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

SECURUS TECHNOLOGIES, INC., *et al.*, *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	)	No. 16-1321 (and consolidated cases)

JOINT REPLY OF THE ICS CARRIER PETITIONERS IN SUPPORT OF THEIR MOTIONS FOR PARTIAL STAY PENDING JUDICIAL REVIEW

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INTRODUCTION

The FCC's opposition to the stay motions filed by GTL, Securus, and Telmate is based on the premise that the FCC has statutory authority to deny ICS providers recovery of lawfully incurred costs because the site commissions required by correctional facilities result in inmate calling rates that are too high and thus not "fair." *See* FCC Opp. 21-22. But § 276(b)(1)(A) does not authorize the FCC to regulate intrastate rates based on their perceived unfairness to consumers. Rather, the statute requires the FCC to adopt a per-call compensation plan to ensure that payphone providers – which the statute indicates includes ICS providers – are fairly compensated for the intrastate and interstate services they provide. Site commissions are lawful costs, required under public contracts, and the FCC has no authority to deny recovery of those costs – either under § 276 or, as relevant to interstate calls only, under § 201(b).

The claim that the FCC overstepped its statutory authority – as well as ICS providers' showing that the FCC set rates too low, even leaving site commissions aside – supported the ICS providers' requests for a stay of the *2015 Order*, which this Court granted. The *Reconsideration Order* does not address the defects in the *2015 Order*. The FCC's own *Stay Denial Order*[1] is telling: the FCC ruled that the

[1] Order Denying Stay Petitions, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, DA 16-1119 (WCB rel. Sept. 30, 2016) ("*Stay Denial Order*").

ICS petitioners had failed to show a likelihood of success on the merits because their merits arguments "largely reiterate arguments . . . raised previously," which the FCC rejected based "on [the agency's] previous analysis." *Stay Denial Order* ¶ 10. But ICS providers renewed the same arguments because the FCC did nothing to correct the errors in the *2015 Order*. And these are the very arguments that this Court repeatedly found to satisfy the "stringent requirements" for a stay.

The *Stay Denial Order* dismisses this Court's prior orders by asserting that "it is impossible to accurately determine" their underlying reasoning. *Id.* ¶ 21. But the merits arguments have not changed, and the *Reconsideration Order* does not address them or even purport to do so. And it likewise remains true that, if the modified (and previously stayed) caps go into effect, ICS providers will suffer irretrievable losses. Inmates and their families will likewise suffer harm if the new rates disrupt either calling services or the inmate welfare services that site commissions support. Petitioners do not question that they must meet the usual stringent standards to justify a stay. *See* GTL Mot. 8; Securus Mot. 6; Telmate Mot. 7. But it is not every day that a petitioner can point to three prior stay orders in a single proceeding to support that showing. The FCC's insistence on forcing the parties into Court, once again, to obtain a stay pending review fails to accord this Court's orders the respect they are due.

ARGUMENT

I. THIS COURT'S PRIOR STAY ORDERS STRONGLY SUPPORT PETITIONERS' SHOWING OF LIKELIHOOD OF SUCCESS

Contrary to the FCC's arguments, the *Reconsideration Order* does not address the challenges underlying this Court's orders staying the *2015 Order*.[2] Those prior rulings thus provide strong support for petitioners' showing here.

A. The FCC's Treatment of Site Commission Payments Is Unlawful

The FCC admits that the *Reconsideration Order* "adhere[s]" to the erroneous determination in the *2015 Order* that site commissions are not a recoverable cost of providing ICS, and it does not question that, notwithstanding the small increases in rates, ICS rates remain below cost if site commissions are taken into account. *See Reconsideration Order* ¶ 24 n.94 ("we still find that the bulk of site commission payments should not be considered in calculating the rate caps"). The FCC argues (at 21) that requiring the agency to "take all site commission payments" into account as recoverable costs would "undermine the agency's ability to ensure" that ICS providers are "fairly" compensated. But, even

[2] The FCC likewise has no plausible response to Telmate's point that the *Reconsideration Order* violated the Administrative Procedure Act and the FCC's own procedural rules. The FCC argues (at 26) that it "reasonably chose an alternative solution" to what petitioner Michael Hamden requested on reconsideration as a "logical outgrowth" of the petition, but Hamden requested that site commissions be banned and that providers be *required* to pay a fee to compensate facilities. The FCC did neither of those things; Hamden himself argued against the FCC's approach. Securus Mot. App. G.

leaving to one side that § 276(b)(1)(A) does not authorize the agency to reduce compensatory rates, *see infra* pp. 6-8, the argument is a non sequitur. Given the unquestioned competition among ICS providers, recovery of site commission payments will permit those providers to recover their lawfully incurred costs, and no more. *See Paddock Publ'ns, Inc. v. Chicago Trib. Co.*, 103 F.3d 42, 45 (7th Cir. 1996). Denying recovery of site commissions cannot be justified as an effort to regulate compensation earned by ICS providers.

Instead, as the FCC argues, the refusal to permit recovery of site commissions is based on the judgment that site commissions are excessive relative to *facilities'* costs. *See* FCC Opp. 21 ("[S]ite commissions bear no necessary relation to the actual costs of providing inmate calling services."). But, if a state or local government, in the exercise of its legitimate authority, decides to use site commissions to fund inmate welfare programs or simply to defray the high cost of correctional facilities, neither § 276(b)(1)(A) nor § 201(b) can be reasonably read to interfere with that policy decision. That policy decision has nothing to do with the compensation that ICS providers receive or whether ICS rates are just and reasonable in light of ICS providers' costs.

The FCC argues (at 22-23) that the practical result of its rate-setting will be to force correctional authorities to forgo site commissions in excess of what ICS providers can afford to pay. But correctional facilities have no reason to give up

site commissions in existing contracts – as the FCC is aware. *See, e.g.*, Securus Mot. 11. Moreover, to the extent the FCC's rate caps deliberately override state policy choices by rendering site commissions unrecoverable, they preempt state law, notwithstanding the FCC's refusal to limit site commissions directly. *See Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). The FCC's failure to acknowledge – or to provide any statutory justification for – its intrusion on state prerogatives requires vacatur and a remand to the agency. *See Riffin v. Surface Transp. Bd.*, 592 F.3d 195, 198 (D.C. Cir. 2010).

B. The *Reconsideration Order* Rate Caps Fail To Ensure Fair Compensation

The FCC argues (at 17-21) that a two-cent increase in the rate caps for prisons and a nickel increase for most jails overcomes petitioners' prior showing that the FCC failed to set rates designed to permit providers to recover their costs for "each and every" call. But the FCC cannot dispute that the rate-cap increase adopted in the *Reconsideration Order* was on account of *correctional facilities'* costs that were *not* included in the prior rate caps. Accordingly, the *Reconsideration Order* simply does not address the issues underlying petitioners' challenge to the *2015 Order*.[3]

[3] Although the FCC asserts (at 10-11) that Telmate raised the exclusion of the costs that facilities incur as a basis for its prior stay motion, that is simply not correct: Telmate argued that the FCC erred by excluding ICS providers' costs of commissions, *not* the costs incurred by facilities, from the per-call caps. *See* Mot.

It is no answer for the FCC to assert (at 18) that "the additional revenue . . . may flow to . . . providers," not just to facilities. The FCC set its rates based on its evaluation of average costs; in raising the rate caps, it included a new category of costs that it had previously and erroneously ignored. *See Reconsideration Order* ¶ 12 ("our existing rate caps do not separately account for" costs that facilities incur "that are directly and reasonably related to the provision of ICS"). The rate increase thus was not intended to provide any greater recovery of those costs that the FCC had already taken into account, and it thus does not address the defects in the evaluation of cost data that deprive petitioners of recovery of the costs of "each and every completed . . . call." 47 U.S.C. § 276(b)(1)(A); *see* Securus Mot. 7 (caps on prison rates are below Securus's costs of service exclusive of site commissions).

C. The FCC Has No Authority To Cap Intrastate Rates

The *Reconsideration Order* fails to offer any new reasoning in support of the FCC's assertion that the statutory requirement, in § 276(b)(1)(A), that the agency adopt regulations to ensure fair compensation for payphone providers authorizes it to reduce compensatory rates set in a competitive market. Nor does the FCC offer any legitimate reason for seeking to make effective rate caps on intrastate calls that

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of Telmate for Stay at 12, *Global Tel*Link*, Doc. No. 1596259 (D.C. Cir. filed Jan. 29, 2016) ("facilities will very likely continue to charge commissions . . . because *at least a portion* of commission payments pay for costs that facilities incur") (emphasis added).

are *lower* than the rate caps that this Court specifically stayed.[4] The FCC disputes (at 15-16) the significance of this Court's order by noting that this Court allowed restrictions on ancillary fees and certain other charges to go into effect, even with respect to intrastate calls. But no petitioner separately requested a stay of the FCC's restrictions on these regulations with respect to intrastate calls in particular; Telmate and Securus requested stays of those regulations in their entirety. The Third Stay Order is accordingly far more indicative of this Court's preliminary evaluation of the merits of petitioners' challenge to the FCC's statutory authority to cap intrastate calling rates.

The FCC of course cannot dispute that it has no general authority to regulate intrastate rates; § 152(b) of the Communications Act requires that the authority granted in § 276(b)(1)(A) be read narrowly to avoid unwarranted intrusion on the states' regulatory power. The FCC nevertheless continues to argue (at 13, 23-25) that its authority to adopt regulations to ensure that payphone providers are "fairly compensated" constitutes a mandate to regulate rates to ensure that they are "just, reasonable, and fair." But that reading rips the single word "fairly" out of its statutory context and then expands it well beyond its ordinary meaning. *See City of Mesa v. FERC*, 993 F.2d 888, 893 (D.C. Cir. 1993) ("Naturally, we try not to

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

interpret statutory language by plucking a single word out of context and placing it under a microscope."). The FCC is directed to ensure that charges are just and reasonable in various provisions of the Communications Act. Had Congress intended to grant such authority in § 276, it would have used comparable language. This Court should not accept the FCC's effort to expand its regulatory mandate.

II. THE BALANCE OF THE EQUITIES FAVORS A STAY

A. Movants Are Threatened with Irreparable Harm

Allowing the *Reconsideration Order* to go into effect would produce the same harms that provided the basis for the stays granted by this Court earlier this year. Each of the petitioners will suffer a substantial loss in revenue – not just from the lower rates but also from Minimum Annual Guarantees in existing contracts, *see* Securus Mot. 14 – that will not be recoverable if the rate caps are held to be unlawful. And each will likewise incur substantial compliance costs – running into the millions of dollars in the case of Securus, for example, *see id.* And each will suffer harm to its relationship with existing customers frustrated by lack of certainty and repeated changes in business terms. GTL Mot. 18-19; Securus Mot. 13-16; Telmate Mot. 16-17.

The FCC argues (at 27) that these financial losses do not constitute "irreparable harm *per se*." This argument should have a familiar ring, because it is precisely what the FCC argued earlier this year in unsuccessfully opposing

movants' earlier stay motions. *Cf.* FCC Opp. to Mots. for Partial Stay at 32-33, *Global Tel*Link*, Doc. No. 1598743 (D.C. Cir. filed Feb. 12, 2016). The argument overlooks decisions of this Court and other courts of appeals that make clear that unrecoverable economic losses constitute irreparable harm. *See, e.g., Odebrecht Constr., Inc. v. Secretary, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013); *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010).

B. A Stay Would Not Harm Third Parties and Is in the Public Interest

The FCC and intervenors argue that a stay will prevent inmates and their friends and families from gaining the benefit of reduced calling rates, but they fail to recognize that many of the FCC's reforms – including interim rate caps on interstate calls and limits on "ancillary services charges," 47 C.F.R. § 64.6020, and certain other charges – have already taken effect and have sharply reduced the prices for ICS. Imposing additional reductions by allowing the rate caps to go into effect across-the-board would both jeopardize the provision of service in those institutions that continue to require payment of commissions and undermine inmate welfare programs where site commissions disappear or are reduced as a result of the new rates. Moreover, a stay of the *Reconsideration Order* would, once again, maintain the status quo with respect to rates inmates and their families pay, which is the product of the Court's prior stays. Each time the Court has balanced the equities, it has found that any potential harm caused by new rates not

taking effect is outweighed by factors favoring a stay, and the FCC has not shown why staying the *Reconsideration Order* would be any different.

There are additional public interest reasons that a stay is appropriate. ICS providers and state and local correctional authorities have been subjected to repeated changes in ICS regulations, including significant new regulations that came into effect earlier this year; it is therefore appropriate to maintain the status quo at least until the *Reconsideration Order* rate caps are reviewed. *See*, *e.g.*, Securus Mot. 16-17. If those caps do survive review, any delay in implementation is likely to be limited in light of this Court's denial of the FCC's motion to hold the appeal of the *2015 Order* in abeyance. Particularly in light of this Court's repeated prior stay orders, a stay of the *Reconsideration Order* rate caps promotes orderly administrative and judicial procedure. And, given the significant federalism issues implicated by the FCC's effort to establish state correctional policy, a stay reflects appropriate respect for the states' status as sovereigns.

CONCLUSION

Implementation of the *Reconsideration Order*'s new rate caps would require considerable preparatory work prior to their effective date – December 12, 2016, in Prisons. Movants accordingly respectfully request that the Court stay those caps, pending judicial review, at the earliest opportunity.

Respectfully submitted,

/s/ *Michael K. Kellogg*

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CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this joint reply is submitted concur in its content.

/s/ *Michael K. Kellogg*
Michael K. Kellogg

October 20, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on October 20, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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