Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

PETITION OF GLOBAL TEL*LINK FOR STAY PENDING JUDICIAL REVIEW

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TABLE OF CONTENTS

Page

INTRODUCTION AND EXECUTIVE SUMMARY 1

BACKGROUND 4

DISCUSSION 10

I. GTL IS LIKELY TO SUCCEED ON THE MERITS 11

A. GTL Is Likely To Prevail in Arguing That the Commission Lacks Statutory Authority To Cap Intrastate ICS Rates 11

B. GTL Is Likely To Prevail on Its Argument That the Rate Caps Fail To Compensate ICS Providers for Their Reported Costs 15

1. The Commission's Refusal To Allow ICS Providers To Recover Site Commissions — Which the Commission Recognized as Lawful Costs — Is Unlawful 15

2. Even Ignoring Site Commissions, the Rate Caps Deny ICS Providers the Compensation the Statute Requires 18

II. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR A STAY 21

CONCLUSION 24

INTRODUCTION AND EXECUTIVE SUMMARY

The performance to date of the Commission's various Inmate Calling Services Orders in the D.C. Circuit is not a pretty sight. The cost-based regime and safe harbors set forth in the *2013 Order*[1] were stayed pending judicial review, although interim rate caps on interstate calls were allowed to remain in place pending judicial challenge.[2] Before the Court could review the *2013 Order*, however, the Commission changed ground and, in the *2015 Order*,[3] dropped the cost-based regime and instead imposed new, lower rate caps on both interstate and intrastate calls. Those rate caps were stayed by the Court pending judicial review.[4] The Commission nonetheless claimed that, by operation of the *2015 Order*, the 2013 interim rates now applied to intrastate as well as interstate calls.[5] That order, too, was stayed.[6] After petitioners filed their opening briefs, the Commission issued a *Reconsideration Order*[7] that would change the rate caps

[1] Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) ("*2013 Order*").

[2] *See* Order, *Securus Techs., Inc. v. FCC*, Nos. 13-1280 *et al.*, Doc No. 1474764 (D.C. Cir. Jan. 13, 2014) ("First Stay Order") (per curiam).

[3] Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 30 FCC Rcd 12763 (2015) ("*2015 Order*").

[4] *See* Order, *Global Tel*Link v. FCC*, Nos. 15-1461 *et al.*, Doc. No. 1602581 (D.C. Cir. Mar. 7, 2016) ("Second Stay Order") (per curiam).

[5] *See* Public Notice, *Wireline Competition Bureau Addresses Applicable Rates for Inmate Calling Services and Effective Dates for Provisions of the* Inmate Calling Services Second Report and Order, 31 FCC Rcd 2026, 2027-28 (2016) ("WCB Public Notice").

[6] *See* Order, *Global Tel*Link*, Doc. No. 1605455 (D.C. Cir. Mar. 23, 2016) ("Third Stay Order") (per curiam).

[7] Order on Reconsideration, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 16-102 (rel. Aug. 9, 2016) ("*Reconsideration Order*").

yet again. The Commission also asked that review of the *2015 Order* be held in abeyance, a request that the Court denied.[8]

Although the D.C. Circuit did not elaborate on the reasons that led it to issue three stays and deny the abeyance request, the underlying message seems clear. The Commission's new rates — for both interstate and intrastate calls — need to be subject to judicial review *before* they take effect, and the Commission's repeated attempts to defer judicial review by changing the rates — after a stay has issued and briefing has begun — will not be permitted to continue.

Accordingly, the Commission should itself stay the new rate caps adopted in the *Reconsideration Order* pending judicial review. That is the only course that pays due respect to the prior orders of the Court of Appeals. The *Reconsideration Order* does not purport to address any of the legal infirmities that provided the basis for petitioners' successful stay motions in the D.C. Circuit. There has likewise been no change in the circumstances giving rise to petitioners' claims of irreparable harm. To force petitioners *for the fourth time* to move for a stay in the Court of Appeals would improperly burden the parties and the Court. Worse, it would demonstrate blatant defiance of the Court's prior orders.

First, the D.C. Circuit has already stayed extension of the interim rate caps to intrastate calls. Those interim caps were, in most cases, *significantly higher* than the ones at issue here. The Commission cannot possibly believe or credibly contend that *lowering* the caps somehow changes the result. The D.C. Circuit's Second and Third Stay Orders make clear that no intrastate caps should go into effect prior to judicial review. The argument supporting petitioners' motion to stay the application of interim rates to intrastate calls was that the

[8] *See* Order, *Global Tel*Link*, Doc. No. 1631184 (D.C. Cir. Aug. 19, 2016) ("Abeyance Denial Order") (per curiam).

Commission lacks statutory authority to cap intrastate ICS rates. The *Reconsideration Order* does not address at all the Commission's statutory authority to cap intrastate rates, and there is accordingly no basis to dispute that the Court's prior determination applies equally to the new rate caps as they apply to intrastate calls.

Second, the small increase in the per-minute rate authorized by the *Reconsideration Order* fails to address petitioners' additional claims of error regarding the rates adopted in the *2015 Order*. The *Reconsideration Order* does not authorize ICS providers to recover the cost of commission payments required by correctional facilities under state law. And the *Reconsideration Order* does not address the fact that the rate caps are below ICS providers' costs for a majority of ICS calls: the Commission did not revisit its treatment of cost data underlying the *2015 Order* rate caps, and the small increase in rates was based on a rough estimate of correctional facilities' actual costs associated with provision of ICS — a new category of costs and an increase that correctional facilities will presumably seek to recover for themselves.

Third, the threat of irreparable harm that underlay the petitioners' motions in the D.C. Circuit remains the same. The rate caps in the *Reconsideration Order* not only threaten ICS providers with lost revenue but, were they to go into effect, would require renegotiation of contracts that, in many cases, were only recently amended (at great administrative cost) to address the economic changes effected by the FCC's prior orders. It is unreasonable for the Commission to require yet further renegotiations when the Commission's own repeated changes of regulatory course have put off judicial review.

Finally, the balance of equities likewise remains unaffected by the *Reconsideration Order*. Given the Court's recent denial of the Commission's motion to hold petitioners' challenge to the *2015 Order* in abeyance, judicial review of both orders can be expeditiously

completed. Accordingly, although the Commission stated that it was "unpersuaded" by Telmate's argument that revised rate caps should not be implemented prior to judicial review,[9] it should reconsider in light of the fully fleshed out arguments in this stay request.

Petitioners respectfully request that the Commission render its decision by September 20, 2016, to permit an opportunity for orderly further proceedings if the stay is denied.

BACKGROUND

The *Reconsideration Order* marks the Commission's third order setting ICS rate caps in response to a petition for rulemaking filed 13 years ago.[10] None of the three orders has remained in place long enough to be subject to judicial review; elements of each of the first two orders were stayed by the D.C. Circuit, and both orders were superseded by subsequent Commission action prior to final judicial consideration of their validity.

A. The Commission's first rulemaking order in this docket, the *2013 Order*, adopted "interim" rate caps of $0.21 per minute for debit and prepaid ICS calls, and $0.25 per minute for collect ICS calls, applicable to interstate ICS calls only.[11] The *2013 Order* (1) also ordered that all interstate ICS rates and all "ancillary charges" be "cost-based" or be subject to invalidation and (2) established "safe harbor" levels below which ICS providers would not be subject to

[9] *Reconsideration Order* ¶ 3 n.11.

[10] *See* Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition To Address Referral Issues in Pending Rulemaking, *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); *see also* Petitioners' Alternative Rulemaking Proposal, *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).

[11] *See 2013 Order* ¶ 48.

damages liability.[12] The order did not permit the payment of site commissions as a compensable cost of providing ICS.[13]

Several parties, including GTL, filed petitions for review challenging the *2013 Order*.[14] GTL (along with other petitioners) also sought a stay of the portions of the *2013 Order* that imposed cost-based regulation.[15] GTL further demonstrated the irreparable harm it would suffer in lost revenues if it were forced to comply with the *2013 Order* by reducing interstate ICS rates below GTL's own costs to the safe harbor levels — $0.12 per minute for interstate prepaid and debit calls, and $0.14 per minute for interstate collect calls — to avoid the risks of setting higher rates without knowing how the Commission would apply its new standards.[16]

The D.C. Circuit granted GTL's requested stay of the requirement that rates be cost-based and of the safe harbors.[17] The stay left the order's "interim" interstate rate caps in place. After the parties had fully briefed the petitions for review of the *2013 Order*, and with oral argument on the calendar, the Commission successfully moved to have the case held in abeyance pending the completion of further agency-level proceedings.[18]

B. The *2015 Order* promulgated new ICS rate caps for both intrastate and interstate ICS. The Commission supported its intrastate caps by arguing that 47 U.S.C. § 276 — which

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[12] *Id.* ¶¶ 12, 60, 120.

[13] *See id.* ¶¶ 54-58.

[14] *See* Pet. for Review, *Global Tel*Link v. FCC*, No. 13-1281, Doc. No. 1466308 (D.C. Cir. filed Nov. 14, 2013).

[15] *See* Mot. of Global Tel*Link for Partial Stay Pending Judicial Review at 8-16, *Securus Techs.*, Doc. No. 1467732 (D.C. Cir. filed Nov. 25, 2013).

[16] *See id.* at 16-18.

[17] *See* First Stay Order.

[18] *See* Uncontested Mot. of FCC To Hold Case in Abeyance, *Securus Techs.*, Doc. No. 1526582 (D.C. Cir. filed Dec. 10, 2014).

requires the FCC to "establish a per call compensation plan to ensure" that payphone providers are "fairly compensated" for interstate and intrastate calls[19] — provides rate-*capping* authority.[20] The Commission adopted rate caps that were purportedly based on the costs ICS providers reported to the Commission. The Commission concluded, however, that the site commissions that many state and local governments require ICS providers to pay "should not be considered in determining fair compensation for ICS calls" and — although ICS providers reported these sometimes mandatory costs — did not include such commissions in its cost considerations.[21] Even excluding site commissions from the equation, the Commission set the *2015 Order*'s per-minute rate caps *below* the per-minute costs reported by at least some ICS providers.[22] The Commission did not consider costs borne by facilities (as opposed to providers) in calculating its rate caps and doubted whether "facilities incur unique costs that are attributable to ICS and that must be recovered from ICS rates."[23]

C. GTL filed a petition for review of the *2015 Order* in the D.C. Circuit.[24] Before the rules took effect, GTL, along with three other ICS providers, sought a stay of aspects of the *2015 Order*. Though not all providers joined all arguments, the providers collectively argued (among other things) that the *2015 Order*'s rate caps unlawfully excluded the payment of site commissions as a valid cost; that the rates were unlawfully set below reported costs; and that the FCC lacks jurisdiction to cap intrastate ICS rates. The D.C. Circuit found that the requirements

[19] 47 U.S.C. § 276(b)(1)(A).

[20] *See 2015 Order* ¶¶ 108-113.

[21] *Id.* ¶ 123.

[22] *See id.* ¶ 116.

[23] *Id.* ¶ 138; *see id.* ¶¶ 138-140.

[24] Pet. for Review, *Global Tel*Link*, Doc. No. 1590552 (D.C. Cir. filed Dec. 18, 2015).

for a stay had been met and entered an order staying the *2015 Order*'s rate caps and its cap on fees for "single-call services."[25]

Nine days after the Second Stay Order — and the day before the remaining portions of the *2015 Order* were slated to take effect — the Commission announced that it intended to apply the *2013 Order*'s "interim" interstate rate caps to *intra*state ICS calls on the date the *2015 Order* took effect.[26] The same ICS providers moved the Court to clarify the scope of the stay and prevent the Commission from applying its interim caps to intrastate calls, noting that one of the primary arguments supporting the stay was that the Commission lacked statutory authority to cap intrastate rates.[27] On March 23, 2016, the D.C. Circuit (with one judge dissenting) stayed the interim rate caps "insofar as the FCC intends to apply [those rates] to intrastate calling services."[28]

D. Pursuant to an agreed briefing schedule, two sets of petitioners — ICS providers and state and local governments and law enforcement organizations — filed opening briefs on June 6, 2016.[29] On July 14, 2016, before its brief was due in the D.C. Circuit, the FCC released a "Fact Sheet" describing the then-forthcoming *Reconsideration Order* and previewing the

[25] Second Stay Order.

[26] *See* WCB Public Notice.

[27] *See, e.g.*, GTL Mot. To Enforce Order Granting Partial Stay, *Global Tel*Link*, Doc. No. 1604580 (D.C. Cir. filed Mar. 17, 2016) ("GTL Mot. To Enforce").

[28] Third Stay Order.

[29] *See, e.g.*, Joint Br. for ICS Carrier Pet'rs, *Global Tel*Link*, Doc. No. 1617174 (D.C. Cir. filed June 6, 2016) ("ICS Carriers Br."); Br. of State and Local Gov't Pet'rs, *Global Tel*Link*, Doc. No. 1617181 (D.C. Cir. filed June 6, 2016).

changes to the rate caps.[30] The Commission then moved the Court to place the *Global Tel*Link* appeal in abeyance pending the issuance and ultimate judicial review of the instant *Reconsideration Order*.[31] GTL and CenturyLink opposed the motion, arguing that the changes the Commission had announced would not affect the issues under review in *Global Tel*Link* and that the case should proceed with the remainder of the briefing schedule.[32] On August 19, 2016, ten days after the *Reconsideration Order* was released, the Court denied the Commission's abeyance motion and ordered that briefing resume.[33] The Commission's brief is due September 12, 2016; parties are to file proposals to govern further proceedings shortly after the period for seeking review of the *Reconsideration Order* expires.[34]

The Commission released the *Reconsideration Order* on August 9, 2016. It characterized the order as a partial grant of a petition for reconsideration filed by Michael S. Hamden,[35] which proposed that site commissions be banned or regulated and that the Commission add to all rates a "cost-recovery fee" that would, in lieu of site commissions, compensate inmate facilities for their ICS-related costs.[36] Instead of adopting Hamden's approach, however, the *Reconsideration Order* amended the *2015 Order*'s rate caps in a single, narrow way: whereas the prior rate caps

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[30] *See* Fact Sheet: Providing Affordable, Sustainable Inmate Calling Services (FCC rel. July 14, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0714/DOC-340306A1.pdf.

[31] *See* Mot. of Resp'ts To Hold Cases in Abeyance, *Global Tel*Link*, No. 1625782 (D.C. Cir. filed July 20, 2016).

[32] Joint Resp. of Global Tel*Link and CenturyLink to Resp'ts' Mot. To Hold Cases in Abeyance, *Global Tel*Link*, Doc. No. 1628015 (D.C. Cir. filed Aug. 1, 2016).

[33] *See* Abeyance Denial Order.

[34] *Id.*

[35] *See Reconsideration Order* ¶ 1 & n.1 (citing Hamden petition).

[36] *See* Pet. of Michael S. Hamden for Partial Recon. at ii, WC Docket No. 12-375 (FCC filed Jan. 19, 2016).

did not account for costs incurred by facilities in the provision of ICS, the revised rates purportedly "account for reasonable facility costs."[37] To account for these costs, the Commission increased the rate caps by $0.02 per minute for prisons, $0.05 per minute for most jails, and $0.09 per minute for the smallest jails.[38]

The *Reconsideration Order* did not otherwise alter the rate caps adopted in the *2015 Order*. In particular, the *Reconsideration Order* did not revisit the conclusion that site commissions "do not constitute a legitimate cost" incurred by providers in providing ICS.[39] The *Reconsideration Order* likewise did not question the *2015 Order*'s calculation of the costs ICS *providers* incur in providing service; rather, it focused solely on the "costs that *facilities* may incur in connection with ICS."[40] And, finally, the *Reconsideration Order* purports to promulgate "interstate and intrastate rate caps,"[41] without further addressing the Commission's source of statutory authority. The Commission ordered the caps in the *Reconsideration Order* to take effect in stages — three months and six months after publication in the Federal Register, in prisons and jails, respectively.[42]

Commissioners Pai and O'Rielly dissented (as they had from both the *2013 Order* and the *2015 Order*). Commissioner Pai explained that, while the *Reconsideration Order* sets rate caps that now account for facility costs, those caps "leave untouched many other legal flaws with

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[37] *Reconsideration Order* ¶ 13.

[38] *Id.* ¶ 27.

[39] *Id.* ¶ 35; *see also id.* ¶ 24 n.94 ("[W]e still find that the bulk of site commission payments should not be considered in calculating the rate caps . . . .").

[40] *Id.* ¶ 30 (emphasis added).

[41] *Id.* ¶ 3.

[42] *Id.* ¶ 45. The Commission noted that it rejected a request from ICS provider Telmate to "delay implementation of the revised rate caps" pending judicial review to minimize the transition costs to ICS providers of changing rates in response to the new caps. *Id.* ¶ 3 n.11.

last year's caps," including those caps' failure to compensate ICS providers fully for the costs of providing service.[43] The Commissioner further criticized the Commission's attempt to frame the *Reconsideration Order* as a grant of the Hamden petition, particularly in light of Mr. Hamden's own concerns that the gravamen of his request was for the Commission "to prohibit, or at least limit, site commissions."[44]

DISCUSSION

The Commission should respect the repeated determinations of the D.C. Circuit that petitioners have satisfied the "stringent requirements for a stay pending court review"[45] and should stay the rate caps adopted in the *Reconsideration Order*. A petitioner seeking a stay from the Commission must make the same showing that is required to obtain a stay from the court of appeals: that (1) it appears likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay.[46]

Although the *Reconsideration Order*'s interstate rate caps are slightly higher than the rate caps that are currently subject to the Court's stay orders, the intrastate rates are in most cases significantly lower than the interim rates already stayed by the Court. Regardless, the *Reconsideration Order* did not purport to address *any* of the legal challenges underlying

[43] *Id.* at 33 (Pai Dissent).

[44] *Id.* at 34.

[45] First Stay Order; Second Stay Order; Third Stay Order.

[46] *See* Order Denying Stay Request, *Amendment of Parts 73 and 76 of the Commission's Rules*, 4 FCC Rcd 6476, ¶ 6 (1989) (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

petitioners' successful motions for stay.[47] In these unique circumstances, it is clear that a stay is warranted.[48]

I. GTL IS LIKELY TO SUCCEED ON THE MERITS

GTL's challenge to the *Reconsideration Order* is likely to succeed on the merits because the same infirmities that make the *2015 Order* unlawful render the *Reconsideration Order* equally likely to be set aside.

A. GTL Is Likely To Prevail in Arguing That the Commission Lacks Statutory Authority To Cap Intrastate ICS Rates

1. The circumstances surrounding the D.C. Circuit's Third Stay Order make it clear that the Commission should not seek to impose caps on intrastate rates pending judicial review. After the D.C. Circuit stayed the *2015 Order*'s rate caps, the Commission attempted to impose intrastate rate regulation through its 2013 "interim" rate caps.[49] GTL (and others) moved the Court to make clear that the Commission's effort to impose caps on intrastate ICS rates — even at levels significantly higher (in most cases) than the caps already stayed by the Court — was improper. GTL, for example, argued that the Commission's "unprecedented assertion of authority" over intrastate rates was "one of the principal issues raised" in GTL's prior stay request.[50] In granting those motions — and in specifically holding that the interim rates be

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[47] The failure to account for costs incurred by correctional institutions was highlighted in a stay motion filed by the State of Oklahoma. *See* Oklahoma's Mot. for Stay of FCC Rule at 15-18, *Global Tel*Link*, Doc. No. 1600175 (D.C. Cir. filed Feb. 22, 2016). But the D.C. Circuit did not consider that motion in deciding to stay the *2015 Order*'s rate caps. *See* Second Stay Order (granting partial stay but denying Oklahoma's request for leave to file a motion to stay).

[48] *Cf., e.g., City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) ("The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority.").

[49] *See supra* p. 7.

[50] GTL Mot. To Enforce at 5.

stayed "insofar as the FCC intends to apply that provision *to intrastate calling services*"[51] — the Court evidently determined that the challengers' argument that the Commission lacks the authority to cap intrastate ICS rates was likely to succeed.

The *Reconsideration Order* does nothing to affect this determination. The rate-cap increases are irrelevant to the question of statutory authority: if the Commission lacks authority to cap intrastate calls, the specific level of the caps is beside the point. Moreover, the interim rates stayed by the Court in the March 23, 2016, order were, in the case of prisons and large jails, significantly *higher* than the rates adopted in the *Reconsideration Order*. And the *Reconsideration Order* did not purport to revisit the statutory basis for the Commission's assertion of authority to cap intrastate ICS rates. The D.C. Circuit's determination in the Third Stay Order that the Commission's assertion of rate-capping authority under § 276 is unlikely to survive review continues to apply with full force.

2. The arguments supporting the request for stay are indeed likely to succeed. The Communications Act declares in "sweeping" language that the Commission should be "fence[d] off" from regulating "intrastate matters":[52] "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."[53] That statute "contains not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction."[54] Another statute

[51] Third Stay Order (emphasis added).

[52] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986).

[53] 47 U.S.C. § 152(b)(1).

[54] *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 373.

cannot be interpreted to confer intrastate regulatory jurisdiction unless it is "so unambiguous or straightforward as to override the command of § 152(b)."[55]

Section 276(b)(1)(A) cannot reasonably be read to grant the Commission the authority to regulate existing intrastate rates on the grounds that they are unreasonably high — let alone to grant that authority with the clarity the Supreme Court has required. The statute requires the Commission to establish a "per call compensation plan" to "ensure" fair compensation for all calls. This is most naturally read to require the agency to act where payphone providers do not otherwise receive compensation pursuant to market mechanisms. A statute directing an agency to "ensure" that employees are "fairly compensated" would not authorize pay cuts.

The statute's history confirms this straightforward reading of the text. The Communications Act requires payphone providers to permit callers to "dial around" the operator services provider presubscribed to the payphone to reach the long-distance carrier of the caller's choice without prior payment to the payphone provider.[56] As a result, payphone providers must allow callers to dial all toll-free numbers without charge.[57] In passing § 276, "Congress recognized that the 'free' call would impose a cost upon the payphone operator; and it consequently required the FCC to 'prescribe regulations that . . . 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.' "[58]

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[55] *Id.* at 377; *accord Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 561 (D.C. Cir. 1997) ("*IPTA*") (per curiam).

[56] *See* 47 U.S.C. § 226(c).

[57] *See IPTA*, 117 F.3d at 559.

[58] *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 51 (2007); *accord American Pub. Communications v. FCC*, 215 F.3d 51, 53 (D.C. Cir. 2000) (explaining that Congress enacted § 276 to solve "the problem of uncompensated calls").

The purpose of the provision is thus to ensure that calls that were previously not compensated *at all* generate compensation for the provider. And that is how the FCC has always understood its statutory mandate. "The Commission decided that the Act's broad directive to promulgate regulations that would ensure that [payphone service providers] are 'fairly compensated for each and every intrastate and interstate call' required the Commission to act only with respect to those types of calls for which a [payphone service provider] does not already receive fair compensation."[59] In the context of establishing a competitive regime for all payphone providers, Congress could not have conceived that the authority granted in § 276(b)(1)(A) would be used to *reduce* compensation earned by payphone providers.[60] If Congress had intended, in § 276(b)(1)(A), to authorize the Commission to regulate the rates that payphone providers charge for their services — rather than to establish a plan to ensure that payphone providers receive adequate compensation — it could easily have said so.

The *2015 Order* offered no response to this account of the purpose, history, and meaning of § 276 (and the *Reconsideration Order* did not revisit the issue). The Commission's sole reference to § 276's statutory history and purpose was a footnote quoting, but failing to rebut, one of many comments raising this point.[61] "An agency's failure to respond to relevant and

[59] *IPTA*, 117 F.3d at 559; *see also* Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, ¶ 60 (1996) ("*First Payphone Order*") (contrasting the tasks of "ensuring that [payphone service providers] are fairly compensated . . . and protecting consumers from excessive rates").

[60] *See, e.g., First Payphone Order* ¶¶ 3, 13.

[61] *See 2015 Order* ¶ 111 n.348.

significant public comments generally demonstrates that the agency's decision was not based on a consideration of the relevant factors."[62] It signals the same here.

B. GTL Is Likely To Prevail on Its Argument That the Rate Caps Fail To Compensate ICS Providers for Their Reported Costs

Petitioners won a stay of the rates caps adopted in the *2015 Order* as they apply to interstate calls on two basic grounds: (1) that the rates fail to account for the site commissions that ICS providers are required to pay under state law, and (2) that, even ignoring site commissions, the rates are below the documented costs of many ICS providers. The *Reconsideration Order* does not address either failing, and the new rates thus continue to violate the statutory requirement that the Commission "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."[63]

1. The Commission's Refusal To Allow ICS Providers To Recover Site Commissions — Which the Commission Recognized as Lawful Costs — Is Unlawful

The *Reconsideration Order* excludes "the bulk of site commission payments" from the costs it considered in setting rate caps, regardless whether those payments are required by state or local policy.[64] As the Commission acknowledged in the *2015 Order*, if site commission payments *were* taken into account, rate caps would have to be considerably higher in order to

[62] *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014); *see also IPTA*, 117 F.3d at 564 (holding that the FCC's "*ipse dixit* conclusion, coupled with its failure to respond to contrary arguments . . . , epitomizes arbitrary and capricious decisionmaking").

[63] 47 U.S.C. § 276(b)(1)(A).

[64] *Reconsideration Order* ¶ 24 n.94.

cover ICS providers' costs.[65] GTL's primary argument in favor of its motion for a stay before the D.C. Circuit was that "the rate caps are below cost" when site commissions are included.[66]

That conclusion is equally applicable to the *Reconsideration Order*. 47 U.S.C. § 276(b)(1)(A) requires that ICS providers be "fairly compensated" for their services, and the *Reconsideration Order* reaffirms the Commission's conclusion in the *2015 Order* that site commissions are lawful costs of providing ICS.[67] By preventing providers from recouping the money they must spend on site commissions, the *Reconsideration Order* ensures that ICS providers will *not* be "fairly compensated for each and every completed intrastate and interstate call," in violation of § 276's command.[68]

The *Reconsideration Order* does nothing to shore up the justifications provided in the *2015 Order*. The Commission asserts (as it did in the *2015 Order*) that "most" of the value of a site commission payment "is not directly related to the provision of ICS."[69] But state and local governments often require site commission payments as a condition precedent to a service arrangement between the facilities they govern and an ICS provider. The cost is "directly related" to ICS because it must be incurred in order for ICS to be provided. The Commission also noted in the *Reconsideration Order* — as it did in the *2015 Order* — that site commission

[65] *Cf. 2015 Order* ¶ 125.

[66] Mot. of Global Tel*Link for Partial Stay Pending Judicial Review at 3, 9, *Global Tel*Link*, Doc. No. 1595450 (D.C. Cir. filed Jan. 27, 2016) ("GTL Mot. for Partial Stay").

[67] *See Reconsideration Order* ¶¶ 35-38.

[68] It further means that the rate caps are not "just and reasonable," as required under 47 U.S.C. § 201, and that the rate caps, by requiring ICS providers to operate at a loss, are confiscatory, in violation of the Fifth Amendment.

[69] *Reconsideration Order* ¶ 24 n.94.

payments sometimes fund a "variety of non-ICS-related programs."[70] But that is not relevant: how correctional facilities spend commission revenues has nothing to do with whether ICS providers are required to incur that cost to provide service.

The Commission has acknowledged this straightforward logic in other contexts, and even elsewhere in the *2015 Order*. There, the Commission found that regulatory fees and taxes are recoverable costs of providing ICS, even though the government has no obligation to use those revenues for anything related to ICS.[71] Likewise, the Commission has recognized that logic in the cable television context in allowing for the recovery of negotiable payments for the right to provide service.[72] It does not explain its opposite conclusion here.

It is no answer to suggest, as the Commission did in the D.C. Circuit, that "higher rate caps leave providers with a greater ability to pay site commissions."[73] The *Reconsideration Order* increased the Commission's rate caps (just slightly) to account specifically for costs incurred by inmate institutions. That change is not designed to ensure that ICS providers recover the site commissions they are often required to pay, nor will it do so.[74] The Commission's preference that ICS providers negotiate site commission payments that go no further than to

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[70] *Id.*; *accord 2015 Order* ¶ 127.

[71] *See 2015 Order* ¶ 191.

[72] *See, e.g.*, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 1164, ¶ 89 (1993) (ruling that negotiable payments made to a government for the privilege of selling television service are "external costs" recoverable from customers); Memorandum Opinion and Order, *City of Pasadena, California, City of Nashville, Tennessee, and City of Virginia Beach, Virginia*, 16 FCC Rcd 18192, ¶ 14 (2001).

[73] Resp'ts' Reply in Supp. of Their Mot. To Hold Cases in Abeyance at 4 n.2, *Global Tel*Link*, Doc. No. 1629773 (D.C. Cir. filed Aug. 11, 2016).

[74] *See Reconsideration Order* at 33 (Pai Dissent) (*Reconsideration Order*'s increased rate caps left the caps' treatment of *providers'* costs "untouched").

compensate inmate facilities for certain costs[75] — a preference it did not back up with federal regulation — is no basis for preventing ICS providers from recovering costs they are legally obligated to bear.[76]

2. Even Ignoring Site Commissions, the Rate Caps Deny ICS Providers the Compensation the Statute Requires

Even if all site commissions were eliminated, the *Reconsideration Order*'s rate caps would still in some cases deny ICS providers fair compensation and are therefore unlawful. In the *2015 Order*, the Commission acknowledged that "the adopted caps are below the costs [that some ICS providers] reported to us under the Mandatory Data Collection."[77] The fact that rates set in the *2015 Order* "will cause some providers to 'operate at a loss'" was the primary argument that CenturyLink made in favor of its request for a partial stay.[78]

The *Reconsideration Order* does not address this problem, because the order did not reconsider the portion of the rate caps intended to compensate *ICS providers* for the costs *they* incur. Accordingly, the deficiencies present in the caps adopted in the *2015 Order* are no less present in the Commission's current caps. These below-cost rates violate § 276's requirement that ICS providers be "fairly compensated for each and every" call, § 201's requirement that rates be "just and reasonable," and the Fifth Amendment's ban on confiscatory rates.

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[75] *See id.* ¶ 37 n.147 (suggesting that providers and facilities "negotiate a reasonable approach to facility costs" such that providers compensate facilities "for any costs they incur *that are reasonably related to the provision of ICS"*) (emphasis added).

[76] And those costs are substantial. As the *2015 Order* reported, "ICS providers paid over $460 million in site commissions in 2013 alone," and such payments "can amount to as much as 96 percent of gross ICS revenues." *2015 Order* ¶ 122.

[77] *Id.* ¶ 116.

[78] Mot. of CenturyLink Public Communications, Inc. for Partial Stay Pending Judicial Review at 14, *Global Tel*Link*, Doc. No. 1597573 (D.C. Cir. filed Feb. 5, 2016) (quoting *2015 Order* ¶¶ 116 & n.365, 219); *see also* GTL Mot. for Partial Stay at 15-16.

a. The record in this proceeding shows that, under the rate caps adopted in the *2015 Order*, 40 percent of all debit/prepaid minutes of use, across all facility types, would be provided below cost, and that *88 percent* of debit/prepaid call minutes would be below cost across all prisons with 5,000 to 19,999 inmates.[79] The *2015 Order* did not dispute this finding. Indeed, it conceded that seven of the 14 ICS providers to submit cost data reported average per-minute costs that were *higher* than the highest prepaid rate cap adopted in that order.[80] This concession is a fatal one. The statute requires that ICS providers be compensated "for each and every" completed telephone call.[81] The Commission has acknowledged that its rates do not allow providers to be so compensated. That is the end of the matter.

The *Reconsideration Order*'s small rate-cap increases do not affect the analysis. That order added to the rate-cap calculation a separate, and theretofore excluded, cost element corresponding to "costs that *facilities* claim to incur."[82] It made no effort properly to compensate *providers* for their reported costs, despite the *2015 Order*'s acknowledgment that those costs would not be fully recouped.[83] Moreover, even if the rate increases did redound to the benefit of ICS providers, they would be insufficient. The record shows that the *Reconsideration Order*'s

[79] *See* Stephen E. Siwek & Christopher C. Holt, Comments on Wheeler/Clyburn ICS Proposal at 3 & tbl. A1 (Oct. 10, 2015), attached to Letter from Chérie Kiser, Counsel for GTL, to Marlene H. Dortch, FCC, WC Docket No. 12-375 (Oct. 10, 2015).

[80] *See 2015 Order* ¶¶ 9, 64.

[81] 47 U.S.C. § 276(b)(1)(A).

[82] *Reconsideration Order* ¶ 14 (emphasis added); *see also id.* ¶ 24 (recognizing that the "Mandatory Data Collection only included cost information from *providers*, and not from *facilities*"). The *2015 Order* explicitly declined to weigh costs borne by facilities in calculating its rate caps. *See id.* ¶ 16.

[83] *See id.* ¶ 24 ("[W]e still find that the cost data from Mandatory Data Collection are an appropriate basis for constructing rate caps . . . .").

caps remain too low to compensate providers for the cost of providing service in many jurisdictions — even when excluding site commissions from the analysis.[84]

b. In the *2015 Order*, the Commission suggested that its caps would allow providers to recover costs "in the aggregate," even if certain calls were provided below cost. Even if that were true, compensating providers in the aggregate — which risks (or, on this record, guarantees) that some calls will be provided at a loss — cannot be squared with the plain language of § 276, which requires that providers be compensated for "each and every" call.[85]

c. The *Reconsideration Order* also reaffirmed the *2015 Order*'s reasoning that providers with costs above the rate caps need only realize "increased efficiencies" — efficiencies the Commission has never specified.[86] But the Commission's assessment of providers' alleged efficiency or inefficiency ignores reality. For example, in assuming that providers with higher costs are necessarily inefficient, the Commission failed to account for the significant variation in service demands and features across different facilities; the lower-cost providers highlighted in the Commission's analysis may simply serve lower-cost facilities.[87] Likewise, the Commission's attempt to compare rates in different states, and to suggest that low rates in one state mean that costs in another state must be inflated, fails to account for real variation in the services provided in different places.[88]

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[84] *See* ICS Carriers Br. 29-35.

[85] 47 U.S.C. § 276(b)(1)(A).

[86] *2015 Order* ¶ 59; *accord Reconsideration Order* ¶ 4 n.12 (adopting the *2015 Order*'s reasoning that caps can be set below cost to "encourage more efficient provision of ICS").

[87] *Compare 2015 Order* ¶¶ 63-64, *with id.* at 203 n.61 (Pai Dissent) ("It's not 'implausibl[e]' that the data don't show average costs falling with the provider's size or that 'roughly similarly situated providers have substantially different costs' "; "the data plausibly suggest such providers serve different institutions.") (citation omitted).

[88] *Compare 2015 Order* ¶ 49, *with id.* at 203 n.61 (Pai Dissent).

II. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR A STAY

GTL faces the same threat of irreparable harm if the *Reconsideration Order* is allowed to go into effect pending judicial review as it faced before. And the public interest considerations supporting a stay have only grown stronger.

A. If the rate caps in the *Reconsideration Order* are permitted to take effect as scheduled, GTL will suffer serious and irreparable harm. In addition to the harm GTL will suffer from having to provide service under unlawfully low rate caps, GTL will suffer irreparable harm from undertaking the significant and costly administrative efforts required to *once again* reset rates for customers and renegotiate service contracts with inmate facilities. If GTL rearranges its business to operate under the *Reconsideration Order*'s rates, and those rates are invalidated — as the D.C. Circuit's stay orders suggest is likely — those efforts will have been for naught, and the expenditures therefor will be unrecoverable.[89]

Such harms are especially likely where, as here, so much of the Commission's regulatory scheme remains in legal limbo. The *Reconsideration Order* represents the Commission's third attempt to set ICS rate caps in as many years. Neither of the prior two attempts has yet been subject to judicial review, and the D.C. Circuit has stayed aspects of both. As a result, GTL has already taken steps to comply with the *2013 Order*'s interstate rate caps *and*, more recently, with the *2015 Order*'s restrictions on ancillary charges. If the *Reconsideration Order*'s rate caps were

[89] *See, e.g.*, *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) (holding that product distributor would be irreparably harmed by agency's order that would destroy distributor's ability to cover its purchase or production costs); *National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 824 (1st Cir. 1979) (finding irreparable harm when plaintiff would incur substantial unrecoverable expenses to comply with regulations that may be invalid); *Brendsel v. Office of Federal Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004) (general rule that economic losses are not irreparable harm "is of no avail . . . where the plaintiff will be unable to sue to recover any monetary damages against [federal agencies]").

to take effect, GTL would *again* have to reset its rates and renegotiate its contracts (to the extent its customers remain willing).

The process of reviewing and revising hundreds of contracts with hundreds of customers — particularly in the compressed time frame demanded by the *Reconsideration Order* — will consume tremendous resources. The sort of hasty and uncertain renegotiation processes that the revised rate caps would require would disrupt the budgets and plans of GTL's customers, risking confusion, loss of goodwill, and customer churn. Those effects, too, constitute irreparable injury and justify a stay.[90] Moreover, those expenses will be unrecoverable and will have been wasted if the reviewing court sets the *Reconsideration Order* aside and GTL is forced to renegotiate its contracts yet another time to adhere to whatever regulatory scheme comes next.[91]

GTL relied on these same arguments in seeking a partial stay from the D.C. Circuit earlier this year.[92] Subjecting ICS providers to multiple layers of uncertain — and quite possibly short-lived — rate regulation subjects all ICS providers to a very high and unnecessary risk of repeated and unrecoverable losses.

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[90] *See, e.g.*, *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (finding irreparable harm when FCC order would cause carriers "irreparable losses in customers, goodwill, and revenue"); *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (producer would suffer irreparable injury from labeling rule that would force it either to misbrand its products and damage its reputation or withdraw from the market and face unrecoverable lost profits); *see also Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (affirming preliminary injunction when harm to plaintiff's business-development opportunities and customer goodwill resulting from defendant's conduct would cause an indeterminate amount of loss for years to come).

[91] *Cf.* 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").

[92] *See* GTL Mot. for Partial Stay at 19.

B. Other interested parties, by contrast, will not suffer material irreparable injury in the event of a stay. The interim rate caps established in the *2013 Order* — which have been in place since 2014 — would remain in effect pending a stay of the *Order*. The Wright Petitioners cannot claim to be harmed by rates that comply with those caps, since they are nearly identical to what those petitioners requested in the first place. Beyond those rate caps, much of the *2015 Order* — including rules limiting "ancillary service charges,"[93] — have taken effect.

On the contrary, the public will be harmed if a stay is *not* entered. The *Reconsideration Order* subjects ICS providers to rate caps that prevent them from recovering the full cost of providing service. As Commissioner Pai recognized in dissent from the *2015 Order*, the "ineluctable result" of below-cost rate caps is a reduction in the availability and quality of ICS.[94] Staying the rate caps for a limited time to ensure that the regulatory scheme that takes effect is grounded in the law will not risk any harm.

Furthermore, in the unusual circumstances present here, respect for the authority of the Court of Appeals and the general interest in reducing the burdens of litigation counsel in favor of the Commission itself granting a stay. Petitioners are eager to finalize review of the *2015 Order* and the *Reconsideration Order* as quickly as possible, and the D.C. Circuit has signaled its own interest in having this matter resolved by denying the Commission's motion to hold review of the *2015 Order* in abeyance. Forcing ICS providers to litigate a stay motion (for the fourth time!) cannot be justified.

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[93] *See* 47 C.F.R. § 64.6020. The D.C. Circuit stayed § 64.6020(b)(2), which specifically governs "single-call" and "related services." The remaining ancillary-fee rules have taken effect.

[94] *2015 Order* at 203 (Pai Dissent).

CONCLUSION

The Commission should issue a stay pending review of the *Reconsideration Order*.

Respectfully submitted,

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September 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of September, 2016, the foregoing Petition of Global Tel*Link for Stay Pending Judicial Review was served via electronic mail on the following persons:

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