INITIAL VERSION

ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals for the District of Columbia Circuit

No. 13-1280
Consolidated with 13-1281, 13-1291, 13-1300, 14-1006

SECURUS TECHNOLOGIES, INC., GLOBAL TEL*LINK, CENTURYLINK PUBLIC COMMUNICATIONS, INC., MISSISSIPPI DEPARTMENT OF CORRECTIONS, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petitions for Review of an Order of the Federal Communications Commission

JOINT BRIEF FOR THE ICS PROVIDER PETITIONERS AND SUPPORTING INTERVENOR

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners Securus Technologies, Inc. ("Securus"), Global Tel*Link ("GTL"), CenturyLink Public Communications, Inc. ("CenturyLink"), and supporting Intervenor Telmate, LLC ("Telmate") – collectively, the "ICS Providers" – certify as follows:

A. PARTIES AND AMICI

1. Parties Before the Court

Petitioners in these consolidated cases are Securus (No. 13-1280), GTL (No. 13-1281), CenturyLink (No. 13-1291), the Mississippi Department of Corrections and the South Dakota Department of Corrections (No. 13-1300), and the Arizona Department of Corrections (No. 14-1006).

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

Intervenors in support of Petitioners in these consolidated cases are the Arkansas Department of Correction, the Barnstable County Sheriff's Office, the Indiana Department of Correction, and Telmate.

Intervenors in support of Respondents in these consolidated cases are Peter Bliss, Winston Bliss, Ulandis Forte, Gaffney & Schember, Katharine Goray, David Hernandez, Lisa Hernandez, M. Elizabeth Kent, Jackie Lucas, Mattie Lucas, Darrell Nelson, Laurie Nelson, Vendella F. Oura, Earl J. Peoples, Ethel Peoples,

Melvin Taylor, Sheila Taylor, Annette Wade, Charles Wade, Dorothy Wade, and Martha Wright.

2. Parties to the Proceeding Below

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

B. RULING UNDER REVIEW

The order under review is the FCC's Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, FCC 13-113, 28 FCC Rcd 14107 (2013) ("*Order*") (JA___-__).

C. RELATED CASES

The order under review has not previously been the subject of a petition for review by this Court or any other court. The ICS Providers are unaware of any related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the ICS Providers respectfully submit the following corporate disclosure statements:

CenturyLink is a direct and wholly owned subsidiary of Embarq Corporation. Embarq Corporation is in turn a direct and wholly owned subsidiary of CenturyLink, Inc., a publicly traded corporation that, through its wholly owned affiliates, provides voice, broadband, video, and communications services to consumers and businesses. CenturyLink, Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

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

Securus is wholly owned by Securus Technologies Holdings, Inc., whose principal investor is Securus Investment Holdings, LLC ("SIH"). SIH is indirectly controlled by ABRY Partners VII, LP ("ABRY"). Neither SIH nor ABRY has stock that is publicly traded. No entity having publicly traded stock owns 10 percent or more of either company. Securus, a Delaware corporation, is a

telecommunications service and technology company that provides calling services and call management software to correctional facilities exclusively.

Telmate is a telecommunications company that develops, deploys, and services inmate communications systems to correctional facilities throughout North America. Telmate is a privately held corporation, and no parent corporation or publicly held corporation owns 10 percent or more of its stock.

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GLOSSARY

Bureau	Wireline Competition Bureau
Communications Act or Act	Communications Act of 1934, as amended,47 U.S.C. § 151 *et seq.*
DOC	A State Department of Corrections
FCC or Commission	Federal Communications Commission
ICS	Inmate Calling Services
NPRM	Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629 (2012)
Order	Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, FCC 13-113, 28 FCC Rcd 14107 (2013)

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The *Order* was released on September 26, 2013. The new regulations adopted in the *Order* were published in the Federal Register on November 13, 2013, at 78 Fed. Reg. 67,956. The petitions were timely filed within 60 days of publication of the new regulations. 28 U.S.C. § 2344; *see also Small Bus. in Telecomms. v. FCC*, 251 F.3d 1015, 1024 (D.C. Cir. 2001).

STATEMENT OF THE ISSUES

1. Whether the requirement in Rule 64.6010 that interstate inmate calling rates and ancillary charges be cost-based is unlawful because the FCC adopted it without notice and an opportunity for comment; failed to explain its embrace of rate-of-return regulation, which the FCC has long disfavored; failed to provide adequate clarity about how to comply with the requirement; and failed to permit recovery, through interstate rates, of the costs of site commissions required by many correctional authorities.

2. Whether the rate caps in Rule 64.6030 – which govern interstate calling rates at all correctional facilities across the country, irrespective of size or type – are arbitrary, capricious, or contrary to law.

3. Whether the safe harbor rates in Rule 64.6020 – which also apply at all correctional facilities in the country – are arbitrary, capricious, or contrary to law.

4. Whether the FCC's regulation of "ancillary fees" is arbitrary, capricious, or contrary to law.

5. Whether the FCC's failure to exempt from its new rules the interstate calling rates set under existing contracts is arbitrary, capricious, or contrary to law.

STATUTES AND REGULATIONS

Pertinent statutes and regulations have been reproduced in the Addendum.

PRELIMINARY STATEMENT

Last year, the FCC adopted sweeping new rules to reduce the rates for interstate telephone calls from prisons and jails. The *Order* establishes two rate caps – one for interstate collect calls, and another for interstate debit calls – which apply to every interstate call, from every correctional facility in the country (absent a waiver for "unique circumstances"). The *Order* also goes much further, requiring that ICS providers charge rates for interstate calls no greater than costs "reasonably and directly related to the provision of ICS," plus some reasonable return on investment. Although the *Order* creates "safe harbor" rates for debit and collect calls – at a level about half the rate caps – those rates entitle a provider only to a presumption of compliance with the cost-based-rate rule, not an exemption

from it. The *Order* imposes the same cost-based requirement (though without offering safe harbors) on account set-up and maintenance fees and other "ancillary charges."

These new rules are unlawful. The cost-based-rate rule should be overturned because the FCC provided no notice that it was considering a regime of rate review based on providers' historic costs. That rule is also arbitrary and capricious: the FCC did not justify its decision to adopt a rate-of-return regime it has disfavored for decades, or provide adequate guidance about how ICS providers may comply with the rule. Moreover, the FCC's conclusion that cost-based rates cannot include the costs of site commissions – which many state and local correctional institutions require and use to finance inmate welfare programs – exceeds the FCC's statutory authority under the Communications Act while impinging on state and local authority to choose how to run and fund their prisons.

The *Order*'s "interim" overlay of rate caps and safe harbor rates on the cost-based-rate rule cannot survive this Court's review, either. The FCC's refusal to adopt rate caps tailored to facilities of different types and sizes ignores the unrebutted evidence that ICS costs vary widely among correctional facilities, and will make it impossible for providers to continue to provide service at many facilities at rates that permit recovery of costs. The FCC's rate caps are also tainted by serious methodological flaws. The cap for collect calls, for example,

was set based on a cost study that omitted the three highest-cost data points. And the safe harbors – which would be necessary only if the cost-based-rate rule survives (and it should not) – suffer from the same defects as the rate caps. In establishing the safe harbor rates, the FCC ignored a critical data set – cost data for jails, which comprise a substantial proportion of the facilities regulated by the *Order*, and can be much costlier to serve.

Compounding these problems, the FCC declined to exempt existing contracts from the *Order*'s cost-based-rate rule and rate caps – even though contracts with above-cap interstate rates and contracts that require payment of site commissions will be affected. Where ICS providers find themselves unable to renegotiate or unilaterally terminate existing (multi-year) contracts, they will be forced to absorb the costs, without any mechanism of recovering the lost revenue later.

The *Order* should be vacated in full.

STATEMENT OF THE CASE

A. The ICS Providers – CenturyLink, GTL, Securus, and Telmate – provide inmate telecommunications services in correctional facilities throughout the country. Their customers range from municipal and county jails that house fewer than ten inmates to state correctional systems that house tens of thousands

and from minimum-security to maximum-security facilities.[1] The ICS Providers provide these telecommunications services pursuant to exclusive multi-year contracts with correctional authorities, which select their providers through a competitive bidding process. *Order* ¶¶ 21, 98 (JA___, ___-__). Collectively, the ICS Providers have contracts with departments of corrections in nearly all 50 states, and with numerous city and county jails.[2]

The costs of providing these services are substantial and vary widely by institution.[3] Security considerations partly account for the costs. Correctional authorities require their contract providers to make available customized security and network features, including special automated voice-processing systems to enable call screening; sophisticated blocking mechanisms to prevent inmates from evading screening; "monitor[ing] for frequent calls to the same number," which

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[1] Comments of GTL at 3 (FCC filed Mar. 25, 2013) (JA___) ("GTL Comments").

[2] *See* Comments of Human Rights Defense Center, Ex. A (FCC filed Mar. 25, 2013) ("HRDC Comments") (JA___) (identifying ICS providers for each state); *see also* Letter from Glenn B. Manishin, Counsel for Telmate, to Marlene H. Dortch, FCC, at 1 (July 26, 2013) ("July 26, 2013 Telmate Letter") (JA___) (noting the "thousands of smaller county and municipal jails served by ICS providers like Telmate").

[3] Comments of Network Communications International Corp. at 3-4 (FCC filed Mar. 25, 2013) ("NCIC Comments") (JA___-__); Comments of CenturyLink at 7 (FCC filed Mar. 25, 2013) ("CenturyLink Comments") (JA___); GTL Comments at 6-7 (JA___-__); July 26, 2013 Telmate Letter at 1 (JA___).

might signal "possible criminal activity or a scheme to evade calling restrictions"; listening and recording capabilities; and "detailed, customized reports" concerning inmates' telephone use.[4] The composition and costs of these security features depend on each facility's size and needs.[5]

Most correctional authorities also require, under their contracts, that their ICS providers pay them site commissions, which typically are based on calling revenues. *Order* ¶ 33 (JA___). Correctional authorities often use those fees in part to pay for inmate welfare services they provide. *Id.* ¶ 34 (JA___). Owing to these and other costs, inmate calling rates often exceed, sometimes substantially, rates for ordinary toll calls. *Id.* ¶¶ 32-34 (JA___-__).

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[4] Order on Remand and Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, ¶ 9 (2002) ("*ICS Order on Remand and NPRM*"); *accord* Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶ 6 (2012) ("*NPRM*") (JA___); Comments of GTL at 5, CC Docket No. 96-128 (FCC filed May 2, 2007) ("2007 GTL Comments") (JA___).

[5] *See ICS Order on Remand and NPRM* ¶ 9; Second Report and Order and Order on Reconsideration, *Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, ¶ 56 (1998) ("*Billed Party Preference Second Report and Order*"); Second Further Notice of Proposed Rulemaking, *Billed Party Preference for InterLATA 0+ Calls*, 11 FCC Rcd 7274, ¶ 48 (1996); Declaratory Ruling, *Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, 11 FCC Rcd 7362, ¶¶ 23, 25 (1996) ("*ICS Declaratory Ruling*").

B. Because the provision of ICS is subject to unique "concerns and requirements of corrections authorities,"[6] the FCC has historically refrained from intrusive regulation of inmate calling rates. In 1991, the FCC found that "the provision of [inmate-only phones] to inmates presents an exceptional set of circumstances that warrants their exclusion from . . . any requirements under the [Telephone Operator Consumer Services Improvement] Act or the Commission's rules."[7] In 1996, after again finding that ICS was subject to unique concerns and demands of correctional facilities, the FCC "deregulated inmate payphones."[8] In 1998, the FCC opted against "intrusive" regulatory measures for ICS providers, such as the adoption of a "billed party preference" rule or benchmark rates for outgoing calls by prison inmates, in favor of "less intrusive" new disclosure rules.[9]

C. In 2012, the FCC issued a Notice of Proposed Rulemaking to consider several specific proposals to lower ICS rates. The proceeding was initiated in

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[6] *ICS Declaratory Ruling* ¶ 25; *see also Billed Party Preference Second Report and Order* ¶ 57 (structure of exclusive ICS contracts is driven by "the special security requirements applicable to inmate calls").

[7] Report and Order, *Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd 2744, ¶ 15 (1991).

[8] Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, ¶ 143 (1996); *accord ICS Declaratory Ruling* ¶ 26 ("[customer premises equipment] used in providing inmate-only services must be provided on an unregulated, unbundled basis by those who provide inmate-only services").

[9] *Billed Party Preference Second Report and Order* ¶ 59.

response to two petitions for rulemaking filed by Martha Wright and other individuals seeking new ICS regulations. The first petition, filed in 2003, asked the FCC to prohibit exclusive ICS contracts and collect-call-only restrictions, but only at privately administered prisons.[10] The second petition, filed in 2007, proposed as an alternative that the FCC 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.[11] The 2007 petition asked the FCC 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 charges.[12] The *NPRM* sought comment on these and several other discrete proposals, focusing on rate caps.[13] Interested parties, including GTL, CenturyLink, and Securus, filed comments addressing each of these specific issues.

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[10] 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.") (JA___).

[11] 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.") (JA___, ___).

[12] *Id.* at 5 (JA___).

[13] *NPRM* ¶¶ 18-26, 28, 30-34, 36, 39-40 (JA___-__) (seeking comment on eliminating per-call charges, capping per-minute rates, using marginal location

On September 26, 2013, the FCC released the *Order*. The *Order* acknowledged the specific relief sought in the two petitions for rulemaking and the specific ICS issues about which it had sought comment. *Order* ¶¶ 9, 10 (JA___-__). It adopted several of those proposals at least in part, including "interim rate cap[s]" nearly identical to the rate caps the Wright petitioners had sought – "$0.21 per minute for debit and prepaid interstate calls, and $0.25 per minute for collect interstate calls." *Id.* ¶ 48 (JA___-__).

The FCC also went much further, adopting, by a 2-1 vote,[14] a sweeping new rule requiring that all interstate ICS rates be based on providers' costs. *Id.* ¶ 12 (JA___). Under this rule, all interstate ICS rates above the rate caps are unlawful (absent a waiver for "extraordinary circumstances"), and any interstate ICS rate, even if below the rate caps, is unlawful if not based on a provider's costs to provide interstate ICS. *Id.* ¶ 120 (JA___). Expressly excluded from those costs,

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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 call blocking).

[14] The prior Chairman and one other Commissioner had left the FCC when this item was voted. The new Chairman and Commissioner had been nominated but not yet confirmed.

and therefore unrecoverable through interstate ICS rates, are site commissions – which many ICS contracts require providers to pay. *Id.* ¶ 7 (JA___-__).

As part of its cost-based regime, the *Order* creates interim "safe harbor" levels for interstate rates ($0.12 per minute for debit and prepaid calls, and $0.14 per minute for collect calls), below which rates are presumed permissible. Even rates at safe harbor levels are unlawful, however, if not based on costs the FCC deems "allocable" to interstate ICS, *id.* ¶¶ 60, 120 (JA___, ___), and the "safe harbor" is unavailable to an ICS provider that charges rates above safe harbor levels at any of the facilities that it serves, *id.* ¶ 60 n.226 (JA___). Rates above the safe harbor level are not presumed reasonable and could result in refunds and forfeitures (of more than one million dollars per "continuing violation"), even if they are lower than the rate caps. *Id.* ¶¶ 89, 118 (JA___, ___).

	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

The *Order*'s cost-based-rate requirement applies not only to rates for interstate calls but also to "ancillary charges," a term that the *NPRM* did not even

mention and which the *Order* defines broadly to include any ICS charges not assessed on a per-call basis. *Order* at 89 (Rule 64.6000) (JA___). ICS providers assess such charges for services related, for example, to the debit and prepaid account systems that they maintain for inmate callers. *See id.* ¶ 90 (JA___) (*e.g.*, charges to "set up or add money to a debit or prepaid account [or] to refund any outstanding money in a prepaid or debit account") (footnote omitted). The *Order* requires that these charges be cost-based without creating safe harbors or caps.

Commissioner Pai issued a 21-page dissent stating that he could not support an order which, rather than "institut[e] simple rate caps, . . . essentially imposes full-scale rate-of-return regulation on ICS providers." Dissenting Statement of Ajit Pai at 111 ("Pai Dissent") (JA___). He noted that the FCC had not informed the public that such a rule was on the table, lacks the "competence to micromanage" ICS prices, and lacks the resources to review the tremendous quantity of data providers will soon be required to file. *Id.* at 111-12 (JA___-__). Commissioner Pai also objected to the FCC's "one-size-fits-all approach" to rate caps and safe harbors, which he said ignored substantial evidence that ICS costs vary widely as a result of differences in facility size, composition of inmate population, and other factors. *Id.* at 116-22 (JA___-__).

The *Order*'s new rules were published in the Federal Register on November 13, 2013, and were scheduled to take effect on February 11, 2014. 78 Fed. Reg. 67,956.

D. Securus and a group of correctional institutions each petitioned the FCC for a stay of the *Order* in full.[15] GTL petitioned the FCC for a stay of the cost-based-rate regime adopted in the *Order*.[16] On November 21, 2013, the FCC's Wireline Competition Bureau denied Securus's and GTL's petitions, and deferred ruling on the correctional institutions' petition.[17] Two other ICS providers, CenturyLink and Pay Tel, subsequently filed petitions for stay.[18]

E. Securus, GTL, CenturyLink, and the Mississippi and South Dakota Departments of Corrections petitioned this Court for review of the *Order*, and each moved the Court for a stay of all or part of the *Order* pending review.[19] On

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[15] Securus Petition for Stay of Report and Order Pending Appeal (FCC filed Oct. 22, 2013); Correctional Institutions Petition for Stay Pending Judicial Review (FCC filed Nov. 12, 2013).

[16] GTL Petition for Stay Pending Judicial Review (FCC filed Oct. 30, 2013).

[17] Order Denying Stay Petitions and Petition To Hold in Abeyance, *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 15927, ¶¶ 60, 62 (Wireline Comp. Bur. 2013) ("*Bureau Denial*") (JA___).

[18] CenturyLink Petition for Stay (FCC filed Nov. 27, 2013); Pay Tel Petition for Partial Stay (FCC filed Nov. 26, 2013).

[19] GTL Motion for Partial Stay Pending Judicial Review (filed Nov. 25, 2013); Securus Emergency Motion for Stay of FCC Order Pending Review (filed Nov. 25, 2013); CenturyLink Motion for Stay Pending Judicial Review (filed Dec.

January 13, 2014, a panel of this Court granted a stay of the *Order*'s cost-based-rate rule, 47 C.F.R. § 64.6010, and the regulations deriving from it, *id.* §§ 64.6020 (the safe harbor rule), 64.6060 (an annual reporting requirement). Order, Nos. 13-1280, *et al.* (Jan. 13, 2014). The panel noted that, with respect to those rules, "petitioners have satisfied the stringent requirements for a stay." *Id.*

STANDARD OF REVIEW

This Court will vacate an FCC order that is contrary to law, arbitrary and capricious, unsupported by evidence, or without observance of procedure required by law. 5 U.S.C. § 706(2). An order is unlawful if it adopts new rules without "adequate notice and opportunity for comment" by affected parties. *Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991) (per curiam).

An order is arbitrary and capricious if the FCC has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Fox v. Clinton*, 684 F.3d 67, 74-75 (D.C. Cir. 2012). This Court will also reverse, as arbitrary and capricious, "a decision that departs from established precedent without a reasoned

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4, 2013); Mississippi Department of Corrections and South Dakota Department of Corrections Motion for Stay Pending Judicial Review (filed Dec. 13, 2013).

explanation." *Exxon Mobil Corp. v. FERC*, 315 F.3d 306, 309 (D.C. Cir. 2003). "*Post hoc* rationalizations advanced to remedy inadequacies in the agency's record or its explanation are bootless." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987).

SUMMARY OF ARGUMENT

I. The cost-based-rate rule, codified at 47 C.F.R. § 64.6010, is unlawful for four independent reasons. *First*, the FCC failed to provide notice that it was contemplating the adoption of such a rule. *Second*, the FCC failed to explain its decision to adopt in this context a regulatory mechanism that it has uniformly disfavored for decades. *Third*, the FCC imposed obligations on ICS providers without providing adequate guidance about how they are to comply with the cost-based-rate regime – what rate of return is permissible, for example, and which costs count. *Finally*, the FCC exceeded its statutory authority by refusing to permit providers to recover the costs of site commissions through the cost-based rates they must now charge. These defects require *vacatur* of the cost-based-rate rule and the regulations that hinge on it.

II. The *Order*'s one-size-fits-all "interim" regime of rate caps disregards unrebutted evidence that differences in facilities' size and functions warrant different rates and that average per-minute costs at some facilities far exceed the rate caps adopted in the *Order*. Indeed, even the FCC now concedes that the rate

caps will force providers either to charge rates below their costs for many small, high-cost institutions or to cease providing service to those institutions.

III. The *Order*'s safe harbor rates – which depend upon and thus should fall with the cost-based-rate rule – suffer from the same flaws as the rate caps. Among other methodological errors, they too were set without regard to differences in size, function, and cost of providing ICS at correctional facilities across the country, and despite substantial and unrebutted evidence that costs in many cases far exceed even the rate caps, not to mention the much lower safe harbor rates.

IV. The FCC's regulation of ancillary charges must be vacated for three reasons: the Commission gave no notice that it was considering cost-based regulation of ancillary charges; the fees are outside of its jurisdiction; and the FCC fails to offer any guidance on how providers should determine whether their ancillary charges are cost-based.

V. In refusing to exempt existing contract rates from the *Order*'s cost-based-rate requirement and rate caps, the FCC improperly ignored the practical effects of its *Order*, namely, that ICS providers will be precluded from recovering substantial costs, including site commissions, built into their existing contracts.

STATEMENT OF STANDING

The ICS Providers have constitutional standing because the *Order* has directly caused them injury: it imposes new limitations on the interstate calling rates and ancillary fees they are permitted to charge end users for the inmate calling services they provide, and refuses to exempt existing contracts from those rules. *See Order* ¶¶ 5-7 (JA___-__). The ICS Providers have prudential standing because each participated in the proceedings that led to the *Order*. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2344; *American Trucking Ass'ns, Inc. v. Federal Motor Carrier Safety Admin.*, 724 F.3d 243, 246 (D.C. Cir. 2013).

ARGUMENT

I. The FCC's Cost-Based-Rate Rule in § 64.6010 Is Unlawful

A. The FCC Adopted Rate-of-Return Regulation Without Notice and an Opportunity for Comment

1. Until the *Order* was released, "[n]o party could have foreseen" that the Commission was contemplating a regime that would require every ICS provider to calculate every interstate rate on the basis of its costs. Pai Dissent at 112 (JA___). The two petitions for rulemaking that prompted the 2012 *NPRM* did not request it. The first petition did not propose regulation of ICS rates at all.[20]

[20] *See generally* Wright Pet. at 8-9 (JA___-__) (describing relief requested); *see also* Comments of Martha Wright, *et al*., Ex. C at 5 (FCC filed Mar. 25, 2013) ("Wright Comments") (JA___) ("In regulating prison payphone rates, a simple

The second petition proposed rate caps, not regulation limiting providers to recovery of costs the FCC considers "allocable" to interstate ICS. Alternative Wright Pet. at 5 (JA___). The Wright petitioners clearly distinguished that rate cap proposal from cost-based rate of return.[21] The *NPRM* also failed to hint at the possibility of a cost-based regime in which any rate – even if beneath the "caps" – could be invalidated if deemed not based on allowable interstate ICS costs. Instead, the *NPRM* sought comment on rate cap proposals. *See NPRM* ¶¶ 18-40 (JA___-__) (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).

The difference between rate caps and the *Order*'s "cost-based" rule is fundamental. Rate caps provide certainty by setting "limits on prices carriers can

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benchmark rate – which sets a maximum allowed rate, but not a minimum or required rate, for all service providers – is appropriate.").

[21] *See* Alternative Wright Pet. at 19-20 (JA___-__) (describing the proposed caps as "proxies" – *i.e.*, substitutes – for "actual incremental cost plus a market-based rate of return"); Wright Comments at 32 (JA___) (proposing caps akin to "price caps [that would] provide a powerful incentive for service providers to become more efficient"); *see also*, *e.g.*, 2007 GTL Comments at 7 (JA___) (describing Wright petitioners' proposal to "impos[e] a rigid system of national rate caps").

charge for their services."[22] They are also easy to administer; although rate caps may be based on cost data, they do not require that rates be justified by reference to each provider's individual costs, and thus do not require the FCC to gather "detailed cost data from the regulated firms," or "formulae for allocating the costs among the firm's services." *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993).[23] The *Order*'s cost-based-rate rule, by contrast, requires each ICS provider to track and account for its costs, to make determinations about which costs are properly allocable to the regulated service, and to ensure that its rate of return is "allowable."[24]

As Commissioner Pai observed, the *Order*'s cost-based-rate requirement thus operates as rate-of-return regulation, which the *NPRM* indisputably did not put on the table. Pai Dissent at 123-29 (JA___-__). But, irrespective of labels, the

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[22] 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*").

[23] 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." *NPRM* ¶ 22 (JA___) (citing Alternative Wright Pet. at 7-8 (JA___-__) (emphasis added).

[24] 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*") (describing rate of return); *see Order* ¶ 53 n.195 (JA___).

NPRM failed to provide notice that the FCC might adopt a rule that ICS providers set each of their rates equal to certain allowable costs plus a reasonable return. *See Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) ("[I]t is the substance of what the [FCC] has purported to do and has done which is decisive.") (internal quotation marks omitted).

2. The FCC's shifting justifications for the adequacy of notice do not accurately describe the new rules it has adopted. In the *Order*, the FCC conflates its cost-based-rate rule and rate caps, claiming that the pair amount to a "variant on rate caps" similar to the *NPRM*'s rate cap proposals. *Order* ¶ 59 n.222 (JA___). In fact those two rules operate (and are codified) independently; neither needs the other. The nature of this Court's stay order – which permitted the rate caps to go into effect on schedule without the cost-based-rate rule – proves that point. The FCC's more recent claim (in briefing before this Court) that the *Order* is at bottom a rate cap regime of "safe harbor rate[s]," FCC Opposition to Motions for Stay at 14 (filed Dec. 16, 2013) ("FCC Stay Opp."), forgets that the "[g]eneral [s]tandard" governing each interstate ICS rate is the cost-based-rate rule, *Order* at 28 (JA___). That rule – not the safe harbor, which provides no exemption from it – is the crux of the regulatory regime in the *Order*. *See*, *e.g.*, *id.* ¶ 5 n.19 (JA___) ("emphasiz[ing] that ICS providers" cannot "increase rates up to either the

interim safe harbor or interim rate caps" except "when necessary to ensure recovery of [ICS] costs").

The *Order* identifies no language in the *NPRM* supporting its claim that the FCC previously provided notice of the cost-based-rate rule. The *NPRM*'s request for other "proposals in the record," *NPRM* ¶ 35 (JA___), and for "alternative methodologies" to determine rates, *id.* ¶ 25 (JA___); FCC Stay Opp. at 14, could not establish notice because "catch-all" requests for comment do not give parties adequate notice of specific rules.[25]

The *NPRM*'s discussion of costs and solicitation of cost data likewise failed to provide notice, because the FCC sought such data only for the purpose of setting rate caps. Notice of the possibility of rate caps reflecting cost data did not provide notice of a rule requiring every provider's interstate ICS rates to be set based on that provider's costs.[26] Providers had no reason to anticipate that approach, which

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[25] *See Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005); *accord National Black Media Coal. v. FCC*, 791 F.2d 1016, 1022-23 (2d Cir. 1986) (reference to "variants, modifications, or alternatives" "can hardly be said to have apprised interested parties" of the specific rule later adopted) (internal quotation marks omitted); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("Agency notice must describe the range of alternatives being considered with reasonable specificity.").

[26] *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

the FCC has long disfavored, *see infra* Part I.B, and therefore had no "opportunity to . . . criticize" it. *Shell Oil*, 950 F.2d at 751; *see Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 256 (3d Cir. 2010) (finding no notice where "no commenter manifested an understanding that the FCC was considering" rule); *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).

Finally, the FCC's assertion that the cost-based-rate rule is "nothing new," FCC Stay Opp. at 15, conflates the provider-specific adjudication of a complaint with rules that, if upheld, will govern every ICS provider. At the outset, nothing in section 201 of the Communications Act requires "provider[s] . . . to show that its rates are based on its costs," *id.* – section 201 requires that charges for interstate communication services be "just and reasonable," not cost-based. This Court and the Commission itself have often held that market-based rates are just and reasonable irrespective of costs. *See*, *e.g.*, *Orloff v. FCC*, 352 F.3d 415, 421 (D.C. Cir. 2003) (upholding Commission determination that sales concessions did not

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recent year of data); *Shell Oil*, 950 F.2d at 752 (rule is "not a logical outgrowth of the proposed regulations" if it "is not implicit in . . . the system presented in the proposed regulations").

constitute unjust and unreasonable discrimination); Memorandum Opinion and Order, *Orloff v. Vodafone Airtouch Licenses, LLC*, 17 FCC Rcd 8987, ¶ 26 (2002) (rejecting claim that concession practices were unjust and unreasonable); *see also Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 211 (D.C. Cir. 1982). Just as important, the cost-based rule, if upheld, will require *all* providers to undertake the data collection, jurisdictional separations, and cost allocation obligations the *Order* requires. When the FCC chooses to proceed through rulemaking, it must provide notice and an opportunity for comment first. *See American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

B. The FCC's Adoption of a Disfavored Regulatory Approach Without Explanation Was Arbitrary and Capricious

Rule 64.6010 is defective also because the FCC adopted it without justifying (or even acknowledging) its departure from more than two decades of contrary FCC precedent. An agency must provide "good reasons" for its new regulations, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009), and articulate "a reasoned explanation" for "depart[ing] from established precedent," *Exxon Mobil*, 315 F.3d at 309. The *Order* does not explain its embrace of a regulatory approach – rate of return – that the FCC has long disfavored.

Since the late 1980s, the FCC has retreated from rate-of-return regulation, recognizing that it "has certain inherent flaws," presents carriers with "perverse"

incentives, and is "difficult[to] administer[ ] . . . under any circumstances."[27] 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." *Second Report and Order on Rates for Dominant Carriers* ¶ 29; *accord id.* ¶ 9. Rate of return creates a similar incentive to misallocate costs from unregulated services to services subject to rate-of-return rules (where costs can be passed on to consumers). *Report and Order on Rates for Dominant Carriers* ¶ 100. And it produces "high administrative costs," *id.*, because the agency must use its finite resources to police cost padding and misallocation, *Second Report and Order on Rates for Dominant Carriers* ¶ 34; *accord id.* ¶ 24. For all these reasons, the FCC concluded long ago that rate of return is "not the best" regulatory strategy and that "incentive regulation is superior." *Id.* ¶ 29.[28]

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[27] *Report and Order on Rates for Dominant Carriers* ¶¶ 29, 30, 33, 100; *National Rural Telecom Ass'n*, 988 F.2d at 178; *see also* 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).

[28] Even the inmate groups that requested an ICS rulemaking proceeding recognized the FCC's longstanding "concern that traditional rate-of-return regulation did not result in sufficient incentives to improve efficiency," and thus

The *Order*'s suggestion that, in regulating ICS rates, the FCC was *required* to adopt a cost-based-rate rule unless the record "specially justif[ied]" a different approach, *Order* ¶ 45 (JA___), not only ignores the FCC's longstanding view, it also misreads this Court's precedent. In the case on which the FCC principally relies, this Court held that the FCC must justify a rate structure "that does not reflect cost." *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996) ("*Comptel*"). This Court did not hold, in *Comptel* or any other case, that rate of return is the default "cost-based" rate structure.[29] Any mandate for "cost-based" rates provides no basis for choosing between rate-of-return regulation and rate caps that reflect costs. The FCC's adoption of a regulation based on its misunderstanding of this judicial precedent provides additional reason to vacate the cost-based-rate rule. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-90 (1943) (an agency order that rests on a misunderstanding of judicial precedent cannot be sustained); *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1172 (D.C. Cir. 1986).

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asked instead for benchmark rates akin to "price caps." Wright Comments at 32 (JA___).

[29] As the FCC recognized at the time, a "cost-based" rate structure is simply one in which costs are recovered "(1) only from the party that causes the costs to be incurred; and (2) in the manner in which the costs are incurred (*e.g.*, non-traffic-sensitive costs should be recovered on a non-traffic-sensitive basis)." *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure*, 62 Fed. Reg. 56,121, 56,128 (Oct. 29, 1997).

Finally, the FCC's justification for the *Order* – that lower call rates will reduce inmate recidivism – is a goal wholly outside the FCC's authority to pursue and which has virtually no record support. *See* Correctional Institutions Br. 35.

C. The FCC's Failure To Provide Meaningful Guidance on the Implementation of the Cost-Based-Rate Rule Was Arbitrary and Capricious

The cost-based-rate requirement is also flawed because it 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); *see also Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (vacating FCC decision based on directions that were too vague concerning when "new submissions were required and what form they had to take"). The *Order* requires all interstate ICS rates and all ancillary charges to be reduced to cost-based levels, with violators subject to refund obligations and forfeiture penalties. *Order* ¶ 118 (JA___). Yet it withholds critical information providers need to determine whether they are in compliance with the rule.

For example, 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. (Even the agency's definition of site commissions is ambiguous, because it may be read to cover not only profit-sharing payments but

also reimbursement for costs incurred by a facility to provide telecommunications services to inmates. *See id.* ¶ 54 nn.199, 203 (JA___-__).) At most, the *Order* suggests some cost categories that will "likely" count and some that "likely" will not, *id.* ¶ 53 & n.196 (JA___); but it makes no promises.[30] In addition, the FCC refuses to "opine" on what rate of return it will permit. *Id.* ¶ 54 n.203 (JA___). Thus, despite the potential for refunds and forfeitures, providers are left to guess at what the FCC considers a fair or permissible return.

D. The FCC's Refusal To Permit Recovery of Site Commission Costs Exceeds Its Statutory Authority

In requiring ICS providers to set cost-based rates that exclude the costs of site commissions they are required to pay, the *Order* travels beyond the FCC's statutory authority. The Communications Act empowers the FCC to ensure that interstate calling rates are "just and reasonable," 47 U.S.C. § 201(b), but it does not entitle the FCC to ignore real costs of providing service.

Site commission payments – like the purchase of telephone equipment or the lease of local telephone lines – are a real cost of providing ICS. As the *Order* acknowledges, these payments comprise a sizable percentage of the total cost of

[30] The *Order* also requires ICS providers to "apportion" their costs between interstate and intrastate calls, *Order* ¶ 53 n.195 (JA___), but provides no guidance on how to do so. The FCC nonetheless threatens penalties if it disagrees after the fact with a provider's jurisdictional separations.

providing calling services at inmate institutions. *See Order* ¶¶ 33-34, 38 (JA___-__, ___-__). And, for ICS providers, the costs are often unavoidable. Many state and local correctional authorities require commissions in their ICS contracts, *see id.*, sometimes because of a statutory mandate, *see*, *e.g.*, Miss. Code Ann. § 47-5-158. "[P]rison administrators and other local policymakers" use these commissions to "fund inmate health and welfare programs" they provide. *Order* ¶ 34 (JA___); *see* Correctional Institutions Br. 22-26.

The *Order*'s conclusion that these actual costs are not a permissible cost of providing ICS and are "therefore not compensable in interstate ICS rates," *Order* ¶ 54 (JA___), reflects a policy preference that the FCC is not entitled, under the Communications Act, to write into law. Commissions exist because state and local authorities have chosen to use them to finance the inmate programs and services their prisons provide. Such choices are theirs – not the FCC's – to make. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 208-09 (1998) ("administration of state prisons" is a core state function reserved to states absent an "unmistakably clear expression of intent to alter the usual constitutional balance between the States and the Federal Government") (internal quotation marks omitted); *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more

intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.").

The *ICS Order on Remand and NPRM* – which the *Order* cites as support for excluding site commissions from recoverable costs, *Order* ¶ 54 (JA___) – is not to the contrary. That decision referred to a prior order in which, pursuant to the statutory mandate to ensure "fair[ ] compensat[ion]" for payphone service providers, 47 U.S.C. § 276(b)(1)(A), the FCC established a default per-call compensation amount to be paid to providers for calls made using their payphones. The FCC ultimately elected to base that default rate on costs to provide service at a "marginal payphone location," *i.e.*, a location where call volume generates just enough revenue to permit the provider to recoup its costs without making any payments to the owner of the premises where the payphone is installed. *See* Third Report and Order, and Order on Reconsideration of the Second Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545, ¶¶ 15, 59 (1999).

The FCC's prior conclusion, in the payphone context, has no relevance here. The FCC's method of calculating the default per-call compensation rate did *not* require payphone providers to charge cost-based rates, nor did it prohibit payment of site commissions at higher-volume locations. To the contrary, where call

volumes exceeded the volume at the hypothetical "marginal" location, any revenue above costs would presumably be shared with the location owner in the form of commissions. (Indeed, as in the ICS context, because of robust competition among payphone service providers, location owners were presumably able to capture the lion's share of any excess of revenues above costs.)

The *Order*, by contrast, forbids ICS providers from building site commissions (real costs that providers are contractually required to pay) into their interstate calling rates – including for existing contracts negotiated on the premise that the costs of site commissions would be recoverable in rates. That rule is both unprecedented and wrong.

* * *

Each of the defects identified above requires *vacatur* not just of the cost-based-rate rule, but also of the safe harbor and data collection rules that hinge on it. The safe harbor, Rule 64.6020, "only makes sense as part of a rate-of-return system" and "explicitly ties itself to the rate-of-return ratemaking rule." Pai Dissent at 114-15 (JA___-__); *see* 47 C.F.R. § 64.6020(a) ("[a] Provider's rates are presumptively in compliance with § 64.6010 (subject to rebuttal)"). Similarly, the data collection rule, Rule § 64.6060, which requires detailed information from providers concerning rates, fees, and calls, and a certification of compliance with the cost-based-rate rule, makes sense only if the cost-based-rate rule survives.

Vacatur of Rule 64.6010 therefore requires *vacatur* of Rules 64.6020 and 64.6060 as well.

II. The "Interim" Rate Caps in § 64.6030 Are Unlawful

A. The *Order*'s One-Size-Fits-All Approach to Rate Caps Inexplicably Disregards Significant Differences Among Institutions

1. The *Order*'s rate caps should be vacated because, in setting uniform, generally applicable caps, the FCC disregarded unrebutted evidence that differences in facilities' size and function warrant different rates. *See* Pai Dissent at 116 (JA___) (the "record is replete with evidence" of significant cost differences among facilities).[31] Given that the majority of ICS costs are fixed, and do not vary with the length or number of calls, average per-minute costs can be much higher in smaller facilities than in larger ones.[32] Moreover, ICS providers incur costs to set

[31] *See*, *e.g.*, Expert Report of Stephen E. Siwek for Securus at 3, 5 (Mar. 25, 2013) ("Siwek Rep.") (JA___, ___); Letter from John E. Benedict, CenturyLink, to Marlene H. Dortch, FCC, at 2-3 (Aug. 2, 2013) ("Aug. 2, 2013 CenturyLink Letter") (JA___-__) (costs of serving jails are almost 20% higher than costs of serving state prisons); NCIC Comments at 3-4 (JA___-__); CenturyLink Comments at 7 (JA___); GTL Comments at 6-7 (JA___-__); July 26, 2013 Telmate Letter (JA___-__); Don J. Wood, Inmate Calling Services – Interstate Call Cost Study at 4-5, CC Docket No. 96-128 (Aug. 15, 2008) ("Wood Study") (JA___-__); Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, FCC, Attach. at 4 (July 23, 2013) ("Pay Tel Rep.") (JA___).

[32] Wood Study at 5 (JA___); Pay Tel Report at 4 (JA___); CenturyLink Comments at 7 (JA___); Siwek Rep. at 8 (JA___) (average length of interstate call

up payment features and activate security features for each new inmate, increasing costs in institutions with high inmate turnover.[33]

The record established not just that costs vary substantially, but also that average per-minute ICS costs at some facilities far exceed the rate caps adopted in the *Order*. According to data submitted by ICS providers, for example, costs of service in 2008 ranged as high as $1.59 per minute for debit calls and $2.05 per minute for collect calls, exclusive of site commissions.[34] Securus submitted evidence that, at many facilities it serves, ICS costs per minute average $1.39, not counting site commissions. Siwek Rep. at 3, 5 (JA___, ___). CenturyLink described costs at the smaller facilities it serves of up to 70 cents per minute. Aug. 2, 2013 CenturyLink Letter at 2 (JA___).

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made in state prisons is 12.51 minutes compared to 7.10 minutes in city and county jails).

[33] *See* Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, FCC, Attach. at 1 (Aug. 1, 2013) (JA___); Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, FCC, at 1 (July 3, 2013) (JA___).

[34] Pai Dissent at 118 (JA___) (citing Letter from Stephanie A. Joyce, Counsel for Securus, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, Attach. (Aug. 22, 2008) (JA___-__); Report of Several Providers of Inmate Telephone Service, CC Docket No. 96-128 (FCC filed Oct. 15, 2008) (JA___-__)).

Although the FCC sought and obtained information about how rates, call volumes, and costs vary at facilities across the country,[35] it declined to account for those differences in setting its rate caps. *Order* ¶ 17 (JA___-__). The *Order* does not distinguish among the correctional institutions – private and public prisons, jails, secure mental facilities, and juvenile detention centers of all sizes – to which its rules apply. Nor does the *Order* seriously consider alternatives to a "one size fits all" approach, even though the FCC was presented with alternatives. *See*, *e.g.*, Pai Dissent at 111 (JA___) (describing proposal of tiered sets of rate caps tied to facility type and size); Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, FCC, CC Docket No. 96-128, at 6 (Dec. 9, 2008) (JA___) (suggesting that the FCC "adopt a tiered rate structure[] using facility size as a proxy for cost differentials").[36]

The *Order*'s "tack[ed] on" waiver procedure does not blunt the impacts of its one-size-fits-all rate caps for facilities with disparate costs, and does not

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[35] *See NPRM* ¶ 26 (JA___) (seeking such data); GTL Comments at 6-8 (JA___-__); NCIC Comments at 3-4 (JA___-__); CenturyLink Comments at 7 (JA___); Siwek Rep. at 3-4 (JA___-__); July 26, 2013 Telmate Letter at 2 (JA___); Aug. 2, 2013 CenturyLink Letter (JA___-__).

[36] The FCC's excuse for rejecting a more tailored regulatory scheme – that there was too little information to draw more precise lines, *Order* ¶ 81 (JA___-__) – was a reason to defer action, not to adopt "interim" regulations that are unreasonable for a large percentage of correctional facilities. If the FCC had too little information to act, it should have sought more information before acting.

compensate for the FCC's failure to craft more tailored rules. *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988). As the *Order* takes pains to emphasize, its waiver process is reserved for "unique circumstances," *Order* ¶ 17 n.60 (JA___); *accord id.* ¶ 6 (JA___), and the "rare provider" that can make the necessary showing, *id.* ¶ 74 (JA___), that rate caps at a given facility will preclude recovery of costs at the holding-company level. Where, as here, the FCC "is on record that it will not freely grant waivers," the lawfulness of its "rules must be assessed without reference to the waiver provisions." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977) (per curiam).

2. In dismissing small, high-cost facilities where ICS costs far exceed the rate caps, because those facilities "hold only a very small share of inmates nationally," *Order* ¶ 26 (JA___), the FCC ignores that these facilities constitute a substantial proportion of the correctional institutions covered by the *Order*. *See* Pai Dissent at 119 & n.67 (JA___). It was inexplicable for the FCC to subject these many facilities to the same rate caps as much larger facilities with much lower costs to provide ICS.[37]

[37] The Wright petitioners' own consultant acknowledged that, "[b]ecause of the unavoidable inefficiencies of serving extremely small facilities, [petitioners'] analysis may not apply to locally-administered jails and other low-capacity prison facilities." Wright Pet., Attach. A at 37 n.46 (JA___).

The *Order*'s claim that ICS providers "typically use uniform rates when they serve multiple correctional facilities with differing cost and demand characteristics under a single contract," *Order* ¶ 76 n.280 (JA___), similarly focuses on the wrong evidence. There is no record evidence that ICS providers set uniform rates for local jails across various counties, or for both statewide prisons and county jails. Instead, the record reflects that ICS providers set different rates, pursuant to different contracts, for facilities with such different costs of service. *See*, *e.g.*, Comments of Securus at 1-2 (FCC filed Mar. 25, 2013) ("Securus Comments") (JA___-__); July 26, 2013 Telmate Letter at 2 (JA___); Affidavit of Richard A. Smith ¶ 4, Nos. 13-1280, *et al.* (Nov. 25, 2013) (attached to Securus Emergency Motion for Stay) (Securus serves 2,200 facilities and has approximately 1,800 contracts).

B. The *Order* Ignores the Practical Consequences of Its Failure To Account for High-Cost Facilities in Setting Rate Caps

The *Order*'s rate caps should also be vacated because the FCC failed to grapple with the practical consequences – for inmates and facilities alike – of its one-size-fits-all rules. The *Order* predicts that its rate caps will represent an "upper limit of what can reasonably be expected to be cost-based rates." *Order* ¶ 5 (JA___). As even the FCC now concedes, that prediction was not accurate. Following the *Order*'s adoption of the rate caps, Pay Tel – the very same ICS provider whose own cost study was used to set the *Order*'s $0.21/$0.25 per-minute

rate caps – was forced to request a waiver because compliance with the caps would "leave[] it in an 'economically unsustainable situation.'" Order, *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 1302, ¶ 6 (Wireline Comp. Bur. 2014) ("*Waiver Order*") (JA___) (quoting Pay Tel Waiver Pet. at 2). The FCC agreed, and granted Pay Tel a waiver that permits it to charge rates as high as $0.46 per minute, or approximately double the rate caps. *See id.* ¶¶ 11, 17 (JA___-__).

But the rate caps will put other providers in the position of charging rates below their costs for many small, high-cost institutions.[38] The caps are more than a dollar per minute too low, for example, to permit recovery of costs for a substantial proportion of the facilities Securus serves, and nearly 50 cents below costs for small facilities where CenturyLink provides ICS. *See supra* p. 31.

The *Order* promises no relief for such facilities: providers can obtain a waiver only in "extraordinary circumstances," and only after proving that, at the *holding-company* level, rate caps preclude recovery of costs. *Order* ¶ 73 n.270

[38] Agency action predicated on unreasonable predictive judgments cannot stand. *See International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821-22 & n.56 (D.C. Cir. 1983) (agency's predictive judgment must be reasonable and grounded in record evidence, and must not "ignore important factors" or reach judgments that are "irrational given the relevant evidence in the record"); *see also Amoco Prod. Co. v. FERC*, 158 F.3d 593, 595-96 (D.C. Cir. 1998) (refusing to defer to agency's predictive judgment that was not adequately explained and where evidence raised doubt about the reliability of the prediction).

(JA___). Many providers with above-cap costs at some facilities (but below-cap costs at others) thus have no hope of obtaining any waiver. Pay Tel was granted one only after it demonstrated that, given facility and state regulatory requirements applicable to intrastate calling rates, the *Order*'s rate caps would force the whole company to "'substantially curtail its operations'" or "go 'out of business.'" *Waiver Order* ¶ 6 (JA___) (quoting Pay Tel Waiver Pet. at 2).

With little hope of obtaining any waiver (and no assurance that a waiver would offer more than fleeting relief), ICS providers may cease providing ICS altogether at the highest-cost facilities they serve.[39] Providers have no statutory obligation to provide ICS at any particular correctional facility. At facilities where costs run much higher than the rate caps, providers may make the business judgment to stop providing ICS rather than take substantial losses on the service. The *Order* shrugs off this concern, noting that "many state departments of correction make ICS available to inmates at rates lower" than those the *Order* adopts. *Order* ¶ 70 (JA___). That is beside the point. It is small facilities and

[39] *See* Comments of Alabama Sherriffs Association at 1 (FCC filed Apr. 22, 2013) (JA___); Comments of Idaho Sheriff's Association at 2-3 (FCC filed Apr. 22, 2013) (JA___-__); Comments of Oregon State Sheriffs' Association at 2-3 (FCC filed Apr. 22, 2013) (JA___-__); Letter from Louisiana Sheriffs' Association, CC Docket No. 96-128, at 1 (June 26, 2008) (JA___); Letter from Louisiana Sheriffs' Association, CC Docket No. 96-128, at 1 (July 14, 2008) (JA___); Letter from Arkansas Sheriffs' Association, CC Docket No. 96-128, at 1 (Aug. 18, 2008) (JA___).

other high-cost institutions – not statewide departments of correction, which generally have less challenging cost structures – where ICS is likely to cease. Moreover, that ICS providers may occasionally provide service at facilities at rates below costs[40] hardly indicates that ICS providers will serve *all* high-cost institutions with below-cost rates, or that they would be willing or able to continue providing service at these institutions at *any* rate.

To the extent ICS providers continue serving these facilities, at rates below costs, they will be able to do so only by using revenues from lower-cost facilities to cross-subsidize those costs of service. Consequently, "long-term prison inmates will be forced to subsidize the calls of short-term jail inmates." Pai Dissent at 120 (JA___). The *Order* does not acknowledge this, let alone explain why it would be reasonable to reduce rates for some inmates at the expense of others.

C. The *Order*'s Rate Caps Are Tainted by Methodological Flaws

Finally, the FCC's rate caps should be rejected because the FCC's methodology for arriving at the caps – using averaged cost data and ignoring outliers – was flawed. Although "composite industry data or other averaging

[40] *See Order* ¶ 80 n.301 (JA___) (one ICS provider has served small facilities at a loss when it "represent[s] that community or . . . ha[s] a lot of facilities in that area"); *Bureau Denial* ¶ 27 (JA___-__) (noting that, according to the Siwek Report, Securus charges some below-cost rates at the highest-cost facilities it serves).

methods" may be appropriate where the data are sufficiently comparable, and where the FCC is willing to "adjust[ ] and modif[y]" its approach for "varied" data points, *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352-53 (D.C. Cir. 1999); *see* FCC Stay Opp. at 21, here the cost data varied widely, and the FCC was unwilling to modify its averaging approach for high-cost facilities. Instead, the FCC chose its debit rate cap based on Pay Tel cost data reflecting Pay Tel's average per-minute costs, *Order* ¶ 76 (JA___-__), and its collect rate cap based on averaged 2008 cost data for several providers, *id.* ¶ 78 (JA___). Averaging divergent data to arrive at across-the-board rate caps was not a reasonable approach on this record.[41]

In setting a rate cap for collect calls, the FCC compounded its error by excluding some data points before averaging, without explaining "why the outliers were unreliable or their use inappropriate." *See United States Tel. Ass'n v. FCC*, 188 F.3d 521, 525 (D.C. Cir. 1999) ("*USTA I*"). The study from which the collect-call rate cap was derived discussed two methodologies for arriving at average

[41] *See Petal Gas Storage, LLC v. FERC*, 496 F.3d 695, 699-700 (D.C. Cir. 2007) (rejecting use of proxy groups comprised of companies with "highly different risk profiles"); *cf. Southwestern Bell*, 168 F.3d at 1352-53 (approving use of industry data where the FCC concluded "that the LECs generally use the same assets and perform the same tasks in providing physical collocation service," and where the FCC made "adjustments and modifications to this general approach where costs varied widely among carriers") (internal quotation marks omitted).

costs. The methodology chosen by the FCC reflected the costs of providing service at 25 facilities, *see* Pai Dissent at 120 (JA___), but it excluded three other facilities "whose traffic characteristics cause service providers to be unable to recover their costs of serving that location," Wood Study at 4-5 & n.10 (JA___-__). The second methodology presented in the cost study included the three locations deemed uneconomical to serve, and generated a per-minute average rate of $0.283 – more than three cents per minute higher than the collect-call rate cap. Pai Dissent at 120 (JA___). The FCC provides no reason – other than a desire to push caps lower regardless of the evidence – to eliminate three facilities from the data set it averaged to reach a collect-call rate cap. Moreover, prior agency applications of the same methodology suggest that these facilities should have been included in the analysis.[42] And the FCC does not explain how its collect-call rate cap can be described as "conservative," *Order* ¶ 6 (JA___), when the study from which the cap is derived warned that ignoring the three high-cost locations would likely understate costs, Wood Study at 9 (JA___).

The FCC was also aware of, but ignored, record evidence that the study on which its collect-call rate cap is based understated costs in other respects. *See id.*

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[42] *See* Report and Order, *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, 20 FCC Rcd 20231, ¶ 47 (2004) (including payphones that "may not currently recoup all their costs" in a marginal location analysis similar to the analysis on which the *Order* relies).

at 15-16 (JA___-__). For instance, the study's author reported that low-volume, high-cost facilities were likely "statistically underrepresented." *Id.* at 15 (JA___). The FCC, by contrast, somehow concluded that "smaller, potentially higher-cost facilities are over-represented in the data submission's sample." *Order* ¶ 80 (JA___). In addition, Securus reported that its cost data from the 2008 study were no longer accurate and that its costs had since increased by more than 16%. *See* Securus Comments, Ex. 5 (JA___). The FCC disregarded this information, undermining its conclusion that the collect-call rate cap "presumably ensures fair compensation to ICS providers." *Order* ¶ 79 (JA___).

III. The Safe Harbor Rates in § 64.6020 Are Independently Unlawful

The *Order*'s safe harbor rates should be invalidated not only because they depend on the existence of the cost-based-rate rule – which already has been stayed and now should be vacated, *see supra* Part I – but also because they suffer from the same flaws as the rate caps. The FCC set safe harbor rates without regard to differences in size, function, and cost of providing ICS at correctional facilities across the country, and would deny the safe harbor to any ICS provider that charges higher rates at even a single facility – despite the substantial and unrebutted evidence that costs vary widely and in many cases far exceed even the rate caps (not to mention the safe harbor rates, which are much lower). Moreover, the safe harbor rates the FCC chose are indefensible on this record. The FCC

derived these rates solely from rate data for seven state *prisons* that do not accept site commissions. *Order* ¶¶ 61-62 (JA___-__). Even if site commissions were properly considered not to be a cost of providing ICS and thus were properly excluded from ICS rates (*but see supra* pp. 26-29), that methodology could not withstand scrutiny.

First, the FCC excluded any cost data for jails – even though jails often cost more to serve, and charging above-safe-harbor rates at even a single jail will entirely disqualify a provider for the safe harbor. Pai Dissent at 121 (JA___). The *Order*'s claim that safe harbors are set "at conservative levels to account for the fact that there may be cost variances among correctional facilities," *Order* ¶ 62 (JA___), is thus incorrect.[43]

Second, the FCC "decline[d] to base" its safe harbor rates – even in part – on cost and revenue data submitted by two ICS providers, Securus and CenturyLink. *Order* ¶ 68 (JA___). The FCC's "concerns about relying entirely on these data to calculate rates" because Securus and CenturyLink did not present disaggregated data, *id.*, could not justify that decision, given that the data on which the FCC

[43] The Bureau was likewise wrong to describe the "data from state prisons" as "more closely approximat[ing] actual costs." *Bureau Denial* ¶ 26 (JA___). That claim would be accurate only if the FCC ignored providers' "actual costs" of serving other types of facilities, which the FCC is not permitted to do. *See USTA I*, 188 F.3d at 525.

relied likewise failed to disaggregate individual costs. *See* HRDC Comments, Ex. A (JA___). Moreover, the FCC did not need granular data from ICS providers distinguishing among collect, debit, or prepaid calls, to understand that its safe harbor rates are far too low to provide service at many of the facilities Securus and CenturyLink serve.

Third, the FCC calculated safe harbor rates by averaging rate data for the seven prison systems, despite large rate variances among those seven states. *Order* ¶¶ 61-62 (JA___-__). As a result, per-minute rates in two of the seven states, Michigan and Rhode Island, substantially exceed the safe harbor levels. In Rhode Island, current per-minute rates exceed the *Order*'s *rate caps*, too – leaving ICS providers serving Rhode Island state prisons prohibited from charging rates that the FCC used to compute the safe harbor. *Id.* ¶ 63 n.235 (JA___-__). The FCC dismisses these states – which comprise nearly 30% of the data set – as statistical anomalies that did not warrant any increase in the safe harbor levels. *Id.* But that assumes, without record support, that Michigan and Rhode Island prisons do not have cost characteristics that would explain their higher rates.

Fourth, the FCC excluded California's rates from the analysis, even though California has also prohibited the payment of site commissions. The explanation for this exclusion is wholly inadequate; the FCC merely notes that the rates in California "recover the costs of significant in-kind contributions that, under the

contract, the ICS provider is required to make," *id.* ¶ 62 n.228 (JA___), without describing what those in-kind contributions are, or evaluating whether the in-kind contributions are directly attributable to California's costs of providing telecommunications service to inmates, which the FCC has told this Court would be appropriately *included* in setting a provider's rates, FCC Stay Opp. at 7 & n.1 (citing *Order* ¶ 54 n.203 (JA___)); *id*. at 8. Had California been included, the resulting "safe harbor" for collect calls would have been $0.18/minute (28.5% higher than the $0.14 actually adopted) and for debit and prepaid calls it would have been $0.16/minute (25% higher than the $0.12 actually adopted). The lack of analysis strongly suggests that the FCC excluded California simply because it did not like the resulting rates.

Fifth, the FCC's calculations were anything but "conservative," *Order* ¶ 62 (JA___). After averaging the seven state prisons' rate data, the FCC rounded *down* to arrive at its safe harbor rates. *Id.* ¶¶ 63-64 (JA___-__). As noted, this left the average interstate rate for two of the states' prison systems – which do not accept commissions – *above* the safe harbor levels. The safe harbor levels are thus unreasonably low even in states that "have adopted the reforms the *Order* suggests are necessary to correlate rates with costs." Pai Dissent at 121 (JA___).

IV. The Commission's Attempt To Regulate "Ancillary Fees" Is Contrary to Law

Rules 64.6010 and 64.6060 also purport to regulate fees for financial transactions and account management. These measures also should be vacated.

1. The FCC gave no notice that it was considering regulation of ancillary charges; the *NPRM* did not even mention the term. Months later, the Wireline Competition Bureau issued a two-page Public Notice titled "More Data Sought on Extra Fees Levied on Inmate Calling Services."[44] But the *Order* does "not suggest[ ] that this Bureau-level request itself provided notice with respect to ancillary charges." *Order* ¶ 91 n.338 (JA___). The Bureau lacks power "to issue notices of proposed rulemaking" and thus, as a matter of law, could not have supplied notice here.[45] And the "hodgepodge of comments strewn over several years," Pai Dissent at 115 n.33 (JA___), which included uninvited calls for the regulation of ancillary fees, *Order* ¶ 91 n.338 (JA___), cannot excuse the FCC's failure to provide notice.[46]

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[44] 28 FCC Rcd 9080 (Wireline Comp. Bur. 2013) (JA___-__).

[45] 47 C.F.R. § 0.291(e); *see Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003) (public notice by Common Carrier Bureau, "which lacks the authority under the Commission's regulations to issue notices of proposed rulemaking," could not have put Sprint on notice that the Commission was proposing to revise a rule).

[46] *CSX Transp.*, 584 F.3d at 1082 ("Under the APA, . . . notice must come from the NPRM."); *Shell Oil*, 950 F.2d at 751 ("Even if the mixture and

2. The FCC's regulation of these fees must also be rejected because the fees are outside of its jurisdiction.[47] "Ancillary charges" are fees assessed on the financial transactions, not the telecommunications services. "It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress." *American Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (vacating broadcast flag rules as outside Commission's authority). The FCC's mandate is for "regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151. Fees related to payment methods are entirely outside and independent of inmate "communication by wire or radio." For this reason, neither the Commission's "ancillary authority" under 47 U.S.C. § 154(i) of the Act, or the reference to "any ancillary services" in § 276(d) of the Act, gives the FCC jurisdiction. It is unreasonable to stretch the meaning of these sources of authority to allow the Commission to regulate transactions fees that are not charged in exchange for access to payphone equipment or telecommunications services.

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derived-from rules had been widely anticipated, comments by members of the public would not in themselves constitute adequate notice.").

[47] Reply Comments of Securus at 16 (FCC filed Apr. 22, 2013) (JA___) (citing 47 U.S.C. § 151 mandate "regulating interstate and foreign commerce in communication by wire and radio"); *see also* Securus Reply Comments in Response to DA-13-1445 at 1-3 (FCC filed July 24, 2013) (JA___-__).

3. The "cost-based" rule for ancillary charges is also substantively flawed. The FCC 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 FCC's approval – based on metrics the FCC has not yet laid out, let alone tried to justify.

V. The FCC's Refusal To Exempt Existing Contract Rates from the *Order*'s Cost-Based-Rate Rule and Rate Caps Was Arbitrary and Capricious

In refusing to exempt interstate rates in existing ICS contracts from the *Order*'s cost-based-rate requirement and rate caps, the FCC "ignore[d] the practical effect of its order," *AT&T v. FCC*, 978 F.2d 727, 734 (D.C. Cir. 1992), namely, that ICS providers will be precluded from recovering substantial costs built into their existing contracts. The FCC's failure to grapple with this obvious consequence was arbitrary and capricious. *National Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) ("The APA's arbitrary-and-capricious standard requires that agency rules be reasonable and reasonably explained.").

During the proceeding below, there was substantial consensus among stakeholders that any new rate regulations should not apply to the rates in existing ICS contracts for (at minimum) one year after the rules became effective. *See Order* ¶¶ 98-102 (JA___-__); Alternative Wright Pet. at 28-29 (JA___-__); Reply

Comments of Martha Wright, *et al*., at 17 (Apr. 22, 2013) (JA___) ("There is simply no legitimate justification for the FCC not to adopt a one-year, fresh-look period . . . ."). Numerous commenters, including both ICS providers and state correctional authorities, went further, requesting that the FCC make any new ICS rate regulations applicable only to contracts entered into after the regulations' effective date. As those commenters explained, contracts obligate providers to make "long-term capital commitments," over a period of three or more years, and those commitments are "made with a certain set of assumptions," such as the rates that ICS providers will be allowed to charge. CenturyLink Comments at 15 (JA___). Although ICS contracts may contain change-of-law provisions, those provisions are individualized to specific contracts and do not all clearly permit providers to renegotiate rates when the law changes. *Id*. at 15-16 (JA___-__); GTL Comments at 29 (JA___).

Not only does the *Order* fail to create an exemption for existing ICS contracts; it also denies the obvious implications of that choice. The *Order* states that the FCC "do[es] not take a position" on whether its new rules will affect any existing contracts, *Order* ¶ 101 (JA___), and that, in any case, ICS providers can "renegotiate their contracts or terminate existing contracts so they can be rebid based on revised terms," *id.* ¶ 102 (JA___). The *Order* further concludes, without explanation, that 90 days is a sufficient period of time for the parties "to

renegotiate contracts or take other appropriate steps." *Id.* (JA___). These claims utterly "fail[ ] to consider an important aspect of the problem" providers have identified – the economic and legal realities underlying ICS providers' existing contracts. *State Farm*, 463 U.S. at 43; *see also* Memorandum Opinion and Order, *Ryder Communications, Inc. v. AT&T Corp.*, 18 FCC Rcd 13603, ¶ 24 (2003) ("the integrity of contracts . . . is vital to the proper functioning of any commercial enterprise, including the communications market," and "the long-term health of the communications market depends on the certainty and stability that stems from the predictable performance and enforcement of contracts").

The *Order* addresses neither the possibility that prison and jail officials will be unwilling to renegotiate their contracts with ICS providers nor the consequences of their inability or refusal to do so. Nor does the *Order* contemplate the possibility that officials in some states are required by state law to insist on the payment of site commissions even where such commissions will make the ICS contracts uneconomical. *See*, *e.g.*, Tex. Gov't Code Ann. § 495.027(a). The *Order* does not address why ICS providers should bear the financial consequences of the FCC's decision to exclude site commissions from the costs of services provided under existing contracts when facilities do not or cannot permit the modification of existing contracts. The FCC's failure to address any of these consequences of its *Order* is arbitrary and capricious, and requires *vacatur*.

CONCLUSION

The *Order* should be vacated in its entirety.

Dated: May 22, 2014

Respectfully submitted,

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RULE ECF-3(B) ATTESTATION

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

/s/ *Stephanie A. Joyce*
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May 22, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), as modified by the Court's April 22, 2014 briefing order granting the ICS Providers 11,900 words, the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), this brief contains 11,710 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2007) used to prepare this brief.

/s/ *Stephanie A. Joyce*
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May 22, 2014

ADDENDUM

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47 U.S.C. § 201

§ 201. Service and charges

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

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

47 U.S.C. § 276

§ 276. Provision of payphone service

(a) Nondiscrimination safeguards

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

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

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

(b) Regulations

(1) Contents of regulations

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

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

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

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

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the

location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

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

(2) Public interest telephones

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

(3) Existing contracts

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

(c) State preemption

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

(d) "Payphone service" defined

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

47 C.F.R. § 64.6000

§ 64.6000 Definitions.

As used in this subpart:

Ancillary charges mean any charges to Consumers not included in the charges assessed for individual calls and that Consumers may be assessed for the use of Inmate Calling Services. Ancillary Charges include, but are not limited to, fees to create, maintain, or close an account with a Provider; fees in connection with account balances, including fees to add money to an account; and fees for obtaining refunds of outstanding funds in an account;

Collect calling means a calling arrangement whereby the called party agrees to pay for charges associated with an Inmate Calling Services call originating from an Inmate Telephone;

Consumer means the party paying a Provider of Inmate Calling Services;

Debit calling means a calling arrangement that allows a Consumer to pay for Inmate Calling Services from an existing or established account;

Inmate means a person detained at a correctional institution, regardless of the duration of the detention;

Inmate calling services means the offering of interstate calling capabilities from an Inmate Telephone;

Inmate telephone means a telephone instrument or other device capable of initiating telephone calls set aside by authorities of a correctional institution for use by Inmates;

Prepaid calling means a calling arrangement that allows Consumers to pay in advance for a specified amount of Inmate Calling Services;

Prepaid collect calling means a calling arrangement that allows an Inmate to initiate an Inmate Calling Services call without having a pre-established billing arrangement and also provides a means, within that call, for the called party to establish an arrangement to be billed directly by the Provider of Inmate Calling Services for future calls from the same Inmate;

Provider of Inmate Calling Services, or Provider, means any communications service provider that provides Inmate Calling Services, regardless of the technology used.

47 C.F.R. § 64.6010

§ 64.6010 Cost-based rates for inmate calling services.

All rates charged for Inmate Calling Services and all Ancillary Charges must be based only on costs that are reasonably and directly related to the provision of ICS.

47 C.F.R. § 64.6020

§ 64.6020 Interim safe harbor.

(a) A Provider's rates are presumptively in compliance with § 64.6010 (subject to rebuttal) if:

(1) None of the Provider's rates for Collect Calling exceed $0.14 per minute at any correctional institution, and

(2) None of the Provider's rates for Debit Calling, Prepaid Calling, or Prepaid Collect Calling exceed $0.12 per minute at any correctional institution.

(b) A Provider's rates shall be considered consistent with paragraph (a) of this section if the total charge for a 15–minute call, including any per-call or per-connection charges, does not exceed the appropriate rate in paragraph (a)(1) or (2) of this section for a 15–minute call.

(c) A Provider's rates that are consistent with paragraph (a) of this section will be treated as lawful unless and until the Commission or the Wireline Competition Bureau, acting under delegated authority, issues a decision finding otherwise.

47 C.F.R. § 64.6030

§ 64.6030 Inmate calling services interim rate cap.

No provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. A Provider's rates shall be considered consistent with this section if the total charge for a 15-minute call, including any per-call or per-connection charges, does not exceed $3.75 for a 15-minute call using Collect Calling, or $3.15 for a 15-minute call using Debit Calling, Prepaid Calling, or Prepaid Collect Calling.

47 C.F.R. § 64.6060

§ 64.6060 Annual reporting and certification requirement.

(a) All Providers must submit a report to the Commission, by April 1st of each year, regarding their interstate and intrastate Inmate Calling Services for the prior calendar year. The report shall contain:

(1) The following information broken out by correctional institution; by jurisdictional nature to the extent that there are differences among interstate, intrastate, and local calls; and by the nature of the billing arrangement to the extent there are differences among Collect Calling, Debit Calling, Prepaid Calling, Prepaid Collect Calling, or any other type of billing arrangement:

(i) Rates for Inmate Calling Services, reporting separately per-minute rates and per-call or per-connection charges;

(ii) Ancillary charges;

(iii) Minutes of use;

(iv) The average duration of calls;

(v) The percentage of calls disconnected by the Provider for reasons other than expiration of time;

(vi) The number of calls disconnected by the Provider for reasons other than expiration of time;

(2) A certification that the Provider was in compliance during the entire prior calendar year with the rates for Telecommunications Relay Service as required by § 64.6040;

(3) A certification that the Provider was in compliance during the entire prior calendar year with the requirement that all rates and charges be cost-based as required by § 64.6010, including Ancillary Charges.

(b) An officer or director from each Provider must certify that the reported information and data are accurate and complete to the best of his or her knowledge, information, and belief.

CERTIFICATE OF SERVICE

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

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

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