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 BY TELMATE LLC FOR STAY PENDING JUDICIAL REVIEW

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The FCC opposes Telmate's stay motion by describing *what* the FCC did because it cannot explain *why* its decisions were authorized or reasonable. This does not overcome Telmate's "substantial case on the merits," which, coupled with the irreparable harm it will suffer and the balance of the equities, justifies a stay. *Wash. Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The Court should grant Telmate's motion for a stay.

I. SECTION 276 DOES NOT AUTHORIZE RATE CAPS.

The FCC reasserts that, contrary to Telmate's claims, a "straightforward reading of [47 U.S.C. § 276's] terms, which are unqualified," provides the FCC with general ratemaking authority. *FCC Opp.* at 15. This is incorrect.

Whereas 47 U.S.C. § 201 broadly authorizes regulation of "[a]ll charges, practices, classifications, and regulations for and in connection with . . . communication service," Section 276 simply requires the Commission to "ensure . . . fair[] compensat[ion]" for providers. Section 276 also specifically directs that the FCC's regulations "promote the widespread deployment of payphone services." Section 276(b)(1). The FCC's interpretation of Section 276 reads all of that out of the text and reads into it a general ratemaking authority identical to that of Section 201. That is not permissible. *See Nat. Res. Def. Council v. EPA*, 822 F.2d 104, 113 (D.C. Cir. 1987) ("To read out of a statutory provision a clause setting forth a specific condition or trigger to the provision's applicability is . . . an

entirely unacceptable method of construing statutes."); *see also In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013) ("[F]ederal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress."). The FCC's prior proceedings under Section 276 show that the statute *does* have a straightforward meaning that the FCC has long recognized, and that said meaning does not authorize rate caps. Here, the FCC has not justified the departure that it now makes from that meaning.

Relatedly, just as Section 276 does not authorize *intra*state rate caps, it also does not authorize *inter*state rate caps. As a result, non-carriers like Telmate that are not subject to Section 201 cannot be subject to either interstate or intrastate rate caps. *See Telmate Mot.* at 5–7, 16. The FCC does not address these points in its opposition (except, perhaps, to jettison its reliance on Section 201), and so appears to have conceded them here. *See, e.g.*, *Day v. D.C. Dep't of Consumer & Regulatory Affairs*, 191 F. Supp. 2d 154, 159 (D.D.C. 2002) ("If a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded."). For this reason, the Court should, at minimum, stay the rate caps as applied to non-carriers like Telmate.

II. THE FCC'S TREATMENT OF COMMISSIONS IS UNLAWFUL.

The *Order* identified site commissions as the primary driver of prison calling rates, and the FCC suggested it could take "action to prohibit site commissions, if

necessary." *In Re Rates for Interstate Inmate Calling Services*, Second Report and Order, WC Docket No. 12-375, FCC 15-136, 30 F.C.C. Rcd. 12,763 at ¶ 129 (rel. Nov. 5, 2015) ("*Order*"). But, instead of banning or otherwise regulating them, the FCC excluded commissions when calculating rate caps. *Telmate Mot.* at 10–13. This approach denies fair compensation to providers and would depress the proliferation of prison calling, both contrary to Section 276's text. *Id*. The FCC defends its action by asserting that it had made a "reasonable prediction" that facilities "will not continue to insist on receiving excessive site commission payments" and that providers therefore will receive fair compensation under the new rules. *FCC Opp.* at 21. But the FCC continues to ignore record evidence that facilities incur meaningful costs in connection with inmate calling, which, absent taxpayer funding, they necessarily recover through site commissions. Several parties below—including the National Sheriffs' Association—provided detailed accounts of these expenses. *Order* at ¶ 136. The FCC cited *no* record evidence suggesting that facilities incur zero or near-zero costs when they permit inmate calling. *Id.* at ¶¶ 136–139. Given this record, it is unreasonable to predict that facilities will voluntarily stop charging site commissions and simply absorb the costs that those commission payments had been covering.

Essentially recognizing this, the FCC hedged in the *Order* that "if" such expenses existed, then its rate caps were "sufficiently generous" to cover costs that

would "likely amount to no more than one or two cents per billable minute." *Id.* at ¶ 139. The FCC's opposition now repeats that conclusion. *FCC Opp.* at 21–22. As discussed below, however, there is no reason to believe that the rate caps—which are expressly designed to *eliminate* site commissions—are "generous" enough to *permit* the payment of commissions. In the case of the $0.11 rate cap for prisons, for example, the FCC's (unreasonably low) cost estimate of 1 to 2 cents per minute represents 9% to 18% of the highest permissible price.

On this issue, the FCC ignored record evidence and unreasonably presumed that rate caps designed to exclude commission payments will actually cover them. That is not reasoned decision-making and does not merit deference.

III. THE FCC SET THE RATE CAPS UNREASONABLY LOW.

Telmate also asserted that the FCC set unreasonably low rate caps even after ignoring commissions, witnessed primarily by the fact that it limited calling prices to levels below the non-commission-related costs of seven of the fourteen providers who submitted data to the FCC. *Telmate Mot.* at 14–16. Because Section 276 requires "fair[] compensat[ion]" for "each and every" phone call, the FCC's rules violate that statute. *Id.*

The FCC first responds by challenging Telmate's framing of the issue, asserting that Telmate stated "without support" that the rate caps were lower than the costs of half of the industry. *FCC Opp.* at 24. It is puzzling that the FCC makes

this claim; the *Order* recounts that the FCC received cost data from "*14* . . . ICS provider respondents," and that the new rate caps "imputed reductions in providers' ability to recover costs . . . to *seven* of the reporting providers." *Order* at ¶¶ 51, 64 (emphasis added). The FCC specifically noted that each of these seven providers reported per-minute costs of "$0.25 or higher," *id.* at ¶ 64, in contrast to the highest prepaid rate cap under the new rules of $0.22 per minute. *Id.* at ¶ 9 (also noting that rate caps for larger facilities are set as low as $0.11 per minute). All seven of those providers (out of fourteen who reported) will therefore receive compensation below their costs under the new rules.

Next, on the substance, the FCC seems to have simply ignored Telmate's argument that it was unreasonable to conclude that the providers with costs above the rate cap are inefficient, and so not entitled to full recovery of those costs. *Order* at ¶ 64. We showed that this conclusion was unreasoned, as the FCC provided no explanation in the *Order* for why providers would elect inefficiency if they could increase profits by being more efficient. *Telmate Mot.* at 14–15.

The FCC offers no further explanation in its response. Instead, it presents arguments that have nothing to do with efficiency and which, problematically, are reasons already disclaimed by the *Order*. The FCC asserts in its opposition that the rate caps are acceptable because "the Commission reasonably predicted that lowered rates will lead to 'increases in call volumes'," which presumably might

result in more revenue for the higher-cost providers. *FCC Opp.* at 25. But the FCC expressly stated in the *Order* that the rates "take[] no account of likely increases in call volumes," and are valid even without that assumption. *Order* at ¶ 57. And it was sensible for the Commission not to take increased call volumes into account, as certain other aspects of the *Order*, such as the elimination of flat rate calling, will likely decrease call volume. Likewise, the FCC asserts that providers may have overstated their costs, but then inconsistently notes that the FCC nevertheless took the provider cost data "at face value." *FCC Opp.* at 25; *see also Order* at ¶ 57 (noting that the rate caps "assume[] that [the reported data] do not overstate costs"). And of course, neither of these arguments, even if valid, speak to the FCC's failure to explain its assertion that seven of the fourteen reporting providers are inefficient.

The closest that the FCC comes to trying to explain its conclusion that providers are inefficient is its claim that local variations did not account for the higher costs that some providers reported. Specifically, the FCC now asserts that it "considered commenters' assertions of local cost variation but found that, beyond factors accounted for in the four-tiered rate framework, the administrative record did not show that such variation exists." *FCC Opp.* at 26.

That misstates both the record and the FCC's burden here. Providers reported divergent costs; assuming (as is rational) that those providers are

motivated to maximize profits, *that* is the evidence that shows that costs vary based on unique local conditions. It is the FCC that, in turn, must provide a coherent reason for concluding that inefficiency—that is, the irrational acceptance of lower profits—explains the phenomenon instead. The FCC has never attempted to do so. Instead, it merely points out that, in some locations, providers offer prison calling at substantially lower rates than others, and that those rates are in some cases below the rate caps. *FCC Opp.* at 25; *Order* at ¶ 49. This, of course, says nothing about what accounts for higher (or lower) rates in other locations, including such factors as provider cross-subsidization or loss-leaders, state socialization of facility costs, variations in labor cost, and the like.

The FCC set rate caps below the costs of seven providers not because those providers are inefficient, but because the FCC wanted to set a lower rate cap. That is not reasoned decision making.

IV. SECTION 276 DOES NOT AUTHORIZE THE FCC'S LIMITS ON CHARGES FOR ANCILLARY SERVICES.

Telmate showed that the plain language of Section 276(b)(1)(A) gives the FCC authority to ensure fair compensation for "calls," not "payphone service" or the "ancillary services" identified in Section 276(d). *Telmate Mot.* at 17. The FCC does not contest that this is what the statute says, but instead makes the novel claim that it had "reasonably determined that it cannot ensure fair compensation for calls without regulating fees for services that are ancillary to those calls." *FCC Opp.* at

17–18 (citing *Order* at ¶¶ 154, 194). As an initial matter, the FCC raises this argument for the first time in its opposition, and the Court does not defer to "appellate counsel's *post hoc* rationalizations for agency action." *Nat. Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (internal quotation marks omitted) (collecting cases). Indeed, neither of the paragraphs that the FCC cites in response mentions Section 276. In fact, paragraph 194 of the *Order*, which the FCC quotes in its opposition, expressly relies on Section 201—a section that does not even apply to VoIP providers like Telmate.

Even if the Court considers the FCC's new position, however, it is wrong. The FCC claims it can interpret the term "call" in Section 276 to include "ancillary services," without even identifying it as an ambiguous term—which, of course, it is not. The FCC's interpretation also impermissibly ignores that the drafters used the word "call" for that subsection in place of the defined term "payphone service," which *would* have incorporated "ancillary services."

As for the details of the limits on ancillary charges themselves, we argued that the FCC acted unlawfully by, among other things, denying recovery of the costs of collecting and remitting taxes and fees. *Telmate Mot.* at 18. The FCC responded that there was no indication that this kind of task entails any cost at all, and that even if it did, the cost would be covered by the FCC's "conservative" rate caps. *FCC Opp.* at 29–30.

Both contentions are wrong. *First*, with respect to the FCC's assertion that no record evidence supports Telmate's position, Telmate does not complain about a *low* rate of recovery; it complains that the FCC barred recovery of these costs *entirely*. Even without comprehensive financial data in the record, the fact that providers must accurately collect and remit money to the government (usually on penalty of criminal prosecution), is strong evidence that meaningful resources must be devoted to this task. And yet the FCC barred *all* recovery of these costs. That is not reasonable. *Second*, while the FCC also asserts that its "conservative" rate caps *will* permit recovery of any such costs if they exist, this is no defense where, as here, the rate caps already fail to fully compensate providers for their other costs of service. In effect, the FCC has set rates below providers' reported costs, without challenging those reported costs, and then intentionally ignored other costs, all while asserting the below-cost rates are conservative. This is not reasonable. Telmate is thus likely to succeed in showing that these and other limits on ancillary fees are arbitrary and capricious.

V. TELMATE WILL SUFFER IRREPARABLE HARM IF THE FCC'S RULES TAKE EFFECT.

Telmate showed that under the new rules, it *will* be faced with hundreds of contractual obligations that it cannot meet, and that it has *currently* been threatened with litigation if it breaches its contracts. This harm is not theoretical. The FCC is blithely dismissive, asserting that facilities *will* voluntarily renegotiate contracts,

and that Telmate *can* renegotiate in the relevant time period. But even if this were true, the FCC does not dispute that Telmate will not be able to recover revenues lost after the new rules become effected but before they are struck down. When "adequate compensatory or other corrective relief" is unavailable "at a later date," economic loss can justify a stay. *Holiday Tours*, 559 F.2d at 843 n.2. There is no requirement, as the FCC insinuates, that economic harm must threaten Telmate's very existence before a stay is appropriate. But even if there were, Telmate showed that it will be hard-pressed to weather those financial losses through full merits review.

The FCC also relies on its most recent prior prison calling rule change as proof that no irreparable harm will come here. But this Court found irreparable harm in that proceeding, and those rules were far narrower than the present ones. Thus, to the extent that the Court finds, as it should, that Telmate is likely to succeed on the merits here, it should easily find that the other, equitable prongs of the test for a stay are met, too.

CONCLUSION

For the foregoing reasons, the Court should stay the FCC's new inmate calling rules pending judicial review.

Respectfully submitted,

February 19, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2016, the foregoing document was served on all parties or their counsel of record through the 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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