

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

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**REPLY COMMENTS OF SECURUS TECHNOLOGIES, INC.  
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

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## SUMMARY

That the Commission lacks authority to set intrastate inmate calling rates is shown abundantly in this record. Several State Commissions, along with NARUC, successfully put to rest the idea that the clear jurisdictional line that Congress drew in Section 152 of the Communications Act, separating interstate communications from intrastate, somehow was erased by Section 276. At issue here are the rates for telephone calls that originate and terminate in the same state, and the Commission's authority to set Payphone Service Provider compensation for equipment owners has no application to providers of the actual telephone calls. The Commission's wish to investigate or set fees for financial transactions is likewise unauthorized.

State regulators also came forward to show the work they already have done regarding intrastate inmate calling rates, and to ask the Commission not to render that work moot. The legal prohibition aside, the simple ethic of federal-state comity should persuade the Commission to restrain itself from setting intrastate rates.

With regard to the Commission's intent to finalize, or cut even further, the previously adopted interstate calling rates, the record is equally opposed. Evidence shows that the "interim" rate caps and "safe harbors" already are below the costs of providing inmate telecommunications service; rendering those rates "permanent", or decreasing them again, would compound the problem. And with the Report and Order already being under review at the D.C. Circuit regarding both its methodology and its rates, taking additional action on interstate rates at this time would be folly. Indeed, today the Court of Appeals for the D.C. Circuit issued an order staying the rules establishing the "safe harbors", the "cost-based" standard, and the annual reporting requirements.

Security concerns, and how this proceeding will exacerbate them, drew comment from several state and local correctional authorities as well as from groups like the National Sheriffs' Association and the American Jail Association. Slashing rates and preventing carriers from paying site commissions will, according to these authorities, compromise their ability to maintain secure calling systems. In addition, interfering in call-blocking policies or requiring implementation of multiple-provider service arrangements would breach the security measures that these authorities are charged with maintaining. Inmate phone systems simply are different, as the Commission has expressly recognized for decades, and that fact must not be forgotten or minimized.

Other proposed measures like federal quality-of-service rules also drew strong opposition. The safe and satisfactory operation of inmate phone systems is under the authority and supervision of correctional agencies. Evidence in the record demonstrates their active supervision in these matters. The Commission has no call or need to intervene in these aspects of inmate telecommunications services.

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Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.415, files these Reply Comments in response to the Further Notice of Proposed Rulemaking (“FNPRM”).<sup>1</sup> The record does not support the Commission’s proposal to adopt intrastate inmate calling rates, nor does it support the additional rates and rules for interstate services discussed in the FNPRM.

**I. CORRECTIONAL AUTHORITIES REMAIN CONCERNED ABOUT THE EFFECT OF COMMISSION INTERVENTION IN THIS MARKET**

Several state and county correctional authorities have submitted comments and letters asking the Commission not to take action that would intrude on their authority or conflict with penological policy. Securus referred to several such filings in its Initial Comments,<sup>2</sup> and several more have been filed in the last few weeks. These submissions regard security issues as well as the need for site commission revenue. They uniformly express concern that the Commission is interfering with – will “trample upon”<sup>3</sup> – correctional facility operations.

**A. Authorities State That Commission Intervention in This Market Poses Risks to Security**

The Maryland Sheriffs’ Association states that the Commission’s “interim” interstate rates prevent the recovery of costs needed for “administering inmate calling services

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<sup>1</sup> WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 14107 (2013).

<sup>2</sup> WC Docket No. 12-375, Comments of Securus Technologies, Inc. on Further Notice of Proposed Rulemaking at 13 (Dec. 20, 2013) (“Securus Initial Comments”) (quoting comments from Pamunkey Regional Jail (Virginia), Michigan Sheriffs’ Ass’n, and National Sheriffs’ Ass’n).

<sup>3</sup> WC Docket No. 12-375, Comments of Correctional Authorities at 2 (Dec. 20, 2013) (jointly filed by more than 19 parties including the Mississippi Department of Corrections, South Dakota Department of Corrections, the New York State Sheriffs’ Association, the American Correctional Association, the American Jail Association, and several country Sheriffs) (“Correctional Institution Comments”).

and monitoring phone calls to protect the public.”<sup>4</sup> These Sheriffs believe that the Commission is “intruding on our authority to effectively manage our jail operations.”<sup>5</sup>

The Solano County (California) Sheriff’s Office states that inmate telecommunications services “include security components that have consistently been able to detect criminal activity occurring inside correctional facilities.”<sup>6</sup> The Sheriff of Onondaga County, New York has similar concerns that slashing call rates will endanger security: “The security features associated with ICS are critical for our staff to combat continued criminal activity inside the walls of our facility and outside in our community.”<sup>7</sup>

The American Jail Association (AJA) also filed comments regarding the nexus between calling rates and prison security. It argues that the “interim” rates “will seriously jeopardize Jail Administrators’ ability to manage the Inmate Telephone Services in their facilities.”<sup>8</sup> The AJA “is the only national association that focuses exclusively on issues specific to the operations of local correctional facilities,”<sup>9</sup> and has “thousands of jails”<sup>10</sup> as members. It

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<sup>4</sup> WC Docket No. 12-375, Letter from Sheriff Darren M. Popkin, Montgomery County, and Karen J. Kruger, Executive Director, Maryland Sheriffs’ Ass’n at 1 (Dec. 16, 2013). The Commission received this letter on January 7, 2014. The Association represents the Sheriffs of 24 Maryland counties. See <<http://www.mdsheriffs.org/index.php/the-sheriffs/meet-the-sheriffs>>.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> WC Docket No. 12-375, Letter from Thomas A. Ferrara, Sheriff of Solano County (California), at 1 (Dec. 17, 2013). The Commission received this letter on December 31, 2013.

<sup>7</sup> WC Docket No. 12-375, Letter from Esteban M. Gonzalez, Chief Custody Deputy, Onondaga County Sheriff’s Office, at 1 (Dec. 19, 2013). The Commission received this letter on December 27, 2013.

<sup>8</sup> WC Docket No. 12-375, Letter from Esteban M. Gonzalez, President, and Robert J. Kasabian, Executive Director, American Jail Ass’n, at 1 (Dec. 20, 2013) (“AJA Letter”). The letter addresses the new rates and rules in the Report and Order, but has equal application to the further rate proposals under consideration in this phase of the proceeding.

<sup>9</sup> American Jail Ass’n webpage <<http://www.americanjail.org/american-jail-association/>>.

<sup>10</sup> AJA Letter at 2.

explains that, for security reasons, “equipment must be detention grade” and thus “costs more to acquire, install, and maintain than conventional telephone systems do.”<sup>11</sup> In addition, “there are features built in that assist law enforcement in protecting the public.”<sup>12</sup> These features have “resulted in numerous cases where lives have been saved[.]”<sup>13</sup>

Cutting call rates and adopting just one set of rates for every type and size of facility<sup>14</sup> (the “one-size-fits-all” approach<sup>15</sup>) will, according to the AJA and these Sheriffs, compromise jail security and public safety.<sup>16</sup> In fact, the AJA predicts that if calling rates prevent the provision or maintenance of necessary security features, it will “hinder phone contract procurement” and may cause authorities to “cease phone operations entirely.”<sup>17</sup>

The Commission did not appreciate the effect of the “interim” interstate rates on prison security and public safety.<sup>18</sup> The FNPRM, however, asks parties to comment on the effect

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<sup>11</sup> AJA Letter at 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> The rate caps and “safe harbors” are not two distinct sets of rates. If a carrier is charging the rate cap but is, according to the Commission’s as-yet undefined rate methodology, earning excessive returns, the carrier must go down to the “safe harbor”. If the “safe harbor” rate also results in excessive returns, the carrier must cut its rate even further. These matters will be reviewed on a company-wide basis, *e.g.*, Report and Order n. 226 & 429, and thus it is not the case that the carrier may rely on a tiered rate structure or choose between sets of rates on a facility-by-facility basis. To the extent that the envisioned “cost-based” ongoing rate reviews and investigations will result in a variety of rates across various facilities, that result cannot be credited as the Commission’s establishment, in the first instance, of a multi-rate structure.

<sup>15</sup> *E.g.*, AJA Letter at 1; Maryland Sheriffs’ Ass’n Letter at 2; WC Docket No. 12-375, Initial Comments of Securus Technologies, Inc. at 14 (Mar. 22, 2013).

<sup>16</sup> *See* AJA Letter at 1-2; Onondaga Letter at 1-2; Solano County Letter at 1.

<sup>17</sup> AJA Letter at 3.

<sup>18</sup> Report and Order n.123 (“While interstate ICS requires unique security measures, there is no evidence in the record that the costs of these additional security functions justify the higher interstate ICS rates that are in place today.”).

of security measures on cost structure.<sup>19</sup>

What the Commission must understand is that today's inmate communications already include many security features which necessarily are a joint and common cost; the incremental cost of software deployment is not at all easily derived. For the Commission to state that slashing rates nationwide – with one set of rates – will not affect security features is to assume a contrapositive set of facts that does not exist. We do not know what inmate telephone systems can look like under the new rates. But we do know, as is further discussed below, that the cost of serving most facilities will not be recovered under the “interim” rate caps and “safe harbors”. *See* Section III., *infra*.<sup>20</sup>

As a related matter, correctional authorities have asked the Commission not to override longstanding security policies that require call blocking.<sup>21</sup> Pamunkey Regional Jail (Virginia) states that

**There are significant security risks posed by prohibiting call blocking to call routing services** that allow called parties to mask their identity and location. By prohibiting call blocking, the FCC is taking away one of the tools used by law enforcement to ensure that ICS isn't being used to perpetrate criminal activity.<sup>22</sup>

The Ohio Department of Rehabilitation and Correction remarks that

**The Commission previously has recognized the importance of security** in conjunction with ICS, and with respect to call blocking, has found that ‘legitimate security concerns may justify ICS

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<sup>19</sup> FNPRM ¶ 164 (“We seek comment on specific ways in which advanced services help to address security concerns and whether such advancements reduce costs.”).

<sup>20</sup> *See also* Securus March 25 Comments at 16-18 & Expert Report of Stephen E. Siwek (appended to Comments).

<sup>21</sup> FNPRM ¶¶ 172, 175.

<sup>22</sup> WC Docket No. 12-375, Letter from Col. James C. Willett, Pamunkey Regional Jail, at 2 (Dec. 10, 2013) (emphasis added).

providers blocking calls in certain circumstances.’<sup>23</sup>

The Department notes that, in the FNPRM, “the Commission appears to be backing away from those findings in an effort to eliminate all call blocking in the ICS context.”<sup>24</sup> It urges the Commission not to do so, because “[w]hile call blocking of non-ICS calls may ‘pose a serious threat’ to the telecommunications network, **any such threat is far outweighed by the security needs of the ODRC in the context of ICS calls.**”<sup>25</sup>

These correctional authorities have security concerns that cannot be minimized or ignored, and have explained how the Commission’s actions in this proceeding – those already taken and those now proposed – add to those concerns.<sup>26</sup> The Commission had been mindful of these concerns in the past and should not abandon that tack now.<sup>27</sup>

**B. Authorities Rely on Site Commission Revenue for Inmate Welfare and Facility Operations**

Correctional authorities also explain why the Commission should not prohibit inmate telecommunications service providers from recovering the cost of site commissions – which will *de facto* prevent carriers from paying them – and particularly those commissions already required by existing contracts or state statutes.

The Maryland Sheriffs’ Association states that its members use site commission

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<sup>23</sup> WC Docket No. 12-375, Comments of the Ohio Department of Rehabilitation and Correction (“ODRC Comments”) at 8 (Dec. 20, 2013) (quoting *Policies and Rules Concerning Operator Service Providers, et al.*, 28 FCC Rcd. 13913, n.34 (2013)) (emphasis added).

<sup>24</sup> ODRC Comments at 8.

<sup>25</sup> *Id.* at 8-9 (emphasis added).

<sup>26</sup> The issue of whether the Commission can require carriers to install videophones, FNPRM ¶¶ 150-51, also impinges on prison safety and the authority of correctional agencies. That action would seem to burden facilities with additional obligations for another discretionary service and they may find that burden to be unreasonable.

<sup>27</sup> The question whether the Commission’s treatment of security concerns in the Report and Order was reasonable, *e.g.*, ¶ 32, is before the Court of Appeals.

funds “for a variety of programs and services, including but not limited to, educational and vocational programs, substance abuse treatment programs, law libraries, recreation supplies and other services that benefit inmates[.]”<sup>28</sup> The Ohio Department of Rehabilitation and Correction states that it “**uses all of its ICS commissions to directly benefit all of its inmates** in the form of inmate earnings, release, pay, lower commissary pricing, and advanced inmate job training.”<sup>29</sup>

Solano County notes that site commissions are mandated by a California state statute:

I direct you to California Penal Code § 4025, which requires each county to establish an “Inmate Welfare Fund” and requires that “any money, refund, rebate, or commission ... attributable to the use of pay telephones ... by inmates” be deposited into the fund.<sup>30</sup>

This Inmate Welfare Fund is “a funding source to assist all inmates with programs and services designed to help them be successful in returning to their communities.”<sup>31</sup> And the AJA states that its members use site commissions for “drug and alcohol rehabilitation, [and] GED certification.”<sup>32</sup>

Some parties argue, without data, that increased inmate phone usage will decrease recidivism.<sup>33</sup> The Commission has made that policy goal the crux of this proceeding.<sup>34</sup> Surely the inmate welfare programs enabled by site commissions have at least equal power to dissuade

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<sup>28</sup> Maryland Sheriffs’ Ass’n Letter at 2.

<sup>29</sup> ODRC Comments at 13 (emphasis added).

<sup>30</sup> Solano County Letter at 2 (ellipses in original).

<sup>31</sup> *Id.*

<sup>32</sup> AJA Letter at 3.

<sup>33</sup> WC Docket No. 12-375, Letter from David Fathi, National Prison Project of the ACLU (Dec. 20, 2013); Comments of Prisoner Legal Services of MA at 3 (Dec. 20, 2013).

<sup>34</sup> *E.g.*, Report and Order ¶¶ 2, 42, 43. The Commission relies on one law review article as support for this goal. *Id.* n.172. Steve Siwek, in Sections 5.2 and 5.3 of his Rebuttal Report filed with the Securus Reply Comments on April 22, 2013, explained the fallacy of relying on recidivism projections as grounds for setting below-cost calling rates.

inmates from re-offending after release. These programs actually teach marketable skills for pursuing a meaningful livelihood.

It also bears mention that a State Senator from New York is “greatly concerned” that a prohibition on site commissions will injure “county jails in my Senate District.”<sup>35</sup> She states that “[c]ounty governments have acted on their budgets for the year and have not accounted for the loss of funding that will be incurred[.]”<sup>36</sup> She is concerned that these counties will not have “the financial resources necessary to continue to administer inmate calling services and perform the vital security functions that are required to protect the public.”<sup>37</sup>

For these reasons, the Commission should not adopt rules for intrastate inmate calling service that has the effect of preventing ICS providers from paying site commissions.

## **II. STATE REGULATORS ASK THE COMMISSION NOT TO INTRUDE INTO INTRASTATE RATEMAKING**

In its Initial Comments on the FNPRM, Securus summarized the early comments of several state utility commissions who urge the Commission not to set intrastate rates.<sup>38</sup> The National Association of Regulatory Utility Commissioners (“NARUC”) now echoes the pleas of those commissions.

NARUC lists several of the states that presently are reviewing intrastate calling rates, such as Alabama and Massachusetts, and warns that their efforts “could be slowed or

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<sup>35</sup> WC Docket No. 12-375, Letter from Elizabeth O’C. Little, New York State Senator, 45th District of New York (Dec. 16, 2013). The Commission received this letter on December 23, 2013.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Securus Initial Comments at 10 (quoting comments from the public service commissions of Alabama, the District of Columbia, Massachusetts, and Minnesota).

negatively impacted by continued FCC proceedings focused on intrastate rates.”<sup>39</sup> NARUC goes on to provide lengthy analysis of the legal prohibition on the Commission’s setting intrastate rates. *See* Section IV., *infra*.

It is notable that a county correctional officer has lodged similar concerns. Chief Deputy Max Bartlett states that, “Any jurisdictional dispute would create **unnecessary uncertainty that would delay needed and ongoing reform** at the state level, to the detriment of the inmates and the public at large.”<sup>40</sup> Deputy Bartlett adds that, “State Utility Commissions have staff equipped to conduct, and experienced in conducting, cost-based rate regulation on a provider-by-provider and facility-by-facility basis.”<sup>41</sup> The state commissions of Alabama, Minnesota, Massachusetts, and the District of Columbia made the same argument themselves.<sup>42</sup>

The nation’s state regulators and their representatives have come forward to ask, essentially as a matter of comity and administrative prudence (the legal prohibition already being clear), that the Commission not intrude on state ratemaking authority. In addition, the record demonstrates that twelve states have addressed inmate calling rates already.<sup>43</sup> This evidence should convince the Commission that it is not in fact “compelled to take action” as it may have thought.<sup>44</sup>

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<sup>39</sup> WC Docket No. 12-375, Comments of the National Association of Regulatory Utility Commissioners (“NARUC”) at 6 (Dec. 20, 2013).

<sup>40</sup> WC Docket No. 12-375, Comments of Chief Deputy Max Bartlett at 1 (Dec. 13, 2013) (emphasis added). Deputy Bartlett does not identify the county or state that he serves.

<sup>41</sup> *Id.*

<sup>42</sup> *See* Securus Initial Comments at 10.

<sup>43</sup> NARUC Comments at 5-6.

<sup>44</sup> FNPRM ¶ 132.

### III. MANY PARTIES URGE THE COMMISSION NOT TO FURTHER REDUCE THE BELOW-COST INTERSTATE RATES ALREADY ADOPTED

The record in this proceeding did not support adoption of the rate cap or “safe harbors” in the Report and Order,<sup>45</sup> and thus cannot adopt the additional rate reductions contemplated in the FNPRM.<sup>46</sup> Securus proved with the expert report of economist Steven Siwek that the rate caps are below Securus’s cost of providing service even without site commissions. Several parties, including CenturyLink and Pay Tel, have made this clear again in recent filings.

Pay Tel has asked the Commission to stay the Report and Order as to all city and county jails on the ground that it is unable to serve small facilities at the newly prescribed rates.<sup>47</sup> Last week it filed a Petition for Waiver, on a company-wide basis, to exempt all Pay Tel sites from those rates permanently.<sup>48</sup> Pay Tel has provided cost data in an attempt to show that the rates adopted in the Report and Order, both the “safe harbors” and the rate caps, are below Pay Tel’s costs of providing service at its facilities.

Indeed, Pay Tel has advocated from the start that the Commission not set rates for “jails”, which Pay Tel serves exclusively, due to their low call volume and higher costs of service.<sup>49</sup> Pay Tel maintains that the Commission should adopt rate caps only for “prisons”,

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<sup>45</sup> E.g., WC Docket No. 12-375, Reply Comments of Securus Technologies, Inc. at 5-6 (Apr. 22, 2013) (“Securus April 22 Reply Comments”); Securus March 25 Comments at 15-17.

<sup>46</sup> FNPRM ¶ 154.

<sup>47</sup> WC Docket No. 12-375, Petition of Pay Tel Communications, Inc. for Partial Stay of *Rates for Interstate Calling Services* Order (Nov. 26, 2013) (seeking a stay of the rate caps, “safe harbors”, and “cost-based requirements” of the Report and Order “as applied to jails”).

<sup>48</sup> WC Docket No. 12-375, Pay Tel Communications, Inc.’s Petition for Waiver of Interim Interstate ICS Rates (Jan. 8, 2014) (seeking a waiver by February 11, 2014, of the rate caps and “safe harbors” for all Pay Tel sites).

<sup>49</sup> E.g., WC Docket No. 12-375, Letter from Marcus Trathen, Counsel to Pay Tel Communications, Inc., at 1 (July 31, 2013) (“the Commission ... should exempt jails”); Reply

meaning facilities operated by State Departments of Corrections. According to Pay Tel’s opponents, city and county jails comprise a large portion of the nation’s correctional facilities.<sup>50</sup> And Pay Tel has shown that it cannot serve those city and county jails without a waiver of the new rates. Pay Tel’s advocacy in itself demonstrates that the rates adopted in the Report and Order are below cost.

CenturyLink likewise tells the Commission not to lower the already below-cost rates adopted in the Report and Order.<sup>51</sup> “The cost of serving ten of CenturyLink’s fifteen county contracts exceeds the safe harbor levels adopted in the Order for interstate calls. Thus, the interim safe harbor levels have been set far too low.”<sup>52</sup> As the Report and Order states, carriers that apply rates higher than the “safe harbors” must prove that their rates are cost-based and are subject to investigation.<sup>53</sup> Apparently CenturyLink is at risk of such an investigation and hence has sought a stay of the order both here and within the D.C. Circuit appeal.<sup>54</sup> The safe harbors are now stayed.

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Comments of Pay Tel Communications, Inc. at 8 (Apr. 22, 2013); Comments of Pay Tel Communications, Inc. at 10 (Mar. 25, 2013).

<sup>50</sup> The FNPRM cites a letter from Lee G. Petro, Counsel for the Wright Petitioners, stating that “a Bureau of Justice Statistics Study showed that in 2011, 39% of inmates were serving their sentences in local jails and over 50% of the inmates in Louisiana were confined in local jails.” FNPRM n.503.

<sup>51</sup> CenturyLink also notes that “[p]rice caps and rules that require ICS services to be cost-based will ultimately frustrate the deployment of VRS and other forms of assistive technologies.” WC Docket No. 12-375, Comments of CenturyLink at 13 (Public Version) (Dec. 20, 2013). As CenturyLink goes on to show, the “cost-based” concept already has been employed in a manner that cuts rates too far.

<sup>52</sup> *Id.* at 14.

<sup>53</sup> Report and Order ¶¶ 59, 73 and n.226 & 429. A finding that a carrier is charging non-cost-based interstate rates at one facility will strip that carrier of all “safe harbor” protection nationwide and company-wide. *Id.* n.429.

<sup>54</sup> *Securus v. FCC*, Case Nos. 13-1280, *et al.*, Motion of CenturyLink Public Communications, Inc. for a Stay Pending Judicial Review (Dec. 4, 2013).

Telmate faces a similar problem. It states that “[t]he rate caps and safe harbors must be raised, at least at smaller facilities” due to the “[b]asic economies of scale” in serving jails.<sup>55</sup> At the Fillmore County Jail, Telmate already has made investments that, due to a tiny call volume, require a rate of \$0.40 per minute.<sup>56</sup> The rate cap is half that amount, and the “safe harbors” are just over a third of that amount. Telmate thus cannot rationally provide service at Fillmore County, or sites like it, under the interstate rates as they are today.

Global Tel\*Link Corporation states that “the Commission adopted arbitrarily low per-minute rates for interstate ICS,” and it “strongly opposes any further reduction in interstate ICS rates[.]”<sup>57</sup> Global Tel\*Link warns that the new “all-distance” rate of \$0.07 per minute, which the Wright Petitioners began to advocate in the last phase of this proceeding, “will have unintended and detrimental consequences” and actually would “threaten the elimination of inmate services and programs implemented to reduce recidivism.”<sup>58</sup>

Aside from cost data and amortization issues, parties agree with Securus that it is impractical for the Commission to take further action on rates – action expressly premised on the “interim” rates adopted in the Report and Order – pending the D.C. Circuit’s review.<sup>59</sup> The Commission’s new methodology and new rates for ICS have been challenged in this appeal, and petitioners maintain that their appeal is likely to succeed. Today’s grant of a stay seems to demonstrate that fact. This rush to cut interstate calling rates even further seems to invite more

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<sup>55</sup> WC Docket No. 12-375, Comments of Telmate, LLC at 3 (Dec. 20, 2013).

<sup>56</sup> Telmate Comments at 3.

<sup>57</sup> WC Docket No. 12-375, Comments of Global Tel\*Link Corporation at 2 (Dec. 20, 2013).

<sup>58</sup> Global Tel\*Link Comments at 5, 6.

<sup>59</sup> Securus Initial Comments at 19; CenturyLink Comments at 13-14; *see also* Global Tel\*Link Comments at 2 & n.4 (stating that the Report and Order “creates an unworkable one-size-fits-all framework” and listing pending Petitions for Review and Motions for Stay pending before the court of appeals).

disputes and possibly the adoption of rates that the already-pending appeal will render null and void.<sup>60</sup>

For all these reasons, the Commission should not take further action with regard to interstate inmate calling rates.<sup>61</sup>

#### **IV. THE RECORD OVERWHELMINGLY SHOWS THAT THE COMMISSION LACKS AUTHORITY TO SET INTRASTATE RATES**

In its Initial Comments, Securus explained that the Communications Act does not permit the Commission to set intrastate rates, and that the Commission's reliance on Section 276 for this purpose will fail.<sup>62</sup> The majority of commenting parties, including NARUC, strongly agree.

NARUC provided lengthy analysis to show that the Commission's power to preempt state authority will not apply in this instance. In sum, NARUC states that, "On top of

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<sup>60</sup> The question of blocking calls for prolonged nonpayment is inextricably linked to rates. FNPRM ¶¶ 173-74. Allowing inmates and their called parties to continue having telephone calls without paying for them has the same, if not worse, effect on ICS providers' ability to maintain service. Long-distance companies serving the general public are permitted to block calls for non-payment and it would be unlawfully discriminatory to prevent ICS providers from protecting themselves in the same way.

<sup>61</sup> Securus has addressed TeleTypewriter ("TTY") calls at length in this proceeding. Securus March 25 Comments at 23-25; Securus Initial Comments at 17-19. AT&T now has chimed in on this issue, most recently by filing a supplemental *ex parte* letter addressing some Staff questions. WC Docket No. 12-375, Letter from William L. Roughton, Jr., AT&T Services, Inc. (Jan. 8, 2014). AT&T supplies service to many state Telecommunications Relay Services ("TRS") agencies. It has asked the Commission not to include these services in the definition of "inmate calling services" or subject them to the new interstate inmate calling rates. Now AT&T makes the surprising proposal that the Commission require ICS providers to register with TRS agencies as "Carriers of Choice" and build transport facilities to interconnect with TRS. *Id.*, Attachment 3. Securus does not provide service through, or in conjunction with, TRS. The only TTY calls that Securus handles are TTY-to-TTY calls that are originated, carried, and terminated like any other inmate telephone call. Securus March 25 Comments at 24 (citing Hopfinger Decl. ¶ 12). The Commission has no reason to force Securus to become a registered TRS provider. It moreover should treat all TRS providers the same with respect to inmate-initiated calls to avoid an unlawfully discriminatory result.

<sup>62</sup> Securus Initial Comments at 2-7.

the general jurisprudential rule establishing a heavy presumption against finding a federal statute preempts State authority, Congress imposes an explicit rule of statutory construction in § 601(c)(1): **where a provision can be read in several ways, it must be construed to avoid preemption.**<sup>63</sup> Here, however, “Section 276 has to be read in *pari materia* with 47 U.S.C. § 152 express reservation of State authority over the toll service rates of calls that originate and terminate within the boundaries of that State.”<sup>64</sup> And, as Securus also has explained, “that all calls are fairly compensated, **including those for which the PSP currently receives no revenue.**”<sup>65</sup>

The ICS providers make similar arguments. Global Tel\*Link states that “[o]nly when Congress uses ‘unambiguous or straightforward’ language to grant the Commission jurisdiction over intrastate communications may the Commission attempt to assert such jurisdiction. Section 276 does not provide the Commission with that authority.”<sup>66</sup> CenturyLink states that Section 276 “has a narrow focus of ensuring that payphone service providers receive compensation for all completed calls where they would not otherwise have received compensation.”<sup>67</sup> Telmate states simply that “[i]t is the jurisdiction of the States, not the Commission, to evaluate whether intrastate rates and practices are just and reasonable.”<sup>68</sup>

The Correctional Institutions also find no Commission jurisdiction over intrastate rates, stating that “Section 276(b)(1) of the Communications Act does not grant the Commission

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<sup>63</sup> NARUC Comments at 7 (emphasis added).

<sup>64</sup> *Id.* at 8.

<sup>65</sup> *Id.* at 10 (emphasis in original) (quoting *First Payphone Report and Order* ¶ 48); *id.* n.10 (quoting 47 C.F.R. § 64.1300).

<sup>66</sup> Global Tel\*Link Comments at 8 (quoting *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 377 (1986)) (emphasis added).

<sup>67</sup> CenturyLink Comments at 3.

<sup>68</sup> Telmate Comments at 5.

authority over intrastate ICS rates as the Order and FNPRM suggests.”<sup>69</sup>

Public interest advocates maintain that Section 276 overrides the clear restriction in Section 152 that enables the Commission to regulate interstate communications only. Their arguments are more wish than analysis. The Wright Petitioners argue that “it is functionally impossible to separate the Interstate and Intrastate components of ICS, and therefore the FCC is justified in applying Section 2(b) of the Communications Act as well.”<sup>70</sup> The Petitioners rely on the fact that “a typical ICS call is routed to a centralized calling service,” and thus is jurisdictionally unidentifiable. That logic would shut down every State Commission in the country; if intermediate call path determined the jurisdiction of a call, the nation’s billing systems and separations regulation would be toppled.

Those who support Commission intervention in intrastate rates do so based on their own policy goals rather than close analysis of the Communications Act and applicable precedent. One party advocates intrastate ratemaking on the ground that “[t]he right of ICS consumers across the nation to just and reasonable rates, as established by 47 U.S.C. § 201(b), will be hollow if only interstate rates are regulated.”<sup>71</sup> But wishing will not make it so. Federal agencies are creatures of federal statutes, and “may issue regulations only pursuant to authority delegated to them by Congress.”<sup>72</sup> These advocates must find a basis in the Communications Act for the FCC to intervene in intrastate matters, and they have not done so.

For these reasons, the record in this proceeding opposes the Commission’s assumption of jurisdiction and authority to set intrastate rates.

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<sup>69</sup> Correctional Institution Comments at 9.

<sup>70</sup> WC Docket No. 12-375, Comments of Martha Wright, *et al.* at 7 (Dec. 20, 2013).

<sup>71</sup> Comments of Prisoners’ Legal Services of Massachusetts at 2 (Dec. 18, 2013).

<sup>72</sup> *American Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (vacating broadcast flag rules as outside Commission’s authority).

## V. THE RECORD DOES NOT SUPPORT COMMISSION ACTION WITH REGARD TO FINANCIAL TRANSACTION FEES

Securus has explained in both phases of this proceeding that the Commission lacks both jurisdiction and authority over financial transaction fees such as “credit card processing fees, check-by-phone processing fees, and fees to use Securus’s premised-based kiosks where available.”<sup>73</sup> This issue is also squarely before the D.C. Circuit in the pending appeal from the Report and Order.<sup>74</sup> The Court just stayed Rule 64.6060 which requires reporting on, among other things, “ancillary fees”, indicating that it finds no Commission jurisdiction over these items.

CenturyLink and Global Tel\*Link have taken the same position. CenturyLink states that neither Section 201 nor Section 276 are “a carte blanche authorization to regulate any service no matter how remotely connected to payphone or ICS services, and in particular, services that are not payphone communications services.”<sup>75</sup> Global Tel\*Link argues that Commission precedent and caselaw militates against setting such fees: “Many of the ancillary charges imposed by ICS providers today pertain to billing and collection, **which the FCC has determined is a ‘financial and administrative service’ that is not subject to regulation** by the

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<sup>73</sup> Securus Initial Comments at 20 (Securus has since ceased providing the check-by-phone option); *see also* WC Docket No. 12-375, Securus Technologies, Inc. Reply Comments in Response to DA 13-1445, *More Data Sought on Extra Fees Levied on Inmate Calling Services*, at 1-3 (July 24, 2013) (“Securus July 24 Reply Comments”); Securus April 22 Reply Comments at 14-17.

<sup>74</sup> *Securus v. FCC*, Case Nos. 13-1280, *et al.*, Securus Technologies, Inc. Statement of Issues to Be Raised (Dec. 16, 2013); Global Tel\*Link Corporation Statement of Issues to Be Raised (Dec. 16, 2013).

<sup>75</sup> CenturyLink Comments at 8.

Commission because it is not a ‘communication service.’”<sup>76</sup> Global Tel\*Link also notes that many such fees “are charged by third-parties”, rendering Commission intervention “unworkable”.<sup>77</sup> Indeed, Securus has explained that its fee for credit card processing “goes to third-party financial vendors and to cover Securus’s cost of credit card fraud.”<sup>78</sup>

Pay Tel, by contrast, continues to believe that the Commission can and should set rates for financial transactions.<sup>79</sup> It is somewhat incongruous, however, that Pay Tel asks the Commission to overstep its authority and set transaction rates while also asking the Commission, repeatedly and through several different procedural vehicles, to exempt Pay Tel’s facilities from the rate caps and “safe harbors”.<sup>80</sup> In addition, Pay Tel has been incorrect when presenting the Commission with purported Securus fees that Pay Tel believes require supervision.<sup>81</sup> Moreover, some of the transactions for which Pay Tel seeks Commission regulation are items that Pay Tel does not itself provide.<sup>82</sup> Pay Tel’s advocacy is therefore curious.

A company called AmTel, which “provides inmate telephone and customer care

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<sup>76</sup> Global Tel\*Link Comments at 10-11 (emphasis added) (quoting *Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150 (1986); *Capital Network System, Inc. v. FCC*, 3 F.3d 1526, 1528 (D.C. Cir. 1993)).

<sup>77</sup> Global Tel\*Link Comments at 11.

<sup>78</sup> Securus July 24 Reply Comments at 4. “This fee also covers Securus’s costs in obtaining the necessary credit card security software and providing training to customer service representatives.”

<sup>79</sup> Pay Tel Comments at 30-34.

<sup>80</sup> *See supra* n.47 & 48.

<sup>81</sup> Securus July 24 Reply Comments at 3-4 (Pay Tel erred in stating that Securus imposes a “Mail Check or Money Order” fee and misrepresented the amount of the credit card processing fee).

<sup>82</sup> *See* WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, at 3 (July 16, 2013).

services to more than 150 correctional facilities throughout the United States,”<sup>83</sup> says that it must charge **\$10.00** “per live credit or debit card payment” if it will continue to provide free customer service calls.<sup>84</sup> AmTel apparently believes that the Commission is empowered to accept or reject that rate, but makes clear that performing financial transactions imposes considerable direct costs.

This record does not provide meaningful support for Commission regulation of transaction fees. The jurisdictional issues are unsettled, many of the parties at issue are not regulated utilities, and the basic facts are confused. For these reasons, the Commission should not adopt still more rules or policies, much less rates, for transaction fees.

## **VI. PARTIES AGREE THAT MANDATED FACILITIES-BASED COMPETITION WILL ENDANGER SECURITY**

The Commission asks whether it should disturb the exclusive-contract system in this market<sup>85</sup> that previously it expressly endorsed.<sup>86</sup> The Wright Petitioners, whose first Petition for Rulemaking was devoted to this issue,<sup>87</sup> argue that the Commission should conduct an “investigation” into a “plan” for mandatory facilities-based interconnection on a site-by-site basis.<sup>88</sup> The Wright Petitioners spend one paragraph on a proposal that would drastically alter,

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<sup>83</sup> See <<http://www.atni.net/>>.

<sup>84</sup> WC Docket No. 12-375, Letter from Karen Doss-Harbison, President, ATN, Inc., at 2 (Dec. 17, 2013).

<sup>85</sup> FNPRM ¶ 177.

<sup>86</sup> *Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, Second Report and Order and Order on Reconsideration, FCC 98-9, 13 FCC Rcd. 6122, 6156 ¶ 57 (1998) (based on “comments of the United States Attorney General,” “other federal officials,” and “nearly all who have commented on this issue,” the Commission held that the “special security requirements applicable to inmate calls” support the maintenance of the exclusive-contract system).

<sup>87</sup> CC Docket No. 96-128, Petition of Martha Wright, *et al.* for Rulemaking (Nov. 3, 2003).

<sup>88</sup> Wright Comments at 17.

and likely destroy, the provision of secure inmate telecommunications systems.

It is unsurprising that many correctional authorities vehemently oppose this idea.

The Ohio Department of Rehabilitation and Correction states that

**Multiple vendors increase the risk of a breach in security.** If multiple ICS providers were operating within a single correctional facility, with each running its own systems, software, and recording procedures, no one provider would be responsible for security procedures.<sup>89</sup>

The Correctional Institutions likewise “oppose any requirement that would require them to permit multiple providers to serve a single facility,” agreeing that “[m]ultiple vendors increase the risk of a breach in security.”<sup>90</sup> These institutions also explain that such an arrangement “would increase [their] overall costs as staff would need to be trained on multiple systems, management would need to learn how to interpret and integrate multiple forms of reports,” and so on.<sup>91</sup>

The carriers are unanimously in agreement that the proposed multi-provider requirement cannot work. T-Netix, Inc. (“T-Netix”), now a wholly-owned subsidiary of Securus, submitted comments in response to the Wright Petitioners’ 2003 petition.<sup>92</sup> T-Netix included with those comments an economist’s report and a technical affidavit of its Vice President of Technology Planning, both of which demonstrated that a multiple-provider arrangement for ICS is unworkable.

Chief among T-Netix’s concerns was the ability to maintain secure call paths in such an environment. The notion of installing multiple sets of equipment in one facility, each

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<sup>89</sup> ODRC Comments at 4 (emphasis added).

<sup>90</sup> Correctional Institution Comments at 14.

<sup>91</sup> *Id.*

<sup>92</sup> CC Docket No. 96-128, Comments of T-Netix, Inc. (Mar. 10, 2004).

somehow linked to the other and connected to the telephone network, was an overwhelming possibility for those at T-Netix who truly invented secure, automated inmate calling services.<sup>93</sup>

That arrangement would require fundamental restructuring of the systems governing call validation, PSTN interconnection, billing, and, most importantly, call monitoring and control.<sup>94</sup>

Although the technology that operates inmate telecommunications systems today is more centralized and software-driven, these security concerns have not abated. Global Tel\*Link explains the added risks and burdens that each facility would face in a multiple-provider scenario: “The facility’s staff would need to be trained on multiple systems, its management would need to learn how to interpret and integrate multiple forms of reports, and its investigators would frequently have to conduct duplicative search procedures.”<sup>95</sup> Moreover, in the multi-provider scenario it would necessarily be the case that “no one provider would be responsible for security procedures.”<sup>96</sup>

CenturyLink similarly explains that housing “[m]ultiple providers within a correctional institution will also make it virtually impossible for correctional institutions to track calls and provide the necessary level of security.”<sup>97</sup> This arrangement “would require massive systems work to allow billing information from the various providers to be shared with other providers and to allow correctional institutions to monitor and track calls.”<sup>98</sup> To assume that ICS providers can accomplish this fundamental restructuring “while meeting even the most basic

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<sup>93</sup> CC Docket No. 96-128, Affidavit of Alan Schott, T-Netix Vice President of Technology Planning, ¶¶ 1, 8-12 (Mar. 5, 2004).

<sup>94</sup> Schott Aff. ¶¶ 9-12, 16-17, 28-32.

<sup>95</sup> Global Tel\*Link Comments at 14.

<sup>96</sup> *Id.*

<sup>97</sup> CenturyLink Comments at 21.

<sup>98</sup> *Id.* at 22.

security needs for public and inmate safety” is, according to CenturyLink, “simply unrealistic.”<sup>99</sup>

Pay Tel raises the same concerns and concludes succinctly that, “[a]llowing intra-facility competition would not depress rates; it would, however, increase security risks and costs.”<sup>100</sup>

Securus reiterates that this kind of unprecedented intrusion is simply not warranted for the inmate telecommunications market.<sup>101</sup> Its comments in the prior phase of this proceeding demonstrated that competition is robust in this market,<sup>102</sup> and even the Wright Petitioners agreed.<sup>103</sup>

The Human Rights Defense Center (“HRDC”) attempts to refute this evidence of meaningful competition by misrepresenting the manner in which the public bidding process has operated for state-operated prisons. More specifically, it underrepresents the threat of contract turnover. HRDC states, rather unclearly, that “[f]ifteen DOC phone contracts changed hands over the five-year period from 2007-2008 to 2012-2013” but asserts that “most of the states (70%) continued to contract with the same company.”<sup>104</sup> HRDC chose its words very carefully. It did not assert, because it could not truthfully assert, that contract terms were doubled. Rather, HRDC counted the instances in which an existing provider was able to win a subsequent round of bidding. Stated more clearly, where a state Department of Corrections in fact “continued to

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<sup>99</sup> CenturyLink Comments at 22.

<sup>100</sup> Pay Tel Comments at 42.

<sup>101</sup> See Securus Initial Comments at 7.

<sup>102</sup> Securus March 25 Comments at 2-3 & Affidavit of Curtis L. Hopfinger, Director – Regulatory and Government Affairs, ¶¶ 4-5 (Mar. 25, 2013).

<sup>103</sup> WC Docket No. 12-375, Comments of Martha Wright, *et al.*, at 27 (“there is already active competition to provide ICS services”) (Mar. 25, 2013) (quoting Martha Wright *ex parte* letter to the FCC in CC Docket No. 96-128 dated November 5, 2009).

<sup>104</sup> WC Docket No. 12-375, Letter from Paul Wright, Executive Director of Human Rights Defense Center, at 4 (Dec. 20, 2013).

contract with the same company,” that decision was made after a new public bidding process during which all ICS providers were invited to compete to win the contract. The force of competition remained upon the existing ICS provider, but the provider was able again to beat its rivals on the merits. The Commission should review HRDC’s assertions in that context.

## **VII. FEDERAL QUALITY-OF-SERVICE STANDARDS FOR INMATE TELECOMMUNICATIONS SERVICES COULD CONFLICT WITH CORRECTIONAL FACILITY POLICY AND EXISTING STATE REGULATION**

The FNPRM asks whether the Commission should adopt quality-of-service standards for inmate calling services.<sup>105</sup> The record does not support that action.

Federal service quality standards are not needed. State Commissions retain jurisdiction to address these issues, and indeed they have: the new Institutional Operator Service Provider rules in New Mexico, which the Commission heralds as valuable “reforms”,<sup>106</sup> contain rules mandating a minimum level of service quality.<sup>107</sup> Other State Commissions likewise deal with service quality issues for inmate telephone service.<sup>108</sup>

Secondly, service level guarantees are almost always included in ICS contracts. Correctional authorities routinely require carriers to prove in their bids that they can maintain the requisite service quality,<sup>109</sup> and those terms of service are incorporated into final service

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<sup>105</sup> FNPRM ¶ 178.

<sup>106</sup> Report and Order ¶ 4.

<sup>107</sup> WC Docket No. 12-375, Wireline Competition Bureau Staff filing July 16, 2013 (Final Rule and Final Order, New Mexico Pub. Reg. Comm’n (Nov. 8, 2012)). The service quality provisions in the Final Rule are not challenged in the pending petitions for reconsideration. *See* Securus July 24 Reply Comments, Attachments B and C.

<sup>108</sup> *See* CenturyLink Comments at 23 (“End users also submit complaints to correctional authorities and to third parties, such as state commissions and the Better Business Bureau.”).

<sup>109</sup> For example, the Wright Petitioners submitted the responses of Securus, Global Tel\*Link, and CenturyLink to the Request for Proposals issued by the Florida Department of Corrections in 2013. WC Docket No. 12-375, Letter from Lee G. Petro, Counsel to Wright

contracts. Maintaining good service quality is thus a contractual obligation for carriers, and those matters are under the oversight of the correctional agencies. The Ohio Department of Rehabilitation and Corrections notes that it “is concerned that the Commission’s proposals” regarding, among other things, “quality of service”, do not give “full and careful consideration to the unique aspects of the correctional environment and the security and operational concerns involved in the provision of ICS.”<sup>110</sup>

On a related note, the Wright Petitioners propose, based on unsubstantiated allegations, that the Commission adopt new rules regarding purported “disconnected calls”.<sup>111</sup> As Securus has previously stated, these allegations are “baseless”.<sup>112</sup> Correctional authorities uniformly prohibit three-way calls and forwarded calls in the inmate context. Securus is required by contract “to implement security features to prevent this activity, and its technology in this regard is ‘state of the art.’”<sup>113</sup> Most facilities require that Securus disconnect the inmate’s call when three-way calling or call forwarding is detected. This requirement is a decades-old, and is a fundamental tenet of correctional policy for inmate telephone usage.

Further, in Securus’s experience, complaints about premature termination of inmate calls are usually incorrect, and system records demonstrate that improper call activity had occurred. These complaints are not so “wide-spread” as the Wright Petitioners summarily assert,

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Petitioners (July 18, 2013). Those documents make repeated reference to the quality of telephone service that the carriers promise to provide.

<sup>110</sup> ODRC Comments at 2.

<sup>111</sup> Securus March 25 Comments at 18 (“The fact that inmate calls may be of short duration is likewise no evidence of ‘dropped calls.’”).

<sup>112</sup> Securus March 25 Comments at 18.

<sup>113</sup> Securus March 25 Comments at 17 (quoting Hopfinger Decl. ¶ 34). “Securus’s calling systems can ‘hear’ attempts to dial additional numbers over a connected inmate call.” *Id.* (quoting Hopfinger Decl. ¶ 35).

and the record does not “persuasively demonstrate”,<sup>114</sup> or at all demonstrate, that inmate calls are being wrongfully disconnected for some nefarious purpose.

For these reasons, the Commission again should decline to adopt rules that would require ICS providers to waive charges for successive inmate calls. That rule, by its very intent, would be confiscatory and unlawful.<sup>115</sup> In addition, it would place ICS providers in the untenable position of serving two masters of different minds: the correctional authorities, who must have secure calling systems; and the FCC, which would financially punish ICS carriers for preventing illicit call activity. Indeed, that scenario would reify the concerns already expressed by ICS providers and correctional authorities throughout this docket: the Commission’s actions with regard to inmate calling service should not intrude into the policies or interfere with the requirements that correctional authorities have imposed.

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<sup>114</sup> Wright Comments at 18.

<sup>115</sup> Securus Initial Comments at 1 (citing, *inter alia*, *Alabama Cable Telecomms. Ass’n, Comcast Cablevision of Dothan, Inc. v. Alabama Power Co.*, 16 FCC Rcd. 12209, 12232 ¶ 51 (2001); *Jersey Central Power & Light Co. v. Fed. Energy Reg’y Comm’n*, 810 F.2d 1168, 1178 (D.C. Cir. 1987)).

## CONCLUSION

For all these reasons, the Commission should not adopt rate regulations or rate caps for intrastate inmate telephone services. The Commission lacks jurisdiction over these rates, and the new regime for interstate rates, which the Commission here would import to the intrastate market, has been appealed on several grounds.

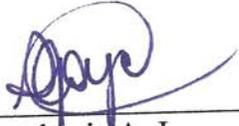
Similarly, the Commission should not take further action with regard to interstate rates until the appeals from the *Inmate Rate Order* are resolved.

The Commission lacks jurisdiction and authority over financial transactions and should not attempt to set rates or rules governing them.

The Commission should not attempt to prohibit correctional facilities from entering into exclusive contracts and or attempt to impose facilities-based competition for inmate telecommunications services.

Commission intervention in call-blocking policies and quality-of-service issues is unwarranted and would intrude on the authority of correctional agencies charged with operating secure facilities and procuring services.

By: \_\_\_\_\_

  
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