**PRISONERS' LEGAL SERVICES***
10 Winthrop Square, 3rd Floor
Boston, MA 02110
617-482-2773; WATS 800-882-1413
FAX 617-451-6383
State Prisoner Speed Dial *9004#
County Collect Calls 617-482-4124
www.mcls.net

November 8, 2013

Catrice C. Williams, Secretary
Department of Telecommunications and Cable
1000 Washington Street, Suite 820
Boston, MA 02118-6500

Re: D.T.C. 11-16

Dear Ms. Williams:

Enclosed for filing please find an original and seven copies of the Petitioners' Opposition to Respondents' Motions to Hold Proceedings in Abeyance. Please feel free to contact me with any questions or concerns at 617-482-2773 x 106.

Thank you for your attention to this matter.

Sincerely,

Bonita Tenneriello
Staff Attorney

cc: Parties of Record

* Formerly known as Massachusetts Correctional Legal Services

**COMMONWEALTH OF MASSACHUSETTS**
**DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

**No. D.T.C. 11-16**

**PETITION OF RECIPIENTS OF COLLECT CALLS FROM PRISONERS AT CORRECTIONAL INSTITUTIONS IN MASSACHUSETTS SEEKING RELIEF FROM THE UNJUST AND UNREASONABLE COST OF SUCH CALLS**

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## PETITIONERS' OPPOSITION TO RESPONDENTS' MOTIONS TO HOLD FURTHER RULEMAKING PROCEEDINGS IN ABEYANCE

Respondents Securus Technologies, Inc. ("Securus") and Global Tel*Link Corporation (GTL) in separate motions ask the Department to hold in abeyance its investigation of Inmate Calling Services pending rulemaking by the Federal Communications Commission (FCC), arguing that FCC regulation of intrastate rates will invalidate any action taken by the Department. At the same time, the telephone companies have asked the FCC to hold its rulemaking in abeyance and to stay its interim rules while they challenge the FCC's jurisdiction to regulate intrastate rates in federal court.[1]

Regardless of whether and how the FCC proceeds, the DTC has jurisdiction over intrastate ICS rates in Massachusetts and, indeed, a duty to set just and reasonable rates. *See* G.L. c. 159 §§ 14, 17. The companies' justification for stalling the DTC's investigation is sheer

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[1] *See* Exh. 1, Securus Petition to FCC to Hold Further Rulemaking Proceedings in Abeyance; Exh. 2, Securus' Petition to FCC for Stay of Report and Order Pending Final Appeal; Exh. 3, Petition of GTL to FCC for Stay Pending Judicial Review; Exh. 4, Comments of GTL submitted to FCC, March 25, 2013. Securus states that the FCC's Report and Order and Further Notice of Proposed rulemaking "and indeed their entire underpinning... are likely to be remanded, if not vacated. *See* Exh. 1, p. 3. GTL cites court decisions limiting the authority of the FCC to regulate intrastate ICS, Exh. 4 pp. 31-32, and cites previous FCC rulings in which the agency declined to preempt state rate caps. Exh. 4 pp. 32-33. Citing a number of states that have eliminated commissions and reformed commission payment systems, GTL concludes, "regulation of ICS is more appropriate at the state level." *Id.* at 36.

speculation: the notion that the FCC *may* eventually seek to regulate intrastate rates, which regulations *may* conflict with future DTC regulations, and *may* be upheld against the appeals of ICS providers. Furthermore, the companies make no claim that the FCC action creates any conflict with the DTC investigation into ICS service quality and billing practices.

Every day, week, month and year that the investigation is delayed, family ties are frayed by the calls that loved ones cannot afford to accept, as eloquently described at the July 2012 public hearings. Should the Department nevertheless hold proceedings in abeyance, the Petitioners request that their appeal be decided now, so that the scope of further proceedings will be determined. This will enable all parties to better prepare for future proceedings.

## I. There is No Reason to Believe that Future FCC Regulation Will Conflict with Future DTC Regulation of ICS.

Securus and GTL posit that possible FCC regulation of intrastate ICS rates could run the risk of precluding rules that the DTC may adopt as a result of its investigation. At the same time, the providers insist that the FCC has no jurisdiction to regulate intrastate rates, and will do their utmost in federal court to prevent it from doing so.[2] It is impossible to know (1) whether, after receiving comment, the FCC will ultimately seek to regulate intrastate rates, and (2) if it does so regulate, whether its authority to do so will eventually be upheld.[3] Further, even if all this came to pass, it is impossible to know whether hypothetical DTC regulations would conflict with these hypothetical federal regulations.

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[2] *See* n. 1, *supra.*

[3] The National Association of Regulatory Utility Commissioners (NARUC) would likely appeal any intrastate rate regulation emerging from the FNPRM. It commented to the FCC that its authority to regulate intrastate calls is not clear, and requested an opportunity to respond to any proffered rationale for regulating in this area. *See* In the Matter of Rates for Interstate Inmate Calling Service, FCC 12-167, Reply Comments of NARUC, p. 4, available at http://apps.fcc.gov/ecfs/document/view?id=7022289729 (last visited on November 1, 2013).

Ironically, while any conflict between future FCC and DTC regulations is pure speculation, right now Massachusetts ICS rates are out of line with the interim interstate rates adopted by the FCC. If the FCC does not stay its interim rules, Massachusetts will have an anomalous situation where in-state rates are substantially higher than out-of state rates. When ICS providers seek to justify interstate rates above the FCC's safe harbor they will no longer be allowed to count site commissions as a cost of providing service, but they could still seek to recover these commissions through intrastate rates, possibly driving intrastate rates up even higher.

The Petitioners have argued that the principles of cost-based regulation articulated in the FCC's Report and Order and NPRM, and the data the FCC has gathered, support the need for state regulation and should inform the DTC's own investigation.[4] Securus and GTL attempt to turn this into a reason for DTC inaction pending final federal rules.[5] It is ironic – or perhaps just convenient -- that the companies urge state deference to the FCC while at the same contesting federal jurisdiction over intrastate rates.[6] The Petitioners nowhere suggest that the DTC is bound by the FCC's analysis, only that it is persuasive.[7]

There is indeed an "overlap[8]" and an "interplay[9]" between the state and federal proceedings, as the companies suggest. But it does not go one way, with the FCC merely dictating to the DTC. While the FCC seeks comment on its own authority to regulate intrastate

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[4] *See* Petitioners' Appeal pp. 6-8,
[5] *See* Securus Motion to Hold Proceedings in Abeyance at p. 4; GTL Motion to Hold Proceedings in Abeyance at 3-4.
[6] *See* n. 1, *supra.*
[7] Referring to the FCC's consideration of a distance-insensitive rate of $0.07 in the FNPRM, the petitioners urged only that "[t] the DTC should not foreclose such a rate for Massachusetts before discovery has even begun." Appeal p. 8.
[8] Securus Motion to Hold Proceedings in Abeyance at p. 4
[9] GTL Motion to Hold Proceedings in Abeyance at 4.

rates, the agency has at the same time encouraged states "to eliminate site commissions, adopt rate caps, disallow or reduce per-call charges, or take other steps to reform ICS rates."[10] If the DTC were to hold its investigation in abeyance, it would thwart the FCC's express wishes. Data resulting from a DTC investigation undoubtedly would be relevant to the FCC's own deliberations, perhaps most saliently to its consideration of whether to seek to regulate intrastate rates. It would be a cruel irony indeed if the FCC's first step toward ICS rate regulation resulted in a step backward for this petition before the DTC.

## II. The FCC Proceeding Will Not Conflict With a DTC Investigation into Service Quality and Billing Problems.

Neither Securus nor GTL has articulated even a hypothetical conflict arising from the DTC's investigation into service quality and billing problems.[11] No possible future action by the FCC undermines the DTC's authority and, indeed, duty to determine the extent to which dropped calls, poor voice quality, and inadequate billing detail plague Massachusetts consumers.

Massachusetts ICS consumers deserve relief from these problems. Even if the DTC decides to hold intrastate rate setting in abeyance, investigation into these problems should continue.

## III. It Will Be Years Before the FCC Issues Final Rules.

In the FCC proceedings, even an interim rulemaking process will have taken over a year to complete. It was noticed in the Federal Register on January 22, 2013, the resulting Report and Order was released on September 26, 2013, and even without abeyance it will not take effect before early 2014 (90 days after publication in the Federal Register, which has not yet

[10] *See* Exh. 1 to Petitioners' Appeal, FCC Report and Order and NPRM, ¶ 130.
[11] See Hearing Officer Interlocutory Ruling at 28-31.

occurred).[12] Permanent rules are likely to take longer, especially given the range of issues under consideration -- including permanent interstate rates, possible intrastate rate reform, ICS for the deaf and hard of hearing, regulation of ancillary charges, prohibition of call blocking, exclusive ICS contracts, and quality of service – as well as the time needed for mandatory data collection.[13] A near-certain appeal of any rules issued, with months of briefing and time for argument and the issuance of a decision, will add further delay, likely well into 2016.

If the FCC's Further Notice of Proposed Rulemaking (FNPRM) is held in abeyance, many additional months or even years must be added to this equation, and final rules might easily wait until 2018. Any appeal of the FNPRM is unlikely to be decided before early 2015. At that point, months might be needed to craft a new FNPRM (to the extent the appeal had succeeded), and then a year or longer for the rulemaking process (as noted above), putting final rules into 2016 or 2017 and the appeal of those rules very likely into 2018.

## IV. Delay Will Cause Severe and Irreparable Hardship to ICS Consumers and to the Public Interest.

While the Securus and GTL spin speculative scenarios in which moving forward with the DTC's investigation could cause inefficiency,[14] the harm caused by further delay in this case is a concrete reality. Since their 2009 Petition, the Petitioners have documented the hardship to consumers from unjust ICS rates and ancillary fees, dropped calls, and poor quality of service.[15] The July 19, 2012 public hearing also provided ample evidence of the severity of these

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[12] *See* Exh. 1 to Petitioners' Appeal, FCC Report and Order and Further Notice of Proposed Rulemaking (FNPRM), ¶ 187.
[13] *See Id.*, ¶ ¶ 124, 125.
[14] *See* Hearing Officer Interlocutory Ruling at 12-13 and cases cited (Department may stay a proceeding where moving forward is an inefficient use of the Department's and parties' resources).
[15] *See* Petition pp. 4- 6; *see also* Exhs. A-1 to A-32 to Amendment #1 to Petition (affidavits of petitioners).

problems.[16] Current telephone company practices force the family and friends of prisoners to forgo or ration conversations with their loved ones, at great cost to family ties and to the welfare of children of incarcerated individuals.

The Petitioners have also presented a wealth of evidence showing that barriers to communication between prisoners and their loved ones harm prisoners' reentry prospects and damage public safety in the communities to which prisoners return.[17] These harms were validated by the FCC, which stated that high ICS rates "discourage communication between inmates and their families and larger support networks, which negatively impact the millions of children with an incarcerated parent, contribute to the high rate of recidivism in our nation's correctional facilities, and increase the costs of our justice system."[18] It also noted that the National Association of Regulatory Utility Commissioners has endorsed "lower prison phone rates as a step to reduce recidivism and thereby lower the taxpayer cost of prisons."[19]

The Department should not delay fulfillment of its statutory duty to ensure that rates are just and reasonable.[20] At stake are the emotional lifeline and hopes for reentry of thousands of Massachusetts families. Once lost, these cannot be regained.

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[16] *See* Hearing Officer Interlocutory Ruling at 7-8, citing oral testimony and more than 200 pieces of written testimony, and referencing the hearing transcript. *See also* Public Comments, *available at* http:/www.mas.gov/ocabr/government/oca-agencies/dtc-lp/dtc-11-16.html.
[17] *See* Appendix III to Petition, "Public and Penological Policy."
[18] *See* Exh. 1 to Petitioners' Appeal, FCC Report and Order and NPRM,¶ 42. The FCC concluded that "[j]just reasonable and fair ICS rates provide benefits to society by helping to reduce recidivism," *id.* ¶ 43, and cited studies to this effect. *Id.* ¶ 43 n. 172.
[19] *Id.* ¶ 43.
[20] G.L. c. 159 §§ 14, 17.

## CONCLUSION

For the above-stated reasons, the motions of Securus Technologies, Inc. and Global Tel*Link Corporation to hold proceedings in abeyance should be denied, and a procedural conference to advance the proceedings should be convened at the earliest possible date.

Date: November 8, 2013

Respectfully submitted:

Bonita Tenneriello, Esq.
Elizabeth Matos, Esq.
James Pingeon, Esq.
10 Winthrop Square, 3rd Floor
Boston, Massachusetts 02110
(617) 482-2773 (telephone)
(617) 451-6383 (facsimile)
btenneriello@plsma.org
ematos@plsma.org
jpingeon@plsma.org

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail ~~(by hand)~~ on 11/8/13

sig

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

| | |
|---|---|
| Rates for Interstate Inmate Calling Services | WC Docket No. 12-375 |

**SECURUS TECHNOLOGIES, INC. PETITION TO HOLD FURTHER RULEMAKING PROCEEDING IN ABEYANCE**

Securus Technologies, Inc. ("Securus"), through counsel and pursuant to 47 C.F.R. § 1.43, hereby files this Petition asking that the Commission hold in abeyance the further rulemaking proceeding initiated by the Further Notice of Proposed Rulemaking included in *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 13-113, released September 26, 2013 ("FNRPM"). At this time, taking and considering comments on the FNPRM, the great majority of which is expressly premised on the findings and conclusions in the Report and Order, would not be an appropriate use of Commission resources for the reasons described below.

Due to the time sensitivity of the relief sought, Securus respectfully requests that the Commission resolve this Petition by **November 8, 2013**.

## I. BACKGROUND

The FNPRM seeks comment on several matters arising from inmate telephone rates. Initial Comments are due 30 days after Federal Register publication, and Reply Comments are due 45 days after publication.

Contemporaneous with this filing, Securus is submitting a Petition for Stay of the Report and Order in FCC 13-113 pending its forthcoming appeal of the findings, conclusions, rates, and rules contained therein. As demonstrated in that petition, Securus is likely to prevail

Exhibit 1

on the merits of its appeal on any of several independent grounds.

## II. THE FCC SHOULD HOLD THE FURTHER PROCEEDING IN ABEYANCE PENDING APPEAL FROM THE REPORT AND ORDER

The FNPRM presents questions and tentative conclusions for comment that rest expressly on the findings and conclusions of the Report and Order, many of which will be challenged before a federal court of appeals. Indeed, the very lens through which the Commission looks at this market is likely to be altered by the appeal. Whatever data and analysis that now would be responsive to the FNPRM therefore may be rendered useless. For these reasons, the Commission should hold the further proceeding in abeyance until the appeal is resolved.

### A. Standard for Granting an Abeyance

The Commission holds matters in abeyance when they involve or rest on Commission rules that remain unsettled. The purpose of an abeyance is to "avoid unnecessary expenditure of time and resources by the parties and [the] Commission[.]"[1]

For example, the Commission has held a petition for preemption of state law in abeyance where the request for relief involved "certain outstanding issues regarding the operation of the new federal universal service program."[2] It also has held petitions for reconsideration of various rules in abeyance where they "may be rendered moot by the rules"

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1 *Donald J. Elardo, Esq. and Stephen C. Garavito, Esq.*, File No. E 92 88S, Letter, 9 FCC Rcd. 7912 (1994) (granting MCI's motion to hold damages phase of enforcement proceeding in abeyance pending review of MCI's Application for Review of liability findings entered against it).

2 *American Commc'ns Svcs., Inc. and MCI Telecomms. Corp.*, CC Docket No. 97-100, Memorandum Opinion and Order, 14 FCC Rcd. 21579, 21581 ¶ 3 (1999).

under consideration in a related proceeding."[3] Thus, where a proceeding begins from a predicate finding, rule, or policy that is under review, the Commission finds an abeyance appropriate.

### B. The FNPRM Builds on Findings and Conclusions That Will Be Appealed, Creating the Strong Likelihood of a Waste of Resources Should Comment Be Taken At This Time

The FNPRM creates a follow-on proceeding that expressly incorporates and builds on the rules adopted in the Report and Order. Many of those rules, and indeed their entire underpinning, will be challenged on appeal and are likely to be remanded, if not vacated. To take comment on the follow-on questions in the FNPRM now would invite an "unnecessary expenditure of time and resources by the parties and this Commission[.]"[4]

Several portions of the FNPRM build directly off the "cost-based" policy adopted in the Report and Order that led to the "safe harbors" and "interim rate caps", all of which will be reviewed. They include:

- "We tentatively conclude that site commissions should not be recoverable through intrastate rates[.]" ¶ 133.
- "Will the cost based rates required by the Order create a market-based solution for driving intrastate rates to cost-based levels absent further regulatory action?" ¶ 134.
- "Given the very small number of deaf and hard of hearing inmates relative to the overall prison population, are the safe harbor rates adopted in today's Order sufficient to allow recovery of the discount?" ¶ 146.

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[3] *Rules and Policies on Foreign Participation in the U.S. Telecomms. Market*, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking, 12 FCC Rcd. 7847, 7849 n.2 (1997); *see also Amendment of Parts 15 and 90 of the Commission's Rules to Provide Additional Frequencies for Cordless Telephones*, ET Docket No. 93-235, Report and Order, 10 FCC Rcd. 5622, 5627 ¶ 30 (1995) (noting that two petitions for reconsideration of the "offset channel rule" had been held in abeyance "pending our determination on providing additional cordless telephone channels in this proceeding.").

[4] *Elardo/Garavito*, 9 FCC Rcd. 7912.

- "We seek comment on maintaining the interim rate caps and safe harbor rate levels adopted in the Order and expanding that structure to encompass intrastate ICS rates." ¶ 154.

- "Should we maintain the current safe harbors and make them permanent or should they be reduced over time given that they were set at conservative levels? ¶ 154.

- "Additionally, we note that the Order adopts a historical cost methodology for the interim rules and we seek comment on what measure of cost – *e.g.*, historical, forward looking – should be adopted for the permanent rate structure." ¶ 163.

- "In the Order, we require charges for any services that are ancillary to the costs of providing ICS to be cost-based, and require ICS providers to submit cost data for these ancillary charges as part of the mandatory data request. Here we seek comment on how the Commission can ensure, going forward, that ancillary charges are just, reasonable, and cost-based." ¶ 168.

- "We seek comment on whether our conclusion resolves the issues surrounding billing-related blocking of interstate ICS calls. Additionally, we seek comment on whether we should extend our prohibition on blocking to intrastate ICS calls." ¶ 173.

These items depend absolutely upon the core of the Report and Order. They reveal, by their terms, that the policy underpinnings, as well as the factual findings and ratesetting methodologies, of the Report and Order form the very basis of the Further Notice of Proposed Rulemaking. These items will be reviewed by a court of appeals and may be vacated or reversed. As a result, the premise of the FNPRM will have been invalidated.

Taking comment now on the follow-on items in the FNPRM would be imprudent. While the appeal is pending, the Bureau will be constrained from undergoing any meaningful review of any comments or data. Thus, in order not to create an "unnecessary expenditure of time and resources"[5] on work that later could well be unhelpful, the Commission should hold the FNPRM in abeyance until the appeal from the Report and Order is resolved.

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[5] *Elardo/Garavito*, 9 FCC Rcd. 7912.

## CONCLUSION

For all these reasons, the Commission should hold the further proceeding, including the call for comments in the Further Notice of Proposed Rulemaking, in abeyance while the appeals from the companion Report and Order are pending. Securus respectfully requests that the Commission resolve this petition by **November 8, 2013**.

By: s/Stephanie A. Joyce
Stephanie A. Joyce
G. David Carter
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20036
202.857.6081 DD
202.857.6395 Fax
Stephanie.Joyce@arentfox.com

*Counsel to Securus Technologies, Inc.*

Dated: October 22, 2013

## CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of October, 2013, that the foregoing Petition to Hold Further Rulemaking in Abeyance was served via electronic mail on the following persons:

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

Acting Chairwoman Mignon Clyburn
Federal Communications Commission
Mignon.Clyburn@fcc.gov

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

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

Sean Lev
General Counsel
Federal Communications Commission
Sean.Lev@fcc.gov

Julie Veach
Chief
Wireline Competition Bureau
Federal Communications Commission
Julie.Veach@fcc.gov

By: s/Stephanie A. Joyce
Stephanie A. Joyce

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

| | |
|---|---|
| Rates for Interstate Inmate Calling Services | WC Docket No. 12-375 |

**SECURUS TECHNOLOGIES, INC.**
**PETITION FOR STAY OF REPORT AND ORDER PENDING APPEAL**
**(FCC 13-113)**

Stephanie A. Joyce
G. David Carter
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20036
202.857.6081 DD
202.857.6395 Fax
Stephanie.Joyce@arentfox.com

*Counsel to Securus Technologies, Inc.*

Dated: October 22, 2013

- Exhibit 2 -

## SUMMARY

Securus respectfully seeks a stay of the *Inmate Rate Order* and demonstrates herein that its request meets all four criteria of the *Virginia Petroleum Jobbers* test.

First, Securus is likely to prevail on the merits of its appeal on any of several independent grounds:

- The *Inmate Rate Order* adopts ongoing, "historical", "cost-based" rate review without providing any notice that such regulation was under consideration.
- The *Inmate Rate Order* is fatally vague as to the rate regime to which inmate telecommunications now will be subject.
- Protestations to the contrary, the Commission is in fact abrogating existing service contracts by imposing a flash-cut rate decrease and preventing inmate service providers from paying site commissions.
- In adopting rates and a new policy that prevents service providers from paying site commissions, the Commission has overstepped its authority.
- The *Inmate Rate Order* sets rates that are demonstrably below cost, even omitting the cost of site commissions.
- The *Inmate Rate Order* establishes, if not requires, nationwide cross-subsidization across all facility sizes and types of call.

Secondly, Securus demonstrates, through the sworn affidavit of its Chief Executive Officer Richard A. Smith, that it will suffer irreparable harm of several types:

- The drastic rate decrease imposed by the *Inmate Rate Order* will prevent Securus from paying the site commissions that are required by contract and often state statute, causing it to lose customer goodwill and fear legal action.
- The *Inmate Rate Order* would require Securus to renegotiate, assuming that it has the right or opportunity to do so, more than 1,700 contracts within 90 days of Federal Register publication, a task that no company reasonably could be expected to complete.
- The below-cost rates imposed by the *Inmate Rate Order* will cause Securus significant financial losses that it could not recoup if the rates are overturned on appeal.

- The reporting requirements adopted in Rule 64.6060, with a due date of April 1, 2014, are so onerous that Securus would require 5 to 20 additional, full-time employees devoted only to compliance with that rule.

- The *Inmate Rate Order* exposes Securus to the strong possibility of litigating multiple rate cases even for rates that are below the rate caps adopted therein. Securus offers several different price structures on interstate calls among its 1,800 contracts, and under the Inmate Rate Order a complaint from just one consumer as to each structure would require a unique rate case.

Third, a stay of the *Inmate Rate Order* will not materially harm third parties and in fact would serve their interests. The Wright Petitioners, whose request for per-minute rate caps were the focal point of this proceeding, understood the tremendous work that will be required to renegotiate the thousands of service contracts in this market and advocated for a one-year "fresh look" period. The *Inmate Rate Order* provides just 90 days for that work; the Petitioners had no expectation of such rapid change. In addition, the *Inmate Rate Order* will create an inevitable and immediate loss of site commission funds that will jeopardize inmate welfare programs across the country. That result certainly will harm inmates, depriving them of irreplaceable programs intended expressly to encourage their rehabilitation and decrease recidivism.

Fourth, the public interest favors a stay, for several reasons:

- A stay will protect state, county, and local expectations of site commission funds on which existing budgets and programs rely.

- A stay will preserve the status quo of existing services and ensure that carriers can continue providing telephone service without incurring the crippling losses imposed by the new rates.

- In permitting carriers to continue providing service, the stay will preserve the competition in this market that the Commission consistently has recognized.

- A stay will prevent these regulated utilities from suffering unrecoverable losses, a result that the Commission has deemed a public benefit that weighs in favor of a stay.

- A stay of the rate regulation adopted in the Inmate Rate Order, which as explained herein is fatally vague and not readily applied, will prevent the public harm that flows from wasting agency resources on matters of uncertain basis and outcome.

Under Commission precedent, a petitioner need not make a strong showing as to every prong of *Virginia Petroleum Jobbers* in order to obtain a stay. Here, however, Securus has amply satisfied each prong and demonstrated that a stay is not only appropriate, but necessary.

## TABLE OF CONTENTS

Securus Technologies, Inc. ("Securus"), through counsel and pursuant to 47 C.F.R. § 1.43, hereby files this Petition for Stay of the order titled *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113, released September 26, 2013 ("*Inmate Rate Order*").[1] In support of this Petition, Securus files herewith the sworn Affidavit of Richard Smith, Chief Executive Officer (Oct. 17, 2013). Securus requests that the *Inmate Rate Order* be stayed pending review to prevent the irreparable harm that would flow from the order's immediate implementation. As described more fully below, maintaining the *status quo* is in the best interest of inmate telecommunications service providers, correctional facilities, and the public.

Due to the extremely brief implementation deadline in the *Inmate Rate Order*, Securus respectfully requests that the Commission resolve this Petition by **November 21, 2013**, which is 30 days from the date of this filing.

## STANDARD FOR ENTERING A STAY

The Commission applies the four-part test in *Virginia Petroleum Jobbers Association* when reviewing petitions for stay pending appeal.[2] That test is: (1) petitioner is likely to prevail on the merits of its appeal; (2) petitioner will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed by entry of a stay; and (4) the public interest

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[1] Contemporaneously with this Petition, Securus is filing a petition to hold in abeyance the follow-on rate proceeding initiated by the Further Notice of Proposed Rulemaking portion of this item.

[2] *E.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 23 FCC Rcd. 1705, 1706 ¶ 4 (2008) (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (granting petition for stay); *Charter Commc'ns Entm't I, LLC*, Memorandum Opinion and Order, 22 FCC Rcd. 13890, 13892 ¶ 4 (2007) (staying orders setting cable rates); *Comcast Cable Commc'ns, LLC*, File No. CSB-A-0741, Order, 20 FCC Rcd. 8217 ¶ 2 (2005) (citing same) (staying several orders that set local cable rates).

favors a stay.[3] The Commission does not always accord each prong of this test equal weight: "If there is a particularly overwhelming showing in at least one of the factors, the Commission may find that a stay is warranted notwithstanding the absence of another one of the factors."[4] For example, "[i]f the petitioner makes a strong showing of likely success on the merits, it need not make a strong showing of irreparable injury."[5]

## BACKGROUND

On August 9, 2013, at its August Open Meeting, the Commission voted to adopt new interstate calling rates and ongoing rate-review regulation for inmate telecommunications services by a 2-1 vote. On September 26, 2013, the Commission released the *Inmate Rate Order* which requires inmate calling service ("ICS") providers to establish cost-based rates and sets forth an interim rate regime consisting of both safe harbor rates and rate caps. The new rates and other rules are codified in Rules 64.6000 – 64.6060. They include:

### 1. Inmate Calling Rates (Rules 64.6020 and 64.6030)

The *Inmate Rate Order* sets "safe harbors" and "interim rate caps" for interstate inmate calls, allowing for slightly higher rates on collect calls than on debit calls due to the increased costs of billing and uncollectible revenue inherent in a collect environment. The rates are:

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3 *TRS Services*, 23 FCC Rcd. at 1706 ¶ 2; *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 2.

4 *TRS Services*, 23 FCC Rcd. at 1707 ¶ 4.

5 *Charter Commc'ns*, 22 FCC Rcd. at 13892 ¶ 4.

| | Call Type | Per-Minute | 15-Minute Total |
|---|---|---|---|
| **Safe Harbor** | Debit | $0.12 | $1.80 |
| | Credit | $0.14 | $2.10 |
| **Interim Rate Cap** | Debit | $0.21 | $3.15 |
| | Credit | $0.25 | $3.75 |

In addition to setting these rates, the Commission has decided that inmate telecommunications service providers no longer may recover the cost of site commission payments in their calling rates.[6]

**2. Prohibition on Call-Blocking (Rule 64.6050)**

Inmate telecommunications service providers must complete collect calls to persons with whom no billing relationship exists. This prohibition will not apply from correctional facilities at which a prepaid calling option was offered prior to the inmate's placing the collect call.

**3. Reporting Requirements (Rule 64.6060)**

All inmate telecommunications service providers must provide reports to the Commission stating the number of both interstate and intrastate calling minutes provided in the previous year. That data must include per-call charges, per-minute charges, and the average duration of the calls. The providers must also state the number and the percentage of inmate telephone calls that were terminated for reasons other than a party hanging up the handset. The reports must be certified by an officer of the company.

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6 *Inmate Rate Order* ¶¶ 54-58.

## ARGUMENT

### I. SECURUS IS LIKELY TO PREVAIL IN ITS APPEAL OF THE *INMATE RATE ORDER*

The first prong that the Commission considers in determining whether to stay the effectiveness of new regulations during the pendency of the appeal is the likelihood of success on the merits.[7] The *Inmate Rate Order* is likely to be overturned on any of the several independent grounds discussed below. Securus amply satisfies this prong.

A court of appeals reviewing the Commission's action in the *Inmate Rate Order* will evaluate Commission action under the strictures of 5 U.S.C. § 706 which states, in pertinent part:

> ... The reviewing court shall –
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

As demonstrated herein, the *Inmate Rate Order* is likely to be found unlawful pursuant to subsections (A), (B), (C), (D), and (E).

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[7] *TRS Services*, 23 FCC Rcd. at 1706 ¶ 4; *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 2.

### A. The Inmate Rate Order Imposes New and Complex Rate Regulations Without Notice

The *Inmate Rate Order* adopts a novel "cost-based" ratemaking methodology that was neither raised in the NPRM nor discussed in the record and is therefore subject to being set aside pursuant to 5 U.S.C. § 706(2)(D). The NPRM simply sought further comment on the Martha Wright $0.20/$0.25 per-minute rate proposal that was raised via Alternative Petition for Rulemaking in 2007.[8] The NRPM refers repeatedly to "rate caps",[9] "per-minute rate caps",[10] and the "Alternative Wright Petition".[11] And though the *Inmate Rate Order* states that the "Commission sought comment on ways of regulating ICS rates based on the costs of providing ICS" as part of the NPRM in this docket, its own record citations prove otherwise.[12] Quite contrary to the Commission's assertion in the *Inmate Rate Order*, the citations prove that the Commission sought cost information in the context of evaluating various proposals for what level of rate caps would be "just and reasonable." There simply was no indication there that the Commission was considering the potential of requiring ICS providers to prove that their rates were cost-based, even if those rates fellow below whatever rate cap the Commission might adopt. The FCC thus failed to provide the requisite notice under the APA[13] and interpretive

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8 WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Notice of Proposed Rulemaking, FCC 12-167 ¶¶ 14-15 (rel. Dec. 28, 2012) ("*Inmate Rate NRPM*"). Petitioners requested a rate of $0.20 per minute for prepaid interstate calls and $0.25 per minute for collect interstate calls.

9 *E.g.*, *Inmate Rate Order* ¶¶ 13, 17, 23, 24, 28.

10 *E.g.*, *id.* ¶¶ 20, 21, 22.

11 *E.g.*, *id.* ¶¶ 17, 21, 22, 30.

12 *See id.* ¶ 50 & n.191.

13 "General notice of proposed rule making shall be published in the Federal Register," and such notice shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b).

precedent[14] that ongoing rate regulation, with periodic mandatory cost-based justification, could be adopted here.

Cost-based regulation with rate caps is not only a surprise, it is unnecessary and imposes heavy burdens on ICS providers and ultimately the Commission. This unexpected burden offends the basic notion of notice and comment rulemaking. Having not appeared in the NPRM, it was never the subject of active discussion during the comment period. Had it been afforded the opportunity, Securus would no doubt have explained the hazards of this hybrid rate-setting approach. But on this proceeding's record, it cannot be reasonably argued that the record provides the Commission with thoughtful presentations as to why cost-based regulation coupled with rate caps is or is not appropriate.[15] As such, the FCC lacks a record on this issue and will be unable to show sufficient evidence to support its decision.[16]

### B. The *Inmate Rate Order* Is Fatally Vague in Describing the Rate Regulation It Imposes

The FCC has imposed a form of rate making that is inexplicable and amorphous. At the least, it is a rate regime heretofore unseen. It is something akin to rate-of-return regulation, something that has not been used in the long distance market since 1989, but also has elements of a rate cap. The Commission describes it in the Further Notice of Proposed

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[14] *Forester v. Cons. Prod. Safety Comm'n*, 559 F.2d 774, 787 (D.C. Cir. 1977) ("sufficient notice ... affords interested parties a reasonable opportunity to participate in the rulemaking process.").

[15] The *Inmate Rate NRPM* asks about the potential of applying the cost methodology that applies to **public pay phones**, *Inmate Rate NPRM* ¶ 26, but that methodology is never mentioned in the rules that the Commission adopted. Rather, as Securus explains in this section, the Commission combined ***two other methodologies*** to create a wholly new system of rate making. The Commission's failure to give proper notice is also indicated by the fact that the *Inmate Rate NRPM* never mentions the potential for a "safe harbor" for rates. A safe harbor is unnecessary in a "rate cap" environment, in which the only thing that matters is whether the provider's rates are below the required cap.

[16] *See* 5 U.S.C. § 706(2)(E).

Rulemaking ("FNPRM") only as "historical".[17] Thus, at a minimum, the new regulations are so vague as to warrant reversal on that ground alone.[18]

Even if a court of appeals was to reach past the threshold vagueness issue to review the rules substantively, reversal would be required due to their unreasonable, even nonsensical, structure. From what Securus can glean in the *Inmate Rate Order*, the Commission's new rate system for ICS service combines the ***worst*** of both worlds.

Under rate-of-return regulation, a carrier is ensured a rate of return that is aimed at ensuring continued business viability.[19] Rate-of-return local exchange carriers, for example, benefit from a 11.25% rate-of-return target.[20] Here, however, no such assured returns exist. Rather, the Commission purports to have used an 11.25% return as part of calculating the rate caps,[21] but makes no finding that this 11.25% rate-of-return is "appropriate in this context." The refusal to say that the return would be reasonable portends a future in which an ICS provider may well be subject to a rate proceeding only to be found to have over-earned even if its rates were under the rate caps and the provider used a cost-based methodology. In short, the Commission suggests that ICS providers are entitled to a "reasonable profit," but then leaves them without sufficient guidance as to what that means.

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17 *Inmate Rate Order* ¶ 163.

18 *See, e.g., Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (FCC directions that were too vague to provide regulated parties with sufficient notice of required conduct were vacated).

19 *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd. 7507, 7532 ¶ 213 (1990) ("It is well established that rate of return prescription under the 'just and reasonable' standard requires a balancing of ratepayer and shareholder interests. The regulated company must be allowed the opportunity to earn a return that is high enough to maintain the financial integrity of the company and to attract new capital to the business.") (citations omitted).

20 *Id.* ¶ 216.

21 *Inmate Rate Order* n.203.

But worse, the Commission then adds "interim" rate caps into the mix. Rate caps were, after all, what the Wright Petitioners requested and what the NPRM proposed. Thus, the Commission apparently decided it needed to purport to be applying a rate cap in theory, even if it was not applying it in practice. And, indeed, the rate caps will mean little in practice, because an ICS provider can only charge rates consistent with the rate cap if it shows that the rate is cost-justified. Thus, if the provider's costs decline, the Commission ***requires*** the carrier to reduce its rates ***again***, even though the rates are already below the cap. The result: ICS providers will no longer have an incentive to innovate or to improve efficiency.[22]

If the ICS provider must relinquish the benefit of its efficiency gains, and in the same time reduce its total revenue, then it is given little incentive to continue innovating.

A simple example will demonstrate. To begin, a rate cap is a form of rate regulation that simply assigns what an agency believes is a reasonable end user price for service and enables carriers to arrange their costs, and other sources of revenue, in a manner that maximizes profit.[23] Consider Provider A which has costs of $1 million. Assuming, *arguendo*,

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[22] The Commission previously appreciated this reality. *Cf.* CC Docket No. 92-77, *In re Billed Party Preference for Interlata 0+ Calls*, Second Report and Order and Order on Recon., 13 FCC Rcd. 6122, 6156 ¶ 59 (1998) ("If we set caps or benchmarks, carriers would have little incentive to contract to offer services at a lower rate.").

[23] *See, e.g., Implementation of Local Competition Provisions in Telecommunications Act of 1996*, 16 FCC Rcd. 9151, 9155-56 ¶ 7 (2001), *remanded by WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2001) (setting rate caps for intercarrier compensation on ISP-bound traffic where the Commission wanted carriers to collect more revenue from end users than from other carriers and "emphasiz[ing] that ***the rate caps we impose are not intended to reflect the costs*** incurred by each carrier that delivers ISP traffic. Some carriers' costs may be higher; ***some are probably lower***. Rather, we conclude, based upon all of the evidence in this record, that these rates are appropriate limits on the amounts recovered from other carriers and provide a reasonable transition from rates that have (at least until recently) typically been much higher.") (emphasis added); *see also* CC Docket No. 87-313, *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786, 6789-91 ¶¶ 22-37 (1990) (explaining the justification for establishing price cap regime for certain local exchange carriers and establishing rules that allowed LEC's profits to increase if the LEC improves efficiency and stating "[b]y

the Commission at some point formally declared an 11.25% rate of return reasonable, the provider would set rates that produced $112,500 in returns (assuming those rates comport with the rate cap).

Assume now that Provider A could implement efficiencies that would reduce its costs to $900,000. If Provider A pursued those efficiencies, with an 11.25% rate of return, it now would be required to set its rates for a return of $101,250. Thus, once a carrier has been able to constrain its costs sufficiently to get below the rate caps, the new rules eliminate any incentive to innovate and, in many cases, even to compete for contracts. Decreased competition among competent firms does not enhance consumer welfare.

It bears mention that the FCC has not regulated long distance services to this degree in almost 25 years. Until that time, AT&T was subject to rate-of-return review as the sole provider of retail long-distance service in the United States. The Commission realized in 1989, however, that rate-of-return was not only "difficult and complex" but also "has certain inherent flaws."[24] Moreover, the Commission found this type of regulation unnecessary "in an environment marked by competition and technological change."[25] Here, the FCC's record demonstrates that the inmate telephone service industry also boasts of significant competition and dramatic technological advancements. And unlike AT&T and the other rate-of-return

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establishing limits on prices carriers can charge for their services, and placing downward pressure on those limits or 'caps,' we create a regulatory environment that requires carriers to become more productive. ***Carriers that can substantially increase their productivity can earn and retain profits at reasonable levels above those we allow for rate of return carriers***, although earnings above a certain level are shared or returned. If carriers fail to become more productive, they risk seeing their earnings erode. Rate of return regulation lacks incentives for carriers to become more productive.") (emphasis added).

[24] *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd. 2873, 2890-91 ¶¶ 31, 33 (1989).

[25] *Id.*, 4 FCC Rcd. at 2891 ¶ 34.

incumbents whose costs were analyzed across an entire region, Securus's costs must be reviewed on a contract-by-contract basis, resulting in regulation unprecedented in its granularity and burdensomeness.[26] Adoption of such intrusive regulation on an indefinite basis inexplicably reverses the Commission's desire to avoid hyper-regulation and is thus unreasonable, unwarranted, and unsupportable.

### C. The *Inmate Rate Order* Unlawfully Impairs Existing Contracts

The *Inmate Rate Order* is likely to be set aside on review, because it interferes with thousands of existing ICS contracts without meeting the necessary legal standards. While the Commission blithely asserts that it is not abrogating existing contracts,[27] this statement ignores the inescapable effect of the Commission's new ICS pricing rules and its long-understood and endorsed policy that ICS rates were to set by negotiated contract between correctional facilities and ICS providers.

The *Inmate Rate Order* interferes with existing contracts in exactly the two fundamental ways that Securus anticipated.[28] First, it ignores that ICS service contracts generally include the *rate* that will be charged for ICS services at correctional facilities – the very thing the Commission now purports to regulate under a wholly different standard. The record was abundantly clear and undisputed that rates for these services have been established by contracts resulting from competitive bidding processes and that nearly all of those contracts will

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[26] Securus is aware that the Commission prefers to review the costs of inmate service on an aggregated basis "at the holding company level." *Inmate Rate Order* ¶ 83. That type of review is itself arbitrary, capricious, and unreasonable, because it ignores the reality of this market, as reflected in the record and the Order, that rates are derived on a contract-by-contract basis. Such aggregated review encourages, if not requires, national cross-subsidization across all facilities. *See* Section I.F., *infra*.

[27] *Inmate Rate Order* ¶ 100.

[28] Securus Initial Comments at 13.

remain in effect for months or years beyond when the new rate regulations take effect.[29] Secondly, the FCC now is effectively prohibiting inmate telecommunications service providers from recovering the cost of site commission payments through their calling rates.[30]

*Sierra-Mobile* requires the Commission to make explicit findings of public interest to justify the intrusion into existing contracts and findings of unlawfulness to modify rates set forth in private contracts.[31] As the Commission observed in *IDB v. COMSAT*, "[t]he threshold for demonstrating sufficient harm to the public interest to warrant contract reformation under the *Sierra-Mobile* doctrine is much higher than the threshold for demonstrating unreasonable conduct under Sections 201(b) and 202(a) of the Act."[32] The Commission also has recognized that the doctrine would apply not just to contracts between two carriers, but also to the Commission's intrusion into contracts between a carrier and a non-carrier.[33] Specifically with regard to private contracts that contain rates for public utilities, "the Commission must make a finding that [the rates] are 'unlawful' according to the terms of the governing statute ..." before it is authorized to modify those rates.[34]

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29 Securus Initial Comments at 13.

30 *Inmate Rate Order* ¶¶ 54-58.

31 *See Texaco, Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998) (an agency's "rulemaking authority requires only that it point to a generic public interest in favor of a proposed rule; the public interest necessary to override a private contract, however, is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect.")

32 *IDB v. COMSAT*, File No. E-97-48, 16 FCC Rcd. 11474, 11480 ¶ 15 (2001).

33 *Ryder Communications, Inc. v. AT&T Corp.*, File No. EB-02-MD-038, 18 FCC Rcd. 13603, 13614 ¶ 24 & n.78 (2003).

34 *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501, n.2 (D.C. Cir. 1987)

Although the Commission seems to recognize, at least in part, the standard that is required to interfere with existing contracts,[35] it completely fails to make the findings necessary to meet the standard established in the cases applying *Sierra-Mobile*. Indeed, it appears that the Commission expressly denied that the Order abrogates contracts precisely because it could not meet the *Sierra-Mobile* standard. Instead, the Commission makes broad pronouncements about what it could do or what "would be in the public interest," while explicitly *not* making the required findings. In short, the *Inmate Rate Order* swings an axe where the *Sierra-Mobile* doctrine requires a surgical scalpel. The Commission's intrusion into private contracts is therefore unlawful and likely to cause the *Inmate Rate Order* to be set aside upon review.

### D. The *Inmate Rate Order* Exceeds the Commission's Authority

It is axiomatic that when a regulatory agency adopts rules that exceed its statutory jurisdiction, a reviewing court must vacate the agency's action.[36] Here, the *Inmate Rate Order* exceeds the Commission's jurisdiction in two independent ways. First, the Commission improperly intrudes into the regulation of correctional facilities. Second, the Commission purports to regulate ancillary services over which it has no jurisdiction.

#### 1. The Commission improperly interferes with state and local corrections operations and policies.

The FCC has exceeded its authority in the *Inmate Rate Order*. It has adopted rates that will prevent Securus, and likely other inmate telephone service providers, from paying the site commissions on which state and local correctional authorities rely. In effect, the Commission abolished site commissions, prohibiting them from being passed through by rule and preventing them in practice via slashed calling rates. This action not only improperly

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35 *See Inmate Rate Order* n.365.

36 5 U.S.C. § 706(2)(C).

interferes with existing contracts, but it interferes with the operations and policies of state and local corrections authorities which rely on that revenue. Securus attempted to forewarn the Commission of this problem in its Comments.[37]

The decision to impose site commissions lies in the authority of state and local governments. The FCC never disputed the record evidence that site commissions are mandated by contract, if not state statute. The Commission is likewise aware of the uses to which site commission revenue is put, many of which inure directly to the benefit of inmates.[38] Now, in proscribing and preventing the payment of site commissions, the FCC has encroached on that authority. And in preventing carriers from paying site commissions, the FCC has changed the manner in which facilities operate and the services that they can provide. This action is, as Securus has explained in the docket, beyond the FCC's purview.[39]

In addition, the *Inmate Rate Order* prohibits ICS blocking calls to destinations in which the ICS provider has no billing relationship *unless* the facility agrees to permit an alternative to collect calling.[40] The decision of whether to have a collect calling alternative, however, has been *entirely* within the purview of the correctional facility and is not controlled by Securus. This new prohibition against call blocking therefore interferes with the decision-making authority of the correctional institution and requires Securus effectively to render free

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37 Securus Initial Comments at 8-10 (citing *Miranda v. Michigan*, 141 F. Supp. 2d 747 (E.D. Mich. 2001); *McGuire v. Ameritech Svcs., Inc.*, 253 F. Supp. 2d 988 (S.D. Ohio 2003); *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001)).

38 *See* Smith Affidavit ¶ 6.

39 *E.g.*, *Arsberry*, 244 F.3d at 566 ("[s]tates and other public agencies ... have to get revenue somehow, and the 'somehow' is not the business of the federal courts unless a specific federal right is infringed."); *McGuire*, 253 F. Supp. 2d at 1007 ("when the ODRC establishes a collect calling telephone system in an Ohio correctional institution, that is the clear and articulated policy of Ohio.").

40 *Inmate Rate Order* ¶¶ 113-14.

services to inmates if the correctional facility does not agree to adopt an alternative to traditional collect calling. The Order is thus likely to be vacated, set aside, or reversed on this additional ground.

### 2. The Commission has no authority over ancillary fees.

The *Inmate Rate Order* imposes new "cost-based" rate regulation on ancillary fees that are charged in conjunction with ICS services. Though it does not set exact fees or caps, it states that it can and will subject a carrier to a rate investigation where they allegedly are not "cost-based".[41] As Securus articulated in its Reply Comments[42] and again in its Supplemental Reply Comments in response to the Commission's request for more data,[43] the Commission's statutory authority does not extend to financial transactions. Thus, the decision to impose regulation on ancillary fees is *ultra vires* and likely to be set aside on review.

## E. The *Inmate Rate Order* Imposes Below-Cost Rates

The *Inmate Rate Order* sets a maximum rate of $0.21 per minute for calls that are prepaid by an account or calling card, and $0.25 per minute for collect calls. And though a per-call charge or call set-up charge is permitted, the total price of a 15-minute call must not exceed the product of these per-minute rates multiplied by 15. The immediate and unavoidable result is that the Order purports to adopt cost-based regulation but sets rate caps that are well below the costs Securus incurs to provide service nearly all of its locations.

Through the sworn Expert Report of Stephen E. Siwek, Securus provided cost information that included data which, the Commission acknowledged, was categorized

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41 *Inmate Rate Order* ¶¶ 92, 91.

42 Securus Reply Comments at 16.

43 Securus Supplemental Reply Comments at 1-3 (July 24, 2013) (responding to WC Docket No. 12-375, DA 13-2445, Public Notice, *More Data Sought on Extra Fees Levied on Inmate Calling Services* (June 26, 2013)).

"according to type and size of facility."[44] The Report demonstrated that smaller facilities are orders of magnitude more expensive to serve than larger facilities, especially state-run penitentiaries. The *Inmate Rate Order* dismisses these differences in cost structure by observing that smaller facilities "hold only a very small share of inmates nationally."[45]

That statement is problematic for a few reasons. First, the fact that small facilities hold few inmates was precisely Securus's point. Smaller facilities are disproportionately more expensive to serve, because they require many of the same infrastructure investments as larger facilities, but have lower call volumes over which to spread those costs. Thus, the Commission's decision to set rate caps based entirely on the costs of serving larger prison facilities under statewide contracts[46] erroneously ignores the record evidence that demonstrates that smaller sites, such as jails in rural areas, produce significantly higher costs.[47] The Commission's failure to address Securus's evidence, which was one of two cost data reports from the industry,[48] is a failure of "reasoned decisionmaking" and thus constitutes reversible error.[49]

Further, the failure to fully consider and analyze the record evidence regarding site commissions that are imposed by contract or state law has also caused the Commission to set

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44 *Inmate Rate Order* ¶ 26.

45 *Id.*

46 *See id.* ¶ 62 (setting rates based on data from bid submissions for "seven states that have excluded site commission payments from their rates").

47 The second unavoidable error flowing from the Commission's "small share of inmates" statement is that the Commission, in order to shoe-horn the entire country into one rate, has effectively mandated cross-subsidization between large prisons and small facilities which is itself an unreasonable decision. *See* Section I.F., *infra*.

48 CenturyLink also provided cost data for its calling rates. *Inmate Rate Order* ¶ 68.

49 *E.g.*, *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1232 (D.C. Cir. 1980) (partially vacating FCC order as to private line rates); *see also id.* at 1231 ("the FCC failed to take a sufficiently careful look at the problem presented") .

rate caps that are confiscatory in violation of the Takings Clause of the Fifth Amendment.[50] The *Inmate Rate Order* states that inmate telephone service providers may not include mandatory site commission payments as a cost of providing interstate calling service, and then sets rates that, as the record amply shows, will prevent providers from recouping those payments. In the parlance of utility regulation, it will now be unlawful for carriers to "pass through" the cost of site commissions. Simply put, the FCC deliberately set rates that are below Securus' costs to a staggering degree.

Stephen Siwek analyzed what would be the effect on Securus if the FCC were to adopt a prohibition on site commission pass-through. His sworn report, filed contemporaneously with Securus's comments, showed that eliminating site commission pass-through would render rates below cost by as much as 438%. The Commission's disregard of this evidence is likely to result in *vacatur* of the *Inmate Rate Order*.

### F. The *Inmate Rate Order* Effectively Mandates Cross-Subsidization Nationwide and Among All Facilities

Finally, the Commission's failure to take into appropriate consideration the disparate costs of providing service to smaller facilities, especially those located in more rural locations, creates an unreasonable cross-subsidization that the Commission's Order fails to acknowledge or justify. Although the Commission sought information about how rates, call volumes, and costs vary at facilities across the country,[51] it simply ignored the data that was provided when it came to establishing the rate caps. That data, there can be no dispute, showed that costs to provide service to smaller facilities, which have lower call volume, were higher for

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50 "The Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *see also Verizon Commc'ns v. FCC*, 535 U.S. 467, 481 (2002) (rates must be "sufficiently reasonable to avoid unconstitutional confiscation").

51 *E.g.*, *Inmate Rate NRPM* ¶ 26.

Securus and other providers of ICS services at smaller facilities.[52] The record also demonstrates the fundamentally different calling patterns and cost structure at jails, which typically house individuals for short periods of time, as opposed to state prisons.

The Commission ignored the record evidence and adopted a "one size fits all" approach that is arbitrary and capricious. Moreover, it unreasonably has coupled this "one size fits all" approach with a waiver standard that carriers are unlikely to meet.[53] The result is a policy that not only ***permits*** but ***requires*** nationwide cross-subsidization of ICS services.[54] This cross-subsidization contravenes the mandate of section 276, which expressly requires fair compensation for "each and every" call,[55] and the Commission's own oft-repeated policy against cross-subsidization.[56] Here, the Commission not only fails to justify the cross-subsidization, it never even acknowledges that it is the necessary outcome of its new rules. Inmates at prisons will now be required to subsidize the calls of those in jail, and larger prisons will be required to

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52 *See Inmate Rate Order* ¶ 26 (describing and citing to the data provided by Securus).

53 The Commission's indicates that it will only entertain waiver requests of the rate cap on a holding company basis. *Inmate Rate Order* ¶ 83. Thus, there is no way to obtain a waiver of the rate cap for a particular high-cost facility. The result is a requirement that Securus subsidize that service to high-cost facilities in the short term. *See id.* ¶ 123 (requiring cost averaging "on the basis of either the whole of its ICS business or by groupings that reflect reasonably related cost characteristics"). In the long term, Securus will choose between continuing to subsidize the service or cease providing service to the facility all together.

54 This, of course, assumes incorrectly that all of the higher cost correctional facilities will continue to be able to contract with ICS provider to provide services at their facility.

55 47 U.S.C. § 276.

56 *See, e.g., Local Competition Order*, 16 FCC Rcd. at 9192 ¶ 87 (finding no public policy reason for basic telephone users to subsidize dial-up Internet access users); *Billed Party Preference Order*, 13 FCC Rcd. 6122, 6154 ¶ 55 (finding cross-subsidization with regard to operator services "would inhibit competition" and is "contrary to [the Commission's] policies."); *id.* ¶ 61 (finding cross-subsidization with regard to prison phone service would be contrary to Commission policy).

subsidize the costs of ICS for smaller prisons. In addition, revenue generated from local and intrastate inmate calling services will now subsidize interstate services.

The Commission's lack of reasoned analysis in all of these matters renders the *Inmate Rate Order* an arbitrary and capricious decision that is likely to be vacated, reversed, or set aside.

## II. SECURUS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

As the foregoing discussions make clear, Securus is likely to prevail on the merits of its appeal, a factor that strongly weighs in favor of granting the requested stay.[57] Securus also amply satisfies the second prong of *Virginia Petroleum Jobbers*, because it will suffer irreparable harm if the *Inmate Rate Order* becomes effective.

The harm that Securus will suffer if the *Inmate Rate Order* becomes effective prior to appellate review is of several types: (1) being forced to continue paying mandatory site commissions during the duration of its existing contracts without the ability to recover those costs; (2) the Herculean task of re-negotiating more than 1,700 contracts; (3) being forced to provide interstate calling service at below-cost rates; (4) compliance with the extremely onerous reporting requirements; and (5) the almost unavoidable, highly burdensome rate investigations that the *Inmate Rate Order* invites.

### A. Securus Will Be Unable To Recover the Cost of Mandatory Site Commissions Under Its Approximately 1,800 Contracts

The *Inmate Rate Order* sets rate caps that preclude Securus from recovering the cost of mandatory site commissions. Despite acknowledging that site commissions are an express term of service contracts, the *Inmate Rate Order* boldly asserts that it does not "explicitly

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[57] *Charter Commc'ns*, 22 FCC Rcd. at 13892 ¶ 4.

abrogate any agreements between ICS providers and correctional facilities."[58] "Explicitly" or not, the Commission's new policy leaves Securus and other ICS providers in the untenable position of having contractual, and sometimes statutorily imposed, obligations to pay millions of dollars in site commissions without any possibility of recoupment.

Further, although the Commission encourages "voluntarily renegotiation,"[59] there is no recourse for Securus if a correctional facility declines the Commission's invitation to voluntarily relinquish its contractual rights to funds that are allocated for anti-recidivism programs and other penological purposes. The result could be that nonpayment would be deemed a breach and expose Securus to hundreds of claims. At the least, failing to pay site commissions will endanger Securus's goodwill in a very competitive market, a harm that courts have deemed sufficient to support entry of a stay.[60]

This need, or contractual obligation, to continue paying site commissions without possibility of recoupment is another form of irreparable harm that warrants a stay of the Report and Order.

### B. Securus Will Be Unable To Renegotiate The More Than 1,700 Contracts Affected By The *Inmate Rate Order* In The Allotted 90-day Period

Having wholly modified the method by which ICS rates are set, abandoning a market-based approach in favor of a heavily-regulated process, and in many instances requiring Securus to assess below-cost rates for interstate calls, the *Inmate Rate Order* provides carriers with a scant 90-day period in which to implement the new rate caps. Existing rates are, however,

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58 *Inmate Rate Order* ¶ 101.

59 *Id.* ¶ 102.

60 *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Svcs.*, LLC, 425 F.3d 964, 970 (11th Cir. 2005) ("'the loss of customers and goodwill is an irreparable injury'") (staying FCC *Triennial Review Remand Order*) (internal citation omitted).

generally included as express terms of service contracts.[61] The Commission recognizes that only some "contracts may include change-of-law provisions" but then nevertheless appears to proceed under the assumption that ICS providers can insist on modifying their existing contracts to meet the Commission's new rules or, perhaps more accurately, arbitrary ignores that many ICS providers have no ability to demand immediate renegotiation of contract terms. In most cases, Securus has no such right and will therefore be at the mercy of the correctional facilities in seeking to implement negotiated changes to the existing rate structure.[62]

Even if Securus had the right to demand renegotiation of all or even most contracts, it is a practical impossibility. Securus asserted in its comments that it would be impossible for it to renegotiate its contracts in the one year period proposed by Petitioners.[63] The *Inmate Rate Order* never denies this assertion or the supporting evidence provided by Securus. Of its approximately 1,800 contracts, **95%** would require amendment.[64] And even prior to seeking renegotiation, where permitted, Securus must calculate its costs on a contract-by contract basis to understand whether its cost would support charging the safe harbor, the interim rate cap, or perhaps some other rate.

No company could reasonably be expected to change 1,000+ contracts in 90 days. Indeed, Securus estimates that it will take approximately **20 person hours per contract** to complete analysis, negotiation and contract amendment, so approximately **19 person years of**

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61 Smith Affidavit ¶ 7.

62 *Id.* ¶ 10.

63 *Securus Initial Comments* at 11 (citing Hopfinger Decl. ¶ 3); *see also Inmate Rate NRPM* ¶ 45.

64 Smith Affidavit ¶ 11.

**work** for all 1800 contracts.[65] The *Inmate Rate Order* thus purports to mandate an impossibility. It "essentially is setting Securus up to fail."[66]

Moreover, as a practical matter, if Securus were to seek a waiver of the interim rate cap so as to avoid providing below-cost service, it would need to complete that process before it could practicably complete contract renegotiations to modify the rates established in its existing contracts. It is virtually impossible to believe that a waiver request could be filed, briefed, and decided by the Wireline Competition Bureau in the 90-day period provided in the Order, much less also engage in thousand of contract renegotiations. All of this uncertainty and delay will bring the ICS industry to a standstill. For this additional reason, Securus will be severely harmed if a stay is not entered.

### C. Securus Will Be Forced To Provide Below-Cost Service Under The New Rates

The filings made by Securus clearly establish that its cost of providing service to many correctional facilities are well above the rate caps established by the *Inmate Rate Order*, even removing site commissions from the cost base. Although the Order purports to establish a waiver process for situations in which the carrier can demonstrate that the rate caps are insufficient to meet its costs on a holding company basis, as Securus noted above it is not practicable to prepare, file, and conclude a necessary request for waiver in the 90-day period provided in the *Inmate Rate Order*.[67]

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65 Smith Affidavit ¶ 10.

66 *Id.*

67 The Commission may believe that the inclusion of a waiver option in the Order would prevent Securus from showing irreparable harm. However, the waivers as described in the *Inmate Rate Order* are ineffective in preventing irreparable harm, for two interrelated reasons. First, the rules provide no time limit in which waivers will be evaluated. Secondly, during this unknown time period in which a waiver request would be pending, Securus would be required to

Thus, although Securus already has demonstrated to the Commission that hundreds of its sites have costs that exceed the adopted rate cap, if not stayed the Commission's order would require Securus to accept those below-cost rates for an extended period of time while it goes through a proceeding with the Wireline Competition Bureau, which, of course, is under no requirement to act within any given time period. The harm that would flow from Securus's inability to complete a waiver request, and thus be forced to provide below-cost service, before the effective date of the *Inmate Rate Order* is another form of irreparable harm that warrants a stay.

### D. The *Inmate Rate Order* Subjects Securus To New Regulatory Reporting Requirements In Less Than Six Months

The *Inmate Rate Order* imposes new requirements to report annually on several aspects of their rates and costs, minutes of use, as well as average call duration.[68] In addition, ICS providers must submit information regarding call terminations, the reason or cause for the termination, and data regarding ancillary charges. The first filing deadline is April 1, 2014.

The Commission opines that these additional reporting requirements will be "minimally burdensome."[69] According to Mr. Smith, they actually are extremely burdensome.

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assess rates below the interim rate cap, even if those rates are insufficient to meet Securus's costs.

Moreover, the potential for a waiver from the rate caps is illusory as a practical matter and itself presents additional burdens. For example, the Commission fails to consider as a practical matter how an ICS provider will be able to determine obtain a waiver in the time period typically permitted to respond to requests for competitive bids. Thus, Securus will be faced with the dilemma of either competing for a contract without knowing how much it will be permitted to charge or foregoing the opportunity to bid. With regard to pre-existing contracts, Securus must accept below-cost payments until it can obtain a waiver and re-negotiate its contracts. Then, because it is required to publish and/or its calling rates at each institution, a later-approved waiver would require Securus to duplicate its notification efforts.

68 *Inmate Rate Order* ¶¶ 116-17, 124-26; Rule 64.6060.

69 *Inmate Rate Order* ¶ 117.

Securus estimates that providing the detailed reports that the FCC now demands would require the hiring of **an additional 5-10 full-time employees** devoted to making these reports.[70]

The first report will be due during the pendency of the forthcoming appeal, and yet the requirement very well may be vacated on appeal. Thus, compliance with Rule 64.6060 would result in unrecoverable losses. This problem presents an additional example of the irreparable harm that will result absent a stay.

### E. The *Inmate Rate Order* Subjects Securus To Multiple, Potentially Endless Rate Proceedings

The *Inmate Rate Order* states that the new rules are effective 90 days after Federal Register publication. On the 91st day, any consumer can lodge a complaint with the FCC and initiate a full rate investigation proceeding against Securus. If the rates charged by Securus exceed the safe harbor at even a single location, Securus will not be entitled to the protection of the safe harbor ***even for locations where its rates are within the safe harbor.***[71] And because each Securus contract carries its own calling rates, each consumer complaint could trigger a different proceeding with Securus having the burden of production and persuasion in each case.

The burden that a rate-of-return investigation imposes cannot be overstated. They require submission of reams of cost and operational data, as well as expert analysis. The FCC

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70 Smith Affidavit ¶ 13.

71 *Inmate Rate Order* n.226 & 429. This decision suggests that the Commission will entertain complaints on a location-by-location basis. That type of location-based review, however, is inconsistent with the manner in which the Commission discusses costs in other parts of the Order. For example, the Order states that requests for waiver will be reviewed "at the holding company level," *id.* ¶ 83, and indicates that an ICS provider is entitled to "fair compensation" only on an ***aggregated basis***, *id.* ¶ 123.

itself has called rate-of-return review "an administrative quagmire for the industry and for this agency."[72]

Securus never has participated in a rate-of-return proceeding.[73] It does not have the human resources that may be required to address these inquiries and estimates that it would be required to hire **5-20 new full time highly-skilled employees** for these tasks alone.[74] In a word, the *Inmate Rate Order* creates a regulatory morass, the likes of which have not been seen in the retail market for decades, and which will immediately impose enormous, unrecoverable costs if permitted to go into effect. For this additional reason, Securus will suffer irreparable harm absent a stay.

## III. THIRD PARTIES WILL NOT BE HARMED BY A STAY

With regard to the third prong of *Virginia Petroleum Jobbers*, the Wright Petitioners and other consumers of ICS will not be materially harmed by a stay of the *Inmate Rate Order*. As an initial matter, the Wright Petitioners did not envision or advocate the ongoing, cost-based rate review that the Commission has established here. Suspension of that regulatory regime thus would not deprive them of any expected relief in that regard.

Further, the Wright Petitioners did not advocate for new rate caps to become effective within 90 days. Rather, their proposal suggested a "fresh look" period of one year, four times the period the Commission ultimately provided in the *Inmate Rate Order*, for ICS providers to review and adjust their contracts.[75] Others agreed that 6 months was a minimally reasonable time period for implementation of the new rates, unless contracts were earlier

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72 *Authorized Rate of Return for the Interstate Services of AT&T Commc'ns and Exchange Telephone Carriers*, 49 Fed. Reg. 32871, 32872 ¶ 4 (1984).

73 Smith Affidavit ¶ 12.

74 *Id.*

75 *Inmate Rate NRPM* ¶ 45.

negotiated.[76] The record therefore demonstrates that more than 90 days would be required to implement the changes that were then under consideration.

In addition, the drastic, almost immediate rate cuts that the *Inmate Rate Order* imposes, coupled with the danger of decreased competition and unpaid site commission revenue, pose a much greater harm to the public than would a stay pending review. A 78% decrease in rates may seem attractive at first blush, but the competitive and operational repercussions would quickly overshadow it.

## IV. THE PUBLIC INTEREST FAVORS A STAY

Finally, a stay will satisfy the fourth prong of *Virginia Petroleum Jobbers*, because the public interest will be gravely impaired if the *Inmate Rate Order* becomes effective. Most obviously, public will be harmed because the FCC has taken two actions that will prevent correctional agencies from obtaining the site commission revenue that was an express part of their RFPs and a material term of their service contracts: first, it has held that site commissions are not a real cost of service for providers and thus cannot be recovered via their rates; secondly, it has set interstate calling rates so low as to preclude site commission recovery even if the FCC would permit it. This loss of revenue will have a significant impact on the operation of correctional facilities. As discussed more below, there are several other public harms that will also flow from the immediate implementation of the *Inmate Rate Order* that support Securus's petition for a stay pending appeal.

### A. Enforcement Of The *Inmate Rate Order* Will Deprive State And County Governments Of Funds Used For Salutary Purposes Such As Victims' Rights Funds And Inmate Welfare

The *Inmate Rate Order* imposes grave harm to third parties, most notably to the

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[76] *See Inmate Rate Order* n.360.

inmates whom the Commission would like to serve and protect. It forbids, as a matter of law, and precludes, as a matter of fact, carriers from remitting site commission revenue on which agencies rely for prison operations, anti-recidivist programs like job training, and financial assistance for indigent inmates. Depriving state, county and local budgets of expected revenue, immediately resulting in either an increased the burden on the public tax base and or diminished inmate welfare, is a serious and irreparable harm to the public interest.

Moreover, contrary to the Order's hopeful prognosis, the deprivation of site commissions also makes it inevitable that the continued advancement of security features and functionalities necessary to maintain public safety inside and outside of the correctional facility will be curtailed in the long run. Service providers will be without the resources to continue to innovate and correctional facilities will be unable to pay for them. Public safety is perhaps the most crucial responsibility for the government to protect and uphold yet it will be undermined without the appropriate resources. Thus, the public interest weighs in favor of a stay.

### B. The Commission Failed To Consider The Possibility That Its Rate Caps Could Lead Correctional Facilities To Deny Inmates Access To Telecommunications Services

In addition to denying inmates access to services that are funded through site commissions, the *Inmate Rate Order* failed to acknowledge the potential that the Commission's decision to impose a rate cap that is below the cost of providing service to smaller facilities, and the elimination of an ISP providers' ability to pass through site commission charges, could result in certain inmates being denied access to the very services that the Commission seeks to make more accessible. With limited budgets and the inability to make up site commissions through other sources, the Commission should take seriously the possibility that correction facilities will revisit its policies on providing regular access to phone services to inmates.

As Securus previously noted, courts have found that there is "no constitutionally

guaranteed right of inmates to use a telephone."[77] Thus, it is not at all clear that smaller facilities that rely on site commissions to provide important services to inmates will continue to make phone services available if the Commission eradicates site commissions. For this reason, the public interest favors maintaining the *status quo* during the review process.

### C. The Harsh, Flash-Cut New Rate Regime In The *Inmate Rate Order* Is Likely To Have A Materially Adverse Effect On Competition

As demonstrated herein, the *Inmate Rate Order* sets rates below cost, abrogates thousands of publicly awarded service contracts, and puts service providers in the impossible position of providing safe and secure service while overhauling their rates and operations in 90 days. Carriers now face an immediate loss of revenue as well as the threat of litigation to remedy the breaches of contract that the *Inmate Rate Order* will create. These harms will be substantial and will gravely imperil the ongoing operations of inmate telephone service providers.

The record at the FCC demonstrates that this industry is fiercely competitive. Rates are decreasing, many costs are decreasing, and margins are not fat. The tremendous financial and operational body-blows that the *Inmate Rate Order* imposes could well drive carriers to choose between acquisition and cessation of service. With a stated goal of fostering competition in the inmate service market, the Commission's new order could well lead to increased consolidation and market exits in situations where ICS service cannot be provided without a loss. As stated in Section I.B. above, a decrease in competition among competent firms does not serve the public interest.

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[77] *Walton v. New York State Dep't of Correctional Svcs.*, 921 N.E. 2d 145, 155 (N.Y. 2009) (citing *U.S. v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000)).

### D. Requiring Securus To Charge Below-Contract Rates, Without A Mechanism To Reclaim The Lost Revenue If The *Inmate Rate Order* Is Reversed, Is Also Contrary To The Public Interest

The Commission has provided no mechanism that would allow ICS providers to recover the difference in rates charged under the *Inmate Rate Order* and its existing contract rates if a court subsequently determines that the *Inmate Rate Order* is invalid. The Commission's precedent provides that a carrier's inability to recover uncollected revenue associated with improper rate reduction orders is not only a harm to the carrier, but also against the public interest.[78] As the Commission has recognized, the effort to recoup the losses caused by enforcing a rate reduction that is later vacated leads to a "waste of time and energy" that is ultimately borne by subscribers to the service.[79] Consistent with this prior precedent, staying the effectiveness of the rate caps and allowing the *status quo* to remain is in the public interest.

### E. Additional Public Interest Considerations Support A Stay

As in the *Comcast Cable* decision, the *Inmate Rate Order* lacks specifics regarding the appropriate calculation of the cost-based rates that the Commission purports to mandate.[80] This lack of specificity, together with the number of potential appeals involved, and "the efficacy of having a uniform resolution imposed" are additional public interest factors that the Commission has previously found to weigh in favor of a stay pending appeal.[81]

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78 *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 3 (granting stay in part on ground that public interest would not be served if Comcast issued refunds to consumers without a mechanism for recouping those funds if order was later reversed).

79 *Charter Commc'ns*, 22 FCC Rcd. at 13893 ¶ 9.

80 *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 3.

81 *Id.*

## CONCLUSION

For all these reasons, the Commission should stay the effectiveness of the Report and Order until the forthcoming appeals from that order are resolved. Securus respectfully requests that this Petition be resolved by **November 21, 2013**.

By: s/Stephanie A. Joyce
Stephanie A. Joyce
G. David Carter
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20036
202.857.6081 DD
202.857.6395 Fax
Stephanie.Joyce@arentfox.com

*Counsel to Securus Technologies, Inc.*

Dated: October 22, 2013

## CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of October, 2013, that the foregoing Petition for Stay of Report and Order Pending Appeal (FCC 13-113) was served via electronic mail on the following persons:

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

Acting Chairwoman Mignon Clyburn
Federal Communications Commission
Mignon.Clyburn@fcc.gov

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

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

Sean Lev
General Counsel
Federal Communications Commission
Sean.Lev@fcc.gov

Julie Veach
Chief
Wireline Competition Bureau
Federal Communications Commission
Julie.Veach@fcc.gov

By: s/Stephanie A. Joyce
Stephanie A. Joyce

# ATTACHMENT

## Affidavit of Richard Smith
## Chief Executive Officer
## Securus Technologies, Inc.
## (October 17, 2013)

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

| | |
|---|---|
| Rates for Interstate Inmate Calling Services | WC Docket No. 12-375 |

## AFFIDAVIT OF RICHARD SMITH

I, Richard Smith, hereby affirm under penalty of perjury and pursuant to 18 U.S.C. § 1621, that

1. I am the Chief Executive Officer of Securus Technologies, Inc. ("Securus") with headquarters at 14651 Dallas Parkway, Sixth Floor, Dallas, TX 75254.

2. I am providing this Affidavit in support of the Motion for Stay seeking immediate relief from the *Inmate Rate Order* of the FCC. I have personal knowledge of the facts stated herein and could testify to the same.

3. I have been CEO of Securus since June 2008. I have been an executive officer in the telecommunications industry since 1985, most recently as CEO of Eschelon Telecom which was acquired by Integra Telecom in August 2007.

4. Securus provides services exclusively to correctional facilities. As Securus has told the FCC, it presently serves approximately 2,200 correctional facilities in 43 states and the District of Columbia. It holds approximately 1,800 service contracts with state, county, and city governments.

5. Securus is required by the vast majority of its contracts to pay site commissions to its correctional facility clients. Correctional agencies decide the level of site commissions they require. In some instances, such as at state facilities in Maryland and Texas, site commissions are mandated by state statute.

6. Site commission revenue is used for different purposes, all at the discretion of the supervising governmental agency. In my experience, this money goes to inmate job placement programs, inmate job training, inmate health care programs, inmate substance abuse treatment programs, welfare funds for indigent inmates, and victims' rights funds. In some instances, site commission revenue goes straight to paying the cost of jail operations. Securus has no input in where site commission revenue is spent.

7. Calling rates are key terms of Securus's contracts. Each bid is customized to the stated needs of the correctional facility, and each rate proposal is structured to recover the costs of that customized package. In this way, the correctional facilities have actually set the calling rates by choosing them.

8. The new FCC rates make it impossible to pay site commissions. At rates that equate to $0.21 per minute for debit calls, and $0.25 for collect calls, the FCC has cut Securus's interstate rates by as much as 78%. These rates will prevent Securus from paying site commissions, and, in most cases, will not even cover the cost of facilities, software, and service.

9. In addition, the FCC rates do not account for the fact that Securus already provides approximately 20-30 million free calls per year because of State statutes and contractual requirements. For example, some correctional agencies require the first 2 calls made by an inmate to be free of charge; in addition, some correctional agencies require calls to criminal attorneys, bail bondsmen, embassies, and certain state agencies to be free of charge.

10. The FCC has given carriers 90 days to implement the new rules. In other words, Securus has 90 days to change material contract terms in nearly all of its 1,800 contracts. But in most instances, Securus does not even have the right to demand renegotiation at this time. Even if we have the right, it is not possible to change so many contracts so quickly. The FCC has set a completely unworkable deadline, and essentially is setting Securus up to fail. My estimate is that it will take approximately **20 person hours per contract** to complete analysis, negotiation and contract amendment, so approximately **19 person years of work** for all 1800 contracts. Accordingly, it is clearly impossible for us to complete this task in 90 days.

11. In order to amend its rate structures nationwide to comport with the new interstate rates, Securus must amend more than **95% of its contracts**.

12. I am also deeply concerned about the huge regulatory burden that will fall on Securus under this new order. Securus has never been subject to ongoing rate review. Securus has never participated in a rate-of-return proceeding. We do not have the human resources to comply with the enormous data production and analysis required for this kind of ratemaking. Securus would need to hire at least **5-20 new full-time employees** devoted solely to the task of complying with the FCC's new rate-review rule.

13. Finally, the data reporting requirement contained in the *Inmate Rate Order* is extremely burdensome. Securus processes hundreds of millions of calls each year. Providing the detailed reports that the FCC now demands, the first of which is due in less than six months, would require the hiring of **an additional 5-10 full-time employees** devoted to making these reports.

I affirm that the foregoing is true and correct to the best of my knowledge.

Richard A. Smith

SUBSCRIBED TO AND SWORN BEFORE ME this 17th day of October, 2013.

NOTARY PUBLIC

KAREN KENNEDY
Notary Public, State of Texas
My Commission Expires
September 03, 2014

My Commission expires: 9.3.14

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

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

# PETITION OF GLOBAL TEL*LINK FOR STAY PENDING JUDICIAL REVIEW

Michael K. Kellogg
Courtney S. Elwood
Aaron M. Panner
John B. Ward
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

*Counsel for Global Tel*Link*

October 30, 2013

- Exhibit 3 -

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## INTRODUCTION AND SUMMARY

Pursuant to 47 C.F.R. §§ 1.41, 1.43, and 1.44(e), petitioner Global Tel*Link ("GTL")[1] respectfully requests that the Commission grant a stay as to part of the *Order*[2] – specifically, the Commission's requirement that rates for "Inmate Calling Services" ("ICS") be "based only on costs that are reasonably and directly related to the provision of ICS"[3] – pending GTL's petition for judicial review of this and other aspects of the *Order*.

In requiring that interstate ICS rates be cost-based, the *Order* imposes "*de facto* rate-of-return regulation,"[4] without any warning or any explanation for the Commission's decision to embrace a regulatory regime it has disfavored for decades. That result is fundamentally inconsistent with the Commission's legal obligations to provide public notice and an opportunity for comment and to explain its departures from prior practice and precedent. Moreover, the *Order* does not give adequate guidance about how ICS providers are to comply with it – what rate of return is permissible, for example, and which costs count. Magnifying the problem, the *Order* extends rate-of-return regulation to what the Commission calls "ancillary charges" – that is, ICS charges other than those assessed for individual calls[5] – without any prior notice or

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

[2] Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 13-113 (rel. Sept. 26, 2013) ("*Order*").

[3] 47 C.F.R. § 64.6010. The Commission has also promulgated a rule providing a "safe harbor" from the cost-based rule. *See id.* § 64.6020. Because the latter is derivative of the former, GTL requests a stay of the effect of both regulations.

[4] Dissenting Statement of Commissioner Ajit Pai at 112 ("Pai Dissent").

[5] *See Order* App. A at 89 (defining ancillary charges); *id.* ¶ 90 (citing, as examples of ancillary charges, charges on end users to "set up or add money to a debit or prepaid account, to refund any outstanding money in a prepaid or debit account, or to deliver calls to a wireless number") (footnote omitted).

guidance about what costs an ancillary charge can include, and without providing any clear basis to regulate these charges.

Absent a stay to preserve the status quo, the Commission's poorly conceived rate-of-return regulation will impose on GTL millions of dollars in unrecoverable losses and create substantial disruption and uncertainty in the industry. By contrast, a stay would not impose material harms on other parties: the petitioners for this rulemaking did not request rate-of-return regulation, and in any event proposed that the Commission delay implementation of any new rules for at least a full year. Indeed, the public would benefit from a stay. Rate-of-return regulation would jeopardize ICS at high-cost facilities that are no longer economical to serve, and it would slash site commission revenues on which cash-strapped state and local governments depend to fund inmate welfare services. A stay would defer these significant harms pending review.

Because of the severe and irreparable harm that will be caused by the new cost-based regulation if it is permitted to take effect, and to allow sufficient time for the reviewing court to address a stay motion in the event that the Commission does not grant relief, GTL respectfully requests action on this petition by November 21, 2013. If the Commission fails to resolve this petition by that date, GTL will seek relief in the court of appeals pursuant to Rule 18 of the Federal Rules of Appellate Procedure.

## BACKGROUND

This proceeding was initiated in response to two petitions for rulemaking concerning interstate rates for ICS. The first of those petitions asked the Commission to prohibit exclusive ICS contracts and collect-call-only restrictions at privately administered prisons, and to require

private prisons to permit interconnection with multiple long-distance carriers.[6] The second petition proposed as an alternative that the Commission establish rate caps "for all interstate, interexchange inmate calling services" and require ICS providers to offer debit calling services at all prison facilities they serve.[7] That petition asked the Commission to adopt benchmark rates no higher than $0.20 per minute for debit calls and $0.25 per minute for collect calls, with no additional set-up or per-call fees.[8]

Less than a year ago, the Commission initiated this rulemaking to seek comment on these and several other specific means of reducing ICS rates for interstate, long-distance calling at correctional facilities.[9] The *NPRM* sought comment on various "discrete proposals";[10] eliminating per-call charges, capping per-minute rates, using marginal location methodology to establish rate caps, adopting tiered pricing (with different per-minute rates for different volumes of usage), establishing different caps for collect calls and debit calls, capping interstate rates at intrastate long-distance rates, requiring ICS providers to offer debit or prepaid calling options, mandating a certain amount of free calling per inmate per month, and restricting billing-related

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

[7] Petitioners' Alternative Rulemaking Proposal at 4, 23, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (FCC filed Mar. 1, 2007) ("Alternative Wright Pet.").

[8] *Id.* at 5.

[9] *See generally* Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629 (2012) ("*NPRM*").

[10] Pai Dissent at 112, 114.

call blocking.[11] Interested parties filed comments addressing each of the discrete issues about which the Commission had sought comment.[12]

On September 26, 2013, the Commission released the *Order*. In the *Order*, the Commission noted the specific relief sought in the two petitions for rulemaking: a "prohibit[ion on] exclusive ICS contracts and collect-call-only restrictions," a "debit-calling option" requirement, a "prohibiti[on on] per-call charges," and the adoption of "rate caps for interstate, interexchange ICS."[13] The Commission further noted that it had sought comment on these and other specific "issues affecting the ICS market," including "possible rate caps for interstate ICS," "collect, debit, and prepaid ICS calling options," "site commissions," and "issues regarding disabilities access."[14]

The Commission accepted some of these proposals in whole or in part. For example, the Commission "adopt[ed] an interim rate cap of $0.21 per minute for debit and prepaid interstate calls, and $0.25 per minute for collect interstate calls."[15] It "strongly encourage[d] correctional facilities to consider including debit calling and prepaid calling as options for inmates."[16] And it prohibited ICS providers from engaging in billing-related call blocking of interstate ICS calls unless the providers have made available an alternative means to pay for a call, such as prepaid

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[11] *NPRM* ¶¶ 18-26, 28, 30-34, 36, 39-40.

[12] *See, e.g.*, Comments of Global Tel*Link Corp., WC Docket No. 12-375 (FCC filed Mar. 25, 2013) (addressing issues including rate caps; marginal location methodology; impact of rate reduction on call volumes; collect calling, debit calling, and prepaid calling; collect-call-only rules; no-cost calling; and billing-related call blocking).

[13] *Order* ¶ 9.

[14] *Id.* ¶ 10.

[15] *Id.* ¶ 48.

[16] *Id.* ¶ 110.

collect, that would avoid the need to block for lack of a billing relationship or to avoid the risk that bills would be uncollectible.[17]

But the Commission did not stop there. In addition to adopting discrete proposals contemplated by the *NPRM*, the Commission promulgated, by a two-to-one vote, a sweeping rule requiring that all interstate ICS rates and all ancillary charges be "cost-based."[18] The majority warned that any ICS rate – even if below the rate caps established in the *Order* – could be invalidated if not based on costs reasonably allocable to the provision of ICS.[19] Although the *Order* established interim "safe harbor" levels, below which rates would be presumed to be permissible, it made clear that even those rates could be invalidated.[20] It also made clear that no rates above the safe harbor would enjoy a presumption of reasonableness – and invalidation of those rates could force ICS providers to pay refunds and steep forfeitures (of hundreds of thousands or millions of dollars per "continuing violation").[21] And the *Order* created no safe harbor (nor any caps) at all for ancillary charges.

Notice of the Commission's new "cost-based" rule, and the safe harbor rule that derives from it, is expected to be published in the Federal Register shortly, and the new rules are scheduled to take effect 90 days after publication.

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[17] *Id.* ¶ 113.

[18] *Id.* ¶ 12.

[19] *Id.* ¶ 120.

[20] *Id.* ¶¶ 60, 120.

[21] *Id.* ¶¶ 89, 118.

## DISCUSSION

The FCC should stay the cost-based rule adopted in the *Order*, 47 C.F.R. § 64.6010, and the safe harbor rule, *id.* § 64.6020, that follows from it. A stay is warranted where a petitioner demonstrates a likelihood of success on the merits and a showing of "irreparable injury," or, alternatively, a "serious" question regarding the merits coupled with a more substantial showing regarding the balance of equities.[22] This motion meets either standard: GTL is likely to succeed on the merits and without a stay is likely to suffer substantial irreparable injury, and the equities strongly favor a stay.

### I. GTL IS LIKELY TO SUCCEED ON THE MERITS

GTL is likely to succeed on its petition for review because the Commission adopted rate-of-return regulation without adequate notice and comment, the rule represents a sharp and unexplained departure from Commission precedent, and the rule is insufficiently developed to enable ICS providers to comply with it.[23]

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[22] *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) ("One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.") (internal quotation marks omitted); Order, *Regulation of Prepaid Calling Card Services*, 22 FCC Rcd 5652, ¶ 7 (Wireline Comp. Bur. 2007) (applying the test "established in *Virginia Petroleum Jobbers Association v. FPC*, as modified in *Washington Metropolitan Area Transit Commission*").

[23] Although GTL does not seek to stay the effect of the rate caps adopted by the *Order*, the record evidence demonstrates that the caps are arbitrary and capricious – a one-size-fits-all approach where more tailored regulatory measures are needed. The caps are far too low, for example, to permit recovery of costs at some correctional facilities. And they depend on the incorrect assumption that the costs of maintaining security features requested by facilities has held steady over time, when in fact the cost of some of those features has risen. Moreover, the caps will also diminish inexorably a revenue stream on which state and local budgets depend: ICS contracts typically entitle facilities to a *percentage* of ICS revenues, which the rate caps will reduce. For these and other reasons, GTL plans to challenge the rate caps in its forthcoming petition for review.

### A. The Commission Did Not Give Notice of the Possible Adoption of Rate-of-Return Regulation

Before promulgating a new rule, the Commission must provide notice and an opportunity for public comment.[24] A reviewing court is likely to find that the Commission failed to give any notice that it would impose rate-of-return regulation on the provision of interstate ICS and ancillary services. The public thus had no chance to comment on the problems unique to this form of regulation, and the Commission had no chance to consider them.

1. Until the *Order* was released, "[n]o party could have foreseen" that the Commission was contemplating a cost-based, rate-of-return regime.[25] The two petitions for rulemaking that prompted last year's *NPRM* did not request it. Indeed, the first petition did not propose any regulation of ICS *rates*.[26] The second petition did ask the Commission to regulate interstate, interexchange ICS rates – but by establishing rate caps, not regulation limiting carriers to recovery of costs.[27] The petitioners clearly distinguished their proposal from rate of return. They described their proposed benchmark rates as "*proxies*" for "actual incremental cost plus a market-based rate of return"[28] – i.e., *substitutes* for rates established pursuant to a rate-of-return form of regulation. And in comments they filed with the Commission, the petitioners described

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[24] 5 U.S.C. § 553(b), (c); *see, e.g., National Black Media Coal. v. FCC*, 791 F.2d 1016, 1022-23 (2d Cir. 1986); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (Commission must provide notice of alternatives it is considering).

[25] Pai Dissent at 112.

[26] *See generally* Wright Pet. at 8-9 (describing relief requested).

[27] Alternative Wright Pet. at 5.

[28] *Id.* at 19-20 (emphasis added; internal quotation marks omitted).

the benchmark rates they had proposed as akin to "*price caps* [that would] provide a powerful incentive for service providers to become more efficient."[29]

The *NPRM*, which opened a new docket for comments on these and other "discrete proposals,"[30] was equally silent on the possibility of rate-of-return regulation. The Commission sought comment on a number of specific avenues to reduce rates, including several rate cap proposals.[31] None of these proposals even hinted at a regulatory regime in which *any* rate – even a rate under the established rate caps – could be invalidated if the Commission deemed it not to be based on interstate ICS costs. Nor did the Commission's proposals indicate that it was considering regulation of ancillary charges – a term that did not even appear in the *NPRM*.[32]

After soliciting comment on these proposals, the Commission majority opted to impose a completely different, and far more disruptive, regulatory regime. The core of the new regime is a broad requirement, never mentioned by the Commission before now, that ICS revenues – both per-minute rates for interstate ICS calls and ancillary charges for all ICS – be "cost-based."[33]

**2.** The difference between this cost-based, rate-of-return regime and the *NPRM*'s proposed rules is fundamental. Rate caps like those described in the *NPRM* set "limits on prices carriers can charge for their services."[34] They therefore provide regulatory certainty and are easy

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[29] Comments of Martha Wright et al. at 32, WC Docket No. 12-375 (FCC filed Mar. 25, 2013) ("Wright Comments") (emphasis added).

[30] Pai Dissent at 112.

[31] *See NPRM* ¶¶ 18-40 (seeking comment on, among other things, across-the-board per-minute caps, caps tied to usage volumes, different caps for collect and debit calls, and caps tied to intrastate long-distance rates).

[32] *See* Pai Dissent at 115.

[33] *Order* ¶¶ 5, 7.

[34] Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, ¶ 22 (1990) ("*Second Report and Order on Rates for Dominant Carriers*").

to administer: a provider's rates are either in compliance (below the caps) or they are not. The *NPRM* expressly noted such benefits when it described the petitioners' argument that "several benefits would accrue from setting per-minute rate caps, such as *administrative ease* and the absence of jurisdictional challenges."[35]

The *Order*, by contrast, embarks on rate-of-return regulation – with the attendant complications and administrative challenges of that regulatory approach. The basic principle of rate of return is to limit the profits providers make by permitting them to "charge rates no higher than necessary to obtain 'sufficient revenue to cover their costs and achieve a fair return on equity.' "[36] The reasonableness of a given rate depends on determinations of what costs are properly allocable to the regulated service, whether those costs are "properly calculated and efficiently incurred," what rate of return is "allowable" for a carrier, and whether the rate covers allowable costs and an allowable return on capital (that is, rate of return).[37] These are precisely the determinations the *Order*'s new cost-based regime requires ICS providers and the Commission to make. ICS providers must base rates on historical costs that are "reasonably and directly related to the provision of ICS," and some reasonable rate of return (although the Commission has not yet told providers what that will be).[38] The Commission's rate caps thus serve only a peripheral role – setting the outer bounds of what rates the Commission *may* choose to allow but providing no assurance that rates beneath the caps will be deemed lawful.

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[35] *NPRM* ¶ 22 (citing Alternative Wright Pet. at 7-8) (emphasis added).

[36] *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 177-78 (D.C. Cir. 1993) (quoting Further Notice of Proposed Rulemaking, *Policy and Rules Concerning Rates for Dominant Carriers*, 3 FCC Rcd 3195, ¶ 24 (1988)).

[37] Report and Order and Second Further Notice of Proposed Rulemaking, *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, ¶ 18 (1989) ("*Report and Order on Rates for Dominant Carriers*").

[38] *Order* ¶ 52.

The majority denies that its new "cost-based" rule is the equivalent of rate-of-return regulation. The majority first notes that "[c]ost considerations may and frequently do play a role in rate cap regulatory regimes" that are not rate-of-return regulation.[39] That is true enough – a system of simple rate caps based on cost data, for example, is not a rate-of-return regime – but beside the point. The "cost-based" rule amounts to rate-of-return regulation not because it takes costs into account, but because it limits each interstate ICS rate and ancillary fee to historical costs plus some (Commission-approved) rate of return.

The majority also argues that its rule is "fundamentally different than rate-of-return regulation" because it does not require "ex ante review, tariff filings, detailed cost support in compliance with various accounting rules, and a prescribed rate of return, among other things."[40] This argument is wrong, first, because it treats these items as definitional elements of rate of return rather than what they are – regulatory methods the Commission "has used . . . in numerous circumstances, sometimes as part of rate-of-return regulation and sometimes not."[41] It is wrong, second, because the *Order* does include most of these requirements; it just calls them by different names.[42]

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[39] *Id.* ¶ 53 n.195.

[40] *Id.*

[41] Pai Dissent at 128 n.131.

[42] *See id.* at 128-29 (noting the *Order*'s requirements that ICS providers annually file detailed rate information and allocate costs, and its prohibition on above-cap rates without *ex ante* agency review).

Whatever the Commission calls its rules, "'it is the substance of what the [Commission] has purported to do and has done which is decisive.'"[43] What the Commission has done here is rate-of-return regulation, plain and simple.

**3.** The majority's suggestions that the *NPRM* provided adequate notice of its new rate-of-return regime for interstate inmate calls are misplaced. *First*, the *NPRM*'s solicitation of comment "on other possible ways of regulating ICS rates, as well as any other proposals from parties,"[44] could not suffice. "Catch-all" notice provisions do not give parties adequate notice of specific rules adopted thereafter.[45]

*Second*, that the *NPRM* sought comment on the costs of providing ICS hardly put parties on notice of the universe of cost-based ratemaking possibilities.[46] It suggested, at most, that the Commission might implement one of its proposals using cost data supplied by ICS providers or other parties. It certainly did not signal that ICS providers might be subjected to rate-of-return

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[43] *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (quoting *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942)).

[44] *Order* ¶ 59 (characterizing the *NPRM*).

[45] *E.g.*, *Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (rejecting approach that would permit an agency "to justify *any* final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy 'notice,'" and noting that "[s]uch an exercise in looking over a crowd and picking out your friends does not advise interested parties how to direct their comments and does not comprise adequate notice") (citation and internal quotation marks omitted); *National Black Media Coal.*, 791 F.2d at 1023 (statement that the final rule would be promulgated as proposed in the NPRM but in accordance with any future "variants, modifications, or alternatives" did not provide parties with adequate notice of a policy shift); *Small Refiner*, 705 F.2d at 549 (general notice that the agency might make changes in the definition of small refinery was "too general to be adequate" and did not "describe the range of alternatives being considered with reasonable specificity").

[46] *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009) (agency rule for resolving rail rate disputes, which permitted parties to draw from four most recent years of railroad movement data, was not a "logical outgrowth" of NPRM, which proposed a rule permitting parties to draw from most recent year of data); *Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991) (per curiam) (rule is "not a logical outgrowth of the proposed regulations" if it "is not implicit in . . . the system presented in the proposed regulations").

regulation, and it gave providers no "opportunity to anticipate and criticize" *that* very different approach.[47] Although parties commented on every one of the proposals announced in the *NPRM*, none weighed in on the advantages or disadvantages of rate-of-return regulation. The absence of comments on that topic strongly suggests that "no commenter manifested an understanding that the FCC was considering" the "cost-based" rule it eventually adopted.[48]

For similar reasons, the majority is incorrect that providers should have anticipated rate-of-return regulation because § 201(b)'s "just and reasonable" standard "has traditionally been construed to require rates to be cost-based."[49] "Cost-based" ratemaking, as courts have used the term, can encompass *any* ratemaking that reflects costs.[50] For example, had the Commission adopted rate caps of $0.21 per minute for debit calls and $0.25 per minute for collect calls (but gone no further), that rule would constitute cost-based ratemaking because the caps purport to reflect the cost data the Commission received. Notice of cost-based rate caps did not provide notice of the *Order*'s very different sort of "cost-based" rule.

Finally, the 2007 Geo Group comments and the 2013 NASUCA comments did not satisfy the notice requirement, first of all, because a party's comments cannot substitute for proper

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[47] *See Shell Oil*, 950 F.2d at 751 ("[W]eak signals from the agency gave petitioners no such opportunity to anticipate and criticize the rules or to offer alternatives."); *see also Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) ("Something is not a logical outgrowth of nothing.").

[48] *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 256 (3d Cir. 2010); *cf. Northeast Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (concluding rule was logical outgrowth of proposed rule, where "[n]umerous commenters – including two that are among the Industry Petitioners here – filed comments" on the issue).

[49] *Order* ¶ 59 n.222.

[50] *See Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996).

notice by the Commission itself.[51] The Commission "cannot bootstrap notice from a comment"; it "must *itself* provide notice of a regulatory proposal."[52] In any event, those comments did not anticipate the regulation that the Commission adopted in the *Order*. The Geo Group argued against *any* interstate ICS rate-setting.[53] And NASUCA's position on granular cost-based ratemaking was at best unclear: NASUCA did ask the Commission to "require ICS providers to justify their rates and their costs,"[54] but on the next page it waffled, proposing benchmark rates "to ensure that rates for interstate ICS calls become just and reasonable *without the need for complex regulatory reviews*"[55] – which granular cost-based regulation would plainly require.

**4.** The Commission's procedural error is not harmless. "[U]tter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure."[56]

GTL satisfies that standard here. By proceeding without notice of any proposal to impose cost-based, rate-of-return regulation, the Commission gave GTL and other ICS providers no opportunity, during the notice-and-comment period, to ventilate the significant flaws of a

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[51] *E.g.*, *CSX Transp.*, 584 F.3d at 1082; *Shell Oil*, 950 F.2d at 751; *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

[52] *Small Refiner*, 705 F.2d at 549.

[53] *See* Comments of The Geo Group, Inc. at 7-15, CC Docket No. 96-128 (FCC filed May 2, 2007).

[54] Initial Comments of NASUCA at 4-5, WC Docket No. 12-375 (FCC filed Mar. 25, 2013) ("In order to ensure that rates for interstate ICS calls become just and reasonable without the need for complex regulatory reviews, the Commission should include a provision that any interstate rate charged for a call from a correctional facility is unjust and unreasonable if it exceeds a benchmark determined by the Commission.").

[55] *Id.* at 5 (emphasis added).

[56] *Sugar Cane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002); *see also Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) ("showing of actual prejudice is not required under the prejudicial error rule").

rate-of-return approach. Rate-of-return regulation creates perverse incentives for telecommunications providers and has a poor track record in generating rates comparable to those achievable through competition. Rate-of-return regulation will also be significantly more expensive and complicated for the Commission and the ICS industry to implement than many of the *NPRM*'s proposals would have been.[57] For these exact reasons, the Commission has long disfavored rate of return. *See infra* Part I.B.

The Commission's procedural error prevented GTL and other interested parties from fully developing a record on the competitive distortions that would follow from applying rate-of-return regulation to interstate ICS and ancillary services. Had the Commission issued a proper notice, such issues could have been addressed in a comprehensive fashion, and the Commission would have had the opportunity to use this information in evaluating regulatory alternatives.

### B. The Commission Failed To Justify the Adoption of a Regulatory Approach It Has Long Disfavored

The Commission must provide "good reasons" for its new regulations and articulate "a reasoned explanation . . . for disregarding facts and circumstances," including reliance interests, "that underlay or were engendered by the prior policy."[58] It failed to do so here. The Commission adopted rate-of-return regulation without explaining any reason for its departure from more than two decades of Commission precedent.

For more than 20 years, the Commission has retreated from rate-of-return regulation, recognizing that it "has certain inherent flaws," presents carriers with "perverse" incentives, and

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[57] *Second Report and Order on Rates for Dominant Carriers* ¶ 23 (using rate of return to ensure just and reasonable rates for consumers "is not a simple matter"); *see id.* ¶ 28 ("[W]hile we have made improvements in our ability to administer rate of return rules, the basic, underlying regulatory structure lying at the heart of our rules remains unchanged."); *id.* ¶ 24 (rate of return requires Commission's "extensive attention" to costs).

[58] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

is "difficult[ to] administer[ ] . . . under any circumstances."[59] In the late 1980s, the Commission first "began to take serious note of some of the inefficiencies inherent in rate-of-return regulation."[60] The Commission noted that the regulatory strategy creates "incentives for carriers to be inefficient."[61] Because rate of return ties profits directly to the amount of costs in the rate base, it encourages carriers to "attribute unnecessary costs to their operations in an effort to generate more revenue."[62] As the Commission recognized, the approach also supplies "insufficient incentives to encourage innovation,"[63] because carriers are free to pass on any costs (unless identified as imprudent) to ratepayers. The Commission further noted that rate of return "tend[s] to foster cross-subsidization and inability to move toward an optimally efficient set of prices"; carriers have an incentive to misallocate costs from unregulated services to services subject to rate-of-return rules (where the costs can be passed on to consumers).[64] Finally, the Commission explained that rate of return produces "high administrative costs,"[65] as the agency is forced to "spend a great deal of [its] regulatory resources policing" cost padding and misallocation.[66]

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[59] *Report and Order on Rates for Dominant Carriers* ¶¶ 29, 30, 33.

[60] *National Rural Telecom Ass'n*, 988 F.2d at 178; *see also* Robert B. Friedrich, *Regulatory and Antitrust Implications of Emerging Competition in Local Access Telecommunications*, 80 Cornell L. Rev. 646, 689 (1995) ("In recent years, the FCC has moved away from rate-of-return pricing for interstate local access, as evidence continues to mount that such pricing is no longer appropriate.").

[61] *Report and Order on Rates for Dominant Carriers* ¶ 100.

[62] *Second Report and Order on Rates for Dominant Carriers* ¶ 29; *accord id.* ¶ 9.

[63] *Report and Order on Rates for Dominant Carriers* ¶ 100.

[64] *Id.*

[65] *Id.*

[66] *Second Report and Order on Rates for Dominant Carriers* ¶ 34.

The Commission saw "substantial" advantages in adopting price caps to encourage carriers to "engage in efficiency-enhancing techniques to generate profits."[67] It concluded that its "lengthy, substantial, and ongoing efforts to improve [its] rate of return methods . . . cannot create the positive incentives that are embodied in incentive-based regulation."[68] Although the Commission did not go so far as to say that "rate of return is necessarily a bankrupt regulatory practice," it made clear that "it is not the best" and that "incentive regulation is superior."[69]

In 1989, the Commission "concluded that price cap regulation would on balance be an improvement over rate-of-return in terms of meeting its statutory goals" and applied price cap regulation to AT&T.[70] In the next few years, the Commission extended price caps to local exchange carriers, although it made the shift optional for many of those carriers.[71] More recently, the Commission has frequently explained the reasons for its shift away from rate of return.[72] Indeed, the petitioners who requested this rulemaking proceeding recognized the Commission's longstanding "concern that traditional rate-of-return regulation did not result in sufficient incentives to improve efficiency," and therefore advocated for benchmark rates akin to

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[67] *Report and Order on Rates for Dominant Carriers* ¶ 101.

[68] *Second Report and Order on Rates for Dominant Carriers* ¶ 25.

[69] *Id.* ¶ 29.

[70] *National Rural Telecom Ass'n*, 988 F.2d at 178 (citing *Report and Order on Rates for Dominant Carriers* ¶ 1).

[71] *Id.* at 178-79.

[72] *See, e.g.*, Sixth Order on Reconsideration and Memorandum Opinion and Order, *Connect America Fund*, 28 FCC Rcd 2572, ¶ 2 (2013); Memorandum Opinion and Order, *Petition of USTelecom for Forbearance*, 28 FCC Rcd 7627, ¶ 153 (2013); Report and Order, *International Settlement Rates*, 12 FCC Rcd 19806, ¶ 24 (1997); Order and Notice of Proposed Rulemaking, *Petition of Comsat Corp.*, 13 FCC Rcd 14083, ¶ 4 (1998).

"price caps" that would "provide a powerful incentive for service providers to become more efficient."[73]

The Commission imposed rate of return here without even acknowledging that its regulatory approach is a long-disfavored one – much less providing any justification for imposing on ICS providers this severely flawed form of regulation. On the basis of that failure by itself, a court is likely to reverse the *Order*'s "cost-based" rule.

### C. The Commission Failed To Provide Guidance on the Implementation of Rate-of-Return Regulation

Finally, the Commission failed to provide sufficient guidance to enable ICS providers to implement the cost-based, rate-of-return regime it has adopted.[74] The *Order* requires all interstate ICS rates and all ancillary charges to be reduced to cost-based levels and threatens violators with severe penalties, including forfeitures of up to $1.5 million per continuing violation, refund obligations, and, in "egregious" cases, revocation of § 214 carrier authorization.[75] Yet the *Order* unaccountably withholds from ICS providers the critical information they need in order to ensure that they comply with the rule.

*First*, although the *Order* demands that ICS providers build into interstate rates only their historical costs "reasonably and directly related to the provision of ICS," it does not specify which costs count (other than to say that site commissions do not). The Commission *suggests* several cost categories that will "likely" count (such as equipment costs; costs for originating, switching, transporting, and terminating calls; certain security costs; and billing and collection

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[73] Wright Comments at 32.

[74] Deference cannot be afforded to regulatory "mush" that lacks "sufficient content and definitiveness" to qualify as "a meaningful exercise in agency lawmaking." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997).

[75] *Order* ¶ 118.

costs), and several others that "likely" will not (such as costs to integrate ICS with other correctional facility systems and services, and certain other security costs).[76] But the Commission makes no promises.

*Second*, the *Order* requires ICS providers to "apportion" their costs between interstate and intrastate calls, but "leave[s] it up to the individual providers to determine" how.[77] The Commission treats this as a flexible regulatory strategy that gives providers the ability to "determine the best and most efficient way to [apportion costs] for their companies." That is cold comfort to providers, however, for the Commission retains the right to impose penalties if it disagrees with a provider's jurisdictional separations.

*Third*, implicit in the new "cost-based" rule is a requirement that ICS providers build into their interstate ICS rates a reasonable rate of return. But the Commission refuses to "opine" on what rate of return it will permit.[78] Providers are left to guess at what the Commission considers a fair or permissible return. If they get it wrong, and the Commission deems their rate of return too high, they could owe refunds and forfeitures.

Compounding these uncertainties, the *Order*'s "cost-based" rule applies not only to interstate inmate calling rates, but also to ancillary charges.[79] The Commission does not begin to explain how providers should determine whether their ancillary charges are cost-based. But, because the *Order* establishes no "safe harbor" or caps for ancillary charges, ICS providers must bear all the risk as they try to predict whether their ancillary charges will meet the Commission's

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[76] *Id.* ¶ 53 & n.196.

[77] *Id.* ¶ 53 n.195.

[78] *Id.* ¶ 54 n.203.

[79] *Id.* ¶ 91 ("[E]ven if a provider's interstate ICS rates are otherwise in compliance with the requirements of this Order, the provider may still be found in violation of the Act and our rules if its ancillary service charges are not cost-based.").

approval – based on metrics the Commission has not yet laid out, let alone tried to justify, and without obvious precedent about which costs providers may count as allocable and which they may not.

The Commission's failure to explain critical pieces of its new "cost-based" rule – when ICS providers are expected to adhere to the rule effective three months from now, and may be subjected to harsh penalties if they do not – epitomizes arbitrary and capricious decisionmaking and will likely require vacatur of the rule.

## II. THE BALANCE OF EQUITIES FAVORS A STAY

The balance of equities likewise supports staying the "cost-based" rule pending review.

**A.** GTL will experience considerable irreparable harm if the rule goes into effect on schedule, little more than 90 days from now. Because the Commission provides no assurance that any rate will be approved if challenged, the only sure way to avoid the risk of significant penalties is to reduce all of GTL's interstate ICS rates all the way down to the *Order*'s safe harbor levels. If GTL were to do that, it would lose revenues of between $9 and $11 million in the next year alone even if GTL ceased paying all site commissions, and between $16 and $18 million if GTL continued to pay commissions under existing terms.[80] GTL is aware of no path – and the *Order* identifies none – by which it could recover these lost revenues from end users later, if it ultimately prevails on its petition for review. Such unrecoverable losses constitute irreparable harms.[81]

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[80] Yow Decl. ¶ 6 (estimating lost revenue if GTL does and does not continue to pay site commissions to customers).

[81] *See American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 594, 596 (7th Cir. 1986) (risk that complete recovery will not be possible creates irreparable injury); *Hughes Network Sys., Inc. v. InterDigital Communications Corp.*, 17 F.3d 691, 696 (4th Cir. 1994) (same); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1479 (9th Cir.

The Commission's refusal to say how existing ICS contracts will be affected by the "cost-based" rule only intensifies these harms. GTL is currently a party to hundreds of contracts requiring it to pay site commissions on individually tailored terms and conditions.[82] Under the Commission's rate-of-return regime, GTL will be prohibited from recouping these costs through ICS revenues. Yet the *Order* neither abrogates GTL's existing contracts nor grandfathers them in.[83] The Commission suggests that GTL and its customers can simply "voluntar[ily] renegotiat[e]" their contracts.[84] But renegotiating hundreds of contracts with hundreds of customers in less than three months would be an impossible task.[85] Even the petitioners for rulemaking advocated for a *one-year* "fresh look" period to give ICS providers time to adjust to the petitioners' proposed rules.[86] GTL thus has two options: absorb the cost itself (an unrecoverable expense) or refuse to pay future commissions on the basis of change-of-law, *force majeure*, or other provisions that some ICS contracts may contain. The former course would cost GTL between $5 and $9 million in the next year.[87] The latter course may lead to significant contract disputes with customers. That litigation would require significant and unnecessary diversion of public and private resources, and it would also dampen customer goodwill. Loss of

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1994) (same); *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (in the absence of "adequate compensatory or other corrective relief," "economic loss" amounts to irreparable harm) (internal quotation marks omitted).

[82] Yow Decl. ¶¶ 4-5.

[83] *See Order* ¶ 100.

[84] *Id.* ¶ 102.

[85] Yow Decl. ¶ 10 (estimating that renegotiation will require more than 10 person hours per contract, and more than 5,000 person hours total).

[86] Alternative Wright Pet. at 28.

[87] *See* Yow Decl. ¶ 6.

customers – stemming not from competition on the merits but rather from the inequitable effects of the *Order* – establishes irreparable injury.[88]

In addition, GTL does not believe full compliance with the Commission's "cost-based" rule will be practically attainable within 90 days. The *Order* instructs ICS providers to construct "cost-based" interstate ICS rates and ancillary charges, but it does not give definitive answers about key inputs to those rates or charges – what costs the Commission will consider properly allocable to the provision of ICS, or what rate of return the Commission will allow ICS rates to include. Nor will it suffice for GTL to cut its interstate ICS rates to the level of the rate caps; below-cap rates enjoy no presumption of reasonableness unless they are also below the (much lower) safe harbor levels adopted in the *Order*, so such rates are still at risk of invalidation and still leave GTL open to fines and refund obligations. And without a safe harbor (or cap) for ancillary services, no ancillary charge is safe. All of GTL's ancillary charges will remain at risk of invalidation – and GTL could incur penalties and be forced to pay refunds – if the Commission decides at some later date that they are not "cost-based."

Even if GTL could comply with the rule within the prescribed period – and it cannot – compliance will require substantial (unnecessary) expenditures that GTL will never be able to recover. GTL must, among other things, "record and document its costs of providing service"; distinguish between eligible and ineligible costs; figure out how to unbundle eligible costs from ineligible costs where, for example, the cost relates to both ICS and another service; determine how to treat each capital investment (including what depreciation method or amortization schedule to use); apportion joint and common costs among the facilities it serves; separate the

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[88] *See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994).

costs of interstate ICS from the costs of intrastate ICS; and translate interstate, eligible costs into per-minute rates that include some rate of return.[89] These unrecoverable expenses themselves constitute irreparable injury.[90]

**B.** Other interested parties, by contrast, will not suffer material irreparable injury in the event of a stay. *First*, a stay of rate-of-return regulation would not injure the petitioners because they did not *ask* for that complex and disfavored regulatory approach, acknowledged its weaknesses, and proposed rate caps as a superior regulatory solution. Implementation of the rate caps adopted in the *Order* – which are nearly identical to those the petitioners requested – would not be affected by the stay GTL seeks.

*Second*, the petitioners cannot plausibly claim that they would be irreparably injured by a limited stay pending resolution of the legal challenges to the *Order* – likely a year or less from now – because the petitioners themselves asked for a one-year delay in implementation of the rate caps they proposed. The petitioners advocated for a one-year "fresh look" period to give ICS providers sufficient time to adjust their business plans and renegotiate or terminate their ICS contracts as needed.[91]

Indeed, a stay may *benefit* inmates housed in particularly high-cost facilities. At those facilities, if ICS providers reduce their rates to safe harbor levels – as, absent a stay, they will be forced to do, *see supra* Part II.A – they will be unable to operate above cost. If providers "make the rational business decision to withdraw from facilities where they would have to operate at a

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[89] Pai Dissent at 124-25.

[90] *See National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 824 (1st Cir. 1979) (irreparable harm found because plaintiff would incur substantial unrecoverable expenses to comply with regulations that may be invalid).

[91] Alternative Wright Pet. at 28.

loss, inmates in those facilities ultimately will suffer" – as will their families.[92] If providers continue to serve these facilities, inmates at lower-cost facilities will suffer, because they will have to pay to subsidize facilities where the rates permitted are inadequate to recover costs.

C. Finally, the public interest favors a stay. *First*, reducing interstate ICS rates to safe harbor levels will have a direct, adverse impact on the ability of correctional facilities to provide goods and services to inmates, because those services are frequently funded by site commissions and site commissions are usually a function of ICS revenues. Take Maryland as an example; its Department of Corrections (the "Maryland DOC") has an ICS contract with GTL that covers two dozen facilities in the state. Maryland law directs each state correctional facility to establish an Inmate Welfare Fund using ICS commissions (and other funds) to pay for goods and services that benefit the general inmate population.[93] Commissions are used to fund inmate medical supplies and services; athletic and recreational services, supplies, and equipment; educational services, material, supplies, and equipment; entertainment expenditures, including movie rentals, newspapers, and books; repair and replacement of property; indigent inmate welfare packages; and other goods and services.[94] To pay for these services at the two dozen facilities where GTL provides ICS, the Maryland DOC charges GTL an 87% commission on ICS revenue from collect calls and a 65% commission on ICS revenue from debit and prepaid calls.[95] If GTL were to cut its interstate ICS rates to $0.12 per minute for debit calls and $0.14 per minute for debit calls (but keep paying commissions), site commission revenues to these 24

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[92] Pai Dissent at 119-20.

[93] Md. Code Ann., Corr. Servs. § 10-502.

[94] Md. Code Regs. 12.11.09.04.

[95] Yow Decl. ¶ 8.

facilities would likely decline by more than $300,000 in the next year.[96] Without commission payments, the facilities would lose revenues of more than $500,000 within a year.[97]

Similar cuts would be felt in correctional facilities across the country. According to GTL's projections, if interstate rates were reduced to the safe harbor levels, the facilities it serves would see their revenues from site commissions decline by $14 to $16 million in the next year, *even if* GTL kept paying site commissions under its existing contracts.[98] If GTL were to stop paying site commissions, site commission revenues to these facilities would drop by $20 to $22 million in the next year.[99] And these numbers take into account only facilities where GTL provides ICS; hundreds more would feel the impact of the new rate-of-return regulation in the coming months as other ICS providers scramble to comply with it.

Absent a stay, correctional facilities would have many fewer dollars to spend on goods and services that *they* deem essential to the safety and well-being of inmates, correctional personnel, and the general public. Even the *Order* acknowledges the social value of such services.[100] For this reason alone, a stay is in the public interest.

*Second*, a stay will forestall the expense and confusion – in the ICS industry and among correctional facilities – that would result from efforts to implement a "cost-based" rate rule

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[96] *Id.* ¶ 9.

[97] *Id.*

[98] *Id.* ¶ 7.

[99] *Id.* Even if GTL were to reduce its interstate rates only to the rate cap levels, GTL facilities would see between a $9 and $11 million decline in site commission revenues (if GTL continued to pay commissions at the same levels), or a $20 to $22 million decline (if GTL did not). *Id.*

[100] *Order* ¶ 57 ("The record reflects that site commission payments may be used for worthwhile causes that benefit inmates by fostering such objectives as education and reintegration into society.").

prematurely, and without adequate guidance from the Commission. The measures the Commission directs ICS providers and correctional facilities to take – e.g., the amendment of contracts to set interstate ICS rates at cost-based levels and eliminate site commissions – will require substantial time and effort not only from ICS providers, but also from the correctional facilities they serve.[101] Moreover, any amendments that providers and facilities negotiate will be time-consuming to unwind when the *Order* is overturned. Contracts that are renegotiated this winter will have to be renegotiated again next year. Facilities will not be able to recoup these substantial resource costs.

*Third*, as described above, *supra* Part II.B, a stay will increase the likelihood that ICS remains available to inmates (and their families) in high-cost facilities where the costs of providing service exceed the safe harbor levels established in the *Order*. The *Order* expressly acknowledges the societal benefits of family contact with inmates during incarceration – "lower recidivism rates," "fewer crimes," less need for more correctional facilities, and lower "overall costs to society."[102] The continued provision of ICS at high-cost facilities is critical to achieving these objectives.

*Fourth*, without a stay the Commission itself will face tremendous administrative burdens it lacks the resources to handle. As the dissent explains, the *Order*'s particular brand of rate-of-return regulation – "all-out rate-of-return regulation" without any "clarity over how the Commission will implement [it]" – will result in hundreds or thousands of waiver petitions for the Commission to adjudicate and hundreds of thousands of pieces of information for the

[101] Yow Decl. ¶ 10 (estimating person hours required).

[102] *Order* ¶ 2.

Commission to review and analyze.[103] The Commission's resources are already stretched thin,[104] and these additional burdens – which will have been unnecessary if the legal challenge to the *Order* succeeds – will steal time from the Commission's other communications policy priorities.

The public should not be forced to bear these burdens, particularly when a limited stay could be granted which, in the interim, gives inmates precisely the relief they sought in a petition for rulemaking filed just last year.

## CONCLUSION

The Commission should issue a stay pending review of the *Order*.

Respectfully submitted,

/s/ *Michael K. Kellogg*
Michael K. Kellogg
Courtney S. Elwood
Aaron M. Panner
John B. Ward
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

*Counsel for Global Tel*Link*

October 30, 2013

[103] Pai Dissent at 124, 126-27, 129.

[104] *Id.* at 128.

## CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of October, 2013, the foregoing Petition of Global Tel*Link for Stay Pending Review was served via electronic mail on the following persons:

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

Acting Chairwoman Mignon Clyburn
Federal Communications Commission
Mignon.Clyburn@fcc.gov

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

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

Sean Lev
General Counsel
Federal Communications Commission
Sean.Lev@fcc.gov

Julie Veach
Chief
Wireline Competition Bureau
Federal Communications Commission
Julie.Veach@fcc.gov

*/s/ Michael K. Kellogg*
Michael K. Kellogg

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

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

## DECLARATION OF CHARLES STEPHEN YOW

1. My name is Charles Stephen Yow. I am over the age of 21. I have never been convicted of a felony or a crime of moral turpitude. I am competent to make this declaration and, unless otherwise indicated, all the facts set forth in this declaration are based on my personal knowledge.

2. I am the Chief Financial Officer and Treasurer of Global Tel*Link Corporation ("GTL"). I also serve as Chief Financial Officer and Treasurer of Public Communications Services, Inc. ("PCS") and as Chief Financial Officer and Treasurer of Value-Added Communications, Inc. ("VAC"). Before joining GTL in 2002, I was the Director of Finance for a wireless communications provider, Powertel, Inc. I received a B.S. in business administration from Birmingham-Southern College and an M.B.A. from Emory University.

3. GTL and its wholly owned subsidiaries, which include PCS and VAC, are leading developers and suppliers of telecommunications systems and services to correctional facilities across the country. The systems and services that GTL, PCS, and VAC supply allow inmates to make phone calls from the correctional facility and permit correctional staff to review the calls, along with providing many other features. These services are commonly known as inmate calling services, or "ICS."

4. GTL and its wholly owned subsidiaries presently provide ICS to in excess of 1,650 correctional facilities throughout the nation, including in excess of 1,600 facilities operated by state or local governments.

5. GTL is a party to in excess of 700 ICS contracts, including in excess of 650 contracts with state, county, or city governments. These contracts typically have multi-year terms.

6. Of these contracts, more than 500 set rates for interstate ICS calls above the safe harbor levels of $0.12 per minute for debit calls and $0.14 per minute for collect calls adopted in the *Order*. According to GTL's internal projections, reducing interstate ICS rates in these contracts to the safe harbor levels would cost GTL between $16 million and $18 million in the next year, if GTL were to continue to pay site commissions according to commission terms of its contracts.[1] Reducing interstate ICS rates in these contracts to safe harbor levels would cost GTL between $9 and $11 million in the next year if it were to cease paying site commissions altogether.

7. Reducing interstate ICS rates to safe harbor levels would also reduce revenues to the correctional facilities GTL serves. During the next year, GTL projects that such rate reductions would result in between $14 million and $16 million in lost commission revenues to GTL facilities if GTL continued to pay site commissions, and more than $20 million if GTL stopped paying commissions to facilities. Indeed, even reducing interstate ICS rates to the rate caps would dramatically reduce these facilities' commission revenues in the next year – a revenue drop of $9 to $11 million if GTL kept paying commissions, or of $20 to $22 million if it did not.

[1] The projections in this declaration do not account for demand elasticity, which may or may not occur but must be determined on a facility-by-facility basis.

8. For example, GTL has entered into a contract with the Maryland Department of Corrections to provide ICS to two dozen Maryland correctional facilities. That contract requires GTL to pay an 87% commission on ICS revenue from collect calls, and a 65% commission on ICS revenue from debit and prepaid calls.

9. If GTL were to reduce its interstate ICS rates to $0.12 per minute for debit calls and $0.14 per minute for debit calls, GTL projects that site commission revenues to the Maryland DOC's 24 facilities would likely decline by more than $25,000 per month and more than $300,000 in the next year (if it continued to pay commissions), and by more than $40,000 per month and more than $500,000 in the next year (if it did not).

10. I estimate that it will require at least 10 person hours to renegotiate the terms of each of the more than 500 existing GTL contracts that set interstate rates above safe harbor levels, or more than 5,000 person hours overall. Even then, there is no guarantee that GTL's renegotiation attempts will be successful for all contracts.

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

Executed at Mobile, Alabama, on the 29 day of October, 2013.

Charles Stephen Yow

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

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

## COMMENTS OF GLOBAL TEL*LINK CORPORATION


David Silverman
Senior Vice President and General Counsel
GLOBAL TEL*LINK CORPORATION
Suite 100
21021 Sunset Hills Road
Reston, VA 20190

Chérie R. Kiser
Janet A. Beer*
Angela F. Collins
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006

*Counsel to Global Tel*Link Corporation*


Dated: March 25, 2013



Exhibit 4

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**FEDERAL COMMUNICATIONS COMMISSION**
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## COMMENTS OF GLOBAL TEL*LINK CORPORATION

Global Tel*Link Corporation ("GTL"),[1] by its undersigned counsel, hereby submits these comments in response to the Notice of Proposed Rulemaking released on December 28, 2012.[2]

## INTRODUCTION AND SUMMARY

The Federal Communications Commission ("FCC" or "Commission") has compiled an extensive record on issues relating to inmate calling services ("ICS"). In the *2002 Order on Remand*, the FCC requested detailed comments on ICS rates, commissions, cost and revenue data, and related issues, and on proposed methods to lower ICS rates, and numerous comments regarding ICS reform were received.[3] Since 2003, the FCC has sought and received comments on the First Wright Petition, in which Petitioners requested that the Commission "prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons,"[4] and on the Alternative Wright Petition, in which Petitioners proposed, *inter alia*, that the Commission establish nationwide rate caps for all interstate, interexchange

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1 These comments are filed by GTL on behalf of itself and its wholly owned subsidiaries that also provide interstate inmate calling services: DSI-ITI, LLC, Public Communications Services, Inc., Value-Added Communications, Inc., and Conversant Technologies, Inc.

2 *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶ 1 (2012) ("*NPRM*").

3 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, ¶¶ 73-79 (2002) ("*2002 Order on Remand*").

4 CC Docket No. 96-128, Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in a Pending Rulemaking, at 3 (filed Nov. 3, 2003) ("First Wright Petition").

inmate calling services.[5] Noting that there has recently been "substantial renewed interest and comment in this docket highlighting both the wide disparity among interstate interexchange ICS rate levels and significant public interest concerns," the FCC now seeks comment to refresh the record and consider whether rule changes are necessary to ensure just and reasonable ICS rates for interstate, long distance calling at publicly and privately administered correctional facilities.[6] In particular, the FCC seeks comment on "the reasonableness of current ICS rates and what steps the Commission can and should take to ensure reasonable ICS rates going forward."[7]

The following comments respond to many of the questions posed by the *NPRM* in an effort to answer the primary question of whether ICS rates are just and reasonable. This analysis must take into consideration the extraordinary diversity among correctional facilities across the country and the wide diversity of the security features required by individual facilities. Inmate calling services are not susceptible to one-size-fits-all federal regulation, nor are they required to be.[8]

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5 *See, generally* CC Docket No. 96-128, Petitioners' Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services (filed Mar. 1, 2007) ("Alternative Wright Petition").

6 *NPRM* ¶ 1.

7 *NPRM* ¶ 8.

8 *Holloway v. Magness*, No. 5:07CV00088 JLH-BD, 2011 WL 204891 (E.D. Ark. Jan. 21, 2011) ("The courts have generally dismissed claims such as this one by saying that prisoners have no right to unlimited telephone use and no right to a specific telephone rate."); *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) ("There is no authority for the proposition that prisoners are entitled to a specific rate for their telephone calls and the complaint alleges no facts from which one could conclude that the rate charged is so exorbitant as to deprive prisoners of phone access altogether."); *Riley v. Doyle*, No. 06–C–574–C, 2006 WL 2947453 (W.D. Wis. Oct. 16, 2006) ("[T]elephone rates charged to institutionalized persons do not implicate the First Amendment no matter how exorbitant they may be."); *see also Semler v. Ludeman*, No. 09-0732, 2010 WL 145275 (D. Minn. Jan. 8, 2010) (dismissing a claim that telephone rates were expensive because involuntarily committed sex offenders "do not have a First Amendment right to a specific rate for their telephone calls," and the plaintiffs "made no allegation that they are precluded from making telephone calls given the rate charged"); *Jayne v. Bosenko*, No. 2:08–cv–02767–MSB, 2009 WL 4281995 (E.D. Cal. Nov. 23, 2009) (same); *Beaulieu v. Ludeman*, 07–CV–1535, 2008 WL 2498241 (D. Minn. June 18, 2008) (same); *Bowcut v. Idaho State Bd. of Corr.*, No. CV06–208–S–BLW, 2008 WL 2445279 (D. Idaho June 16, 2008) (same); *Thomas v. King*, No. CV F 06 0649, 2008 WL 802475 (E.D. Cal. Mar. 24, 2008) (same); *Dotson v. Calhoun Cnty. Sheriff's Dep't*, No. 1:07–CV–1037, 2008 WL 160622 (W.D. Mich. Jan. 15, 2008); *Boyer v. Taylor*, No. 06–694–GMS, 2007 WL 2049905 (D.Del. Jul. 16, 2007);

Among the unique features that correctional facilities require are costly and increasingly sophisticated security elements – including automated call screening, biometric caller verification, real-time recording and monitoring, fraud control features, and more. In addition, many correctional facilities require the payment of commissions by ICS providers as an essential component for the privilege to provide inmate calling services. Mandatory commissions can be a significant amount of the costs associated with the provision of the inmate calling services where they are required. The amount of commissions, how they are calculated, and the determination of which programs the funds support are all decisions within the discretion of state and local policymakers, and the FCC must continue to defer to state and local authorities with regard to such determinations.[9]

## BACKGROUND

GTL is a leading provider of inmate services, software solutions, and equipment used in correctional facilities throughout the United States. GTL's customers encompass more than 1,900 correctional facilities in 47 states and over 800 counties, and the company maintains a system of over 65,000 telephones across those facilities. The GTL services made available by those correctional facilities allow more than 1.11 million incarcerated individuals to communicate with millions more family members and friends nationwide and around the globe. GTL serves correctional facilities of all types and sizes, ranging from municipal and county jails housing fewer than ten inmates to state and federal maximum-security systems housing tens of thousands of inmates. Its widely varied customers include publicly and privately managed institutions, minimum-security and maximum-security facilities, correctional mental health

[9] *2002 Order on Remand* ¶ 29 ("any solution to the problem of high rates for inmates must embrace the states").

facilities, remote work camps, correctional facilities in urban and rural locations, facilities that hold prisoners for a short time and those that house prisoners for extended periods.

GTL has been providing services to correctional facilities since 1989. The company offers an integrated package of services, software, and equipment on a contractual basis, which is tailored to meet the unique security and public safety demands of each correctional facility. The company enters into multi-year contracts with its correctional facility customers through a competitive bidding process operated by the customer. At present, GTL has contracts with the Departments of Corrections ("DOCs") in 30 states, including 12 of the country's 20 largest prison systems, and the Federal Bureau of Prisons.

The FCC has previously recognized that inmate calling requires "special security measures" and that prisons have specialized security needs.[10] GTL has developed a broad suite of proprietary technology products and services that are designed not only to provide inmates with fair and adequate access to telephones, but also to provide extensive controls and investigative capabilities that meet the unique security and public safety needs of correctional facilities, law enforcement, and homeland security.

GTL installs, manages and maintains a sophisticated network integrated together with a proprietary software platform that supplies a wide variety of specialized investigative and security products and services, to meet the varied needs of its diverse customer base. The company's specialized security services include fraud control features to prevent three-way calling and call-forwarding; blocking mechanisms to prevent repetitive dialing of blocked or unaccepted phone numbers and to prevent inmates from calling judges, prosecutors, jurors or witnesses in legal proceedings; real-time recording and call monitoring capabilities; biometric

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[10] *Billed Party Preference for InterLATA 0+ Calls*, 16 FCC Rcd 22314, ¶ 15, n.46 (2001); *see also 2002 Order on Remand* ¶ 9.

caller verification based on voice analysis; cell phone detection investigative tools; and sophisticated tracking tools that enable law enforcement authorities to assemble data on gang structures and criminal activity by analyzing GTL's databases to determine inmate calling patterns.

GTL provides durable telephone receivers to minimize prison maintenance costs, and it employs a web portal to enable remote access to security-related information. The company also develops and administers payment and billing systems, which increasingly include prepaid or debit billing systems. The company provides human resources support, maintenance services, on-site administrators, and proactive diagnostic monitoring for software and hardware failures. Each correctional facility requires the design and implementation of an individually tailored suite of communications and security services to meet the needs of that correctional facility. These individual case basis arrangements involve a significant capital investment, and the ongoing management and maintenance of the system is often labor-intensive, including full-time staff to assist investigators and maintain the system, which is subject to harsh use.

GTL thus provides a specialized inmate calling service that serves a dual purpose, each of which must be balanced against the other: (1) providing the means for inmates to communicate with friends and family members, within the parameters defined by the particular correctional facility, and (2) assisting correctional facilities and law enforcement officials in identifying and investigating any criminal activity that may arise from, or be furthered by, the use of an inmate telephone system.[11]

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[11] *Cf. 2002 Order on Remand* ¶ 72 (noting that correctional facilities and service providers must "balance the laudable goal of making calling services available to inmates at reasonable rates . . . with necessary security measures and costs related to those measures").

## I. FEDERAL REGULATION OF INMATE CALLING SERVICES RATES

Both in their initial petition proposing limitations on correctional facilities' ability to contract for ICS services and again in their alternative submission proposing nationwide ICS rate caps, Petitioners ask the Commission to impose a system of nationwide federal regulation on a complex array of diverse county, local, and state prison facilities that should continue to be governed by county, local, and state authorities. These and other proposals in the record are premised on a fundamental failure to appreciate the broad range of correctional systems around the country and their widely divergent security needs, service levels, policy views, budgetary practices, and calling rates. The Commission has consistently and appropriately recognized that inmate calling services present unique issues that are best addressed by state and local governments and prison administrators.[12] The Commission should continue to defer to state and local authorities with regard to the determination of the ICS required by each individual facility and its unique inmate calling environment.[13]

### A. Inmate Calling Services Present Unique Issues that Are Not Susceptible to One-Size-Fits-All Federal Regulation

The FCC seeks comment on Petitioners' proposal to have the Commission establish benchmark rates for domestic interstate interexchange calling service, including imposing per-minute rate caps for debit and collect calls and eliminating all set-up or other per-call charges or, in the alternative, eliminating per-call charges for reinstating dropped calls.[14] Petitioners' desire to impose a one-size-fits-all approach in the form of nationwide rate caps is wholly at odds with

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12 *See, e.g., 2002 Order on Remand* ¶ 19 ("the correctional facility and its communications policy, not the market, often determine the number of prison phones"); *see also id.* ¶ 29 ("any solution to the problem of high rates for inmates must embrace the states").

13 There is no constitutional right on the part of an inmate to utilize a telephone on his own terms. *Gilday v. Dubois*, 124 F.3d 277, 293 (1st Cir. 1997); *see also United States v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000) ("Prisoners have no per se constitutional right to use of a telephone.").

14 *NPRM* ¶¶ 17-23.

the enormous variability among correctional institutions across the United States. By requesting a uniform national rate structure for all U.S. correctional facilities, without regard for their size, location, security requirements, and the types of services the facilities require and without taking account of state and local management, policy, and budgetary decisions, Petitioners dramatically oversimplify the security, budgetary, and political challenges confronting prison administrators.

The FCC has previously recognized that "inmate calling services, largely for security reasons, are quite different from the public payphone services that non-incarcerated individuals use."[15] Indeed, the FCC has stated that, "while one function of the service is to provide communications service to the inmate population, the concerns and requirements of corrections authorities are different and often in conflict with those associated with the provision of basic public payphone service."[16] Correctional facilities require complex and costly technological features for their inmate calling environments, including, among other things, special automated voice-processing systems for call screening, sophisticated blocking mechanisms, recording systems that must store terabytes of data for easy retrieval, monitoring to evade restrictions on call-forwarding or three-way calling, voice overlays identifying calls and disclosing that calls are recorded, and detailed reporting systems.[17]

The substantial costs associated with such security and public safety requirements cannot be reduced to a simple national rate formula as Petitioners appear to believe. The security needs of any one correctional facility vary dramatically from the needs of other facilities, depending on numerous interrelated variables, including the size and location of the facility, the level of

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15 *2002 Order on Remand* ¶ 9; *see also Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, ¶¶ 57-61 (1998) ("*1998 Order*") (declining to impose billed party preference requirements on outgoing calls by prison inmates).

16 *Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, 11 FCC Rcd 7362, ¶ 25 (1996).

17 *2002 Order on Remand* ¶ 9.

security, the length of incarceration and other characteristics of the inmate population, as well as the amount of money local administrators have and choose to spend on security features. The services chosen by prison administrators and other local administrators, and their budgetary decisions, are reflected in the contracts negotiated between ICS providers and local officials. Thus, ICS pricing is, to a large extent, determined by the terms of those individual contracts, which reflect the enormous diversity of services required by correctional facilities, and the costs of providing those services, more realistically and accurately than any oversimplified rate formula could.

Such variations necessarily affect the system design and implementation costs borne by service providers, and the demand for ever-more sophisticated technology increases the variability among correctional facilities. Providing inmate calling services to a correctional facility with thousands of inmates, for example, is vastly different from serving a small municipal or county jail. Larger facilities demand more complex systems to contend with an inmate population with varying prison terms and diverse criminal backgrounds, including organized crime and gang activity, which can be orchestrated through inmate phone conversations. For example, GTL typically places more telephones in high-security inmate cell blocks to minimize security risks associated with transporting prisoners to other locations in the facility to place a call. More complex systems require GTL to provide on-site technical support because equipment and software problems not only can compromise the institution's ability to monitor and block calls, but could even cause threats to the safety of inmates and correctional officers if telephones remain out of service for extended periods.

Individual prison administrators frequently require customized features, which further compounds the wide variety of security and public safety requirements among correctional

facilities of different types and sizes. For example, one routine feature of ICS security systems is that inmate calls are recorded and retained for investigatory use. Correctional facilities vary greatly, however, in their specific requirements for inmate call recording. One facility may choose to retain recordings for 30 days, another for 60 days, yet another for 18 months or even up to five years. These individual institutional choices have a significant impact on the audio file capacity required, location of storage (local or remote), and, consequently, on storage costs. For instance, California requires seven years of recordings to be maintained, which amounts to approximately 160 terabytes of data.[18] Preferred audio formats also vary from facility to facility. One facility may choose to have recordings created and retained in a format that is accessible only by inmate name and call date, while another facility opts to install a more sophisticated system that permits biometric analysis, such as voiceprint identification, or a system that enables investigators to conduct word searches and map the information in the recordings against other data on file for a particular inmate. Each of these choices introduces a cost variable, and their collective impact demonstrates the difficulty of attempting to nationalize rate structures.

The FCC has long respected the "exceptional circumstances" that characterize the inmate calling services environment,[19] appropriately rejecting prior calls for federal regulation. The Supreme Court likewise has recognized that "running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources" and has counseled restraint and deference on matters related to correctional facilities.[20] The Commission

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18 By comparison, the U.S. Library of Congress claims that it has collected "about 385 terabytes of web archive data" as of January 2013, and that its web archives grow about 5 terabytes per month, with one terabyte equaling 1,024 gigabytes. *See* Library of Congress, Web Archiving FAQs, *available at* http://www.loc.gov/webarchiving/faq.html#faqs_05.

19 *Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd 2744, ¶ 15 (1991).

20 *Turner v. Safely*, 482 U.S. 78, 84-85 (1987).

should continue to heed that sound principle when considering the proposal to impose nationwide ICS rate caps.

### B. The Payment of Commissions Is within the Discretion of Local Policymakers; They Are a Cost of Providing Inmate Calling Services

The *NPRM* seeks comment on the effect of commissions on ICS rates, including whether the FCC must address the effect of commissions in order to ensure just and reasonable ICS rates.[21] The amount of commissions and how they are to be calculated vary among state, county and municipal facilities, based on the decisions of state legislatures or local policymakers. In GTL's experience, commissions can range from 0% to more than 75% of gross revenues generated from prisoners' phone calls, or commissions may be expressed as either a fixed or minimum annual guarantee plus a percentage of all revenues generated from inmates' calls over the minimum guarantee. GTL has observed, as a general trend, that the size of commissions have increased substantially since the First Wright Petition.

Petitioners make no effort to conceal their intention to use FCC regulation to drive down or eliminate site commissions,[22] which would short-circuit local political decision making by imposing a rigid system of national rate caps. Petitioners' arguments ignore important public policy considerations underlying commissions. Commission amounts are often driven by how local policymakers strike the balance between relying on state appropriated funds versus revenues generated by ICS consumers. In most instances, commissions collected pursuant to state law are channeled back into correctional facilities to fund inmate health and welfare programs or for other public interest purposes, in accordance with the decisions of prison

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21 *NPRM* ¶¶ 37-38.

22 Alternative Wright Petition at 7.

administrators and other local policymakers.[23] Many local officials have expressed the belief that commission payments have significant public benefit.[24] In GTL's experience, when policymakers eliminate a commission in the midst of a contract, rates have been lowered by the removal of commissions from the cost structure. State and local governments that have chosen to reduce or eliminate commissions, in an effort to lower calling rates, are required to either make up the budgetary shortfalls through other revenue generating activity or to forgo the inmate programs once funded by commissions.

Whatever may be the advantages or disadvantages of lower commission structures, this complex issue is simply not amenable to a uniform national solution. To the extent that regulation of inmate calling services is required, the Commission has recognized that any reforms "must embrace the states."[25] Because these choices implicate complex and important questions of local concern, any decision about the use of commissions and the amounts to be collected must be made by state and local officials who are accountable to the affected communities.[26] The Commission should therefore continue its policy of restraint, recognizing that the regulatory scheme Petitioners propose would encroach on quintessential state police powers and prerogatives.

The FCC also seeks comment on whether its previous finding, that "under most contracts, the commission is the single largest component affecting the rates for inmate calling service" is

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23 CC Docket No. 96-128, *Ex Parte* Presentation of Global Tel*Link, at 7 (filed Oct. 2, 2012) ("GTL 2012 *Ex Parte*) (describing how various states utilize commission payments to fund inmate programs).

24 GTL 2012 *Ex Parte* at 8 (discussing how correctional facilities receive benefit from commission payments).

25 *2002 Order on Remand* ¶ 29.

26 *See, e.g., United States v. Michigan*, 940 F.2d 143, 155 (6th Cir. 1990) ("The unabridged teachings of the [Supreme] Court convey the Court's own unequivocal commitment to and its adamant recognition of the state's sovereign authority to operate its penal institutions. Anchored in the sensitive principles of federalism, this sovereign authority is a prerogative of the state . . . .").

still accurate.[27] In GTL's experience, where a commission is a requirement, it is accurate to state that "the commission is the single largest component affecting the rates for inmate calling service."[28] But GTL does not agree with the FCC's finding that "location rents are not a cost of payphones, but should be treated as profit."[29] In reviewing the payphone industry in 1999, the Commission determined that "locational rents" should be treated as a form of profit rather than a cost.[30] This conclusion was based, in part, on the Commission's finding that a payphone that "earns just enough revenue to warrant its placement, but not enough to pay anything to the premises owner" is "a viable payphone . . . because the payphone provides increased value to the premises."[31] The FCC made this conclusion with respect to Section 276's requirement that payphone providers be fairly compensated.

This conclusion is not relevant to the Commission's current inquiry as it is no longer a viable analogy based on the evolution of inmate telephone technology and the near death of the payphone industry in the intervening period. Further, as the FCC notes, it is Section 201(b) of the Communications Act of 1934, as amended ("Act"), that drives the determination of whether rates are just and reasonable.[32] Commissions should not be treated as profits for the purposes of determining whether rates are reasonable under Section 201(b). The analysis conducted by the FCC with respect to fair compensation for payphone providers is fundamentally different from determining whether a service provider's rates are compliant with Section 201(b). Moreover, the FCC's prior conclusion did not take into account the fact that ICS "are quite different from the

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27 *NPRM* ¶ 37 (citing *2002 Order on Remand* ¶ 10).

28 *2002 Order on Remand* ¶ 10.

29 *NPRM* ¶ 37 (citing *2002 Order on Remand* ¶ 15).

30 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545, n.72 (1999) ("*1999 Payphone Order*").

31 *1999 Payphone Order* ¶ 156.

32 *NPRM* ¶ 37.

public payphone services that non-incarcerated individuals use" or that ICS "is economically different than other payphone services."[33]

Correctional facility commissions are a cost of providing inmate calling services; they are not "location rents." Location rent cannot and should not be equated with commissions. To the extent that ICS contracts require payment of location rent, it is typically a *de minimis* charge in exchange for the placement of telephones. A commission, in contrast, is more akin to a concession fee, such as that paid by a restaurant operator at an airport, in exchange for the opportunity to be the exclusive vendor in a particular location.[34]

The FCC also questions whether its prior determination that, "because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates," remains accurate.[35] This is not the case in today's ICS environment. Merely because a company charges high rates does not mean it is able to offer the highest commissions. For example, even if it charges very high rates, a smaller competitor will likely not be able to offer the highest commissions if it has higher telecommunications or maintenance costs than its competitors. In contrast, because GTL is one of the largest providers in the market, it has economies of scale and efficiency that enable it to pay high commissions, provide high-quality service, and still charge lower rates than many other ICS vendors. Nor is it necessarily the case that the competitive bidding process will result in higher rates when commissions are required. In GTL's experience, correctional facility customers routinely refer to rates in the same breath as commissions, and even those customers that want the highest possible commissions also want the lowest possible rates along with

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33 *2002 Order on Remand* ¶¶ 9, 12.

34 GTL treats both location rent and commissions as cost items.

35 *NPRM* ¶ 37 (citing *2002 Order on Remand* ¶ 10).

technical solutions that provide sophisticated security and the highest degree of public safety to the facility.

Competition for inmate service contracts is robust, and service providers absolutely must compete with respect to rates. Contracts for the provision of inmate calling services are generally awarded by a public bidding process that commences with the publication of a request for proposal by the correctional facility, setting forth the relevant requirements. For larger contracts, it is typical for more than five or more service providers to submit bids. It is up to the ICS provider to find the desired balance between its cost structure and its need to make a profit, and the specific technical requirements for security and public safety spelled out in the customer's procurement request, whether or not those requirements include a commission. It is not necessarily the case that the competitive bidding process will result in higher rates. As part of the bidding process, correctional facilities often demand the submission of itemized rate-structure proposals from bidders so they can meet their revenue requirements while minimizing the rates imposed on end users. In fact, service providers compete vigorously with respect to rates, and the winning bids often include the lowest overall rate structure, inclusive of the commission. Indeed, the Commission has previously found that the contracts between ICS providers and correctional facilities provide fair compensation, as required by Section 276.[36]

### C. The Establishment of Just and Reasonable Rates for Inmate Calling Services Must Be Consistent with the Current Regulatory Framework

In this section, GTL addresses certain of the Commission's specific requests for comment that appear to be addressed to ICS providers.

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[36] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 11 FCC Rcd 21233, ¶ 72 (1996) ("*1996 Payphone Order*") ("[W]henever a PSP 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.").

*1. Rate Caps in the ICS Market*

The Commission seeks comment on various proposals for ensuring just and reasonable ICS rates, including adopting rate caps, using a "marginal location" methodology, implementing tiered pricing, relying on market forces, distinguishing between different calling methods, and establishing intrastate-interstate parity.[37] But, as the Commission itself notes, it "does not currently regulate interstate ICS rates."[38] Thus, any decision to change the existing regulatory framework for ICS interstate rates must be reconciled with the Commission's prior determinations regarding the appropriate regulatory regime for ICS providers and other non-dominant providers.

Since the '80s, the Commission has acknowledged that non-dominant carriers should be subject to less stringent regulatory burdens than dominant carriers.[39] The decision to eliminate certain regulatory oversight of non-dominant carriers was based on the Commission's "conclusion that marketplace forces will operate to ensure that the rates and other tariff provisions of non-dominant carriers comply with the objectives of Sections 201 and 202 of the Act."[40] Based on these findings, the Commission ruled the "tariffs of non-dominant carriers to be presumptively lawful."[41]

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37 *NPRM* ¶¶ 17-23.

38 *NPRM* ¶ 2.

39 *See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1 (1980) ("*Competitive Carrier Order*"). The Commission defined a "dominant carrier" as one that possesses market power, which "refers to the control a firm can exercise in setting the price of its output," and "is able to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest." *See id.* ¶ 56. By contrast, a non-dominant carrier lacks market power and "must take the market price as given, because if it raises price it will face an unacceptable loss of business, and if it lowers price it will face unrecoverable monetary losses in an attempt to supply the market demand at that price." *See id.*

40 *Competitive Carrier Order* ¶ 48.

41 *Competitive Carrier Order* ¶ 96.

In 1996, the FCC determined that tariff filings from non-dominant carriers were no longer necessary to ensure that those carriers' charges, practices, or classifications are just and reasonable, or for the protection of consumers.[42] The FCC applied its detariffing requirements to nearly all international and interstate, domestic interexchange services, including casual calling services, which the FCC defined as "services that do not require a consumer to open an account or otherwise presubscribe to a service, including use of a third-party credit card, collect calling, or dial-around through the use of an access code."[43] Instead of filing tariffs, the FCC required non-dominant carriers to make their rates, terms, and conditions for the services subject to detariffing available in a public location and on their website.[44]

The Commission has taken similar steps with respect to providers of inmate operator services. Under Section 226(h) of the Act, providers of interstate operator services are required to maintain an informational tariff on file with the Commission specifying the provider's rates, terms, and conditions.[45] Any changes made to the informational tariff are effective without prior notice to the public.[46] Inmate operator service providers are required to make certain oral disclosures prior to completion of the call so "the billed party can decide whether to accept the call and can limit the length of the call."[47] In light of the informational tariff requirement and the oral disclosure rules, the Commission specifically declined to impose "price benchmarks or rate

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42 *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 20730, ¶¶ 21, 36 (1996) (subsequent history omitted) ("*Detariffing Order*").

43 *Detariffing Order* ¶ 58, n.127; *see also* 47 C.F.R. § 61.19.

44 47 C.F.R. § 42.10.

45 47 U.S.C. § 226(h)(1); *see also* 47 C.F.R. § 64.709.

46 *1998 Order* at n.109 ("Unlike the effective date of rates in tariffs filed pursuant to Section 203 of the Act, which the Commission may suspend, rates and surcharges in informational tariffs filed pursuant to Section 226 are effective without prior notice to the public and the Commission. *See* Section 226(h)(1)(A) ('changes in [informational tariff] rates, terms, or conditions shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect.'").

47 *1998 Order* ¶ 49; *see also* 47 C.F.R. § 64.710.

caps" on inmate calling services as requested by some parties.[48] The Commission found that, "because rates must be filed with the Commission and must conform to the just and reasonable requirements of Section 201 of the Act . . . it is more efficient and less intrusive to proceed on a case-by-case basis, should the [disclosure] rules . . . not lead to reasonable rates for calls from inmate phones."[49]

*2. Marginal Location Methodology*

The FCC seeks comment on the potential use of "marginal location" methodology to propose just and reasonable ICS rates.[50] The Commission used this methodology nearly 20 years ago in calculating public payphone rates.[51] The underlying cost and demand factors for public payphones are not sufficiently similar to those associated with ICS to justify employing a cost methodology designed for public payphones, for two principal reasons. First, the proposed methodology is shackled to an antiquated technology, which, for all intents and purposes, no longer exists in reality and thus cannot provide a meaningful analog to today's constantly evolving ICS systems. Second, even if it could be assumed that the "marginal location" methodology was fully inclusive of the non-telephone costs of a call, any attempts to draw parallels between ICS and public payphones are inherently flawed because they fail to take into account the unique security concerns involved with operating inmate telephone systems in a correctional setting or the wide variations among correctional facilities.[52]

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48 *1998 Order* ¶ 48.

49 *1998 Order* ¶ 48.

50 *NPRM* ¶¶ 24-26.

51 *See, e.g., 1999 Payphone Order* ¶¶ 139-153 (discussing the FCC's use of marginal location methodology in its 1996 and 1997 decisions).

52 *See, e.g., 2002 Order on Remand* ¶ 9 ("inmate calling services, largely for security reasons, are quite different from the public payphone services that non-incarcerated individuals use").

*3. Impact of Rate Reductions on Call Volumes*

The FCC seeks comment on whether call volumes have increased where rates have been lowered, and the resulting impact on ICS providers' revenues.[53] In GTL's experience, there is not a direct relationship between rate reduction and increased telephone usage. Lower rates alone are unlikely to have a significant impact on call volumes. While there is early data in some locations, *e.g.*, New York, suggesting that an increase in call volume followed the reduction or elimination of commissions, other locations, *e.g.*, California and Georgia, experienced no difference in telephone usage following the same changes. Indeed, GTL has seen the most direct impact on call volumes in situations where there have been no rate changes. For instance, when prepaid calling is made available in a correctional facility, call volumes typically increase significantly as an inmate's family and friends can more easily manage a prepaid account for budgeting purposes than postpaid billing.

Accordingly, many interrelated factors can affect telephone usage in a correctional facility - including the number of inmates per telephone, the availability of those telephones, access to prepaid or debit accounts, and general economic conditions - and each of those factors needs to be reviewed in context and in combination. Lower rates, for example, would be more likely to produce an increase in usage in a facility with 6 inmates per telephone than in a facility where more than 50 inmates share a single telephone. Moreover, other internal factors, such as restrictions imposed by elements not controlled by the correctional facility, can also have an impact on an inmate's ability to use the telephones or to use all of his or her telephone allotment.

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53 *NPRM* ¶ 27.

*4. Market Forces*

The FCC seeks comment on the accuracy of the Petitioners' assertions (a) that telecommunications costs in general, and long distance costs in particular, are decreasing and (b) that ICS rates should follow the market and decrease as well.[54] GTL notes that Petitioners are looking at only one cost item, the basic telecommunications cost, and extrapolating overall cost reductions from that overly narrow base. While it is accurate that certain telecommunications costs have declined over the past 10 years, the nature of ICS products and services has changed dramatically over that same time period. As a result, many of the costs associated with providing inmate calling services have increased. For example, many investigative functions that once had to be performed "manually" by trained investigators are now possible through specialized software analytics, such as voice biometrics, data IQ, and digital audio search functions. For the correctional facility, the increase in software security features often means that fewer investigators are needed, which reduces that category of labor costs and frees up funds for other uses. For the ICS provider, however, the development, installation, and maintenance of increasingly sophisticated software security features results in increased research and development costs, higher maintenance and repair costs, and increased labor costs for the personnel needed to support those security features. In addition, as noted above, the general trend in the marketplace is that commissions paid to local jurisdictions have been increasing. And, although bad debt expense is expected to decline with increased use of prepaid calling plans, it still represents a substantial cost for ICS providers. The decrease in certain traditional telecommunications service costs is thus not material to rates because it is

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[54] *NPRM* ¶ 29.

subsumed by increases in numerous other costs or the creation of new costs related to enhanced features and functionality.

*5. Collect Calling, Debit Calling and Prepaid Calling*

The FCC seeks comment on the benefits of debit calling, its potential safety concerns and administrative costs, on the viability and current availability of prepaid calling, and on its authority to mandate that ICS providers offer debit calling.[55] As an initial matter, it is necessary to clarify the terminology used to discuss alternative payment methods. GTL understands there to be three alternative payment methods, depending on *who* pays for a call (the caller or the recipient) and *when* payment is made (before or after the call). First, the term "collect calling" refers to the traditional collect call that results in the local exchange carrier ("LEC") placing a charge on the recipient's telephone bill; thus the cost of the call is paid after the fact or postpaid by the call recipient, and the charge has the potential to become a bad debt expense. Second, the term "prepaid calling" refers to calling that is paid from an account that belongs to a family member or friend of the incarcerated individual; the account is funded in advance, *i.e.*, prepaid, by the call recipient and the prepaid minutes purchased decrease as they are used. Third, the term "debit calling" refers to calling that is paid for with an existing account, but here it is an account that belongs to the inmate; funds from the account are debited as calls are made.

In GTL's experience, collect calling is generally more expensive for the ICS provider than prepaid calling or debit calling because of billing cost and uncollectibles.[56] The rates for

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[55] *NPRM* ¶¶ 30-33, 53. Petitioners' assertion that "debit calling is less expensive because it reduces staff responsibilities" cannot be addressed because it is not clear what is meant by "staff." *See NPRM* ¶ 30 (citing Alternative Wright Petition at 20-21, 23-27).

[56] *2002 Order on Remand* ¶ 76 (stating that collect calling for inmate calls includes "operator services, billing and collection, and bad debt").

non-inmate interstate collect calling also reflect these costs.[57] ICS collect call rates cannot be reviewed in isolation when many carriers are charging similar or higher rates for non-inmate interstate collect calling.[58]

Debit calling, however, can actually increase some administrative costs depending on the characteristics of the inmate account. For example, a system that uses PINs (personal identification numbers) tied to inmate IDs has to be managed, and the management costs are likely to be higher in facilities with high turnover of the inmate population. As to safety concerns, a PIN can become a commodity inside a correctional facility, which can lead to PIN theft. Although those safety concerns can be addressed by the facility, the ICS provider may be asked to provide software solutions, such as voice recognition PINs (combining PIN and voice biometrics), which result in increased cost.

Debit calling also requires more detailed administration of an inmate's "allowed calls" list to validate each call being made via the debit account and ensure that calls are being made only to those persons the inmate is permitted to contact. Depending on the facility, the process of administering inmate "allowed calls" lists is done manually through human intervention or via automated software, both of which involve additional costs. Thus, while there are obvious

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[57] *See, e.g.*, CC Docket No. 96-128, Comments of Corrections Corporation of America, at 9 (filed May 2, 2007) ("The Petitioners support their request for benchmark rates by comparing their worst-case inmate calling rates to standard long distance rates, including rates for standard prepaid and debit calls. The most appropriate evaluation of inmate calling rates, however, would be to compare the rates charged for calls from correctional facilities with the rates charged for person-to-person collect calls that are available to the general public. Courts and the Commission have recognized the need of correctional facilities to identify, monitor, and block inmates calls to specific individuals, and this need, in addition to the need to establish other security measures, makes station to station calls the more comparable model.").

[58] *See, e.g.*, Global Crossing Companies, Domestic Informational Price List No. 1, at 204 (effective February 1, 2001), *available at* http://www.level3.com/en/legal/global-crossing-tariffs/~/media/96EE3A0624F24E50BC1AC03CC6038617.ashx; XO Communications, Rates for Operator and Directory Assistance, *available at* http://www.xo.com/SiteCollectionDocuments/information/TOS_SLA_Rates/voice/rates/XORates_ChargesOP4.5.pdf; tw telecom, Interstate Price List No. 4, at 42 (effective July 1, 2008), *available at* http://www.tariffs.net/tariffs/10090ero8n/temptwtel%20Interstate%20Price%20List%20%2007%2023%2012%20%28LD%20Lang%29%20CUR%20No.%204.pdf.

benefits to debit calling plans, there is no reason to expect that such plans will exert downward pressure on collect calling rates.

Correctional facilities are becoming more open to debit calling, but it is not yet universally accepted. Local authorities determine whether to permit inmates to direct their own calls through the use of debit calling. Some facilities still prefer not to give inmates the greater degree of latitude to direct their own calls. Prepaid and debit calling are viable options, and more than approximately 80% of consumers are using these methods to pay for their calls. Prepaid and debit calling have been the prevalent trend in the industry over the past 3-5 years, and a significant number of ICS providers now offer either prepaid calling or debit calling or both to the extent permitted by the correctional facility. Prepaid calling is popular among friends and family members of inmates, in part, because it makes it easier to manage how much is spent on telephone calls. The transition also has gained greater impetus because of the increasing difficulty ICS providers experience in billing for collect calls as many LECs are moving away from processing third-party charges for telecommunications services.[59] Given recent trends and the need for correctional facilities to determine whether debit calling is appropriate for their facility, there does not appear to be a need for regulatory intervention.

Finally, issues of billing and collection for inmate calling services likely remain outside the FCC's authority to regulate.[60] The FCC deregulated telecommunications billing and

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[59] *See, e.g., Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure, Truth-in-Billing and Billing Format*, 27 FCC Rcd 4436, ¶¶ 9,16 (2012) (discussing the measures LECs have taken to limit and third-party billing); *see also* United States Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations, Majority Staff, State Report for Chairman Rockefeller, "Unauthorized Charges on Telephone Bills," at ii (July 12, 2011) (determining that the "evidence obtained and analyzed by Committee staff suggest that third-party billing on landline telephone has largely failed to become a reliable method of payment that consumers and businesses use to conduct legitimate commerce").

[60] *NPRM* ¶ 53.

collections in 1986, stating in a 1986 order that billing and collections were not a "communication service" and thus not subject to regulation by the FCC.[61]

*6. Competition in the ICS Market (Exclusive Contracts and Collect-Call-Only Rules)*

The FCC seeks comment on the First Wright Petition's proposal that the Commission should prohibit exclusive contracts and collect call-only restrictions in privately administered correctional facilities.[62] The unique security needs of correctional facilities necessitate the use of exclusive contracts for inmate calling services.[63] If multiple ICS providers were operating within a single correctional facility, with each running its own systems, software, and recording procedures, no one provider would be responsible for security procedures. The facility's staff would need to be trained on multiple systems, its management would need to learn how to interpret and integrate multiple forms of reports, and its investigators would frequently have to conduct duplicative search procedures. It is highly likely that the facilities' overall costs, particularly its labor costs, would increase. Inmates and/or their family members and friends would need to have prepaid or debit accounts on multiple systems, and all of those accounts would need to be administered. It is unlikely that the revenue associated with the fragmented service would be sufficient to support the service for any of the vendors. In GTL's experience, exclusive contracts do not influence ICS rates: the contracts are awarded through a competitive bid process, in which the rates are influenced principally by the facility's requirements as set forth in the procurement specifications.

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61 *Capital Network System, Inc. v. FCC*, 3 F.3d 1526, 1528 (D.C. Cir. 1993).

62 *NPRM* ¶ 36.

63 *1998 Order* ¶¶ 56-57 (finding that inmate telephone systems are not required to provide the caller access to the carrier of its choice because inmates are limited to the carrier selected by the prison due to the special security requirements applicable to inmate calls).

*7. Offer No-Cost Calling*

The FCC seeks comment on Petitioners' suggestion that ICS providers should be required to provide a certain amount of no-cost calling per inmate per month in each of the facilities they serve in exchange for the right to charge a higher per-minute rate.[64] While some correctional facilities may be interested in considering a no-cost calling option, it does not change the fact that every call that goes out free has to be figured into the per cost call because there is a cost associated with providing the service. Put simply, there is no free lunch. An arrangement to provide no-cost calling per inmate per month typically would be managed by providing inmates that have a PIN with free time accounts, so this proposal would impose a certain amount of administrative cost on the correctional facility. And, as with debit calling accounts as discussed above, the PIN essentially functions as currency and thus could create potential safety issues.

*8. Billing-Related Call Blocking*

The FCC seeks comment on the practice of blocking collect calls to numbers served by LECs with which the ICS providers have no billing arrangements.[65] The LECs' unwillingness to bill for collect calls is not only continuing; it is increasing.[66] As a result, ICS providers have no alternative but to block collect calls where they would otherwise be completing calls with no way to bill the consumer and thus no way to be paid for those calls. The impasse further spurs the shift to prepaid and debit calling methods. Debit calling and prepayment options will ultimately make it irrelevant whether or not the LECs are willing to bill for collect calls. At the same time, the LECs are being supplanted by local wireless or Voice over Internet Protocol ("VoIP") service providers, another change in technology that makes location irrelevant in

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64 *NPRM* ¶ 39.

65 *NPRM* ¶ 40.

66 *See supra* n. 60.

collect call billing because the call is tied to a person, not a place. GTL is not aware of any practical ways to deter call blocking, other than by supporting increased use of debit or prepaid calling if the correctional facility permits such calling options.

*9. Non-Geographic Numbers*

The FCC seeks comment on whether disparity between interstate and local calling rates creates an incentive for call recipients to obtain non-geographic telephone numbers, such as wireless or VoIP numbers, and on security concerns associated with the use of such numbers.[67] GTL has observed the trend for call recipients to obtain non-geographic telephone numbers from wireless or VoIP providers, including numbers local to the prison, which allows the call recipient to take advantage of lower local calling rates. The practice occurs more often at state facilities than at local facilities. The use of non-geographic numbers means there is no accurate record of inmates' ultimate calling destinations, which raises serious security concerns. Suppose, for example, that an investigator using voice biometrics identifies a call recipient as an intermediary communicator for a criminal gang and law enforcement officials then try to locate that individual by identifying the telephone number the inmate called. If the call was placed to a non-geographic number local to the prison, the records would lead to a local exchange and the security flow would be interrupted by a third-party switch. From a security perspective, the result is similar to automatic call forwarding, which is routinely blocked by most correctional facilities for similar security concerns.

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[67] *NPRM* ¶ 41.

*10. Disabilities Access*

The FCC seeks comment on the types of ICS access provided to inmates with hearing disabilities and the rates for such access.[68] GTL's inmate calling services and the rates for those services are fully compliant with requirements under the ADA and current FCC requirements, including in most instances the availability of TTY devices in the correctional facilities.

*11. Updated Data*

The Commission seeks comment on the accuracy and reliability of an analysis of prison phone contracts by Prison Legal News ("PLN") and seeks updated data on ICS rates.[69] Because GTL has more than 1,900 correctional facility customers, each with unique procurement requirements and individualized contractual terms, it would be extraordinarily difficult and time-consuming to extract the summary information the Commission has requested for each of those correctional facility customers. In addition, referring to rate information alone, without an understanding of the underlying procurement requirements, necessarily yields misleading conclusions.

GTL, however, agrees with the Commission that the accuracy and reliability of the PLN study should be questioned. The examples the Commission found from its independent research demonstrate that the PLN study does not provide a currently accurate picture of the inmate calling market.[70] The PLN study is not reliable for a variety of reasons: its methodology is flawed, the rates reported are not reflective of reality or all of the calling options available to

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68 *NPRM* ¶ 42.

69 *NPRM* ¶ 43.

70 While the correct interstate rate for Texas is reflected in the PLN study, the study neglects to mention that those rates are for calls billed to a "Friends & Family Account." A call billed to an "Offender Account" maintained by the prisoner receives a discount, and would be $5.81 for a 15-minute interstate call. *See* Texas Offender Telephone, Calling Programs, Rates, Fees & Taxes, *available at* http://texasoffenderfriendsandfamily.com/rates.asp.

inmates and their families,[71] and the information is stale. While the PLN study was published in April 2011, the chart indicates that it is based on information from 2007-2008. Accurate and up-to-date information is available. Most interstate ICS rates are publicly available, either through dissemination by correctional facilities or via ICS providers' web-posted rates, terms, and conditions for interstate services. For example, in addition to the those cited by the Commission, the PLN study also reflects incorrect rates for Colorado ($3.00 for 15-minute interstate debit call),[72] Massachusetts ($1.78 for 15-minute interstate prepaid debit call),[73] North Carolina ($3.40 for all long distance calls up to 15 minutes),[74] Rhode Island ($5.22 for 15-minute interstate debit call),[75] and South Carolina ($1.53 (collect) or $1.29 (debit) for 15-minute call to anywhere in United States).[76]

*12. Reliability of Data*

The FCC seeks comment on whether the Alternative Wright Petition and the ICS Provider Proposal are grounded in sufficiently reliable data.[77] Neither proposal is reliable as support for setting interstate rates for interexchange long distance inmate calling services because the data are outdated and cover an insufficient portion of market.

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71 For example, for Idaho, the PLN study lists only the interstate rate for collect calls, but does not include the rate for interstate debit calls ($3.40 for a 30-minute call ) or the rate for interstate prepaid collect calls ($15.60 for a 15-minute call). *See* Idaho Department of Correction, Phone Services, *available at* http://www.idoc.idaho.gov/content/prisons/offender_services/phone_services.

72 Colorado Department of Corrections, Inmate Phone System, Debit Inmate Phone Rates (rates effective March 1, 2012), *available at* http://www.doc.state.co.us/inmate-communications#phone.

73 Massachusetts Department of Correction, Global Tel Link (GTL) Inmate Telephone Services - Calling Rates (rates effective October 2010), *available at* http://www.mass.gov/eopss/agencies/doc/.

74 North Carolina Department of Public Safety, Inmate Phone Program (rates effective July 1, 2011), *available at* http://www.doc.state.nc.us/Communications/index.htm.

75 State of Rhode Island Department of Corrections, GTL Calling Rates, available at http://www.doc.ri.gov/faq/telephone.php.

76 South Carolina Department of Corrections, Telephone Calls, Rate Structure, *available at* http://www.doc.sc.gov/family/TelephoneCalls.jsp.

77 *NPRM* ¶ 44.

In the Alternative Wright Proposal, Petitioners propose national rate caps on the basis of rate and cost data that are incomplete and considerably more outdated now than when they were submitted more than six years ago. Petitioners' claim that "[t]ypical long distance inmate collect calling rates include a per-call charge of $3.95 plus as much as $0.89 per minute"[78] overstates actual market conditions.[79] The Petitioners' estimates of service providers' costs do not reflect the costs of a representative sample of service providers or the extremely broad range of institutions they serve. Petitioners' data significantly understate important costs and overlook some cost categories altogether. Service providers must continually improve their security features to remain competitive in bidding contracts – GTL, for example, has developed cell-phone detection tools, voice biometrics systems, data IQ, and other technologies to deal with emerging security threats – but Petitioners did not include any measure of research and development costs in their cost model. Petitioners also dramatically understate the costs of maintaining and supporting the hardware and software used in inmate calling systems, data storage costs, bad debt expense, and other key cost drivers, and they fail to recognize that ICS contracts often require the placement of public payphones at locations unrelated to correctional facilities, such as parks and highway rest stops, which must be operated at a loss.

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78 Alternative Wright Petition at 2.

79 *See, e.g.*, Massachusetts Department of Correction, Inmate Domestic Debit and Collect Calling Rates (rates effective October 2010), *available at* http://www.mass.gov/eopss/agencies/doc/ (showing interstate rate of $.10 per minute plus an $.86 surcharge); North Carolina Department of Public Safety, Inmate Phone Program (rates effective July 1, 2011), *available at* http://www.doc.state.nc.us/Communications/index.htm (showing rates capped at $1.25 for local calls up to 15 minutes and $3.40 for long distance calls up to 15 minutes); Colorado Department of Corrections, Debit Inmate Phone Rates (rates effective March 1, 2012), *available at* http://www.doc.state.co.us/inmate-communications#phone (showing interstate rates of $.10 a minute plus a $1.50 surcharge); CC Docket No. 96-128, Letter from Securus Technologies (filed May 10, 2012) (listing a selection of Securus Inmate Collect Call Rates, including interstate rates in Florida of $.06 per minute plus a $1.20 surcharge, Maryland of $.30 a minute plus a $1.70 surcharge, Texas of $.43 a minute with no surcharge, and Missouri of $.05 a minute plus a $1.00 surcharge); *see also* Interstate and International Rates, Terms and Conditions Provided by Global Tel*Link Corporation, *available at* http://www.tariffs.net/tariffs/10094bvbq5/tempFCC%20RTC%2002%2019%2013%20GLOBAL%20CUR01.pdf (listing 22 domestic contracts, the rates for 18 of which are lower than $.89 a minute with a $3.95 surcharge).

The ICS Provider Proposal extrapolates from data selected from only 30 correctional facilities[80] to propose a rate structure for all ICS providers and the 4575 U.S. correctional facilities they serve.[81] A purported "sample" of 30 is far too small to produce reliable results. There are enormous variations among correctional facilities and the ICS products and services they request from ICS providers. In addition, the ICS Provider Proposal includes only correctional facilities that do not require commissions, which is not representative of the majority of U.S. correctional facilities. Moreover, the data provided are now well over five years old and thus incapable of providing an accurate picture of current conditions even as to the 30 correctional facilities selected.

*13. Existing Contracts*

The FCC seeks comment on how existing contracts should be treated, in the event the Commission was to implement a rate cap.[82] GTL urges the Commission to grandfather existing ICS contracts and apply any new ICS rules only to new contracts entered into after the effective date of such new rules. Most ICS contracts run for a term of three to ten years, depending in part on the number of extensions. The contracts typically include change of law provisions, but the application of those provisions is too uncertain to relieve the ICS provider of the economic burden of any new ICS rules that are made applicable to existing contracts. GTL currently provides ICS services under the terms of thousands of contracts with correctional facilities, and the company's business plans and its day-to-day operations are predicated on the assumptions that were considered and agreed to when those contracts were executed. If 30% to 40% of those

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80 *NPRM* ¶ 44 (citing to ICS Provider Proposal at 4-5).

81 Max Raskin & Ilan Kolet, *U.S. Jails More People Than Any Other Country: Chart of the Day*, Bloomberg, Oct. 15, 2012, http://www.bloomberg.com/news/2012-10-15/u-s-jails-more-people-than-any-other-country-chart-of-the-day.html; Natasha Lennard, *US has more prisoners, prisons than any other country*, Salon, Oct. 15, 2012, http://www.salon.com/2012/10/15/us_has_more_prisoners_prisons_than_any_other_country/.

82 *NPRM* ¶ 45.

contracts were to be altered to take account of new ICS rules, the change could have a material impact on GTL's ability to do business.

*14. Dropped Calls*

Petitioners also propose that per-call charges be eliminated when a dropped call is re-initiated within a certain amount of time.[83] Dropped calls can result from a variety of circumstances wholly unrelated to the inmate calling platform, such as when an inmate calls a person using a wireless phone, a home portable phone, or background noise or static triggers the security system that is designed to detect and deter three-way calling. Anyone that uses a wireless phone is susceptible to dropped calls - it is not an experience unique to the inmate calling environment.[84] When any type of wireless call is dropped, the wireless user is required to use additional minutes to initiate or receive a call to re-establish the lost connection. To avoid dropped calls, GTL advises its customers that call recipients should use landline telephones and, if they must use wireless telephones, to avoid talking in areas with prevalent background noise.

Eliminating per-call charges when a dropped call is re-initiated is not reasonable because the ICS provider must go through the same validation process and incur the same costs as for a new call, including the cost of using a third-party vendor. It is no more unreasonable to require inmates and call recipients to follow instructions for making telephone calls than it is to require prison visitors to pass through a metal detector and follow the instructions of prison security guards.

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83 *NPRM* ¶ 19; *see also id.* ¶ 53 (seeking comment on the FCC's legal authority regarding the treatment of dropped calls).

84 *See, e.g., Amendment of Parts 1, 2, 22, 24, 27, 90 and 95 of the Commission's Rules to Improve Wireless Coverage through the Use of Signal Boosters*, FCC 13-21, Report and Order, ¶ 1 (rel. Feb. 20, 2013) ("While nearly the entire U.S. population is served by one or more wireless providers, coverage gaps that exist within and at the edge of service areas can lead to dropped calls, reduced data speeds, or complete loss of service."); *see also* FCC Guide, Understanding Wireless Telephone Coverage Areas (explaining how dropped calls can occur), *available at* http://www.fcc.gov/guides/understanding-wireless-telephone-coverage-areas.

## II. LEGAL AUTHORITY TO REGULATE INMATE CALLING SERVICES

The FCC seeks comment on the scope of its legal authority to regulate inmate calling services, in particular its authority to address interstate interexchange ICS rates under Sections 201(b) and 276(b)(1)(A) of the Act.[85] Specifically, the FCC requests comment on whether it has jurisdiction to establish per-minute rate caps for privately- and publicly-administered facilities and whether it has the legal authority to disallow call set-up charges for re-initiation of disconnected calls, to mandate that ICS providers offer debit calling, or to address site commissions.[86]

Section 201(b) gives the FCC the power to ensure that all charges for interstate communications services are "just and reasonable."[87] This section illustrates the dual jurisdictional system regarding regulation of communications that Congress adopted when it enacted the Communications Act of 1934. Although the FCC's power over interstate services has been construed broadly, recognizing the authority of the FCC to address certain intrastate issues in order to carry out its mandates under the Act effectively,[88] courts have also repeatedly acknowledged the limitations of this authority. In *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, for example, the United States Court of Appeals for the Third Circuit reiterated the jurisdictional divide between the FCC and the states, noting that Congress could have made preemption of state regulation complete when it enacted the Telecommunications Act of 1996 but had instead preserved a role for state utility commissions in the federal regulatory

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85 *NPRM* ¶¶ 49-53.

86 *See id.*

87 47 U.S.C. § 201(b).

88 *See, e.g.*, 47 U.S.C. § 251.

scheme.[89] Section 201(b) thus gives the FCC broad license to regulate interstate calling to ensure "just and reasonable" rates, but the power is not absolute.

Section 276(b)(1)(A) requires the FCC 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."[90] Inmate calling services are specifically included in the statute's definition of "payphone service."[91] Section 276 applies to *all* service providers for *all* payphone calls and thus directs the FCC to ensure fair compensation for both interstate *and* intrastate calls.[92]

The FCC has repeatedly declined to impose federal surcharges or otherwise address ICS rates under Section 276.[93] In the *1996 Payphone Order*, the FCC concluded that the contracts negotiated between inmate calling service providers and correctional facilities satisfied the FCC's statutory obligation to ensure "fair compensation."[94] In the *2002 Order on Remand*, the FCC again explicitly rejected requests either to preempt state rate caps to allow higher ICS rates or to impose a federal per-call surcharge of $.90 on inmate calls.[95] The FCC acknowledged that inmate calling services in city and county correctional facilities exist largely in a state-regulated environment, because most calls made from such facilities are local or intrastate calls that are

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89 271 F.3d 491, 510 (3rd Cir. 2001).

90 47 U.S.C. § 276(b)(1)(A). Only emergency calls and telecommunications relay service calls for the hearing disabled are exempted from the "fair compensation" requirement.

91 47 U.S.C. § 276(b)(1)(C),

92 Section 276 was enacted to address the concerns that payphone providers and payphone service providers were not always being compensated fairly for payphone calls, in particular where telephone service providers offered "dial-around" methods that allowed consumers using public payphones to access cheaper providers for their calls instead of paying the provider of the payphone or its service via the coin-operated system. *See Precision Pay Phones v. Qwest Communications, Corp.*, 210 F. Supp.2d 1106, 1109 (N.D. Cal. 2002).

93 *1996 Payphone Order* ¶ 72 (ICS providers "tend to receive their compensation pursuant to contract, which makes them ineligible to receive a per-call compensation amount."); *2002 Order on Remand* ¶¶ 3, 24-26.

94 *1996 Payphone Order* ¶ 72 ("[W]henever a PSP 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.").

95 *2002 Order on Remand* ¶¶ 25-26.

subject to state-imposed rate ceilings.[96] The FCC refused to preempt those state rate ceilings or impose a federally-tariffed per-call surcharge.[97]

In the *2002 Order on Remand*, the FCC concluded that "any solution to the problem of high rates for inmates must embrace the states."[98] The FCC rejected a proposal for uniform national rates for inmate calling services, reasoning that because of the great diversity in local costs and conditions, a national surcharge could result in excessive recovery in many states and confinement facilities.[99] A federal surcharge that provides excessive recovery to ICS providers in a subset of correctional facilities would not satisfy the FCC's obligation to ensure "fair compensation" for all interstate and intrastate calls.

Taken together, Sections 201 and 276 appear to provide broad authority for the FCC to address interstate interexchange ICS rates – on the one hand, to ensure that rates are "just and reasonable" for the consumers of inmate calling services and, on the other hand, to ensure that ICS providers receive "fair compensation" for all ICS calls. FCC intervention in issues subject to state regulation – including intrastate ICS rates – would be appropriate only if there were no other way for the FCC to carry out its mandates under the Act.

While the FCC has certain obligations under the Act, the historic regulation of prisons by the states and the unique challenges presented by state prisons and ICS, place regulation of ICS more appropriately with the states. Courts have routinely ruled that the regulation of state and local corrections facilities must be left to the local authorities. For example, in *Arsberry v. Illinois*, the Seventh Circuit reviewed a challenge to the ICS system in Illinois, which granted

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96 *2002 Order on Remand* ¶ 11.

97 *2002 Order on Remand* ¶ 24.

98 *2002 Order on Remand* ¶ 29.

99 *2002 Order on Remand* ¶ 26.

one phone company the exclusive right to provide telephone service to inmates in return for having 50% of the revenues generated by the service be paid to the state.[100] Observing that the payment to the state was functionally a tax, the court affirmed the dismissal of plaintiff's complaint, stating, in part, "By what combination of taxes and user charges the state covers the expense of prisons is hardly an issue for the federal courts to resolve."[101] In *U.S. v. Michigan*, the Sixth Circuit expressed the general view that states should be given broad deference in their handling of correctional facilities and the penal system:

> 'The problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' . . . The unabridged teachings of the [Supreme] Court convey the Court's own unequivocal commitment to and its adamant recognition of the state's sovereign authority to operate its penal institutions. Anchored in the sensitive principles of federalism, this sovereign authority is a prerogative of the state.[102]

As GTL explained in its comments in opposition to the Alternative Wright Petition, this well-founded policy of deference to state and local administrators extends, and should continue to extend, to inmate calling services.[103] "Inmate calling rates cannot be examined in isolation, since inmates services are inextricably bound up with pivotal aspects of prison administration, the security of inmate and the public at large, complex budgetary issues, and other inherently local concerns. The FCC has appropriately avoided one-size-fits-all federal mandates in past orders, and instead deferred to state and local officials to strike the right balance between

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100 *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001) (Posner, J.).

101 *Id.* at 564, 565.

102 *U.S. v. Michigan*, 940 F.2d 143, 154-55 (6th Cir. 1991) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (footnotes omitted).

103 CC Docket No. 96-128, Comments of Global Tel*Link, at 4-8 (filed May 2, 2007) ("GTL 2007 Comments").

institutional needs and calling rates."[104] GTL explained, further, that because of the enormous variation in local needs and resultant costs – including the diversity of security and investigative features required by correctional facilities of different types and sizes – a nationwide rate system for ICS cannot "be squared with the statutory assurance of fair compensation" under Section 276.[105]

ICS rates are inextricably bound up with the payment of commissions, which are also established and administered by local policymakers. At the state level, many state laws explicitly authorize commissions,[106] and the funds frequently are used to support inmate health and welfare programs that local policymakers deem beneficial. For example, in Alabama, all county commissions from ICS go into a "Sheriff Law Enforcement Fund" to go back into providing services at the jails, according to state statutes.[107] In Connecticut, revenues from the "provision of pay telephone service" to inmates go into the Department of Correction fund, to be used for expanding inmate educational services and reentry program initiatives.[108] In many locations, these programs could not otherwise be offered without an increased draw on local tax revenues, and many local officials have concluded that the costs of funding such programs should be borne, at least in part, by the prison population for whose benefit they are offered.

Apparently acknowledging that such decisions are appropriately committed to the sound discretion of state and local policymakers, in the *2002 Order on Remand*, the FCC recommended that the *states* should address the issue of commissions: "States are encouraged to examine the issue of the significant commissions paid by ICS providers to confinement facilities and the

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104 GTL 2007 Comments at 2.

105 GTL 2007 Comments at 11.

106 *See, e.g.*, FLA. STAT. CH. 945.215; *see also Holloway v. Magness*, 666 F.3d 1076 (8th Cir. 2012).

107 *See, e.g.*, ALA. CODE 45-1-232.

108 *See, e.g.*, CONN. CODE § 18-81x.

downward pressure that these commissions have on ICS providers' net compensation and, more important, the upward pressure they impose on inmate calling rates."[109] Since the *2002 Order on Remand*, several states appear to have heeded the FCC's recommendation. New York and California, for example, eliminated commissions in its state prison system, and a number of other states, including Maryland, Missouri, New Hampshire, and Vermont have reformed their commission payment systems. Accordingly, regulation of ICS is more appropriate at the state level.

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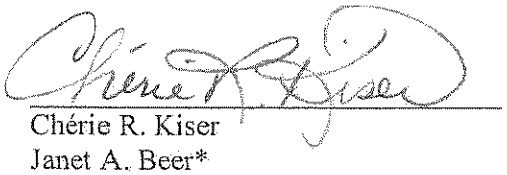
109 *2002 Order on Remand* ¶ 29.

## CONCLUSION

For the foregoing reasons, the Commission should reject the proposals set forth in the First Wright Petition and the Alternative Wright Petition.

Respectfully submitted,

**GLOBAL TEL*LINK CORPORATION**




Chérie R. Kiser
Janet A. Beer*
Angela F. Collins
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006
(202) 869-8900
ckiser@cahill.com

Its Attorneys

David J. Silverman
Senior Vice President and General Counsel
GLOBAL TEL*LINK CORPORATION
12021 Sunset Hills Road, Suite 100
Reston, VA 20190
(703) 955-3886
dsilverman@gtl.net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*Admitted in New York