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

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

REPLY OF CENTURYLINK PUBLIC COMMUNICATIONS, INC. IN SUPPORT OF MOTION FOR PARTIAL STAY PENDING JUDICIAL REVIEW

John E. Benedict
CENTURYLINK
1099 New York Avenue NW
Suite 250
Washington, DC 20001
(202) 429-3114
john.e.benedict@centurylink.com

Robert A. Long, Jr.
Kevin King
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000
rlong@cov.com
kking@cov.com

Counsel for CenturyLink Public Communications, Inc.

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GLOSSARY

FCC	–	Federal Communications Commission
ICS	–	Inmate Calling Services
Order	–	*Second Report and Order and Third Further Notice of Proposed Rulemaking, Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 15-136, 80 Fed. Reg. 79136 (Dec. 18, 2015)

I. CENTURYLINK IS LIKELY TO SUCCEED ON THE MERITS

A stay is warranted because the FCC has no answer to CenturyLink's core argument that the *Order*'s rate caps will prevent CenturyLink from recovering its cost of service in Texas and several other jurisdictions, in direct contravention of section 276's requirement that the FCC "ensure that all [ICS] providers are fairly compensated for *each and every* . . . call" they complete. 47 U.S.C. § 276(b)(1)(A) (emphasis added).

1. CenturyLink's largest ICS customer, the Texas prison system, is also the largest state prison system in the country. *See* United States Bureau of Justice Statistics, *Prisoners in 2014*, at 3 (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf. CenturyLink's cost data show that its cost of service in Texas prisons is [redacted] per minute, exclusive of site commissions—well above the *Order*'s $0.11 per minute cap for calls from prisons.[1] *See* CenturyLink Motion for Partial Stay, *Global Tel*Link v. FCC*, No. 15-1461, at 4 (D.C. Cir. filed Feb. 5, 2016) ("CenturyLink Mot."). Nearly [redacted] of that amount is attributable to (i) the cost of administering security-screening procedures mandated by state law and (ii) the [redacted] capital investment necessary to provide service in Texas

[1] The initial rate cap for collect calls is $0.14 per minute, but changes to $0.13 per minute in 2017 and $0.11 per minute in 2018. *See Order* ¶ 9.

prisons (which previously had not allowed regular inmate calling). *See id.* Although CenturyLink also serves lower-cost jurisdictions where its cost of service is well below the *Order*'s cap, its average cost of service across all jurisdictions (again exclusive of site commissions) is well above $0.11 per minute. *See* CenturyLink Mot. Ex. 2 (Decl. of Paul Cooper) ¶¶ 9–10; *see also id.* ¶ 11 (showing specific jurisdictions in which the cost of service exceeds the *Order*'s rate caps).

The FCC does not challenge CenturyLink's cost data in any way. Instead, the *Order* accepts the data "at face value." Opposition of Respondent FCC to Motions for Partial Stay, *Global Tel*Link v. FCC*, No. 15-1461, at 8 (D.C. Cir. filed Feb. 12, 2016) ("FCC Opp.") (quoting *Order* ¶ 53).[2]

[2] Intervenors incorrectly suggest that CenturyLink's 2008 infrastructure investment in Texas can be ignored because "[u]nder the Internal Revenue Code, investments in telecommunications equipment may be amortized in 7 years." Movant-Intervenors' Joint Opposition to Motions for Stay Pending Judicial Review, *Global Tel*Link v. FCC*, No. 15-1461, at 19 (D.C. Cir. filed Feb. 12, 2016) ("Intervenors' Opp."). Tax amortization under the Internal Revenue Code is not the same as actually recovering the cost of an investment. CenturyLink seeks to recover its investment over the life of the Texas contract, including extension options that run through 2019. It will be unable to do so as a result of the *Order*'s rate caps. *See* Cooper Decl. ¶¶ 31–32 (*Order* puts "tens of millions of dollars in capital investment at risk in Alabama and Texas alone."). Intervenors' assertion (at 12) that "Texas law appears to allow renegotiation of the current 40% rate" is also incorrect. The Texas statute requires a 40 percent site commission; it is not possible for CenturyLink to negotiate a lower rate unless the Texas legislature—which will not be in session again until 2017, *see infra* n.5—amends the statute. *See* CenturyLink Mot. at 13 & n.7, 18. The FCC did not rely on these arguments, and therefore they provide no basis for sustaining the *Order*. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

Yet the FCC does not even *attempt* to show that CenturyLink will be "fairly compensated for each and every . . . call" made in Texas and other high-cost jurisdictions. 47 U.S.C. § 276(b)(1)(A). The FCC mentions Texas only once in its opposition paper, and then only to make a conclusory assertion that CenturyLink's Texas data "do[ ] not undermine the FCC's general finding." FCC Opp. at 26. Where a party has made "arguments resting on solid data," the FCC's failure to provide a reasoned response "epitomizes arbitrary and capricious decisionmaking." *Ill. Pub. Telecomms Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997).[3]

2. Rather than explaining how an $0.11 per minute rate cap fairly compensates CenturyLink for calls that cost [redacted], the FCC argues that CenturyLink could potentially be eligible for a waiver of the rate cap. *See* FCC Opp. at 11, 26–27. But this Court has long held that the lawfulness of FCC regulations "must be assessed without reference to the waiver provisions" where, as here, the FCC is "on record that it will not freely grant waivers." *Home Box Office v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977).

[3] As the FCC has acknowledged, section 276 requires a rate structure that allows each provider to "recove[r] at least its incremental costs." *In re Implementation of Pay Tel. Reclassification & Comp. Provisions of Telecomms Act of 1996*, 17 FCC Rcd. 3248, 3256 (2002). With respect to Texas and other high-cost jurisdictions, the *Order* marks an arbitrary and unexplained departure from this principle. *See Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003).

The *Order* makes clear that ICS providers cannot count on obtaining a waiver. Under the *Order*, waivers will be granted only in "extraordinary circumstances." *Order* ¶ 217. The *Order* also indicates that relief is available only if a provider can show hardship at "the holding company level"—a test that is effectively impossible for large, diversified companies like CenturyLink to meet. *See* CenturyLink Mot. at 15–16. These standards set a "high hurdle" for obtaining waiver relief. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

CenturyLink made each of these points in its motion; the FCC does not dispute any of them in its opposition paper. Instead, the FCC says only that a provider whose costs exceed the rate caps "may *apply* for a waiver of the rate rules for good cause, which the agency's staff must endeavor to act on within 90 days." FCC Opp. at 11 (emphasis added). At no point does the FCC indicate that such a request will be *granted*, or that the FCC will issue a decision within 90 days.

3. A stay would enforce section 276's requirement that the FCC "shall . . . ensure that all [ICS] providers are fairly compensated for *each and every* completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A) (emphasis added). The FCC acknowledges that the *Order*'s rate caps do not provide fair compensation for "each and every . . . call," and are instead based on the "averag[e] . . . cos[t] to serve each category of facility," FCC

Opp. at 8. The FCC's attempt to defend its counter-textual approach does not withstand scrutiny.

First, the FCC incorrectly asserts that this Court has previously approved a similar averaging methodology. *See* FCC Opp. at 24 (citing *Am. Pub. Comm'cns Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000) ("*APCC*")).[4] In the order under review in *APCC*, the FCC "*declined* to rely on . . . call volumes from an average payphone because it would cause many payphones with below-average call volume to become unprofitable." 215 F.3d at 54 (emphasis added). Instead, the order focused on the economics of "a marginal payphone"—i.e., one "that gathers revenue to meet its costs . . . but is not otherwise profitable," *id.*—because doing so would "ensure fair compensation under § 276(b)(1)," *id.* at 57. To be sure, in computing the cost to operate a marginal payphone, the FCC relied on composite data. *See id.* at 58. No party in *APCC* argued that the FCC's approach deprived payphone providers of fair compensation for "each and every . . . call," so the Court had no occasion to decide that issue. Moreover, the *APCC* order adopted a rate which ensured that even outliers——payphones with "below-average call volume"—would remain economical. *Id.* at 54. The same cannot be said of the

[4] The FCC also asserts (FCC Opp. at 22–23) that this Court has upheld the use of industry-wide averages in ratemaking. Those decisions are inapplicable because they did not apply section 276 and did not involve a statutory requirement that the agency ensure adequate compensation for "each and every" unit of service.

Order under review here, which the FCC admits will cause some ICS providers to "operate at a loss." *Order* ¶ 116 & n.365. In short, Section 276 does not prohibit any type of averaging. Instead, it prohibits averaging (or any other approach) that fails to ensure fair compensation for "each and every . . . call."

Second, the FCC erroneously asserts that section 276's "each and every . . . call" requirement "is plainly unreasonable as well as administratively infeasible." FCC Opp. at 24. Federal agencies are charged with implementing the statutes Congress writes, not revising them as they see fit. As Commissioner O'Rielly observed in dissent, "The Commission is governed by a statute, not an optional menu. We don't get to order a la carte and make substitutions at will." Dissenting Statement of Commissioner Michael O'Rielly, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 15-136, at 209. This Court and the Supreme Court have repeatedly rejected agencies' attempts to disregard portions of the statutes they are charged with implementing. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (reaffirming "the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate"); *In re Aiken Cnty.*, 725 F.3d 255, 260 (D.C. Cir. 2013) ("Congress sets the policy, not the Commission.").

In any event, it is neither unreasonable nor infeasible to construct a per-call compensation plan that fairly compensates ICS providers for each and every call.

CenturyLink has advocated for just such a plan before the Commission, which would provide substantial reforms for inmates and their families, while preserving ICS providers' ability to cover their costs of service and earn a reasonable return on investment. *See, e.g.*, Comments of CenturyLink, *Matter of Rates for Interstate Inmate Calling Services*, WC Docket 12-375, at 1 (Mar. 25, 2013), http://apps.fcc.gov/ecfs/comment/view?id=6017169662 ("CenturyLink Comments").

II. THE *ORDER*'S RATE CAPS WILL IRREPARABLY HARM CENTURYLINK

The *Order* will irreparably harm CenturyLink because CenturyLink will not be able to recover the lost income, goodwill, and other losses caused by the *Order*'s rate caps. *See* CenturyLink Mot. 16–19. The FCC asserts that these unrecoverable losses "do not constitute irreparable harm per se," FCC Opp. at 33, but it cites no authority in support of that argument and overlooks decisions of this court and other courts holding that unrecoverable economic losses are a quintessential form of irreparable harm. *See, e.g.*, *Odebrecht Constr., Inc. v. Sec'y, Florida Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013); *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010). The FCC also contends that CenturyLink's losses will not "threaten either its business or its ability to provide inmate calling services at most, if not all, of its facilities," FCC Opp. at 33, but this is both irrelevant and incorrect. It is irrelevant because a petitioner need not face

the demise of its business to suffer irreparable harm. *See, e.g., Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1544 (10th Cir. 1994) ("complete demise of plaintiffs' business" is not "the only injury acute enough to justify injunctive relief"). It is incorrect because, as explained in CenturyLink's motion and supporting declaration, the *Order*'s rate caps will in fact prevent CenturyLink from recovering its cost of providing ICS in higher-cost jurisdictions. *See* CenturyLink Mot. 16–19; Cooper Decl. ¶¶ 27–32.

Similarly immaterial is the FCC's argument that CenturyLink has "been on notice for years that the agency might impose new inmate calling rules." FCC Opp. at 34. The fact that an agency has announced plans to implement an unlawful regulation does not insulate regulated businesses from suffering harm when those regulations are adopted. If that were so, courts could never stay unlawful agency orders so long as the agency announced its plans ahead of time.

It makes no difference that CenturyLink's Texas contract has a *force majeure* provision, because Texas's 40 percent site commission is required by statute and therefore cannot be waived or modified in contractual negotiation. *See* CenturyLink Mot. at 13 & n.7, 18. Intervenors suggest that CenturyLink "could ask Texas to modify or remove [its statute] in light of the Order," Intervenors-

Opp. at 12, but there is no reason to think the Texas legislature will amend the statute, let alone do so before the *Order* takes effect on March 17, 2016.[5]

Amicus NCIC incorrectly asserts that CenturyLink and other ICS providers will not be irreparably harmed because NCIC is able to provide service in Alabama under rate caps "ranging from $0.21 to $0.25 per minute." *See* Brief of Amicus Curiae NCIC, *Global Tel*Link v. FCC*, No. 15-1461, at 4–5 (D.C. Cir. filed Feb. 12, 2016). NCIC fails to acknowledge that the *Order*'s rate caps for prisons are nearly 50 percent lower than the $0.21 to $0.25 per minute rates NCIC charges in Alabama.[6] NCIC also makes an unjustified assumption that the cost of providing service in Alabama is the same as in other jurisdictions. CenturyLink's cost data—which the *Order* takes "at face value"—clearly show that the cost of service is not the same in every jurisdiction, and that security and infrastructure costs often result in per-minute costs well above the *Order*'s rate caps.

III. A STAY WILL NOT HARM OTHER PARTIES OR THE PUBLIC

A stay would not impose undue hardship on other parties. If a partial stay is granted, the interim rates adopted in 2013 will remain in effect. Those interim

[5] Indeed, the Texas legislature is not scheduled to meet again until 2017. *See* Legislative Reference Library of Texas, *Texas Legislative Sessions and Years*, http://www.lrl.state.tx.us/sessions/sessionYears.cfm (accessed Feb. 18, 2016).

[6] Under the *Order*, the small jails served by NCIC will be subject to rate caps well above those applicable to the prisons served by CenturyLink in Alabama. *See Order* ¶ 9 (providing rate cap of $0.22 per minute for debit and prepaid calls from small jails, versus a rate cap of $0.11 per minute for such calls from prisons).

rates are nearly identical to the rates the Wright Petitioners requested in their 2007 petition for rulemaking, as Intervenors concede. *See* Intervenors' Opp. at 12–13.

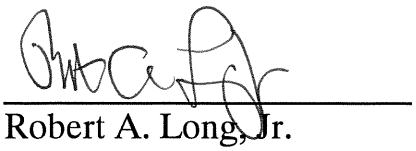
A partial stay would also serve the public interest by upholding the twin statutory objectives expressed by Congress in section 276: "promot[ing] competition among [ICS] providers and promot[ing] the widespread deployment of [inmate calling] services." 47 U.S.C. § 276(b)(1).

Throughout the proceedings at the FCC, CenturyLink has supported reasonable ICS reforms that will provide more affordable opportunities for inmates and their families to communicate by telephone. *See* CenturyLink Comments, *supra*, at 1. But as Commissioner Pai explained in dissent, these goals cannot be achieved by rate caps that prevent ICS providers from recovering their reasonable service costs. *See* Dissenting Statement of Commissioner Ajit Pai, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 15-136, at 203–05. Absent a stay, the "ineluctable result" of the *Order*'s below-cost rate caps will be *reduced* competition and *reduced* availability of ICS for inmates and their loved ones. *Id.* at 203.

CONCLUSION

This Court should stay the *Order*'s rate caps pending adjudication of CenturyLink's petition for review.

Respectfully submitted,



February 19, 2016

Robert A. Long, Jr.
Kevin King
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000
rlong@cov.com
kking@cov.com

John E. Benedict
CenturyLink
1099 New York Avenue NW
Suite 250
Washington, DC 20001
(202) 429-3114
john.e.benedict@centurylink.com

Attorneys for CenturyLink
Public Communications, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February 2016, I filed the foregoing Public version of the Reply of CenturyLink Public Communications, Inc. in Support of Motion for Partial Stay Pending Judicial Review with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system. Parties that are registered users of the Court's CM/ECF system will be served through that system.

Kevin King

Counsel for CenturyLink Public Communications, Inc.