

**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**

January 6, 2016

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SUMMARY

Telmate respectfully requests that the Commission grant a stay pending appeal of its recently adopted¹ rate caps for “Inmate Calling Services” (“ICS”) and related limits on ancillary charges, particularly to the extent that those rules apply to parties that do not provide telecommunications services.² The Commission should grant the requested stay because Telmate is likely to prevail in its appeal of the Commission’s action, Telmate will suffer irreparable harm if Commission’s rules go into effect, and the remaining balance of equities favors a stay.

Telmate provides ICS and other communications services predominantly using VoIP and other advanced technologies not subject to Section 201 of the Communications Act.³ Section 276, the only other authority on which the Commission here relies, does not alone provide sufficient authority for the Commission’s rules as promulgated.⁴

The Commission’s action is *ultra vires* and arbitrary and capricious because (1) Section 276 requires the Commission to ensure fair compensation for providers, but the Commission’s rules fail to do so, (2) Section 276 does not authorize the intrastate or interstate rate caps adopted in the *Order*, and (3) Section 276 does not permit the Commission to set ancillary service

¹ *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136, (rel. Nov. 5, 2015) (“*Order*”).

² 47 C.F.R. §§ 64.6010, 64.6020, 64.6030, 64.6060, 64.6070, 64.6080, 64.6090, and 64.6100. Unless otherwise indicated, all citations to these sections are to the new rules implemented by the *Order*, which take effect on March 17, 2016.

³ 47 U.S.C. § 201 (applying only to common carriers).

⁴ Telmate supports Global Tel*Link’s and Securus’ arguments that the Commission’s rules should be stayed because they are likewise not authorized by Section 201, or by Section 201 in combination with Section 276. Telmate petitions separately because if the Commission were to reject Global Tel*Link’s and Securus’ stay requests, it should nonetheless grant Telmate’s stay request for the reasons provided herein.

charges that are below provider costs. A stay is therefore appropriate here. If the Commission declines to grant a stay, Telmate expects to request one from the U.S. Court of Appeals for the D.C. Circuit on January 27, 2016.

BACKGROUND

Telmate seeks a stay with respect to the rate caps, the limits on ancillary charges, and all related rules adopted in the *Order*.⁵ The *Order*, which was adopted by a 3-2 vote on October 17, 2015, and released on October 22, 2015, is the latest step in the Commission's multi-year effort to adopt legally sustainable reforms of ICS.

Telmate provides inmate calling services and enhanced information services using IP technology in federal, state, and local prisons and jails across the country. Telmate's flagship product is its inmate phone service, which allows inmates to place outbound VoIP calls using Telmate's IP phones. When an inmate places a call using a Telmate phone, the call is delivered over an Internet connection from the inmate's location to a Telmate data center, where Telmate converts the call from IP format to TDM format and enables its delivery to the public switched telephone network ("PSTN"). Because it allows inmates to make outbound calls but does not permit inbound calling from the PSTN, Telmate's service is one-way VoIP as that term has been

⁵ 47 C.F.R. §§ 64.6010, 64.6020, 64.6030, 64.6060, 64.6070, 64.6080, 64.6090, and 64.6100.

defined by the Commission.⁶ Telmate also provides a net protocol conversion (from IP to TDM), so its service is also an information service under the Commission’s precedents.⁷

In 2013, the Commission issued its initial ICS Order⁸, in which it (1) found that ICS rates and ancillary fees must be cost-based, (2) adopted interim interstate rate caps, and (3) established limited safe harbors. Various ICS providers and state departments of corrections appealed the Commission’s action to the D.C. Circuit, in part because the FCC adopted its cost-based rates without notice and failed to explain its embrace of long-disfavored rate-of-return regulation; Telmate intervened in support of that appeal.⁹ Several parties likewise sought a stay of portions of the *2013 Order* pending appellate review. The D.C. Circuit granted those requests in part,¹⁰ staying the provisions that (1) imposed cost-based rates for ICS, (2) created a limited safe harbor,

⁶ *Universal Service Contribution Methodology A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, FCC 12-46, 27 FCC Rcd. 5357, 5387 (2012) (proposing to impose USF contributions on one-way VoIP service and defining that service as: “A service that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user’s location; (3) requires Internet protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network or terminate calls to the public switched telephone network.”) (“*Contributions NPRM*”).

⁷ 47 U.S.C. § 153(24) (defining “Information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, 11 FCC Rcd. 21,905, 21,956 (1996).

⁸ *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113, 28 FCC Rcd. 14,107 (2013) (“*2013 Order*”).

⁹ See Joint Br. for the ICS Provider Pet’rs and Supporting Intervenor, *Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. May 22, 2014), ECF No. 1494131.

¹⁰ Order, *Securus Techs. v. FCC*, No. 13-1280, (D.C. Cir. Jan. 13, 2014), ECF No. 1474764, at 1 (“D.C. Circuit Stay Order”). Judge Brown would have stayed the entire Order. *Id.* at 1 n.*.

and (3) imposed annual reporting and certification requirements.¹¹ The D.C. Circuit did not stay the Commission’s cap on interstate ICS rates, and that cap remains in effect.

After imposition of the stay but before oral argument, the Commission asked the D.C. Circuit to hold review of the *2013 Order* in abeyance pending agency action on a new notice of proposed rulemaking (“NPRM”), which sought comment on a market-based approach to regulating ICS rates. The D.C. Circuit granted the FCC’s request, and the appeal of the *2013 Order* remains in abeyance today.

This past October, the Commission acted on its NPRM by adopting rate regulation that goes far beyond the stayed portions of the *2013 Order* and is contrary to the simplified, market-based solution the Commission had noticed. The Commission extended its initial cost-based regulation of interstate rates to intrastate rates, and adopted extensive rate caps much lower than the 2013 rate caps—in one case even lower than the *safe harbors* stayed by the D.C. Circuit. More importantly, the Commission had in 2014 made clear that banning site commissions would “align[] the interests” of all parties so that “market-based dynamics” led to reasonable ICS rates.¹² But in its final rules, the Commission continued to permit facilities to demand those payments, while nevertheless excluding the costs that this posed to ICS providers when calculating rate caps.¹³ The Commission then further set the rate caps at providers’ average reported costs, thus allowing full cost recovery by only a subset of “efficient” ICS providers, at a subset of low-cost facilities, on a subset of low-cost calls—and only when a facility demanded

¹¹ D.C. Circuit Stay Order at 1.

¹² *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, FCC 14-158, 29 FCC Rcd. 13,170, 13,174, 13,183 ¶¶ 6, 27 (2014).

¹³ *E.g.*, *Order*, ¶¶ 118, 123.

no site commissions.¹⁴ The *Order* then assumed, notwithstanding its average cost-based rates, that providers would share profits (if any) with facilities to subsidize those facilities' legitimate costs incurred in providing and overseeing ICS.

The Commission also adopted limits on both the type and amount of ancillary fees ICS providers may charge, enumerating a short list of permitted charges and prohibiting all others.¹⁵ As with its rate caps, the Commission ignored the costs of site commissions. It also expressly precluded full cost recovery by, for example, prohibiting any mark-up on third-party transaction fees notwithstanding the costs that necessarily accompany an ICS provider's handling of third-party transactions.

STANDARD

An agency may postpone the effective date of an action pending judicial review when it finds that justice so requires.¹⁶ 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.¹⁷ These factors are satisfied here. *First*, as discussed below, Telmate is likely to prevail on the merits because the *Order* is without authority under Section 276 and, in any event, arbitrary and capricious. *Second*, Telmate will suffer irreparable

¹⁴ *Order*, ¶ 116 (explaining that rates will “allow economically efficient—possibly all—providers to recover their costs that are reasonably and directly attributable to ICS.”).

¹⁵ 47 C.F.R. § 64.6020.

¹⁶ 5 U.S.C. § 705.

¹⁷ *See, e.g., Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Order, DA 12-1122, 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)).

harm if it is subjected to rate caps that do not allow it to recover its legitimate costs of doing business.¹⁸ *Finally*, a stay would not harm (and indeed will benefit) other parties,¹⁹ and it would be in the public interest because it would have the same effect as the existing stay of the Commission’s 2013 *Order*.

ARGUMENT

I. TELMATE IS LIKELY TO SUCCEED ON THE MERITS BECAUSE SECTION 276 DOES NOT SUPPORT THE COMMISSION’S RULES.

Pursuant to 47 C.F.R. §§ 1.41, 1.43, and 1.44(e), Telmate respectfully requests that the Commission stay the effectiveness of the *Order* pending judicial review, specifically as it applies to services that are not subject to 47 U.S.C. § 201. In addition, Telmate joins in full the stay petitions filed by Securus and Global Tel*Link.²⁰

The Commission can only and does only rely on Section 276 for its authority to regulate ICS provided using VoIP. The Commission explained that Section 276 “is technology neutral with respect to inmate calling services,” and that the newly adopted ICS rules thus “apply to ICS regardless of the technology used to deliver the service.”²¹ To reach this conclusion, the

¹⁸ See Letter from Chérie R. Kiser, Counsel to Global Tel*Link, Stephanie A. Joyce, Counsel to Securus Technologies, Daniel A. Broderick, Counsel to Telmate, to Chairman Tom Wheeler et al., at 1, WC Docket No. 12-375 (filed Oct. 15, 2015) (“Joint Provider Letter”); see also *Order*, ¶ 70 (acknowledging that Telmate has cautioned the Commission that proposed rate caps are too low).

¹⁹ The fact that two other major ICS providers—Securus and Global Tel*Link—have filed similar petitions for a stay underscores the fact that other parties will not be harmed by a stay.

²⁰ *Securus Technologies, Inc.[’s] Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136)*, WC Docket No. 12-375 (filed Dec. 22, 2015) (“Securus Petition”); *Petition of Global Tel*Link for Stay Pending Judicial Review*, WC Docket No. 12-375 (filed Dec. 22, 2015) (“Global Tel*Link Petition”).

²¹ *Order*, ¶ 250.

Commission cited the *2013 Order*, which made plain the Commission’s reliance on Section 276 for its authority over ICS provided using VoIP technology:

Section 276 makes no mention of the technology used to provide payphone service and makes no reference to ‘common carrier’ or ‘telecommunications service’ definitions. Thus, the use of VoIP or any other technology for any or all of an ICS providers’ service does not affect our authority under section 276.²²

Section 276 does not support the Commission’s rules. Congress passed Section 276 to ensure that payphone providers would get paid fairly for certain calls for which they were receiving no compensation, and for others for which they were receiving little compensation.²³ Congress made no mystery about this, requiring the Commission to “ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.”²⁴ Congress also crisply articulated its policy goal in the statute’s text, explaining that the provision’s purpose was to “promote the widespread deployment of payphone services to the benefit of the general public.”²⁵ This goal is particularly salient in the confinement context, where by definition payphone access depends on local service.

The Commission’s rules, however, both fail to “ensure” that providers receive “fair[] compensat[ion],” and fail to promote more deployment of prison phones.²⁶ Even though Section 276 requires the Commission to promote payphone deployment and ensure fair compensation,

²² *Id.* (citing *2013 Order*, ¶ 14). Implicit in its reliance on Section 276 is the Commission’s acknowledgement that it cannot rely on Section 201 to regulate non-common carriers. Section 201 mandates just and reasonable rates for communications services furnished by “common carriers.” 47 U.S.C. § 201. VoIP providers and information service providers are not common carriers subject to this mandate.

²³ *See, e.g., Am. Pub. Commc’ns Council v. FCC*, 215 F.3d 51, 53 (D.C. Cir. 2000).

²⁴ 47 U.S.C. § 276(b)(1)(A).

²⁵ 47 U.S.C. § 276(b)(1).

²⁶ *See Order* at 201-02, 204 (Dissenting Statement of Commissioner Ajit Pai).

the Commission itself acknowledges that its rules will not, in all cases, cover the costs of providing service. Instead, the Commission impermissibly treats its Section 201 “rate” regulation power as interchangeable with its obligation to ensure “fair compensation” for providers.

But Section 276 is not “another iteration of section 201 for payphones;”²⁷ 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”²⁸ by requiring that compensation is *high enough*. This authorizes a floor below which compensation may not sink, but it does not authorize the Commission to erect a ceiling above which rates may not rise.²⁹ Section 276 similarly does not authorize rules that, as here, are purportedly designed only to permit “cost recovery” (rather than ensuring fair compensation³⁰), and certainly it does not authorize rules that only “possibly” permit cost recovery for all providers.³¹ Because the Commission’s rules cannot be squared with Section 276’s statutory requirements, Telmate is likely to succeed on the merits of its appeal.

A. The Commission’s Rate Caps Fail to Ensure the Fair Compensation Required by Section 276.

The Commission’s rate caps do not, for several reasons, satisfy Section 276’s requirement that the Commission “ensure” “fair[] compensat[ion] for each and every ... call.”³²

²⁷ *Order* at 201 (Dissenting Statement of Commissioner Ajit Pai).

²⁸ 47 U.S.C. § 276(b)(1).

²⁹ *Order* at 200 (Dissenting Statement of Commissioner Ajit Pai).

³⁰ *Order*, ¶ 116.

³¹ *Order*, ¶ 116; 47 U.S.C. § 276(b)(1)(A) (requiring fair compensation for “each and every ... call”).

³² 47 U.S.C. § 276(b)(1)(A). An agency may not ignore a clear statutory requirement. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (“It may be presumed that Congress does

First, the Commission’s rate caps are impermissibly low even before considering the cost of site commissions, discussed below. This is not simply because the cost data in the record shows this—though, indeed that data does—but also because the structure of the rules themselves are *intended* to capture the costs of only *some* providers. The Commission explained that it sought only to allow a subset of so-called “economically efficient” providers to recover their costs, and expressly endorsed the possibility that some providers would not recover their costs.³³ That, alone, contradicts Section 276. Then, when the Commission sought to support its conclusion that its adopted rate caps nevertheless ensure fair compensation for each and every call, it cited an economic consultant who found only that the rate caps “will *largely* cover the individual ICS providers’ costs in providing service.”³⁴ “*Largely* cover[ing] . . . costs,” of course, does not ensure the fair compensation that Section 276 requires for “each and every” call. Even before considering site commissions, then, the rate caps already contradict the statute.

Having adopted rules that, by design, do not cover all of ICS providers’ costs, the Commission then goes yet further by continuing to allow facilities to demand site commissions (including for costs that facilities incur to provide ICS) while refusing to treat those payments as

not intend administrative agencies, agents of Congress’ own creation, to ignore clear. . . statutory or constitutional commands”); *In re Aiken County*, 725 F.3d 255, 387 (D.C. Cir. 2013) (“[F]ederal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress.”); *Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 207 (D.C. Cir. 2007) (“An agency acts arbitrarily if it ignores an issue that Congress directs it to address.”); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1573 (D.C. Cir. 1984) (“[N]either this court nor the agency is free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress.”) (internal quotation marks omitted).

³³ *Order*, ¶ 116 (“We therefore find that the rates we adopt today are reasonable for the reasons provided above and will allow economically efficient—possibly all—providers to recover their costs that are reasonably and directly attributable to ICS.”).

³⁴ *Order*, ¶ 55 (emphasis added).

a cost of providing ICS. Here, again, the Commission is quite clear 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.”³⁵

The Commission reasons that site commissions are unnecessary in the way that “private jets” are unnecessary, and that once excluded from providers' acceptable cost structure, providers will stop paying for them.³⁶ This analogy fails on multiple fronts. First, while providers don't need jets to offer service, they do undoubtedly need permission to operate in prisons and jails. The Commission knows this, of course, and doesn't think that providers can simply decline to pay site commissions the way that they can decline to buy corporate jets. Instead, the Commission *wants* providers to tell states that they can no longer afford site commissions, which the Commission *hopes* will cause states in turn to stop charging them. Second, while facilities don't care about providers' jets, the facilities must recover the costs they incur to provide and oversee ICS in their prisons and jails.

It is nearly certain however that a number of states, including states where site commissions are statutorily mandated,³⁷ will continue to demand location rents, and very likely that many other facilities will do the same. One reason for this is simply that facilities *can* continue to demand commissions, leaving providers—the one set of actors that Section 276 requires the Commission to protect—to feel the pinch. 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

³⁵ *Order*, ¶ 125.

³⁶ *Order*, ¶ 142.

³⁷ *See, e.g.*, Tex. Gov't Code Ann. § 495.027 (West 2009).

with facilities demanding site commissions), deprive inmates of ICS.³⁸ These outcomes are flatly prohibited by Section 276’s statutory text.³⁹ And particularly given that Section 276 requires fair compensation for “each and every” phone call, the asserted outlying instances where commissions might be paid by rates under the rate caps⁴⁰ do not salvage the rule. 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. Nor can the rules be saved by the Commission’s hope that facilities will renegotiate their ICS contracts, which even if required will not eliminate facilities’ desire or need to charge site commissions. In short, any time a site commission is demanded, the regulations 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 they contravene Section 276’s prescription to promote deployment of phones by requiring providers to withdraw service.

In addition, facilities will continue to demand site commissions because they *incur costs* when they host ICS—but the Commission has off-handedly ignored this, too.⁴¹ Prisons and jails

³⁸ 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.” *Order*, ¶ 142.

³⁹ These outcomes are also inimical to the Commission’s stated goal of “promot[ing] the general welfare of our nation by making it *easier* for inmates to stay connected to their families and friends while taking *full account* of the security needs of correctional facilities.” *2013 Order*, ¶ 2 (emphasis added).

⁴⁰ *Order*, ¶ 128.

⁴¹ An agency acts arbitrarily and capriciously when it ignores evidence in the record. *See, e.g., Butte County, Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (“[A]n agency cannot ignore evidence contradicting its position.”); *Morall v. DEA*, 412 F.3d 165, 178 (D.C. Cir. 2005) (collecting cases for proposition that agencies must consider all evidence); *Nat. Resources Defense Council, Inc. v. U.S. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (“[A]n agency rule is arbitrary and capricious if the agency . . . ignores important arguments or evidence . . .”).

have traditionally recovered those costs by charging site commissions to providers, who in turn pass those expenses on to end-users. Rather than recognize this, however, the Commission arbitrarily excluded *even these* costs from the rate caps that it set. Evidence showing that facilities incur costs in connection with provisioning of ICS came from such disparate parties as the National Sheriffs' Association,⁴² ICS providers,⁴³ and the Director of the Utility Services Division of the Alabama PSC.⁴⁴ The Commission acknowledged the strength of this evidence, and appeared to recognize that it could not conclude that facilities incur no costs to provide ICS. Although the Commission posited that such expenses “would likely amount to no more than one or two cents per billable minute,” it at least acknowledged the existence of a material cost.⁴⁵ But then, the Commission inexplicably asserted that its rate caps—which, as explained above, are designed *not to cover* all of ICS providers' costs—are somehow “sufficiently generous” to also cover the additional one or two cents per minute of costs that facilities bear in providing ICS.⁴⁶ That is nothing more than a convenient fiction, and one that both denies providers fair compensation and fails to discharge the Commission's obligation to engage in reasoned decision-making.

⁴² *Order*, ¶ 136 (“The NSA suggests that the Commission approve a ‘compensation amount for the security and administrative duties performed in jails in connection with ICS that is an additive amount to the ICS rate.’ Relying, in large part, on the results of a survey it took of its members, as well as analyses submitted by other parties, NSA suggests that this additive amount should range from \$0.01 to \$0.11 per minute, depending on the size of the facility being served.”).

⁴³ *Order*, ¶ 137 & n.481 (citing Global Tel*Link estimate); *id.* nn.482-483 (citing Pay Tel estimate).

⁴⁴ *Order*, ¶ 137.

⁴⁵ *Order*, ¶ 139. An additional cost of one or two cents per minute is certainly material to ICS rate caps that have been set as low as 11 cents per minute.

⁴⁶ *Id.*

The Commission's rate caps contravene Section 276, and the Commission should therefore stay them with respect to non-common carriers pending appeal.

B. Section 276 Does Not Permit the FCC to Impose its Rate Structure on Telmate With Respect to Intrastate or Interstate Calls.

We have explained above why Section 276 does not authorize the Commission's rate caps with respect to any rates (*inter* or *intrastate*). Separately, Global Tel*Link has detailed why Section 276 does not authorize the Commission's *intrastate* rate caps as to any ICS provider, and we agree with those arguments.⁴⁷ Rather than belabor arguments amply discussed by others, however, we point out only the obvious fact that, to the extent that Section 276 does not authorize *intrastate* rate caps as to any provider, it also does not authorize *interstate* rate caps as to non-telecommunications providers such as Telmate. This is because, as noted earlier, Section 201 does not apply to VoIP and other information services, so the Commission can rely only on Section 276 for its authority to regulate those providers, including in the interstate arena. It follows, then, that any stay of intrastate rates based on the limitations of Section 276's authority should similarly apply to interstate rates for VoIP and other information service providers. As Telmate is likely to prevail on a challenge to the Commission's authority to cap intrastate and interstate ICS rates, the Commission should grant a stay of those rules with respect to VoIP and other information services providers.

C. The Commission's Regulation of Ancillary Charges Is Barred by Section 276.

Securus has elsewhere explained that the Commission's jurisdiction under Sections 201 and 276 does not permit the Commission to regulate financial transaction and other fees that are unrelated to inmate calling,⁴⁸ and Telmate joins those arguments. Telmate also agrees with

⁴⁷ Global Tel*Link Petition at 21-24.

⁴⁸ Securus Petition at 5-8.

Securus that adopting ancillary fee caps that are below the costs demonstrated in the record violates Section 276’s mandate that the Commission “ensure” “fair[] compensat[ion]” for ICS and otherwise is unlawful.⁴⁹ The flaws in the Commission’s fee rules, however, go beyond those identified by Securus. Because those rules do not provide *any* compensation for costs incurred when passing through governmental and other third-party charges, they again deny providers the fair compensation required by Section 276.⁵⁰

As explained in detail above, the Commission’s rate caps do not permit—let alone ensure—fair compensation.⁵¹ Having nevertheless adopted those rate caps, the Commission compounds the harm to ICS providers by adopting fee limits that do not cover the cost of providing the relevant ancillary services. This is made most plain by the Commission’s treatment of mandatory taxes and fees and third-party charges, each of which ICS providers must now pass through without any mark-up to cover the costs that administering these third-party charges necessarily imposes. In the Universal Service context, for example, the Commission has recognized that providers “incur some administrative costs associated with the collection of the universal service charges”⁵² and has therefore given providers the freedom to recover these costs “through their customer rates or through [a non-Universal Service Fund] line item”⁵³ But under

⁴⁹ *Id.* at 8-12; Telmate’s Response to Mandatory One-Time Data Collection, WC Docket No. 12-375 (filed Aug. 18, 2014).

⁵⁰ A non-ICS service is either truly “ancillary to” ICS calling, in which case it is entitled to fair compensation, 47 U.S.C. §§ 276(b)(1)(A), 276(d), or it is an unrelated service that falls entirely outside the Commission’s Section 276 authority. Either way, the Commission cannot prevent ICS providers from being compensated for non-ICS services they provide.

⁵¹ *See supra* pp. 8-12.

⁵² *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329, 17 FCC Rcd. 24,952, 24,979 ¶ 54 (2002).

⁵³ *Id.* at 24,974 ¶ 40.

the ICS rules, ICS providers may not increase their rates or adopt additional ICS line items. Instead, they must recover these costs, if at all, through the Commission's capped ICS rates. Where, as here, those rates already fail to cover costs, ICS providers are effectively denied *any* compensation for the costs incurred to pass-through governmental and third-party charges, plainly violating the fair compensation mandate of Section 276.

D. The Commission Cannot Cure the Deficiencies in its Rules Through Waivers.

To remedy the failings of its rules, the Commission repeatedly cites the availability of waivers.⁵⁴ But the availability of waivers does not satisfy Section 276, which requires the Commission to “*prescribe regulations that*” “ensure” “fair[] compensat[ion] for each and every ... call.”⁵⁵ The Commission's reliance on a waiver process instead of adopting regulations that ensure fair compensation simply does not satisfy the plain language of Section 276.

For these reasons and those explained in Global Tel*Link's and Securus' petitions for a stay, Telmate is likely to prevail on a challenge to the merits of the Commission's new rules.

II. THE BALANCE OF THE EQUITIES FAVORS A STAY.

Not only is Telmate likely to succeed on the merits, but the balance of the equities favors a stay because Telmate and other ICS providers will be irreparably harmed by the Commission's rate caps, whereas the public will not be harmed by (and might benefit from) a stay.

A. Telmate Would Suffer Irreparable Harm if the *Order* Took Effect.

Telmate cannot long afford to do business under the *Order*, which in many cases sets rates (and fees) below Telmate's site commission-excluded costs. By also excluding site commissions from ICS providers' costs of business and refusing to design rate caps that allow

⁵⁴ *Order*, ¶¶ 65, 70, 87 n.268, 96, 131 n.458, 143, 204 n.729, 212, 215, 216.

⁵⁵ 47 U.S.C. § 276(b)(1) (emphasis added).

providers to recover those expenses, the *Order* condemns ICS providers in many jurisdictions—including jurisdictions in which Telmate offers service—to either operate at a loss or simply to cease doing business at those locations. As the Commission acknowledges,⁵⁶ Telmate has already warned that if the *Order* took effect, it would not be able to recover its costs of providing ICS to many facilities. And if the *Order* were later reversed, which Telmate has shown is likely, Telmate would have no mechanism for recovering the money it improperly lost while the rate caps were in effect.

Telmate agrees with Global Tel*Link that a stay is necessary because the *Order* does not adequately protect against such irreparable financial losses.⁵⁷ The theoretical possibility that Telmate could renegotiate contracts with hundreds of facilities⁵⁸ does not guarantee that Telmate actually will be able to eliminate its existing site commission obligations, some of which may be required by state law.⁵⁹ And even if Telmate could somehow eliminate all its obligations to pay site commissions, it could not plausibly do so within the 90 days before the new rules become effective.⁶⁰

⁵⁶ See *Order*, ¶ 70 (“A few providers, including . . . Telmate, contend that our rate caps are too low and will not allow them to recover their costs.”).

⁵⁷ See Global Tel*Link Petition at 24-25 (arguing that *Order*’s remedies are inadequate); *id.* at 23 n.96 (collecting cases for the proposition that “[U]nrecoverable losses constitute irreparable harm.”).

⁵⁸ See *Order*, ¶ 132 (noting that new rules “are likely to . . . trigger the renegotiation of many ICS contracts”).

⁵⁹ See Comments of CenturyLink at 9 (citing Tex. Gov’t Code § 495.027(a) & (c)), WC Docket No. 12-375 (filed Dec. 20, 2013).

⁶⁰ *Order*, ¶ 251.

B. A Stay Will Not Harm Other Parties or the Public.

In contrast to Telmate and other ICS providers, which demonstrably will be injured by the new rules, other parties and the public will not be harmed by a stay. In fact, by preserving the compensation available to providers and, thus, preserving the revenue stream needed to fund ICS costs incurred by the facilities, a stay will help ensure that inmates, especially those in high-cost facilities, retain access to ICS pending resolution of this appeal on the merits. Indeed, the U.S. Court of Appeals for the D.C. Circuit has already found that a challenge to the *2013 Order* satisfied the “stringent requirements for a stay pending court review”⁶¹—in other words, the D.C. Circuit has already found that a stay of cost-based interstate rate regulation is in the public interest. A stay of this *Order* would simply leave in place the existing regime established by the *2013 Order* and the D.C. Circuit’s stay, and would not cause any additional harm.

Because the consequences of staying the *Order* would be no different from the stay already in effect, and because the harm ICS providers will suffer under the *Order* is similar to the harm they would have suffered under the *2013 Order*, it is substantially likely that the D.C. Circuit will stay this *Order* pending judicial review if the Commission does not. The Commission has not identified any new exigency or changed circumstances that would require the *Order* to take immediate effect even though its predecessor was stayed.⁶² Indeed, the Commission implicitly conceded that a stay will not harm the parties and public interest when it

⁶¹ D.C. Circuit Stay Order, at 1. The D.C. Circuit applied the four-part test for a preliminary injunction set out in *Winter v. NRDC*, 555 U.S. 7 (2008), which is nearly identical to the test the Commission applies for a stay. *See* 555 U.S. at 7 (“A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”).

⁶² Telmate also agrees with Securus that the public would be harmed if a stay were denied, because some providers may leave the market depriving inmates and their families of *any* ICS services. Securus Petition at 28.

asked the D.C. Circuit to *continue* holding the 2013 appeal in abeyance, knowing that doing so would necessarily perpetuate the stay.⁶³

CONCLUSION

For the foregoing reasons, the Commission should grant a stay of its rate cap and ancillary services charges rules with respect to VoIP and other information services providers.

Respectfully submitted,



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January 6, 2016

⁶³ Mot. of the FCC to Continue Holding Cases in Abeyance, *Securus Techs. v. FCC*, No. 13-1280 (Dec. 7, 2015), ECF No. 1587249, at 1 (requesting that D.C. Circuit “continue to hold the above-captioned cases in abeyance pending the resolution of any petitions for review of the FCC’s order governing inmate calling services released November 5, 2015, or until the period for filing such petitions for review expires”).

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of January, 2016, the foregoing Petition of Telmate, LLC for Stay Pending Judicial Review was served via electronic mail on the following persons:

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