

INTRODUCTION AND SUMMARY

Pursuant to 47 C.F.R. §§ 1.41, 1.43, and 1.44(e), CenturyLink respectfully petitions the Commission to stay the effectiveness of its 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*”), pending a final decision by the courts on the *Order*’s validity.

The *Order* imposes de facto rate-of-return regulation on inmate calling services (“ICS”) providers. Pursuant to the *Order*, ICS providers may charge only rates sufficient to recover their costs and a reasonable rate of return. The *Order* supplements this rate-of-return regime with “rate caps” (*i.e.*, maximum rates that ICS providers may exceed only by obtaining preapproval from the Commission)¹ and “safe harbors” (*i.e.*, rates subject to a rebuttable presumption that they reflect providers’ costs),² but the “general standard” the Commission adopts is rate-of-return regulation.³

The *Order* faces substantial opposition from correctional institutions and ICS providers alike. A broad coalition of correctional institutions (“Correctional Institutions”) has petitioned the Commission to stay the effectiveness of the *Order* pending judicial review, and CenturyLink is the fourth ICS provider to request such relief. The Commission has already denied the stay petitions filed by two ICS providers,⁴ Global Tel*Link (“GTL”) and Securus Technologies, Inc. (“Securus”), but has not yet acted on the stay petition filed by the Correctional Institutions⁵ or

¹ *Order* ¶¶ 73-84.

² *Id.* ¶¶ 60-72.

³ *Id.* at 28 (capitalization omitted).

⁴ See Order Denying Stay Petitions and Petition to Hold in Abeyance, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (rel. Nov. 21, 2013) (“*Stay Order*”).

⁵ See *id.* ¶ 60 (noting that the Commission “will address the Correctional Institutions petition in a separate order”).

the more recent petition of Pay Tel Communications, Inc. (“Pay Tel”). CenturyLink believes that all four petitions present compelling arguments in favor of granting a stay.

This petition discusses two reasons – in addition to those presented by the other petitions – why the *Order* is unlikely to survive judicial scrutiny. *First*, the Commission did not provide a reasoned justification for applying its new regulatory regime to existing ICS contracts, and for failing to grant ICS providers even the one year “fresh look” period proposed by the petitioners themselves. *Second*, the Commission rested its decision to impose rate-of-return regulation on ICS providers on a misreading of judicial precedent, invoking a presumption in favor of rate-of-return regulation that lacks a legal basis. As a result, the courts are likely to set aside the *Order* as arbitrary and capricious.

ARGUMENT

“When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”⁶ A stay of the effectiveness of a Commission order is warranted where (1) the petitioner is likely to prevail on the merits; (2) the petitioner is likely to suffer irreparable harm in the absence of a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.⁷ While “[t]he relative importance of the four criteria will vary depending on the circumstances of the case,”⁸ all four factors favor a stay here.

⁶ 5 U.S.C. § 705.

⁷ See *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, DA 12-1122, at ¶ 6 (MM Docket NO. 00-168) (MB July 12, 2012).

⁸ *Id.*

I. The Order Is Unlikely To Survive Judicial Review.

A. The other stay petitions present compelling arguments that the Commission's *Order* is unlikely to survive judicial review.

CenturyLink is not alone in registering its opposition to the Commission's *Order*.

Organizations representing law enforcement officers and correctional facilities have raised significant concerns about the *Order*'s impact on security and on inmates' continued access to telephones,⁹ and numerous correctional institutions have petitioned the Commission to stay the effectiveness of the *Order* pending judicial review.¹⁰ In addition, three ICS providers other than CenturyLink – GTL, Securus, and Pay Tel – have already petitioned the Commission to stay the effectiveness of the *Order* pending judicial review.¹¹

While the Commission has already denied two of the previously filed stay petitions, all four petitions present compelling arguments that a court is likely to invalidate the *Order*. *First*, as explained by Commissioner Pai, the Correctional Institutions, GTL, and Securus, the *Order* violates the Administrative Procedure Act (“APA”) because the central feature of its rate-of-return regime is not a “logical outgrowth” of the Commission’s Notice of Proposed Rulemaking (“*NPRM*”).¹² The petitioners proposed rate caps rather than rate-of-return regulation. Nothing in the *NPRM* suggested that the Commission was considering a regulatory regime that it has

⁹ *See, e.g.*, Comments of the National Sheriffs’ Ass’n et al. (filed Oct. 30, 2013); Comments of the American Jail Ass’n (filed Nov. 1, 2013).

¹⁰ *See* Correctional Institutions Petition for Stay Pending Judicial Review (filed Nov. 12, 2013) (“Correctional Institutions Petition”).

¹¹ *See* Petition of GTL for Stay Pending Judicial Review (filed Oct. 30, 2013) (“GTL Petition”); Securus Petition for Stay of Report and Order Pending Appeal (FCC 13-113) (filed Oct. 22, 2013) (“Securus Petition”); Petition of Pay Tel Communications, Inc. for Partial Stay of Rates For Interstate Inmate Calling Services Order (filed Nov. 26, 2013) (“Pay Tel Petition”).

¹² *See* Dissenting Statement of Commissioner Pai at 112-16 (“Pai Dissent”); Correctional Institutions Petition at 11-13; GTL Petition at 7-14; Securus Petition at 5-6.

disfavored for decades – and for good reason. As a result, interested parties did not receive the notice and opportunity to comment guaranteed by the APA.

Second, the *Order* fails to provide an adequate justification for imposing rate-of-return regulation on ICS providers. The Commission has long disfavored rate-of-return regulation as problematic and inefficient. The *Order* offers no reasoned explanation for resurrecting this disfavored form of regulation in the ICS context.¹³

Third, the Commission has compounded the inadequacy of its explanation for imposing enhanced rate-of-return regulation by failing to provide meaningful guidance to ICS providers seeking to comply with the *Order*'s requirement that all rates be “cost-based.”¹⁴ The *Order* does not specify: (i) which costs (other than site commissions) ICS providers may, or may not, build into their interstate rates; (ii) how ICS providers should apportion costs between interstate and intrastate calls; (iii) how ICS providers should characterize ancillary costs; or (iv) what the Commission considers a reasonable rate of return. The *Order* nevertheless subjects providers to the possibility of severe sanctions if they make the wrong guess on any of these issues—creating significant risk and uncertainty for providers.¹⁵ This approach to rulemaking is arbitrary, capricious, and irresponsible.

Fourth, the Commission has failed to address the significant problems associated with the cross-subsidization between higher- and lower-cost facilities that the *Order* will require.¹⁶ The

¹³ See Pai Dissent at 116-23; GTL Petition at 14-17.

¹⁴ See GTL Petition at 17-19; Securus Petition at 6-10; Pay Tel Petition at 21-23.

¹⁵ See GTL Petition at 17-19.

¹⁶ See Securus Petition at 16-17; Correctional Institutions Petition at 8-11; see also Pai Dissent at 120, 125, 126 n.113.

Commission thus fails to come to grips with the fact that its regulations may result in increased ICS rates for inmates at some facilities.¹⁷

B. The *Order* is unlikely to survive judicial review for additional reasons.

The courts are likely to set aside the *Order* for at least two additional reasons not emphasized in the other stay petitions. *First*, the Commission did not adequately justify its application of the new rules to existing contracts. *Second*, the Commission rested its adoption of rate-of-return regulation on an incorrect reading of D.C. Circuit precedent.

1. “The APA’s arbitrary-and-capricious standard requires that agency rules be reasonable and reasonably explained.”¹⁸ The Commission’s decision to apply its new rate regime to existing ICS contracts is neither.

CenturyLink and numerous other commenters, including both ICS providers and States, requested that the Commission make any new ICS rate regulations applicable only to contracts entered into after the regulations’ effective date.¹⁹ As the comments explain, applying the new rate regulations to existing contracts will leave ICS providers unable to recover their up-front costs and, in many instances, unable to renegotiate the terms of their contracts.

The petitioners themselves acknowledged that it would be problematic for the Commission simply to apply its new regulations to existing contracts.²⁰ Recognizing that “many [ICS] providers might not be able to pay” the site commissions required by their existing

¹⁷ See *Order* ¶ 5 n.19.

¹⁸ *Nat’l Tel. Coop. Ass’n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009).

¹⁹ See, e.g., CenturyLink Comments at 15-16 (filed Mar. 25, 2013); GTL Comments at 29 (filed Mar. 25, 2013); Securus Comments at 11-12 (filed Mar. 25, 2013); Comments of the California Department of Corrections and Rehabilitation at 2 (filed Mar. 25, 2013); Comments of the Louisiana Department of Public Safety and Corrections at 7-8 (filed Mar. 22, 2013).

²⁰ See Petitioners’ Alternative Rulemaking Proposal at 28-29 (filed Mar. 1, 2007).

contracts if the Commission were to impose rate caps for ICS services,²¹ the petitioners proposed that the Commission *must* “provide for a one-year ‘fresh look’ transition period” during which “entities contracting with [ICS] providers would be required to permit the [ICS] providers to terminate their existing contracts or renegotiate the contracts to take account of the [rate caps].”²² In the petitioners’ view, “[t]here is simply no legitimate justification for FCC not to adopt a one-year, fresh-look period”²³

Yet the Commission did just that, disregarding the substantial consensus among stakeholders that the new rules should not apply to existing contracts for at least one year after the rules’ effective date.²⁴ The *Order* offers no affirmative policy justification for the Commission’s refusal to exempt existing contracts from the new rules or even to allow the “fresh look” period requested by the petitioners. To the contrary, the Commission implicitly recognized that it is not in the public interest for ICS providers to be saddled with contracts that do not allow them to obtain any return on their investments.²⁵

Even though commenters generally recognized that that rate caps will likely make many existing ICS contracts uneconomic, the *Order* states that the Commission “do[es] not take a position” on whether its new rules will affect any existing contracts,²⁶ and that ICS providers can “renegotiate their contracts or terminate existing contracts so they can be rebid based on revised

²¹ *Id.* at 28.

²² *Id.*

²³ Reply Comments of Martha Wright, et al. at 17 (filed Apr. 22, 2013) (emphasis added).

²⁴ *See Order* ¶¶ 98-102.

²⁵ *See id.* at ¶ 102 (“[W]e strongly encourage parties to work cooperatively to resolve any issues. ... We find that voluntary renegotiation would be in the public interest”).

²⁶ *Id.* at ¶ 101.

terms.”²⁷ The *Order* further concludes, without explanation, that 90 days is a sufficient period of time for the parties “to renegotiate contracts or take other appropriate steps.”²⁸ The Commission’s ostrich-like approach to the consequences of its *Order* ignores the economic and legal realities underlying ICS providers’ existing contracts.

The *Order* addresses neither the possibility that prison and jail officials will be unwilling to renegotiate their contracts with ICS providers nor the implications of their inability or refusal to do so,²⁹ including the likely disruption of telephone services for inmates at the affected facilities. Nor does the *Order* contemplate the possibility that officials in some states are required by state law to insist on the payment of site commissions even though they recognize that such commissions will make the ICS contracts uneconomical.³⁰ The *Order* does not address why ICS providers should bear the financial consequences of the Commission’s decision to exclude site commissions from the costs of services provided under existing contracts when the facilities do not or cannot permit the modification of existing contracts.

Moreover, contrary to the Commission’s assumption, ICS providers may not be able to unilaterally terminate their contracts. And even where termination of services is an option, the resulting disruption of services clearly is not in the public interest.³¹ The Commission’s failure to address any of these consequences of its *Order* is arbitrary and capricious.

²⁷ *Id.* ¶ 102.

²⁸ *Id.*

²⁹ *See infra* at p. 11 (explaining some reasons why institutions may be unable to renegotiate their ICS contracts).

³⁰ *See, e.g.*, Tex. Gov’t Code § 495.027(a) (providing that the Texas Board of Criminal Justice “may not consider a proposal or award a contract [for ICS] unless [the ICS provider] . . . pays the department a commission of not less than 40 percent of the gross revenue received from the use of any service provided”).

³¹ *See infra* at pp. 12-15.

2. As explained above and in the GTL petition, the Order does not provide a reasoned justification for the Commission’s decision to impose rate-of-return regulation, and the administrative record does not provide an adequate basis for this regulatory approach.³² Rather than building an adequate record and articulating a reasoned basis for its decision, the Commission rests on a presumption that it “must” impose rates of the kind the Order adopts unless the record “specifically justif[ies]” a different approach.³³ But no such presumption exists. The Commission’s contrary conclusion rests on a misreading of decades-old D.C. Circuit precedent, and that legal error alone provides a basis for a court to vacate the Order.

In the principal decision on which the *Order* relies, the D.C. Circuit determined that the Commission had not adequately justified a requirement that interexchange carriers pay local exchange carriers a per-minute charge in order to compensate the local exchange carriers for the below-cost rates that the Commission permitted them to charge smaller interexchange carriers.³⁴ The Court observed that the per-minute charge was not “cost-based,” because it required the largest interexchange carriers to subsidize a local exchange service used only by their smaller competitors.³⁵ As the Commission understood the D.C. Circuit’s decision at the time, “[f]or [a] rate structure to be ‘cost-based,’ costs must be recovered (1) only from the party that causes the costs to be incurred; and (2) in the manner in which the costs are incurred (*e.g.*, non-traffic-sensitive costs should be recovered on a non-traffic sensitive basis).”³⁶

³² See *supra* at p. 4; Pet. of GTL at 14-17.

³³ *Order* ¶ 45.

³⁴ See *Competitive Telecomms. Ass’n v. FCC*, 87 F.3d 522 (D.C. Cir. 1996).

³⁵ See *id.* at 529-32.

³⁶ *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure*, 62 Fed. Reg. 56,121, 56,128 (Oct. 29, 1997).

The D.C. Circuit’s decision does not hold, or suggest, that rate-of-return regulation is the default regulatory regime. Any statutory preference for cost-based rates provides no basis for choosing between rate-of-return regulation on the one hand and rate caps that reflect costs, for example, on the other.³⁷ The Commission’s erroneous reading of the case law will require remand.³⁸

II. The Remaining Factors Favor A Stay.

A. CenturyLink will suffer irreparable harm in the absence of a stay.

Given the uncertainty and risk that it will face in the event it charges rates above the safe harbor, if the *Order* goes into effect, CenturyLink will act, to the extent possible, to bring all of its ICS rates down to safe harbor levels or, at a minimum, below the rate caps.³⁹ Across the more than thirty ICS contracts to which CenturyLink is a party, rate reductions to safe harbor levels would likely cost the company \$3.1 million to \$4.3 million in earnings per year, and require it to serve many accounts at a loss.⁴⁰ Additionally, the renegotiation of its contracts will likely take hundreds of hours and potentially over a thousand hours – an undertaking that will prevent the responsible CenturyLink personnel from pursuing other opportunities for the company and hinder its ability to compete for new contracts.⁴¹

In denying the GTL and Securus stay petitions, the Commission implies that any financial harm suffered by ICS providers as a result of the *Order* is not irreparable because, in

³⁷ *Cf. Nat’l Rural Telecom Ass’n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993) (discussing the pros and cons of rate-of-return regulation versus rate caps).

³⁸ *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-90 (1943) (holding that an agency order that rests on a misunderstanding of judicial precedent cannot be sustained).

³⁹ *See* Declaration of Paul Cooper at ¶¶ 9, 12 (“Cooper Decl.”).

⁴⁰ *Id.* at ¶¶ 6, 10.

⁴¹ *Id.* at ¶ 13.

the Commission’s view, ICS providers could potentially find “a way to recover lost revenue if the *Order* were to be reversed by a court . . . , for example through subsequently negotiated agreements with correctional facilities.”⁴² Even if correctional facilities were, for some reason, willing to reimburse ICS providers for their losses, that is not the correct standard for evaluating irreparable harm; the question, rather, is whether ICS providers can recover their lost revenue through litigation.⁴³ And the Commission correctly does not suggest that judicial review of the *Order* offers ICS providers any avenue for recovering the money they lose as a result of the Commission’s action.

The Commission also concludes that any losses will be “minor in the context of [an ICS provider’s] entire business” because “the interim rate regime applies only to interstate calls.”⁴⁴ Even if the irreparable harm inquiry focused on what portion of a regulated entity’s business is affected by a challenged regulation – and it does not⁴⁵ – the Commission’s conclusion ignores the reality that a significant reduction in interstate rates as a result of the *Order* will likely lead inmates and their families to use “call diversion” and “call forwarding” services to disguise their intrastate calls as less-expensive interstate calls. Under the Commission’s interim rate structure, therefore, interstate calls can be expected to constitute a much more significant portion of an ICS provider’s business.⁴⁶

⁴² *Stay Order* ¶ 35 n.147.

⁴³ *See Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (explaining that monetary injuries may not qualify as irreparable if “adequate compensatory or other corrective relief will be available at a later date, *in the ordinary course of litigation*” (emphasis added)).

⁴⁴ *Stay Order* ¶ 35.

⁴⁵ *See Wisc. Gas Co. v. FERC*, 758 F.2d at 674.

⁴⁶ Cooper Decl. at ¶ 8 (projecting that interstate calls will increase to between 45% and 60% of all inmate calls if rates are reduced to safe harbor levels).

Moreover, while acknowledging that “[t]he new rules may reduce [an ICS provider’s] revenue compared to pre-reform levels,”⁴⁷ the Commission asserts that such losses are irrelevant because providers derive their current revenue from rates that are not just and reasonable.⁴⁸ This circular argument provides no basis for ignoring the *Order*’s real-world consequences.

In any event, the 90 day period between the date of publication of the *Order* in the Federal Register and the effective date of the *Order* does not allow CenturyLink sufficient time to renegotiate all its contracts, even assuming that a renegotiation is possible.⁴⁹

In many cases, however, correctional institutions have only a limited ability to renegotiate their contracts. Some States have already set their budgets for the year and fund many critical state programs at least in part with site commission payments.⁵⁰ Moreover, some States have statutes requiring ICS providers to pay site commissions. In Texas, for example, CenturyLink is required by statute to pay 40 percent of its gross revenue to the State in the form of site commissions.⁵¹ These statutes undermine the petitioners’ assertion that ICS providers will readily be able to “reform[]” their existing contracts “to take into consideration the new price caps.”⁵² And some of CenturyLink’s contracts do not permit renegotiation in the event of changes in the law, which would at least allow CenturyLink to mitigate the *Order*’s effects on its revenue.⁵³

⁴⁷ *Stay Order* ¶ 35.

⁴⁸ *See id.* at ¶¶ 35, 37.

⁴⁹ *See Cooper Decl.* at ¶¶ 12-14.

⁵⁰ *See id.* at ¶¶ 14-15.

⁵¹ *See id.* at ¶ 16; *see also* Tex. Gov’t Code § 495.027(a).

⁵² Petitioners’ Opposition to GTL Petition at 4 (filed at Nov. 6, 2013); Petitioners’ Opposition to Securus Petition at 3 (filed Oct. 29, 2013).

⁵³ *Cooper Decl.* at ¶ 14.

B. Delaying the effective date of the new rules will not cause significant harm to other interested parties. As noted by GTL, petitioners themselves requested a one-year delay in the effectiveness of the Commission’s rules.⁵⁴ The petitioners nevertheless opposed GTL’s petition without even acknowledging their earlier position.⁵⁵

C. The public interest also favors a stay. CenturyLink acknowledges that giving effect to the *Order* sooner rather than later will mean that some inmates and their families will pay less for their interstate telephone calls sooner rather than later.⁵⁶ The public interest in reducing their ICS rates is outweighed, however, by the negative consequences that giving immediate effect to the *Order* will have on other inmates, on the contractual relationships between ICS providers and institutions, and on the many programs funded by site commissions.

Most significantly, a stay will increase the likelihood that ICS remains available to inmates while the appeals are pending. The *Order* recognizes that “making it easier for inmates to stay connected to their families and friends” “will promote the general welfare of our nation.”⁵⁷ Giving immediate effect to the *Order* is likely to have the opposite effect, by causing ICS providers to withdraw from facilities where they cannot recover their costs under the new regulations. As a direct result of the *Order*, CenturyLink is unlikely to pursue future contracts with juvenile facilities or secure mental health facilities, which typically have low call volume and high service costs.⁵⁸ Additionally, CenturyLink is unlikely to pursue future contracts with certain county facilities at least until the ambiguities in the interim rate structure are addressed in

⁵⁴ See GTL Petition at 22.

⁵⁵ See Petitioners’ Opposition to GTL Petition at 4-6.

⁵⁶ See *Stay Order* ¶ 48.

⁵⁷ *Order* ¶ 2.

⁵⁸ See Cooper Decl. ¶ 18.

a future rulemaking.⁵⁹ Inmates at facilities where CenturyLink does not renew its contract will lose the ability to contact family members and friends until the facilities find new ICS providers (if any can be found) who are willing and able to provide service.

A stay will also allow ICS providers and correctional facilities to avoid modifying their existing contracts in order to accommodate regulations that are unlikely to be upheld on appeal. Absent a stay, ICS providers and correctional facilities will be compelled to attempt to adjust their contractual relationships on a crash schedule,⁶⁰ and then renegotiate contract terms again and again as the Commission modifies and clarifies its interim rates.⁶¹ Moreover, once the *Order* is set aside on appeal, providers will again be left to revisit their contractual relationships.⁶² The Commission's refusal to grant a stay would thus introduce instability and uncertainty into the marketplace for ICS.

Even if ICS providers are able to renegotiate their contracts to eliminate site commissions, there will be net negative consequences for both prisoners and the general welfare. As the *Order* acknowledges, "site commission payments sometimes fund inmate health and welfare programs such as rehabilitation and educational programs; programs to assist inmates once they are released; law libraries; recreation supplies; alcohol and drug treatment programs; transportation vouchers for inmates being released from custody; or other activities."⁶³ For example, the Kansas Department of Corrections received about \$3,643,434 in site commissions in fiscal year 2013, which were deposited in the State's Inmate Benefit Fund, which is used to

⁵⁹ *See id.*

⁶⁰ *See Order* ¶ 102.

⁶¹ *See Cooper Decl.* at ¶¶ 12-13.

⁶² *See id.* at ¶ 13

⁶³ *Order* ¶ 34; *see also id.* ¶ 57; Correctional Institutions Petition at 17-18.

fund programs including: educational assessments; vocational training; GED reading; job readiness services; sex offender treatment; substance abuse treatment; gender violence education and counseling; library services; and recreational activities for juvenile offenders.⁶⁴ Likewise, the Alabama Department of Corrections received about \$5,665,000 in site commission last fiscal year, and the loss of this funding will cause significant disruptions to programs that the State offers inmates, which include Adult Basic Education and GED coursework; Alcoholics and Narcotics Anonymous; library resources, supplies, and subscriptions to news and educational publications; counseling; and athletic and recreational programs.⁶⁵ The *Order* thus jeopardizes the funding for numerous inmate welfare programs.

Giving immediate effect to the *Order* will place at risk not only programs that directly benefit inmates but also a wide variety of other programs that benefit the general welfare.⁶⁶ Site commissions support programs funded out of states' general revenue funds,⁶⁷ programs that help protect the safety of corrections officers,⁶⁸ and programs that provide for the compensation of victims of crime.⁶⁹ A stay will ensure that funding for these important programs is not disrupted while the *Order* undergoes judicial review.⁷⁰ The Commission does not deny that these social

⁶⁴ See Declaration of Ray Roberts in Support of the Petition for Stay Pending Judicial Review at ¶¶ 8-11.

⁶⁵ See Declaration of Kim Thomas in Support of the Petition for Stay Pending Judicial Review of the Notice of Proposed Rulemaking in WC Docket No. 12-375, Dated August 19, 2013, at ¶¶ 7-11.

⁶⁶ See *Order* ¶ 3 n.13; *id.* ¶¶ 33-34 & nn.125, 132.

⁶⁷ See *id.* ¶ 34.

⁶⁸ See *id.*

⁶⁹ See Tex. Gov't Code § 495.027(c) (providing that the first \$10 million in site commission payments and 50 percent of all site commissions payments thereafter will be contributed to the compensation of victims of crime fund).

⁷⁰ Cf. GTL Petition at 23-24.

welfare programs are “successful or worthy,”⁷¹ and should not ignore the social costs of defunding these programs when it assesses how a stay would benefit the public interest.

CONCLUSION

The petitions for a stay pending judicial review should be granted.

Respectfully submitted,

/s/ Robert A. Long, Jr.

Robert A. Long, Jr.

Matthew S. DelNero

Matthew J. Berns

COVINGTON & BURLING LLP

1201 Pennsylvania Avenue, NW

Washington, DC 20004-2401

(202) 662-6000

rlong@cov.com

Counsel for CenturyLink

November 27, 2013

⁷¹ *Stay Order* ¶ 54 (quoting *Order* ¶ 57).

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

DECLARATION OF PAUL COOPER

1. My name is Paul Cooper. I am over the age of 21. I have never been convicted of a felony or a crime of moral turpitude. 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. I am currently the General Manager of CenturyLink Public Communications, Inc. (“CenturyLink”), a wholly owned subsidiary of CenturyLink, Inc., a publicly traded corporation that, through its wholly owned affiliates, provides voice, broadband, video and communications services to consumers and businesses. Prior to my current position, I served as a Senior Director at Embarq Corporation following its spin-off from Sprint Corporation, where I previously served in various managerial roles. I am a graduate of Bates College (B.A. in Economics and Political Science), University of Rochester (M.A. in Economics) and the University of Chicago - Booth School of Business (M.B.A. with a focus in Finance and Marketing).

3. CenturyLink recently changed its name; formerly it was known as Embarq Payphone Services, Inc.

4. CenturyLink provides inmate calling services (“ICS”) to correctional facilities across the country. CenturyLink is the third largest provider of ICS in the country, as measured by the number of inmates served.

5. The systems and services that CenturyLink supplies allow inmates to make phone calls from the correctional facility and permit correctional staff to review the calls, along with providing many other specialized security features that are critical to these institutions and for public safety.

6. CenturyLink currently is a party to more than thirty (30) ICS contracts. Under its ICS contracts, CenturyLink is typically obligated to pay commissions to correctional institutions based on end user revenues. In some states, correctional institutions are required to assess commissions pursuant to state law.

7. The vast majority of CenturyLink’s ICS contracts require CenturyLink to pay site commissions. Where required by the contract, site commissions account for between 26% and 72% of CenturyLink’s direct costs to provide intrastate and interstate ICS for its individual clients.

8. Because the *Order* effectively mandates interstate rates that are lower than intrastate rates, I anticipate that the *Order* will cause the ratio of interstate to intrastate services to shift significantly. In the past, when intrastate rates have been lower than interstate rates, inmates have used “call diversion” or “call forwarding” services offered by third parties to make interstate traffic appear to be intrastate in nature, and thus subject to lower rates. These services disguise the true location of the call recipient and thus raise serious security concerns for ICS providers, correctional institutions, and law enforcement. It is likely that once interstate rates are lower than intrastate rates as a result of the *Order*, these schemes will instead make intrastate

calls appear interstate in nature. Based on the high level of arbitrage observed where intrastate rates are or were lower than interstate rates, I expect the percentage of CenturyLink's ICS traffic that is interstate to increase from approximately 7% to between 45% and 60% of total minutes of use.

9. The *Order* creates great uncertainty for CenturyLink as to the circumstances in which rates above the level of the safe harbor could be sustained in the event of a challenge. In light of this uncertainty and the potentially severe sanctions if the Commission were to find that CenturyLink's above-safe harbor rates were not sufficiently "cost based," CenturyLink has an incentive to charge rates that are at safe harbor levels.

10. CenturyLink estimates that charging rates at the safe harbor levels, as a result of the *Order*, will have a significant negative impact on its earnings. I have estimated that CenturyLink will face \$3.1 million to \$4.3 million in lost earnings annually if rates are reduced to safe harbor levels. Additionally, CenturyLink will be forced to serve many of its accounts at a loss. These estimates reflect my projections regarding the use of schemes to disguise intrastate calls as interstate calls.

11. The *Order* also will result in stranded investment in ICS facilities. CenturyLink has tens of millions of dollars in capital investment at risk in Alabama and Texas alone. Due to the high capital investment required to be made in ICS facilities, CenturyLink typically does not break even on a multi-year contract until towards the end of the contract term.

12. CenturyLink will attempt to renegotiate its ICS contracts if the Commission's *Order* on ICS rates goes into effect, in order to ensure that CenturyLink charges only rates that fall within the safe harbors or, at a minimum, below the rate caps, and, if possible, to readjust site commissions so that provision of inmate calling services is economic for

CenturyLink. Because the Commission intends to clarify the *Order* through future rulemakings, CenturyLink anticipates multiple rounds of renegotiation for these contracts. Moreover, if the *Order* ultimately is vacated upon judicial review, CenturyLink would have to engage in another round of contract renegotiation to undo changes agreed to by the contract parties while the appeal is pending.

13. CenturyLink estimates that the renegotiation of its contracts will take hundreds of hours and potentially over a thousand hours given the three or four rounds of renegotiation that likely will be required. Renegotiating the contracts will prevent the responsible personnel at CenturyLink from pursuing other opportunities for the company and hinder CenturyLink's ability to compete for new contracts.

14. CenturyLink may be unable to renegotiate all of its contracts. Some of CenturyLink's contracts do not permit renegotiation in the event of changes in the law. In addition, several entities' ability to renegotiate contract is limited due to the timing of budget cycles and/or state law.

15. For example, the State of Alabama's fiscal year began only recently, and many critical state programs rely on the fixed per-inmate/per-day commission payments required under our contract with the State.

16. The State of Texas, which is a party to CenturyLink's largest contract, has a statute that requires the ICS provider to pay 40 percent of their gross revenue to the State in the form of site commissions. The first \$10 million in site commission payments, and 50% of all site commission payments thereafter, are deposited in the State's Crime Victims' Compensation Fund, while the remainder is deposited in the general revenue fund.

17. Additionally, CenturyLink anticipates that it will not seek to renew certain of its existing contracts upon their expiration in light of the *Order*. CenturyLink believes service for these facilities simply will not be viable at rates within the rate structure of the *Order*, considering the *Order*'s refusal to allow consideration of site commissions in establishing permissible rates, the uncertainty it creates for ICS providers that charge fees above the safe harbor but below the rate caps, and the hard rate caps it establishes.

18. Specifically, absent a stay, CenturyLink is unlikely to pursue contracts with juvenile facilities or secure mental health facilities, which typically have low call volume and high service costs, in the future. In addition, CenturyLink is unlikely to pursue contracts with certain county facilities at least until the Commission concludes its anticipated rulemakings to clarify and finalize the ICS rate structure.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Kansas City, MO on the 27th day of November, 2013.



Paul Cooper

commissions pursuant to the contracts that are paid by the ICS Provider in exchange for access to the facilities of the Department. These contracts are integrated agreements that reflect a careful balancing of the various terms and conditions. The KDOC could not simply change one provision of the contract (pertaining to site commissions, for example) without renegotiating, if at all, the entirety of the agreement.

4. With certain exceptions, the offenders housed in the KDOC are afforded the opportunity to use pay telephones to communicate with individuals outside the facilities. Due to the differing degrees of security risk presented by our offenders, however, the KDOC mandates that security procedures be put in place to ensure that offenders do not misuse the pay telephones for illicit purposes. The KDOC has an Inmate Telephone Platform with a full suite of investigative features, including phone recordings storage and VPN licenses for outside law enforcement agencies.

5. These services are a vital tool in our efforts to combat continued criminal enterprise, smuggling of contraband, witness intimidation, narcotics trafficking, violent crime, theft and even inter-facility communications between offender gangs. Further, the monitoring of the KDOC offenders' communications provides valuable information for law enforcement, aiding in investigating, prosecuting and preventing crimes in Kansas and the surrounding areas. The public safety would be compromised if these security features were not maintained due to a loss of funds or for any other reason.

6. I understand that the Commission has recently adopted regulatory caps that will limit prepaid interstate calls to \$0.21 per minute and collect interstate calls to \$0.25 per minute, as well as limit which offender services may be recovered through rates. Absent the current security features, the KDOC will find it increasingly difficult to protect the general public (and

corrections employees working, as well as offenders housed, in the facilities) from the types of criminal activity described above.

7. KDOC lacks appropriated funds to pay for the security features involved, which are, in my view, now part-and-parcel of providing offender calling services, and should rightfully be considered as inherent in provision of offender calling services. Without payment of the costs of providing such security features by the users of what is actually not a service mandated by either federal or state law, KDOC will be presented with the dilemma of either eliminating the service altogether, thereby inconveniencing offenders and their family members, or being subject to unacceptable risks of occurrence of offender misconduct as outlined in Par. 5 above.

8. The provision of security features, however, is not the only public safety framework at risk from the implementation of the Commission's Order. Decreases in the site commissions we receive will eliminate or negatively affect availability of offender programs. The State of Kansas vests the KDOC with the responsibility to maintain the orderly administration of its facilities, and ensure the proper care of the offenders confined therein. This goal is accomplished in a variety of ways, which include the provision of services to aid offender welfare as detailed below.

9. The KDOC offers inmates the following programs and services, which are supported by the Department's Inmate Benefit Fund:

- Educational Assessment
- Vocational Training
- GED Reading
- Job Readiness Services
- Sex Offender Treatment
- Substance Abuse Treatment
- Gender Violence Education & Counseling
- LSI-R Testing
- Electronic Law Library
- Support & Consulting Services

- Dietitian Consultant
- Religious Programs Advisors

The KDOC offers juvenile residents certain services and programs, paid for by juvenile resident benefit funds as follows:

- Privilege and Incentive Events (featuring food items not on ordinary menu)
- Movie nights & video games
- License to show movies via DVR
- Recreation supplies & equipment
- Television cable service

10. None of these services is mandatory under Kansas law. Rather, the decision to provide these services falls squarely within the discretion afforded to KDOC officials pursuant to the applicable statutes and regulations. Correctional officials can only continue to offer these services if they are in receipt of adequate funding.

11. An important and substantial way in which these services and programs are funded is through receipt of site commissions that are tendered to KDOC by the ICS Provider, and then placed in the Inmate Benefit Fund, and juvenile residents benefit funds. The amount of site commissions payable to the KDOC are set forth in the contracts referenced above. The calculation of these commissions is performed by the ICS Provider pursuant to a methodology incorporated in the contracts. Applying these parameters, the KDOC received approximately \$3,643,434.40 in site commissions last fiscal year (FY '13) alone. In many instances, these funds are the difference between having such offender welfare programs or not.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.


Ray Roberts
Secretary of Corrections
Kansas Department of Corrections

Executed on November 25, 2013

**DECLARATION OF KIM THOMAS IN SUPPORT OF THE PETITION
FOR STAY PENDING JUDICIAL REVIEW OF THE NOTICE OF PROPOSED
RULEMAKING IN WC DOCKET NO. 12-375, DATED AUGUST 19, 2013**

I, Kim Thomas, state as follows:

1. I am Kim Thomas, Commissioner of the Alabama Department of Corrections. I am competent to make this declaration and, unless otherwise indicated, all of the facts set forth in this declaration are based on my personal knowledge. I submit this declaration in support of the contemporaneously filed Petition for Stay Pending Judicial Review (the "Petition").

2. In my role as Commissioner, I have familiarity with the inmate calling services that are provided at the Alabama Department of Corrections. These services include Prepaid Phone Accounts and Collect Call services that inmates may use to make telephone calls to persons outside the facilities where they are housed.

3. The Alabama Department of Corrections has a contractual arrangement with an inmate calling service (ICS) provider – CenturyLink - that governs the manner in which these inmate calling services are provided. One term and condition covered by that contract is the provision of certain security protocols and procedures that call for monitoring of inmate telephone calls. The Alabama Department of Corrections also receives site commissions pursuant to the contract that are paid by the ICS Provider in exchange for access to the facilities. This contract is an integrated agreement that reflects a careful balancing of various terms and conditions. The Alabama Department of Corrections could not simply change one provision of the contract, particularly site commissions, without being required to rebid for all the services.

4. With certain exceptions, the inmates housed in the Alabama Department of Corrections are afforded the opportunity to use pay telephones to communicate with individuals outside the facilities where they are housed. Alabama Department of Corrections Administrative Regulation

431, however, mandates that security procedures be put in place to ensure that prisoners do not misuse the pay telephones for illicit purposes. The Alabama Department of Corrections has an Inmate Telephone Platform with a full suite of investigative features, including phone recordings storage for the life of the contract and the ability to monitor live calls from any workstation. Despite these regulations, and our efforts to enforce them, inmates frequently violate these procedures and utilize contraband cell phones to conduct illicit and illegal activity.

5. These services are vital tools in our efforts to combat continued criminal enterprise, smuggling of contraband, witness intimidation, narcotics trafficking, violent crime, theft, and inter-facility communications between inmates and even prison gang members. Further, the monitoring of Alabama Department of Corrections inmate communications provides valuable information for law enforcement, aiding in investigating, prosecuting, and preventing crimes in Alabama and the surrounding areas. Public safety would be compromised if these security features were not maintained due to a loss of funds or for any other reason.

6. I understand that the Commission has recently adopted regulatory caps that will limit prepaid interstate calls by inmates to \$0.21 per minute and collect interstate calls by inmates to \$0.25 per minute, as well as limit which inmate services may be recovered through rates. Absent the current security features, the Alabama Department of Corrections will find it difficult to protect the general public as well as the inmates housed in its facilities and the corrections employees who work there every day from the types of criminal activity described above. As a result, forcing ICS Providers to cap their rates at a level below that required to pay for all necessary security procedures may result in the termination of the telephone services at the Alabama Department of Corrections.

7. The provision of security features, however, is not the only public safety framework potentially at risk as a result of the implementation of the Commission's Order. Decreases in the site commissions we receive will eliminate or negatively affect availability of inmate programs. The Code of Alabama vests the Alabama Department of Corrections with the responsibility of maintaining the orderly administration of its facilities, and ensuring the proper care of the offenders confined therein. This goal is accomplished in a variety of ways, including the provision of services to aid inmate welfare as detailed below.

8. The Alabama Department of Corrections offers inmates Adult Basic Education and GED coursework, Alcoholics Anonymous and Narcotics Anonymous, library resources, supplies, and subscription-based offerings to news and educational publications. The Alabama Department of Corrections also provides inmates with counseling resources, as well as athletic and recreational opportunities.

9. None of these services are mandatory under Alabama law. Rather, the decision to provide these services falls squarely within the discretion afforded to public officials pursuant to applicable statutes and regulations. Correctional officials can only continue to offer these services if they are in receipt of adequate funding.

10. One of the ways in which these services and programs are funded is through receipt of site commissions that are tendered to Alabama Department of Corrections by the ICS Provider. The amount of site commissions payable to the Department are set forth in the contract previously referenced. The calculation of these commissions is performed by the ICS Provider pursuant to a methodology established in the contract. The Alabama Department of Corrections received approximately \$5,665,000 in site commissions last fiscal year alone.

11. Loss of these commissions will require additional funds from the State of Alabama General Fund which is the primary source of revenue for governmental agencies providing most public services; or in the alternative, elimination of meaningful programs and services that have rehabilitative and correctional management value. I understand that any regulatory framework that eliminates the payment of site commissions by ICS Providers will cause significant disruptions to these services as well as those offered to inmates.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.



Executed on November 25, 2013

Given under my hand and official notarial seal this 25th day of November, 2013.



Notary Public
State of Alabama

My Commission Expires: 6.18.2016

