
706 F.3d 499 (D.C. Cir. 2013) 36, 41, 42

I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.,
502 U.S. 183 (1991) 27

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 46

*Illinois Pub. Telecommunications Ass'n v. F.C.C.,
117 F.3d 555 (D.C. Cir. 1997) 5, 6, 7, 9, 32, 34, 35, 39

*Illinois Pub. Telecommunications Ass'n v. F.C.C.,
752 F.3d 1018 (D.C. Cir. 2014) 6, 10, 11, 32

Insulation Transp. Comm. v. ICC,
683 F.2d 533 (D.C. Cir. 1982) 29

*Louisiana Pub. Serv. Comm'n v. F.C.C.,
476 U.S. 355 (1986) 37, 39

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 23

Marbury v. Madison,
5 U.S. 137 (1803) 47

MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.,
512 U.S. 218 (1994) 29, 31

MCI Telecommunications Corp. v. F.C.C.,
143 F.3d 606 (D.C. Cir. 1998) 9

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 38, 40

Michigan v. Bay Mills Indian Cmty.,
134 S. Ct. 2024 (2014) 33

Middle S. Energy, Inc. v. F.E.R.C.,
747 F.2d 763 (D.C. Cir. 1984) 34

Morrison v. Nat'l Australia Bank Ltd.,
561 U.S. 247 (2010) 33

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 24 (1983) 48, 55, 59

NetworkIP, LLC v. F.C.C.,
548 F.3d 116 (D.C. Cir. 2008) 11, 32

*New England Pub. Commc'ns Council, Inc. v. F.C.C.,
334 F.3d 69 (D.C. Cir. 2003) 5, 7, 8, 10, 11, 28, 30, 31, 32, 35, 39, 40, 45, 46

O'Lone v. Estate of Shabazz,
482 U.S. 342 (1987) 37

Owner-Operator Ind. Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin.,
494 F.3d 188 (D.C. Cir. 2007) 55

Republic of Argentina v. Weltover, Inc.,
504 U.S. 607 (1992) 33

Russello v. United States,
464 U.S. 16 (1983) 29

Sec'y of Labor, Mine Safety & Health Admin. v. Excel Mining, LLC,
334 F.3d 1 (D.C. Cir. 2003) 34

Shays v. Fed. Election Comm'n,
528 F.3d 914 (D.C. Cir. 2008) 29

State of Alaska v. U.S. Dep't of Transp.,
868 F.2d 441 (D.C. Cir. 1989) 22

Sw. Bell Tel. Co. v. F.C.C.,
100 F.3d 1004 (D.C. Cir. 1996) 6

Torres v. Lynch,
136 S. Ct. 1619 47

Tozzi v. U.S. Dep't of Health & Human Servs.,
271 F.3d 301 (D.C. Cir. 2001) 22

Trumpeter Swan Soc. v. E.P.A.,
774 F.3d 1037 (D.C. Cir. 2014) 23

U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.,
508 U.S. 439 (1993) 27

United States v. Am. Trucking Ass'ns,
310 U.S. 534 (1940) 27

United States v. Radio Corp. of Am.,
358 U.S. 334 (1959) 29

Util. Air Regulatory Grp. v. EPA,
134 S. Ct. 2427 (2014) 31

Whitman v. Am. Trucking Associations,
531 U.S. 457 (2001) 31

Yates v. United States,
135 S. Ct. 1074 (2015) 27

STATUTES

5 U.S.C. § 706 ..... 23, 25, 49

28 U.S.C. § 2342 1

28 U.S.C. § 2344 1

*47 U.S.C. § 152 ..... 24, 30, 39, 40, 41

*47 U.S.C. § 201 ..... 14, 16, 19, 21, 24, 25, 28-30, 43, 44

47 U.S.C. § 226 46

*47 U.S.C. § 276 ..... 2-11, 16-21, 24-36, 39-47, 59, 60

47 U.S.C. § 402 1

Ind. Code §§ 5-22-23-5, -6 ..... 14, 37

REGULATIONS

In the Matter of Implementation of the Pay Tel. Reclassification & Comp. Provisions of the Telecommunications Act of 1996, Report and Order 11 F.C.C. Rcd. 20541 (1996) 8

In the Matter of Implementation of the Pay Tel. Reclassification & Comp. Provisions of the Telecommunications Act of 1996, Order on Reconsideration 11 F.C.C. Rcd. 21233 (1996) 35

In re Telecommunications Relay Servs. & the Americans with Disabilities Act of 1990, 17 F.C.C. Rcd. 21233 (2002) 30

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (9th Ed.) 26

H.R. CONF. REP. 104-458 ..... 8, 33

H.R. REP. 104-204 ..... 8, 33

PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) 47

GLOSSARY

Act	The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*
1996 Act	The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
ICS	Inmate Calling Services
Order	The order challenged in this suit, *In the Matter of Rates for Interstate Inmate Calling Services*, "Second Report and Order and Third Further Notice of Proposed Rulemaking," 30 FCC Rcd. 12763, FCC 15-136, WC Dkt. No. 12-375 (released November 5, 2015)

JURISDICTIONAL STATEMENT

Petitioners seek review of a Federal Communications Commission (the "Commission") final rule published at 80 Fed. Reg. 79,136 (Dec. 18, 2015) (the "Order").[1] Petitions for review of the Rule were timely filed within 60 days of publication[2] on January 25, 2016 (No. 16-1057, CA10 No. 16-9503) and February 5, 2016 (No. 16-1038), and this Court has jurisdiction to review this agency action under 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).[3]

---

[1] *In the Matter of Rates for Interstate Inmate Calling Services*, "Second Report and Order and Third Further Notice of Proposed Rulemaking," 30 FCC Rcd. 12763, FCC 15-136, WC Dkt. No. 12-375 (2015) ("Order"), reproduced at Joint Appendix ("J.A.") __.

[2] *See* 28 U.S.C. § 2344.

[3] *See also F.C.C. v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) ("Exclusive jurisdiction for review of final FCC orders … lies in the Court of Appeals.").

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum.

STATEMENT OF THE ISSUES

The Communications Act empowers the Commission to require interstate phone rates to be "just and reasonable," but forbids the Commission from any regulation of intrastate rates. Meanwhile, Section 276 of the Telecommunications Act of 1996 allows the Commission to promote competition by crafting compensation plans for payphone providers to ensure that they are "fairly compensated" for each and every call, including intrastate calls. In the challenged Order, the Commission sets rate caps for intrastate inmate payphone calls on the premise that it has the authority to fix intrastate payphone toll and local rates to make them "just, reasonable, and fair."

I. **Does the Order exceed the Commission's statutory authority under Section 276 because the text, context, history, purpose, and long-accepted meaning of that provision only allows the Commission to ensure that payphone providers are not undercompensated, and does *not* provide the Commission with plenary authority to mandate "just and reasonable" intrastate local and toll rates akin to the authority provided for interstate calls by other statutory provisions?**

II. **Assuming the Commission has the authority to set intrastate payphone rate caps, did it do so arbitrarily and capriciously by completely excluding from its calculations the costs charged to payphone providers by jails and prisons for the right to provide service in the facility, which include the costs jails and prisons incur in security measures and other services related to allowing inmates to place phone calls?**

INTRODUCTION

The Commission Order at issue in this case is a solution in search of statutory authority. The Commission set out to lower rates charged to inmates for phone calls made from jails and prisons. What drew the particular ire of the Commission—because it contributed significantly to the rates—was that state and local government entities were receiving a portion of the revenue gained from inmate calls and using it to fund security measures related to the phone calls, as well as other rehabilitative and inmate welfare programs. Relying on its general authority to require interstate phone call rates to be "just and reasonable," the Commission set out strict rate caps for interstate calls.

But the Commission ran into a few problems. To start, this Court partially stayed the Commission's order. More fundamentally, however, most inmate phone calls are intrastate, not interstate, but the law strictly fenced off the Commission from requiring intrastate rates to be "just and reasonable" unless unambiguously otherwise provided, leaving such regulation to the domain of the States. The Commission eventually decided that the authority on which it would premise its desired public policy solution was Section 276 of the Telecommunications Act of 1996—a provision designed to allow independent payphone companies to compete on an equal footing with the entrenched payphone services of Bell companies by ensuring that the payphone services are "fairly compensated" for every intrastate and interstate call. Amalgamating that mandate with its "just and reasonable" authority for *inter*state calls,

the Commission decided that it has the authority to set *intra*state payphone rates to the levels it deems "just, reasonable, and fair," and through that, it could promulgate its desired intrastate inmate call rate caps.

The Commission's attempt to cobble together statutory authority to impose rate caps on intrastate inmate payphone calls, however, flouts almost every applicable canon of statutory construction. The Commission relies on isolated words in Section 276 while ignoring its text, context, history, purpose, and original meaning, and asks this Court to defer to its statutory interpretation untethered from any effort to ascertain Section 276's actual meaning. But in light of those traditional tools of statutory construction, Section 276 plainly does not authorize the Commission's attempt to limit the compensation that payphone providers, as well as local jails and State prisons, receive from inmate calling services. Section 276 ensures service providers are not *under*compensated; it does not give the Commission plenary authority to set intrastate rates to be "just, reasonable, and fair," nor has this provision ever been interpreted or applied that way. Instead of deferring to the Commission's unreasonable grasp for authority, this Court should invalidate the Order as *ultra vires*.

To make matters worse, the Commission also arbitrarily ignored the costs to jails and prisons for allowing access to phone calls in setting its rate caps. For this additional reason, the Order must be invalidated.

STATEMENT OF THE CASE

The Commission premises its authority to promulgate the Order in this case on Section 276 of the Telecommunications Act of 1996.[4] A review of the history of Section 276, as well as the history of the Order, is necessary to understand why the Order is unlawful.

A. Section 276 of the Telecommunications Act of 1996.

Because of the high cost of building a telephone network, prior to the mid-1980s, "local phone service was thought to be a natural monopoly"; as a result, States granted exclusive franchises in each locality to local exchange carriers, who owned all the equipment and provided all the service that make local phone calls possible.[5] For the most part, only carriers "provided payphone service because its provision could not be accomplished independently from [a carrier's] network."[6] Due to a 1982 consent decree that divested AT&T from its local carriers, most local carriers were highly-regulated "Bell operating companies."[7] But advances in technology allowed

---

[4] 47 U.S.C. § 276.

[5] *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999).

[6] *Illinois Pub. Telecommunications Ass'n v. F.C.C.*, 117 F.3d 555, 558 (D.C. Cir. 1997), *decision clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997).

[7] *New England Pub. Commc'ns Council, Inc. v. F.C.C.*, 334 F.3d 69, 71 (D.C. Cir. 2003).

competition with Bell companies to be possible,[8] including competition from independent payphone service providers against the Bells' payphone operations.[9]

Despite these technological advances, independent payphones were still not able to compete on an equal footing with payphone services offered by Bell companies because (1) Bell companies subsidized their payphone services with the charges assessed on interexchange carriers[10] for long-distance calls;[11] (2) independent payphone providers received no compensation for many "800" number and other toll-free calls because the fees from those calls went directly to carriers;[12] and (3) a Bell company "could exploit its control over the local phone lines by charging lower service rates to its own payphones or higher service rates to independent payphone providers."[13] "It was against this background that the Congress enacted § 276 of the

---

[8] *See Iowa Utilities Bd.*, 525 U.S. at 371.

[9] *Illinois Pub. Telecommunications Ass'n*, 117 F.3d at 558.

[10] An interexchange carrier is a carrier that transmits long-distance calls by connecting customers in two separate local networks operated by local exchange carriers through the interexchange carrier's interchange network. *See Sw. Bell Tel. Co. v. F.C.C.*, 100 F.3d 1004, 1005 (D.C. Cir. 1996).

[11] *Illinois Pub. Telecommunications Ass'n*, 117 F.3d at 559.

[12] *Id.*

[13] *Illinois Pub. Telecommunications Ass'n v. F.C.C.*, 752 F.3d 1018, 1020 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1583 (2015).

Telecommunications Act of 1996 'to promote competition among payphone service providers.'"[14]

Section 276 contains two mandates: Bell companies "(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations" and they "(2) shall not prefer or discriminate in favor of its payphone service."[15] It then "directs the Commission to implement section 276(a)'s anti-subsidy and anti-discrimination mandates by undertaking five specific measures to promote 'competition among payphone service providers and … the widespread deployment of payphone services to the benefit of the general public.'"[16] One of those five measures requires the Commission to "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."[17] This provision

---

[14] *Illinois Pub. Telecommunications Ass'n*, 117 F.3d at 559 (quoting 47 U.S.C. § 276(b)(1)).

[15] 47 U.S.C. § 276(a).

[16] *New England Pub. Commc'ns Council*, 334 F.3d at 75-76 (quoting 47 U.S.C. § 276(b)(1)); *see also id.* at 71 ("Section 276 of the Act … authorizes the Commission to prescribe regulations consistent with the goal of promoting competition, requiring that the Commission take five specific steps toward that goal.").

[17] 47 U.S.C. § 276(b)(1)(A).

specifically "addressed the problem of uncompensated calls," such as 800 number and other toll-free calls.[18]

The 1996 Act's legislative history confirms this understanding. The report on the House bill that added the "fairly compensated" directive noted that the provision was needed because Bell companies were "assured of recovering their payphone costs," but independent payphone providers were not.[19] Similarly, the conference report offered as an example ensuring fair compensation for "'toll-free' calls to subscribers to 800 and new 888 services and calls dialed by means of carrier access codes"—calls for which independent providers were being undercompensated.[20]

The Commission implemented Congress's five specified measures to ensure a level competitive playing field in a comprehensive Order issued in 1996.[21] The Commission first set out to "determine the scope of its new mandate" and, decided that the directive to ensure that each payphone provider is "fairly compensated for each and every intrastate and interstate call" required the Commission to act *only* with

---

[18] *Am. Pub. Commc'ns Council v. F.C.C.*, 215 F.3d 51, 53 (D.C. Cir. 2000).

[19] H.R. REP. 104-204, 88 (1995).

[20] H.R. CONF. REP. 104-458, 158 (1996).

[21] *See In the Matter of Implementation of the Pay Tel. Reclassification & Comp. Provisions of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C. Rcd. 20541 (1996) ("First Payphone Order"); *see also New England Pub. Commc'ns Council*, 334 F.3d at 71 ("The Commission implemented section 276 in a series of orders, beginning with the so-called Payphone Orders.").

respect to those types of calls for which providers were being undercompensated, such as 800 number calls.[22] The Commission then delineated a series of market-based reforms to correct for that undercompensation, as well as regulations that implemented Congress's four other mandates in Section 276, including those that prevent Bell subsidization of their payphones and prohibit Bell discrimination against independent providers in the services the Bell company provides.[23]

This Court upheld the bulk of those regulations, but invalidated as inadequately reasoned the per-call compensation rate that carriers were required to pay to payphone providers for toll-free calls (like 800 number calls).[24] The FCC engaged in a second attempt to set the compensation plan, and this Court again invalidated it as an unreasoned decision.[25] Finally, this Court upheld the FCC's third attempt to come to a reasoned decision on this issue.[26] In sum, Congress mandated in Section 276(b)(1)(A) that the FCC institute a compensation plan to enable independent payphone providers to compete on the same level as Bell payphone services and, "[a]fter several

---

[22] *See Illinois Pub. Telecommunications Ass'n*, 117 F.3d at 559.

[23] *See id.* at 560-61.

[24] *See id.* at 561-70.

[25] *See MCI Telecommunications Corp. v. F.C.C.*, 143 F.3d 606 (D.C. Cir. 1998).

[26] *See Am. Pub. Commc'ns Council*, 215 F.3d at 52.

failed attempts, the Commission finally crafted such a plan,"[27] generally referred to as the "Payphone Orders." Subsequent FCC orders and litigation surrounding Section 276 have concerned the specific implementation of the Payphone Orders and revisions and clarifications.[28]

But despite the fact that "[t]he FCC and the payphone industry have traveled a long and winding road in implementing Section 276,"[29] the consistent construction of the provision is that it empowers the FCC "[t]o ensure fair competition in the payphone market" by ensuring that payphone providers are not undercompensated.[30] This Court's most recent opinion on the "fairly compensated" language confirms that the "provision responded to the development of long-distance access codes and 800

---

[27] *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238, 1241 (D.C. Cir. 2005), *vacated on other grounds*, 550 U.S. 901 (2007).

[28] *See, e.g.*, *Glob. Crossing Telecommunications, Inc. v. F.C.C.*, 259 F.3d 740 (D.C. Cir. 2001) (addressing whether a carrier must compensate a payphone provider after self-certification of compliance with Payphone Orders); *New England Pub. Commc'ns Council*, 334 F.3d at 71-73 (addressing Commision order regulating rates Bell companies can charge payphone providers for use of Bell services); *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075 (9th Cir. 2006) (addressing remedy for provider after carrier failed to file tariffs pursuant to Payphone Orders); *Illinois Pub. Telecommunications Ass'n*, 752 F.3d at 1020 (addressing whether refunds to payphone providers were required when Bell companies violated Payphone Orders); *see also* Order, Pai dissent at 199-200, J.A.__ (detailing the content of other Commission orders under Section 276).

[29] *Illinois Pub. Telecommunications Ass'n*, 752 F.3d at 1021.

[30] *Illinois Pub. Telecommunications Ass'n*, 752 F.3d at 1020; *see also New England Pub. Commc'ns Council*, 334 F.3d at 71.

numbers that allowed callers to use payphones without depositing coins, thereby depriving payphone operators of revenue" and the Commission implemented Section 276 by mandating that "the long-distance carriers who benefited from such 'dial-around' calls … compensate payphone providers."[31] By contrast, Section 276 has never been applied to give the Commission plenary authority to regulate intrastate payphone rates to the level it deems just and reasonable to the consumer or to ensure that payphone providers do not receive too much compensation for services in state-regulated markets.[32]

B. Inmate Calling Services.

Inmate calling services (ICS) includes typical collect and debit-based payphone platforms as well as security systems necessary to ensure safety for persons both inside and outside of the correctional facility.[33] ICS programs are a privilege that

---

[31] *Illinois Pub. Telecommunications Ass'n*, 752 F.3d at 1026; *see also Glob. Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 51 (2007) (stating that "Congress recognized that the 'free' call would impose a cost upon the payphone operator; and it consequently" enacted Section 276(b)(1)(A) to remedy that problem); *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 118 (D.C. Cir. 2008) (noting that "[t]he concept [of Section 276(b)(1)(A)] is simple: Telecommunications carriers must compensate [payphone providers] for calls made from payphones," including for calls that don't require the consumer to deposit a coin, such as calls with calling cards); *New England Pub. Commc'ns Council*, 334 F.3d at 71.

[32] *See* Order, Pai Dissent at 199-201, J.A.__.

[33] Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶¶ 2, 5-6, J.A.__ (Dec. 28, 2012) (2012 NPRM).

correctional facilities offer so that inmates can communicate with their families in an attempt to foster a more successful rehabilitation program.

Unlike other payphone services, the phone company cannot provide ICS by itself; ICS requires a cooperative relationship between provider and facility in order to safely deliver calling privileges to inmates.[34] The service provider's role is to supply the calling "platform"—meaning the hardware and software necessary to connect to telecommunication carriers—as well as the technology and training necessary for facilities to monitor and record phone calls and the systems to identify inmates and bill them for their calls. The service provider, however, rarely administers these measures or facilitates the inmates' use of the phone.[35] Rather, facility employees, from prison guards to commissary clerks, must securely escort inmates to phones; monitor and record inmate phone calls to ensure they are not used to further criminal activity; provide copies of those calls to investigators and prosecutors upon subpoena; enroll inmates in biometric voice identification systems; maintain, update, and administer protective do-not-call lists; and enroll inmates into billing systems to ensure that ICS providers get paid, among other tasks.[36] Absent these tasks performed

---

[34] *See id.* at ¶ 6, J.A.__.

[35] *See*, *e.g.,* Letter from Pay Tel Communications, Inc. to Marlene H. Dortch, Secretary, FCC, at 3, J.A.__ (filed May 8, 2015).

[36] *See id.* at 9-12.

by jail and prison officials, allowing inmates unfettered and unsupervised access to phones would present unacceptable risk to the lives and well-being of both those inside and outside the prison.[37]

The services provided by jails and prisons are not free: Correctional facilities can spend over $100,000 a month to provide ICS privileges to inmates, most of which goes into the labor hours required to facilitate and monitor inmates' use of ICS.[38] Traditionally, ICS providers would compensate facilities with a portion of the revenue generated from the tolls charged on inmate phone calls—compensation known as "location rent" or "site commissions." In addition to paying for the salaries of the employees who facilitate ICS programs,[39] site commissions are sometimes also used to fund inmate welfare programs like addiction rehabilitation, inmate education, and legal research services.[40] Those commissions, naturally, increase the costs of providing calling services and thus ICS rates tend to be higher than normal phone rates.

---

[37] *See, e.g.*, Imperial County Sheriff Jan. 12, 2015 Letter at 2, J.A.__.

[38] National Sheriff's Association Comment, Exhibit A, J.A.__ (Jan. 12, 2015) (listing ICS-related duties performed by correctional facility employees).

[39] *See, e.g.*, Cook County Comment on Second FNPRM, 3-5, J.A.__ (Jan. 12, 2015).

[40] *See, e.g.,* Letter from Donny Youngblood, Sheriff, Kern County, California, to Marlene H. Dortch, Secretary, FCC, at 2, J.A.__ (Jan. 5, 2015).

Nevertheless, States are active in regulating these rates to ensure that they are affordable for inmates.[41]

In 2012, in response to a series of petitions from inmates and their relatives asking for the Commission to cap *interstate* ICS rates, the Commission sought comment on ways to lower those interstate rates to "just and reasonable" levels pursuant to its authority under Section 201(b) of the Act.[42] After the comment period, the Commission promulgated an Order in its *Rates for Interstate Inmate Calling Services* docket (the "2013 Order"), which imposed an interim cap on interstate ICS rates of $0.21 for prepaid and debit calls and $0.25 for collect calls.[43] These caps did not include facility-borne costs in the rate calculus. The Commission decided that site commissions "were not part of the cost of providing ICS and therefore [are] not compensable in interstate ICS rates."[44]

A group of ICS providers and industry members challenged the 2013 Order in this Court, claiming, *inter alia,* that the rate caps and their calculation were an abuse of

---

[41] *See, e.g.*, Order, Pai dissent at 202, J.A.__; Ind. Code §§ 5-22-23-5, -6 (regulating ICS rates); *Alexander v. Marion Cnty. Sheriff*, 891 N.E.2d 87, 96 (Ind. Ct. Appeals 2008) (holding that sheriff had authority under statute designed to ensure low rates to receive commission payments pursuant to contract from service providers).

[42] 2012 NPRM, ¶ 1, J.A.__.

[43] Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107, ¶¶ 59-81, J.A.__ (2013) ("2013 Order").

[44] *Id.* at ¶ 54, J.A__.

the Commission's authority.[45] In October 2014, after the 2013 Order was partially enjoined,[46] the Commission issued its *Second Further Notice of Proposed Rule Making* ("Second FNPRM").[47] In view of that decision to promulgate new rules, the Commission asked this Court to hold the litigation over the 2013 Order in abeyance, and this Court obliged.

Realizing that intrastate calls form the bulk of the ICS market,[48] in its Second FNPRM, the Commission solicited an even broader regulatory scheme than the one already partially enjoined, and sought comments and data on all facets of ICS, including intrastate rates, ancillary service fees, costs and functions borne by facilities, and site commission practices.[49] ICS providers and facility operators responded with comments and data detailing the role that facilities play in ICS provision and the costs

---

[45] *See Securus Techs., Inc., v. F.C.C.*, No. 13-1280 (D.C. Cir.).

[46] *Id.*, Order (D.C. Cir. Jan. 13, 2014). Judge Brown would have stayed the entire Order.

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

[48] *See* 2013 Order, ¶ 131 & n.444, J.A.__.

[49] *See generally* Second FNPRM, J.A.__.

they incur.[50] Comments also informed the Commission that it had no authority to set intrastate payphone rate caps under Sections 201 and 276.[51]

In November 2015, the Commission issued its *Second Order and Third FNPRM*—the Order at issue in this case. This Order purports to "reform … all aspects of ICS" by requiring that ICS rates conform with its new interpretation of Sections 201 and 276—which, according to the Commission, gives it plenary power to regulate *intra*state payphone rates to any level it deems "just, reasonable, and fair" even if payphone providers are not being undercompensated.[52] The regulation includes, among other mandates, new rate caps for both interstate and—for the first time—intrastate ICS calls.[53] The new caps are tiered based on the size of the correctional facility, ranging from $0.22 per minute to $0.11 per minute.[54] For the second time, however, the Commission refused to include facility-borne costs and site commissions in its rate calculus.[55] To the Commission, these payments merely "distort

---

[50] *See* Order, ¶ 18, J.A.__; *see also, e.g.,* National Sheriff's Association Comment, J.A.__.

[51] *See, e.g.*, Nat'l Ass'n of Regulatory Utility Commissioners (NARUC) Comments (Jan. 9, 2015), J.A.__.

[52] Order, ¶ 9, J.A.__.

[53] *Id.*

[54] *Id.*

[55] *See id.* at ¶¶ 9, 114-140, J.A.__.

the ICS marketplace."[56] And while the Commission does not outright prohibit them, the Commission "otherwise discourage[d]" ICS providers from sharing revenues with facilities[57] and encouraged the States to ban such practices.[58]

Three Commissioners voted for the Order while two dissented. Commissioner Pai stated that the Commission lacked the authority under Section 276 to cap intrastate payphone rates because, given the text and purpose of the provision, and how it has been invariably applied by the Commission, Section 276 allows for intrastate rate regulation "only when [they] are *too low* to ensure fair competition."[59] He also faulted the majority for ignoring the significant and well-documented costs to jails and prisons of providing ICS.[60] Similarly, Commissioner O'Rielly stated that Section 276 "was not meant to give the Commission the authority to cap end-user rates" for intrastate payphones and he was "appalled that the Commission would try to mash together bits and pieces of different provisions in an attempt to create a new unsubstantiated legal standard: just, reasonable, and fair rates."[61]

---

[56] *Id.* at ¶ 122, J.A.__.

[57] *Id.* at ¶ 9, J.A.__.

[58] *Id.* at ¶ 131, J.A.__.

[59] Order, Pai Dissent, at 198-203, J.A.__.

[60] *Id.* at 203-06, J.A.__.

[61] Order, O'Rielly Dissent, at 209, J.A.__.

Petitioners brought the instant action challenging the validity of the Order before this Court, and this Court again granted a partial stay in its order dated March 23, 2016.

SUMMARY OF THE ARGUMENT

The Order violates the Administrative Procedure Act for two independent reasons: (I) The Commission's attempts to limit compensation to payphone providers by, *inter alia*, setting intrastate rate caps is in excess of statutory authority, and (II) the Commission's refusal to include the costs of ICS to jails and prisons in its rate cap calculations is arbitrary and capricious.

I. The Commission premises its authority to set intrastate rate caps on Section 276(b)(1)(A)'s requirement that that payphone providers are "fairly compensated" for their services, arguing the provision gives it the authority to set intrastate rate caps to levels it deems "just, reasonable, and fair." But Section 276(b)(1)(A) provides the Commission only the limited authority to regulate intrastate calls to ensure payphone providers are not undercompensated such that they can compete with the payphone services of Bell companies and other carriers. Section 276(b)(1)(A) does not provide the Commission with the authority to limit the compensation given to payphone providers or plenary power to regulate intrastate payphone rates.

A. This interpretation of Section 276(b)(1)(A) is compelled by the statute's text, context, history, purpose, and contemporaneous interpretation by the

Commission and courts. The text is focused on payphone compensation and ensuring competition, rather than on rates or charges more generally or low rates for consumers. Moreover, the exceptions to the "fair compensation" mandate—such as for emergency calls—make sense only if the mandate is designed to ensure providers are not undercompensated rather than also designed to prevent excessive charges.

In enacting Section 276(b)(1)(A), Congress deliberately chose different language than the well-established, historical, and important "just and reasonable" authority provided to regulate interstate rates in Section 201(b). This is an unequivocal indication that Section 276(b)(1)(A) does not provide the Commission the claimed authority to regulate intrastate payphone rates in the same manner as it regulates interstate rates. And the rest of Section 276 and the 1996 Act confirm that Congress's concern was ensuring competition with Bell companies, *not* with regulation of excessive rates.

Section 276's history and purpose confirm this understanding of the statutory text. As detailed in the Statement of the Case, through Section 276(b)(1)(A), Congress intended to correct one of several problems facing independent payphone providers trying to compete on a level field with Bell companies, namely, the undercompensation for completing certain calls (*e.g.*, toll-free and 800-number calls). Congress simply wasn't trying to fix any issues with payphones making too much profit or consumers being overcharged for payphone calls.

Finally, contemporaneous interpretations of Section 276(b)(1)(A) by all three branches of government show that the original intent and public meaning of the provision comports with Petitioners' interpretation. In addition to legislative committee reports, the Commission itself had always interpreted Section 276(b)(1)(A) as preventing undercompensation and had always wielded its authority in that way—and the courts (including this Court) agreed. In fact, the Commission previously *disclaimed* the authority to regulate inmate calling compensation levels that were established pursuant to contract.

B. *Chevron* deference is inapplicable in this case because this Court has held that Section 276 does not confer jurisdiction over intrastate rates unless it is "so unambiguous or straightforward so as to override" the Act's directive retaining that authority exclusively in the States. To the extent that there is any ambiguity in the statute, both the express terms of the Act and principles of federalism require that the statute be construed against giving the Commission authority to regulate intrastate rates. In any event, the meaning of Section 276(b)(1)(A) is clear and the Court need not consider deference to the Commission before striking down the Order.

And even if *Chevron*'s second step is reached, this Court must reject the Commission's interpretation of Section 276(b)(1)(A) because, in light of the well-established tools of statutory construction, it is patently unreasonable. The Commission made no effort to attempt to construe the statute or apply any canons of interpretation, but instead directly contradicted an important canon by rendering

meaningless Congress's decision to use different words in Sections 201(b) and Section 276(b)(1)(A). The Commission's interpretation is also unreasonable because it attempts to use a statute that was intended to ensure adequate compensation of payphone providers to deliberately undercompensate providers for costs actually incurred in the provision of payphone service.

II. The Commission's Order is also arbitrary and capricious. Despite copious record evidence that jails and prisons incur substantial security and support costs as a direct result of allowing ICS in their facilities—costs which are charged to the ICS provider—the Commission arbitrarily decided to exclude such costs in its calculation of the rate caps as not "legitimate." None of the Commission's explanations for wholesale exclusion of such costs amounts to reasoned decisionmaking.

Mere uncertainty with the data quantifying those costs does not justify complete abrogation of the duty to consider such costs. Nor does the Commission's fallback that the rate caps are sufficiently "generous" to cover those costs withstand scrutiny because (1) the rate caps were based on average ICS costs that necessarily means that half of the facilities will not be able to cover their costs; (2) the Commission's decision to depart from its "averaging" philosophy by assuming the lowest facility-cost estimate had no justification and ignores the substantial variation in facility security requirements (and therefore costs); and (3) in other parts of the Order, the Commission provides the same excuse for not considering other costs,

double-counting the purported "cushion" that excuses willful blindness to the cost of providing ICS.

For these reasons, the Order must be vacated.

STANDING

The Government Petitioners will be directly injured by the Order if it is enforced. The intention and effect of the Order is to limit the site commissions and other fees charged by the Government Petitioners,[62] thus decreasing revenues by millions per year and undermining Petitioners' correctional and rehabilitative programs, as well as their ability to recoup the costs of providing vital security measures for ICS.[63]

These injuries are sufficient to establish the Government Petitioners' standing.[64] Moreover, because the Rule seeks to infringe on State authority to regulate intrastate rates and to override State contracts, contract laws, and laws regulating ICS rates,[65] the Petitioner States are harmed as sovereigns with the power to create and enforce law.[66] This Court "need only find one party with standing" in order "to

---

[62] Order, ¶¶ 9, 14, 117-44.

[63] *See* Affidavits in attached Addendum, A5-25.

[64] *See Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308-09 (D.C. Cir. 2001).

[65] *See* Argument Section I.B.1, *infra*.

[66] *See State of Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443-44 (D.C. Cir. 1989).

proceed to the merits of their claims."[67] Thus, the Government Petitioners have standing because they will be injured, those injuries will be caused by the FCC's action challenged in this case, and vacatur of the FCC's Rule will redress those injuries.[68]

STANDARD OF REVIEW

This Court generally considers questions of law *de novo*.[69] However, in certain circumstances, this Court will defer to an agency's interpretation of the statute it administers if the provision is ambiguous as to the question at issue and the agency's interpretation is reasonable.[70] Nevertheless, as Petitioners argue below, such deference is not warranted in this case.[71] Finally, the Administrative Procedure Act requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[72]

---

[67] *Americans for Safe Access v. Drug Enf't Admin.*, 706 F.3d 438, 443 (D.C. Cir. 2013).

[68] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[69] *See Trumpeter Swan Soc. v. E.P.A.*, 774 F.3d 1037, 1042 (D.C. Cir. 2014) .

[70] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

[71] *See* Argument Section I.B., *infra.*

[72] 5 U.S.C. § 706(2)(A).

ARGUMENT

I. The Commission lacks authority to regulate intrastate ICS rates as the Order provides.

A. Section 276 requires the Commission to allow independent payphone providers to compete with Bell companies by ensuring they are not undercompensated; it does not provide the FCC with plenary authority to set intrastate payphone rate caps that it deems "just, reasonable, and fair" to the consumer.

In Section 201(b) of the Act, Congress authorized the Commission to carry out its command that, with respect to *inter*state telephone communication, "[a]ll charges [and] practices … shall be just and reasonable."[73] Congress has generally reserved that same authority with respect to *intra*state rates, however, to the States in Section 152(b).[74] Separately, in Section 276(b)(1), Congress provided the Commission the authority to, "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" in order to "promote competition among payphone service providers."[75]

The Commission interprets these provisions to mean that they have the authority to regulate all *intra*state payphone calls to ensure that they are "just,

---

[73] 47 U.S.C. § 201(b).

[74] *See* 47 U.S.C. § 152(b).

[75] 47 U.S.C. § 276(b)(1).

reasonable, and fair" to the consumer.[76] Pursuant to that claimed authority, the challenged Order set caps on inmate payphone calling rates.

But the text, context, history, purpose, and original understanding of Section 276(b)(1)(A) all confirm that it provides the Commission with only the authority to ensure that independent payphone service providers, including ICS providers, receive sufficient compensation for all costs to be competitive with payphone services provided by Bell companies and other carriers. Once that level of compensation is reached, and providers are not *under*compensated, the Commission's authority with respect to intrastate payphone rates is at an end. Section 276(b)(1)(A) does *not* provide the Commission with plenary authority to, commensurate with its power under Section 201, regulate intrastate payphone rates for any purpose to ensure that they are "just and reasonable." Accordingly, this Court should "hold unlawful and set aside" the Commission's Order because it is "in excess of statutory jurisdiction, authority, [and] limitations," and is "short of statutory right."[77]

1. The statutory text.

Section 276(b)(1) begins with giving the Commission only the power to prescribe regulations that are aimed at "promot[ing] competition among payphone

---

[76] *See* Order, ¶¶ 3, 48, 57-59, 105-15.

[77] 5 U.S.C. § 706.

service providers and promot[ing] the widespread deployment of payphone services."[78] It is in furtherance of those specific goals that the Commission must "ensure that all payphone service providers are fairly compensated."[79] The statute's concern with providers' *compensation* rather than rates or charges more generally indicate that the provision is focused on ensuring remuneration for payphone providers, as opposed to the overall justness of the rates for consumers.[80] When the prefatory language expressing the law's purpose is considered, it becomes more evident that the Commission's authority is limited to ensuring providers are not so undercompensated as to be unable to compete, rather than a broad concern that payphone rates be equitable for any and all purposes or that payphone providers don't receive too much revenue.

This interpretation is confirmed by the exception embedded in Section 276(b)(1)(A): the Commission's compensation mandate applies to all calls "except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation."[81] This exception for calls that

---

[78] 47 U.S.C. § 276(b)(1).

[79] *Id.* at § 276(b)(1)(A).

[80] *See* BLACK'S LAW DICTIONARY 322 (9th Ed.) (defining "compensation" as "Remuneration and other benefits received in return for services rendered; esp., salary or wages").

[81] 47 U.S.C. § 276(b)(1)(A).

serve immensely important public policies makes perfect sense if Section 276(b)(1)(A) is only concerned with undercompensation, because Congress could reasonably make the judgment that payphone providers should be required to complete these calls even if undercompensated. By contrast, this exception would be absurd if Section(b)(1)(A) was actually intended to also prevent overcompensation, because it would mean that the law prohibits exorbitant rates as to all calls *except* for the calls that matter the most, such as emergency calls.[82]

2. The statutory context and structure.

This construction is confirmed by the immediate statutory context of Section 276.[83] The statutory Part that contains Section 276 is titled "Special Provisions Concerning Bell Operating Companies."[84] Subsection (a) of Section 276 prohibits

---

[82] *See Brooks v. United States*, 337 U.S. 49, 51 (1949) (holding that the exceptions to a statute make plain the scope and meaning of the general rule); *see also Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (canon of *noscitur a sociis* requires courts to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress").

[83] *See Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) ("Courts have a duty to construe statutes, not isolated provisions."); *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law…."); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940).

[84] 47 U.S.C. Chp. 5, Subchapter II, Part III. "[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text." *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991).

unfair subsidization or discriminatory practices of Bell operating companies in favor of their own payphone services, and this Court has held that subparagraph (b)(1)(A) is one of five specific measures intended to implement subsection (a)'s mandate.[85] Thus, Section 276(b)(1)(A) is concerned with ensuring that all payphone providers receive sufficient compensation such that independent providers can compete on a level field with Bell providers. It has nothing to do with independent payphone providers systemically receiving "too much" compensation from consumers, since that would only serve to encourage competitive entry into the market. By contrast, as Commissioner Pai points out, the Order's rate caps very well might flout the purposes of Section 276 by decreasing competition.[86]

More importantly, the broader statutory context of the Communications Act of 1934 precludes the Commission's interpretation of Section 276. The Commission's position is that its authority to regulate intrastate payphone rates under Section 276 is commensurate with its authority to regulate interstate rates under Section 201. That position is belied by the fact that Congress specifically chose to use very different language in those two sections. "[W]hen Congress uses different language in different

---

[85] *New England Pub. Commc'ns Council*, 334 F.3d at 75-76.

[86] Order, Pai dissent at 206, J.A.__.

sections of a statute, it does so intentionally."[87] In contrast to the language of Section 276, Section 201(b) mandates that all "charges, practices, classifications, and regulations" for interstate communications by wire or radio "shall be just and reasonable."[88] This language was well-established for many decades and was the subject of countless regulations and judicial rulings at the time of the enactment of Section 276. In enacting Section 201, Congress gave the Commission broad regulatory authority over interstate communications in a "traditional form" mirroring regulation of railroads and public utilities, enabling it to set rates to allow a monopolistic utility to recover a reasonable profit but also protect the consumer from unjustly high prices.[89] The regulation of rates as "just and reasonable" forms "the heart of the common-carrier section of the Communications Act,"[90] and as a result, interstate communications are subject to "extensive controls."[91]

---

[87] *Florida Pub. Telecommunications Ass'n, Inc. v. F.C.C.*, 54 F.3d 857, 860 (D.C. Cir. 1995) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Shays v. Fed. Election Comm'n*, 528 F.3d 914, 934 (D.C. Cir. 2008); *Insulation Transp. Comm. v. ICC*, 683 F.2d 533, 537 (D.C. Cir. 1982).

[88] 47 U.S.C. § 201(b).

[89] *Glob. Crossing Telecommunications, Inc.*, 550 U.S. at 48-49.

[90] *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229-30 (1994)

[91] *United States v. Radio Corp. of Am.*, 358 U.S. 334, 349 & n.17 (1959).

If Congress wanted to give the Commission the same authority over intrastate payphone calls that it has over interstate calls, it knew very well how to do so.[92] Instead, unlike Section 201, Section 276(b)(1)(A) requires regulation only to advance specific statutory purposes and chose the "fairly compensated" language over the well-worn phrase "just and reasonable" to indicate, as explained above, that the Commission's authority was limited to ensuring only that payphone providers were not undercompensated. Thus, the Commission has previously stated that it "does not regulate payphone rates."[93]

Moreover, Section 276(b)(1)(A) is just one of five statutory subparagraphs, within a paragraph, within a subsection tailored to make specific reforms in the payphone market;[94] it is not the generalized grant of authority akin to Section 201 that the Commission asserts. The notion that Section 276(b)(1)(A) completely abrogates Section 152(b)'s jurisdictional bar on the Commission's authority over intrastate rates with respect to a significant portion of the market—payphone calls—does not

---

[92] *See* Order, Pai dissent at 201, J.A.__ (detailing the differences between Congress's language in §§ 201-205 and § 276).

[93] *In the Matter of Telecommunications Relay Servs. & the Americans with Disabilities Act of 1990*, Fifth Report and Order, 17 F.C.C. Rcd. 21233, 21244, ¶ 24 (2002).

[94] *See New England Pub. Commc'ns Council*, 334 F.3d at 71, 75-76.

withstand scrutiny. There is simply no indication that Congress intended to hide that elephant in this mousehole.[95]

3. The statute's history and purpose.

As extensively detailed above in Section A of the Statement of the Case, the history leading up to the enactment of Section 276 and the purposes of its provisions[96] show beyond a doubt that Section 276(b)(1)(A) was intended to address the undercompensation of independent payphone service providers. Section 276 was enacted in response to the lack of competition in the payphone market, and subparagraph (b)(1)(A) specifically addressed one cause of that lack of competition:

---

[95] *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.") (citing *MCI Telecommunications Corp.*, 512 U.S. at 231 (rejecting FCC's claimed authority to alter "just and reasonable" rate regulation through ancillary modification provision)); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (treating such agency claims with "skepticism").

[96] *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."); *New England Pub. Commc'ns Council*, 334 F.3d at 77 (interpreting Section 276 based on the statute's "structure and purpose"); *see also Glob. Crossing Telecommunications*, 550 U.S. at 53 (interpreting Communications Act based on the history of the statutory sections).

The undercompensation of payphone providers for certain calls (such as toll-free 800 number calls).[97]

Once the Commission has ensured that this problem was addressed—that every completed payphone call resulted in sufficient compensation for payphone providers to enable them to compete—Congress's purposes have been fulfilled and Section 276(b)(1)(A) provides no additional authority to the Commission. Nothing in the history of the enactment of Section 276(b)(1)(A) indicates that Congress was concerned with overly high phone rates for inmates or payphone customers more generally. The Commission's attempt to regulate ICS using Section 276(b)(1)(A) because it deems the rates too high is simply an attempt to misuse a statutory tool for a purpose for which it was never intended and to solve an alleged problem the statute was never meant to address.[98] The Order takes a provision intended as a shield to protect and promote payphone providers and transforms it into a sword to curtail them. Even if high ICS rates are a problem, it simply is not a problem addressed by

---

[97] *See Glob. Crossing Telecommunications*, 550 U.S. at 51; *Illinois Pub. Telecommunications Ass'n*, 752 F.3d at 1020, 1026; *NetworkIP*, 548 F.3d at 118; *New England Pub. Commc'ns Council*, 334 F.3d at 71, 75-76; *Illinois Pub. Telecommunications Ass'n*, 117 F.3d at 559.

[98] *See Fin. Planning Ass'n v. S.E.C.*, 482 F.3d 481, 487 (D.C. Cir. 2007) ("[U]nder *Chevron*'s first step, 'the court looks to … the problem Congress sought to solve.'" (citation omitted)).

Section 276, and "[a] casus omissus does not justify judicial legislation."[99] "It is [the court's] function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve."[100]

4. The original intent and understanding.

When Section 276(b)(1)(A) was enacted and in the time immediately thereafter, the drafters and those reading the law—namely, the Commission and the Courts—all agreed that it was intended to address undercompensation of payphone providers. As recounted in Section A of the Statement of the Case above, the legislative history indicates that this was the intent of the provision.[101] Conversely, no legislator or committee appears to have ever understood Section 276(b)(1)(A) to mandate that the Commission exercise the authority it now attempts to wield, namely, the regulation of

---

[99] *Ebert v. Poston*, 266 U.S. 548, 554 (1925); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) ("The question, however, is not what Congress 'would have wanted' but what Congress enacted."). High ICS rates are not even a new problem, as the Commission admits. Order, ¶ 118 n.375, ¶ 129 n.442, J.A.__, __ (noting that ICS rates have been high since the late-1980s).

[100] *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010); *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033-34 (2014) (Courts will not alter meaning of a statute "just because the text as written creates an apparent anomaly as to some subject it does not address. … Congress typically legislates by parts—addressing one thing without examining all others that might merit comparable treatment. … 'Congress wrote the statute it wrote'—meaning, a statute going so far and no further." (citation omitted)).

[101] *See* H.R. REP. 104-204, 88 (1995); H.R. CONF. REP. 104-458, 158 (1996).

all payphone calling rates because they provide payphones with *too much* compensation.

The same is true of the original public meaning of Section 276(b)(1)(A) as shown by the Commission's regulations attempting to implement Section 276 and courts' interpretation of that provision.[102] As discussed in more detail in the Statement of the Case, the Commission originally interpreted Section 276(b)(1)(A) to provide it limited authority to regulate rates only for those types of calls for which payphone providers were not being fairly compensated, and the calls regulated by the Commission in its orders implementing Section 276 were calls for which providers were being *under*compensated.[103] Since then, it has never attempted to use or interpret

---

[102] *See Glob. Crossing Telecommunications*, 550 U.S. at 48 (noting that "regulatory history helps to illuminate the proper interpretation and application" of Communication Act provisions); *Sec'y of Labor, Mine Safety & Health Admin. v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) (taking into account the agency's "original interpretation, adopted at a time when the origins of both the statute and the finding were fresh in the minds of their administrators" and giving "weight to the fact that the agency … interpreted them the same way for more than 25 years"); *Middle S. Energy, Inc. v. F.E.R.C.*, 747 F.2d 763, 769 (D.C. Cir. 1984) (holding that "the most nearly contemporaneous construction" of the statute by the agency corroborated the agency's lack of authority because the agency disclaimed that authority "in its first comprehensive discussion of" the provision at issue); *see also id.* ("Courts regard with particular respect the contemporaneous construction of a statute by those initially charged with its enforcement."); *Cont'l Air Lines, Inc v. C. A. B.*, 519 F.2d 944, 954-55 (D.C. Cir. 1975).

[103] *See Illinois Pub. Telecommunications Ass'n*, 117 F.3d at 559; *see also* Order, O'Rielly dissent at 209, J.A.__ ("For those people actually involved, we remember that the provision was clearly designed to protect payphone providers that had been unable to

(Cont'd on next page)

Section 276 to limit the compensation payphone providers receive on the market.[104] In fact, contrary to the Commission's current attempts to override state and local government contracts with ICS providers, the Commission in 1996 rejected a request to regulate inmate calling rates, concluding that "whenever a [provider] is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied."[105]

This Court too recognized that this was the proper course for the Commission to take to fully implement Section 276(b)(1)(A),[106] noting that the law requires the Commission to create a compensation plan, and that the "Payphone Orders" correcting the systematic undercompensation meant "the Commission finally crafted such a plan."[107] Nothing in this Court's decisions addressing the Commission's

---

(Cont'd from previous page)

receive fair compensation for their service from [carriers]. It was not meant to give the Commission authority to cap end-user rates.").

[104] *See* Order, Pai Dissent at 199-201, J.A.__.

[105] *In the Matter of Implementation of the Pay Tel. Reclassification & Comp. Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 F.C.C. Rcd. 21233, ¶ 72 (1996); *see also id.* at ¶ 52 (ruling that "[t]he level of 0+ commissions paid pursuant to contract on operator service calls is beyond the scope of [] Section 276").

[106] *New England Pub. Commc'ns Council*, 334 F.3d at 71, 75-76; *Am. Pub. Commc'ns Council*, 215 F.3d at 53; *Illinois Pub. Telecommunications Ass'n*, 117 F.3d at 559.

[107] *APCC Servs., Inc.*, 418 F.3d at 1241; *see also* Order, Pai dissent at 199, J.A.__ ("The FCC prescribed regulations to fulfill [the duties created by Section 276] before the end of 1996.").

implementation of Section 276 even contemplated that the Commission's orders failed to complete the task mandated by Congress on account of the orders not protecting against unfairly high charges by payphone providers to consumers, inmates or otherwise.[108]

* * *

When the work of statutory construction is done, it is obvious that Section 276 unambiguously does not give the Commission the authority it purports to exert in the challenged Order. Accordingly, the Order must be vacated.

B. This Court owes no deference to the FCC's interpretation of Section 276, which is unreasonable and attempts to infringe on State authority.

The Commission will undoubtedly claim, as it did in its opposition to a stay, that its interpretation of Section 276 is owed deference, asking this Court to accept its view rather than having the Court exercise independent judicial authority to say what the law is. But no such deference is owed to the Commission.

---

[108] *See Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 505 (D.C. Cir. 2013) (rejecting agency's attempt to regulate new category of things when, until the latest agency action, those things had never been regulated under the statute).

1. Deference is not owed because any ambiguity in the statute should be resolved against interpretations that infringe on State authority to regulate intrastate rates.

Because courts presume that Congress does not intend to encroach on state authority—a presumption which applies with special force to the Communications Act—to the extent there is any ambiguity in the statutory text, that ambiguity is resolved in favor of *not* allowing the Commission to infringe on the States' authority to regulate intrastate rates. Thus, a *Chevron* analysis is not applicable to a case like this.[109]

The Commission's Order seeks to preempt the State and local government Petitioners' authority in this case. The Order purports to set intrastate rates—an authority reserved for and exercised by the States.[110] It seeks to alter how States manage and fund programs in their jails and prisons—a core area of traditional state power[111]—and questions the legitimacy of state and local criminal justice practices.

---

[109] *Cf. Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (holding that "*Chevron* deference is not applicable in" case involving Indian claims because "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' (citation omitted)).

[110] *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 360 (1986); *see also, e.g.*, Order, Pai dissent at 202, J.A.__ (providing examples of state regulation of ICS rates); Ind. Code §§ 5-22-23-5, -6 (regulating ICS rates).

[111] *See, e.g.*, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1515-16 (2012); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987).

Throughout the Order, the Commission repeatedly makes clear that it "will preempt state laws that are inconsistent with the federal framework" established in the Order.[112] States will no longer be able to receive the site commissions for which they contracted (which are sometimes mandated by state statute)[113] and to the extent that States will seek to enforce those contractual provisions, the Commission asserts its authority to preempt State law.[114]

But "because the States are independent sovereigns in our federal system,"[115] it "has long been settled [that courts] presume federal statutes do not … preempt state law."[116] Thus, "it is incumbent upon the federal courts to be *certain* of Congress's intent before finding that federal law overrides the usual constitutional balance of federal and state powers."[117] In other words, any rule that purports to "affect[] the federal balance" requires a "clear statement" before presuming Congress intended

---

[112] *See* Order ¶¶ 9, 204-05, 212-16, J.A.__, __, __.

[113] 2012 NPRM, ¶ 38, J.A.__.

[114] Order, ¶¶ 215-16, J.A.__.

[115] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

[116] *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (citation omitted).

[117] *Id.* at 2089 (citations and internal marks omitted) (emphasis added).

such a result.[118] In this way, "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute."[119]

Moreover, this presumption is reflected in the Communications Act itself, which in Section 152(b) "expressly den[ies] th[e] agency 'jurisdiction with respect to intrastate communication service.'"[120] Accordingly, "§ 276 should not be read to confer upon the FCC jurisdiction" over intrastate rates "unless § 276 is 'so unambiguous or straightforward so as to override the command of § 152(b).'"[121] This is "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction."[122] It applies to any regulation of intrastate rates, regardless of whether it preempts any particular State action or not. This is further fortified by Section 601(c) of the Telecommunications Act of 1996 (the same Act that created Section 276), which provides that the Act "shall not be construed to modify, impair, or supersede" any State or local "law unless expressly so provided." Thus, even

---

[118] *Id.* (citations and internal marks omitted).

[119] *Id.* at 2090; *see also Am. Bar Ass'n v. F.T.C.*, 430 F.3d 457, 471-72 (D.C. Cir. 2005).

[120] *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 360 (quoting 47 U.S.C. § 152(b)).

[121] *Illinois Pub. Telecomms. Ass'n*, 117 F.3d at 561 (citation and internal marks omitted).

[122] *Louisiana Pub. Serv. Comm'n.*, 476 U.S. at 373; *see also New England Pub. Commc'ns Council*, 334 F.3d at 78 ("Such general provisions [in Section 276] cannot, however, trump section 152(b)'s specific command that no Commission regulations shall preempt state regulations unless Congress expressly so indicates.") (citing *Iowa Utils. Bd.*, 525 U.S. at 381 n. 8 ("Insofar as Congress has remained silent … § 152(b) continues to function.")).

though Section 276(c) contains an express preemption clause, Section 152(b), Section 601(c), and principles of federalism dictate that any authority to regulate intrastate rates provided by Section 276 must be narrowly construed and any ambiguity as to the Commission's authority must be resolved against the interpretation that results in greater infringement on State authority to regulate intrastate rates.[123] The Commission itself has recognized that its authority to regulate intrastate rates must be strictly construed, and this Court agreed with that interpretive rule.[124]

With these principles in mind, this case is easily resolved. Section 276(b)(1)(A) infringes on State authority to regulate intrastate rates in only a narrow field: Ensuring that payphone providers are sufficiently compensated so as to compete with Bell companies for the provision of payphone services. Any State laws that deprive payphone providers of this compensation floor can be preempted, but no other State action relating to payphone rates is affected. The Commission, in contrast, seeks to interpret Section 276 to give it much broader authority over intrastate rates, permitting the Commission to override State law as the arbiter of what is "just,

---

[123] *Medtronic*, 518 U.S. at 485 (rejecting argument that "this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the *scope* of its intended invalidation of state law," and instead using "the presumption against the pre-emption of state police power regulations to support a narrow interpretation of [] an express [preemption] command").

[124] *See New England Publ. Commc'ns Council*, 334 F.3d at 73, 78.

reasonable and fair" in every rate charged for every intrastate payphone call in every context. If this Court finds that Section 276 is ambiguous between these two interpretations, both principles of federalism and Section 152(b)'s command that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction" over intrastate charges require the Court to adopt Petitioners' interpretation. Ambiguity is resolved in favor of the States, the Order is invalidated, State authority over intrastate rates is preserved, and *Chevron*'s deference is never reached.

2. Deference is not owed because the meaning of the statute can be discerned after application of traditional tools of statutory construction.

Deference to any agency interpretation is only a possibility if the statute's meaning cannot be discerned *after* applying traditional tools of statutory construction.[125] In the Commission's view, because a portion of a single word in the statute—"fair"—can have multiple meanings, the statute is ambiguous and the Court must defer to whatever construction the Commission dreams up. But in a *Chevron* analysis, "ambiguity is a creature not of definitional possibility but of statutory context."[126] Therefore, "[t]he issue is not so much whether the word ['fair'] is, in some

---

[125] *See Hearth, Patio & Barbecue Ass'n*, 706 F.3d at 503; *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

[126] *Brown v. Gardner*, 513 U.S. 115, 118 (1994)

abstract sense, ambiguous, but rather whether, read in context and using the traditional tools of statutory construction, the term" encompasses the Commission's attempted actions in this case.[127]

Applying the tools of statutory construction, as Petitioners have done above, the meaning of the term "fairly compensated" in Section 276(b)(1)(A) is readily discernable and unambiguously answers the question of whether the Commission has the authority to set intrastate payphone rate caps to ensure their charges as "just, reasonable, and fair" to the consumer: It does not. *Chevron*'s second step need not be reached as the statute plainly does not authorize the agency actions taken in the Order. "Government regulators simply cannot choose to ignore statutory limits on their authority and expect deference to come of their intransigence."[128]

3. Deference is not owed because the Commission's interpretation is unreasonable.

Even if this Court reaches *Chevron*'s second step, deference is only warranted if the Commission's interpretation of Section 276 is "based on a permissible construction of the statute" *and* is "reasonable in light of the Act's text, legislative

---

[127] *California Indep. Sys. Operator Corp. v. F.E.R.C.*, 372 F.3d 395, 400 (D.C. Cir. 2004); *see also Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp.*, 642 F.2d 527, 533 (D.C. Cir. 1980).

[128] *Hearth, Patio & Barbecue Ass'n*, 706 F.3d at 506.

history, and purpose."[129] But in light of all the indications of statutory meaning detailed above, the Commission's purported exercise in statutory interpretation is unreasonable.

In the challenged Order, the Commission purported to set out its "Legal Authority for Intrastate and Interstate Rate Caps," but spends the bulk of the discussion justifying their authority to impose *some* regulations relating to intrastate ICS payphone compensation without addressing the *scope* of that authority.[130] Throughout the Order, the Commission claims the authority to regulate intrastate rates to ensure that they are "just, reasonable, and fair,"[131] and purports to base that authority on Section 276(b)(1)(A) simply by stating that the "fairly compensated" mandate "must be read in conjunction with our obligation under section 201(b) to ensure that charges and practices be just and reasonable."[132]

This is entirely unreasonable. Well-accepted rules of statutory construction counsel that the two provisions, when read together, show that Congress's deliberate choice of different words in Section 276 must lead to giving those words *different*

---

[129] *Glob. Crossing Telecommunications*, 259 F.3d at 744.

[130] Order, ¶¶ 106-113, J.A.__.

[131] *See supra* note 76.

[132] Order, ¶ 115, J.A.__.

meaning from the "just and reasonable" language of Section 201(b).[133] Instead, the Commission does just the opposite by presuming that the different language in the two provisions must mean the *same* thing.[134] Moreover, the Commission makes virtually no effort to discern the meaning of "fairly compensated" by applying any other tools of statutory construction to the text, or to look to the statutory context, structure, history, purpose, interpretation by contemporaneous agency rules or court decisions, or legislative history. When those tools are applied, as they are above, the inevitable conclusion is that Congress never gave the Commission the power to limit the amount of compensation that ICS providers (or location providers like jails and prisons) receive for their services.

The Commission's Order unreasonably interprets Section 276 for two additional reasons. Even if the statute's notion of "fairly compensated" encompasses some power to prevent overcompensation so that payphone providers do not make too much profit, that is not what the Order does here. Section 276(b)(1)(A) is focused on the payphone providers and compensation for costs incurred. But the focus of the Order is *not* that ICS provider compensation is "unfair" because it greatly exceeds the

---

[133] *See* authorities cited *supra* note 87.

[134] *See* Order, O'Rielly dissent at 209, J.A.__ (noting that the Commission "mash[ed] together bits and pieces of different provisions" and emphasizing that "[t]he Commission is governed by a statute, not an optional menu. We don't get to order a la carte and make substitutions at will.").

provider's cost. Rather, the Order seeks to prevent *any* compensation for a primary driver of provider costs, namely commissions paid to jails and prisons.[135] Those costs are not illusory or being translated into unconscionable profits for the providers, but instead being remitted to correctional facilities as a cost of doing business. The Commission's dispute is with local jails and state prisons, believing that the charges *to* providers are illegitimate and having policy disagreements with the sovereigns' criminal justice programs and their funding—an area far outside the Commission's expertise and authority. No reasonable interpretation of Section 276(b)(1)(A) gives the Commission the power to dictate how jails and prisons fund their programs or to prohibit the charges they levy on payphone providers for intrastate calls,[136] or to perversely use Section 276(b)(1)(A) to accomplish either of those tasks by deliberately *under*compensating ICS providers for costs that the providers actually incur on the market.

The Order is also unreasonable because it fails to recognize the Section 276's distinction between the provision of payphone equipment (by ICS providers) and the

---

[135] *See* Section II.B., *infra*.

[136] *See New England Pub. Commc'ns Council*, 334 F.3d at 78 (Section 276(b)(1)(C) authorizes the Commission to regulate certain Bell company charges to payphone providers, but not to limit any other charges to providers).

provision of operator and telecommunications line services (by carriers).[137] The FCC has previously conceded, and this Court has confirmed, that the agency cannot use its Section 276 authority to regulate the rates non-Bell carriers charge payphone providers for line services.[138] The Commission cannot, nor ever has, regulated intrastate toll rates charged by a carrier to an ICS provider for carrying toll traffic under Section 276. The power to regulate carrier tolls, rather, is provided by Section 226 and is limited to *interstate* calls.[139] By setting rate caps for intrastate calls, the Order unreasonably applies Section 276 to regulate not just payphone equipment providers, but also intrastate toll charges by carriers to those providers, which no reasonable interpretation of Section 276 permits.

A final rule of construction is applicable here: deferring to the Commission in this context should be avoided because it would take *Chevron* deference over the constitutional edge.[140] Under our constitutional system of separation of powers, "[i]t is emphatically the province and duty of the judicial department to say what the law

---

[137] Order, Pai Dissent at 200 n.26, J.A.__.

[138] *New England Pub. Commc'ns Council*, 334 F.3d at 78.

[139] *See* 47 U.S.C. § 226.

[140] *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). Petitioners also preserve for appeal the more general argument that *Chevron* deference itself it unconstitutional.

is."[141] Deferring to the Commission's "interpretation" of Section 276 here, which lazily stares at the word "fairly" and without even attempting to engage in statutory construction gives it any dictionary definition it fancies,[142] would result in judicial abdication to the Executive branch the "emphatic[]" duty to interpret law. That the framers and the people who ratified the Constitution would have never countenanced such Executive authority to "say what the law is" is well-established in history.[143] The Court should avoid this result by holding that the Commission's Order setting rate caps for intrastate ICS calls exceeds its statutory authority.

II. The Order is unlawful because the Commission's refusal to include the costs of ICS to jails and prisons in its calculations is arbitrary and capricious.

Among the costs facing any payphone service provider is the cost of locating the phone equipment in a particular place. That is why Section 276 generally promotes unfettered negotiation and contracting between location providers and payphone providers.[144] For the location provider, real estate isn't free, and the fees charged to

---

[141] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[142] *Luna Torres v. Lynch*, 136 S. Ct. 1619, No. 14-1096, Slip op. at 6 (May 19, 2016) (because words "take[] on different meanings in different contexts, … staring at, or even looking up, the words … cannot answer" the question of statutory interpretation).

[143] *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 284-321 (2014).

[144] *See* 47 U.S.C. § 276(b)(1)(E).

payphone providers are a very real cost of doing business. Those costs increase greatly when the location of the payphone is inside a jail or a prison, where security concerns that result from giving inmates the privilege to use the telephone require extensive effort to be mitigated.

In the challenged Order, the Commission decided that the costs to jails and prisons for providing ICS—which are passed on to the ICS provider—are illegitimate and, as a result, ICS providers are not entitled to any compensation (much less "fair" compensation) for these costs. Thus, it calculated its rate caps without considering these costs in an attempt to greatly reduce, if not eliminate, any compensation for the costs of ICS borne by jails and prisons. This willful exclusion of relevant evidence is arbitrary and capricious.

A. Jails and prisons incur substantial costs directly related to the provision of ICS.

Before it announces a rule, the Commission has a duty to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[145] The Commission breaches that duty where it "relie[s] on factors which Congress has not intended it to consider, entirely fail[s] to consider an important aspect of the problem, offer[s] an

---

[145] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 24, 43 (1983) (internal quotation marks and citation omitted).

explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[146] Agency action that results from such flawed reasoning is "arbitrary and capricious."[147]

From the start of this rulemaking initiative, the Commission has targeted correctional facilities and their commissions as the culprit behind what the Commission calls an "unjust" and "predatory" market.[148] In its most recent attack on these institutions, the Commission has decided to exclude those commissions from its rate calculus, meaning that "*any* form of monetary payment, in-kind payment requirement, gift, exchange of services or goods, fee, technology allowance, product or the like," payed from the service provider to the facility, was not considered a "legitimate cost" for purposes of calculating the new rate caps.[149] According to the Commission, site commissions paid to correctional facilities "are not reasonably related to the provision of ICS."[150]

---

[146] *Id.*

[147] *See id*; *see also* 5 U.S.C. § 706.

[148] *See* Order, ¶¶ 14, 118, J.A.__, __; *id.* at 194, J.A.__ (Statement of Commissioner Clyburn) ("The truth is that each of us is paying a heavy price for what is now a predatory, failed market regime.").

[149] *Id.* at ¶¶ 117-18, J.A.__ (emphasis added).

[150] *Id.* at ¶ 123, J.A.__.

But there was ample evidence before the Commission demonstrating that facilities do, in fact, bear costs to provide ICS programs.[151] Numerous jail and prison officials provided comments in this proceeding and all of them share the same sentiment: facilities spend much time and money providing ICS privileges.[152] The Commission's decision to ignore these costs in its calculus is arbitrary and capricious.

For example, comments from facility operators in California, Illinois, Indiana, and Massachusetts explain that their employees spend significant time facilitating and monitoring the use of ICS.[153] As the Sheriff of Imperial County, California, stated:

> On a daily basis, staff monitors phone calls and many of those calls are coordinating drug drop-offs between the inmates and their friends or family members or people intentionally coordinating an arrest to bring in and deliver illegal substances. … It is estimated that monitoring, detecting, and following-up account for 25% of the workload for one full-time Correctional Officer assigned to the Classification unit. This

---

[151] *See* Order, Pai dissent at 204-06, J.A.__.

[152] *See generally* Praeses LLC Comment 28-29 & n.67, J.A.__ (Jan. 12, 2015) (listing facilities to have commented on the ICS rate initiative and detailing some of the costs claimed by those facilities).

[153] *See* Cook County Comment 3-5, J.A.__ ("The [Cook County 2013 cost study] determined that labor hours equaling $2.4M were required to operate Cook County's ICS system[.]"); Marion County Sheriff Dec. 29, 2014 *Ex Parte* Letter at 2, J.A.__ ("Costs associated with Jail telephones are high due to the wanton destruction, and unusual wear and tear. … At the Marion County Jail, we have staff dedicated to making sure the telephones are in good repair. We have additional staff dedicated to ensure inmates do not rig the telephone system and gain access to outside lines that are not restricted. This is a constant and expensive endeavor."); Barnstable County Sheriff Comment 3, J.A.__ ("I have a Special Operations Unit that devotes a great deal of time to listening to inmate phone calls.").

> does not include any patrol response that may be required. … Monitoring outbound calls is a necessary part of our job to enhance facility and community safety, but it requires an extensive amount of staff-time.[154]

A facility's ICS role, however, does not stop with escorting prisoners to and from the phones and monitoring what they say. It also includes enrolling and re-enrolling detainees in biometric identification systems, retrieving and copying call recordings in response to subpoenas, administering and managing payment and billing systems, and updating and maintaining do-not-call lists to protect witness, judges, prosecutors, and other potential victims.[155] Thus, while ICS providers do provide the hardware, software, and network infrastructure, the facilities themselves incur significant costs in ICS provision.[156]

Multiple facilities included hard data in their filings, detailing things like labor-hours and actual dollars spent in maintaining ICS programs.[157] The most

---

[154] Imperial County Sheriff Jan. 12, 2015 Letter at 2, J.A.__.

[155] *See* National Sheriff's Association Comments 2-3, J.A.__ (Jan. 12, 2015); Cook County Comment 3, J.A.__; Imperial County Sheriff Jan. 12, 2015 Letter 2, J.A.__; National Sheriff's Association June 12, 2015 *Ex Parte* Letter 2, J.A.__; Letter from Sheriff John Bishop (Ret.), Executive Director, Oregon State Sheriff's Office Association, to Tom Wheeler, *et al.*, Chairman, FCC, at 2-3, J.A.__ (Jan. 5, 2015).

[156] *See* National Sheriff's Association June 12, 2015 *Ex Parte* Letter 2, J.A.__ (stating that, while ICS providers often provide the technology, it is jail officers that implement it).

[157] *See, e.g.*, Cook County Comment 3-5, J.A.__ (breaking down the $2.4 million Cook County spent on ICS-related functions in 2013); *id.* at Exhibit 1, 2-4, J.A.__ (detailing

(Cont'd on next page)

comprehensive source for that data came from a survey conducted by the National Sheriff's Association.[158] That survey included data from correctional facilities in twenty-three states, including the District of Columbia, and representatives from all facility-size categories.[159] The survey showed that, not only do facilities perform integral parts of ICS provision, but also that performing those functions can cost facilities anywhere from less than $0.01 per minute to upward of $0.40 per minute, depending largely on the facility's size and security requirements.[160] For some facilities, that translates into an average of over $100,000 per month in ICS-administration and security costs.[161] Indeed, without receiving any revenue from ICS, some jails and prisons may greatly reduce ICS or eliminate it entirely.[162]

(Cont'd from previous page)

the number of hours correctional officers spent performing ICS related duties); Imperial County Sheriff Jan. 12, 2015, Letter at 2, Table 1, J.A.__.

[158] *See generally*, National Sheriff's Association Comment Exhibit A, J.A.__; *see also* National Sheriff's Association June 12, 2015 *Ex Parte* Letter, J.A.__.

[159] National Sheriff's Association June 12, 2015, *Ex Parte* Letter 2, J.A.__.

[160] National Sheriff's Association Comment Exhibit A, J.A.__; National Sheriff's Association June 12, 2015 *Ex Parte* Letter 3, J.A.__.

[161] National Sheriff's Association Comment, Exhibit A, J.A.__ (calculating average monthly costs for respondent 148).

[162] *See, e.g.*, Letter from JLG Technologies, LLC, to Marlene H. Dortch, Secretary, FCC, Attachment C, p. 10, J.A.__ (Jul. 30, 2013) ("If the FCC chooses to decouple the cost of the ICS from the cost of security for the ICS we believe it is highly probable that the net result will be that correctional agencies will be forced to

(Cont'd on next page)

Data provided by the ICS providers corroborated that provided by jails and prisons. For example, Pay Tel explained that "jails, not ICS providers, perform the lion's share of administrative tasks associated with the provision of ICS and, more importantly, jail officers handle ALL of the monitoring of inmate calls."[163] Pay Tel also provided a chart, detailing the division of labor between correctional facilities and ICS providers with respect to administrative and security-based ICS functions.[164] That chart demonstrated that, of the thirty functions listed, Pay Tel routinely assisted in only two of them, whereas facility personnel were entirely or mostly responsible the remaining twenty-eight.[165]

(Cont'd from previous page)

significantly reduce inmate access to phones."); Letter from Combined Public Communications, Inc., to Marlene H. Dortch, Secretary, FCC, at 2, J.A.__ (Dec. 22, 2014) ("If jails have absolutely no monetary incentive to put forth the time and resources needed to ensure that their inmates have access to a well-functioning and secure telephone platform, some facilities, particularly small ones, may simply decline to allow or at least reduce the amount of telephone contact with family and friends."); NCIC Comments 3-4, J.A.__ (Jan. 12, 2015); Letter from County of Butler, Pennsylvania, Prison Board, to Marlene H. Dortch, Secretary, FCC, at 1, J.A.__ (Dec. 29, 2014); National Sheriff's Association Comment 7, J.A.__.

[163] Letter from Pay Tel Communications, Inc. to Marlene H. Dortch, Secretary, FCC, at 3, J.A.__ (May 8, 2015).

[164] *Id.* at 9-12, J.A.__.

[165] *Id.*

Similarly, ICS providers CenturyLink[166] and Securus Technologies[167] also submitted charts showing that correctional facilities perform administrative and security-based ICS functions. One of the smaller ICS providers, Network Communications International Corp. (NCIC), explained that, in smaller, more remote locations, correctional facility staff may handle up to 90% on the onsite work.[168] Indeed, even Global Tel*Link (the provider that has been most conservative in its facility-borne cost analysis) admits that "facility-level ICS costs not borne by the telecommunications provider are non-trivial and may vary significantly by contract."[169]

B. The Commission failed to provide a reasoned basis for excluding all facility-borne costs in its calculation of rate caps.

Despite the evidence that jails and prisons incur real and substantial costs in allowing access to ICS, the Commission decided to exclude all such costs in calculating the rate caps. In so doing, the Commission failed to "cogently explain"

---

[166] CenturyLink Letter to Marlene H. Dortch, Secretary, FCC, Attachment A, J.A.__ (Sept. 19, 2014).

[167] Securus Technologies, Inc. Letter to Marlene H. Dortch, Secretary, FCC, J.A.__ (Dec. 8, 2014).

[168] Network Communications International Corp. Letter to Marlene H. Dortch, Secretary, FCC, at 1, J.A.__ (Dec. 17, 2014).

[169] Global Tel*Link Corp. Letter to Marlene H. Dortch, Secretary, FCC, Attachment 2, p. 11, J.A.__ (Sept. 19, 2014).

that willfully-blind decision and thus failed to demonstrate that its rate caps are "the product of reasoned decisionmaking."[170]

The Commission essentially puts forth two excuses: (1) the data quantifying facility-borne costs has flaws and (2) the rate-caps are generous enough to absorb any such costs without considering them in calculating the caps. None of these can be supported in the record to justify complete exclusion of facility costs in calculating the rate caps.

First, the Commission attempts to excuse ignoring the evidence of facility-borne costs by denouncing its reliability.[171] But this does not explain the exclusion of *every* claimed facility-borne cost. Conclusory complaints of "uncertainty" are not a justification for agency action.[172] As detailed above, there is significant data in the record suggesting that facilities bear costs in the provision of ICS programs and virtually no data to support the Commission's conclusion that no facility incurs any ICS-related costs. The best the Commission can point to is uncertainty over the

---

[170] *Owner-Operator Ind. Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188, 203 (D.C. Cir. 2007) (quoting *State Farm*, 463 U.S. at 48, 52).

[171] *See generally*, Order, ¶¶ 133-140, J.A.__.

[172] *See State Farm*, 463 U.S. at 52-55.

amount of those costs.[173] But data will never be perfect or certain, especially where the Commission vainly hopes for consistent data between facilities with vastly different security needs and costs.[174] Faced with less-than-ideal data, the Commission's obligation is to either (1) "determine as best it can" ICS-related facility costs[175] or (2) refuse to set any rate caps until it can obtain data sufficiently reliable for its purposes.[176] By acting as if jails and prisons bear *no* costs in allowing ICS simply because the amount of those costs cannot be established with certainty is arbitrary and capricious.

Second, the Commission claims that it need not consider the costs of ICS to jails and prisons because, "if facilities incurred any legitimate costs in connection with ICS, [the record indicates] those costs would likely amount to no more than one or two cents per billable minute," which the rate caps are "sufficiently generous to cover."[177] But in doing so, the Commission abandons its (already flawed) "averages" approach

---

[173] *See* Order, ¶¶ 136-37, J.A.__; *see also* Order, Pai dissent at 205, J.A.__ (noting that the record is clear that such costs exist and "[t]he only dispute is the amount of those costs").

[174] *See* Order, Pai dissent at 203-04, 206 & n.61, J.A.__, __.

[175] *Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1148, 1150 (D.C. Cir. 2011).

[176] *See* Order, Pai dissent at 205, J.A.__ ("Notably, the FCC did not ask for these data as part of its mandatory collection, so these estimates are the best record evidence available.").

[177] Order, ¶ 139, J.A.__.

and arbitrarily choses the *lowest* estimates of cost in the record, with other estimates putting the number closer to 5, 6, or 9 cents a minute on average,[178] and as high as 40 cents a minute for certain facilities.[179]

The Order also justifies this in part by pointing to the mere fact that certain states have prohibited site commissions and still offer ICS.[180] But the Commission did not point to any data to suggest that provision of ICS in those states is costless to the facility. Indeed, as Commissioner Pai points out in dissent, in one state cited to as an example (New York) "the legislature made up for the shortfall through 'budget increases and the elimination of some inmate services.'"[181] The same has been true in other States.[182]

Moreover, even if such a cushion existed, the Commission then relies on it to cover not just facility-borne costs, but a whole host of other, excluded costs. Those include things like processing and billing costs,[183] taxes and other third-party

---

[178] *See* Order, Pai dissent at 205.

[179] National Sheriff's Association Comment Exhibit A, J.A.__; National Sheriff's Association June 12, 2015 *Ex Parte* Letter at 3, J.A.__.

[180] Order, ¶ 138, J.A.__.

[181] Order, Pai dissent at 205 n.76, J.A.__.

[182] *Id.*

[183] *See* FCC Order Denying Stay at ¶¶ 45-46, J.A.__.

transactional costs,[184] costs associated with new service and technology,[185] and inflation.[186] The cushion, at some point, must disappear, but the Commission refused to consider that possibility as it swept more and more costs under the rug. Double counting is a capricious way to go about rulemaking.

And even if such a cushion existed, and even if it were "generous" enough to cover all of those currently excluded costs, it would still only help those ICS providers and facilities that were operating at average to below average operating costs.[187] As more fully explained in the ICS Providers' Brief, considering the fact that the rate caps are only calculated to cover the costs of an "efficient" operator,[188] the likelihood that the caps are high enough to allow reimbursement to facilities for their legitimate costs—as well as the ancillary costs also excluded from the calculus—is mathematically irrational.

The excuses and the evidence demonstrating facility-borne ICS costs demonstrate that the Commission is engaged in a method of decisionmaking that started with a conclusion (to lower call rates for inmates) and then sought out reasons

---

[184] *See id.* at ¶¶ 45, 48-49, J.A.__.

[185] *See id.* at ¶¶ 45, 51, J.A.__.

[186] *See* Order , ¶ 71, n.221, J.A.__.

[187] *See* Order, Pai dissent at 205-06, J.A.__.

[188] *See* Order, ¶ 71, J.A.__ ("An analysis of the adopted rate caps shows that some providers will recover more than their stated costs, while other will recover less[.]").

and theories to support it—excluding those to the contrary along the way. That kind of confirmation bias cannot be described as "reasoned." Rather, it is arbitrary, capricious, and unlawful.

C. Because Section 276 requires the Commission to ensure fair compensation to payphone service providers for all costs, exclusion of the cost of site commissions is arbitrary and capricious.

As noted above in Section I.B.3, the Commission's order exceeds its statutory authority because it uses Section 276 to deliberately *under*compensate ICS providers. But this same reality can also be seen as an additional reason why the Order is arbitrary and capricious. An agency action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider."[189] As detailed above, the text, context, history, and purpose of Section 276(b)(1)(A) all demonstrate that Congress was concerned with providers being "fairly compensated" for costs actually incurred in providing payphone service. Nothing indicates that Congress intended that the Commission examine the practices of location providers (like jails and prisons) and question the legitimacy of the costs imposed on payphone providers by location providers based on how location providers choose to use their revenue. Section 276(b)(1)(A) commands the Commission to ensure that payphone providers are compensated for all costs incurred in providing payphone service rather than to

[189] *State Farm*, 463 U.S. at 43.

rely on as a factor what facilities do with revenue gained from imposing those costs. Indeed, such attempts to restructure the market by requiring that payphone providers be undercompensated flips Section 276 on its head.

CONCLUSION

For the foregoing reasons, this Court should vacate the challenged Order. If the Court determines that the Commission is without authority to set intrastate caps, vacatur is the appropriate relief since no possible revised order could remedy this problem. Similarly, if the Court finds the Order arbitrary and capricious, it should vacate the Order because failure to account for site costs and respond to empirical data in its rate determination is a serious deficiency, as those costs are a primary driver of ICS rates, and because vacatur will maintain the status quo since enforcement of the Order has been stayed by this Court.[190]

[190] *See Comcast Corp. v. F.C.C.*, 579 F.3d 1, 8-9 (D.C. Cir. 2009).

DATED: June 6, 2016

Respectfully submitted,

/s/ Mithun Mansinghani

James Bradford Ramsay
General Counsel
Jennifer Murphy
Assistant General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, N.W., Suite 200
Washington, D.C. 20005
P: (202) 898-2207
E: jramsay@naruc.org

COUNSEL FOR NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

E. Scott Pruitt
Attorney General of Oklahoma
Patrick R. Wyrick
Solicitor General
Mithun Mansinghani
Deputy Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
P: (405) 521-3921
E: Mithun.Mansinghani@oag.ok.gov

COUNSEL FOR THE STATE OF OKLAHOMA

Danny Honeycutt
Oklahoma County Sheriff's Office
201 N. Shartel Ave.
Oklahoma City, OK 73102
P: (405) 713-2050
E: sodanhon@okcounty.org

COUNSEL FOR JOHN WHETSEL, SHERIFF OF OKLAHOMA COUNTY, OKLAHOMA

Christopher J. Collins
Collins, Zorn & Wagner
429 NE 50th Street, 2nd Floor
Oklahoma City, OK 73105
P: (405) 524-2070
E: cjc@czwglaw.com

COUNSEL FOR OKLAHOMA SHERIFFS' ASSOCIATION

Mark Brnovich
Attorney General of Arizona
Dominic E. Draye
Deputy Solicitor General
Arizona Office of the Attorney General
1275 West Washington
Phoenix, AZ 85007
P: (602) 542-5025
E: dominic.draye@azag.gov

COUNSEL FOR STATE OF ARIZONA

Leslie Rutledge
Attorney General of Arkansas
Lee Rudofsky
Solicitor General
Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
P: (501) 682-8090
E: lee.rudofsky@arkansasag.gov

COUNSEL FOR STATE OF ARKANSAS

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

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

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

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

COUNSEL FOR STATE OF KANSAS

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

COUNSEL FOR STATE OF INDIANA

Jeff Landry
Attorney General of Louisiana
Patricia H. Wilton
Assistant Attorney General
Louisiana Department of Justice
1885 North Third Street
Baton Rouge, LA 70802
P: (225) 326-6006
E: wiltonp@ag.louisiana.gov

COUNSEL FOR STATE OF LOUISIANA

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

COUNSEL FOR STATE OF MISSOURI

Adam Paul Laxalt
Attorney General of Nevada
Lawrence VanDyke
Solicitor General
Office of the Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701-4717
P: (775) 684-1100
E: LVanDyke@ag.nv.gov

COUNSEL FOR STATE OF NEVADA

Brad D. Schimel
Attorney General of Wisconsin
Misha Tseytlin
Solicitor General
Daniel P. Lennington
Deputy Solicitor General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
P: (608) 267-9323
E: tseytlinm@doj.state.wi.us

COUNSEL FOR STATE OF WISCONSIN

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Garamond, 14-point. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's briefing order because it contains 13,856 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Mithun Mansinghani
Mithun Mansinghani

CIRCUIT RULE 32(A)(2) ATTESTATION

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

/s/ Mithun Mansinghani
Mithun Mansinghani

CERTIFICATE OF SERVICE

I hereby certify that, on June 6, 2016, a true and correct copy of the foregoing Brief of State and Local Government Petitioners was served via the Court's CM/ECF system on counsel of record for all parties.

/s/ *Mithun Mansinghani*
Mithun Mansinghani

ADDENDUM

STATUTES AND REGULATIONS A1

AFFIDAVIT OF JONATHAN SKUTA,
OKLAHOMA COUNTY SHERIFF'S OFFICE A5

AFFIDAVIT OF TINA HICKS,
OKLAHOMA DEPARTMENT OF CORRECTIONS A12

AFFIDAVIT OF MICHAEL P. KEARNS,
ARIZONA DEPARTMENT OF CORRECTIONS A18

AFFIDAVIT OF STEPHEN P. LUCE,
INDIANA SHERIFFS' ASSOCIATION A21

STATUTES AND REGULATIONS

47 U.S.C. § 152

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. § 201

(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

(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.

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

GLOBAL TEL*LINK, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	**Case No. 15-1461 (and consolidated cases)**
	)	
FEDERAL COMMUNICATIONS COMMISSION, and	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	

AFFIDAVIT OF JONATHAN SKUTA

State of Oklahoma)
) ss
County of Oklahoma)

I, Jonathan Skuta, of lawful age, being first duly sworn upon my oath, hereby state the following:

1. The following statements are true and correct to the best of my personal knowledge.

2. I am the Finance Director for the Sheriff's Office of Oklahoma County, Oklahoma. My job responsibilities include overseeing the financial aspects of the Sheriff's office, excluding the inmate trust account, providing financial recommendations to the Sheriff, and proceeding as directed.

3. My job responsibilities include assisting in the research, negotiation, and management of any contract between Oklahoma County, Oklahoma, and a provider of inmate calling services that would be affected by the Federal Communications Commission's Order published on December 18, 2015.

4. Oklahoma County's jail system, operated by the Sheriff's Office of Oklahoma County, Oklahoma, had an average daily population of 2,397 inmates in fiscal year 2015. Oklahoma County's

jail system, all in one facility, is not expected to observe a drop in its average daily population below 1,000 in the foreseeable future.

5. Oklahoma County, Oklahoma, currently has a contract with Telmate LLC to provide inmate calling services at jails operated by the Oklahoma County Sheriff's Office.

6. Telmate LLC has been awarded the contract to provide inmate calling services after participating in competitive bidding processes governed by Oklahoma's county bidding laws. Telmate LLC has been the County's inmate calling services provider since 2009 and most recently succeeded in a competitive bidding process for the contract period starting with July 1, 2014, with successive annual renewals available.

7. The contract between Telmate LLC and Oklahoma County, Oklahoma, includes terms governing video visitation kiosks, technology grants, and a website in addition to inmate calling services.

8. The contract between Telmate LLC and Oklahoma County, Oklahoma, includes a fee schedule that governs the rates charged to inmates for phone calls as well as the prices of various services related to prepaid calling accounts and other calling services.

9. The rates set out in the current contract include a flat per-call fee and per-minute rates across local, intrastate, interstate, and international categories that are further divided between prepaid, collect, and "Quick Connect," a calling service similar to collect calling.

10. Because of the Federal Communications Commission's interim interstate rates, the fee schedule for interstate calls sets the rates at $0.21 per minute or $0.25 per minute depending on the type of call with no flat per-call fee.

11. The fee schedule sets rates for other calls with flat per-call fees ranging from $2.25 to $3.25 and per-minute fees from $.04 to $1.00 depending on the type of call. For example, a local

prepaid call would have a $2.75 flat fee and would then cost $.04 per minute. An international prepaid call would have a $2.25 flat fee and would then cost $1.00 per minute.

12. The current contract also specifies that Oklahoma County, Oklahoma, would receive 69% of phone call revenue, not including revenue from related services, as a commission. Under the contract in force before July 1, 2014, that amount was 59% of phone call revenue.

13. The current contract does not provide for the payment of commissions to Oklahoma County, Oklahoma, for interstate calls. Oklahoma County, Oklahoma currently receives no compensation from its contract with Telmate LLC tied directly to interstate calls.

14. The contract operated without the effects of Federal Communications Commission rate setting during the entirety of 2013.

15. During 2013, there were 890,234 inmate phone calls in Oklahoma County's jail. There were 8,773,267 minutes used. Oklahoma County, Oklahoma received approximately $819,895.45 in commissions that year. Approximately 11.14 of phone call minutes were interstate minutes that year.

16. The average length of a non-interstate phone call in 2013 was approximately 9.95 minutes.

17. During March 2014, the Federal Communications Commission's interim rates for interstate calls went into effect.

18. During 2014, there were 858,003 inmate phone calls, and there were 8,955,156 phone call minutes used that year. Oklahoma County, Oklahoma, received $887,963.03 in revenue.

19. Approximately 15.34% of phone call minutes were interstate phone calls during the period when the interim rates for interstate calls were effective in 2014. Interstate phone call minutes during the relevant period were 1,119,909, and other phone call minutes were 6,295,987.

20. The average length of a non-interstate phone call in 2014 was approximately 10.23 minutes.

21. During 2015, the interim rates for interstate calls were effective during the entire year. There were 805,329 inmate phone calls and 8,622,348 phone call minutes that year. Oklahoma County, Oklahoma, received $946,773.85 in commissions that year.

21. During 2015, about 18.37% of phone call minutes were interstate minutes. There were 1,584,094 interstate phone call minutes and 7,038,254 other minutes.

22. The average length of a non-interstate phone call in 2015 was approximately 10.30 minutes.

23. Telmate LLC provided no compensation to Oklahoma County, Oklahoma, for interstate calls made once the interim interstate rates went into effect in 2014.

24. If the Order published by the Federal Communications Commission on December 18, 2015, went into effect, the rate applicable in Oklahoma County jails would be $0.14 per minute for prepaid calls. Flat per-call fees would be prohibited.

25. Currently, for a ten-minute local phone call, Telmate LLC would collect a $2.75 flat fee and $.40 in per-minute charges for a total of $3.15. 69% or approximately $2.17 would be paid to Oklahoma County, Oklahoma, as a commission while Telmate LLC would retain approximately $0.98 or approximately $.098 per minute.

26. If Telmate LLC retained the same amount per minute that it currently does, approximately $.098 per minute, after the Federal Communications Commission's Order goes into effect, Oklahoma County, Oklahoma could only receive at most about $.042 per minute while complying with the Order's $0.14 per minute rate cap.

27. At the low end of phone call minutes that occurred in 2015, Oklahoma County, Oklahoma, would receive approximately $362,138.62 in revenue per year.

28. At the high end of phone call minutes that occurred in 2014, Oklahoma County, Oklahoma, would receive approximately $376,116.55 in revenue per year.

29. The inmate calling service provider, Telmate LLC, may also be unable to provide service at current levels if the Order goes into effect.

30. Oklahoma County, Oklahoma, therefore, stands to see its revenue fall from approximately $850,000 per year to anywhere from nothing to approximately $375,000 per year if the Order goes into effect. The County thus stands to lose at least $475,000 per year in revenue and as much as $850,000 per year.

31. Oklahoma County, Oklahoma, must use the revenue it receives from inmate calling services for the operations of the Sheriff's Office per Title 19, Sections 180.43(E) and 514.1 of the Oklahoma Statutes.

32. The Sheriff's Office of Oklahoma County, Oklahoma, would see an impact on its ability to maintain operations if annual revenue from inmate calling services dropped from around $850,000 per year to around $375,000 per year due to the Federal Communications Commission's Order. That impact would likely include a reduction in staffing levels and/or services.

33. Tools imbedded within the Telmate online interface for recorded jail phone calls are routinely utilized for identification purposes of additional suspects that have not yet been arrested, criminal undertakings within and outside the facility, and information gathering. While there are costs associated with the efforts to provide inmate phone systems, these tools also provide a valuable asset in monitoring the activities of the facility and the community at large.

34. Investigators, while listening to recorded jail phone calls, were able to determine that a current employee was communicating with an inmate that was currently in the custody of the Oklahoma County Sheriff's Office (OCSO). Telmate records were a vital piece of evidence that eventually lead to the arrest of the employee and the discovery of an ongoing drug enterprise benefiting the inmate. Investigators utilized Telmate to establish contacts the inmate frequently communicates with and establish probable cause to obtain search warrants on the residences of several

suspects. Information gained from these search warrants resulted in the arrests for Possession of CDS with intent to distribute and Possession of CDS in the presence of a minor.

35. At the request of an outside agency, investigators recently utilized Telmate to locate the address associated with a telephone number called by an OCSO inmate to a murder suspect. Authorities made contact with the person associated with this phone number and were able to make an arrest for First Degree Murder.

36. Utilizing Telmate has proven to be useful in establishing code used by OCSO inmates. Being that the inmates are aware that all their communications have the propensity to be monitored, many of them have established a code that they utilize when they reference drugs or other contraband being smuggled into the facility. The code inmates are using on Telmate allowed investigators to discover the whereabouts of many smuggled cellphones, tobacco, marijuana and methamphetamine.

37. Investigators often use Telmate to monitor phone calls of inmates of which they arrested. It is not uncommon that the arrestee, while incarcerated at OCSO, explains the details of their crime on recorded jail calls. Evidence gathered in this fashion is a tremendous asset to the community as it helps land a conviction in the case as well as often factor into sentencing of the defendant.

38. If the Order goes into effect, then, the Sheriff's Office of Oklahoma County, Oklahoma would be forced to alter its priorities and internal operations.

FURTHER AFFIANT SAITH NOT.

Jonathan Skuta

SUBSCRIBED AND SWORN before me, the undersigned Notary Public, on this _____ day of June, 2016.

RAELINA J. MAXEY
IN AND FOR
#14008114
EXP. 09/11/18
STATE OF OKLAHOMA
NOTARY PUBLIC

Raelina J Maxey
Notary Public

My Commission Expires on 09/11/2018

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

GLOBAL TEL*LINK, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	**Case No. 15-1461 (and consolidated cases)**
	)	
FEDERAL COMMUNICATIONS COMMISSION, and	)	
	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	

AFFIDAVIT OF TINA HICKS

State of Oklahoma)
) ss
County of Oklahoma)

I, Tina Hicks, of lawful age, being first duly sworn upon my oath, hereby state the following:

1. The following statements are true and correct to the best of my personal knowledge.

2. I am the Chief of Administrative Services for the Oklahoma Department of Corrections. My job responsibilities include overseeing the Department's contracts with outside vendors, its information technology system, and personnel management.

3. My job responsibilities include oversight of any contract between the Oklahoma Department of Corrections and a provider of inmate calling services that would be affected by the Federal Communications Commission's Order published on December 18, 2015.

4. The Oklahoma Department of Corrections currently has a contract with Value-Added Communications, Inc., to provide inmate calling services at prisons operated by the Department.

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

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

7. The contract between the Oklahoma Department of Corrections and Value-Added Communications, Inc., whose terms were set in 2011 to begin in effect on January 1, 2012, and were in effect at the time the Federal Communications Commission released its Second Report and Order and Third Further Notice of Proposed Rulemaking on Rates for Interstate Inmate Calling Services (Nov. 5, 2015) (the "Order"), sets the rates that inmates pay for telephone service and for other services.

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

9. The contract also specifies that the Oklahoma Department of Corrections would receive $2.30 of revenue for each $3.00 phone call charge.

10. The average call length since the contract went into effect has been about 13.49 minutes. That means that inmates paid an average of about $0.22 per minute for calls, the Oklahoma Department of Corrections received about $0.17 per minute, and Value-Added Communications, Inc., retained about $.05 per minute.

11. The contract operated during the entirety of 2012 and 2013 without the effects of Federal Communications Commission rate setting in the Order or previous orders.

12. During 2012 and 2013, there were an average of 1,318,099.5 inmate phone calls in Oklahoma prisons. There were an average of 17,764,903 minutes in calls during those years. The Oklahoma Department of Corrections received an average of $3,037,883.525 per year in revenue during each of those years.

13. During March 2014, the Federal Communications Commission's interim rates for interstate calls went into effect.

14. During 2014, there were 1,509,188 inmate phone calls, and the Oklahoma Department of Corrections received $3,030,112.76 in revenue. There were 20,363,911 phone call minutes in 2014.

15. Approximately 14.16% of phone calls were interstate phone calls during the period when the interim rates for interstate calls were effective in 2014. Intrastate phone call minutes during the relevant period were 14,698,757, and interstate phone call minutes were 2,426,361.

16. During 2015, the interim rates for interstate calls were effective during the entire year. There were 1,448,965 inmate phone calls and 19,551,835 phone call minutes. The Oklahoma Department of Corrections received $2,850,983.15 in revenue that year in addition to a $250,000 signing bonus received after renewing the contract for the 2015 year.

17. During 2015, about 14.54% of phone calls were interstate phone calls. There were 16,707,248 intrastate phone call minutes and 2,844,587 interstate phone call minutes.

18. Given the number of interstate calls made during 2014 and 2015 when the interim interstate rates were in effect without attributing any change in volume to different rates, the Oklahoma Department of Corrections received an estimated $894,233.46 less in revenue than it otherwise would have received in those years.

19. If the Order went into effect, the rate applicable in Oklahoma prisons would be $0.11 per minute. Flat calling plans would be prohibited. By not including the cost of commissions

when setting the rate, the Order discourages any attempt by the Oklahoma Department of Corrections to recover any form of revenue.

20. If Value-Added Communications, Inc., retained the same amount per minute that it currently does, approximately $.05 per minute, after the Federal Communications Commission's Order goes into effect, the Oklahoma Department of Corrections could only receive at most about $.06 per minute while complying with the Order.

21. At the low end of phone call minutes that occurred on average in 2012 and 2013, the Oklahoma Department of Corrections would receive an estimated $1,065,894.18 in revenue per year under the Order's rates.

22. At the high end of phone call minutes that occurred in 2014, the Oklahoma Department of Corrections would receive an estimated $1,221,834.66 in revenue per year under the Order's rates.

23. Communications between the Oklahoma Department of Corrections and its inmate calling service provider Value-Added Communications, Inc., reveal an intent by the provider to drastically reduce or eliminate payments to the Department altogether if the Order goes into effect.

24. In addition to lost revenue from interstate rate caps set in 2013, the Oklahoma Department of Corrections stands to see its revenue fall from approximately $3,000,000 per year to anywhere from nothing to $1,500,000 per year if the Order goes into effect. The Department thus stands to lose at least $1,500,000 per year in revenue and as much as $3,000,000 per year.

25. The Oklahoma Department of Corrections is critical in the delivery of the inmate calling service to the inmates incarcerated in its correctional facilities. The Department has seventeen correctional facilities with security levels ranging from minimum to maximum security. As a result, there are varying levels of staff involvement and time that must be invested by the

Department in order for the inmate calling service to be provided to the inmates. Without this investment by the Department, inmates would not be able to utilize the inmate calling service.

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

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

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

29. The Oklahoma Department of Corrections would not be able to fund all of the benefits currently provided through the canteen system if revenue from inmate calling services

dropped from approximately $3,000,000 per year to nothing or to somewhere between $1,000,000 and $1,500,000 per year.

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

FURTHER AFFIANT SAITH NOT.

Tina Hicks

Tina Hicks

SUBSCRIBED AND SWORN before me, the undersigned Notary Public, on this 6th day of June, 2016.

NOTARY SEAL PUBLIC
LORI EVANS WILSON
Notary Public
State of Oklahoma
Commission # 05008463 Expires 09/12/17

Lori Evans Wilson

Notary Public

My Commission Expires on 9/12/17

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF

GLOBAL TEL*LINK, et al., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION, and THE UNITED STATES OF AMERICA, Respondents	Case No. 15-1461 **AFFIDAVIT OF MICHAEL P. KEARNS**

I, MICHAEL P. KEARNS, hereby state, under the penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I am employed by the Arizona Department of Corrections ("ADC") as the Division Director for Administrative Services.

2. I am competent to testify to the matters contained herein and make this Declaration based on my own personal knowledge.

3. My job responsibilities include, but are not limited to, overseeing the Department's contracts with outside vendors, its information technology system, engineering and facilities services, and financial services for the Department.

4. My job responsibilities include oversight of any contract between the Arizona Department of Corrections and a provider of inmate calling services that would be affected by the Federal Communication Commission's Order published on December 18, 2015.

5. The Arizona Department of Corrections currently has a contract with CenturyLink, Inc., to provide inmate calling services at prisons operated by the Department.

6. CenturyLink, Inc. was awarded the contract to provide inmate calling services after participating in a competitive bidding process governed by Arizona's purchasing laws.

7. The contract between the Arizona Department of Corrections and CenturyLink, Inc., which went into effect on July 1, 2015, established the rates that inmates pay for telephone service and for other services, and took the proactive step to eliminate ancillary service charges.

8. The rates set out in the original contract for 15-minute local calls included a flat charge ranging from $1.60 for pre-paid/debit calls to $1.84 for collect calls. The rates for all other calls ranged from $0.20 to $0.40 per minute, with an additional surcharge per call which ranged from $1.60 to $2.40.

9. The contract also specified that the Arizona Department of Corrections would receive 93.9% commission on all but Interstate calls.

10. If the Order published by the Federal Communications Commission on December 18, 2015 went fully into effect, the rate applicable in Arizona prisons would be $0.11 per minute. Flat calling plans would be prohibited. By not including the cost of commissions when setting the rate, the Order discourages any attempt by the Arizona Department of Corrections to recover any form of revenue.

11. Communications between the Arizona Department of Corrections and its inmate calling service provider CenturyLink, Inc. reveal intent by the provider to drastically reduce payments to the Department if the Order goes into effect.

12. The Arizona Department of Corrections must use the revenue it receives from inmate calling services for the benefit of inmates pursuant to A.R.S. §41-1604.03.

13. The benefits provided to inmates pursuant to A.R.S. §41-1604.03 include, among other things, education services, legal resources, and indigent resources.

14. In addition to lost revenue from interstate rate caps set in 2013, the Arizona Department of Corrections estimates its revenue would be approximately $1 million less than the authorized budget for the services provided pursuant to A.R.S. §41-1604.03.

15. The Arizona Department of Corrections would not be able to fund all of the benefits currently provided under A.R.S. §41-1604.03 if revenue from inmate calling services dropped to $1 million below the authorized budget.

16. If the Order goes into effect, the Arizona Department of Corrections would be forced to seek alternative funding from the Legislature and Governor to replace funding currently used for critical inmate welfare programs such as education.

. . .

. . .

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of May, 2016

MICHAEL P. KEARNS

SUBSCRIBED AND SWORN before me, the undersigned Notary Public, on this 31st day of May, 2016.

CHRISTINA VALENZUELA
Notary Public - Arizona
Maricopa County
Expires 07/24/2017

Notary Public

My Commission Expires on 7/24/2017

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

STATE OF OKLAHOMA, et al. Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents.	)	Case No. 16-1057 (Consolidated with No. 15-1461)

AFFIDAVIT OF STEPHEN P. LUCE

Stephen P. Luce, hereby swears under penalty of perjury to the truth of the following statements:

1. I am the Executive Director of the Indiana Sheriffs' Association ("ISA"). I have been in this position since February 1, 2009.

2. From January 1, 2003 to January 31, 2009, I also was the elected Sheriff for Knox County, Indiana.

3. From my knowledge and experience in these two positions as well as input from current elected Sheriffs in the State of Indiana, all of whom are members of the ISA, it is clear that the County Jails in the State of Indiana will be financially impacted by the Federal Communications Commission's final agency action, *In re Rates for Interstate Inmate Calling Services, Second Report and*

Order and Third Further Notice of Proposed Rulemaking, Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, FCC 12-167 (Nov. 5, 2015) (the "Order").

4. Indiana has 92 County Sheriffs, and the County Jails are classified as large, medium, or small. On average, the Indiana County Jails are at about 83% capacity. Due to recent Indiana legislation that will keep low-level offenders in County Jails who would otherwise go to the Department of Corrections after sentencing, I anticipate an increase in County Jail inmate population in the near future. This will lead to an increase in inmate calling services ("ICS") at the County Jails.

5. County Jails in Indiana Counties with populations greater than 75,000 are subject to and comply with the same telecommunications standards as the Indiana Department of Corrections pursuant to state statute Indiana Code § 5-22-23-6. The Marion County Sheriff's Office and the Lake County Sheriff's Department, both named Intervenors, are large County Jails.

6. Each of Indiana's Sheriffs with the exception of one runs a County Jail. Those that run a County Jail provide ICS through their individual contracts with an ICS provider (the "ICS Contract").

7. The ICS Contract sets the rates that inmates pay for telephone and other services. The ICS Contract provides the Sheriff's Office with a site commission based on the rate charged ("Site Commission").

8. The Indiana Sheriffs use a portion of the Site Commission to defray costs directly related to ICS. This includes at least the following:

a. Administrative costs;

b. Monitoring and recording phone calls;

c. Monitoring inmates placing calls;

d. Maintain and administer lists of blocked numbers for judges, witnesses, victims, jurors, etc.;

e. Preventing and remedying destruction of phones;

f. Preventing inmates from tampering with phones or using them to access outside lines;

g. Enrollment and management of inmates into voice biometrics systems;

h. Producing call recordings for investigatory requests and subpoenas;

i. Answering questions from inmates and families related to ICS;

j. Preparing, updated, and implementing ICS standard operating procedures; and

k. Providing security for on-site ICS technicians.

9. Inmates use ICS to plan illegal activities both inside and outside of the County Jails. The Indiana Sheriffs routinely and, depending on the size of the County Jail, in real time have to expend resources to monitor ICS to deter this illegal activity, which ranges from drug and other contraband activity to witness tampering. On at least one occasion in 2013, an inmate in the Marion County Jail used ICS in an attempt to contract to have a key witness in his case murdered.

10. Additionally, Site Commission is deposited into the commissary fund, which Indiana Sheriffs control in accordance with state statute and local ordinances. Any decrease in Site Commission significantly decreases Indiana Sheriffs' ability to run County Jails effectively and efficiently.

11. Some smaller county Indiana Sheriffs have determined that without Site Commission they anticipate significantly limiting discretionary ICS because there is no way to recover the costs.

I affirm under the penalties for perjury that the foregoing statements are true.

Dated: 6/6/2016

Stephen P. Luce
Sheriff Stephen P. Luce (ret.)

SUBSCRIBED AND SWORN before me, the undersigned Notary Public, on this 6th day of June, 2016.

Megan Buchanan
Notary Public

My commission expires on 7-30-16