Before the
Federal Communications Commission
Washington, D.C. 20554

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

ORDER DENYING STAY PETITIONS

Adopted: January 22, 2016 **Released: January 22, 2016**

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. Three inmate calling service (ICS) providers, Global Tel*Link Corporation (GTL), Securus Technologies, Inc. (Securus), and Telmate, LLC (Telmate) (jointly, the Petitioners), have each filed petitions for stay of portions of the *2015 ICS Order*.[1] The Wright Petitioners have filed separate oppositions to each of the Petitions.[2] After considering the Petitions and the oppositions, we deny all three petitions for the reasons set forth below.[3]

[1] *See* Petition of Global Tel*Link for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Dec. 22, 2015), http://apps.fcc.gov/ecfs/comment/view?id=60001361606 (GTL Petition); Securus Technologies, Inc. Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136), WC Docket No. 12-375 (filed Dec. 22, 2015) http://apps.fcc.gov/ecfs/comment/view?id=60001361748 (Securus Petition); Petition of Telmate, LLC for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Jan. 6, 2016), http://apps.fcc.gov/ecfs/comment/view?id=60001372226 (Telmate Petition); *see also Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136 (2015) (*2015 ICS Order* or *Order*). None of the petitions seek a complete stay of the entire *2015 ICS Order*. *See* GTL Petition at n. 39 (noting that GTL seeks a stay only as to the rate caps adopted in the *2015 ICS Order*); Securus Petition at i (noting that Securus seeks a partial stay of the *2015 ICS Order*); Telmate Petition at 2 n.5 (seeking a stay of most, but not all, of the rules adopted in the *2015 ICS Order*).

[2] Opposition of Martha Wright et al. to the Petition of Global Tel*Link for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Dec. 29, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001395132 (Opposition to GTL); Opposition of Martha Wright et al. to the Petition for Partial Stay of Second Report and Order Pending Judicial Review Filed by Securus Technologies, Inc., WC Docket No. 12-375 (filed Dec. 29, 2015), http://apps.fcc.gov/ecfs/comment/view?id=60001366740 (Opposition to Securus); Opposition of Martha Wright et al. to the Petition for Stay Pending Judicial Review Filed by Telmate, LLC, WC Docket No. 12-375 (filed Jan. 11, 2016), http://apps.fcc.gov/ecfs/comment/view?id=60001374346 (Opposition to Telmate).

[3] In support of its Stay Petition, on Jan. 5, 2016, Securus filed a Motion for Leave to File a Reply as well as a reply to the Opposition to Securus. *See Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Securus Technologies, Inc. Motion for Leave to File Reply (filed Jan. 5, 2016). The Commission's rules do not allow for replies to oppositions to stay petitions to be filed. *See* 47 C.F.R. § 1.45(d). As such, we deny Securus' motion. The Wright Petitioners' Opposition to Motion for Leave to File Reply is therefore dismissed as moot, as is Securus' reply to the Wright Petitioners. *See Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Opposition to Motion for Leave to File Reply (filed Jan. 6, 2016); *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Securus Technologies, Inc. Reply to Wright Petitioners' Opposition to Motion for Leave to File Reply (filed Jan. 7, 2016). Even if the filings in question had been timely filed, they did not include any new substantive arguments that would have altered our decision to deny the Petitions. We note, however, that this is not the first time that Securus, in particular, has attempted to make filings that are not permitted by the Commission's

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II. BACKGROUND

2. In 2012, the Federal Communications Commission (Commission or FCC) adopted a notice of proposed rulemaking in response to petitions to address ICS rates and practices.[4] The *2012 ICS NPRM* sought comment on various issues affecting the ICS market, including proposed rate caps; collect, debit, and prepaid ICS calling options; site commission payments; and the Commission's statutory authority to regulate ICS.[5] On August 9, 2013, the Commission adopted the *2013 ICS Order*, finding that market forces were not operating to ensure that interstate ICS rates were just, reasonable, and fair.[6] The *2013 ICS Order* focused on reforming interstate site commission payments, rates, and ancillary service charges, but did not address intrastate ICS reforms.[7]

3. In October 2014, the Commission adopted the *2014 FNPRM*, seeking comment on a number of issues identified in the record, including issues related to ICS rates, ancillary service charges, and site commissions.[8] For example, the Commission sought comment on whether it should prohibit site commissions, or whether it should "[set] interstate and intrastate ICS rates at levels that do not include the recovery of site commission payments instead of prohibiting site commission payments directly."[9] The

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rules. *See Notice of Prohibited Presentations in the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 et al.*, WC Docket No. 12-375, Public Notice, DA 15-1341 (OGC, Nov. 20, 2015), 2015 WL 7354030 (providing notice that the Commission received prohibited written presentations in WC Docket No. 12-375 during the Sunshine Agenda period, including a letter from Securus Technologies). We admonish Securus that repeated and willful attempts to circumvent the Commission's procedural rules will not be tolerated and may result in sanctions.

[4] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012) (*2012 ICS NPRM*) (incorporating relevant comments, reply comments, and *ex parte* filings from the prior ICS docket, CC Docket No. 96-128, into WC Docket No. 12-375); *2012 ICS NPRM,* 27 FCC Rcd at 16636, para. 15. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 (filed Nov. 3, 2003) (First Wright Petition); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007) (Alternative Wright Petition).

[5] *See generally 2012 ICS NPRM.* The Commission also sought additional comment on ancillary charges. *See More Data Sought on Extra Fees Levied on Inmate Calling Services*, WC Docket No. 12-375, Public Notice, 28 FCC Rcd 9080 (WCB June 26, 2013).

[6] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, at 14131-32, para. 46 (2013) (noting that "fair" compensation requires that the rates be fair to both ICS providers and ICS end users) (*2013 ICS Order*).

[7] *See id*., at 14132, para. 47; at 14173-74, para. 130. Securus and other parties sought a judicial stay of the *2013 ICS Order* and the United States Court of Appeals for the District of Columbia Circuit granted the stay in part and denied it in part. Securus and other parties sought a judicial stay of the *2013 ICS Order* and the United States Court of Appeals for the District of Columbia Circuit granted the stay in part and denied it in part. The court stayed three rules adopted by the Commission pending resolution of appeals parties filed regarding the *2013 ICS Order*, and the litigation has been held in abeyance. *See Securus Techs. v. FCC,* No. 13-1280 (D.C. Cir. 2013); 47 C.F.R. §§ 64.6010 (Cost Based Rates for Inmate Calling Services), 64.6020 (Interim Safe Harbor), and 64.6060 (Annual Reporting and Certification Requirement). The Court stayed the rule requiring rates to be based on costs, the rule adopting interim safe harbor rates, and the rule requiring ICS providers to file annual reports and certifications. *Id*. The Court allowed other aspects of the *2013 ICS Order* to take effect, including the interim interstate rate caps and Mandatory Data Collection.

[8] *See generally Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170 (2014) (*2014 ICS FNPRM*).

[9] *Compare id*. at 13183-90, paras. 27, 43-44 (seeking comment on whether the Commission should prohibit or cap site commissions) *with id.* at 13190, para. 46 (proposing the approach that the Commission ultimately adopted); *see*
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Commission also sought comment on establishing tiered rate caps for interstate and intrastate ICS and on reforming ancillary charges.[10]

4. After considering the extensive record regarding the matters raised in the *2014 FNPRM,* the Commission adopted the *2015 ICS Order,* which is the subject of the stay petitions.[11] As described further below, the *2015 ICS Order* establishes new rate caps that apply to both interstate and intrastate ICS calls, limits and caps ancillary service charges, adopts reporting and certification requirements, and takes other measures to ensure that ICS rates are consistent with the statute.[12]

5. There is little dispute that the ICS market provides a prime example of a market failure. Each facility selects a single provider that is granted a monopoly contract to offer ICS in that facility.[13] As a result, the ICS market has been characterized by a lack of competitive pressure on prices and a perverse structure that incentivizes providers to raise end users' rates in an effort to win more business. Because rates are set in contracts between providers and correctional facilities – with no input from end users – ICS providers have had no incentive to keep rates reasonable, but had every incentive to offer site commission payments[14] to facilities (sometimes as high as 96 percent of gross ICS revenues)[15] in order to win contracts, as well as the ability to recover these payments by charging end users increasingly high calling rates and ancillary service fees. Until now, inmates and their families, many of them among the most vulnerable members of society, have financed these site commissions, as well as the profits of ICS providers, who have operated as monopolists in the facilities they serve.

6. While the Commission prefers to rely on competition and market forces to discipline prices, the inherently dysfunctional structure of the ICS market has left the Commission with no choice but to intervene to correct the existing market failure. The more than decade long record in this proceeding indicates that, absent regulatory intervention, ICS rates and associated ancillary service fees will likely continue to rise, and prisoners and their families will continue to bear the burden of excessive bills for ICS. After the adoption of interim interstate rate caps in 2013, the Commission hoped that states

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also id. at 13184-86, paras. 29-36 (seeking comment on the Commission's legal authority to regulate site commissions).

[10] *Id*. at 13196-99, paras. 67-72 (seeking comment on tiered rate caps); *see also id.* at 13195-97, paras. 61-66 (seeking comment on a unitary rate cap); *id.* at 13197-208, paras. 87-94 (seeking comment on prohibiting certain ancillary charges and capping rates for others).

[11] *See generally 2015 ICS Order*.

[12] *Id*. *The 2015 ICS Order* also adopts the Third Further Notice of Proposed Rulemaking, in which the Commission seeks comment on promoting additional competition in the ICS marketplace, new technologies being used to deliver inmate communications, the collection of additional data, contract-filing requirements, third-party transaction fees, and international calling. *Id.*

[13] *See, e.g.,* GTL 2012 ICS NPRM Comments at 23 (arguing that considerations such as facility differences, security requirements, training requirements, and labor costs deter correctional facilities from using multiple ICS providers); *see also* Verizon and Verizon Wireless NPRM Comments at 6-7 (suggesting that calling rates may not decrease if multiple ICS providers are allowed to offer service in a correctional facility).

[14] Site commission payments from ICS providers to correctional facilities became more common in the late 1980s and have since become the determinant factor in contract negotiations for the provision of ICS. Letter from Paul Wright, Executive Director, HRDC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 10 (filed Jul. 29, 2015).

[15] Letter from Lee G. Petro, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at Attach. (filed Aug. 16, 2014); Letter from Andrew D. Lipman, Morgan, Lewis, & Bockius, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 5 (filed Jul. 6, 2015) (explaining that site commissions are not constrained by market forces and that "ICS providers had an incentive to offer increased site commissions . . . and consumers had no influence [over site commission payments] even though this expense was being passed through to them.") (Lipman July 6, 2015 *Ex Parte* Letter).

would take a more active role in reforming intrastate ICS rates and ancillary service charges. While this has occurred in a handful of states, the unfortunate reality is that many states have not tackled reform and intrastate ICS rates have continued to increase since the *2013 ICS Order*.

7. In October 2015, the Commission acted to fulfill its statutory mandate of ensuring that ICS rates are just, reasonable, and fair. In order to achieve the necessary relief for consumers, the Commission took a multipronged approach. This approach included, among other things: adopting tiered rate caps that apply to both interstate and intrastate ICS calls; addressing payments to correctional institutions, by excluding site commission payments from the costs used to set the rate caps; limiting and capping ancillary service charges; and establishing a periodic review of ICS reforms. With these reforms, the Commission struck a balance between providing necessary relief to consumers while remaining mindful of the potential impact any new requirements would have on facilities and on ICS providers.

8. The Commission received a significant amount of cost data from ICS providers, as well as comments from ICS providers, inmate advocates, ICS end users, and others. Through a careful review of this information, the Commission balanced all the concerns in the record and crafted a workable framework that ensures rates comply with the directives in the statute without adopting more regulations than necessary to correct a market failure. The record contained many proposals for how to structure the reforms to fix the broken ICS market. These included a variety of proposals for addressing site commissions, ranging from prohibiting site commission payments entirely to maintaining the *status quo*. After examining all of the options in the record, the Commission adopted simple rate caps based on its traditional ratemaking expertise to ensure that rates are fair, just, and reasonable levels, without complicating its traditional rate-cap framework by prohibiting site commissions. Thus, instead of acting indirectly by limiting site commissions in the hope that lower site commission payments would result in rates that are consistent with the statute, the Commission acted more directly by capping the rates at levels that ensure compliance with the requirements of the Communications Act of 1934, as amended (the Act), without seeking to limit or dictate how ICS providers spend revenue they generate within the caps. Capping rates at the tiered levels offers ICS providers and facilities the freedom to negotiate compensation that is fair to all parties, while also ensuring that ICS consumers are charged just, reasonable, and fair rates. While multiple approaches may have led to the same result, the record supports the Commission's decision as a reasonable and sound legal path, grounded in the record evidence and data, to achieving the statutory goals of the Act.

9. As the Commission explained, based on the experience from the *2013 ICS Order*, it expects that the current *Order* will reduce rates, which, in turn, will result in increased ICS call volumes, leading to increased contact between inmates and their families.[16] Thus, lower rates benefit not only ICS consumers, but also the public at large since such contact has been shown to reduce recidivism rates and generate significant savings for tax payers.[17] However, if the *2015 ICS Order* is stayed, the ICS market will continue in its current dysfunctional state, and inmates and their families will continue to pay exorbitant rates for intrastate ICS and ancillary services.

10. On December 22, 2015, GTL and Securus each filed a petition for stay.[18] Telmate later

[16] *See 2015 ICS Order* at para. 6.

[17] *See* Opposition to GTL at 9 (citing Declaration of Coleman Bazelon, Ph.D.) (explaining that "a 1% decrease in the recidivism rate would result in savings of more than 250 million dollars for state, county and local jurisdictions").

[18] *See* Securus Petition at 30 (seeking a stay of the definition of "site commission" in rule 64.6000; fee caps on credit card processing and "single-call service" in rule 64.6020; reporting requirements in rule 64.6060, as they related to site commissions and video-based services; per-call and per-connection charges in rule 64.6080; flat-rate calling in rule 64.6090; and minimum and maximum account balances in rule 64.6100); GTL Petition at 1 (seeking a stay of the rate caps and "other aspects" of the *2015 ICS Order*).

filed a petition for stay on January 6, 2016.[19] GTL argues that it is likely to succeed on the merits of its appeal of the *2015 ICS Order* because the Commission: (1) failed to include the costs of paying site commissions in the rate caps; (2) set the rate caps below the documented costs of many ICS providers; (3) failed to address site commissions; and (4) lacked jurisdiction to impose rate caps on intrastate calls.[20] GTL further argues it will suffer irreparable harm because the rate caps are below what many ICS providers actually pay to provide service and there is no mechanism to recover these amounts.[21] GTL argues that other interested parties would not suffer irreparable injury in the event of a stay because the interim caps on interstate rates would remain effective.[22] Securus also argues that it is likely to prevail on the merits of its appeal of the *2015 ICS Order*. Specifically, Securus argues that the Commission: (1) lacked jurisdiction to regulate financial transaction fees and video-based services; (2) adopted financial transaction fees and caps for "single call services" that are below Securus' demonstrated costs of service; and (3) adopted a definition of site commission that is vague and overbroad.[23] Securus argues that it will suffer irreparable harm because it will lose tens of millions of dollars in up-front, sunk investments and lost revenue.[24] Securus also contends that a stay would not materially harm third parties because the current rules would remain in effect.[25] Finally, Securus claims that the public interest would be harmed if a stay is not granted because Securus alleges that it would stop enabling online credit card transactions and would cease providing Text2Connect and PayNow calling services.[26] Telmate's Petition echoes many of the arguments GTL and Securus make in their petitions.[27] Telmate also argues that "to the extent that Section 276 does not authorize *intra*state rate caps as to any provider, it also does not authorize *inter*state rate caps as to non-telecommunications providers such as Telmate."[28] The Wright Petitioners oppose the petitions of GTL, Securus, and Telmate, arguing that the Petitioners each fail to satisfy the *Virginia Jobbers* test for granting a stay, stressing the importance of the "overwhelmingly positive public interest benefits from the adoption of the [*2013 ICS Order*]" and explaining that any delay in the adoption of the *2015 ICS Order* would delay relief to consumers and harm the public interest.[29]

11. As described below, we find that the Petitioners have failed to demonstrate that they will suffer irreparable harm if the *2015 ICS Order* is not stayed. Nor have they persuaded us that they are likely to succeed on the merits of their arguments or that a stay would be in the public interest. To the contrary, we find that other parties – particularly ICS consumers – will be harmed if the relevant provisions of the *Order* are stayed. Accordingly, we deny Petitioners' requests.

[19] Telmate Petition at 2, n. 5 (seeking a stay of 47 C.F.R. §§ 64.6010, 64.6020, 64.6030, 64.6060, 64.6070, 64.6080, 64.6090, and 64.6100).

[20] GTL Petition at 9-23.

[21] *Id*. at 23-25.

[22] *Id*. at 25.

[23] Securus Petition at 4-23.

[24] *Id*. at 23-27.

[25] *Id.* at 27-28.

[26] *Id*. at 28-29.

[27] "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." Telmate Petition at n.4; *accord id*. at 13.

[28] *Id*. at 13 (emphasis in original).

[29] *See* Opposition to Telmate at 7; Opposition to Securus at 7; Opposition to GTL at 8.

III. DISCUSSION

12. To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.[30] For the reasons described below, the Petitioners have failed to meet the test for extraordinary equitable relief.

A. Petitioners Are Unlikely to Prevail on the Merits

13. Petitioners have failed to demonstrate that they are likely to succeed on the merits. Contrary to the Petitioners' claims – and as explained in greater detail below – section 276 of the Act provides the Commission ample authority to enact the regulations adopted in the *2015 ICS Order*:[31] The rate caps adopted by the Commission are lawful, allowing providers to charge rates that are fair, just, and reasonable; the Commission's approach to site commissions is lawful and reasonable and complies with the requirements of the Administrative Procedure Act (APA); the Commission's decision to cap ICS rates was consistent with section 276's mandate requiring the Commission to ensure fair compensate for interstate and intrastate ICS calls; the Commission's decision to prohibit certain ancillary service charges and limit others was also consistent with the authority Congress explicitly granted the Commission in section 276 and is amply supported by evidence in the record, as was the Commission's treatment of single-call services; and the Commission's imposition of reporting requirements related to video visitations complies with both section 276 and the APA. Accordingly, the Petitioners are unlikely to prevail on the merits of any of their claims.

1. The Adopted Rate Caps Are Lawful

14. *Site Commission Payments were Properly Excluded from the Costs Used to Determine the Rate Caps.* GTL and Telmate argue that the Commission's decision to exclude site commission payments from its calculations resulted in unlawful rate caps.[32] This argument is based on a fundamentally flawed premise: that site commission payments are a legitimate cost of providing ICS. Contrary to GTL and Telmate's claims, however, longstanding Commission precedent makes clear that site commission payments are *not* a "real cost of providing ICS."[33] Therefore, it was entirely proper for

[30] *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*VA Petroleum Jobbers*).

[31] Section 201 of the Act provides additional authority to regulate interstate ICS rates and related ancillary services. *See* 47 U.S.C. § 201(b).

[32] GTL Petition at 9-13; Telmate Petition at 9-10.

[33] *See* GTL Petition at 10; *see also* Telmate Petition at 9-10. Although Telmate argues that facilities demand commissions to compensate them for costs they incur in "hosting" ICS, the evidence in the record shows otherwise. *See* Telmate Petition at 11. First, site commissions are a relatively recent phenomenon and the rapidly ballooning size of site commission payments are unrelated to costs facilities may incur in permitting ICS. *See* Lipman July 6, 2015 *Ex Parte* Letter, WC Docket No. 12-375, at 5 (explaining that "site commissions were not related in any way to cost, nor were they restrained by market forces."); Letter from Paul Wright, Executive Director, HRDC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 10 (filed Jul. 29, 2015); Letter from Gregory J. Ahern, Sheriff-Coroner, Alameda Co., CA to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed Jan. 16, 2015) (noting that site commissions are used mainly to fund a wide and disparate range of activities, including general governmental or correctional activities unrelated to the costs of providing ICS). Second, as explained both in the *2015 ICS Order* and in the text below, revenues from site commissions are commonly used to fund a panoply of programs that bear no relationship to ICS. *2015 ICS Order,* para. 127. Third, although parties continue to allege that facilities incur costs in allowing inmates to access ICS, there has been no credible evidence identifying or quantifying specific costs attributable to ICS. *See id*. at paras. 134-140. Finally – and most importantly – the record indicates that to the extent that facilities incur legitimate costs in connection with ICS, ICS providers can cover those costs while still complying with the Commission's rate caps. *See, e.g.*, *id*. at para. 139.

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the Commission to exclude these non-ICS costs from its rate cap calculations. Indeed, the Commission's action was consistent with the relevant provisions of section 276, which focus on "the provision of inmate telephone service in correctional institutions, and any ancillary services."[34]

15. As the Commission reaffirmed in the *2015 ICS Order,* the evidence in the record demonstrates that site commissions are "not reasonably related to the provision of ICS."[35] Rather, they are payments made to entice facilities to select a particular ICS vendor, and the funds are used to pay for a wide variety of educational, vocational, recreational and rehabilitative programs and/or a general revenue fund wholly unrelated to ICS.[36] Even if these programs are worthy endeavors, their costs – unlike the costs of network infrastructure, telecommunications equipment, and similar expenditures – cannot reasonably be attributable to ICS[37] and have no bearing on the determination of what constitutes fair compensation for ICS calls. Indeed, the Commission's treatment of site commissions in the *2015 ICS Order* – i.e., excluding the costs of site commission payments from the rate cap calculations – is consistent with longstanding precedent establishing that site commissions, and similar payments, such as location rents, are not costs that are reasonably and directly related to the provision of ICS and should not be recoverable through ICS rates.[38] Thus, even if site commission payments may indeed be "real costs,"

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As the Commission explained, it was not clear from the record that facilities bear any costs that are directly and reasonably related to the provision of ICS. *Id*. Many of the costs facilities claim to incur are either borne by the providers or are not directly related to the provision of ICS. *Id.* If facilities decide to "in-source" aspects of ICS that are traditionally borne by ICS providers, those decisions should result in a concomitant cost savings to ICS providers. Providers should be able to share those savings with the facilities without charging rates that exceed the generous caps set by the Commission. *See id.* at para. 139 and n. 497.

[34] 47 C.F.R. § 276(d). Thus, in ensuring fair compensation, consistent with the statute, the Commission does not take cognizance of any and all costs incurred by ICS providers. Instead, it considers only those costs that are reasonably and directly related to "the provision of" ICS. For example, while the Commission considers the costs of network infrastructure, telecommunications equipment, and other similar expenses in determining fair compensation for ICS providers, it does not include site commission payments or other costs that are not directly related to the provision of ICS. *See, e.g.*, *2015 ICS Order*, para. 142; *see also* Opposition to GTL at 2 (explaining that "rather than being in the same category as 'telephone equipment or the lease of local telephone lines,' site commissions operate outside the costs that are necessary to initiate, connect and complete and ICS call").

[35] *2015 ICS Order* at para. 123; Letter from Andrew D. Lipman, Morgan, Lewis, & Bockius, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 9 (filed Apr. 8, 2015); *see also id.* at 10-13 (describing a wide variety of programs that are supported by site commissions but are unrelated to ICS); PPI Second FNPRM Reply at 7-9 (filed Jan. 27, 2015).

[36] *See* Opposition to GTL at 2 (noting that site commissions came into existence as "a vehicle for . . . ICS providers to win contracts to provide ICS to correctional facilities"); *see also, e.g., 2015 ICS Order* at para. 123, n. 400; Securus Second FNPRM Reply at 12-13 (noting that it is "well documented in the record . . . that correctional facilities rely on site commission payments to fund prison initiatives and administer inmate welfare programs").

[37] *2015 ICS Order* at para. 126

[38] *See, e.g.*, *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* 17 FCC Rcd 3248, at 3254, para. 15 (*2002 ICS Order*). GTL and Telmate appear to use "site commissions" as a synonym for "location rents." GTL Petition at 10 (claiming that site commissions are "in effect, location rental payments."); Telmate Petition at 10 (using "site commissions" and "location rents" interchangeably). It is clear from the record, however, that site commission payments encompass much more than simply compensating facilities for the space used to house an ICS telephone. *See, e.g.*, *2015 ICS Order* at para. 126 (describing the wide variety of programs that site commission payments are used to support); *see also* Lipman July 6, 2015 *Ex Parte* Letter at 5. Indeed, even GTL admits that site commission payments are used to "support inmate health and welfare programs and other prison initiatives" that bear no relationship to the provision of ICS. GTL Petition at 11. GTL further conceded that even where a part of site commission payments are used to compensate facilities for the cost of providing space for ICS, "it is typically a de minimis charge in exchange for the placement of telephones." GTL Mar. 25, 2013 Comments at 13. Moreover, the Commission has long excluded even location rents from the costs that are relevant to determining fair compensation under section 276. *See, e.g.*, *In the Matter of*
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they are not reasonably and directly related to the provision of ICS and, therefore, it would neither be consistent with longstanding precedent nor fair, just, or reasonable to pass those costs onto consumers as part of the rates for ICS.[39]

16. In addition, GTL's assertion that the Commission "fail[ed] to address site commissions" in the *2015 ICS Order* is demonstrably incorrect, as is GTL's claim that the Commission "endorse[d] . . . site commissions."[40] In fact, the Commission addressed site commissions at length.[41] The Commission noted that several parties supported a ban on site commissions, while others questioned whether the Commission had the authority to impose such a ban.[42] Ultimately, the Commission adopted a middle ground that was supported by evidence in the record. Specifically, the Commission restricted site commission payments, but only "indirectly, by imposing caps on ICS providers' rates, thereby limiting the amount of profit available to pay site commissions."[43] This approach, which was supported by a wide cross-section of commenters,[44] was further bolstered by the Commission's conservative approach to setting rate caps, which were designed to reflect a reasonable, data-based approximation of the costs of providing ICS (including a reasonable return on capital), but an approximation sufficiently conservative to leave a "cushion" for reasonably efficient providers to pay modest site commissions while still earning

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Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996, 14 FCC Rcd 2545, 2577, para. 97 and 2616, para. 156 (1999); *2002 ICS Order*, 17 FCC Rcd at 3254, para. 15 ("location rents are not a cost of payphones"). Indeed, rather than representing a cost to facilities, the record indicates that ICS provides a benefit to the facilities, just as payphones provide a benefit to premises owners. *See, e.g.*, Letter from Paul Wright, Executive Director, HRDC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 9 (filed Jul. 29, 2015) ("Telephone calls from prisons and jails are a privilege… they serve as an incentive for good behavior and can be removed or restricted for bad behavior… [t]he ability to speak with family, particularly spouses and children, gives prisoners an incentive to follow the rules, which benefits the facilities where they are housed.").

[39] *See 2015 ICS Order*, para. 121; *2013 ICS Order*, 28 FCC Rcd at 14135-37, paras. 54-56; *see also 2015 ICS Order* at para. 142 (explaining that if an ICS provider chose to purchase a fleet of private jets for its executives to use, the cost of the jets – while "real" and substantial – would not be included in the costs used to determine fair compensation for ICS because it is not reasonably related to the provision of the service.) Telmate's attempt to attack this analogy falls flat. Telmate Petition at 10. Telmate's claims notwithstanding, facilities are unlikely to deprive inmates of ICS even in the absence of site commission payments. *See 2015 ICS Order,* para. 140 (explaining that facilities have incentives to continue allowing ICS regardless of whether they receive site commissions); *see also supra* at para. 15 (debunking arguments that site commission payments are used to cover facilities' ICS-related costs). As the Commission explained in *2013 ICS Order*, site commission payments are analogous to revenues that are shared in access stimulations schemes, which the Commission has found should not be included in the costs used to set rates for rate-of-return carriers. *See 2013 ICS Order*, 28 FCC Rcd at 14137, para. 55; *cf. USF/ICC Transformation Order,* 26 FCC Rcd at 17876-85, paras. 666, 684-86.

[40] GTL Petition at 2 (claiming that the Commission endorsed site commissions, yet prevent[ed] ICS providers from recovering that real cost of providing service."); *id.* at 15-20. GTL fails to explain how the Commission could both "endorse" site commissions and fail to address them in the same order. In reality, it seems that GTL is simply disappointed that the Commission failed to regulate site commissions in the manner GTL would have liked. As explained below, however, the Commission's treatment of site commissions was a reasonable response to the evidence and arguments presented in the record and is consistent with the Commission's preference to rely on market forces, rather than regulatory fiat, whenever possible. *See 2015 ICS Order*, para. 130.

[41] *See 2015 ICS Order*, paras. 117-143.

[42] *See id*. at para. 127 (also noting that a group of commenters favored the continued use of site commissions).

[43] *See id*. (citing broad record support for this approach).

[44] *See id*. at para. 124 (noting that the Commission's approach to site commissions was supported by "inmate advocates, such as the Wright Petitioners and the Civil Rights Coalition . . .; providers, such as CenturyLink and NCIC; United States Senators; and state regulators, such as the Alabama PSC.").

a profit.[45] There were a number of reasons the Commission decided not to prohibit site commissions entirely. These reasons include, but are not limited to, a desire to: (1) ensure that facilities could receive appropriate compensation for any costs they might incur if they decide to "in-source" any aspects of providing ICS;[46] (2) avoid potentially impinging on state sovereignty – or the rights of correctional facilities – unnecessarily when the Commission could ensure that ICS rates are just, fair, and reasonable without doing so;[47] and (3) foster a market-based resolution rather than act purely by regulatory fiat.[48]

17. As the Commission clearly explained in its *Order*,

> [t]he fact that we do not prohibit site commission payments does not mean, however, that we have failed to address site commissions. To the contrary, we have addressed the harmful effects of outsized site commissions by establishing comprehensive rate caps and caps on ancillary service charges that may limit providers' ability to pass site commissions through to ICS consumers. We have also made the considered decision to establish caps on rates and ancillary service charges and allow market forces to dictate adjustments in site commission payments.[49]

These actions were taken based on the Commission's core ratemaking authority and were designed to ensure fair, just, and reasonable ICS rates. Prior to the *2015 ICS Order*, providers were able to use inflated intrastate rates and ancillary service charges to fund exorbitant site commissions at the expense of ICS consumers.[50] That is no longer the case, as the Commission's decision to cap both interstate and intrastate rates and constrain providers' ability to exploit ancillary service charges, eliminated – or at least severely limited – the distortive effects of site commissions.[51] Moreover, the Commission reiterated that it would continue to monitor the ICS market and would "not hesitate to take additional action to prohibit site commissions, if necessary."[52]

18. Like its claim that the Commission failed to address site commissions, GTL's claim that the Commission "endorsed" the use of site commissions also ignores the plain language of the *2015 ICS Order*. In the *Order*, the Commission explicitly cautioned that its "decision not to prohibit site

[45] *See, e.g.*, *id.* at paras. 57, 59, 114. Somewhat ironically, the conservative nature of the Commission's caps was highlighted by GTL's recent decision to provide service to inmates in Virginia prisons for just over $0.04 per minute, well below the $0.11 per minute rate cap the Commission adopted for prisons. *See* Letter from Paul Wright, Executive Director, HRDC, to Chairman Wheeler, FCC, WC Docket No. 12-375, at 1 (filed Dec. 31, 2015) (quoting Brian Oliver, CEO of GTL's statement explaining that the four-cent rate is sufficient to allow GTL to "provide the necessary security and safety features to protect the public."); *see 2015 ICS Order*, para. 9, Table One; *see also* Assemb. 4576, 216th Leg., Reg. Sess. (N.J. 2015) (enacting legislation capping ICS rates at 11 cents per minute).

[46] *See 2015 ICS Ord*er, para.139, n. 497.

[47] *See id.* at paras.130, 139.

[48] *See id.* at paras. 128, 130. The Commission's approach also leaves open the door for further action on site commissions if it finds that market forces are insufficient to adequately constrain ICS rates and/or ancillary service charges. *See infra* para. 17; *id.* at para. 129.

[49] *Id*. at para. 128.

[50] Although the *2013 ICS Order* regulated rates for interstate ICS calls, it did not address intrastate rates or impose specific limits on ancillary charges. *See 2013 ICS Order*, 28 FCC Rcd at 14138-14153, 14156-14159, paras. 59-81 (addressing interstate ICS rates), 90-93 (discussing ancillary charges, but not adopting any specific limits beyond those inherent in sections 201 and 276).

[51] *2015 ICS Order*, para. 129 (explaining that "the caps and restrictions we impose on providers' rates should eliminate or substantially reduce the ability of site commissions to inflate rates above providers' costs or reasonable profit to otherwise distort ICS rates.").

[52] *Id*.

commission payments should not be viewed as an endorsement of such practices."[53] Indeed, the Commission's decision not to ban site commissions is no more an "endorsement" of such payments than the federal government's decision not to prohibit cigarettes is an "endorsement" of smoking. In both cases, the government permits potentially harmful behavior without condoning it.

19. GTL and Telmate argue that site commission payments must be included in the data used to calculate ICS rate caps because "[m]any states and local correctional authorities" require site commission payments, "sometimes because of a statutory mandate."[54] Telmate also asserts that states will continue to demand site commissions, and argues that there are "states where commissions are statutorily mandated."[55] GTL and Telmate grossly overstate the issue, however. In fact, evidence in the record indicates that only one state, Texas, appears to require the payment of site commissions.[56] Even the statutory provision in Mississippi that GTL cites in its petition does not require ICS providers to pay site commissions; it merely dictates how site commissions must be used *if* they are collected.[57] Moreover, there is evidence in the record that providers can pay site commissions while charging rates that comply with the adopted rate caps.[58] Furthermore, the *2015 ICS Order* includes mechanisms for providers to obtain relief if they cannot obtain fair compensation under the applicable rate caps.[59] These include the ability to petition the Commission to preempt inconsistent state requirements or for waiver of the rate caps.[60]

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[53] *Id*.; *see also id*. at para. 130, n. 446 (discussing some of the harmful effects of site commissions).

[54] GTL Petition at 11.

[55] Telmate Petition at 10.

[56] *See* Tex. Gov't Code Ann. § 495.027(a)(2) (West 2009) (prohibiting the corrections board from awarding a contract to ICS vendor unless the provider pays a commission based on gross revenues received from the use of the services provided). Although ICS providers are contractually obligated to pay site commissions in certain other states, those states do not have statutory provisions requiring the payment of site commissions. *See, e.g.*, Contract between ICSolutions and State of New Hampshire, http://www.admin.state.nh.us/purchasing/Notice%20of%20Contract%20SIGNED/8001393%20Svs,%20Inmate%20&%20Pay%20Telephone-IC%20Solutions.pdf (last visited Jan. 5, 2016); Prison Phone Justice, Pennsylvania State Prison Rates and Phone Kickbacks, https://www.prisonphonejustice.org/state/PA/ (last visited Jan. 5, 2016).

[57] *See* GTL Petition at 11 (citing Miss. Code Ann. § 47-5-158). Although the Mississippi statute cited by GTL dictates that any site commission payments must be directed into a specified fund, it does not require that ICS contracts include site commissions. *See* Miss. Code Ann. § 47-5-158.

[58] *See, e.g.*, *2015 ICS Order*, para. 128 (noting that Pennsylvania and New Hampshire have per-minute rates of $0.06 or less – far below the Commission's rate caps – while requiring site commissions of 35 percent and 20 percent, respectively); *see also id*. n. 439 (citing record evidence that New Hampshire has effective intrastate rates below $0.06 despite imposing a site commission of 20 percent); *id.*, n. 428. These rates serve as proof that providers can offer rates well within the Commission's caps even if they pay site commissions as high as the 40 percent required by Texas. *See* TX GV. Code Ann. § 495.027(a)(2).

[59] *See 2015 ICS Order* at paras. 211-12; *see also id.* at paras. 217-20. We also note that all of the cited examples, from Texas, Pennsylvania, and New Hampshire, assess site commissions based on a percentage of revenue. *See supra* notes 57 and 58. Neither GTL nor Telmate have proven that they cannot pay such percentage-based commissions – or any other commissions for that matter – while charging rates that comply with Commission's rate caps. *See, e.g.*, *supra* note 58.

[60] *Id.* Telmate's argument that the Commission cannot rely on waivers to satisfy the requirements of section 276 is inapposite. *See* Telmate Petition at 15. The Commission is not relying on a waiver process to ensure fair compensation. *Contra id.* Rather, the Commission established a complete regulatory framework, addressing rates, ancillary service charges, and other issues, all of which ensure that the compensation paid to ICS providers is fair, just, and reasonable. The waiver process described in the *2015 ICS Order*, is simply a safety valve that can be used if there are specific situations in which a particular provider finds that it cannot obtain fair compensation without a limited waiver of the Commission's rules.

20. In addition, as explained in greater detail below, the record does not support GTL's claims that it will not be able to renegotiate its ICS contracts to reflect the new rules, including the new rate caps.[61] Accordingly, the Commission reasonably expects providers to renegotiate contracts, as needed, to ensure that they comply with the new rate caps.[62] In some cases, those renegotiations may include reducing or eliminating site commission payments.[63]

21. *The Adopted Rate Caps Do Not Deny ICS Providers Fair Compensation*. GTL and Telmate contend that "in some cases" the Commission's rate caps would deny ICS providers fair compensation.[64] Similarly, GTL asserts that "[a] rate cap that is intended to allow parties with average costs . . . to recover their costs will inevitably deny fair compensation to those providers and in those facilities with higher than average costs."[65] The Commission accounted for facilities with higher than average costs when it adopted tiered rate caps, however.[66] Specifically, the Commission adopted one set of rate caps for calls from prison facilities and a higher set of rate caps for calls from jail facilities, broken out by facility size, to make certain that the "rate caps will most closely conform to the costs as filed in the record."[67] In support of rate tiering the Commission reasoned that "[a]s a group, jails are more varied than prisons and, as we have discussed herein, there are economies of scale to be gained as facility size increases."[68]

22. As discussed in the *2015 ICS Order*,[69] basing rates on average costs is a reasonable approach to ratemaking that has been repeatedly affirmed by the courts.[70] The Commission set the adopted rate caps based on an average of the reported costs received in response to the Mandatory Data Collection.[71] The Commission did not manipulate or question these data filings, but took them at face value.[72] In fact, the Commission's approach to rate averaging in the *2015 ICS Order* resulted in higher rate caps for collect calling than those adopted in the *2013 ICS Order*.[73]

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[61] *Compare* GTL Petition at 13 *with 2015 ICS Order*, paras. 132, 213-15; *see also infra* at para. 64.

[62] *2015 ICS Order*, paras. 213-16.

[63] In the event that a provider is unable to renegotiate a contract that would prevent compliance with the Commission's new regulations, it may seek relief from the Commission. *See 2015 ICS Order*, paras. 217-20; *see also id.* paras. 211-12.

[64] GTL Petition at 13; *see* Telmate Petition at 8-12.

[65] GTL Petition at 15; *see also* Telmate Petition at 9 (arguing that the Commission's rules only allow economically efficient" providers to recover their costs).

[66] We note that the Commission used the data supplied by the providers without manipulating it, despite evidence in the record that the data were inflated. *See infra* n. 72. The data and the Commission's rate caps also do not account for the likely increase in call volumes that the Commission predicts will result from lower ICS rates. *See infra* at para. 53.

[67] *2015 ICS Order*, at para. 46.

[68] *Id*. This approach was supported by the data received in response to the Mandatory Data Collection. *See id*.

[69] *Id*. at para. 115 (citing *FPC v. Natural Gas Pipeline Co.,* 315 U.S. 575, 585*)*.

[70] "[T]he Supreme Court has affirmed ratemaking methodologies employing composite industry data or other averaging methods on more than one occasion." *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344 at 1352 (1999); *see also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 14 FCC Rcd 2545 (1999)*.

[71] *See 2015 ICS Order*, at Section IV.A.3.

[72] *Id*. at para. 53 ("We take the data at face value, even though the analysis shows that there is significant evidence – both from our *own* analysis and commenters' critiques – suggesting that the reported costs are overstated.").

[73] *See 2013 ICS Order*, 28 FCC Rcd at 14111, para. 5.

23. Telmate complains that the Commission's rate caps are "intended to capture the costs of only some providers."[74] Likewise, GTL suggests that the Commission should set rate caps based on data from the least efficient or highest cost ICS provider.[75] The Commission reasonably declined to take this approach, however. First, the Commission determined that the record contained no reasonable justification for the costs reported by the highest cost providers, stating that "no providers have submitted evidence that their higher costs may be attributable to higher-quality or more technologically advanced ICS."[76] Second, the Commission recognized that, consistent with the overarching goal of this proceeding – to curb excessive and unaffordable charges for ICS[77] – it did not make sense to rely solely on data from the least efficient or highest cost ICS providers.[78] This type of "reform" would only reward inefficiency, resulting in unfairly high compensation in violation of the statute.[79]

24. Average costs may, by definition, leave some providers with costs on some calls or from some locations above the caps, as well as some providers with costs on some calls or from some locations below the caps, this does not mean that the rates are unfair or otherwise unlawful. Rather, this variation in costs supports the averaging of rates across all calls.[80] GTL argues that the Act "requires the Commission to ensure that ICS providers are fairly compensated for "*each and every* . . . call using their payphone," suggesting that the Commission must ensure that not one call is provided at a loss.[81] This interpretation of section 276's "each and every" requirement is not only unreasonable but is administratively infeasible and unworkable. Such a strict reading of the statutory language would require an individual rate for every ICS call. It defies logic that Congress expected the Commission to formulate a unique rate for each call based on the specific characteristics of the particular location and provider involved. Such an approach would be irrational and contrary to Commission precedent establishing that "[g]iven the goals of the 1996 Act, we will not construe section 276 inflexibly to require that each call

[74] Telmate Petition at 9.

[75] *See* GTL Petition at 14.

[76] *See 2015 ICS Order* at para. 59.

[77] *See, e.g.*, *id*. at para. 1.

[78] "An analysis of the adopted rate caps shows that some providers will recover more than their stated costs, while other will recover less (because the caps are based on weighted industry averages but, as explained above, we believe all providers can more than recover the efficient costs of ICS supply)." *2015 ICS Order*, at para. 73. "We need not set our rate caps at the level of the highest cost providers, but can use the rate cap to encourage more efficient provision of ICS." *Id.* at n.222.

[79] Setting rates based on the highest-cost calls or providers would also create perverse incentives for current ICS providers or companies looking to enter the market. Fair compensation has consistently been, over the course of many years, interpreted by the Commission to mean fair to both the provider and the paying customer. *See 2002 ICS Order*, 17 FCC Rcd at 3254-58, paras. 14-24; *see also 2013 ICS Order*, 28 FCC Rcd at 14115, para. 14 ("The Commission has previously found the term 'fairly compensated' permits a range of compensation rates that could be considered fair, but that the interests of both the payphone service providers and the parties paying the compensation must be taken into account." (internal citations omitted); *see also 2014 ICS FNPRM*, 29 FCC Rcd at 13184-85, para. 30 ("While the Commission has previously found the phrase 'fairly compensated' to be ambiguous, and acknowledged that a range of compensation rates could be considered fair, it has treated the concept of fairness as encompassing both the compensation received by ICS providers and the cost of the call paid by the end user."); *see also 2015 ICS Order*, para.114. Through the ratemaking process described in the *2015 ICS Order*, the Commission has developed just, reasonable, and fair ICS rates. *See id*. at para. 115. "Based on the record and our own analysis described below, we find that our prescribed rate caps as outlined above are more than sufficient to allow providers to recover efficiently-incurred ICS costs (excluding reported commissions)." *Id*. at para. 54. The adopted rates are also supported by multiple commenters in the record, including certain ICS providers. *See id*. at para. 115.

[80] Telecommunications companies, including ICS providers, routinely charge uniform rates even though calls between some locations may be more expensive to serve. *See e.g.*, *APCC v. FCC*, 215 F.3d 51, 54 (D.C. Cir. 2000).

[81] GTL Petition at 15; *see also* Telmate Petition at 9.

makes an identical contribution [to the shared and common cost of the payphone]."[82] As such, the "each and every" statutory language must be subject to a reasonable "per-call compensation plan."[83] We follow well-settled precedent in finding that Congress authorized the Commission to promulgate an administratively feasible plan for regulating rates for payphone services, including ICS.[84]

25. *The Adopted Rate Caps Do Not Violate the Constitution*. Contrary to GTL's argument, and for the reasons provided above and herein, GTL's Petition does not support a Fifth Amendment claim. GTL argues that "because the rates deny ICS providers the ability to recover the costs that they actually incur, they violate the Fifth Amendment."[85] As an initial matter, the adopted regulations do not involve the permanent condemnation of physical property and thus do not result in a *per se* taking.[86] Moreover, in evaluating regulatory takings claims, the Supreme Court has stated that three factors are particularly significant: "(1) the economic impact of the government action on the property owner; (2) the degree of interference with the property owner's investment-backed expectations; and (3) the 'character' of the government action."[87] GTL's brief argument does not begin to explain how the rate caps adopted in the *2015 ICS Order* meet any of these considerations, nor does GTL allege that the caps will "destroy the value of [its] property for all the purposes for which it was acquired" or deprive "all or most economic use" of its property as would be necessary to give rise to a tenable claim under the Fifth Amendment's Takings Clause.[88]

26. GTL's Fifth Amendment argument also ignores the availability of the Commission's waiver process if an ICS provider cannot recover its legitimate costs of providing service through the adopted rate caps.[89] In reaffirming the waiver process adopted in the *2013 ICS Order* the Commission recognized, in the *2015 ICS Order*, "that we cannot foreclose the possibility that in certain limited instances, our rate caps may not be sufficient for certain providers."[90] The availability of the Commission's waiver process further undermines GTL's "takings" argument.

2. The Commission's Treatment of Site Commissions is Entirely Lawful

27. *The Commission's Adopted Approach to Site Commission Payments Does Not Violate the APA*. GTL argues that the Commission violated the APA because it (1) failed to address site

[82] *2002 ICS Order*, 17 FCC Rcd 3248, para. 23. "[W]e conclude that the relevant statutory language does not require *every* call to make an identical contribution to shared and common cost. Section 276 directs the Commission to create a 'per call compensation plan' to guarantee fair compensation, but it does not require the Commission to create the most inflexible and intrusive plan." *2002 ICS Order*, 17 FCC Rcd 3248, para. 23. *See also* 47 C.F.R. § 64.1300 (establishing a single payphone compensation rate).

[83] *See* 47 U.S.C. § 276(b)(1)(A); *see also 2015 ICS Order*, at para. 109.

[84] *New England Public Comm'ns Council, Inc. v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) (*New England Public Comm's Council*); *see also Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) ("§ 276 substantially expands the Commission's jurisdiction and gives it broad authority to regulate both intrastate and interstate payphone calls.") (*citing Illinois Public Telecommunications Association*, 117 F.3d at 561-62), *aff'd sub nom. Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007).

[85] GTL Petition at 12.

[86] *See Loretto v. Teleprompter Manhattan City Corp*., 458 U.S. 419, 427 (1982) ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.").

[87] *2013 ICS Order*, 28 FCC Rcd at 14163-64, para. 104.

[88] *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (citation and internal quotation marks omitted); *see also Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1109 (D.C. Cir. 2011).

[89] *See 2015 ICS Order*, at Section IV.F.

[90] *See id*. at para. 219.

commissions; and (2) departed from "the course contemplated in the *2014 NPRM*."[91] Neither of these arguments has any merit. First, as explained above and in the *2015 ICS Order,* the fact that the Commission decided not to prohibit site commissions did not constitute a failure to address the issue.[92] To the contrary, after examining the record – including arguments that it lacked the authority to regulate or prohibit site commissions and that any attempts to limit site commissions would be subject to gaming – the Commission decided that the best way to address the harmful effects of site commissions was to set conservative rate caps that ensured that ICS rates were fair, just, and reasonable and to leave it to the market to determine whether and how much providers will pay in site commissions.[93]

28. Second, the approach adopted by the Commission was neither a "bait-and-switch" nor an impermissible "change of course."[94] In the *2014 FNPRM*, the Commission sought comment on site commissions, including whether it should take a more "market-based approach" to ICS.[95] In fact, the Commission specifically sought comment on the precise proposal it ultimately adopted, asking whether it should "set[] interstate and intrastate ICS rates at levels that do not include the recovery of site commission payments instead of prohibiting site commission payments directly."[96] It also sought comment on its legal authority regarding site commissions, and on whether it should establish permanent rate caps for all interstate and intrastate calls and limit ancillary service charges.[97] After receiving extensive comments, the Commission analyzed the record and adopted comprehensive reforms that included a market-based approach to site commissions,[98] final rate caps for interstate and intrastate calls,[99] and limits on ancillary service charges.[100]

29. Just because the Commission did not directly regulate site commission payments in any of the multiple manners that GTL suggested during the pendency of this proceeding does not mean it violated the APA or performed a "switcheroo."[101] Despite GTL's assertions to the contrary, the Commission was not required to adopt the specific proposals it presented in the *2014 FNPRM*. Those proposals were not a "promise."[102] Rather, they were, as the Commission plainly stated, proposals on

[91] GTL Petition at 15-20.

[92] *See supra* para. 16; *2015 ICS Order* at para. 128.

[93] The approach the Commission adopted also accommodates concerns in the record that simply prohibiting site commissions without a transition period would preclude the ability of jails to "modify their budgets to account for the loss of revenues." National Sheriffs' Association Jan. 27, 2015 Reply Comments at 4. The *2015 ICS Order* allows facilities and providers the flexibility to negotiate fair site commission payments, and leaves open the possibility for the Commission to address site commission further in the future either by adjusting the rate caps downward over time or by regulating site commissions directly.

[94] GTL Petition at 19.

[95] *2014 ICS FNPRM,* 29 FCC Rcd at 13174, para. 6.

[96] *Id*. at 13190, para. 46.

[97] *See id.* at 13174, para. 6.

[98] *See 2015 ICS Order,* para. 130.

[99] *See id.* at para. 91 (noting that the Commission expects providers to set rates below the rate caps, especially as costs decline and efficiencies are gained); *see also id.* para. 116.

[100] *See id.* at para. 9, Table Two; *id.* paras. 144-193.

[101] *See* GTL Petition at 19.

[102] *Cf. id*. at 19. Nor did the Commission "promise" the court that it would adopt a new, market-based approach to ICS. *See id.* Despite GTL's attempt to mischaracterize the Commission's statements, the Commission merely explained to the court that it was seeking comment on "'a more market-based approach' with rate caps as a 'backstop.'" Motion of the Federal Communications Commission to Continue Holding Cases in Abeyance at 3, *Securus Techs., Inc. v. FCC* (D.C. Cir. No. 13-1280 and consolidated cases), Dkt. #1588241. This statement was

(continued…)

which the Commission solicited comments.[103] Indeed, the whole point of notice-and-comment rulemaking under the APA is to require agencies to make proposals and then rationally assess, based on comments from the public, whether it makes sense to adopt those proposals, revise them, or discard them altogether.[104] Requiring agencies to rigidly cling to proposals after receiving and evaluating comments would vitiate the very purpose of the APA.[105] Here, after receiving comments on the proposals, the Commission reviewed and analyzed the record, and then issued an order adopting reforms that were consistent with the evidence in the record, charting a middle course between prohibiting site commissions, as some parties favored, and taking no action at all, as other parties asked.[106]

30. GTL's argument that it was "deprived . . . of a meaningful opportunity to comment on the rules ultimately adopted," is similarly baseless and ignores the fact that the Commission specifically sought comment on the action it wound up adopting.[107] This clearly put parties on notice of the fact that the Commission might not regulate site commissions directly.[108] In addition, the Commission specifically

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entirely factual and true – the Commission did seek comment on these issues, as well as others. *See, e.g., 2014 ICS FNPRM*, 29 FCC Rcd at 13174, para. 6. In fact, the Commission adopted a "market-based approach" to site commissions and adopted rate caps that act as a "backstop." *See supra* para. 25.

[103] *See, e.g.*, *2014 ICS FNPRM*, 29 FCC Rcd at 13177-79, paras. 15-19 (listing various proposals and topics on which the Commission was seeking comment).

[104] As the Wright Petitioners aptly explain, "the APA does not require the FCC to adopt every proposal contained in a notice of proposed rulemaking. Instead, the FCC has the discretion as the expert agency to review the relative merits of their proposals in light of public comment, and adopt final rules." Opposition to GTL at 5. It is a well-established tenet of administrative law that an agency is not required to adopt positions it proposes and on which it seeks comment. *See, e.g.*, *Miami-Dade Cty. v. U.S. E.P.A.*, 529 F.3d 1049, 1058-59 (11th Cir. 2008); *Ass'n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000); *Am. Fed'n of Labor & Cong. Of Indus. Organizations v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) ("[i]t is, of course, elementary that a final rule need not be identical to the original proposed rule.). Indeed, "[s]uch a restriction would 'undermine the purpose of notice and comment – to allow an agency to reconsider, and sometimes change, its proposal based on the comments of the affected persons.'" *Miami-Dade*, 529 F.3d 1049, 1058-59 (quoting *Ass'n of Battery Recyclers*, 208 F.3d 1047, 1058).

[105] *See*, *e.g.*, *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1300 (D.C. Cir. 2000) ("[A]ny reasonable party should have understood that EPA might reach the opposite conclusion after considering public comments. In short, it is fair to say that the purpose of notice and comment rulemaking has been served, and that the Agency's change of heart on this issue only demonstrates the value of the comments it received."); *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 9517 (D.C. Cir. 2004) ("EPA is not required to adopt a final rule that is identical to the proposed rule. Indeed, '[i]f that were the case, [EPA] could learn from the comments on its proposals only at the peril of subjecting itself to rulemaking without end.' Agencies, are free — indeed, they are encouraged — to modify proposed rules as a result of the comments they receive.") (citations omitted); *Kooritzky v. Reich,* 17 F.3d 1509, 1513 (D.C.Cir.1994) ("It is an elementary principle of rulemaking that a final rule need not match the rule proposed, indeed must not if the record demands a change.").

[106] *Compare 2015 ICS Order*, para. 127, n. 422 (citing filings by HRDC, American Bar Association, and U.S. Conference of Catholic Bishops, among others, urging the Commission to prohibit site commissions) *with id.* ns. 425-27 (citing filings by ICSolutions, CenturyLink, and several law enforcement organizations arguing that the FCC should not restrict or regulate site commission payments).

[107] *Compare* GTL Petition at 19 *with 2014 ICS FNPRM*, 29 FCC Rcd at 13190-91, para. 46 (proposing that, rather than regulating site commissions directly, the Commission simply adopt rate caps that do not include the recovery of site commission payments). GTL's argument is further weakened by the fact that the company repeatedly argued against banning site commissions and even asserted that the proper treatment of site commissions "is simply not amenable to a uniform national solution." Opposition to GTL at 5 (citing various GTL filings and quoting *GTL Comments*, CC Docket No. 96-128, p. 7 (filed May 7, 2007)).

[108] *See 2014 ICS FNPRM*, 29 FCC Rcd at 13197-99, paras. 67-72 (seeking comment on a variety of approaches to rates, including tiered rate caps); *id*. at 13205-10, paras. 87-98 (seeking comment on reforms to ancillary charges).
(continued…)

sought comment on whether it had the legal authority to prohibit site commissions,[109] and several parties presented substantial arguments that the Commission lacked such authority.[110] It was entirely consistent with the APA for the Commission to consider such arguments, rather than blindly adopt the proposals set forth in the *2014 FNPRM*.[111] Indeed, as the Wright Petitioners point out, GTL itself questions whether the Commission has the authority to ban site commission payments, even as GTL makes the Commission's reasoned decision not to ban such payments "the basis for its judicial appeal."[112]

31. *The Definition of "Site Commission" Is Neither Fatally Vague nor Overly Broad*. We reject Securus' argument that the Commission's definition of site commissions is fatally vague and overly broad.[113] First, Securus argues that the site commission definition "has immediate effect."[114] As the *Order* clearly states, however, the first report – like all regulations that require approval under the Paperwork Reduction Act (PRA) – will not be due until "after the Commission publishes Office of Management and Budget (OMB) approval."[115] Thus, even if Securus were correct that the definition adopted by the Commission is "fatally vague"[116] (which it is not), Securus would not be subject to any immediate harm that would justify the need for a stay.[117] Even in the unlikely event that Securus were to succeed on its vagueness claims on the merits, there is plenty of time for it to file an appeal and for a

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GTL's APA argument regarding the Commission's rules establishing rate caps and reforming ancillary charges is even weaker than its arguments regarding site commissions. Both rate caps and ancillary service charge caps were explicitly addressed in the *2014 ICS FNPRM*, which resulted in the *2015 ICS Order*. In addition, multiple parties commented on the approach the Commission ultimately adopted. *See 2015 ICS Order*, paras. 119, 127; *see also, e.g.,* Reply Comments of NCIC, WC Docket No. 12-375, at 4 (filed Jan. 27, 2015) (NCIC Second FNPRM Reply) (stating that "the FCC should cap the rates, ancillary fees, and single-payment products at the rates they deem reasonable to inmates and then let market-forces manage the cost-recovery paid to the jails and prisons.").

[109] *2014 ICS FNPRM*, 29 FCC Rcd at 13184-86, paras. 29-36; *see also 2015 ICS Order,* para. 127 (explaining that in the *2014 ICS FNPRM* the Commission "sought comment on whether it could or should prohibit site commission.").

[110] *See, e.g.*, ICSolutions Second FNPRM Comments at 4 ("ICSolutions does not believe the Commission has the jurisdiction to regulate or otherwise restrict site commissions"); Letter from Thomas M. Dethlefs, Associate General Counsel - Regulatory, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 ("the Commission does not have legal authority over … site commissions").

[111] 5 U.S.C. § 553(b)-(c); *see also Ass'n of Battery Recyclers*, 208 F.3d 1047, 1058 ("Under [the arbitrary and capricious] standard, an agency is not restricted to adopting the position it proposed and on which it sought comment. Such a restriction would undermine the purpose of notice and comment – to allow an agency to reconsider, and sometimes change, its proposal based on the comments of affected persons."). As the D.C. Circuit has explained, the "whole rationale" of the APA's notice and comment requirements is based on the expectation that the final rules will be "different – and improved – from the rules originally proposed by the agency." *Trans-Pacific Freight Conference v. Federal Maritime Commission,* 650 F.2d 1235, 1249 (D.C. Cir. 1980).

[112] Opposition to GTL at 3 (quoting GTL Petition at 13).

[113] *See* Securus Petition at 17-20.

[114] *See id*. at 17-18.

[115] *See 2015 ICS Order*, at para. 268. "If for example, OMB approval is granted in 2016 then the first annual report and certification (as discussed below) will be due on April 1, 2017 and cover the time period from January 1, 2016 to December 31, 2016." *Id*.; *see also id.* at para. 336.

[116] Securus Petition at 18.

[117] *See Improving Public Safety Communications in the 800 MHz Band,* Order, 21 FCC Rcd 678, 682 at para. 12 (a party seeking a stay "must show that the injury complained of is of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm") (internal quotations omitted); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

court to rule before the reporting requirements take effect.[118] Moreover, the PRA process will offer Securus an opportunity to comment on the relevant reporting requirements and to argue that they are based on an overly broad definition of "site commission" or impose an onerous burden on ICS providers.

32. Second, Securus' argument is undercut by the fact that the *2015 ICS Order* does not prohibit or ban site commissions. Therefore, the definition of "site commissions" adopted in the rules has no bearing on the Commission's core rate reforms. Thus, even in the unlikely event that the definition were struck down on appeal, the only practical effect would be on a single reporting requirement codified in 47 C.F.R. §64.6060(a)(3). The potential "harm" that this reporting requirement might cause does not provide a sound basis for granting a stay, particularly in light of the fact that – as explained above – the reporting requirement will not take effect until after the PRA process has been completed.[119] Further, Securus' suggestion that the definition of "site commission" somehow empowers the FCC to "micromanage the technological evolution of ICS service and the technological choices of correctional facilities," or to interfere in "the security-related choices that correctional facilities make," is unfounded.[120] The definition of "site commission" – however construed – will only affect ICS providers' reporting obligations. It does not allow the Commission to seize vast powers, as suggested by Securus. Indeed, the very fact that the Commission is not banning site commissions – a fact decried by GTL in its petition – provides assurance against the ominous suggestions voiced by Securus in its petition. The Commission has merely defined a term – "site commission" – and required providers to report the monthly amount they pay in site commissions.[121] There is no plausible argument that this simple reporting requirement, imposed solely on ICS providers and subject to PRA approval, places any sort of regulatory burden on correctional facilities – or any other entity that is not an ICS provider – or is otherwise likely to cause any harm that would justify a stay.

33. Finally, Securus' complaint that it is "impossible to tell what is a site commission and what is not" is unfounded and ignores the context in which the definition was adopted.[122] The *2015 ICS Order* makes a clear distinction between site commission payments and costs that are directly and reasonably related to the provisions of ICS.[123] Thus, providers should report all goods, services, or payments that they provide to correctional facilities (or other entities described in rule 64.6000) that are not directly and reasonably related to the provision of ICS.[124] This does not seem vague, much less "fatally" so.[125] Nor does it seem unduly burdensome.[126] Surely, Securus tracks these payments, goods,

[118] Similarly, Securus' reliance on *Salzer v. FCC* is inapposite. *See* Securus Petition at 18 (citing *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985)). In that case, the court established a sliding scale, indicating that the more severe the sanction is, the clearer the relevant standard must be. *Id*. at 875-76. In this case, there is no severe sanction that would be triggered by a misinterpretation of the "site commission" definition. To the contrary, "in almost all cases of new rule regimes, the Commission typically works with providers to help guide them through the implementation of the [new] rules and would be unlikely to assess penalties on ICS providers that make good faith efforts to comply" with the rules. *2013 Stay Order*, para. 20 (citations omitted).

[119] *See* Opposition to Securus at 6 ("While it is understandable that ICS providers like Securus would not want to disclose the many ways ICS providers attempt to influence the decision-making process, the disclosure itself is not an irreparable harm.")

[120] Securus Petition at 19-20.

[121] *See* 47 C.F.R. §§ 64.6000(t), 64.6060(a)(3).

[122] Securus Petition at 18.

[123] *Compare 2015 ICS Order* para. 116 *with id.* para. 121.

[124] 47 C.F.R. § 64.6000(t).

[125] *Cf.* Securus Petition at 18.

[126] *Cf. id*. at 19. To the contrary, the Commission's definition merely "reflects the variety of different ways that ICS providers funnel goods and services to correctional authorities, their governmental oversight agencies, and/or associations of which these correctional authorities are members." Opposition to Securus at 5.

and services for internal reasons. Securus would merely have to gather the relevant information from its internal documents and report it to the Commission. Moreover, if Securus believes that the reporting requirement is overly broad, then it can raise that point during the PRA review process.[127] In fact, that is the precise type of issue the PRA process is designed to address.

3. The Commission has Authority to Cap Both Interstate and Intrastate ICS Rates

34. *Section 276 Grants the Commission Jurisdiction over Both Interstate and Intrastate Rates for ICS.* Telmate argues that it "provides ICS and other communications services *predominantly* using VoIP and other advanced technologies not subject to Section 201 of the Communication Act."[128] Telmate further asserts that "[b]ecause 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 defined by the Commission.[129] Telmate also provides a net protocol conversion (from IP to TDM), so its service is also an information service under the Commission's precedents."[130] First, as in the Further Notice of Proposed Rulemaking that Telmate cites as precedent, we again note that "[t]he Commission has not classified one-way VoIP as a telecommunications service or an information service."[131] We do not make any such classification of one-way VoIP here. We also note that a review of all of Telmate's filings in this docket revealed that Telmate never raised this issue in the record and that Telmate's Petition represents the first time it has questioned the Commission's jurisdiction over Telmate's service under section 201 based on this "one-way VoIP" theory. As a result, the Commission did not have an opportunity to address this argument in the *2015 ICS Order.*[132] Second, Telmate has not provided sufficient information for us to determine conclusively that its service meets the definition of one-way VoIP, much less that it is an information service that falls outside the purview of section 201.[133] Telmate's Petition over-generalizes past Commission documents, over-broadly describes its services, and then jumps to unwarranted conclusions about the Commission's jurisdiction. Even assuming, *arguendo,* that Telmate is correct and its ICS offerings are not subject to section 201, Telmate would not prevail in arguing that the Commission lacks the authority to impose the requirements adopted in the *2015 ICS Order* on Telmate's services. As explained below, section 276 provides the Commission with an independent and sufficient source of authority over Telmate's ICS offerings.[134]

35. GTL argues that the "Commission lacks jurisdiction to cap intrastate ICS rates."[135] This

[127] *See 2015 ICS Order*, para. 330 (noting that the information collection requirements in the order will be submitted to OMB for review under section 3507(d) of the PRA). Although Securus' arguments focus on the definition of "site commission" in the rules, the only practical effect of this definition is its effect on the reporting obligation imposed under 47 C.F.R. § 64.6060; *see also* Securus Petition at 18-19.

[128] Telmate Petition at 1 (emphasis added).

[129] *See id*. at 2-3.

[130] *Id*.

[131] *Universal Service Contribution Methodology A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 5357, 5387, para. 58, n.167 (2012).

[132] *Cf.* 47 U.S.C. § 405(a).

[133] Even if all of Telmate's ICS offerings involve a conversion from IP to TDM, it does not necessarily mean that those services are not subject to section 201. Two-way interconnected VoIP involves a similar conversion, and the Commission has not determined that those services are exempt from regulation under section 201. *See* 47 C.F.R. § 9.3; *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10257–58, para. 24 (2005), *aff'd sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

[134] *See infra* paras. 35-38 (discussing the Commission's authority under section 276]].

[135] GTL Petition at 20.

argument ignores the plain language of section 276, which expressly requires the Commission to establish a compensation plan encompassing "each and every completed *intrastate* and interstate call."[136] This language is "so unambiguous [and] straightforward as to override" section 2(b)'s general limitation on the Commission's jurisdiction over intrastate services.[137] In addition, "[s]ection 276 [also] contains several [other] express references both to ICS and intrastate calling, making it clear that the Commission has the authority to regulate intrastate ICS calling."[138] Not surprisingly, there is significant judicial precedent establishing that section 276 provides the Commission with clear authority to regulate intrastate rates for payphone providers, including ICS providers.[139] For example, the U.S. Court of Appeals for the D.C. Circuit found that section 276 provides the Commission with "authority to set local coin rates," including intrastate service rates.[140] The same court also found that "section 276 unambiguously and straightforwardly authorizes the Commission to regulate…intrastate payphone line rates."[141]

36. *Section 276 Does Not Operate as a "One-Way Ratchet."* Given the precedents cited above, GTL is reduced to arguing that, although the Commission has "some jurisdiction over intrastate rates," its authority is limited to increasing intrastate rates that are too low.[142] In other words, GTL asks us to find that section 276 "operates as a 'one-way ratchet,'" allowing the Commission to increase rates to ensure that ICS providers receive adequate compensation, but not allowing the Commission to "reduce overcompensation."[143] The crux of GTL's argument appears to be that the Commission has not used its authority under section 276 to reduce intrastate rates in the past. Even if GTL is correct in asserting that the Commission has not previously relied on section 276 to limit intrastate ICS rates, that does not mean that the Commission lacks the authority to do so now.[144] GTL's citation to language from a 20-year old Notice of Proposed Rulemaking as alleged support for its position is not compelling, much less binding.[145]

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[136] 47 U.S.C. § 276(b)(1)(A) (emphasis added).

[137] *Cf.* GTL Petition at 21 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373 (1986)); 47 U.S.C. § 152(b)(1).

[138] *2015 ICS Order*, at para. 109.

[139] Section 276 defines "payphone service" to include "the provision of inmate telephone service." 47 U.S.C. § 276(d).

[140] *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997).

[141] *New England Public Comm'ns Council, Inc. v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003); *see also Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) ("§ 276 substantially expands the Commission's jurisdiction and gives it broad authority to regulate both intrastate and interstate payphone calls.") (*citing Illinois Public Telecommunications Association*, 117 F.3d at 561-62), *aff'd sub nom. Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc*., 550 U.S. 45 (2007).

[142] GTL Petition at 21-22. Telmate makes a similar argument, contending that section 276 requires only that the Commission ensure that compensation is "high enough." Telmate Petition at 8 (emphasis omitted).

[143] GTL Petition at 22; *see also* Telmate Petition at 8 (arguing that section 276 authorizes a "floor below which compensation may not sink, but . . . does not authorize the Commission to erect a ceiling above which rates may not rise.").

[144] GTL does not argue, for example, that the fact that the Commission has not previously acted to regulate interstate ICS rates means that it lacks the authority to do so under section 201.

[145] The paragraph of the NPRM that GTL cites explicitly explains that the Commission was seeking comment on "tentative conclusions." Notice of Proposed Rulemaking, *Implementation of the Pay Tel. Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 6716, 6725-26, para. 16 (1996) (*1996 NPRM*). Thus, it is clear that the "conclusions" GTL relies on were merely "tentative." The fact that the Commission does not appear to have adopted these "conclusions" in any order issued over the intervening 20 years severely undercuts GTL's position. *See supra* paras. 27-30. In addition, the *1996 NPRM* does not conclude, even tentatively, that section 276 only allows the Commission to increase rates. Although the section of the *1996 NPRM* cited by GTL is largely concerned with ensuring that payphone providers receive adequate compensation, it does not (continued…)

37. Nor are we persuaded by GTL's misguided argument that "[i]f Congress had intended . . . 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."[146] If Congress had intended to limit the Commission to ensuring that ICS rates were "adequate" or "sufficient" it would have done so.[147] Instead, Congress directed the Commission to ensure that the compensation is "fair."[148] "Fair," unlike "adequate," implies that the Commission should take into account the interests of both the payor and the payee.[149] Consistent with Congress' language—and also with the stated purpose of section 276 to foster "the widespread deployment of payphone services to the benefit of the general public" (not just to "promote competition among payphone service providers")[150] – the Commission has interpreted "fair" under section 276 to require that the compensation be neither too high (to the detriment of the ICS consumer) nor too low (to the detriment of the ICS provider).[151]

38. Given the Commission's clear authority over intrastate rates, there can be no doubt that section 276 provides it with jurisdiction over interstate ICS rates.[152] Thus, even if Telmate's services are

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in any way foreclose the possibility that section 276 can be used to reduce compensation that is unfairly high. In fact, the *1996 NPRM* specifically addresses at least one instance in which the Commission was concerned about practices that might unfairly *increase* the compensation a payphone provider received. *See 1996 NPRM*, 11 FCC Rcd at 6728-29, para. 23.

[146] GTL Petition at 22.

[147] *Cf.* Telmate Petition at 8 (arguing that section 276 "authorizes a floor," but not a "ceiling.").

[148] 47 U.S.C. § 276(b)(1)(A).

[149] *See, e.g.*, http://www.definitions.net/definition/fair (defining "fair" as "evenhanded"; "without favoring one party" over another); http://www.merriam-webster.com/dictionary/fair (defining fair as "marked by impartiality"). Despite the widely-accepted recognition that "fairness" requires consideration of both sides of a transaction, GTL argues that the legislative history of section 276 requires the Commission to read the statute as authorizing only those regulations that benefit ICS providers, without regard to the interests of ICS consumers. *See* GTL Petition at 21. This argument ignores the limited role that legislative history plays in statutory interpretation. *See, e.g.*, *Am. Ass'n of Cruise Passengers v. Carnival*, 911 F.2d 786, 790 (1990) (considering legislative history "only in order to ensure that [the court's] straightforward reading [of the statutory text was] not demonstrably at odds with the intentions of [the] drafters of the Act" (third alteration in original; internal quotation marks omitted)); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part) ("The principle of our democratic system is not that each legislature enacts a purpose, independent of the language in a statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshot by expanding or ignoring the statutory language as changing circumstances require."). GTL's argument further ignores Congress's expressly stated intent that section 276 "promote the widespread deployment of payphone services to the benefit of the general public," 47 U.S.C. § 276(b)(1), a purpose that is not served when ICS providers with monopoly franchises in the correctional facilities they serve are able to charge unconstrained rates, *see 2015 ICS Order*, para. 116.

[150] 47 U.S.C. § 276(b)(1).

[151] *See Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3254-58, paras. 14-24; *see also 2013 ICS Order*, 28 FCC Rcd at 14115, para. 14 ("The Commission has previously found the term 'fairly compensated' permits a range of compensation rates that could be considered fair, but that the interests of both the payphone service providers and the parties paying the compensation must be taken into account." (internal citations omitted); *see also 2014 ICS FNPRM*, 29 FCC Rcd at 13184-85, para. 30 ("While the Commission has previously found the phrase 'fairly compensated' to be ambiguous, and acknowledged that a range of compensation rates could be considered fair, it has treated the concept of fairness as encompassing both the compensation received by ICS providers and the cost of the call paid by the end user."); *see also 2015 ICS Order*, para.114.

[152] GTL asserts that if section 276(b)(1)(A) requires the Commission to proscribe excessively high rates, then "the Commission has ignored its statutory responsibility for two decades." GTL Petition at 22. The Commission has explicitly recognized that, as GTL suggests, the reforms adopted in the *2015 ICS Order* are "long overdue." *2015 ICS Order*, para. 9. Far from justifying a stay, however, the fact that consumers have waited so long for regulations
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not subject to section 201, they are plainly subject to regulation under section 276.

4. The Ancillary Service Charges the Commission Adopted Are Lawful

39. The Commission received ample evidence that ancillary service charges have increased since the *2013 ICS Order*, which highlights the fact that, absent the adopted reforms, ICS providers would have the ability and incentive to continue to increase such charges.[153] Securus, however, argues that the ancillary service charges rules adopted in the *2015 ICS Order* should be stayed because: (1) some of the ancillary service charge caps regulate financial transactions rather than communications services; (2) the adopted caps prevent ICS providers from recovering their costs, including a return on investment on services permitted by the rules; (3) the caps unreasonably prevent ICS providers from offering any optional service or feature not specified in the rules; and (4) the Commission's decision to limit the number of allowable ancillary service charges is arbitrary and capricious because "it prevents the development and introduction of any new services in the future."[154] Telmate goes further, arguing that a stay is justified because the adopted rules "do not provide *any* compensation for costs incurred when passing thorough governmental and other third-party charges, they again deny providers the fair compensation required by Section 276."[155] As explained below, Securus and Telmate are unlikely to prevail on the merits of these arguments. The Commission was well within its authority when it took the steps necessary to ensure that ancillary service charges are no longer a source of unfair, unjust, and unreasonable charges for ICS users.[156]

40. *Contrary to the Stay Petition Arguments, the Commission Has Jurisdiction over Ancillary Service Charges*. The *2015 ICS Order* clearly lays out the Commission's jurisdiction over ancillary service charges.[157] The *Order* begins by discussing relevant precedent from the *2013 ICS Order*, in which the Commission explained that it has the jurisdiction "to regulate the manner in which a carrier bills and collects for its own interstate offerings, because such billing is an integral part of that carrier's communication service."[158] Additionally, section 276(d) defines "payphone service" as "the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and *any ancillary services*."[159] Based upon the plain language of the statute, and the common definition of the term "ancillary," the Commission found that the term "ancillary services," as used in section 276(d), is reasonably interpreted to mean services that provide necessary support for the completion of international, interstate and intrastate calls provided via ICS.[160] The Commission also

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that effectively constrain inflated ICS rates and charges militates in favor of allowing the Commission's much-needed reforms to take effect as soon as is practicable.

[153] *2015 ICS Order* at para. 144.

[154] *See* Securus Petition at 4-12. Securus seeks a stay of the "Ancillary Service Charge and Related Pricing Rules (Rules 64.6020, 64.6080, 64.6090, 64.6100)." Securus Petition at 2.

[155] Telmate Petition at 14.

[156] *See* Opposition to Securus at 4 ("It would seem that Securus' core argument is that the Second R&O should be stayed because Securus will lose money it had expected to pay its lenders because it can no longer charge unjust, unreasonable, and unfair rates and ancillary fees…Simply put, a petition seeking the stay of an order ending monopoly rates, fees and practices cannot point to the loss of monopoly rates, fees and practices as its justification for the stay.").

[157] *See 2015 ICS Order,* paras. 193-96.

[158] *2013 ICS Order*, 28 FCC Rcd at 14168, para. 114 and n.415 (citing *Truth-in-Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7506-07, para. 25 (1999)).

[159] 47 U.S.C. § 276(d) (emphasis added).

[160] *See 2015 ICS Order* at para. 196; *see also* Opposition to Securus at 3 ("[I]n the Second R&O, the FCC correctly concluded that Section 201 of the Communication Act provides the FCC with the authority to proscribe unjust and

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found that section 276 authorizes it to regulate charges for intrastate ancillary services, such as billing and collection services, to the extent those charges involve the completion of a call, or other communications services. Such charges are quite literally the "necessary support" essential for the completion of inmate phone calls.[161] Indeed, the only purpose for establishing ICS accounts is to fund communication with inmates; therefore, these charges are reasonably understood to be ancillary to the completion of phone calls. Accordingly, the Commission held that "billing-and-collection-related ancillary services such as account set up and transaction fees fall within the Commission's jurisdictional authority."[162]

41. Securus' claim that the Commission lacks jurisdiction over these types of charges is not persuasive.[163] As explained above, and in the *2015 ICS Order*, section 276 explicitly grants the Commission jurisdiction over these types of charges.[164] Securus unreasonably attempts to limit the construction of the term "ancillary services" as used in section 276(d), arguing it must be read as referring only to "*communications* services ancillary to the completion of interstate and intrastate ICS calls."[165] Securus offers no meaningful explanation of its position. Instead, Securus merely summarizes section 276 and baldly states that its interpretation is the only reasonable one.[166] In fact, Securus' interpretation is wholly unreasonable and strips the relevant statutory provision of much of its meaning.[167]

42. Section 276 provides the Commission with a very specific delegation of authority over ICS, as defined in 276(d), and the Commission, therefore, has discretion to reasonably interpret that definition. Congress could have easily adopted a definition of "ancillary services" along the lines that Securus suggests, but it did not do so. Further, contrary to Securus' argument that the very general language in sections one and two of the Act show "the purpose of the Act is to regulate communications, not to regulate financial transactions or sales of other goods or services,"[168] those sections do not provide a determinative "context" that overrides the more specific mandate of section 276.[169] To the contrary, it is well-established interpretive canon that "[a] specific provision . . . controls one[] of more general application."[170] Here, the specific delegation of authority in section 276 cannot be overridden by Securus' interpretation of sections one and two of the Act.[171] Finally, Securus' reliance on

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unreasonable interstate rates and fees, and that Section 276 proscribes unfair compensation for providers of both interstate and intrastate services.").

[161] *See* Oxford Dictionaries, www.oxforddictionaries.com/us (last visited Oct. 21, 2015) (defining "ancillary").

[162] *See 2015 ICS Order* at para. 196.

[163] *See* Securus Petition at 5-6. Telmate joins this argument but provides no additional analysis. *See* Telmate Petition at 13.

[164] *2015 ICS Order* at para. 196. Section 201 provides an additional source of authority over charges that are ancillary to the provision of interstate ICS. *See* 47 U.S.C. § 201(b); *see also 2013 ICS Order*, 28 FCC Rcd at 14168, para. 114.

[165] *See* Securus Petition at 8 (emphasis in original).

[166] *See id*.

[167] Even if Securus' interpretation were reasonable, it does not preclude the Commission's interpretation as another reasonable construction of the statute, for the reasons set forth below.

[168] Securus Petition at 7.

[169] *See id*. at 7.

[170] *See Bloate v. United States*, 559 U.S. 196, 207 (2010).

[171] Of course, those provisions of the Act would be quite relevant if the Commission were attempting to assert Title I ancillary jurisdiction. Perhaps this is why Securus discusses at length the Commission's ancillary authority under section 4(i) and *American Library*. *See* Securus Petition at 7-8 (relying on *Amer. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (*American Library*) to support its assertion that the Commission has overstepped its authority in the regulation of ancillary charges adopted in the *2015 ICS Order*). But this argument is a red herring, because in
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section 276(b)(1)(A) is unavailing. Securus claims that that provision "gives the FCC authority over charges for 'call[s],' not charges for anything separate and apart from a call."[172] But the ancillary services that the Commission regulated in the *2015 ICS Order* are limited to those that "provide necessary support for the completion of international, interstate and intrastate *calls* provided via ICS."[173] The Commission could not effectively regulate charges for calls – as Securus concedes the agency has authority to do – without regulating ancillary service charges. The record indicates that, absent regulation of ancillary service charges, ICS providers could simply increase such charges to recoup any revenue they may lose due to lowering their per-minute rates to comply with the Commission's caps.[174] Thus, the Commission's ancillary service charge regulations are closely tied to ICS calls, notwithstanding Securus' claims to the contrary.

43. *The Adopted Ancillary Service Charge Rate Caps Allow Providers to Recover Costs*. Securus argues that "the FCC arbitrarily and capriciously set rate caps that are below the reasonable costs of providing certain ancillary services."[175] As explained below, Securus fails to demonstrate that it is likely to succeed on the merits of this argument. The Commission based its ancillary service charge rate caps on evidence submitted in the record and, therefore, the caps are unlikely to be reversed on appeal. The Commission explicitly considered – and rejected – Securus' claim that the automated payment fee cap of $3.00 is too low.[176] The Commission specifically noted in the *2015 ICS Order* that companies much smaller than Securus – and unlikely to have the scale advantages or negotiating power of larger ICS providers – can process credit and debit card transactions at the $3.00 capped rate.[177] Accordingly, Securus' claim that it will not be able to allow online credit card processing seems dubious at best.[178] The fact that Securus points to vague "internal processing cost[s]" as justification for why the $3.00 cap is not workable is insufficient to support the extraordinary relief of a stay.[179] In addition, Securus itself already operates under similar rate caps in at least one state in which it provides ICS.[180] These facts belie Securus' unsupported claims that the rate caps for ancillary service charges are insufficient. In fact, as the Commission pointed out, the charges that ICS providers impose on their end users for ancillary services far exceed the costs those providers incur to offer those services.[181]

44. We also reject Securus' contention that "[t]he fact that the FCC made no adjustments to

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the *2015 ICS Order* the Commission did not rely on its Title I ancillary authority to regulate ancillary service charges, but rather relied on its direct authority provided under section 276.

[172] Securus Petition at 8.

[173] *2015 ICS Order* at para. 196.

[174] "This concerns us because it suggests that ICS providers are using ancillary service charges as a loophole to increase revenues and undermine the impact of the interstate rate caps adopted in the *2013 Order*." *2015 ICS Order* at para. 154; *see also id*. at para. 194.

[175] Securus Petition at 9.

[176] *See 2015 ICS Order* at para. 167.

[177] *See id.*; *see also* Opposition to Securus at 2 ("[T]he ancillary fee costs for Securus were demonstrably higher than smaller, less profitable ICS providers, calling into question Securus' cost studies.").

[178] *See* Securus Petition at 24. Securus' claim that it would "lose several dollars per transaction under the new financial transaction fee caps" could just as reasonably be viewed as evidence that Securus has been grossly overcharging for such transactions. *See id*.

[179] *See id*. at 9, Attach. at 1.

[180] Alabama has implemented regulations similar to those adopted by the Commission, and Securus provides ICS in a variety of facilities in Alabama. *See* Securus, *Facilities We Serve*, https://securustech.net/facilities-we-serve (last visited Dec. 31, 2015).

[181] *See 2015 ICS Order* at para. 164.

Pay Tel's proposed rate ceilings suggests that its cost analysis was cursory."[182] The fact that the Commission adopted a proposal in the record does not mean it did not conduct an independent evaluation of that proposal in light of the evidence in the record.[183] In this case, the Commission adopted a reasonable proposal, based on information received in response to the Mandatory Data Collection, and supported by record evidence. Contrary to Securus' claims, these caps were widely supported (in full or in part) in the record by a variety of interested parties, including the Wright Petitioners, Pay Tel, the Alabama PSC, and NCIC.[184]

45. Securus further argues that the Commission's just and reasonable rate standard requires that ICS rates allow providers to recover transaction and other operating costs.[185] As the Commission noted in the *2015 ICS Order*, the adopted rate caps, coupled with the permissible ancillary service charges should permit providers to recover their costs reasonably and directly related to the provision of ICS.[186] The reasonableness of the Commission's expectation is demonstrated by the fact that one reporting ICS provider listed no direct costs related to providing ancillary services, while another provider listed only one ancillary service charge.[187] Finally, as discussed above and in the *2015 ICS Order*,[188] the Commission's analysis of the data received in response to the Mandatory Data Collection indicates that providers' reported costs were likely inflated, confirming that between the rates allowed within the adopted rate caps and the permitted ancillary service charges, providers will recover their costs that are reasonably and directly related to the provision of ICS.

46. *The Limitations on Ancillary Service Charges and Mark-ups Are Supported by the Record.* Securus argues that "the FCC completely prohibited charging customers for processing account deposits transmitted by third-party money transfer services," but this argument mischaracterizes the Commission's rules regarding financial transactions.[189] The Commission did not set rates or prohibit charges for financial transactions – in fact the Commission specifically permits ICS providers to pass those charges through to consumers.[190] The Commission merely prohibited ICS providers from adding their own fees to charges for these financial transactions due to extensive concerns in the record that such fees were unreasonable and excessive.[191]

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[182] Securus Petition at 10.

[183] Securus itself put forth a comprehensive reform proposal. *See* Letter from Brian D. Oliver, Chief Executive Officer, GTL, Richard A. Smith, Chief Executive Officer, Securus, and Kevin O'Neil, President, Telmate, to Tom Wheeler, Chairman, FCC, WC Docket No. 12-375 (filed Sept. 15, 2014).

[184] *See 2015 ICS Order* at paras. 167-72.

[185] *See* Securus Petition at 11.

[186] "We also note that some jurisdictions have banned ancillary service charges and that providers have complied with such regulations. This suggests that ancillary service costs can be recovered with reasonable ICS rates." *2015 ICS Order* at para. 165.

[187] This supports arguments in the record urging the Commission to ban all ancillary service charges because many of the costs that ICS providers were recovering through ancillary service charges should be recovered through fair, just, and reasonable per-minute rates. *See e.g. 2015 ICS Order* at para. 146, n.524 (citing PLS Second FNPRM Comments at 9) ("Most expenses covered by fees are incident [sic] to the general costs of conducting business in the ICS industry and should be included in the per-minute rates.")); *id.* at para. 152 ("In addition, Praeses suggests that '[a]ll costs that Providers necessarily and unavoidably incur as part of completing an inmate call should be recovered through ICS rates. As a result, Providers should not be permitted to charge any ancillary fees to recover such intrinsic ICS costs, such as validation fees or fees related to Facility-required security.'").

[188] *See supra* paras. 21-25.

[189] Securus Petition at 10.

[190] *See 2015 ICS Order* at paras. 170-72.

[191] *See id.* at paras. 170-71.

47. The Commission clearly has authority to address ICS providers' ancillary services, which include fees or mark-ups and function as billing-and-collection related charges imposed by ICS providers on top of any third-party charges that the providers pass through to their end users.[192] ICS providers offered no cost-based justification for imposing these additional fees or mark-ups on end users.[193] Nor have they explained what functions (if any) they must perform to "process" a money transfer that has already been transferred from the third-party provider,[194] and Securus has not provided such information in support of its Petition. Moreover, "[a]ny administrative costs incurred with processing the customer's payment is part of routine business overhead."[195] The record provided ample support for the Commission's decision to prohibit additional fees or mark-ups.[196] Indeed, the Commission's approach was supported by multiple ICS providers, such as CenturyLink and NCIC, as well as by the Alabama PSC.[197]

48. The Commission recognized that ICS providers do not set fees established by third parties, such as Western Union or credit card companies, for payment processing functions.[198] Accordingly, the Commission chose not to limit ICS providers' ability to pass those fees on to their end users. The Commission did, however, act in response to substantial evidence in the record showing that ICS providers are imposing significant additional charges – as high as $11.95 – on end users that make account payments via third parties, such as Western Union or MoneyGram.[199]

49. Telmate argues that "[b]ecause [the Commission's ancillary service charge] 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."[200] Telmate does not argue that it incurs costs related to passing through mandatory, applicable taxes and regulatory fees. Instead, Telmate merely cites Commission action in an unrelated proceeding to support its assertion that there are costs in passing through such taxes and fees.[201] Telmate's claim must fail also because it

[192] *See id.* at para. 171.

[193] *See id*.

[194] *See id*.

[195] Alabama PSC Second FNPRM Comments at 23.

[196] *See e.g. 2015 ICS Order* at para. 171, n. 617 (citing Alabama PSC Second FNPRM Comments at 23 ("[T]he record for our proceeding shows that Western Union and MoneyGram are currently sharing revenue with ICS providers when the transfer fee exceeds $5.95."); Letter from Michael Thurber, Director, Lancaster County DOC to Chairman Wheeler, et al. FCC, WC Docket No. 12-375 at 7-8 (filed Mar. 3, 2015) ("What justification is there for a provider additive to the payment transfer fee other than a dubious claim [that] it is to cover administrative costs for taking the customer's money?"); HRDC Second FNPRM Comments at 10 ("The [Joint Provider Reform Proposal] suggests a maximum of $2.50 for administrative fees with no explanation as to how that amount was calculated and whether it is just or reasonable. The ICS providers should be required to justify the proposed fee by disclosing the actual costs incurred to process a money transfer payment.")); *2015 ICS Order* at para. 172, n. 619 (citing Alabama PSC Second FNPRM Comments at 23 ("The APSC is opposed to the $2.50 transfer fee additive included in the [Joint Provider Reform] Proposal and questions why any such additive should be given any consideration when Western Union or MoneyGram are performing the money transfer, not the ICS provider.."); HRDC Second FNPRM Comments at 11 ("[A] $2.50 fee added to the amount charged by third-party money transmitters (up to $11.95, according to Western Union's website) [as in the Joint Provider Proposal] may result in excessive fees charged to prisoners' families simply to add money to their account.")).

[197] *See 2015 ICS Order* at para. 172.

[198] *See id.* at para. 170.

[199] *See id.* at para. 171.

[200] Telmate Petition at 14 (emphasis in original); *see also id*. at 15.

[201] *See id.* at 14. Telmate specifically cites to the "Universal Service" context as an example of an instance in which the Commission has allowed carriers to recover administrative costs through customer rates or other non-Universal

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provides no support for its argument beyond repeating its fair compensation arguments[202] which have been addressed and disposed of above.[203] For these reasons we do not find that Telmate's argument supports grant of a stay.

50. *The Commission's Limitation of Ancillary Service Charge Categories Is Supported by the Record*. Securus summarily argues that the Commission's decision to limit the number of allowable ancillary service charges is arbitrary and capricious because "it prevents the development and introduction of any new services in the future."[204] We disagree with Securus' argument. The Commission's decision to prohibit all ancillary service charges not specifically enumerated in its rules was not arbitrary. Rather, it was a reasonable conclusion supported by a thorough analysis of the record.

51. Specifically, the Commission found that the record did not contain evidence demonstrating that any other ancillary services are reasonably and directly related to the provision of ICS, or are necessary to ensure that ICS providers receive fair compensation.[205] This does not mean, however, that ICS providers are precluded from innovating in this area.[206] In fact, the Commission's rules broadly define the permissible categories of ancillary service charges without regard to the technology used.[207] This flexibility should give ICS providers an incentive to find innovative ways to provide these services more efficiently, to cut costs and increase service quality – thus stimulating competition among ICS providers to the added benefit of consumers and in keeping with section 276's statutory mandate.[208] The record demonstrates that ICS providers obtain unjust levels of compensation from inmates and their families through ancillary service charges of all kinds. These include, for example, account set-up, maintenance, closure, and refund fees.[209] If the Commission were to accept Securus' position – that, in effect, the Commission cannot limit the list of permissible ancillary service charges to those that the

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Service Fund line items. *Id.* Telmate has failed to show, however, that the alleged "administrative costs" of passing through taxes and regulatory fees without mark-up in the ICS context are more than *de minimis* or that they cannot be recovered through end-user rates that comply with the Commission's rate caps. Telmate also ignores a critical difference between ICS providers and other carriers that are permitted to impose "administrative fees" – unlike most customers of telecommunications services, ICS consumers have no choice of providers. Thus, if an ICS provider imposes egregiously high fees on its end users, those consumers cannot take their business to another provider that offers service at a fairer price. Furthermore, we also note that the Commission's approach to taxes and regulatory fees was based, in part, on advocacy from Telmate. *See 2015 ICS Order* at para. 192.

[202] *See* Telmate Petition at 14.

[203] *See supra* paras. 21-24.

[204] *See* Securus Petition at 12. Securus and other ICS providers have been operating in a largely unregulated environment for decades, in which they were free to innovate without significant constraint from the Commission. Yet that freedom did not lead to better service at a lower price for consumers. Rather, because ICS providers are monopolists, they often have "competed" based on factors other than innovation (*e.g.*, the size of site commission payments to facilities), and any innovations that were developed in this environment were introduced against a backdrop of exorbitant – and rising – rates, to be borne by the segment of society least able to afford them: inmates and their families. Particularly given this history of market failure, it was entirely reasonable for the Commission to prohibit providers from continuing to use ancillary services (other than those specifically found to be permissible) as a means to extract unreasonable payments from consumers. Thus, any delay in a provider's ability to immediately charge a fee for a hypothetical new type of ancillary service is more than offset by the benefit of regulating "ever-increasing fees that are unchecked by competitive forces and unrelated to costs." *2015 ICS Order*, para. 161

[205] *See 2015 ICS Order* at para. 174.

[206] *See* Securus Petition at 12.

[207] *See 2015 ICS Order* at App. A.

[208] *See id.* at para. 162; 47 U.S.C. § 276(b)(1).

[209] *See id.* at para. 146.

record shows to be reasonably related to the cost of providing ICS – the Commission would be powerless to protect ICS consumers from abuse. An ICS provider could simply establish a new category of ancillary service charge, however unreasonable or unnecessary, and thereby make an effective end-run around the reforms adopted in the *2015 ICS Order*. The Commission would quickly find itself in a game of "whack-a-mole" to police abuses. New ways of extracting exorbitant fees in the provision of ICS, contrary to the explicit goals of section 276, is not the sort of "innovation" intended by section 7 of the Act.[210] Indeed, Congress's decision to grant the Commission authority over "ancillary services" would be rendered practically meaningless if the Commission adopted Securus' interpretation of the matter.[211] Thus, it was appropriate for the Commission to limit the categories of ancillary service charges based on the voluminous record before it.

5. The Commission Appropriately Capped the Rates for Single-Call Services/Premium Calling Services

52. Securus argues that the Commission does not have authority over single-call services, which it characterizes as "optional billing methods for completion of a basic telephone call."[212] The record indicates that it is unlikely that ICS end users understand that such services are optional.[213] Regardless of whether the services are truly "optional," it is clear that the Commission has authority to adopt regulations that ensure that the rates for these services are fair, just, and reasonable. Given that single-call and related services are among the most expensive ways to make an ICS phone call, it was incumbent upon the Commission to investigate those services and make adjustments to the allowed charges.[214] Accordingly, it is unlikely that Securus will prevail on the merits of its argument that the Commission lacked authority to regulate charges for these services.

53. *The Commission's Reforms to Single-Call or Premium Calling Services Are Not Arbitrary and Capricious*. Although there may be some benefits from single-call and related services, the record is replete with evidence that these services are being used to inflate the rates paid by ICS consumers, and may be offered at unjust, unreasonable, or unfair rates, and/or at rates above the Commission's interim rate caps or the rate caps adopted in the *2015 ICS Order*.[215] For premium calling services or single-call services, the Commission permitted ICS providers to pass through any third-party financial transaction fees (with no markup) in addition to a per-minute rate that complies with the applicable rate cap.[216] Contrary to Securus' arguments, this determination was not arbitrary and capricious. Rather, it was based on record evidence demonstrating that these services are being used to inflate charges to levels that are unfair, unjust, and unreasonable, and that these offerings cause substantial end-user confusion.[217] Securus tries to characterize its Text2Connect or PayNow services as premium calling services in the hopes of diverting attention from the fact that such calls cost between $9.99 and $14.99 for a single call (regardless of whether the call lasts one minute or 15 minutes).[218] Such rates – ranging from a minimum of $0.67 per minute for a fifteen minute call ($9.99/15), to as much as

[210] *See* 47 U.S.C. § 157(a) (encouraging the provision of new services and technologies to the public); Securus Petition at 16.

[211] *Cf.* 47 U.S.C. § 276(d) (defining "payphone service" under section 276 to include inmate telephone services "and any ancillary services.")

[212] *See* Securus Petition at 13.

[213] *See infra* n. 304.

[214] *See 2015 ICS Order* at para. 183.

[215] *See id.* at para. 182.

[216] *See id.* at para. 186.

[217] *See id.* at paras. 182-85.

[218] *See id.* at para. 185.

$14.99 for a one-minute call – are unfair, unjust, and unreasonable, and the Commission has a statutory obligation to protect consumers from such unlawful charges. In fact, contrary to what Securus claims,[219] the record indicates that other ICS providers offer such services for significantly less. Specifically, the *2015 ICS Order* cites another ICS provider, NCIC, as offering such services at the interim interstate collect calling rate cap of $0.25/minute with no "premium" or "convenience" fee.[220] Also, the Commission logically predicts that lower ICS rates will result in increased call volumes, a prediction supported by Telmate.[221] This should mitigate any concerns about imminent harm to Securus, as higher call volumes should result in higher revenues.[222]

54. Securus also claims that the Commission's new rules governing single-call services will prevent Securus from recouping investments it made to create these services and will prevent it from offering these services in the future.[223] To support these contentions, Securus submits information about lost revenue without any meaningful context for quantifying the impact these lost revenues would have on its business.[224] Most significantly, Securus fails to provide, in support of its stay petition, cost information for these services, making it impossible to tell how much Securus (or a reasonably efficient provider) would have to charge in order to make a profit on these types of services. In addition, Securus provides insufficient information to allow us to determine how much of the investment has already been recovered.[225]

55. We recognize that the rate caps adopted by the Commission could reduce per-call revenues. Indeed, one of the primary goals of the *Order* is to prevent carriers from continuing to charge unfair, unjust, and unreasonable rates. In fact, as explained above, the record shows that the single call or related service charge is often $9.99 or $14.99, regardless of whether the call lasts one minute or 10 minutes, or 15 minutes, and that these rates are 300 percent or 376 percent higher than the effective interstate rate caps.[226] Reducing rates for such services to levels that are fair, just, and reasonable is not only justified, but required under the Act. Securus has not proven that the Commission's action on single call or premium call services was arbitrary and capricious. Therefore, we find that these arguments do not support the grant of a stay.

6. The Commission Appropriately Included Video Visitation in the Adopted Reporting Requirements

56. Securus argues that the Commission lacks "jurisdiction to impose requirements of any kind on video services" and that the Commission imposed video visitation reporting requirements without notice.[227] Specifically, Securus argues that "[t]he Commission's inclusion of video services in Rule 64.6060 was . . . extrajurisdictional" because such services are information services not subject to Title II

[219] *See* Securus Petition at 14.

[220] *See 2015 ICS Order* at para. 184 & n.656.

[221] *See, e.g.*, *id.* at para. 6 ("The record indicates that our interim interstate rate caps increased call volumes, without compromising correctional facility security requirements. Similarly, we expect our actions in this Order to reduce rates and increase call volume, while ensuring that ICS providers receive fair compensation and a reasonable return."). *See also infra* n. 252 (describing Telmate's advocacy on this point).

[222] *See 2015 ICS Order* at para. 70.

[223] *See* Securus Petition at 15, 25.

[224] *See id*. at "Report on Financial Impact of FCC Second Report and Order" Supplement. Securus' Petition appears to be the first time the company has made this "lost revenues" argument.

[225] In addition, the claimed lost revenue streams are entirely irrelevant to our analysis to the extent they come from having to reduce unfair, unjust, or unreasonable prices to lawful levels.

[226] *2015 ICS Order* at para. 185 (citing ICSolutions Second FNPRM Comments at 11).

[227] Securus Petition at 20.

of the Act, and that "[t]he Second FNPRM did not give Securus any cause to believe that reporting requirements would be imposed on video visitation services."[228] As described further below, we find that the Commission properly included video visitation in its reporting requirements. More specifically, while we do not dispute that rule 64.6060 requires reporting of this information,[229] we find that Securus has failed to show that (1) it is likely to prevail on the merits of this issue, (2) the Commission acted in an arbitrary or capricious manner, or (3) that the Commission acted without sufficient notice.

57. First, Securus cites case law affirming that reporting requirements are a form of regulation. This is not in dispute. However, the language quoted by Securus excludes the *Cellco Partnership* court's discussion of why the Commission's adopted reporting requirements were justified in that case. In *Cellco Partnership*, after acknowledging that reporting requirements are a form of regulation, the D.C. Circuit found that the reporting requirements at issue in that case should be upheld, because an exemption from the reporting requirement "would impede the Commission's ability to obtain information on an important segment of the marketplace."[230] The Commission's stated reason for requiring information about ICS video visitation is analogous. Specifically, the Commission, in the *2015 ICS Order*, explained the important role that reporting plays in enabling the Commission to monitor developments, ensure compliance with its rules, and capture trends.[231] The *Third Further Notice of Proposed Rulemaking* also seeks comment on video visitation, which will help inform the Commission whether additional rules are necessary.[232] We agree with the court that "the Commission's regulatory role involves predictive judgments . . ."[233] and we find that the required information will, once the reporting requirement is effective, help the Commission perform its regulatory role now and as new technologies are introduced in the ICS industry in the future.

58. *The Action Taken Is Not Arbitrary and Capricious*. Contrary to Securus' claims, the Commission's decision to require ICS providers to report on video visitation does not represent a departure from precedent that makes the decision arbitrary and capricious.[234] In the *2013 ICS Order* the Commission made clear that "the use of VoIP or any other technology for any or all of an ICS provider's service does not affect our authority under section 276."[235] The Commission reiterated this position in the *2014 FNPRM* when it asked questions about video visitation, "[g]iven the technologically neutral nature of section 276 and the fact that video calling shares many of the attributes of traditional ICS, including the fact that it is a pay per use service involving real time, two-way voice communications. . . ."[236] The Commission repeated this conclusion again in the *2015 ICS Order,* stating that "[w]e confirm the findings

[228] *Id*. at 21-25.

[229] *See id.* at 20-21; *see also Cellco Partnership v. FCC*, 357 F.3d 88, 101-102 (D.C. Cir. 2004) (*Cellco Partnership*) (a Commission-imposed reporting requirement for wireless carriers constitutes reasonable regulation); *see also MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 18 (D.C. Cir. 2001) (confirming that a Commission-imposed reporting requirement does not constitute arbitrary and capricious regulation).

[230] *Cellco Partnership*, 357 F.3d at 102.

[231] *2015 ICS Order*, at para. 266 ("We find that a recordkeeping and reporting requirement will best serve the Commission's stated goals of ensuring that each and every ICS provider's rates and practices are just, reasonable, and fair, and that they remain in compliance with this Order. We also believe that an annual recordkeeping and reporting requirements will help the Commission capture any trends or changes in calling patterns, will facilitate any future enforcement action, and allow other interested parties the ability to monitor ICS providers' compliance with this Order.").

[232] *See id*. at paras. 296-307.

[233] *Cellco Partnership*, 357 F.3d at 102.

[234] *See* Securus Petition at 21.

[235] *2013 ICS Order*, 28 FCC Rcd at 14115, para. 14.

[236] *2014 ICS FNPRM*, 29 FCC Rcd at 13229, para. 151.

in the *2013 Order* that section 276, by its terms, is technology neutral with respect to inmate calling services. As such, our rules adopted herein apply to ICS regardless of the technology used to deliver the service."[237] Thus, far from departing from precedent, the Commission acted consistent with its prior decisions. We therefore disagree with Securus' claim that the reporting requirement involving video visitation service is arbitrary and capricious.

59. *There Was Ample Notice for the Commission's Action*. Contrary to Securus' claim that the Commission's action violated the APA, there was ample notice for the Commission's limited action on video visitation.[238] The reporting requirement adopted in the *2015 ICS Order* is consistent with past Commission action in this proceeding. Specifically, the Commission adopted an annual reporting and recordkeeping requirement in the *2013 ICS Order*[239] and sought comment on a periodic review process in the *2014 FNPRM*.[240] The Commission has repeatedly sought comment on advanced services, including video visitation[241] in the ICS industry, yet received minimal comment.[242] Thus, there can be little argument that the public had notice – and an opportunity to comment on – reporting requirements related to ICS, including video visitation. At a minimum, this reporting requirement is a logical outgrowth of the requests for comment.[243] In order to learn more about video visitation, the Commission needed to require ICS providers that offer these burgeoning services to submit the requested information. The forthcoming video visitation information, coupled with the responses to additional questions about advanced services, including video visitation, in the *Third FNPRM*,[244] will allow the Commission to promote new technologies in the ICS industry while ensuring that rates for such services are just, reasonable, and fair as required by the Communications Act.[245] For the reasons described above, we find that Securus has failed to demonstrate that it is likely to succeed on the merits of its claims that the Commission lacked jurisdiction over, or provided inadequate notice related to, the adopted reporting requirements.

B. Petitioners Will Not Suffer Irreparable Injury

60. The Petitioners have failed to prove that they will suffer irreparable injury absent a grant of their stay petitions. We reject their claims for the reasons described below.

61. *The Described Harms Are Unsubstantiated*. GTL claims that a stay is justified because "[i]f the rate caps in the *Order* are permitted to take effect as scheduled, GTL will suffer serious and

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[237] *2015 ICS Order*, at para. 250.

[238] *See* Securus Petition at 21-22.

[239] *See 2013 ICS Order*, 28 FCC Rcd at 14169-70, paras. 116-17.

[240] *See 2014 ICS FNPRM*, 29 FCC Rcd at 13230, paras. 152-53.

[241] Contrary to Securus' argument, questions about video visitation in the *2013 ICS Order* were not limited to its applicability to users with communications disabilities. *See* Securus Petition at 22. For example, the Commission asked about the effect of video visitation and other advanced services on traditional ICS. *See 2013 ICS Order*, 28 FCC Rcd at 14185-86, paras. 163-65.

[242] *See id.* at 14185, para. 164; *see also 2014 ICS FNPRM*, 29 FCC Rcd at 13227-29, paras. 145-51 (seeking comment on "newer technologies and services available for inmate communications," including, for example, continuous voice identification, wall-mounted, multiservice kiosks, and customized cell phones with the security and control features of prison payphones.) .

[243] *Ne. Md. Waste v. EPA,* 358 F.3d 936, at 952 ("A rule is deemed a logical outgrowth if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.").

[244] The fact that the Commission is asking additional questions about video visitation, along with other advanced ICS, further supports the limited nature of the video visitation-related requirement adopted in the *2015 ICS Order*.

[245] 47 U.S.C. §§ 157, 201, 276.

irreparable harm" with no ability to recover lost "amounts."[246] Telmate similarly argues that "a stay is necessary because the *Order* does not adequately protect against such irreparable financial losses."[247] GTL then discusses challenges associated with contract review and possible disruption to its customers as a result of the *2015 ICS Order*.[248] Neither GTL nor Telmate provide specific information in support of these claims, however. Instead, they offer only summary statements that amount to nothing more than speculation.[249] We conclude that GTL and Telmate have not proven that they will suffer irreparable injury from the *Order* becoming effective.

62. Neither GTL nor Telmate provides any details to support claims of irreparable harm. There is ample precedent holding that such unspecific and unsupported claims of potential lost revenue do not constitute irreparable harm.[250] In addition, GTL and Telmate both fail to take into account the likelihood ICS minutes of use will increase as a result of the adopted rate caps,[251] even though Telmate has acknowledged that it experienced increased call volumes after it lowered its ICS rates.[252] In the *2015 ICS Order*, the Commission predicts that, using the data from the implementation of the *2013 ICS Order*, ICS call volume increases will mitigate effects on providers' revenue.[253] The record in this proceeding, even beyond Telmate's statements, supports this prediction.[254] Indeed, as the Wright Petitioners point out the record indicates that "[h]aving advocated to correctional authorities that low ICS rates would drive up revenue and commissions paid to the correctional authorities, GTL contradicts itself now in insisting that

[246] GTL Petition at 23.

[247] Telmate Petition at 16.

[248] *See* GTL Petition at 24-25.

[249] Opposition to GTL at 7 ("GTL failed to provide evidence that GTL will suffer irreparable harm."); Opposition to Telmate at 6 ("Even if Telmate will no longer earn monopoly profits, Telmate did not provide any evidence that its reduced revenue stream is a cognizable 'irreparable harm.'").

[250] *See, e.g.*, *Wisc. Gas*, 758 F.2d at 674 (to demonstrate irreparable harm "the injury must be both certain and great"); *Holiday Tours*, 559 F.2d at 843 n.2 (referring to a "severe" injury as "destruction of a business" and holding that "'mere' economic injuries" are not sufficient for a stay). Nor has GTL demonstrated that it lacks a way to recover lost revenue if the *2015 ICS Order* were to be reversed by a court, as it alleges, *see* GTL Petition at 24-25, for example through subsequently negotiated agreements with correctional facilities.

[251] *See* Opposition to GTL at 4 ("The FCC correctly noted that ICS providers' cost studies substantially overstated their actual costs to provide service and GTL ignores the verifiable fact that lower ICS rates have led to substantial increases in ICS call volume."); GTL Petition at 23-25.

[252] Telmate 2012 NPRM Comments at 12 (filed Mar. 25, 2013) ("Telmate's experience proves the often-cited economic truism that lower prices stimulate demand. Indeed, Telmate has been able to reverse the trend of falling . . . revenues at some of its correctional facility customer locations by lowering rates and increasing call volumes. When there are lower rates — so long as they are still reasonable rates — volume goes up and everyone wins."); *see also 2013 ICS Order*, 28 FCC Rcd at 14144, para. 66 (citing Telmate's reports of a 233% call volume increase when it brought its interstate ICS rates to the $0.12/minute local ICS rate as well as a call volume increase of up to 300% when it lowered its rates elsewhere); *see also* Letter from Glenn B. Manishin, Counsel to Telmate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed July 26, 2013) ("Telmate is a 'proponent of lower calling prices' for inmates . . . .)).

[253] *See 2015 ICS Order*, para. 70. The interim rate caps adopted in 2013 resulted in increased volumes of interstate calls, as high as 70 percent in some cases. *Id*. at para. 14 (citing Letter from Phil Marchesiello, Counsel to Praeses, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Oct. 3, 2014)).

[254] "The Petitioners have provided previous statements from GTL, CenturyLink, and Securus in response to a Request for Proposal asserting that the reduction in rates would lead to increased call volume, increased revenues for ICS providers, and, in turn, increased commissions paid to the correctional facilities that receive commissions." Opposition to GTL at 9, n. 24.

the low ICS rates will cause them irreparable damage and not serve the public interest."[255]

63. In response to GTL's claim that "the process of reviewing and revising hundreds of contracts with hundreds of customers . . . will consume tremendous resources (if it is even possible)"[256] and Telmate's similar argument,[257] we find that the industry has been on notice that the Commission will act for years.[258] Moreover, the Commission adopted a bifurcated transition to ensure ICS providers have sufficient time to make any adjustments needed to comply with the new rules.[259] After weighing varied suggestions for a transition period, the Commission allowed for two, lengthy transition periods to ease the effect on ICS providers and correctional facilities.[260] GTL's claims of impossible timelines for renegotiating contracts prior to the rules' effective dates are unsubstantiated[261] and contrary to record evidence.[262] The adopted transition periods allow GTL, and other ICS providers, sufficient time to renegotiate contracts, while balancing the need to provide end users timely relief from excessive ICS rates and fees.[263]

64. GTL then argues that "the Commission reaches its conclusion [that the *2015 ICS Order* will 'constitute changes in law and/or instances of force majeure that are likely to alter or trigger the renegotiation of many ICS contracts'] without considering any actual contract language."[264] Contrary to GTL's claims, however, the Commission reviewed various contracts that were submitted into the record by the Wright Petitioners and others and also considered other record evidence indicating that providers will be able to renegotiate most, if not all, of their contracts to reflect the new rules, including the new rate caps.[265] GTL has not provided any evidence in the record to counter the Commission's finding that

[255] *Id.* at 9.

[256] GTL Petition at 24.

[257] "The theoretical possibility that Telmate could renegotiate contracts with hundreds of facilities 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." Telmate Petition at 16. *See supra* para. 19 & n. 60 (contradicting claim that multiple states require site commissions and reiterating that the *2015 ICS Order* accounts for such a scenario).

[258] *See supra* Section II.

[259] *See 2015 ICS Order*, at para. 251; *see also Wireline Competition Bureau Announces the Comment Cycle and Effective Dates for the Inmate Calling Second Report and Order and Third FNPRM*, WC Docket No. 12-375, Public Notice, DA 15-1484 (WCB Dec. 22, 2015) (announcing that the rules and regulations governing the rates and fees in prison facilities will become effective March 17, 2016 and the rules and regulations governing the rates and fees in jail facilities will become effective June 20, 2016).

[260] *See 2015 ICS Order* at para. 251.

[261] GTL Petition at 24.

[262] *See 2015 ICS Order* at paras. 213, 251 (acknowledging that the record does not indicate that providers experienced difficulties implementing the rate caps within 90 days, for both prisons and jails, after the *2013 ICS Order*'s publication in the Federal Register).

[263] *See infra* para. 72.

[264] GTL Petition at 24 (quoting *2015 ICS Order* at para. 132); *see also id.* at 13.

[265] *See, e.g.,* Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Exh. B at 2 (filed Aug. 2, 2012) ("These rates shall remain firm during the term of the contract, and any renewals, unless: The Louisiana Public Service Commission (LPSC) or the Federal Communications Commission (FCC) issues regulations that mandate lower rates (individually or collectively, "Regulations"). If this occurs, and such Regulations are applicable to this Contract, the Contractor shall be required to decrease the affected rates in accordance with the time period required by such Regulations."); *see also* Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 3 (filed June 28, 2012) ("[T]he State of Florida and Securus have amended their agreement on four occasions since its execution in 2007. . . . Among the modifications in the amendments are the rates to be charged inmates for telephone service."); *2015 ICS Order*, paras. 132, 213-215.

ICS contracts typically include change-of-law provisions that would be triggered by the *2015 ICS Order*.[266] As the Wright Petitioners aptly point out, "GTL has never even provided an inventory of its contracts – let alone the actual contracts – to the FCC," to rebut the "substantial evidence" that other parties have provided showing that ICS contracts typically contain change-of-law provisions.[267] Moreover, ICS providers in general – and Petitioners in particular – are sophisticated corporations that should be able to negotiate change-of-law provisions in their contracts, particularly in light of the fact that they have "long been on notice that the Commission might impose new regulations governing ICS rates and ancillary fees."[268] Given the facts in the record, the Commission reasonably expects providers to renegotiate contracts, as needed, to ensure that they comply with the new rate caps.[269] A stay cannot be granted on this point given the minimal support GTL has provided to support its argument that it will not be able to renegotiate its ICS contracts to comply with the Commission's rules.[270]

65. GTL also claims that it will suffer irreparable harm because "uncertainty will disrupt the budgets and plans of GTL's customers, risking confusion and loss of goodwill."[271] Essentially, GTL is speculating about possible harms to its customers and trying to claim those theoretical harms as its own "irreparable harm" in order to justify a stay of the *2015 ICS Order*. Given the lack of evidence supporting these claims, however, they are precisely the type of "'blanket, unsubstantiated allegations of harm' that may not be used to grant a stay."[272] Claims of uncertainty are further undermined by the fact that interested parties, including ICS providers and correctional facility administrators, have long been on notice that the Commission was considering comprehensive ICS reform.[273]

66. Securus' argument that it will suffer "irreparable harm if the *Second Inmate Rate Order* becomes effective"[274] suffers from the same fatal flaw as GTL and Telmate's irreparable harm arguments; Securus provides no evidence in the record to substantiate the harms it claims it will suffer as a result of the *2015 ICS Order*. As discussed above, Securus' filings allege that Securus will lose a percentage of its revenues from two of its services, but do not provide any context for those percentages.[275] In fact, the Wright Petitioners suggest that Securus' "cost studies and other financial information [have] been demonstrated to be misleading at best."[276] Nonetheless, Securus claims that "[t]he substantial and unrecoverable losses that the new Ancillary Charge caps will create may force Securus to stop permitting online credit card transactions."[277] First, the inclusion of the word "may," calls into question Securus' claim that it *will* suffer irreparable harm. In addition, this threat rings hollow given evidence in the record, and relied upon in the *2015 ICS Order*, that Securus' costs and end-user rates for credit card

[266] *2015 ICS Order,* paras. 213-14.

[267] Opposition to GTL at 7.

[268] *2015 ICS Order*, para. 262; *see also Promotion of Competitive Networks in Local Telecommunications Markets,* Report and Order, 23 FCC Rcd 5385, 5391, para. 13 (2008).

[269] *See 2015 ICS Order*, paras. 213-216.

[270] "GTL had both the burden, and the ability, to attempt to prove otherwise and chose not to do so." Opposition to GTL at 7.

[271] GTL Petition at 25.

[272] *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 77 (D.D.C. 2013) (subsequent history omitted).

[273] *See, e.g.*, *2012 ICS NPRM,* 27 FCC Rcd at 16636-16643, paras. 17-34 (seeking comment on establishing rate caps for ICS) and paras. 37-38 (seeking comment on reducing or eliminating site commission payments).

[274] Securus Petition at 23.

[275] *See supra* at para. 53.

[276] Opposition to Securus at 4.

[277] Securus Petition at 24.

processing are out of line with those of other, smaller, ICS providers.[278] As the *2015 ICS Order* noted, "[t]he credit-card processing costs that Securus cites indicate to us that it is an outlier, especially since, as just discussed, companies that are much smaller than Securus acknowledge that they can process credit card payments at a $3.00 rate."[279]

67. Next, Securus claims that it will be irreparably harmed because it "would have to discontinue Text2Connect and PayNow under the new caps."[280] These optional services are Securus' current single-call services, as described by the *2015 ICS Order*.[281] Given the claimed investment in these services, and assuming such statements are accurate without any substantiation, we find it more likely that Securus would modify its services rather than completely discontinue them. In fact, Securus' claim of irreparable harm is entirely inconsistent with what it has told its clients. In a letter sent after the *2015 ICS Order* was released, Securus assured its clients that:

> [g]iven our diversification across other lines of business, about 60% of our revenue is associated with inmate telephone service, and profits and future growth from our subsidiaries will help us manage through these changes. Further, our future costs will be reduced given that we own our platform and technologies and don't need to pay third parties [for] its use. Finally, our scale and past investment in our platform will also make us more efficient.[282]

Securus also told its clients that "if the Order does become effective, we do not plan to eliminate service from any location or significantly reduce any service levels due to its implementation."[283] This message stands in stark contrast to Securus' claims in its Petition that it will discontinue accepting credit card payments as well as its Text2Connect or PayNow services. Because Securus' claims of irreparable injury are unsubstantiated, and, in fact, refuted by its own words, they do not prove the type of irreparable harm necessary to grant a stay.[284]

68. *The Unfounded Concerns about Reporting Requirements are Inaccurate and the Rules are Not Yet Effective*. Next, Securus claims that a stay of the site commission reporting requirement adopted in the *2015 ICS Order* is justified because, without it, the company "will be required to report every task or installation it undertakes at each of the 2100+ jails it serves," thereby causing Securus irreparable harm.[285] Later in its Petition, Securus changes its characterization of the claimed harm, stating that the "'Site Commission' reporting present[s] a *high risk of harm* to Securus and therefore should be stayed."[286] As discussed above, however, the definition of site commission in the rules is not as sweeping as Securus claims and it will not require Securus to report every task or installation at each facility it serves.[287] The applicable test to justify the extraordinary relief of a stay is that the harm be "both certain

[278] *See 2015 ICS Order* at para. 167.

[279] *Id*.

[280] Securus Petition at 25.

[281] *See 2015 ICS Order* at para. 182.

[282] *See* Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at Exh. B (filed Nov. 20, 2015).

[283] *Id*.

[284] *Nat'l Min. Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52 (D.D.C. 2011).

[285] Securus Petition at 24.

[286] *Id*. at 27 (emphasis added).

[287] *See supra* paras. 31-33.

and great; it must be actual and not theoretical."[288] An alleged "high risk" of harm does not justify a stay. Also, the annual reporting requirement is only effective upon approval from OMB and, therefore, it is not imminently effective.[289] Securus will have an opportunity to challenge the breadth of the Commission's reporting requirement during the PRA review process.[290] Accordingly, we find that Securus has failed to show that it is subject to a risk of imminent harm.

69. For the reasons described above, we find that the Petitioners have failed to prove that the *2015 ICS Order* will result in irreparable injury.

C. The Requested Stays Will Result in Harm to the Public Interest and Others

70. The Petitioners have failed to prove that third parties will not be harmed if the Commission grants their stay petitions. We reject their claims for the reasons described below.

71. *Continued Reliance on the Interim Rate Caps Is Insufficient to Satisfy the Commission's Statutory Requirements*. GTL argues that third parties will not be harmed if the Commission grants GTL's petition because the interim rate caps established by the *2013 ICS Order*, which are similar to the rate caps the Wright Petitioners originally requested over a decade ago, would remain in effect in the event of a stay.[291] Telmate makes a similar argument, asserting that ICS providers will be harmed if the *Order* is not stayed, while third parties will not be harmed because a stay would result in the same rates and rules already in effect under the *2013 ICS Order*.[292] We find these arguments unconvincing. As an initial matter, the reviewing court's action on the *2013 ICS Order* challenge has no bearing on our decision making with regard to the stay requests. Once the rules adopted in the *2015 ICS Order* take effect, they will supersede the rules adopted in the *2013 ICS Order*.[293]

72. Third parties will be harmed if a stay of the *2015 ICS Order* is granted because, as the Wright Petitioners point out in their opposition to the GTL's petition, "any delay in the effectiveness of the Second R&O would delay immediate relief to millions of intrastate ICS customers and all customers being charged usurious ancillary fees."[294] Although the interim rate caps adopted in the *2013 ICS Order* made progress towards remedying the situation, those interim caps apply only to interstate traffic; because over 80 percent of calls to and from correctional facilities are *intra*state, the interim rate caps provide only limited relief to end users.[295] And, as the Commission found in the *2015 ICS Order*, the rates providers are charging inmates and their families for ICS and ancillary services are still unfair, unjust, and unreasonable.[296] Moreover, the Commission's action should not be limited to the specific relief sought in

[288] *See, e.g.*, *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir.1985) (per curiam) (*Wisc. Gas*) (To demonstrate irreparable harm "the injury must be both certain and great; it must be actual and not theoretical. . . . [T]he party seeking injunctive relief must show that '[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'") (citations omitted).

[289] *See 2015 ICS Order* para. 268; *supra* para. 31.

[290] *See supra* para. 33, n. 127.

[291] GTL Petition at 25.

[292] Telmate Petition at 17.

[293] *See 2015 ICS Order* at para. 10. As GTL, Securus, Telmate, and other litigants challenging the *2013 ICS Order* have acknowledged to the D.C. Circuit, however, "judicial vacatur of new rules will generally reinstate rules previously in force." Joint Response of Petitioners and Intervenors to Motion of the Federal Communications Commission to Continue Holding Cases in Abeyance at 3 n.2, *Securus Techs., Inc. v. FCC* (D.C. Cir. No. 13-1280 and consolidated cases), Dkt. #1588241. Thus, in the unlikely event that rules in the *2015 ICS Order* take effect but do not survive judicial review, earlier rules from the *2013 ICS Order* may return to force.

[294] Opposition to GTL at 8.

[295] *2015 ICS Order* at para. 7.

[296] *See id.* at paras. 21, 161.

the Wright Petitioners' original request, especially considering that their petition was filed more than twelve years ago.[297] Telecommunications costs have fallen in the interim,[298] and ICS rates that might have been fair, just, and reasonable in 2002 may be excessive now. Furthermore, the data received in response to the Mandatory Data Collection show that the interim rates are above many providers' reported costs.[299]

73. *A Stay Will Harm the Public Interest and Third Parties Who Incur the Costs of Securus' Single Call Service Rates.* Securus argues that third parties will not be harmed by its requested stay, claiming that consumers will benefit from a stay because Securus will not be forced to discontinue many of its "innovative, convenient services on which customers have relied."[300] These "beneficial services" include Securus' Single-Call Service, under which Securus charges "premium" rates for certain calls.[301] As an initial matter, the alleged harm Securus describes would be a result of Securus voluntarily choosing to discontinue these services. The *2015 ICS Order* does not require Securus to stop offering these services – it merely requires Securus and other ICS providers to charge end users for each single call in a manner consistent with the Commission's approach to third-party financial transaction fees.[302] And, contrary to Securus' argument, third parties would be harmed if a stay were granted because they would still be subject to per-minute rates for these services that are 300 to 376 percent higher than the interim interstate rates.[303] The record also demonstrates that Single Call Services, at pre-reform rates, are harmful to ICS consumers, particularly those who are newly incarcerated and vulnerable.[304] Finally, inflated rates likely drive down use of ICS, which could lead to reduction in contact between inmates and their families, thereby increasing recidivism rates and negatively impacting the public as a whole.[305]

74. Additionally, Securus claims that customers who do not want to pay the "premium fee for calls to their mobile phone account do not have to accept those calls[,] [t]herefore, no third party would suffer any meaningful harm if Securus is allowed to continue offering these optional services during the pendency of the stay."[306] Securus' argument is undermined, however, by the fact that the parties paying for these services are often driven by the desire to helped loved ones at a time of urgent need.[307] This

[297] *See id.* at para. 1.

[298] *See 2013 ICS Order*, 28 FCC Rcd at 14122-23, paras. 29-31 (describing how ICS costs have decreased).

[299] *See 2015 ICS Order* at para. 59 (stating that the analysis of the Mandatory Data Collection suggests that providers may have been over inclusive in reporting their costs, implying that the adopted rate caps are conservative).

[300] Securus Petition at 27.

[301] *Id.* at 12, 27-28.

[302] *2015 ICS Order*, para. 147.

[303] *See supra* Section III.A.5.

[304] Securus Petition at 14-15 (providing the transcript detailing how Securus describes its Single Call Services to end users, which indicates that the high-cost Single Call services are described to customers first and the low cost or free options are described last); *Id.* at 29 (acknowledging that initial incarceration may cause arrestees to be "desperate and despondent at being cast into the dangerous and unfamiliar environment of a jail."); *see also 2015 ICS Order* at para. 189; Prison Policy Initiative: Single Call Programs at 5 (quoting Alex Friedman, Associate Director, HRDC, describing receiving a single call service call from a client: "She called me, and when I picked up the phone the automated system told me I was receiving a free call from somebody in jail. And she said, 'I'm locked up. I'm in such-and-such-a jail. I'm scared. I need help. Can you please ...,' and then she was cut off, and an automated system kicked in and informed me that if I wanted to continue that free call, I could conveniently pay $14.95 on my credit card or open a prepaid account." 2013 ICS Workshop Transcript at 24; ICSolutions, LLC *Second FNPRM* Comments at 11 (filed Jan. 12, 2015); CenturyLink *Second FNPRM* Comments at 26 (filed Jan. 27, 2015).

[305] *See infra* n. 324.

[306] *See* Securus Petition at 27.

[307] *See 2015 ICS Order*, para. 186.

urgency, combined with the evidence of "substantial end-user confusion regarding single-call services," likely leads at least some consumers to opt for needlessly overpriced "premium" services as they scramble to communicate with incarcerated friends or family members.[308] The Commission determined that, prior to the reforms adopted in the *2015 ICS Order*, single call services were being used to inflate charges to end users.[309] Accordingly, staying the rule would harm users of Securus' services by subjecting them to unjust, unreasonable, or unfair rates for a service that Securus claims is critical.

75. *The Adopted Reporting Requirements Benefit End Users and Third Parties*. Finally, Securus argues that a stay should be granted because the usefulness of rule 64.6060, which details the annual reporting requirement, "lies with FCC Staff and not the general public,"[310] and exclusively benefits the Commission for use in further rulemaking proceedings.[311] However, as the Commission explained in the *2013 ICS Order*, it established the annual certification requirements to "to facilitate enforcement and as an additional means of ensuring that each and every ICS provider's rates and practices are just, reasonable, and fair and remain in compliance with this Order."[312] In the *2015 ICS Order*, the Commission further explained that the purpose of the annual reporting and certification requirement was to "enable monitoring of developments, and require the providers to be transparent with regard to disclosure of their rates and policies."[313] Contrary to Securus' argument, receipt of this information allows the Commission to protect end users who pay these fees and third parties, and is consistent with the Commission's statutory duty to prescribe rules and regulations as are necessary in the public interest to ensure that charges are just and reasonable.[314]

76. For the reasons described above, we find that grant of the Petitioners' stay petitions would result in great harm to ICS end users by further delaying much-needed reforms.[315]

D. The Public Interest Does Not Support a Grant

77. The Petitioners have failed to prove that the public interest supports grant of their stay petitions. We reject their arguments for the reasons described below.

78. *The Adopted Rate Caps Serve the Public Interest*. First and foremost, Petitioners' contentions that a stay will benefit the public interest contradict evidence in the record of the urgent need to reform the ICS market.[316] As the Commission stated in the *2015 ICS Order*, the actions the Commission has taken to date have been positive in many respects.[317] However, without the reforms provided in the *2015 ICS Order*, the current rates and ancillary service charge structure will continue to harm and delay immediate relief to ICS users. The record indicates that over 80 percent of calls to and from correctional facilities are intrastate, and thus were not subject to the reforms of the *2013 Order*.[318] Without the reforms adopted in the *2015 ICS Order*, intrastate rates in most states will remain at

[308] *See id.* at para. 182, n. 652. Thus, the record evidence belies Securus' arguments regarding the consumer benefits of its "premium calling services." *See* Securus Petition at 13.

[309] *2015 ICS Order* at para. 182.

[310] Securus Petition at ii; *see also id.* at 27-28.

[311] *Id.* at 28.

[312] *2013 ICS Order*, 28 FCC Rcd at 14169, para. 116.

[313] *2015 ICS Order* at para. 9.

[314] 47 U.S.C. § 201.

[315] *See supra* section II.

[316] *See 2015 ICS Order*, para. 7; *see also infra* para. 80.

[317] *2015 ICS Order*, para. 7.

[318] *Id*.

egregiously high levels in most of the country.[319] Furthermore, absent reform, ICS providers have the ability and incentive to continue to increase ancillary service charges in number and in dollar amount, which continues to inflate the effective price consumers pay for ICS.[320]

79. In support of its petition, GTL argues that, absent a stay, it and other ICS providers will be forced to reduce their rates and that doing so will lead to a reduction in the availability and quality of ICS, resulting in harm to consumers.[321] Telmate makes a brief, but similar argument.[322] We disagree with these arguments for several reasons. First, the record does not support GTL's specific argument that the rate caps will result in a reduction in the number of facilities that ICS providers are able to serve.[323] Indeed, as the Commission stated in the *2015 ICS Order*, this argument is unpersuasive.[324] As the Commission explained, the rate caps the Commission adopted are well above the Petitioners' reported costs;[325] if anything, the rate caps are overly-generous.[326] Furthermore, as the Commission also noted, it is "highly unlikely" that facilities would eliminate access to ICS as a result of the *2015 ICS Order*.[327] Moreover, several providers disputed this claim, observing that GTL, in particular, failed to break out its costs by facility type, and proposed rate caps well above their reported average costs over both prisons and jails.[328]

80. Second, GTL fails to include in its analysis the offsetting financial and public interest benefits that a reduction in rates will have on its company. Rather, GTL makes broad, general, and unsupported statements regarding the financial losses it allegedly will incur as a result of the *2015 ICS Order*. However, it is well documented in the record that the rate caps enacted by the *2013 ICS Order* have led to substantial increases in interstate call volume.[329] An increase in call volume has a clear public interest benefit, as it has been shown that increased contact between inmates and their families will reduce recidivism rates, and that "a 1% decrease in the recidivism rate would result in savings of more than 250 million dollars for state, county and local jurisdictions."[330] Increased call volumes may also provide a financial benefit to ICS providers, who, in their own statements, have argued that increased call volumes would lead to increased revenues.[331] Finally, GTL's contention that ICS providers will be forced to

[319] *Id*.

[320] *Id*. at para. 144.

[321] GTL Petition at 25 (arguing that the Commission's rate caps will force providers to reduce their rates below their costs).

[322] *See* Telmate Petition at 17.

[323] *See* GTL Petition at 25.

[324] *2015 ICS Order* at para. 70.

[325] *See id.*

[326] As noted above, the Commission made no downward adjustments to the costs providers self-reported and did not factor in the increased call volumes that are likely to result from lower rates. *See, e.g., id.* paras. 57, 59.

[327] *Id*. at para. 140 (noting both the benefits facilities reap from allowing ICS and the negative repercussions they would likely face if they sought to remove or limit access to ICS).

[328] *2015 ICS Order* at para. 70.

[329] *See* Opposition to GTL at 4; *2015 ICS Order* at para. 14 (citing Letter from Phil Marchesiello, Counsel to Praeses, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Oct. 3, 2014)); *see also supra* n. 259.

[330] *See* Opposition to GTL at 9 (citing Declaration of Coleman Bazelon, Ph.D.).

[331] *See id.* (citing Letter from Lee G. Petro, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Jul. 18, 2013) ("the recent statements of CenturyLink, GTL and Securus demonstrate that a lower ICS rate will lead to higher call volumes, and a commission of 50% or more can still be paid to the correctional authority.")).

reduce their rates below cost does not take into consideration a provision in the *2015 ICS Order* allowing a provider to seek a waiver if it is unable to obtain fair compensation under the rate caps.[332] Should GTL find itself in a position where it cannot receive fair compensation, it can file a petition with the Commission rather than harm the public interest by reducing its ICS offerings. For these reasons, we find GTL does not meet the burden of proving that a stay would benefit the public interest.

81. In a similar vein, Securus argues that the public interest will be harmed absent a stay, because Securus will be "forced to remove services from the market," including its Text2Connect and PayNow services and most credit card transactions.[333] We disagree with Securus' claim that the *2015 ICS Order* may result in the discontinuation of these services. Text2Connect, PayNow, and credit card transaction services are all permitted as allowable ancillary services by the *2015 ICS Order*.[334] The Commission decided to permit these ancillary services, while disallowing others, because it concluded that "the allowable charges will facilitate communications between inmates and their loved ones and will allow ICS providers to recover the costs incurred for provided the ancillary services associated with the relevant fee."[335] Given the Commission's endorsement of the Text2Connect and PayNow services and the use of automated payment fees as allowable ancillary service charges that benefit the public, we disagree that the *2015 ICS Order* compels Securus to remove these services from the market. Instead, we conclude that removing these services would be a voluntary business decision and it is not one that we believe Securus will make. Meanwhile, permitting continued service at unconstrained rates would harm the public.[336]

82. Telmate argues that the Commission has not identified any exigency or changed circumstances that would require that the *2015 ICS Order* take "immediate effect."[337] Contrary to Telmate's characterization, however, none of the rules that the Petitioners seek to stay are immediately effective.[338] Moreover, as the Commission noted in the *2015 ICS Order*, it has repeatedly been demonstrated "that, absent regulatory intervention, ICS rates and associated ancillary fees likely will continue to rise."[339] As explained above, ICS end users have waited over a decade for relief from unjust,

[332] *2015 ICS Order* at para. 65.

[333] Securus Petition at 28. Text2Connect is a service that enables inmates to place collect calls to wireless phones, and PayNow is a service that enables inmates to place collect calls to landline phones, which are paid by the called party immediately via credit card. *Id.* at 3.

[334] *See 2015 ICS Order* at paras. 161-63 (permitting ICS providers to charge fees for single-call and related services, e.g. "direct bill to mobile phones without setting up an account," so long as the provider directly passes through the third-party financial transaction fees with no markup, plus the adopted per-minute rates. ICS providers may also charge third party financial transaction fees, e.g. MoneyGram, Western Union, credit card processing fees and transfers from third-party commissary accounts, so long as the long as the provider directly passes through the charge directly to the consumer with no markup).

[335] *Id.* at 161.

[336] *See supra* Section III.C (discussing the harms that would arise from postponing the Commission's long-awaited ICS reforms).

[337] *See* Telmate Petition at 17.

[338] *See 2015 ICS Order* at para. 336 (ordering that the rules become effective 90 days after publication in the Federal Register, except for rules governing jails, which become effective six months after publication and rules and requirements subject to PRA approval); *see also Wireline Competition Bureau Announces the Comment Cycle and Effective Dates for the Inmate Calling Second Report and Order and Third FNPRM*, WC Docket No. 12-375, Public Notice, DA 15-1484 (WCB 2015).

[339] *2015 ICS Order* at para. 2; *see also 2014 ICS FNPRM*, 29 FCC Rcd at 13174-75, para. 5 ("Many intrastate rates remain high with some having even increased following the [2013 ICS] *Order*. There are indications that ancillary fees have also increased in number, price, or both, leading to further expense for ICS consumers in a manner that is

(continued…)

unreasonable, and unfair ICS rates. The Commission provided partial relief in the *2013 ICS Order* with indications that is would provide more comprehensive relief in the near future.[340] With the adoption of interstate and intrastate rate caps as well as ancillary service charge caps and the adopted site commission approach the Commission provides that much-needed and long-awaited relief.

83. For the foregoing reasons we conclude that the requested stay is likely to result in harm to third parties and would be contrary to the public interest.

IV. ORDERING CLAUSES

84. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 201, 225, 276, and 303(r) and of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 201, 225, 276, and 303(r) and the authority delegated pursuant to section 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, this Order Denying Stay Petitions in WC Docket No. 12-375 IS ADOPTED.

85. IT IS FURTHER ORDERED, that the Petition of Global Tel*Link for Stay Pending Judicial Review, the Petition of Telmate, LLC for Stay Pending Judicial Review, and the Securus Technologies, Inc. Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136) ARE DENIED.

86. IT IS FURTHER ORDERED, that the Securus Technologies, Inc. Motion for Leave to File Reply, filed on January 5, 2016, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Matthew S. DelNero
Chief
Wireline Competition Bureau

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often unrelated to the cost of providing ICS. These developments underscore the critical need for the Commission to move expeditiously to adopt comprehensive, permanent reforms.").