

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

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

**PETITION OF PAY TEL COMMUNICATIONS, INC.
FOR PARTIAL STAY OF
RATES FOR INTERSTATE INMATE CALLING SERVICES ORDER**

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November 26, 2013

SUMMARY

Pay Tel Communications, Inc. (“Pay Tel”) respectfully seeks a partial stay of the *Order*, released September 26, 2013 in this docket (*Rates for Interstate Inmate Calling Services*). Specifically, Pay Tel requests that the *Order*’s cost-based rates requirements, safe harbors and interstate rate caps (47 C.F.R. §§ 64.6010–64.6030) be stayed as applied to jails pending the adoption of permanent ICS rules.

Although well-intentioned, the *Order* imposes upon the ICS industry a one-size-fits-all regulatory scheme in which Pay Tel will not be able to recover its overall costs of providing ICS in jails and will be forced to either operate at a loss or go out of business. The Commission’s decision to adopt a uniform approach to ICS reform, notwithstanding a record replete with evidence demonstrating clear distinctions between prisons and jails, constitutes unlawful, arbitrary and capricious decisionmaking. Moreover, the regulatory regime the *Order* adopts will make it legally and mathematically impossible for Pay Tel and other providers of ICS in jails to recover their aggregate, holding-company level costs, in violation of Section 276 of the Communications Act of 1934.

In addition, the Commission acted arbitrarily and capriciously in disregarding record evidence that the cost of prepaid ICS calling exceeds the cost of debit ICS calling and in erroneously grouping prepaid and debit calls together for purposes of the *Order*’s rate caps. It also adopted “safe harbor” rates that are unworkable and entirely defective as applied to provision of ICS in jails. Finally, the *Order* fails to provide required guidance and standards regarding how ICS providers are to comply with its cost-based regime.

In order to avoid the irreparable harm that will result from complete and immediate implementation of the *Order*, Pay Tel seeks the limited relief and partial stay of the *Order* as set

forth above. The relief is narrow in scope and targeted only toward those parties adversely impacted by the *Order*'s legal deficiencies. Critically, the relief Pay Tel requests would leave in place important, long-needed reforms for all ICS consumers and would keep the focus on the interstate rate regulations and the prisons that have been the subject of the Wright Petitioners' efforts for more than ten years.

Consistent therewith, granting Pay Tel's stay request would not injure third parties; if anything, granting the request would help third parties by ensuring the availability of ICS in jails and would therefore serve the greater public interest. Because Pay Tel is likely to succeed on the merits and will suffer irreparable injury absent a stay, and because the balance of equities favors such stay, Pay Tel's stay request should be granted.

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Declaration of Vincent Townsend, President, Pay Tel Communications, Inc.

Declaration of Don Wood, Principal, Wood & Wood Consulting, Inc.

INTRODUCTION

Petitioner Pay Tel Communications, Inc. (“Pay Tel”), through counsel and pursuant to 47 C.F.R. §§ 1.41, 1.43, and 1.44(e), hereby respectfully requests that the Commission grant a partial stay of the *Order* released September 26, 2013 in this docket.¹ As it has consistently stated in this proceeding, Pay Tel is supportive of reform of the inmate calling services (“ICS”) industry.² Pay Tel applauds the Commission’s well-intentioned efforts to bring about “relief to the millions of Americans who have borne the financial burden of unjust and unreasonable interstate inmate phone rates.”³ But good intentions are not sufficient by themselves, and the *Order* suffers some significant failings as applied to ICS in jails, from which Pay Tel seeks targeted relief.

The *Order* imposes upon the ICS industry a one-size-fits-all regulatory scheme in which Pay Tel will not be able to recover its overall costs of providing ICS in jails and will be forced to either operate at a loss or go out of business. The Commission’s decision to adopt a uniform approach, in the face of abundant record evidence detailing the clear distinctions between prisons and jails, constitutes arbitrary and capricious decisionmaking. More specifically, the establishment of a regulatory environment in which Pay Tel and other providers of ICS in jails will not be able, as a matter of legal and mathematical certainty, to recover total, company-level

¹ Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 13-113 (rel. Sept. 26, 2013) (“*Order*”).

² See, e.g., Pay Tel Comments at 14–16, WC Docket No. 12-375 (Mar. 25, 2013) (advocating for reform regarding several ICS providers’ practice of charging ancillary fees in order to increase profits); Transcript of Reforming ICS Rates Workshop at 264–78, WC Docket No. 12-375 (filed July 16, 2013) (testimony of Pay Tel’s President Vincent Townsend supporting Commission reform of ICS and laying out several concrete elements required therefor and stating that “first and foremost consumers are entitled to a fair and reasonable rate”); Pay Tel Ex Parte Presentation, “Reform of ICS Requires Reform of Both Interstate and Intrastate ICS Elements” at 1, WC Docket No. 12-375 (Aug. 1, 2013) (“Pay Tel Aug. 1 Ex Parte Presentation”) (explaining that Pay Tel “has consistently advocated in this proceeding [for] meaningful and lasting reform”).

³ *Order* ¶ 1.

costs of providing ICS violates Section 276 of the Communications Act of 1934, as amended (“Act”).

As such, to avoid the irreparable harm that will result from the *Order’s* piecemeal implementation of interim pricing mechanisms, Pay Tel requests that the *Order’s* cost-based rates requirements, safe harbors and interstate rate caps (47 C.F.R. §§ 64.6010–64.6030) be stayed as applied to jails pending adoption of permanent ICS rules. This relief is limited in nature, targeted directly to parties adversely impacted by the *Order*, and will leave in place important reforms for all consumers of ICS while focusing the interstate rate regulations on the market (prisons) that was the subject of the Petitioners’ complaints in the first place and with the greatest incidence of interstate calling.

BACKGROUND

The *Order* is the result of an effort more than ten years in the making to reform the ICS industry and reduce the rates that inmates and their families pay to make phone calls.⁴ This proceeding came in response to two petitions for rulemaking, filed in 2003 and 2007, respectively, dealing with ICS rates.⁵ In response to those two petitions, the Commission in December 2012 initiated this rulemaking proceeding, seeking comment as it “consider[ed] changes to [its] rules governing rates for interstate interexchange inmate calling services.”⁶

⁴ *Id.*

⁵ Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (Nov. 3, 2003) (“Wright Petition”); Petitioners’ Alternative Rulemaking Proposal, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (Mar. 1, 2007) (“Alternative Wright Petition”).

⁶ Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629 (rel. Dec. 28, 2012) (“*NPRM*”).

Pay Tel,⁷ which is on record as being “supportive of the Commission’s efforts to reform inmate calling services,”⁸ has been an active participant in this proceeding. Pay Tel’s President, Vincent Townsend, served as a panelist during the Commission’s “Reforming ICS Rates Workshop” in July 2013, where he advocated for a “comprehensive approach” to reform efforts.⁹ In addition, Pay Tel was the *only* ICS provider that submitted a full and properly developed cost study in response to the Commission’s request in the NPRM for cost data.¹⁰ The Commission relied heavily upon Pay Tel’s cost study, particularly in adopting its interstate rate caps for debit calls,¹¹ and even thanked Pay Tel for its cooperation and assistance.¹²

On September 26, 2013, the Commission released the *Order*. In a sweeping reform effort, the *Order*, among other things, requires that all interstate ICS rates and all ancillary fees be “cost-based”.¹³ It also prescribes specific rate caps for each calling type as well as “safe harbor” rates. If providers are able to charge rates within the safe harbor at all facilities they serve, such rates will be presumed reasonable and lawful (but still are subject to challenge) and will not be subject to refund liability if the rates are subsequently determined to be non-

⁷ Pay Tel, founded in 1986, is one of the nation’s leading inmate telephone service providers, serving exclusively jails. It currently provides service to facilities in North Carolina, Georgia, Virginia, South Carolina, Tennessee, Florida, Washington, Kansas, Missouri, New Mexico, California, and Ohio. Pay Tel was the first inmate calling services provider, beginning in 1991, to offer customer service dedicated solely to serving inmates’ families and was the first inmate calling services provider, also beginning in 1991, to offer in-house billing and prepaid calling plans. Pay Tel’s founder and president, Vincent Townsend, is a recognized expert on fraud prevention in public communications and served for over twenty years as the payphone industry’s representative on the former Telecommunications Fraud Prevention Committee of the Alliance for Telecommunications Industry Solutions.

⁸ Transcript of Reforming ICS Rates Workshop at 264–65.

⁹ *Id.* at 265–66.

¹⁰ *See, e.g., NPRM* ¶ 43. Pay Tel was also the only ICS provider that provided cost data on ancillary fees in response to the Commission’s request.

¹¹ *Order* ¶¶ 75–77.

¹² *Id.* ¶ 75 n.282 (“We appreciate Pay Tel’s willingness to provide the kind of objective cost data that the Commission sought in the 2012 ICS NPRM in order to facilitate our data-driven analysis of ICS costs.”).

¹³ *Id.* ¶ 12.

compliant.¹⁴ Rates established in violation of the new requirements can be invalidated and the provider can potentially be subjected to forfeitures of up to \$160,000 for each violation, loss of section 214 authorization to operate as a carrier, and the obligation to make refunds to consumers.¹⁵ This regulatory scheme is to be applied in a uniform manner to all correctional facilities and does not account for cost differences among, for example, jails and prisons.¹⁶

There are several significant flaws with the *Order*, particularly as its commands are applied to provision of ICS in jails. Pay Tel seeks a limited stay from these provisions. So that Pay Tel may take appropriate action to preserve its rights to seek review of the *Order*,¹⁷ Pay Tel respectfully requests that the Commission resolve this Petition by December 10, 2013, which is 14 days from the date of this filing.

STANDARD FOR ENTERING A STAY

In considering a stay request, the Commission applies the four-factor test established in *Virginia Petroleum Jobbers Association v. FPC*, as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*¹⁸ Under this test, a petitioner must demonstrate that: (1) it will suffer irreparable harm in the absence of a stay; (2) it is likely to prevail on the merits of its petition for review; (3) a stay will not injure other parties; and (4) a stay is in the public

¹⁴ *Id.* ¶ 60.

¹⁵ *Id.* ¶¶ 52, 118, 120.

¹⁶ *Id.* ¶ 17.

¹⁷ The issues identified herein are more properly dealt with in the context of the Commission's consideration of permanent rate caps. Should the Commission issue a stay pending adoption of such permanent rates, it may not be necessary for Pay Tel to seek piecemeal reconsideration and/or review of these issues. If necessary in light of the Commission's action or inaction on the instant stay request, Pay Tel intends to either seek reconsideration or review of the *Order*.

¹⁸ *See generally* Order Denying Stay Petitions and Petition to Hold in Abeyance at ¶ 7, DA 13-2236, Docket No. 12-375 (rel. Nov. 21, 2013).

interest.¹⁹ The relative importance of the four criteria will vary depending upon the circumstances of the case. If there is a particularly overwhelming showing in at least one of the factors, the Commission may find that a stay is warranted notwithstanding the absence of another one of the factors.²⁰ A stay is warranted where a petitioner demonstrates a likelihood of success on the merits and a showing of “irreparable injury,” or, alternatively, a “serious” question regarding the merits coupled with a more substantial showing regarding the balance of equities.²¹

ARGUMENT

I. PAY TEL IS LIKELY TO SUCCEED ON THE MERITS

In its zeal to reform prison ICS rates, the *Order* casts its net too widely in including jails, despite evidence in the record that jails are subject to fundamentally different cost structures than prisons. Pay Tel is likely to succeed on the merits of a petition for review/reconsideration because the *Order* disregarded abundant record evidence of cost differences in adopting a one-size-fits-all regulatory scheme that is unworkable as applied to jails; adopted a regulatory scheme that, by operation of law, will preclude Pay Tel and other ICS providers in jails from recovering their total costs of providing service; erred in disregarding record evidence demonstrating that the cost of providing prepaid service exceeds that of providing debit service; and failed to provide meaningful standards and guidance concerning its new cost-based rates requirement.

¹⁹ Order, *In re Regulation of Prepaid Calling Card Services*, 22 FCC Rcd 5652, 5654 ¶ 7 (rel. Mar. 29, 2007).

²⁰ Order, *In re TRS & Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 23 FCC Rcd 1705, 1706–07 ¶ 4 (rel. Feb. 7, 2008) (“2008 Order”).

²¹ See *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (“One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.”) (internal quotation marks omitted).

A. The Commission Ignored Abundant Record Evidence In Adopting One-Size-Fits-All Rate Caps and Safe Harbors

In promulgating new rules, the Commission must take a sufficiently careful look at and consider all aspects of the problems with which it is presented,²² and, where it makes a decision that is contrary to the evidence in the record, the Commission must offer a reasonable explanation therefor.²³ Moreover, if the Commission by rule classifies as similar two things that the record shows are, in fact, different, such Commission action is arbitrary, capricious, and unlawful—particularly where the Commission fails to properly respond to counterarguments regarding the classification.²⁴

The *Order* violates these requirements by electing to treat all correctional facilities in a uniform manner by adopting “one-size-fits-all” rate caps and “safe harbor” rates.²⁵ There is abundant record evidence²⁶ demonstrating there are very real cost differences associated with providing ICS in jails and prisons—and that those differences make it significantly more costly to provide ICS in a jail than a prison.²⁷ These differences flow from the fundamentally different

²² See, e.g., *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1231–32 (D.C. Cir. 1980) (partially vacating FCC Order as to revisions in rates and rate elements within private line service categories because the Commission “failed to take a sufficiently careful look at the problem presented, and failed to engage in reasoned decisionmaking with respect to [the] issue” where it conducted “no examination of the voluminous evidence of record, no analysis of the underlying cost studies, and no discussion of the rate element increases on their merits”).

²³ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that an “agency rule would be arbitrary or capricious if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”).

²⁴ See, e.g., *Ill. Pub. Telecomms. Ass’n v. FCC*, 117 F.3d 555, 563–64 (D.C. Cir. 1997) (“The problem with the FCC’s decision [to assign the same rates to local coin and coinless calls on the grounds such calls are “similar”] is that the record in this case is replete with evidence that the costs . . . are *not* similar.”) (emphasis in original).

²⁵ *Order* ¶ 17 (stating there is “no need at this time to draw any distinction” between prisons and jails).

²⁶ Dissenting Statement of Commissioner Ajit Pai at 112 n.45 (citing record evidence, including Pay Tel’s submissions) (“Pai Dissent”).

²⁷ Pay Tel alone submitted detailed explanations of the differences between providing ICS in prisons and jails, and the higher costs associated with operations in the latter, no fewer than nine times since March 2013 alone. See, e.g., Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Aug. 2, 2013) (“Pay Tel Aug. 2 Ex Parte”); Pay Tel Aug. 1 Ex Parte Presentation at 3–5; Letter from

(continued . . .)

purposes served by the facilities and include matters such as: the heavy, consistent, and faster turnover of the inmate population in jails, leading to increased account set-up costs and requiring more phones per inmate in jails (and higher costs associated with the investment therein and maintenance thereof); a greater reliance on prepaid and collect calling in jails, each of which is more costly to provide than debit calling (which predominates in prisons);²⁸ jail administrators' frequent requirement that ICS providers integrate their systems with other services, like commissary systems; the requirement that ICS providers operating in jails provide a significant amount of zero-revenue, or free, calls to inmates;²⁹ and fewer overall calling minutes in jails relative to prisons over which to spread costs due to prescribed limits on the length of calls in jails and other similar reasons.³⁰

Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Aug 1., 2013); Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (July 31, 2013) ("Pay Tel July 31 Ex Parte"); Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (May 31, 2013) ("Pay Tel May 31 Ex Parte"); Pay Tel Reply Comments at 2, 4–12, WC Docket No. 12-375 (Apr. 22, 2013); Pay Tel Comments at 9–11.

²⁸ See *infra* at Part I.C. The *Order* mistakenly groups debit calling with prepaid calling for purposes of the rate caps and safe harbor.

²⁹ See, e.g., Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, at 2 WC Docket No. 12-375 (July 3, 2013) (explaining the "dramatic increase in zero-revenue calls such as free first calls to connect with family, free calls to public defenders" and more, and noting that these calls "can constitute over one-half of the total calls in the growing-number of jails" where jails require systems' integration); Pay Tel Comments at 10–11 (noting that nearly 13% of Pay Tel's total calls are zero-revenue); Pay Tel Reply Comments at 9.

³⁰ See Pay Tel Comments at 8–12. Pay Tel repeatedly summarized those differences and the higher costs of serving jails. See, e.g., Pay Tel Aug. 1 Ex Parte Presentation at 3–4 (setting forth numerous unique aspects of jails that make provision of ICS therein more costly than provision of ICS in prisons, including "(i) the heavy turnover of the inmate population which results in a greater demand for high-cost individual account set-up and greater density of phones per inmates (with resulting higher capital investment, repair cost and bandwidth demand); (ii) required integration of phone and commissary systems in jails as opposed to prisons; (iii) greater incidence of non-revenue calls in jails as compared to prisons; (iv) heavier reliance on individual account set-up as opposed to lower-cost debit calling in prisons; and (v) fewer calling minutes over which to spread costs as opposed to prisons"). See also, e.g., Letter from Glenn B. Manishin, Counsel for Telmate, LLC, to Marlene H. Dortch, Secretary, FCC at 1, WC Docket No. 12-375 (filed July 26, 2013) ("[T]here are substantial differences in terms of scale, capacity, broadband costs and inmate 'churn' between larger state department of corrections ('DOC') systems and the thousands of smaller county and municipal jails served by ICS providers like Telmate.").

All ICS providers were uniform in agreement with respect to these fundamentally different cost structures.³¹ The Petitioners, while differing in their proposed remedy, also acknowledged these differences and agreed with Pay Tel’s suggestion for a “tiered” rate structure.³²

In the face of this record, acknowledged by the Commission itself,³³ the Order adopts one-size-fits-all safe harbors and rate caps without analyzing, disagreeing with, or otherwise distinguishing the evidence demonstrating that jails and prisons are distinct categories.

The only explanation given for the Commission’s action is that “our record does not permit us to draw any clear distinctions” between facilities.³⁴ This explanation, of course, conflicts with the clear and obvious distinctions between jails and prisons, which were not

³¹ See *supra* note 30; see also, e.g., Network Communications International Corp. Comments at 2–7, WC Docket No. 12-375 (Mar. 25, 2013) (ICS provider that serves nearly 300 jails nationwide discussing the free services it provides; stating that the market data used by the Wright Petitioners to determine proposed benchmark rates “completely disregards the diversity of specific service costs relating to city holding facilities, county jails and privately owned facilities”; and explaining in detail why “it costs more to provide inmate telephone services to short-term stay inmates who generally stay in jail for as little as 1 hour, but require more management during their stay in jail than long-term DOC or federal inmates”); Letter from John E. Benedict, VP—Federal Regulatory Affairs & Regulatory Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC at 2–3, WC Docket No. 12-375 (filed Aug. 2, 2013) (submitting cost data demonstrating that CenturyLink’s cost-per-minute of providing ICS is 18% higher in jails than in prisons); see generally Comments of Securus Technologies, Inc., Expert Report of Stephen E. Siwek, WC Docket 12-375 (Mar. 25, 2013) (showing that the average costs of serving jail facilities are higher than serving prison facilities).

³² See Ex Parte Presentation of Petitioners Martha Wright, et al., Talking Points at 3, Docket No. 96-128 (Jan. 12, 2010) (“Petitioners agree with Pay Tel Communications that governing legal standards could be met by a tiered rate structure”); Ex Parte Presentation of Petitioners Martha Wright, et al., at 6, Docket No. 96-128 (Nov. 5, 2009) (“[I]f the concern is that carriers serving such facilities could not recover their costs under benchmark rates based on average costs, a tiered approach, as suggested by Pay Tel, should meet all legitimate concerns”).

³³ See Order ¶ 77 (“Pay Tel serves jails exclusively, which are generally smaller and which providers claim are more costly to serve than prisons.”); *id.* ¶ 80 (characterizing smaller facilities as “potentially higher-cost” relative to larger facilities); *id.* ¶ 59 n.222 (acknowledging that groups have argued since at least 2007 that “there were variations among facilities in the costs of providing ICS and [that the Commission should] reflect those in setting rate maximums”).

³⁴ *Id.* ¶ 17. Also, remarkably, the Order seems to suggest that the differences between jails and prisons can be disregarded because, essentially, jails are too small to matter in the grand scheme of things. See, e.g., *id.* ¶ 26 (declining to treat county-level facilities that serve small inmate populations differently because “[f]acilities of these sizes hold only a very small share of inmates nationally” and thus “do not necessarily reflect the costs of serving [the] vast majority of inmates that generate nearly all calls”).

controverted by competent evidence.³⁵ This is not surprising because the focus of the Wright Petitioners and the commenters has been on ICS in prisons and not jails. Indeed, throughout this decade-long proceeding, the Wright Petitioners' near-exclusive focus has been on reforming ICS in prisons.³⁶ Consistent therewith, the data on which the Petitioners and other reform advocates have generally relied reflects ICS rates (not costs) in prisons, not jails.³⁷ Such parties, in their efforts to provide relief from excessive interstate ICS rates, have focused on the environment with the greatest incidence of interstate calls (prisons) and have paid little attention to the very real differences between providing ICS to jails and prisons.³⁸

Even if the Commission concludes that it is unable to draw precise lines between facilities based on the current record, this does not permit the Commission to disregard the record evidence showing that these differences exist. Indeed, “[t]he Commission must either

³⁵ While other providers placed “cost” information in the record which differed from Pay Tel’s demonstrated costs, no other provider filed a comprehensive study that permitted a true analysis of costs. For example, Securus submitted an analysis of groupings of “high,” “medium” and “low” jails based on call volume. *See generally* Securus Comments, Expert Report of Stephen E. Siwek. However, Securus does not provide any insight into how common costs are allocated across all facilities; how costs are apportioned as between intra- and interstate jurisdictions; which costs were included in the analysis; or whether these costs are reflective of proper customer service standards. Recognizing these limitations, the data do nonetheless support the conclusion that jails are more costly to serve than prisons. Similarly, Centurylink provided selected average cost data for serving jails, but Centurylink did not support this evidence with submission of true cost analysis that would permit an understanding of its methodology. It specifically excluded costs for facilities with 100 inmates or less, and it based its analysis on jails with an average population of 1,088, far in excess of the average jail size. *See Ex Parte Presentation of CenturyLink, WC Docket No. 12-375 (Aug. 2, 2013)*. Given these infirmities, the Commission made clear that it was not relying on this data for purposes of its rate caps and safe harbors. *See Order* ¶ 68 (“We also decline to base our safe harbor rates on the call volume, cost, commission, and revenue data submitted by Securus or the cost data submitted by CenturyLink.”). *See also id.* n.278.

³⁶ *See, e.g.,* Wright Petition at 4 n.4 (“Petitioners limit the scope of this Petition to inmate telephone services at private prison facilities”); Alternative Wright Petition, Exh. B at 2, 6–14 (declaration of Petitioners’ expert Douglas A. Dawson examining “the rates charged for interstate long distance calling in *prison systems*” (emphasis added)).

³⁷ *See, e.g.,* Letter from Alex Friedmann, Assoc. Director, HRDC, to Marlene H. Dortch, Secretary, FCC, Rev. Exh. B, WC Docket No. 12-375 (June 8, 2013) (“HRDC Ex Parte Letter”); HRDC Comments, Exh. A, WC Docket No. 12-375 (Mar. 25, 2013); Wright Petitioners Comments, Exh. E.

³⁸ It is telling that numerous advocates either completely fail to mention “jails” in their record submissions or mention them at what could only be characterized as de minimis levels. *See, e.g.,* Wright Petitioners Comments (Mar. 25, 2013) (one mention of “jail”); NASUCA Comments (Mar. 25, 2013) (zero mention of jails).

tailor its solution to that evidence or defer until it obtains new evidence. It is arbitrary and capricious to set aside the record evidence . . . and adopt far-reaching regulations in the hope that later data will justify them.”³⁹ Stated another way, it is not permissible for the Commission to adopt a solution that it knows will not work for one class of providers simply because it does not yet have all the data it needs to make a more meaningful evaluation of that class of providers. Shooting in the dark is simply not a defensible agency approach to rulemaking, particularly when, as here, the consequences of “getting it wrong” are serious and widespread.

The *Order*’s failure to recognize and address the cost differences demonstrated in the record between jails and prisons cannot be characterized as “reasonable”: “The FCC’s *ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking.”⁴⁰

B. The *Order*’s Adoption of Cost-Based Interstate Rate Caps Without Preemption of Below-Cost Intrastate Rate Caps Creates an Unsustainable Regulatory Environment that Violates Section 276

Pay Tel is also likely to prevail on the merits because the rate caps adopted in the *Order*, coupled with the Commission’s decision not to exercise its statutorily-granted authority to preempt below-cost state-imposed rate caps, result in a regulatory scheme under which Pay Tel cannot recover its demonstrated costs in the aggregate. This violates Congress’s mandate and the Commission’s obligations under Section 276 of the Act. Such agency action will not be upheld.⁴¹ Moreover, in so doing, the Commission ignored consistent arguments made by ICS

³⁹ Pai Dissent at 123 n.95.

⁴⁰ *Ill. Pub. Telecomms. Ass’n*, 117 F.3d at 563–64 (holding that the Commission’s finding that local coin calls and coinless calls should be subject to the same rate because they were “similar”, while ignoring data in the record showing the costs of such calls were not similar, was arbitrary and capricious).

⁴¹ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (stating regulations cannot be “manifestly contrary” to their enabling statute); *State Farm*, 463 U.S. at 43.

providers—dating back more than a decade and repeated by Pay Tel numerous times in the current proceeding—that failure to preempt those below-cost state rates would create a per-call compensation scheme that was untenable under Section 276.⁴²

1. The Mandates Under Section 276

The plain text of Section 276 requires that the Commission “shall take all actions necessary” to “establish a per call compensation plan to ensure that all [ICS] providers are fairly compensated for each and every completed intrastate and interstate call”⁴³ The Commission is charged with establishing such a plan for the purposes of promoting competition among providers and “widespread deployment of payphone services to the benefit of the general public”⁴⁴

Generally, the Commission has construed Section 276 broadly.⁴⁵ It adopted its current interpretation regarding “fairly compensated,” as applied to ICS providers, in 2002.⁴⁶ There, the Commission rejected a request from a coalition of ICS providers that the Commission either

⁴² See generally Order on Remand and Notice of Proposed Rulemaking, *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, 3254–59, ¶¶ 13–20 (rel. Feb. 21, 2002) (“2002 Order”); see, e.g., Pay Tel Aug. 1 Ex Parte Presentation at 3–5; Pay Tel Reply Comments at 3, 6–7; Pay Tel Comments at 2–9.

⁴³ 47 U.S.C. § 276(b)(1)(A). Section 276 defines “payphone service providers” to include providers of ICS. § 276(d) (“As used in this section, the term ‘payphone service’ means . . . the provision of inmate telephone service in correctional institutions . . .”).

⁴⁴ § 276(b)(1).

⁴⁵ For example, with respect to the “each and every interstate and intrastate call” requirement, the Commission has described crafting regulations that truly reach “each” and “every” call as an “intractable problem.” 2002 Order at ¶ 17. It has held that Section 276’s command can be met without imposing “to-the-call” regulation. *Id.* ¶ 15 (“It is difficult, therefore, to determine ‘fair compensation’ for a particular call from a particular payphone because the ‘cost’ of any call depends on how many other calls are made from that payphone.”). The Commission reinforces this position in the Order: “[W]e doubt that a party could reasonably claim that the Commission must individually determine the costs of each call.” Order ¶ 123.

Its approach to formulating a “per-call compensation” plan is broad, too: “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 Order ¶ 23.

⁴⁶ *Id.* ¶ 23.

preempt below-cost state rate caps on local collect calls or permit ICS providers to collect an additional per-call surcharge above state rate caps on local calls.⁴⁷ Instead, the Commission adopted a “company-level” approach to Section 276, where the “fair compensation” requirement will be satisfied so long as ICS providers are able to cumulatively recover their costs of providing both interstate and intrastate call revenues in the aggregate:⁴⁸

[T]he critical factor is that the costs must ultimately be recovered, but we will not mandate a particular method of cost recovery. Unless an ICS provider can show that (i) revenue from its interstate *or* intrastate calls fails to recover, for *each* of these services, both its direct costs and some contribution to common costs, *or* (ii) the *overall profitability* of its payphone operations is deficient because the provider fails to recover its total costs from its aggregate revenues (including both revenues from interstate and intrastate calls), then we would see no reason to conclude that the provider has not been “fairly compensated.”⁴⁹

The practical effect of this approach has been to force ICS providers like Pay Tel to subsidize below-cost intrastate rates with above-cost interstate rates.⁵⁰ At an absolute minimum, then, even if an ICS provider does not actually recover its per-call costs on each and every completed call, the Commission has long held that Section 276 will be violated if a provider cannot, in the aggregate, recover all of the costs of providing interstate and intrastate ICS.⁵¹ Both the Petitioners and then-Chairwoman Clyburn have explained this rule in laymen’s terms. According to the Petitioners, “the rate for inmate telephone service is not ‘fair’ if it is so low as

⁴⁷ *Id.* ¶¶ 1, 3.

⁴⁸ *Id.* at ¶¶ 23–24.

⁴⁹ *Id.* ¶ 23 (emphasis added). Several ICS providers, including Pay Tel, sought reconsideration of this aspect of the 2002 Order. See generally Petition for Further Reconsideration of the Inmate Calling Service Providers Coalition, Docket No. 96-128 (filed Mar. 25, 2002). That petition was never acted on by the Commission and remains pending.

⁵⁰ See, e.g., *supra* n.42.

⁵¹ Pay Tel does not concede that this is the appropriate interpretation of Section 276’s per-call “fair compensation” requirement. For purposes of the instant analysis, however, whether the requirement applies to each call type or to aggregate costs makes no difference since the Order fails either test.

to cause the service provider to fail”⁵² And then-Chairwoman Clyburn added, at the Inmate Calling Services Workshop in July of this year, that balanced ICS reform required an approach that did not “drive prices down so low that providers leave.”⁵³ For its part, the Commission states that it “interpret[s] the language in Section 276 that ICS providers be ‘fairly compensated’ for each and every completed call to require that an ICS provider be fairly compensated on the basis of either the whole of its ICS business or by groupings that reflect reasonably related cost characteristics, and not on the basis of a single facility it serves.”⁵⁴

The cost-based regulatory scheme adopted in the *Order*, at least as applied to Pay Tel, will lead to the very results the Petitioners and the Chairwoman argued would be improper—in blatant contravention of the statutory mandate.

2. Pay Tel Will Not Recover Its Aggregate Costs of Providing ICS If the Order is Adopted As-Is, In Violation of Section 276

The Commission contends that the rate caps it has established “are set at sufficiently conservative levels to account for all costs ICS providers will incur in providing ICS” pending further data collection and analysis thereof.⁵⁵ This contention is erroneous as applied to Pay Tel and, presumably, other providers of ICS in jails.⁵⁶ As set forth below and in the Wood Declaration attached to this Petition, the Commission fails to properly consider the impact that

⁵² Wright Petitioners Comments at 14.

⁵³ Remarks of Acting Chairwoman Mignon Clyburn, Reforming ICS Rates Workshop (July 10, 2013), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0710/DOC-322109A1.pdf.

⁵⁴ *Order* ¶ 123. The Bureau has recently confirmed this interpretation in its *Order Denying Stay Petitions and Petition to Hold in Abeyance* issued November 21, 2013 in this docket.

⁵⁵ *Id.* ¶ 74.

⁵⁶ As noted, the Commission relied heavily on Pay Tel’s cost study in the *Order*, as Pay Tel was the only provider to submit a comprehensive examination of ICS costs using cost allocation and development mechanisms previously approved by the Commission in other proceedings. As such, Pay Tel’s cost study is the only competent evidence before the Commission of the cost of providing ICS in jails and, until shown otherwise through future cost submissions, Pay Tel’s study serves as a proxy generally for the cost of providing ICS in jails.

state-imposed, below-cost rate caps will have when working in tandem with the *Order's* interstate rate caps.

Pay Tel's cost study was a "whole company" study that did not differentiate between intrastate and interstate costs, as noted by the Commission in its assumption that "[Pay Tel's] cost data is representative of both types of calls."⁵⁷ As a consequence, it is not enough for Pay Tel to recover, for example, \$0.21 per minute for all interstate debit and prepaid calls and \$0.25 per minute for all interstate collect calls; it must also recover at least these same rates for all intrastate calls as well.⁵⁸ But it is unreasonable to assume Pay Tel could charge, for example, \$0.21 per minute for all interstate debit calls, while still being subject to below-cost intrastate rates, and still recover its costs.

In this regard, Pay Tel and others repeatedly submitted into the record evidence that the Commission's 2002 decision to take the "aggregate" approach to the "fair compensation" question created a situation in which below-cost intrastate rates were being propped up by above-cost interstate rates.⁵⁹ As Telmate warned: "[w]ithout careful calibration, a federal cap on interstate inmate rates, while reasonable on a stand-alone basis, could in fact kill the business by making it financially unprofitable overall"⁶⁰

That is exactly what will happen to Pay Tel if the *Order* as currently written takes effect.

This is not a hyperbolic statement or a hypothetical result. The *Order's* rate caps fail to take into

⁵⁷ *Order* ¶ 76 n.281 ("Also, Pay Tel does not report different costs for interstate and intrastate ICS calls, presumably reflecting the fact that it manages its ICS calls through common, centralized call management facilities. We therefore find it is reasonable to assume that its cost data is representative of both types of calls.").

⁵⁸ As discussed *infra* Part I.C., the *Order* erred in adopting a \$0.21 rate cap applicable to prepaid calls; therefore, even if Pay Tel could charge \$0.21 for all intrastate prepaid calls it still would not be recovering its average costs (including security costs) as demonstrated in its cost study.

⁵⁹ *See, e.g.*, Telmate Comments at 10, WC Docket No. 12-375 (Mar. 25, 2013) ("Interstate ICS prices have for years, and increasingly so today, in effect cross-subsidized local ICS rates held below cost by state, county and municipal corrections officials.").

⁶⁰ Telmate Comments at 10; Pay Tel Reply Comments at 6 n.13 (quoting same).

account the fact that, even if Pay Tel’s aggregate costs could be recovered by charging \$0.21 for all debit calls (interstate and intrastate), existing local rate caps—which the *Order* did not preempt—prohibit Pay Tel from doing just that. Pay Tel cannot charge above the below-cost intrastate rates without violating state law and regulatory requirements.

Pay Tel has analyzed its projected revenues as compared to its average costs (using the cost study it filed with the Commission, on which the *Order*’s interstate debit calling rate cap is based) and determined that:⁶¹

- Of the 160 clients⁶² to which Pay Tel provides ICS, 117 of these locations have at least one category of intrastate calls in which Pay Tel’s average revenue per minute is below cost.
- For these 117 locations, the total amount by which intrastate capped rates are below cost is \$2,864,081.
- Even if one factors in those locations at which Pay Tel is able charge above-cost intrastate rates in order to subsidize the below-cost locations (which rates are likely unsustainable in an environment of rabid arbitrage encouraged by the *Order*), the net intrastate deficit that remains is \$1,666,412.

In other words, Pay Tel has currently managed to recover its costs by filling that \$1.66 million “below-cost intrastate hole” through above-cost interstate rates and, in some cases, fees.⁶³ The *Order* effectively eliminates Pay Tel’s ability to subsidize the below-cost intrastate rates. It requires that all ancillary service charges be cost-based,⁶⁴ and it flash-cuts the amount Pay Tel is permitted to charge for interstate calls, while leaving in place and completely untouched the existing below-cost intrastate rates. The *Order* creates for Pay Tel an intrastate

⁶¹ See Wood Declaration, attached.

⁶² Pay Tel provides service to 160 jail clients, which operate 180 separate facilities. All facilities have been considered in this analysis, but commonly-owned facilities have been grouped.

⁶³ Under the rules the Commission adopts in the *Order*, any cost-recovery Pay Tel has obtained from fees to fill this “intrastate hole” will be eliminated.

⁶⁴ *Order* ¶ 91 (holding that ancillary service charges must be cost-based and must be reasonably and directly related to provision of ICS in order to be compensable).

revenue hole between \$1.66 million and \$2.86 million and leaves Pay Tel with no means by which to fill it.

Simply stated, by capping Pay Tel's interstate rates at its average costs, the *Order* creates a situation where Pay Tel is unable to recover its total company costs without preemption of below-cost intrastate rate caps. Because the Commission has not preempted below-cost rate caps, Pay Tel is unable to recover its total company costs and, accordingly, will not be fairly compensated for Section 276 purposes if the *Order's* rate caps and cost-based rates requirement remain.

Given the showing herein by Pay Tel that the *Order* creates a regulatory environment that precludes recovery of total company-level costs, the *Order* violates Section 276.

C. The *Order* Overlooked Evidence That the Cost of Prepaid Calls Exceeds the Cost of Debit Calls and Erred in Establishing the Same Rate Caps for Both Calling Types

The *Order* elects to treat debit and prepaid calls as similar services for the purposes of rate caps and safe harbors on the grounds that “[t]he record establishes that prepaid calling is generally less expensive than collect calling but can be about equal in rates to debit calling.”⁶⁵ In support of this “record” evidence, the Commission cites one source: *rate*,⁶⁶ not cost, data submitted by HRDC showing that prepaid rates are “lower than *or equal to collect rates* in” 38 states.⁶⁷ The Commission thus elected to group prepaid calling with debit calling for rate

⁶⁵ *Order* ¶ 24.

⁶⁶ That rates may be lower for prepaid does not necessarily reflect the underlying cost of the service, given that rates have not heretofore been set strictly on the basis of cost. There may be any number of reasons the prepaid rates cited by HRDC are lower than collect (contrary to Pay Tel's cost study, which shows its prepaid and collect costs are the same), including the possibility that providers charged less for prepaid in order to encourage use of prepaid, which does not entail the risks of non-collection incident to collect calling.

⁶⁷ *Id.* ¶ 24 n.84 (emphasis added).

purposes, and to cap prepaid rates a full \$0.04 below collect rates,⁶⁸ based on *rate* data for prisons, where even that data failed to show conclusively that customers were charged less for prepaid than collect calls nationwide.⁶⁹ Beyond that, the Commission mischaracterizes HRDC’s comments, which point out that “prepaid calls are generally less expensive than collect calls *but more expensive than* or equal to debit calls.”⁷⁰ This difference, multiplied across millions of minutes of ICS calls, is not trivial, especially in an environment where rates are tied to costs.

In solely relying on the HRDC submission to subject prepaid calls to the same rate cap as debit calls, the Commission arbitrarily ignored substantial record evidence submitted by Pay Tel demonstrating that (1) its *costs* of providing prepaid service are far more comparable to its costs of providing collect service than its costs of providing debit service, and (2) its costs for providing prepaid calling—including of additional fees for continuous voice biometric identification service—are above the interim \$0.21 rate cap.⁷¹

Pay Tel consistently referred to its costs for providing prepaid and collect calls together, separate and apart from its less-costly debit calls: “Simply, Pay Tel would implore the Commission to consider rate-related issues with respect to prepaid collect and debit ICS calls

⁶⁸ See § 64.6030.

⁶⁹ The HRDC data relied on by the *Order* shows that only 17 states have rates that are the same for prepaid and debit, while 13 states have prepaid rates that are above debit rates. See HRDC Ex Parte Letter, Rev. Exh. B. Moreover, the seven states’ prison data relied upon by the Commission in establishing the safe harbor rates shows an average rate of \$0.1186/min for debit and \$0.1268/min for prepaid, which is a 6.4% difference in rates. See *Order* ¶ 63.

⁷⁰ HRDC Comments at 8 (emphasis added) (giving examples of states where *rates* for prepaid calls are higher than rates for debit calls).

⁷¹ See, e.g., Pay Tel Aug. 2 Ex Parte; Pay Tel Aug. 1 Ex Parte Presentation at 4 n.15; Pay Tel Notice of Ex Parte (July 26, 2013); Pay Tel’s Further Comments at 3–4 (July 17, 2013); Pay Tel Reply Comments at 9–10; Pay Tel Comments at 11 n.26.

separately. As Pay Tel has explained throughout this proceeding, the former carry considerably greater costs for ICS providers than the latter.”⁷²

In fact, the very cost data that the Commission used in developing its \$0.21 rate applicable to debit and prepaid calls comes from Pay Tel—and yet, incredibly, ignores the very categories Pay Tel used in submitting such data. That is, Pay Tel explained that its cost, excluding commissions, of providing “collect/prepaid collect calls” was \$0.21 per minute and that its cost, excluding commissions, of providing “debit calls” was \$0.19 per minute.⁷³ In the *Order*, the Commission mysteriously and without explanation drops the “prepaid collect” when describing Pay Tel’s cost data.⁷⁴ In reality, as explained, Pay Tel reported average actual and projected costs for “debit” and “collect/prepaid collect” calls, respectively, at those levels. The Commission’s embrace of Pay Tel’s data, on the one hand, and its failure to consider Pay Tel’s repeated declarations that its prepaid costs are in line with its collect costs, on the other, demonstrates a failure to consider an important aspect of the problem with which it was faced.⁷⁵

Taken together, the FCC’s decision to group prepaid and debit calls together because it determined, in conclusory fashion, that the two are “similar”, coupled with its failure to consider

⁷² Pay Tel Aug. 2 Ex Parte (seeking different rate caps for prepaid collect and debit calls).

⁷³ See, e.g., Pay Tel Aug. 1 Ex Parte Presentation; Pay Tel Ex Parte Presentation, Inmate Calling Services Cost Presentation at 1–2, WC Docket No. 12-375 (July 23, 2013) (categorizing costs as those associated with “collect/prepaid collect” or “debit”).

⁷⁴ *Order* ¶ 75 (including no mention of prepaid calling: “In its recent cost study, Pay Tel reports average actual and projected costs for debit and collect ICS calls of \$0.208 per minute and \$0.225 per minute, respectively, inclusive of additional fees for continuous voice biometric identification service . . .”).

⁷⁵ See *State Farm*, 463 U.S. at 43. The Commission also relies only on HRDC-provided data in setting identical safe harbor rates for prepaid and debit calls, and, again, it misrepresents the data on which it relies. *Order* ¶ 63 n.231. The *Order* cites evidence from HRDC’s submission of some eight states in which prepaid and debit call rates are the same and below collect calls, *id.*, while neglecting to mention that that very same submission shows that, while seventeen states have rates in which prepaid and debit are the same, thirteen states have prepaid rates that exceed debit rates. See HRDC Ex Parte Letter, Exh. B. In addition, even by the Commission’s methodology (calculating averages using data prison-only rate data for seven states in which commissions are prohibited), prepaid rates average \$.0082 per minute more than debit rates, yet the Commission, citing the “similarities of debit and prepaid charges . . . group[s] the two into a single category.” *Order* ¶ 63 (emphasis added).

the substantial evidence in the record that the costs of prepaid and debit calls are not similar and “its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking.”⁷⁶

D. The Order’s “Safe Harbor” Rates and Enforcement Mechanism Are Fatally Defective *Ab Initio* As Applied to Jails

In promulgating rules, the Commission is required to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’.”⁷⁷ There is no such rational connection between the record evidence and the resulting choice with respect to the Commission’s imposition of the safe harbor rates upon those who provide ICS in jails.

The safe harbor rates of \$0.12 (debit/prepaid) and \$0.14 (collect) that are applied to jails are calculated based upon rate—not cost—data submitted by HRDC based on statewide contracts for seven state departments of correction (*prisons*) that have excluded site commission payments from their rates.⁷⁸ For the same reasons articulated in Part I.A., it is improper to ignore ample record evidence clearly distinguishing prisons and jails and to treat the two kinds of facilities alike.

This mismatch is apparent when juxtaposed against the cost data upon which the Commission relied in adopting debit and prepaid calling caps. The Commission adopted Pay Tel’s demonstrated average cost for providing debit calls in setting a \$0.21 per minute rate

⁷⁶ *Ill. Pub. Telecomms. Ass’n*, 117 F.3d at 563–64 (holding that the Commission’s finding that local coin calls and coinless calls should be subject to the same rate because they were “similar”, while ignoring data in the record showing the costs of such calls were not similar, was arbitrary and capricious).

⁷⁷ *State Farm*, 463 U.S. at 43.

⁷⁸ *Order* ¶ 61–62. See *Pai Dissent* at 121 (“[The safe harbor] data is based on the prison rates of seven states that have eliminated site commissions. No data for jails (service to which, again, requires higher per-minute costs) was used to calculate the safe harbor, even though that benchmark applies to jails. It is therefore not surprising that the safe harbor is below the average per-minute costs of serving jails.”).

cap for debit calls, concluding that “Pay Tel’s public cost submission provides a sound basis to derive the conservative high-end estimate that we use to set the debit and prepaid interim rate cap.”⁷⁹ It was the only cost data that the Commission deemed competent for purposes of setting its rate caps.⁸⁰

Thus, at least as applied to Pay Tel (and, presumably, to others that provide ICS in jails since Pay Tel’s cost data represents the benchmark data relied on by the Commission), the demonstrated average costs of providing ICS in jails are well above the safe harbor rate. The Commission accepted, at a minimum, that it costs at least one provider of ICS in jails \$0.21 per-minute to do so. Indeed, none of Pay Tel’s existing rates is within the safe harbor.⁸¹ It is therefore irrational to have set a safe harbor rate, applicable to jails, beneath the average cost demonstrated for the service. It would have been one thing if the Commission had established a rate cap above demonstrated average costs—but it did not do so. As a result, since providers of ICS in jails are legally prohibited from pricing above their average costs, it would be irrational for these providers to price below their average costs, since they would have no legal mechanism for recovering the foregone revenue.

The irrationality of establishing a safe harbor for jails so far below average costs is exacerbated by the punitive repercussions of pricing outside the safe harbor. Even though Pay Tel cannot possibly charge rates remotely approaching the safe harbors in one facility, much less all its facilities, the *Order* nonetheless encourages and facilitates the filing of complaints asserting unjust and unreasonable rates against Pay Tel and other providers of ICS in jails—and

⁷⁹ *Order* ¶ 76.

⁸⁰ *See, e.g., id.* ¶¶ 75–76, nn.277–78, 283 (declining to use cost study data submitted by Securus and CenturyLink).

⁸¹ *See* Declaration of Vincent Townsend, attached.

puts the burden on the provider to defend itself in such proceedings at the risk of being forced to make refunds to customers if its rates are found to be non-compliant.⁸² To put Pay Tel and other jail providers in this position for assessing rates based on average cost is nonsensical and defeats the purpose of the safe harbor in the first place. Yet that is the reality the *Order* inflicts.⁸³

To have, on the one hand, adopted Pay Tel’s cost study because of its indicia of reliability and then, on the other, capped Pay Tel’s rates at its average costs makes the *Order*’s “safe harbor” a nullity for providers of ICS in jails. As applied to jails, the “safe harbor” lacks any rational connection to the purpose of the mechanism in the first place and to the facts found regarding service in jails.

E. The *Order* Fails to Provide Adequate Guidance and Standards Regarding How Providers Can Comply With the Cost-Based Rates Requirement

Agency rules, of course, must be sufficiently clear that they are capable of being implemented and followed by the affected party. Here, the *Order* fails to meet this requirement because it does not provide adequate guidance regarding how, practically speaking, to implement its promulgated regulatory scheme in which all interstate ICS rates and ancillary fees must be cost-based.⁸⁴ Worse, at the same time the *Order* fails to offer reasonable instructions regarding how providers can operate in accord with the new regulations, the Commission threatens harsh penalties, including revocation of a provider’s statutory authorization to operate as a carrier, in

⁸² *Order* ¶¶ 120–21 (explaining that only those ICS providers whose rates are at or below the safe harbor at all facilities will be afforded the benefit of a rebuttable presumption that its rates are just, reasonable, and fair and that ICS providers “will bear the burdens of production and persuasion in all complaints challenging whether its ICS rates and/or ancillary charges are just, reasonable and fair”).

⁸³ It is obvious that the safe harbor rates were established with prisons in mind—not jails—under the assumption that the average cost of providing service in prisons is substantially lower than the average cost of providing service in jails. This is borne out by the fact that the safe harbor rates were set based on consideration of rates in prisons, not jails. This is yet another example of how the *Order* simply does not work in the jail environment.

⁸⁴ *See* § 64.6010.

the event of non-compliance.⁸⁵ What the *Order* pronounces as an “approach . . . tailored to provide flexibility for the ICS providers”⁸⁶ is in fact a minefield. Providers are being whipsawed, on the one hand, by regulations that have not been fully articulated and, on the other, by draconian penalties for being found to be in non-compliance.

The Commission recognizes “that the term ‘cost’ is itself ambiguous, and a range of possible interpretations of this term might be reasonable.”⁸⁷ It then helps clarify that ambiguity by explaining that the Commission will rely on “historical costs” in determining whether rates are sufficiently cost-based.⁸⁸ Yet its instruction stops there. With the exception of the *Order*’s firm position “that site commission payments are not part of the cost of providing ICS and therefore not compensable in interstate ICS rates,”⁸⁹ the Commission gives no reliable assurances as to what will and will not be deemed a properly compensable cost,⁹⁰ what will be deemed a proper allocation of costs between the interstate and intrastate jurisdictions, what will be deemed a proper allocation of costs between call types and confinement facilities, and what

⁸⁵ *Order* ¶120 (stating that violations of the new regulations “can include forfeitures of up to \$160,000 for each violation . . . up to a maximum of \$1,575,000 per continuing violation” and can even, “in particularly egregious cases,” lead to “revocation of [a provider’s] section 214 authorization to operate as a carrier”).

⁸⁶ *Id.* ¶ 53 n.195.

⁸⁷ *Id.* ¶ 52.

⁸⁸ *Id.*

⁸⁹ *Id.* ¶ 54. Even here, the Commission’s guidance is wishy-washy. *Id.* n.203 (“[W]e cannot foreclose the possibility that some portion of payments from ICS providers to some correctional facilities may, in certain circumstances, reimburse correctional facilities for their costs of providing ICS.”).

⁹⁰ *Id.* ¶ 53 and n.196 (setting forth numerous “[e]xamples of costs that the Commission *would likely find appropriate* for inclusion in interstate ICS rates” (emphasis added)); *but see* Pai Dissent at 124 (discussing the uncertainty that arises in cases where a provider “uses the same equipment or personnel to provide ICS and another service”).

will be deemed a permissible rate of return⁹¹—among other issues customary with the preparation of cost studies.

The problem is that the Commission gives no guidance as to when it will yank back on what appears to be a fairly long leash and prescribe lower rates and potentially order refunds, forfeitures or other penalties,⁹² leaving providers to find out whether they have “read the tea leaves” correctly ex post facto. This, of course, is the essence of arbitrary and capricious rulemaking as it “leaves most of the questions on how to actually implement such regulation wholly unanswered.”⁹³

II. THE BALANCE OF EQUITIES FAVORS A PARTIAL STAY OF THE *ORDER*

The balance of equities also strongly favors a limited, partial stay of the *Order*. Pay Tel will suffer drastic, potentially catastrophic financial consequences if the *Order*'s provisions go into effect as scheduled. On the other hand, a narrowly-tailored stay of the effectiveness of the cost-based rates, rate caps and safe harbors only as to provision of ICS in jails, will prevent this irreparable harm, will not harm third parties, and will not harm (it will actually help) the greater public. Indeed, such a limited stay would still render effective the bulk of the *Order*'s requirements, including application of the rate caps and safe harbors in prisons and a cost-based approach to ancillary fees for all providers.

⁹¹ *Order* ¶ 54 n.203. See also Pai Dissent at 125 (“Should the rate of return be the same as for rural incumbent local exchange carriers (11.25 percent) or should it reflect the ICS market? And what adjustments to rate-of-return accounting are necessary?”).

⁹² *Order* ¶ 123.

⁹³ Pai Dissent at 125. See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1979) (“A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations.’”).

A. Pay Tel Will Suffer Irreparable Harm in the Absence of a Partial Stay of the Order

Pay Tel will suffer irreparable harm without a partial stay of the *Order*. As shown above, Pay Tel has conducted an analysis of the *Order*'s impact on its projected revenues relative to its average costs for all call types, applying the *Order*'s mandated interstate rate caps. Simply put, the *Order* will result in unsustainable financial losses for Pay Tel that it will have no ability to recoup.

Should the *Order* take effect, Pay Tel will be forced to abandon the methods by which it has, consistent with the 2002 *Order*, cross-subsidized below-cost intrastate rates in order to remain profitable in the aggregate and to continue as a going concern. The *Order*'s implementation of interstate rate caps, coupled with its hands-off approach and refusal to preempt below-cost intrastate rates, effectively cuts Pay Tel off at the knees, wiping out its ability to recover its intrastate losses through interstate rates and ancillary services fees, which now must be based on cost. Pay Tel will continue to have to charge state-mandated, below-cost rates and, with no way to offset losses incurred therefrom, will not be able to recover the \$1.66+ million "hole" that the *Order*'s cost-based regime creates.

There is no apparent mechanism by which Pay Tel's lost revenues will be recovered later. Such losses will be unrecoverable later and, consequently, constitute irreparable harm.⁹⁴ More fundamentally, beyond mere lost revenues, Pay Tel will be not be able to provide service to those facilities where it is unable to recover its costs and, since its business is confined to the jail market, will likely go out of business, creating additional harm that cannot be repaired.^{95,96}

⁹⁴ See, e.g., *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 696 (4th Cir. 1994); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

⁹⁵ See, e.g., *CFTC v. British Am. Commodity Options Corp.*, 434 U.S. 1316, 1320 (1977) (Justice Marshall, as Circuit Justice, refusing to vacate stays where "[i]f and when the regulation goes into effect, respondents may
(continued . . .)

In addition, the *Order* sets up a scheme in which Pay Tel will be forced to expend substantial resources defending itself for charging at-cost rates that happen to be in excess of unworkably low safe harbors. The Commission knows Pay Tel’s costs are far in excess of the safe harbor rates; after all, it adopted those costs in setting its debit calling rate caps. Notwithstanding this, the Commission expressly approves of a complaint system in which any person can file a formal or informal complaint alleging a provider’s rates are unfair, unjust and unreasonable, and the provider will bear the burden of proving otherwise, merely because the rates are above the (in Pay Tel’s case) unreachable safe harbors.⁹⁷ Costs Pay Tel will incur in defending itself from essentially frivolous claims will be unrecoverable in the event the *Order*’s safe harbors are ultimately rejected; those losses constitute additional irreparable harm.

B. A Partial Stay of the *Order* Will Not Injure Third Parties

While Pay Tel will suffer numerous irreparable harms absent a partial stay of the *Order*, other interested parties will not be harmed if such partial stay is granted. As an initial matter, the Wright Petitioners generally focused their reform efforts on ICS in prisons,⁹⁸ and Pay Tel does not seek a stay as to the *Order*’s cost-based requirements, rate caps and safe harbors as applied to

will be driving out of business, and on this basis the District Court expressly found that respondents are threatened with irreparable harm”); *Holiday Tours*, 559 F.2d at 843 n.2 (explaining that the “destruction of a business” is greater than the “mere” economic injuries that may not warrant a stay).

⁹⁶ Pay Tel will also suffer numerous other unrecoverable losses if the *Order* takes effect as-is and the company is forced to comply therewith, only to have portions of the *Order* subsequently overturned. *See, e.g., Nat’l. Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 824 (1st Cir. 1979). These losses include, but are not limited to, the potential of having to continue to pay mandatory site commissions pursuant to existing contracts without a method by which to recover those payments; the potential to lose customer goodwill in the event Pay Tel is forced to discontinue paying site commissions to facilities notwithstanding contractual obligations to do so; the administrative and personnel costs that Pay Tel will be forced to incur in attempting to comply with the onerous data reporting requirements contemplated in the *Order*; and the legal and other costs Pay Tel will have to incur defending its rates against complaints brought pursuant to the *Order*.

⁹⁷ *Order* ¶¶ 120–21.

⁹⁸ *See supra* n.36.

those facilities. Rather, Pay Tel requests very limited relief, to a very small sector of the ICS industry—interstate calls in jails.⁹⁹

In addition, a partial stay of the *Order* as to jails in order to gather further data as to appropriate rates for jails and to potentially preempt below-cost intrastate rates is consistent with the Petitioners’ requests, both from substantive and timing perspectives. Again, the Petitioners argued that a per-call compensation plan that drove a provider out of business would, on its face, violate Section 276.¹⁰⁰ Absent a limited stay, the *Order* will do just that to Pay Tel. In terms of timing, the Commission’s decision to set for the *Order* an effective date ninety days after publication¹⁰¹ contradicts the Petitioners’ longstanding request that, regardless the shape reform takes, there be a one-year delay of its implementation—a so-called “fresh look” period—in order to provide sufficient time for ICS providers to alter their business plans and operations in accord with new regulations.¹⁰²

Frankly, the limited stay Pay Tel seeks actually benefits inmates in the jail facilities Pay Tel and other ICS providers serve. First, the Commission’s failure to properly group prepaid and collect calls together for rate cap purposes will lead to a reduction in security in the jails Pay Tel serves. As noted, Pay Tel’s demonstrated cost for prepaid calls, including continuous voice biometric identification services that enhance security, is \$0.23 per minute.¹⁰³ Yet the *Order* sets the rate for prepaid and debit calls below Pay Tel’s prepaid calling costs, at \$0.21 per

⁹⁹ The Commission recognizes the limited nature of Pay Tel’s provision of interstate ICS. *See, e.g., Order* ¶ 131 n.444 (citing to Pay Tel’s Comments which explain that 84% of its calls in jail facilities were local, not long-distance, calls).

¹⁰⁰ *See supra* n.52 and accompanying text.

¹⁰¹ *Order* ¶ 187.

¹⁰² Wright Petitioners Comments at 28–29; Alternative Wright Petition at 28–29; Wright Petition at 22–23.

¹⁰³ *See, e.g., Order* ¶ 75.

minute.¹⁰⁴ Clearly, Pay Tel will be forced to eliminate the provision of this beneficial security measure on all call types.¹⁰⁵

Second, and of greater negative consequence, within a short timeframe Pay Tel will not be able to provide ICS if the *Order* takes effect as it currently exists. Faced with unrecoverable losses, Pay Tel and other providers serving certain small-to-medium sized jails will, as Commissioner Pai warns in his Dissent, “make the rational business decision to withdraw from facilities where they would have to operate at a loss”¹⁰⁶ Staying the *Order*’s rate caps and safe harbors and cost-based rate requirements as to jails will prevent the loss of ICS service in those facilities.

C. A Partial Stay of the *Order* is in the Public Interest

For many of the same reasons, a limited stay of the *Order* is in the public interest. Pay Tel’s limited petition does not seek to put the brakes on ICS reform. Pay Tel does not seek relief from the bulk of the regulations set forth in the *Order*, among them: the application of the cost-based rates, rate caps, and safe harbors to prisons; the application of the cost-based requirements as to ancillary services charges in all correctional facilities; the mandatory data collection; and the entirety of the Further Notice of Proposed Rulemaking.

But failing to grant the limited relief Pay Tel seeks threatens, at least as applied to jails, the effectiveness of many of the steps the Commission takes. Section 276 requires implementation of a per-call compensation plan that fairly compensates ICS providers “in order to promote competition among . . . providers and promote the widespread deployment of [ICS]

¹⁰⁴ *Id.* ¶ 76.

¹⁰⁵ The continuous voice biometric identification services are used in part to maintain the security of inmate commissary and debit accounts.

¹⁰⁶ Pai Dissent at 119–20.

services to the benefit of the general public”¹⁰⁷ Implementing the *Order* as it currently exists will fail to accomplish those purposes to the extent that providers like Pay Tel, unable to recover their costs, will (1) initially reduce services, limiting the “widespread deployment” of ICS, and (2) then go out of business, further consolidating an already constricting industry. Conversely, staying the impact of the rate caps and safe harbors as to jails in order to adopt a scheme that prevents these severe, negative consequences (for consumers and providers alike) is in the public interest. Pay Tel is not asking for carte blanche to charge whatever rates it wants; it merely seeks the same reform that the Commission wants—a scheme that allows it to recover its reasonable and direct costs of providing ICS.

Moreover, the public interest would be served by affording the Commission additional time in which to ensure that correctional facilities are able to recover their costs under a cost-based regulatory regime. The record shows that jail administrators incur costs in providing ICS in their facilities.¹⁰⁸ Grant of the instant stay request would permit these additional costs to be further examined by the Commission so that the permanent rules can fully account for the costs of administering ICS and monitoring calls to protect inmates, staff, and the public from criminal activity. In the absence of full cost recovery, jails will suffer financial losses that they will not be able to recoup and will face the decision as to whether to curtail ICS services if costs cannot be recovered.

¹⁰⁷ 47 U.S.C. § 276(b)(1).

¹⁰⁸ See, e.g., Pay Tel Ex Parte Presentation, “Cost Recovery for Facility ICS Administration,” at 1–3 WC Docket No. 12-375 (May 31, 2013) (explaining costs facilities incur in administering ICS); Transcript of Reforming ICS Rates Workshop at 261–62 (testimony of Timothy Woods of the National Sheriffs’ Association: “There are jail staffing costs for providing and monitoring, sometimes real-time monitoring, inmate calling services, and these calling systems can be highly sophisticated—blocking inmate calls to certain numbers, detecting calls to the same number by multiple inmates, authenticating voice recognition before an inmate can make a call In short, there are unique and substantial costs to learning about and securely operating a telephone system in a correctional facility.”); National Sheriffs’ Ass’n Letter, WC Docket 12-375 (July 31, 2013) (“There are very real costs associated with the administration of ICS systems, including: monitoring phone calls, analyzing recordings, providing escorts for phone repair technicians, answering questions about the system from inmates and their families, etc.”).

Given that Pay Tel is likely to succeed on the merits of the case, particularly in light of the clear legal error related to the above-stated portions of the *Order*, and considering that Pay Tel will suffer irreparable harm absent a stay, that third parties will not be harmed by a stay, and that the public will benefit from such stay, Pay Tel’s petition should be granted.

III. PAY TEL REQUESTS TARGETED AND NARROW RELIEF

That the balance of harms favors grant of the instant stay request is particularly true given the limited nature of the relief Pay Tel requests. As indicated throughout, the relief Pay Tel seeks here is narrow and designed to prevent only the most drastic and egregious negative consequences that could arise from the *Order*—a reduction in ICS services in jails and further market consolidation due to driving companies like Pay Tel out of business altogether. Pay Tel does not seek a stay of the entire *Order*, or even a substantial portion thereof.

Indeed, Pay Tel seeks a stay only as to the effectiveness of the interim rate caps, safe harbors, and cost-based requirements of the *Order* as applicable to the provision of ICS in jails. Pay Tel has demonstrated the consequences of a failure to grant this relief: Pay Tel will cease operations, and the Commission will have violated Section 276. Granting the relief Pay Tel seeks will allow it and others who provide ICS in jails to continue serving the inmate populations therein while a rate cap that permits full cost-recovery and necessary preemption of below-cost intrastate rates are further considered.

CONCLUSION

For the reasons set forth herein, the Commission should issue an order staying the effectiveness of the portions of the *Order* imposing cost-based rates requirements, rate caps and safe harbor rates (Sections 64.6010, 64.6020 and 64.6030 of the Commission rules, 47 C.F.R. §§ 64.6010–64.6030) as they relate to rates for Inmate Calling Services assessed by providers of

ICS in jail facilities until the effective date of permanent rates for ICS adopted in connection with the pending *Notice of Proposed Rulemaking* (FCC 12-167) released December 28, 2012 in Docket No. 12-375 or the resolution of Pay Tel's Petition for Reconsideration and/or Review of the issues set forth herein, should such a filing become necessary.

Dated: November 26, 2013

Respectfully submitted,

PAY TEL COMMUNICATIONS, INC.



By:

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CERTIFICATE OF SERVICE

I hereby certify on this, the 26th day of November, 2013, the foregoing Petition of Pay Tel Communications, Inc. for Partial Stay of *Rates for Interstate Inmate Calling Services*

Order was served via electronic mail on the following persons:

Marlene H. Dortch
Secretary
Federal Communications Commission
Marlene.Dortch@fcc.gov

Chairman Tom Wheeler
Federal Communications Commission
Tom.Wheeler@fcc.gov

Commissioner Mignon Clyburn
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Marcus W. Trathen

ATTACHMENTS

**Declaration of Vincent Townsend
President
Pay Tel Communications, Inc.
(November 26, 2013)**

DECLARATION OF VINCENT TOWNSEND

I, Vincent Townsend, declare and state as follows:

1. I am the President of Pay Tel Communications, Inc. I am over the age of 21. I am competent to make this declaration and, unless otherwise indicated, all the facts set forth in this declaration are based on my personal knowledge.

2. With regards to the “safe harbor” rates established by the Commission in its Order released on September 26, 2013, in WC Docket No. 12-375 (the “Order”), those rates do not appear to have any applicability to jails as the rates are far below Pay Tel’s average costs as demonstrated in the record.

3. Pay Tel is widely regarded as having the lowest rates in the industry, yet *none* of Pay Tel’s existing interstate rates in any of its facilities would qualify for the Order’s “safe harbor.”

4. Similarly, using a similar approach to cost development utilized by Don Wood in his cost study prepared for Pay Tel, we have attempted to calculate the cost of serving each individual facility currently served by Pay Tel. This analysis indicates that *none* of Pay Tel’s facilities have average *costs* that are within the Order’s “safe harbor.” Even Pay Tel’s lowest-cost facilities have average costs that are above the so-called “safe harbor” rates.

5. I have reviewed the intrastate subsidy analysis prepared by Don Wood. This analysis accurately reflects the regulatory environment that Pay Tel would face if the Order becomes effective.

6. Pay Tel currently assesses the highest legally permissible rates for intrastate calls at each of its facilities in states with rate caps. Based on my extensive experience in dealing with state regulatory commissions, I believe it would be time-consuming, expensive and of unlikely success to seek rate increases in each below-cost intrastate rate cap jurisdiction. For example, I have previously sought increases in North Carolina’s below-cost intrastate cap on local calls. Such increases were opposed by inmate activists and Commission staff on the grounds that local call rates should be kept low for reasons of public policy.

7. If the Order’s cost-based rates requirements and rate caps are allowed to go into effect as to jails, Pay Tel will be placed in an economically unsustainable situation. At a minimum, Pay Tel would not be able to continue providing ICS to high-cost jail facilities, and it is likely that these facilities would be unserved by any provider. Whether Pay Tel would be able to continue to stay in business under the Order is uncertain at best.

I declare under penalty of perjury under the laws of the United States of America that the foregoing information and materials are true and correct to the best of my knowledge, information, and belief.

Dated: November 26, 2013



Vincent Townsend

**Declaration of Don Wood
Principal
Wood & Wood
(November 26, 2013)**

DECLARATION OF DON J. WOOD

1. My name is Don J. Wood. I am a principal in the firm of Wood & Wood, an economic and financial consulting firm. My business address is 914 Stream Valley Trail, Alpharetta, Georgia 30022.

2. I provide economic and regulatory analysis of telecommunications and related convergence industries with an emphasis on economic and regulatory policy, competitive market development, and cost-of-service issues.

3. I am the author of the 2008 Inmate Calling Services Interstate Call Cost Study and the 2013 Pay Tel Communications Cost Study used by the Commission to establish Interim Rate Caps for ICS services in its *Report and Order and Further Notice of Proposed Rulemaking* (FCC 13-113) (rel. Sept. 26, 2013).

4. The cost results relied upon by the Commission from each of these studies represent an average cost per minute across intrastate and interstate jurisdictions; that is, these results represent an average cost of an ICS provider's combination of intrastate and interstate calls.

5. As a result, a rate cap based on these combined costs can permit an ICS provider to receive "fair compensation" for each completed "intrastate and interstate call" *if, but only if*, the rate cap in effect for both intrastate and interstate calls is equal to (or greater than) this amount.

6. In contrast, if a rate cap lower than this amount is in effect for a subset of calls (e.g., for intrastate calls), a rate cap for a different subset of calls (e.g., for interstate calls) that is set equal to average cost will not permit an ICS provider to recover its costs and to receive "fair compensation."

7. Specifically, applicable rate caps for certain categories of intrastate calls are currently well below the average cost levels used by the Commission to establish the interim rate caps for interstate services. As a result, the application of the Commission's interim rate caps to interstate services may make it impossible for a given ICS provider to recover its costs and receive fair compensation for the mix of intrastate and interstate calling services it provides.

8. I have been asked by Pay Tel Communications, Inc. (Pay Tel) to analyze the caps applicable to its intrastate calling services in order to determine whether, with the Commission's interim rate caps in place for interstate services, Pay Tel will be able to recover its costs and receive fair compensation for the combination of intrastate and interstate services that it provides.

9. In order to perform this analysis, I obtained data for all 160 Pay Tel ICS clients, representing 180 individual jail locations. Pay Tel serves only jail facilities. Pay Tel does not serve prisons.

10. The following data was obtained from Pay Tel's records: call volume data, both by call jurisdiction (e.g. local, intraLATA and interLATA intrastate toll, and interstate toll) and call payment type (debit, pre-paid collect, post-paid collect); and rate data (per call and per minute), both by call jurisdiction (e.g. local, intraLATA and interLATA intrastate toll, and interstate toll) and call payment type (debit, pre-paid collect, post-paid collect).¹

11. I calculated average revenue per minute for intrastate and interstate calls at a given location, by call type, based on the rates identified above and assuming a 15-minute call duration (consistent with the Commission's stated methodology for application of interstate price caps). I then compared this average revenue per minute to the average cost per minute (consistent with the Commission's interstate interim cap level) for each call type.

12. For call types in which average revenue per minute is less than the average cost per minute, a total dollar shortfall for each call type at a given location was calculated. The location-specific shortfalls were then summed to calculate a total annual shortfall.

13. The results of this analysis are as follows. Of the 160 clients served by Pay Tel, 117 have at least one category of intrastate calls in which the average revenue per minute is below the average cost. This means that intrastate calling is currently being subsidized at these locations.

14. For these 117 locations, the total amount by which state-imposed intrastate rate caps force rates below cost is \$2,864,081. This means that for the jail locations currently served by Pay Tel, intrastate services currently require a subsidy of \$2,864,081. This amount represents more than 11% of Pay Tel's 2012 total revenue.

15. Some of the intrastate jurisdictions Pay Tel serves do have caps for some categories of intrastate services that are at or above the average cost per minute. These at- or above-cost intrastate locations currently help subsidize below-cost intrastate locations. If these at- or above-cost intrastate locations are assumed to continue to subsidize below-cost intrastate locations (not likely to represent a sustainable scenario over time in an environment where states are continuing to add below-cost rate caps and rates are being driven down by arbitrage), the net intrastate shortfall that remains is \$1,666,412. In other words, even with intrastate-to-intrastate subsidies, the intrastate services provided by Pay Tel require a net subsidy of \$1,666,412.

16. In order for Pay Tel (or any other ICS provider) to recover its costs and to receive fair compensation in this environment wherein states impose below-cost rate caps, a revenue source must exist to subsidize those below-cost intrastate rates.

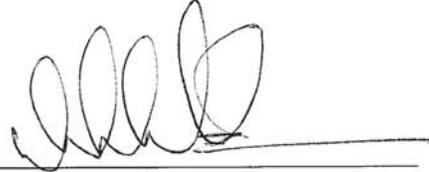
¹ For jail locations where Pay Tel has provided service for a full quarter, the most recent quarterly data (2Q 2013) was used. For locations where Pay Tel began offering service after the beginning of 2Q 2013, the most recent monthly data was used.

17. The application of the Commission's interim rate caps to interstate services will immediately reduce Pay Tel's interstate revenues by \$1,190,751, 100% of which is currently used to provide a subsidy to below-cost intrastate rates.

18. The adoption of rate caps based on average costs (that is, an average of interstate and intrastate calling), and the application of those rate caps only to interstate services, creates a situation in which Pay Tel cannot recover its costs and cannot receive fair compensation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing information and materials are true and correct to the best of my knowledge, information, and belief.

Dated: November 26, 2013

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Don J. Wood