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 GLOBAL TEL*LINK IN SUPPORT OF ITS MOTION FOR PARTIAL STAY PENDING JUDICIAL REVIEW

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INTRODUCTION

The FCC's rate caps are unlikely to withstand review because (1) they violate the statutory command that ICS providers receive fair compensation for "each and every completed" call, 47 U.S.C. § 276(b)(1)(A); and (2) the FCC has no authority to cap intrastate rates under that statute. With respect to the first point, the FCC does not (and cannot) contest that the rate caps deny ICS providers recovery for the site commissions that they are contractually obligated to pay for the right to provide service within inmate institutions; nor does the FCC contest that it deliberately set rate caps below the costs incurred for nearly half of all calls from inmate institutions. As to the second, the FCC adopts an unnatural reading of § 276 that is particularly nonsensical in light of statutory context and history, and in the face of binding law that precludes the FCC from intruding on matters of state authority without clear authorization.

On the equities, the FCC has no answer to the point that, if the new caps go into effect, ICS providers will suffer irretrievable losses because they will be forced to provide service below cost or, at best, will have to undertake complicated contract negotiations to deal with a regulation of untested legality. And inmates and their families will be harmed, not benefited, if implementation of the regulation disrupts service.

The Court should grant the stay.

ARGUMENT

I. GTL IS LIKELY TO PREVAIL ON THE MERITS

A. The FCC's Failure To Account for — or Otherwise Address — Site Commissions Was Unlawful and Unreasonable

1. The FCC defends (at 18-20) its decision to exclude site commissions from the recoverable costs of providing service — *while declining to prohibit them under federal law* — by arguing that site commissions are not a reasonable cost of providing ICS. But the FCC's "historical" support for that view addressed an entirely different issue — whether it was reasonable to set per-call payphone compensation based on the costs of a marginal payphone, which, by definition, does not support the payment of *any* commissions. *See* GTL Mot. 11 n.14. The same cannot be said about ICS, because providers are required by correctional authorities to pay commissions as a condition of providing service.[1]

Once it is recognized that site commissions are actual costs of providing ICS, the FCC's regulation is indefensible, because the FCC admits that its rate cap does not allow the recovery of that cost, thus violating both 47 U.S.C. § 276(b)(1)(A) and the Constitution. The FCC's remaining arguments are just

[1] *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), stands merely for the proposition that an agency can regulate "certain facets of [the provider's] engineering and construction" to ensure that providers cannot "cloak the running up of unreasonable costs." *Id.* at 1280. But that principle — and the FCC's facetious reference to private jets — might justify the FCC in regulating site commissions. It does not justify the FCC in denying ICS providers the ability to recover commissions that ICS providers must pay under state law.

wishful thinking — that is, a hope that states will renegotiate binding contracts to conform to rate caps. The FCC has no basis for that hope and, in any event, provides no legal authority for the proposition that a provider subject to rates set by the FCC can be left to the tender mercies of third parties to bring costs down below the rates that the FCC set.

2. For related reasons, the FCC's approach to site commissions violates the APA, because the *Order* failed to address the primary cause of the market failure that its regulations purportedly were intended to address. The FCC argues (at 21) that the *Order* reflects a "reasonable prediction" that rate caps will drive site commissions down even if they remain permissible as a matter of federal law. But following the *2013 Order*, which *precluded* any recovery of site commissions on interstate calls, the Wireline Competition Bureau still had to make clear, at the request of ICS providers, that any required payment of site commissions — except to reimburse costs "reasonably and directly related to the provision of ICS" — would render ICS rates "unjust and unreasonable under section 201 of the Act."[2] That lesson was apparently lost on the FCC here, which now simply "expect[s]," *Order* ¶ 131, that correctional facilities will voluntarily renegotiate the commissions to which they are contractually entitled (and which they may be

[2] Public Notice, *Wireline Competition Bureau Addresses the Payment of Site Commissions for Interstate Inmate Calling Services*, 29 FCC Rcd 10043, 10043-44 & nn.6-7 (WCB 2014).

obligated to collect). That expectation is irrational in light of the FCC's prior experience, and shows that the Commission failed to address the most important "aspect of the problem," *Saad v. SEC*, 718 F.3d 904, 910 (D.C. Cir. 2013).

In any event, the FCC cannot rely on unregulated third parties to correct a practice that, according to the Commission, "distorts the ICS marketplace." *2014 NPRM* ¶ 22; *accord Order* ¶ 122. The FCC does not explain why correctional facilities will invariably (or even typically) renegotiate existing arrangements that redound to their benefit. The FCC has left correctional facilities free to insist on payments that will put ICS providers to a Hobson's choice of breaching their contracts or providing service at a loss.

B. The Rate Caps Are Unlawful, Even if Site Commissions Are Excluded, Because They Deny Providers Fair Compensation

Even if site commissions are excluded, the FCC's rate caps still risk exposing providers to below-cost rates because, as the FCC acknowledged, they are below some providers' reported costs. *See* GTL Mot. 15-16. This, too, violates the requirement that ICS providers receive "fair[ ] compensat[ion] for each and every" call. 47 U.S.C. § 276(b)(1)(A).

The FCC does not and cannot disagree with what the record plainly shows; it claims only that its caps will allow "as many as 60 percent of all calls" to be lawfully compensated and "possibly all" ICS providers to recover costs. Opp. 25; *cf. Order* ¶ 58 (predicting that "efficient" providers would recover costs). Instead,

it contends that it has no obligation to set a rate to ensure that the cost of every call is covered — suggesting that such a requirement would be unadministrable. But the question is whether the FCC has deliberately set a rate that deprives many ICS providers of fair compensation for the service they provide at many locations — and the FCC agrees that it has done so. That violates the statute. In the public-payphone context, the FCC accepted the consequence that carriers would remove payphones that failed to recoup their costs.[3] But ICS providers, subject to binding contracts, cannot pull out unprofitable payphones — rather, they must operate without the fair compensation the statute requires, a result the FCC claims it wants to avoid. Indeed, even in the public-payphone context, the FCC used call volumes from *marginal* payphones — *not* average call volumes — to calculate per-call compensation, precisely *because* the use of average call volumes "would cause many payphones with below-average call volume to become unprofitable." *American Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 54 (D.C. Cir. 2000).

C. The FCC Lacks Authority To Cap Intrastate Rates

The FCC argues that, because § 276(b)(1)(A) gives it authority to ensure that ICS providers are fairly compensated for "each and every" intrastate call they

[3] *See* Third Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545, ¶ 34 & n.67 (1999) ("[A]bsent sufficient total revenue from coin calls and dial-around or compensable calls, we can expect these payphones to be removed . . . .").

originate, it also has authority to cap intrastate rates that it deems excessive. That reading of the statute twists its plain meaning and, in any event, cannot overcome the rule of construction that the FCC lacks authority to regulate intrastate rates without unambiguous authorization from Congress.

First, despite the FCC's effort to take the single word "fair" out of statutory context, the actual statutory language clearly indicates that the FCC has authority to ensure adequate compensation, not to regulate against excessive rates. The statute directs the FCC to adopt regulations to "ensure" fair compensation. 47 U.S.C. § 276(b)(1)(A). Even without the benefit of the statutory history, that language is naturally read to require adequate payments, not to reduce excessive payments: the statement, "the FCC must ensure that each and every agency employee receives a fair wage," does not, in its ordinary meaning, threaten pay cuts for unproductive or otherwise overpaid employees.

In any event, courts do not interpret a single word "in isolation." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Rather, "[i]nterpretation of a word or phrase depends upon reading the whole statutory text," including "*the purpose and context of the statute*." *Id.* (emphasis added). Moreover, this rule of interpretation "is often wisely applied where," as here, a single word "is capable of many meanings," so as "to avoid the giving of unintended breadth to the Acts of

Congress." *Id.*[4] The FCC can hardly dispute that the statute was enacted to address existing state and federal regulations limiting payphone providers' ability to charge for a variety of local and long-distance calls made from their payphones. Section 276 was included to ensure that payphone providers *were* compensated for calls made from their payphones that would not otherwise require payment from the end user.[5] *Other* provisions of the Communications Act touch on concerns about the excessive rates charged for certain types of calls made from payphones. *See* 47 U.S.C. § 226. Not one word in the legislative history or the FCC's own prior orders suggests that § 276(b)(1)(A) was so directed.[6]

The conclusion that the FCC has overstepped its authority is especially clear in light of the rule that, absent explicit authority from Congress, the FCC lacks

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[4] Furthermore, persuasive legislative history of the type present here can indeed "trump the FCC's" interpretation of statutory text. *Contra* Opp. 15. At *Chevron* step one, courts consult all the "traditional tools of statutory construction," including "legislative history, structure, and purpose." *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000).

[5] *See* GTL Mot. 18; Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 6716, ¶ 16 (1996) ("*1996 NPRM*"); Pai Dissent to *Order* at 200 (calling § 276 a "one-way ratchet" that applies "only when intrastate payphone service rates are *too low* to ensure fair compensation").

[6] Nothing that the FCC cites from its prior order contemplated rate regulation under § 276 to prevent excessive rates. The *1996 NPRM*'s supposed "concern[] about practices that might unfairly *increase*" payphone compensation, Opp. 16, was in fact a concern about fraudulent practices, not a concern about excessive rates. *See 1996 NPRM* ¶ 23 (noting "concern about" "a payphone owner [attaching] an autodialer to a payphone" to "place repeated 800 calls . . . [and] increase the amount of compensation that the payphone owner receives).

authority over intrastate services. *See* GTL Mot. 17; 47 U.S.C. § 152(b)(1); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986). That principle is a "rule of statutory construction"; the Communications Act cannot be read to confer intrastate regulatory authority unless the statute is "so unambiguous or straightforward as to" require that result. *Louisiana Pub. Serv. Commn'n*, 476 U.S. at 373, 377. That injunction, if it is to have any meaning, trumps the ordinary rule that the FCC's interpretation of the scope of its own authority is entitled to deference. No such clarity is present here.

II. THE EQUITIES FAVOR A STAY

A. As GTL explained in moving for a stay (GTL Mot. 19), the FCC's below-cost rate caps will force providers to provide ICS at an unrecoverable loss, because, if GTL's petition for review is successful, it will not be able to recoup the lost revenue from being forced to charge unlawfully low rates. A firm's inability to "cover its costs" under potentially unlawful regulation constitutes irreparable harm. *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010); *see also Independent Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 374 F. App'x 690, 693 (9th Cir. 2010) ("below cost" compensation for drugs would limit patients' access and impose irreparable harm), *vacated due to changed circumstances sub nom. Douglas v. Independent Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012).

The FCC's attempt (at 33 n.7) to distinguish *Sottera* fails. *Sottera* involved potential regulation that would have prevented a firm from selling its product and recovering the cost of bringing it to market. The extent of the prohibition is a difference in degree, not kind. Conversely, the FCC offers no controlling authority for its incorrect view (at 33) that unrecoverable losses *do not* constitute irreparable harm.

The FCC criticizes (at 33) petitioners' motions as being "based on current inmate calling contracts." The contracts, of course, *set the rates* at which ICS is provided and so provide the appropriate benchmark. As explained above, the FCC's speculation that a sufficient number of contracts will contain change-of-law clauses or will be easily renegotiated is unjustified.

In any event, the cost of implementing such changes (if they are possible) is an additional cost that cannot be recovered if the petitions for review succeed. *See* GTL Mot. 19. The FCC answers (at 34), essentially, that ICS providers should have already renegotiated during the "years" in which the agency has been considering ICS rate reform. Even if ICS providers could predict the contours of not-yet-adopted regulation, however, those providers would have been unable to negotiate contracts that allow for the elimination of site commissions, as correctional facilities frequently require such commissions as a matter of state law or policy.

B. Other interested parties will not suffer harm as a result of a stay, because the *2013 Order*'s rate caps will remain in effect — rate caps that are nearly identical to those requested by the Wright Petitioners. *See* GTL Mot. 20.[7] Conversely, those parties, and the public interest, will be harmed if the *Order* is not stayed, because reducing rates below providers' costs could lead to a reduction in the availability and quality of ICS. *See* Pai Dissent at 203.

The FCC ignores this "ineluctable result," *id.*, in speculating (at 35) that lower rates "will make it easier for inmates to stay connected to" family and friends. But if ICS providers are forced to scale back service because they cannot cover costs (at rates the FCC acknowledges are below some providers' costs, *see supra* p. 4), staying in touch will be harder, not easier, and the myriad ancillary benefits of increased ICS, *see* Opp. 35; Intervenors Opp. 14-17, will be obstructed. The public interest favors a stay of the rate caps pending judicial review.

CONCLUSION

Prior to their effective dates — March 17, 2016 (for prisons), and June 20, 2016 (for jails) — the *Order*'s rate caps, 47 C.F.R. § 64.6010, should be stayed pending judicial review.

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[7] The Wright Petitioners assert that the rates they requested are now harmful because they are "more than what the current record demonstrates to be just and reasonable." Movant-Intervenors' Joint Opp. ("Intervenors Opp.") 13. But this undefined assertion of harm from rates the Wright Petitioners defended in this Court less than two years ago rings hollow. *See* Intervenors' Br., *Securus v. FCC*, No. 13-1280, Dkt. #1527528 (D.C. Cir. filed Dec. 16, 2014).

Respectfully submitted,

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February 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on February 19, 2016, I electronically filed the foregoing 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, a copy of the foregoing motion was served by prepaid first-class U.S. Mail on the following:

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