REDACTED – FOR PUBLIC INSPECTION.

HWG | HARRIS, WILTSHIRE & GRANNIS LLP

August 29, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375

Dear Ms. Dortch:

In accordance with the *Protective Order* for the above-referenced proceedings, Telmate, LLC ("Telmate") herein submits a redacted version of the attached petition for stay in the above-referenced proceeding.

Telmate has designated for confidential treatment the marked portions of the attached documents pursuant to the *Protective Order* in WC Docket No. 12-375.[1]

Pursuant to the protective order and additional instructions from Commission staff, Telmate is filing a redacted version of the document electronically via ECFS, one copy of the Confidential version with the Secretary, and sending two copies of the Confidential version to Commission staff.

Please contact me if you have any questions or require any additional information.

Sincerely,

Brita D. Strandberg
Counsel to Telmate

Attachment

cc: Lynne Engledow

[1] *Rates for Interstate Inmate Calling Services*, Protective Order, DA 13-2434, 28 FCC Rcd. 16,954 (Wireline Comp Bur. 2013).

REDACTED – FOR PUBLIC INSPECTION.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

PETITION OF TELMATE, LLC FOR STAY PENDING JUDICIAL REVIEW

August 29, 2016

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SUMMARY

The D.C. Circuit has made clear its intent to preserve the status quo for inmate calling rate caps pending judicial review, and the FCC should recognize this and stay its new rules. The D.C. Circuit has now issued three stays of inmate calling rate rules in this proceeding, including having stayed *less restrictive* rates, as compared to the new rates, for intrastate calls from prisons and large jails. We urge the FCC to accept the D.C. Circuit's direction, and stay its new rules.

Without a stay, Telmate will suffer ****BEGIN CONFIDENTIAL**** [redacted] ****END CONFIDENTIAL**** worth of harm, and even if Telmate ultimately prevails, it will be unable to recoup those losses. Not only would the FCC's newest rates result in the loss of revenue, but the cost of modifying Telmate's business to accommodate new rates—rates which Telmate believes are unsubstantiated—is substantial. These irreparable harms support a stay here, and are buttressed by the D.C. Circuit's prior determinations that the public interest has favored a stay of prior similar rates.

The FCC should also stay its new rules because they, like the rules that they replaced, are not valid. This is particularly true with respect to Telmate, which provides VoIP service, and so is not subject to 47 U.S.C. § 201. Instead, the FCC relies solely on 47 U.S.C. § 276 to regulate Telmate, and Section 276 does not in fact authorize setting rate caps. The FCC's new *Order* also does not address the fact that site commissions are legitimate costs of providers, or that the new rates are *still* below the cost of approximately half of the inmate calls made. On that latter issue, the FCC's assertion that the new rates will now cover providers' costs (where the 2015 rates did not) is just wrong, because it ignores that all of the "new" revenue in the rate caps will go to facilities, not providers.

Telmate therefore respectfully asks the FCC to stay the effectiveness of the *2016 Order* pending judicial review. If the FCC does not stay its rules, Telmate expects to request a stay

from the U.S. Court of Appeals for the D.C. Circuit on September 20, or after publication of the *2016 Order* in the Federal Register, whichever date is later.

BACKGROUND

The FCC's present rate caps are the third set of caps that the FCC has promulgated in this proceeding in three years. The FCC first issued rules in this proceeding on September 26, 2013, limiting providers' interstate calling rates to no more than the cost of their service, calculated as exclusive of site commission payments to prisons and jails.[1] That rulemaking also established a backstop rate cap, which limited all interstate calling rates to 21 cents per minute, regardless of provider costs. Various providers and facilities challenged that rule at the D.C. Circuit, and also asked the FCC to stay the rule while the D.C. Circuit reviewed its validity, which the FCC declined to do. The challengers therefore moved for a stay from the D.C. Circuit, which agreed that the challengers "satisfied the stringent requirements for a stay pending court review," and stayed the portion of the rule that required rates to be set at providers' costs.[2] One judge indicated that he would have stayed the entire rule, but the D.C. Circuit ultimately left unstayed the backstop interstate rate cap of 21 cents per minute, which the FCC codified at 47 U.S.C. § 64.6030.[3]

Before the D.C. Circuit could resolve the validity of the 2013 rules, however, the FCC issued a new Notice of Proposed Rulemaking on October 22, 2014—a year after it issued its

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1 *Rates for Interstate Inmate Calling Services,* Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 14,107 (2013) ("*2013 Order*").

2 Order, *Securus Techs., Inc. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014), ECF No. 1474764, at 1.

3 *Id.*

original rules—which proposed to revise the FCC's approach to regulation of inmate calling.[4] Apprised of this development (and having stayed the core of the FCC's original rule), the D.C. Circuit agreed to put off review of the original rule until the FCC completed its second rulemaking process. The FCC finished that rulemaking process just over a year later, issuing new rules on November 5, 2015 that lowered the rate caps to varying degrees depending on the size of the facility in which calling took place, extended rate caps to intrastate calling, and limited the other fees that providers could charge prisoners.[5] Various providers, facilities, and states challenged those rules and again were forced to seek a stay from the D.C. Circuit when the FCC again declined to stay the new rules pending judicial review. On March 7, 2016, the D.C. Circuit found—for the second consecutive time—that the petitioners "satisfied the stringent requirements for a stay pending court review," and stayed the FCC's 2015 calling rates.[6]

The D.C. Circuit's March 7, 2016 Order stayed 47 C.F.R. § 64.6010, the provision that codified the new rates, but it left unstayed the original 2013 interstate backstop rate (47 C.F.R. § 64.6030), as well as a number of definitions for terms in the regulations. On March 16, 2016, notwithstanding significant reasons not to, the FCC adopted a reading of one of the unstayed definitions to apply Section 64.6030's *inter*state backstop rate to *intra*state calling. For a third time, several providers were forced to seek a stay from the D.C. Circuit, and for a third time, the D.C. Circuit agreed that the "stringent requirements for a stay pending court review" were

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4 *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd. 13,170 (2014).

5 *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd. 12,763 (2015) ("*2015 Order*").

6 Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016), ECF No. 1602581, at 2.

satisfied, and stayed by Section 64.6030—the 2013 backstop rate—"insofar as the FCC intends to apply that provision to intrastate calling services."[7]

Meanwhile, on January 19, 2016, a lawyer named Michael Hamden filed a petition for reconsideration of the FCC's *2015 Order*. Hamden specifically requested that the FCC modify its new rules by (1) banning all site commission payments, and (2) "replac[ing] the site commissions system with a modest, mandated cost-recovery mechanism."[8] The FCC did not act on Mr. Hamden's petition for several months despite the D.C. Circuit issuing the two successive stays in March and the parties commencing full merits briefing before the D.C. Circuit in June. Not until August 9, 2016, days before it was due to file its brief in the D.C. Circuit, did the FCC respond to the petition.

Inexplicably, the FCC did not grant or deny the specific relief that Mr. Hamden sought—either banning site commission payments or establishing a "mandated cost-recovery mechanism."[9] The FCC also did not address any of the deficiencies that the parties had identified in their successful motions for stay before the D.C. Circuit, namely that (1) the exclusion of site commission payments from providers' costs violated the statute; (2) the FCC's methodology for setting rate caps ignored variations in local costs and thus set rates impermissibly low; and (3) the FCC had no authority to cap intrastate calling rates.

Instead, the FCC *sua sponte* moderately increased the rates that it had adopted in the *2015 Order*, explaining that it was choosing, "out of an abundance of caution, to take a more

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7 Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 23, 2016), ECF No. 1605455, at 1 ("March 23, 2016 Stay Order").

8 Petition for Partial Reconsideration at ii, Michael S. Hamden, WC Docket No. 12-375 (filed Jan. 19, 2016) ("Hamden Petition").

9 *Id.*

conservative approach and expressly account for facilities' ICS-related costs when calculating our rate caps."[10] The FCC thus raised the per-minute rate cap for each facility-size tier by between two and nine cents per minute.

Even though the D.C. Circuit had already stayed the very similar 2015 rates, and separately stayed the application of the largely *less* restrictive 2013 interstate rate to intrastate calls, the FCC's *2016 Order* nevertheless provides that the new rates apply to both interstate and intrastate calls, just as the 2015 rules would have applied if not stayed. Consequently, if the 2016 rules are not themselves stayed, they will take effect within ninety days of Federal Register publication, and will cap both interstate and intrastate rates. As with both the *2013 Order* and the *2015 Order*, two Commissioners dissented from adopting the new rules, Commissioner Pai noting in particular that the new rates remained improperly low, and that the Commission had modified its rules with little or no regard to Hamden's narrow requests, and so violated the Administrative Procedures Act.

Following its *2016 Order*, the FCC asserted that the new rates mooted the challenges to the *2015 Order*, and requested that the D.C. Circuit hold that appeal in abeyance until it could be joined with any appeal of the 2016 rules. Several challengers opposed this request, arguing that the FCC's new rule did nothing, for example, to affect the FCC's lack of authority to set intrastate rates, or to raise the rates to the actual level of providers' costs as required by the statute. Those challengers maintained that the 2016 rates were in fact so similar to the 2015 rates that it remained appropriate and efficient to move forward with independent review of the *2015 Order*. The D.C. Circuit agreed with the challengers, denied the FCC's request, and directed the

[10] *Rates for Interstate Inmate Calling Services*, Order on Reconsideration, FCC 16-102, ¶ 3 (rel. Aug. 9, 2016) ("*2016 Order*").

parties to continue briefing the challenge to the *2015 Order*, notwithstanding the new 2016 rates.[11]

Telmate now respectfully asks that the FCC stay the effective date for the *2016 Order* pending review by the D.C. Circuit.

STANDARD

An agency may postpone the effective date of an action pending judicial review when it finds that justice so requires.[12] The Commission will stay an order where the petitioner demonstrates: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors a stay.[13] These factors are satisfied here.

ARGUMENT

I. THE EQUITIES FAVOR A STAY.

A. Telmate Will Suffer Irreparable Harm Without a Stay.

If Telmate is forced to comply with the new 2016 rates pending a decision on the merits from the D.C. Circuit, it will suffer two significant, concrete and irreparable harms.

First, reducing Telmate's existing calling rates to those required by the *2016 Order* will result in Telmate losing approximately ****BEGIN CONFIDENTIAL**** [redacted] ****END**

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[11] Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Aug. 19, 2016), ECF No. 1631184.

[12] 5 U.S.C. § 705.

[13] *See, e.g.*, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Order, 27 FCC Rcd 7683, 7685 ¶ 6 (2012) (applying four-part test established in *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Wash. Metro. Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

CONFIDENTIAL** *per month*.[14] Consequently, if the D.C. Circuit ultimately vacates the *2016 Order* twelve months from now following merits briefing and oral argument, Telmate will have lost over ****BEGIN CONFIDENTIAL**** [redacted] ****END CONFIDENTIAL**** in revenue. Telmate will have no way to recoup this lost revenue that it should have been allowed to earn. Inability to cover the costs of doing business justifies a stay, especially when losses cannot be recovered later.[15] Those losses will not only be irreparable, but financially significant.[16]

Second, without a stay, Telmate will have close to ****BEGIN CONFIDENTIAL**** [redacted] **** END CONFIDENTIAL**** in compliance costs performing tasks such as negotiating amendments to all of its contracts, traveling to meet with customers to explain the changes, and altering its billing and internal systems.[17] Telmate was forced to undertake these tasks and incur the associated costs just a few short months ago in order to comply with the unstayed portion of the *2015 Order*'s June 2016 deadline.[18] Absent a stay, Telmate will have to repeat that process all over again for the second time *before* the D.C. Circuit has an opportunity to rule on the merits. Like the ****BEGIN CONFIDENTIAL**** [redacted] ****END CONFIDENTIAL**** in expected lost revenue, this ****BEGIN CONFIDENTIAL**** [redacted] ****END CONFIDENTIAL**** in compliance costs would be unrecoverable in the event that the D.C. Circuit rules in favor of Telmate on the merits. The harm is therefore concrete and irreparable.

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[14] Declaration of Curt Clifton ¶ 6, appended as Attachment A hereto ("Clifton Declaration").

[15] *See Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010); *Brendsel v. Office of Fed. Hous. Enterprise Oversight*, 339 F. Supp. 2d 52, 66-67 (D.D.C. 2004).

[16] Clifton Declaration ¶ 6.

[17] *Id.* ¶ 7.

[18] *Id.* ¶ 9.

Either of these two concrete and irreparable harms requires that the *2016 Order* be stayed until the D.C. Circuit has had an opportunity to effect judicial review.

B. The Public Interest Favors a Stay.

Three times the D.C. Circuit has made clear that the public interest is best served in this proceeding by maintaining the status quo pending judicial review. The D.C. Circuit is unlikely to see the present iteration of rules any differently, as the FCC itself concedes that the *2016 Order* does not represent a change in general approach.[19] Indeed, the new rate caps are only slightly different than the 2015 rate caps that were stayed by the D.C. Circuit, and, with respect to prisons and large jails, the 2016 rates are *more* restrictive than the 2013 rate cap that the D.C. Circuit stayed from applying to intrastate calls five months ago.[20] Regardless of the ultimate outcome on appeal, the D.C. Circuit has made clear that it prioritizes protection of the status quo here until its review is complete. These new rules will prove no exception.

Given that, a stay by the FCC here will not only serve the public interest, but will best preserve the D.C. Circuit's (and the parties') resources. In the absence of a stay, the parties will proceed to the D.C. Circuit, which will have to review requests for stay for the fourth time, even though the Commission's latest action departs only slightly from its previous *Orders.* The FCC should instead serve the public interest and preserve the D.C. Circuit's scarce resources by staying its *2016 Order* pending merits review.

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[19] *See, e.g., 2016 Order* ¶ 22 n.82.

[20] The 2013 backstop rate (which the D.C. Circuit stayed from applying intrastate) is 21 cents per minute, while the 2016 rates for prisons and large jails (which would now apply intrastate if unstayed) are 13 and 19 cents per minute, respectively.

C. Other Parties Will Not Be Harmed By a Stay.

Just as has been the case with each of the previous three stays, the other parties will not be unduly harmed by a stay pending judicial review. Indeed, the status quo that a stay will leave in place is itself the result of the D.C. Circuit's careful reasoning and weighing of the public interest. There is nothing new about the 2016 rules that would change this analysis from the prior three stays, and in those instances, the D.C. Circuit plainly agreed that any harm to other parties was outweighed by the benefits of a stay and orderly judicial review. The FCC should defer to that view, and find that this factor is satisfied.

II. TELMATE IS LIKELY TO PREVAIL ON THE MERITS.

A. Section 201 Does Not Apply to Telmate, and Section 276 Does Not Support Rate Caps.

As Telmate has consistently noted—including in response to Hamden's Petition—Section 201 does not apply to Telmate's one-way VoIP calling because VoIP is an information service,[21] so the FCC's *sole* authority for regulating Telmate here is 47 U.S.C. § 276. With respect specifically to Section 276, we and others have demonstrated repeatedly in this proceeding that Section 276 is "a singular statute, with unique language directed at a specialized problem,"[22] and that it does not authorize the setting of *any* rate caps. The statute unambiguously requires the FCC to "ensure . . . fair[] compensat[ion]" for payphone providers; in the FCC's practice, this has meant a floor, not a ceiling, for compensation. As Commissioner

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[21] Non-telecommunications providers are not subject to § 201, as the FCC implicitly acknowledged. *See 2015 Order* ¶ 250 & n.878; *2013 Order* ¶ 14 (asserting that the "use of VoIP or any other technology . . . does not affect our authority under section 276"); *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) (FCC has interpreted "common carrier" to exclude information service providers).

[22] Motion of Telmate, LLC for Stay Pending Judicial Review at 7, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Jan. 29, 2016), ECF No. 1596259.

O'Rielly pointed out in dissenting from the *2015 Order*, Section 201 may provide core ratemaking authority, but Section 276 does not.[23] In its prior Section 276 rulemakings, the FCC in fact assumed that its rules would cause some fully compensated providers to make even more profit than before, but concluded that this was necessary to ensure fair compensation for other more marginal providers.[24]

By staying the 2013 backstop rate's application to intrastate calling, the D.C. Circuit has suggested that it, too, is skeptical that Section 276 grants authority to cap calling rates. The FCC relied on Section 201 for the interstate application of the 2013 backstop rate, but relied only on Section 276 in 2015 for its authority to set new intrastate rate caps.[25] In 2014, the D.C. Circuit allowed that backstop rate to take effect pending full merits review, but when the FCC determined in 2016 that that same rate cap applied to *intra*state rates, the D.C. Circuit stayed that extension.[26] The D.C. Circuit did this notwithstanding the FCC's indication that "[t]here was consensus in the FCC's proceeding that the cost of providing interstate and intrastate inmate calling services does not significantly differ."[27] The implication of this history is that the FCC's likelihood of success in justifying *any* rate cap based on Section 276 is low, since the D.C.

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[23] *See 2015 Order*, 30 FCC Rcd. at 12,971 (Dissenting Statement of Commissioner Michael O'Rielly) ("I am appalled that the Commission would try to mash together bits and pieces of different provisions in an attempt to create a new unsubstantiated legal standard: just, reasonable, and fair rates.").

[24] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd. 2545, 2563-64 ¶ 39 (1999).

[25] *See 2015 Order* ¶ 109.

[26] *See* March 23, 2016 Stay Order.

[27] Opposition of the Federal Communications Commission to Motions to Modify, Reconsider, or Enforce Stay at 13, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 22, 2016), ECF No. 1605164.

Circuit stayed an intrastate rate cap that it had nevertheless permitted to take effect in the interstate context.

For Telmate, this is particularly significant, because, unlike most other inmate calling providers, Section 201 does not apply to Telmate even in the interstate context. So Telmate is even more likely to prevail on a challenge to *all* of the FCC's rate caps—both interstate and intrastate—in light of the fact that the D.C. Circuit has shown skepticism about the authority that Section 276 grants to cap calling rates.

B. The FCC's *2016 Order* Does Not Cure the Infirmities in the *2015 Order*.

As the FCC has conceded, the *2016 Order* only modifies the 2015 rate caps to address one issue. The *2016 Order* not only fails to adequately address that issue, however, but also fails to address any of the other issues that the challengers raised in their successful petitions to stay the 2015 rules.

First, as discussed above, Section 276 does not provide authority to set rate caps. It requires that the Commission "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone," with the purpose of "promot[ing] the widespread deployment of payphone services to the benefit of the general public."[28] Section 276 is not "another iteration of section 201 for payphones;"[29] it provides authority to "ensure" "fair[] compensat[ion]" for providers, not to limit end user rates. The statutory text specifically directs the commission to "promote the widespread deployment of payphone services" by requiring that compensation be high enough.[30] This authorizes a floor

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[28] 47 U.S.C. § 276(b)(1).

[29] *2015 Order*, 30 FCC Rcd. at 12,963 (Dissenting Statement of Commissioner Ajit Pai).

[30] 47 U.S.C. § 276(b)(1).

below which compensation may not sink, but it does not authorize the Commission to erect a ceiling above which rates may not rise. Section 276 similarly does not authorize rules that, as here, merely permit "providers to recover their costs," rather than ensuring fair compensation.[31] The FCC's slightly modified 2016 rates do not correct this fundamental flaw.

Second, the FCC's decision (1) to permit facilities to charge site commissions, and yet (2) to exclude those costs (except for the portion that would cover facilities' expenses) in setting rate caps, violates Section 276, too. The Commission was clear in the *2015 Order* about the impact of its choice on ICS providers' compensation, explaining that "[i]f site commissions were factored into the costs we used to set the rate caps, the caps would be *significantly* higher."[32] It is nearly certain that a number of states, including states where site commissions are statutorily mandated,[33] will continue to demand site commissions, and very likely that many other facilities will do the same. Where states and facilities continue to require site commissions, the rules will either deprive providers of fair compensation for their services or, by causing providers to deploy fewer payphones (because they decline to contract with facilities demanding site commissions), deprive inmates of calling.[34] These outcomes are flatly prohibited by Section 276's statutory text, which, as the FCC only now recognizes, requires "promoting deployment of ICS."[35] And particularly given that Section 276 requires fair compensation for "each and every" phone call,

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31 *2015 Order* ¶ 116.

32 *2015 Order* ¶ 125 (emphasis added).

33 *See, e.g.*, TEX. GOV'T CODE ANN. § 495.027 (West).

34 The Commission recognizes this expressly, explaining that "[t]he offering of ICS is voluntary on the part of ICS providers . . . [and] [t]here is no obligation on the part of the ICS provider to submit bids or to do so at rates that would be insufficient to meet the costs of serving the facility or result in unfair compensation." *2015 Order* ¶ 142.

35 *2016 Order* ¶ 14.

the asserted outlying instances where commissions might be paid by rates under the rate caps do not salvage the rule.[36] This is because the rate cap is expressly designed so that, in a majority of instances, site commissions cannot be financed by rates within the caps. So any time a site commission is demanded, the FCC's rate caps either contravene Section 276's fair compensation mandate by requiring a provider to pay site commissions from rates that do not account for that cost, or contravene Section 276's prescription to promote deployment of phones by requiring providers to withdraw service. Again, the FCC's new rates do nothing to change any of this.

Finally, even setting commission payments aside, the FCC's rates impermissibly remain below providers' costs. Again, as we previously explained, by setting rate caps based on providers' average costs, the FCC ignored uncontradicted record evidence that variations in cost derive from local differences in infrastructure and markets.[37] So *regardless* of whether providers are making payments to facilities, the FCC's impermissibly low rates contravene Section 276's requirement that providers be fairly compensated for "each and every" call placed.

On this issue, alone, the FCC maintains that its new rules change things, asserting now that "[b]ased on our analysis of the data providers submitted to the Mandatory Data Collection,

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[36] *2015 Order* ¶ 128.

[37] *See, e.g.*, Joint Brief for the ICS Carrier Petitioners at 35-38, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. June 6, 2016), ECF No. 1617174 (noting that (1) several commenters explained that variations in cost derive from factors like "location, age and infrastructure of the facility"; (2) variations in cost derive also from varying demands from facilities and variances in the allocation of responsibility between facilities and providers; and (3) that small providers reported the highest and lowest average costs in the record, just as large providers reported both high and low individual facility costs, which counterbalanced each other—all of which shows that variation in cost in the record is a function of local differences, not efficiency).

the new rates should allow virtually all providers to recover their overall costs of providing ICS."[38] But that conclusion is unsupported by the record.

The FCC's conclusion is wrong because it compares a rate that contemplates payments to facilities with costs that do *not* contemplate payments to facilities. The FCC of course does not itself identify this mistake, instead noting that it "compared each provider's cost per minute to our new rates for each tier,"[39] and remaining silent on whether those providers' costs also include facilities' costs. But the FCC's data request makes it clear what comparison the FCC was actually making. Providers reported their costs to the FCC both with and without site commission payments, but they never reported costs that included only the portion of commission payments that directly reimburses facilities for their inmate calling costs.[40] So the FCC could not have made the comparison that would actually be helpful, which would be to compare its rates with analogous reported costs. Instead, the FCC apparently compared its rates to the providers' costs exclusive of any facility payment expenses, without considering that all of the "new" revenue under the 2016 rates would go not to the providers, but to facilities.[41] The FCC's comparison thus does nothing to change the fact that the new rates—like the old rates—are well below the cost of providing approximately half of all calls in the industry, and are therefore unlawful.

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38 *2016 Order* ¶ 30.

39 *Id.*

40 *See id.* ¶ 24; https://www.fcc.gov/general/ics-mandatory-data-collection.

41 The FCC obviously did not compare its 2016 rates to provider costs *inclusive* of site commission expenses, because its new rates plainly would not have covered those costs. *See, e.g., 2015 Order* ¶ 122 (describing site commission expenses).

C. The FCC's *2016 Order* is Procedurally Defective.

In addition to conflicting with the text of the statute and being both irrational and unsupported by the record, the *2016 Order* is also procedurally defective. As Commissioner Pai pointed out, Hamden's petition for reconsideration did *not* request any of the FCC's new rules. Hamden requested both the elimination of site commissions and that calling rates include a "mandatory" fee that would be paid to facilities to cover their costs.[42] The FCC itself made clear that its authority to modify its rules under Hamden's petition was limited to the issues that Hamden raised, rejecting one of Telmate's arguments because it "addresse[d] the fundamental structure of our rate caps and methodology and goes to the heart of our *2015 ICS Order*" and so was "an untimely—and improperly presented—request for reconsideration of that order."[43]

In spite of this limited mandate, however, the FCC crafted a rule that no party—and especially not Hamden—had "presented" or "request[ed]" on reconsideration. Instead, it was the FCC alone that suggested its new rule, basing it entirely on record evidence that the FCC had collected *before* it issued the 2015 rules.[44] So as Commissioner Pai concluded, the FCC's *2016 Order* was, in reality, reconsideration of the 2015 rules on the FCC's own motion.[45] The FCC has a regulation that permits such reconsideration, and that, if followed, would presumably have allowed the FCC to make any modification to its rules that was a "logical outgrowth" of the

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42 *See* Hamden Petition at ii.

43 *2016 Order* ¶ 22 n.82.

44 *See, e.g.*, *id.* at 34 (Dissenting Statement of Commissioner Ajit Pai). The FCC did incorporate the appellate record into the administrative record when issuing its most recent order, *id.* ¶ 3, but that record, of course, by definition does not include new substantive factual assertions.

45 *Id.* at 34 (Dissenting Statement of Commissioner Ajit Pai) (noting that the time for the FCC to have reconsidered its order on its own motion had run 199 days before the FCC issued the *2016 Order*).

entire rulemaking proceeding.[46] But that rule, 47 C.F.R. § 1.108, requires the FCC to announce its action within thirty days of the publication of its order, which the FCC of course did not do. The FCC's choice to revise its rules beyond the limited scope of Hamden's petition thus violates the Administrative Procedure Act—and the FCC's implementing regulations—and renders the new order invalid.

CONCLUSION

For the foregoing reasons, the Commission should grant a stay of its *2016 Order* with respect to VoIP and other information services providers.

Respectfully submitted,

August 29, 2016

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[46] *See, e.g.*, *AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997).

ATTACHMENT A

REDACTED – FOR PUBLIC INSPECTION.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

DECLARATION OF CURT CLIFTON

I, Curt Clifton, hereby declare as follows

1. I am Vice President at Telmate, LLC ("Telmate"). I am over 18 years old and am competent to make this declaration. I submit this declaration in support of Telmate's motion for stay pending judicial review.

2. Telmate is a Delaware limited liability company formed in 2009. Telmate provides a number of services to local, state, and federal detention facilities. These services include VoIP-based inmate calling, video visitation, and various information services.

3. Information services offered by Telmate include video games, music downloads, messaging services, photo sharing, and educational programming. Telmate offers services on its phones and on tablets that facilities can make available to inmates.

4. Telmate's inmate calling is entirely IP-based and does not allow inmates to receive calls. When an inmate places a call using a Telmate phone, the call is delivered over an Internet connection from the detention center to a Telmate data center which converts the call from IP to TDM, and then hands the call off to a telephone carrier which routes the call over the PSTN. Neither Telmate's prison phones nor its data center servers are assigned a North American Numbering Plan number, and it is not possible for an outside caller to call either a specific Telmate phone or a specific inmate.

5. Telmate negotiates its contracts with each customer independently. The specific services Telmate provides at a given facility and the specific terms of a contract are a matter of agreement between Telmate and the customer. Telmate collects and transmits facility support payments to all of its state and local government customers.

6. If the FCC's Order on Reconsideration is allowed to become effective pending a final decision on the merits of Telmate's petition for review, Telmate will lose approximately ****BEGIN CONFIDENTIAL**** [redacted] ****END CONFIDENTIAL**** each month in call revenue. That lost revenue can never be recovered if the D.C. Circuit were to grant Telmate's petition on the merits several months from now. To mitigate this loss, Telmate would be required to significantly reduce or stop altogether funding research and development of new products which allow it to compete with other inmate calling providers.

7. In order to comply with the FCC's Order on Reconsideration, Telmate estimates that it will have to incur close to ****BEGIN CONFIDENTIAL**** [redacted] ****END CONFIDENTIAL**** in internal and external compliance costs. These costs encompass necessary tasks such as negotiating and drafting amendments to all of Telmate's contracts, and traveling to meet with customers to explain the changes.

8. If the FCC's Order on Reconsideration is allowed to become effective pending a final decision on the merits of Telmate's petition for review, Telmate will never recover the expected ****BEGIN CONFIDENTIAL**** [redacted] ****END CONFIDENTIAL**** in compliance costs if the D.C. Circuit were to grant Telmate's petition on the merits several months from now.

9. Telmate's expected compliance costs related to the 2016 Order on Reconsideration are based on its experience earlier this year when it incurred over ****BEGIN**

CONFIDENTIAL[redacted]**END CONFIDENTIAL**** in costs in order to comply with the FCC's 2015 Order that went into effect in June 2016.

10. The tasks which Telmate performed in order to comply with the FCC's 2015 Order included drafting and negotiating amendments to its contracts, traveling to meet with customers, increased email and phone communications with customers and end users, internal meetings, producing financial reports, implementing new billing and commission engines to comply with the newly prohibited fees and flat rate calling, and on-demand and nightly compliance monitoring. Telmate expects that it will have to repeat most, if not all, of these tasks in order to comply with the FCC's 2016 Order on Reconsideration.

11. As a result of having to perform these tasks, Telmate would be forced to delay or abandon other important work such as research and development, and compliance and monitoring.

12. If Telmate is unable to successfully negotiate amendments to any one of its contracts, then the only way it could comply with the FCC's Order on Reconsideration would be to breach that contract, thereby exposing the company to significant financial and reputational harm.

13. Telmate is unaware of any mechanism to recover lost revenue or business opportunities incurred pending appeal even if the regulations are later set aside.

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

Executed at Annapolis, Maryland, this 26th day of August, 2016.

Curt Clifton