

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

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

ORDER DENYING STAY PETITIONS

Adopted: September 30, 2016

Released: September 30, 2016

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. Three inmate calling service (ICS) providers, Securus Technologies, Inc. (Securus), Telmate, LLC (Telmate), and Global Tel*Link Corporation (GTL), have each filed petitions for stay of the *Reconsideration Order*.¹ Additionally, the National Association of Regulatory Utility Commissioners, along with a number of states and sheriffs (collectively, State Petitioners) filed a petition for stay.² Two ICS providers and the Wright Petitioners have filed separate oppositions to the Petitions.³

¹ See Securus Technologies, Inc. Petition for Partial Stay of Order on Reconsideration Pending Appeal, WC Docket No. 12-375 (filed Aug. 25, 2016), <https://www.fcc.gov/ecfs/filing/1082584697325/document/1082584697325ba5d> (Securus Stay Petition); Petition of Telmate, LLC for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Aug. 29, 2016), <https://www.fcc.gov/ecfs/filing/10829590427949/document/1082959042794985fe> (Telmate Stay Petition); Petition of Global Tel*Link for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Sept. 1, 2016), <https://www.fcc.gov/ecfs/filing/10901346524862/document/10901346524862d3b4> (GTL Stay Petition); see also *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order on Reconsideration, FCC 16-102 (2016) (*Reconsideration Order*).

² Petition for Stay Pending Judicial Review of Order on Reconsideration by the States of Oklahoma, Arizona, Arkansas, Indiana, Louisiana, Kansas, Missouri, Nevada, Wisconsin, The Oklahoma Sheriffs' Association, The Indiana Sheriffs' Association, Oklahoma County Sheriff John Whetsel, Marion County Sheriff's Office, Lake County Sheriffs' Department, and The National Association of Regulatory Utility Commissioners, WC Docket No. 12-375 (filed Sept. 2, 2016), <https://www.fcc.gov/ecfs/filing/1090279096421/document/10902790964217a75> (State Petitioners Stay Petition).

³ See Inmate Calling Solutions, LLC Opposition to Securus Technologies, Inc.'s Petition for Stay, WC Docket No. 12-375 (filed Sept. 1, 2016), <https://www.fcc.gov/ecfs/filing/10901942828738/document/1090194282873896c4> (ICSolutions Opposition); Network Communications International Corp. Opposition to Petitions for Stay, WC Docket No. 12-375 (filed Sept. 14, 2016) (NCIC Opposition), <https://www.fcc.gov/ecfs/filing/1091461041225/document/10914610412251fe4>; Wright Petitioners' Opposition to Petition for Partial Stay, WC Docket No. 12-375 (filed Sept. 1, 2016), <https://www.fcc.gov/ecfs/filing/10901065457517/document/10901065457517aa39> (Wright Opposition to Securus Petition); Wright Petitioners' Opposition to Petition for Partial Stay, WC Docket No. 12-375 (filed Sept. 6, 2016), <https://www.fcc.gov/ecfs/filing/1090673344753/document/1090673344753998d> (Wright Opposition to Telmate Petition); Wright Petitioners' Opposition to Petition for Partial Stay, WC Docket No. 12-375 (filed Sept. 8, 2016), <https://www.fcc.gov/ecfs/filing/109081995804638/document/109081995804638456a> (Wright Opposition to GTL Petition); Wright Petitioners' Opposition to Petition for Partial Stay by State and Local Government Petitioners, WC Docket No. 12-375 (filed Sept. 9, 2016), <https://www.fcc.gov/ecfs/filing/109091858522281/document/1090918585222811782> (Wright Opposition to States' Petition).

After considering the Petitions and the Oppositions, we deny all four petitions for the reasons set forth below.⁴

II. BACKGROUND

2. In 2015, the Commission adopted the *2015 ICS Order*, relying on its core authority over ICS rates to provide inmates and their families long-awaited relief from unfair, unjust, and unreasonable charges as part of its comprehensive reform of ICS.⁵ The Commission's approach included, *inter alia*: adopting tiered rate caps for both interstate and intrastate ICS calls; limiting and capping ancillary service charges; and establishing a periodic review of ICS reforms.⁶ Notably, and most relevant to this Order, the Commission also declined to adopt a per-minute rate additive specifically to account for costs that facilities incur in connection with ICS.⁷

3. Following the release of the *2015 ICS Order*, four ICS providers filed petitions asking the Commission to stay various provisions of the *Order*.⁸ On January 22, 2016, the Wireline Competition Bureau (Bureau) issued an order denying the stay petitions of GTL, Securus, and Telmate.⁹ After the Bureau issued its order denying the stay petitions, the providers sought a stay from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). On March 7, 2016, the court stayed two provisions of the Commission's ICS rules: 47 CFR § 64.6010 (setting caps on ICS calling rates that vary based on the size and type of facility being served) and 47 CFR § 64.6020(b)(2) (setting caps on charges and fees for single call services).¹⁰ The D.C. Circuit's *March 7 Order* denied motions for stay of

⁴ Securus filed a Motion to Strike the NCIC Opposition with regard to "any statements or arguments directed to the Securus Petition." Securus Technologies, Inc. Motion to Strike, In Part, Opposition to Petitions for Stay, WC Docket No. 12-375 (filed Sept. 14, 2016), <https://www.fcc.gov/ecfs/filing/10914025510873/document/10914025510873c0bc> (Motion to Strike). We deny Securus's Motion to Strike for reasons explained below.

⁵ See *2015 ICS Order*, 30 FCC Rcd at 12769, para. 9; *id.* at 12822, para. 124 (noting the Commission was focusing on its "core ratemaking authority in reforming ICS . . .").

⁶ See generally *id.* The *2015 ICS Order* provides a detailed history of this proceeding through October 2015. See *id.* at 12771-74, paras. 12-19. We do not repeat this history here, but incorporate that description by reference.

⁷ See *Reconsideration Order* at para. 7; see also *2015 ICS Order*, 30 FCC Rcd at 12853, para. 139 (explaining that facilities' legitimate ICS-related costs were "already built into our rate cap calculations and should not be recovered through an 'additive' to the ICS rates."). The Commission excluded site commission payments from the costs used to set the rate caps, but left it up to individual providers to decide whether, and, how much, to pay facilities in connection with ICS. The only limitation was that providers' rates had to comply with the applicable rate caps, regardless of whether they paid any site commissions. See *id.* at 12827, para. 128.

⁸ See Petition of Global Tel*Link for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Dec. 22, 2015), <http://apps.fcc.gov/ecfs/comment/view?id=60001361606> (GTL 2015 Stay Petition); Securus Technologies, Inc. Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136), WC Docket No. 12-375 (filed Dec. 22, 2015) <http://apps.fcc.gov/ecfs/comment/view?id=60001361748> (Securus 2015 Stay Petition); Petition of Telmate, LLC for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Jan. 6, 2016), <http://apps.fcc.gov/ecfs/comment/view?id=60001372226> (Telmate 2015 Stay Petition); Petition of CenturyLink for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Jan. 22, 2016), <http://apps.fcc.gov/ecfs/comment/view?id=60001389462> (CenturyLink 2015 Stay Petition).

⁹ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order Denying Stay Petitions, 31 FCC Rcd 261 (WCB 2016) (*Order Denying 2015 Stay Petitions*). CenturyLink did not file its petition until the day the Bureau released its order, and filed suit in federal court shortly thereafter. See CenturyLink Stay Petition (filed January 22, 2016); Motion of CenturyLink Public Communications, Inc. for Partial Stay Pending Judicial Review, USCA Case #15-1461, Document #1597573 (filed Feb. 5, 2016).

¹⁰ See *Global Tel*Link v. FCC*, No. 15-1451 (D.C. Cir. Mar. 7, 2016) (*March 7 Order*); see also *Wireline Competition Bureau Addresses Applicable Rates for Inmate Calling Services and Effective Dates for Provisions of the Inmate Calling Services Second Report and Order*, Public Notice, DA 16-280 (WCB 2016).

the Commission's ICS rules "in all other respects,"¹¹ permitting the bulk of the Commission's reforms to become effective. On March 23, 2016, the D.C. Circuit modified the stay imposed in the *March 7 Order* to provide that "47 CFR § 64.6030 (imposing interim rate caps)" be stayed as applied to "intrastate calling services."¹²

4. On January 19, 2016, Michael S. Hamden, an attorney who has represented prisoners and served as a corrections consultant, filed a Petition for Partial Reconsideration, seeking reconsideration of certain aspects of the 2015 *ICS Order*.¹³ In particular, Hamden asked the Commission to reconsider its decision not to prohibit providers from paying site commissions¹⁴ or, in the alternative, to mandate a "modest, per-minute facility cost recovery fee that would be added to the rate caps."¹⁵ Multiple parties submitted responses and oppositions to the Hamden Petition, including ICS providers, facilities, and the Wright Petitioners.¹⁶

5. On August 4, 2016, the Commission addressed the Hamden Petition, granting it in part and denying it in part.¹⁷ Specifically, the Commission granted the Hamden Petition to the extent that it sought an increase in the ICS rate caps to expressly account for reasonable facility costs and to the extent that it sought clarification of the definitions of the terms "Mandatory Taxes" and "Mandatory Fees."¹⁸ The Commission denied Hamden's Petition in all other respects.¹⁹

6. In granting Hamden's request to expressly account for reasonable facility costs, the Commission carefully considered the record developed in response to the Hamden Petition, as well as the

¹¹ *March 7 Order* at 2.

¹² See *Global Tel*Link v. FCC*, No. 15-1451 (D.C. Cir. Mar. 23, 2016) (*March 23 Order*); see also *Wireline Competition Bureau Updates Applicable Rates for Inmate Calling Services*, Public Notice, DA 16-332 (WCB Mar. 29, 2016). Petitioners filed opening briefs with the D.C. Circuit on June 6, 2016. See Joint Br. For ICS Carrier Pet'rs, *Global Tel*Link*, Doc. No. 1617174 (D.C. Cir. filed June 6, 2016); Br. Of State and Local Gov't Pet'rs, *Global Tel*Link*, Doc. No. 1617181 (D.C. Cir. filed June 6, 2016). On July 20, the Commission moved the Court to place the appeal in abeyance pending the adoption of the *Reconsideration Order*. Mot. of Resp'ts to Hold Cases in Abeyance, *Global Tel*Link*, No. 1625782 (D.C. Cir. filed July 20, 2016). On August 19, the Court denied the Commission's abeyance motion and ordered that briefing resume. Order, *Global Tel*Link*, Doc. No. 1631184 (D.C. Cir. Aug. 19, 2016). The Commission filed its brief with the Court on September 12, 2016. Respondents' Br., *Global Tel*Link*, Doc. No. 1635294 (D.C. Cir. filed Sept. 12, 2016).

¹³ Petition of Michael S. Hamden for Partial Reconsideration, WC Docket No. 12-375 (filed Jan. 19, 2016), <http://apps.fcc.gov/ecfs/document/view?id=60001408060> (Hamden Petition); see also *Reconsideration Order*, FCC 16-102 at para. 11.

¹⁴ See Hamden Petition at 2.

¹⁵ See *Reconsideration Order* at para. 11; Hamden Petition at ii. The *Reconsideration Order* discussed the Hamden Petition in further detail. We do not repeat those details here, but incorporate that description by reference.

¹⁶ See *Reconsideration Order* at para. 11, n. 47-49 (providing a complete list of parties that filed in response to the Hamden Petition).

¹⁷ See generally *id.*

¹⁸ See *id.* at paras. 5, 13 (amending the Commission's rules to mirror the definitions stated in the text of the 2015 *ICS Order*).

¹⁹ See *id.* at paras. 13, 31-41 (denying Hamden Petition for Reconsideration in all other respects, including the request to reconsider the treatment of site commissions and the request to clarify that ICS providers cannot use unregulated subsidiaries to circumvent the rule regarding charges for single-call services). In reaching these decisions, the Commission considered the record developed in response to the Hamden Petition and was not persuaded, in either case, of the necessity to reconsider the decisions made in the 2015 *ICS Order*. See *Reconsideration Order* at paras. 34-41.

record in the underlying proceeding, and arguments presented in the litigation before the D.C. Circuit.²⁰ As a result of this review, the Commission increased the rate caps for debit and prepaid ICS calls to \$0.31 per minute for jails with an average daily population (ADP) below 350, \$0.21 per minute for jails with an ADP between 350 and 999, \$0.19 per minute for jails with an ADP of 1,000 or more, \$0.13 per minute for prisons.²¹ It also increased the rate caps for collect calls by a commensurate amount.²² The Commission found that the revised rate caps will “adequately ensure that rates for ICS consumers will be fair, just, and reasonable.”²³ The *Reconsideration Order* does not limit providers’ flexibility to decide whether to pay site commissions and, if so, how much to pay.²⁴

7. On August 25, 2016, Securus filed a petition for stay of the *Reconsideration Order*.²⁵ Telmate, GTL, and the State Petitioners filed petitions shortly thereafter, on August 29, September 1, and September 2, 2016 respectively.²⁶ The Petitioners generally challenge the procedural soundness of the *Reconsideration Order*,²⁷ the sufficiency of the revised rate caps,²⁸ the Commission’s authority to set intrastate rate caps,²⁹ and the Commission’s treatment of site commissions,³⁰ among other things. The Wright Petitioners, ICSolutions, and NCIC oppose the stay petitions, arguing that the Petitioners have failed to meet any of the requirements needed to justify a stay.³¹

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

III. DISCUSSION

9. To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.³² For the reasons described below, the Petitioners have failed to carry their burden of proving any of the relevant factors.

²⁰ See *Reconsideration Order* at para. 3.

²¹ See *id.* at para. 12.

²² See *id.*

²³ See *id.* at para. 13.

²⁴ See *id.* at para. 38; *id.* at n. 151 (explaining that nothing in the Commission’s rules “restricts a provider’s ability to distribute as it chooses whatever revenue it collects . . .”).

²⁵ See Securus Stay Petition (seeking a stay of the new ICS rates).

²⁶ See Telmate Stay Petition; GTL Stay Petition; State Petitioners Stay Petition. For purposes of this Order, we refer to Securus, Telmate, GTL, and the State Petitioners collectively, as “Petitioners.”

²⁷ See Telmate Stay Petition at 4-5; 15.

²⁸ See Securus Stay Petition at 4-6; Telmate Stay Petition at 13-14.

²⁹ See Telmate Stay Petition at 9-11; GTL Stay Petition at 11-15; State Petitioners Stay Petition at 5-7.

³⁰ See Securus Stay Petition at 7-10; Telmate Stay Petition at 12-13; GTL Stay Petition at 15-18.

³¹ See generally Wright Opposition to Securus Petition; Wright Opposition to Telmate Petition; Wright Opposition to GTL Petition; Wright Opposition to States’ Petition; ICSolutions Opposition; NCIC Opposition.

³² See *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*VA Petroleum Jobbers*).

A. Petitioners Are Unlikely to Prevail on the Merits

10. Petitioners have failed to demonstrate that they are likely to succeed on the merits. As an initial matter, we note that Petitioners largely reiterate arguments they raised previously and which we disposed of in our order denying petitions seeking stays of the *2015 ICS Order*. We do not address those arguments again here, but instead rely on our previous analysis.³³ Moreover, despite the Petitioners' claims to the contrary, the *Reconsideration Order* is procedurally sound; the *Reconsideration Order* does not dictate how providers spend their ICS revenues; the Commission relied on data from credible sources to determine facilities' ICS-related costs; the revised rate caps allow providers to collect significantly more revenue than they could under the original rate caps; site commissions are clearly distinguishable from taxes and mandatory fees; and the Court's previous stay orders are not determinative of the Petitioners' likelihood of success in appealing the *2016 Reconsideration Order*. Accordingly, the Petitioners are unlikely to prevail on the merits of any of their claims.

1. The *Reconsideration Order* is Procedurally Sound

11. Telmate contends that the *Reconsideration Order* is "procedurally defective."³⁴ Specifically, Telmate argues Hamden did not explicitly request the actions the Commission took in the Order, rendering it "invalid."³⁵ Telmate's argument appears to be premised on the flawed notion that, in considering a petition for reconsideration, the Commission must either adopt the precise relief the petitioner has requested or deny the petition. Not so. Nothing in the Commission's rules restricts it to such a binary choice.³⁶ Hamden's Petition for Reconsideration requested that the Commission prohibit providers from paying site commissions, or, in the alternative, impose a "modest, per-minute facility cost recovery fee that would be added to the rate caps."³⁷ As discussed above, the Commission considered Hamden's request and other relevant evidence, and ultimately decided to amend the ICS rate caps to "better allow providers to cover costs facilities may incur that are reasonably related to the provision of ICS."³⁸ The Commission did not prohibit site commissions;³⁹ it also did not restrict payments by ICS providers to correctional facilities to a specific amount mandated by the Commission, as Hamden and others may have preferred. The Commission's action nevertheless responded to Hamden's proposal that the Commission allow providers to collect additional revenue from consumers of ICS to ensure that rates for inmate calls are high enough to cover facility-incurred costs.⁴⁰ Furthermore, the Commission clearly

³³ See, e.g., *Order Denying Stay Petitions*, 31 FCC Rcd at 278-79, paras. 34-35 (addressing Telmate's contention that it is not subject to section 201 because the service it provides is a one-way VoIP service); *id.* at 271-72, paras. 21-26 (explaining that it was reasonable for the Commission to use average costs as a basis for calculating the rate caps); *id.* at 279-281, paras. 36-39 (responding to arguments that section 276 is a "one-way ratchet" that only allows the Commission to establish a floor, but not a ceiling, on ICS rates); *id.* at 295-96, paras. 71-73 (explaining why continued reliance on the interim rate caps is insufficient to satisfy the Commission's statutory obligations).

³⁴ See Telmate Stay Petition at 15.

³⁵ See *id.* at 15 (arguing that the Commission "crafted a rule that no party . . . 'presented' or 'requested,' on reconsideration). Securus raises a related concern, noting that that "[s]everal parties, including Mr. Hamden, wrote the Commission urging it not to take the proposed action." Securus Stay Petition at 2.

³⁶ To the contrary, Section 405 of the Communications Act and the Commission's associated rules explicitly afford the Commission the discretion to grant a petition for reconsideration "in whole or in part." 47 U.S.C. § 405(a); see 47 CFR § 1.429(i). The only requirement is that the Commission provide an explanation for its decision, which the Commission did in the *Reconsideration Order*. *Id.* (requiring that an order on reconsideration contain "a concise statement of the reason" for the actions taken.).

³⁷ See Hamden Petition at ii.

³⁸ *Reconsideration Order*, FCC 16-102, at para. 1.

³⁹ *Id.* at paras. 22-30; *id.* at n. 54 (explaining the decision to not prohibit site commission payments).

⁴⁰ See Wright Opposition to Telmate Petition at 6.

had the discretion to modify its rates in response to the Hamden Petition, because the revised rates are a “logical outgrowth” of the Hamden Petition as well as the underlying rulemaking that resulted in the previous rates, and the Commission gave a reasoned explanation for its action that was supported by the record in the broader, ongoing inmate calling proceeding. In any event, the Commission’s decision to consider the Hamden Petition but grant only part of the relief requested does not render the Commission’s order procedurally improper. Thus, Telmate is unlikely to prevail on its claim that the *Reconsideration Order* is “procedurally defective.”

2. The Revised Rate Caps Better Allow ICS Providers to Recover their Costs of Providing ICS

12. The Petitioners generally argue that the FCC’s rate caps are impermissibly below providers’ costs.⁴¹ To the extent that Petitioners reassert their opposition to the Commission’s decision to set rate caps in the *2015 ICS Order* based on providers’ average costs, we note that the Bureau has already addressed these arguments, and do not address them here again here.⁴² We do, however, address three versions of this argument that are relevant to the revised rate caps adopted in the *Reconsideration Order*, including arguments that the rate caps are too low because: (1) all of the increased revenue permitted under the revised rate caps will go to facilities; (2) the Commission never asked providers for data on ICS-related costs incurred by facilities; and (3) the revised rate caps add “mere pennies” to the 2015 rates.

13. *The Reconsideration Order Does Not Dictate How Providers Spend Their ICS Revenues.* Securus and Telmate argue that “all” additional revenue from the rate cap increases adopted in the *Reconsideration Order* will go to facilities, not the providers.⁴³ These arguments ignore the plain language of the *Reconsideration Order*, which made clear that nothing in the Commission’s rules restricts a provider’s discretion to distribute or keep “whatever revenue it collects under the adopted rate caps.”⁴⁴ The Commission did not mandate that any – much less all – of the rate increases permitted under the revised caps must be shared with facilities. Instead, the Commission continued to leave it to the parties to negotiate any payments to facilities. Thus, if “all of the ‘new’ revenue under the 2016 rates” goes to facilities, as Telmate contends,⁴⁵ that will be because a provider chose to make such payments as part of its negotiations with the facilities, and not because of any Commission action or requirement.

14. *The Commission Relied on Credible Data in Determining Facilities’ ICS-related Costs.* Telmate and Securus question the credibility of the data the Commission relied on in setting the revised rate caps.⁴⁶ Telmate asserts that the Commission’s analysis of providers’ ability to meet their costs under the revised rate caps is flawed, in part because providers did not report the portion, if any, of site commission payments that directly reimburse facilities for their ICS costs.⁴⁷ This argument ignores the fact that the Commission received data on the costs facilities incur in connection with ICS from multiple

⁴¹ See, e.g., Securus Stay Petition at 5-7; Telmate Stay Petition at 13-14.

⁴² See *Order Denying 2015 Stay Petitions*, 31 FCC Rcd 261, 271-73, paras. 21-24.

⁴³ See Securus Stay Petition at 6 (arguing the “extra pennies that the Commission has doled out ‘for reasonable facility costs’ are not meant for ICS carriers. ICS carriers will receive the same per-minute rates that were adopted last year”); Telmate Stay Petition at 14.

⁴⁴ See *Reconsideration Order*, FCC 126-102, at para. 38, n. 151.

⁴⁵ Telmate Stay Petition at 14.

⁴⁶ See *id.* at 13-14; see also Securus Stay Petition at 7 (claiming that the Commission does not have “any basis to predict that the earmarked rate increases will indeed ‘expressly account for reasonable facility costs related to ICS.’”).

⁴⁷ Telmate Stay Petition at 14 (arguing that “[p]roviders reported their costs to the FCC both with and without site commission payments, but they never reported costs that included only the portion of commission payments that directly reimburses facilities for their inmate calling costs.”).

sources, including providers and – notably – the facilities themselves.⁴⁸ As the Commission explained, it took this information into account when it reconsidered its rate caps in order to “better reflect the costs that facilities incur that are reasonably related to the provision of ICS.”⁴⁹ Securus further disputes the Commission’s reliance on NSA’s proposal in setting the revised rate caps, arguing that the “NSA proposal was a good deal higher than what the FCC has adopted. . . .”⁵⁰ Securus’s argument relies on raw data from the NSA survey.⁵¹ As the Commission noted in the *Reconsideration Order*, NSA itself reasonably elected to discount its raw survey data in estimating jails’ actual costs.⁵² After explaining that NSA treated its survey data as “inputs” that it refined to generate more reliable estimates of facilities’ reasonable costs, the Commission found NSA’s ranges credible, particularly given that the NSA and Baker/Wood analyses arrived at similar conclusions.⁵³ Thus, contrary to Telmate and Securus’s assertions, the Commission reasonably relied on data from NSA and other credible sources to determine the costs that facilities may incur in connection with ICS.

15. *The Revised Rate Caps Allow Providers to Collect Significant Additional Revenue.* Finally, Securus and Telmate argue that the revised rate caps remain too low and do not cover providers’ costs, despite the fact that the revised rate caps are higher than those adopted in the *2015 ICS Order*.⁵⁴ Securus contends that “with respect to ICS providers, the FCC has simply re-adopted” the 2015 rate caps.”⁵⁵ These arguments are based on an apparent misreading of the *Reconsideration Order*.⁵⁶ The *Reconsideration Order* increased the 2015 rate caps by \$0.02 per minute for prisons, by \$0.05 per minute for larger jails, and by \$0.09 per minute for the smallest jails.⁵⁷ These increases may be measured in “mere pennies” per minute, but they are substantial percentage increases over the previously adopted rate caps and add up to more than \$150 million dollars per year in increased revenues for ICS providers.⁵⁸

⁴⁸ See *Reconsideration Order* at para. 26 (explaining that the NSA Proposal is based on “the NSA’s cost survey, which gathered information on the costs to sheriffs of providing security and administrative functions necessary to allow ICS in jails, including the salaries and the benefits of the officers and employees performing the ICS-related duties.”). The Commission also analyzed data from other sources, most notably from Baker and Wood, in assessing the costs that facilities are likely to incur in connection with ICS. See *id.* (explaining that “the rate caps we adopt today are based on a hybrid of the Baker/Wood and NSA Proposals.”); see also *id.* at n. 106 (noting that the “Pay Tel Proposal . . . closely mirrors the rate increases we adopt in this Order.”).

⁴⁹ *Id.* at para. 22. In fact, there was no reason to believe that providers “necessarily had access to the information needed to determine facility costs.” *Id.* at para. 24.

⁵⁰ Securus Stay Petition at 7.

⁵¹ See Letter from Mary J. Sisak, Attorney for National Sheriffs’ Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed June 12, 2015) (NSA Proposal).

⁵² *Reconsideration Order* at para. 29, n. 115 (citing the NSA proposal at 3-5).

⁵³ *Id.*

⁵⁴ See Securus Stay Petition at 4-7; Telmate Stay Petition at 13-14.

⁵⁵ See Securus Stay Petition at 6; see also *id.* at 4 (“[T]he 2015 and 2016 rate[caps] are, for all practical purposes, the same.”); Telmate Stay Petition at 13-14 (arguing that the “new rates—like the old rates—are well below the cost of providing approximately half of all calls in the industry, and are therefore unlawful.”).

⁵⁶ Additionally, as NCIC notes in its Opposition, Securus’s calculation of its average cost per minute (which it cites to demonstrate that its per-minute costs are greater than the revised rates) does not include ancillary fee revenue, which NCIC claims can amount to \$0.03-\$0.10 per minute using the Commission’s new ancillary fee structure. NCIC Opposition at 3.

⁵⁷ *Reconsideration Order* at para. 22.

⁵⁸ Indeed, the new rate cap for the smallest jails is over 40 percent higher than the previous cap, the rate caps for medium and larger jails increased by approximately 30 percent and even the rate caps for prisons increased by over 18 percent. Compare *Reconsideration Order*, FCC 16-102, at para. 3 (listing the revised rate caps) with *2015 ICS Order*, 30 FCC Rcd 12770, para. 9 (listing the rate caps for each tier). An economic analysis by the Wright

(continued....)

Regardless of the way the increased revenue is allocated between providers and facilities, the revised rate caps allow for a substantial new pool of money for providers to recoup their costs.⁵⁹ To the extent Securus and Telmate are arguing that the rate cap increase must go to facilities, this is incorrect for the reasons previously stated.⁶⁰ The indisputable fact is that the revised rate caps adopted in the *Reconsideration Order* enable providers to generate more revenue than they could have under the rate caps adopted in the *2015 ICS Order*.⁶¹ Accordingly, claims that providers are no better off under the revised rate caps are baseless.

3. Site Commissions Are Negotiated Payments, Not Mandatory Taxes or Fees

16. Several Petitioners raise various objections to the Commission's treatment of site commissions.⁶² Most of these objections are not new and were already addressed in the *Order Denying 2015 Stay Petitions* and, therefore, are not addressed here.⁶³ Insofar as GTL now argues, however, that ICS providers should be allowed to recover site commission payments from consumers, in part because state and local governments often require site commission payments as "a condition precedent to a service arrangement between the facilities they govern and an ICS provider,"⁶⁴ we address that contention below.

17. We are unpersuaded by GTL's argument. GTL attempts to equate site commissions with mandatory taxes and fees, which providers are permitted to pass through to consumers.⁶⁵ This is a false equivalency, however. Taxes and regulatory fees are binding legal requirements that compel a class of entities to remit specified amounts to governmental bodies.⁶⁶ Site commissions, on the other hand, are *not*

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Petitioners shows that "the revised ICS rate caps eliminate *any basis* for ICS providers and correctional facilities to argue that *any aspect* of their costs to provide ICS . . . will not be reimbursed." Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed July 29, 2016) (discussing the "enormous increase in revenue for ICS providers" produced by the rate cap increases adopted in the *Reconsideration Order*) (emphasis in original).

⁵⁹ In fact, the rates adopted in the *Reconsideration Order* "ensure that all providers can earn sufficient revenues to cover their ICS-related costs while also compensating facilities for reasonable costs incurred directly as a result of providing ICS." *Reconsideration Order*, FCC 16-102, at para. 4; *see also id.* n. 12 (explaining that "only one small provider may not be able to recover all of its ICS-related costs under the new rates. That provider offered no explanation for its costs, which appear to be a significant outlier among our data set, and has not objected to our rate caps at any stage of this proceeding.").

⁶⁰ *See supra* para. 13.

⁶¹ *See supra* n. 58.

⁶² *See* GTL Stay Petition at 15-18; Securus Stay Petition at 7-10; Telmate Stay Petition at 12-13.

⁶³ *See, e.g.*, GTL Stay Petition at 15-18 (arguing that the Commission's refusal to allow ICS providers to recover site commissions is unlawful); Telmate Stay Petition at 12-15 (arguing that the Commission's decision not to prohibit providers from paying site commissions, without including site commissions when setting the rate caps, is unlawful). The Commission addressed these arguments in the *Order Denying 2015 Stay Petitions*, 31 FCC Rcd at 266- 273, paras. 14-26.

⁶⁴ GTL Stay Petition at 16.

⁶⁵ The Commission has defined mandatory taxes and fees as fees that "a Provider is required to collect directly from consumers, and remit to federal, state, or local governments." A Mandatory Tax or Fee that is passed through to a Consumer may not include a markup, unless the markup is specifically authorized by "a federal, state, or local statute, rule, or regulation." *Reconsideration Order*, FCC 16-102, para. 31.

⁶⁶ Taxes are levied by state legislatures and are not subject to negotiation. Even in the one state where the legislature has mandated site commissions, those payments cannot be properly categorized as "taxes," because ICS providers remain free to negotiate the amount of their site commission payments, as long as the payments are above 40 percent of gross ICS revenue. *See* Tex. Gov't Code Ann. § 495.027(a)(2). GTL's reliance on cable franchise fees as evidence that the Commission must allow providers to pass the costs of site commissions through to consumers is also misplaced. The Commission is subject to a statutory mandate to account for cable franchise fees

(continued....)

mandated by law, except in one state.⁶⁷ Rather, site commissions are an invention of the ICS industry,⁶⁸ offered as an incentive to encourage facilities to enter a contract with a particular provider – usually the one willing to offer the highest payment.⁶⁹ These negotiated payments – originally initiated by the providers themselves – are clearly distinguishable from taxes and fees that are unilaterally imposed by a government body.⁷⁰ It is well established that “the obligation to pay taxes does not rest on any contract.”⁷¹ Providers should not be able to pass the costs of site commissions – which some parties refer to as “kickbacks”⁷² – on to consumers, particularly given that ICS consumers generally have no alternative to the single ICS provider serving an inmate’s facility.⁷³

(Continued from previous page)

in setting cable rates. *See City of Pasadena, et al*, 16 FCC Rcd 18192, 18198, para. 14 (explaining that the rules related to cable franchise fees “have their origin in Section 623(b)(2)(C)(v) of the Communications Act, which provides that in establishing rate rules the Commission shall take into account ‘the reasonably and properly allocable portion of any amount assessed as a franchise fee . . .’”). No similar statutory provision exists regarding site commission payments. Even if the Commission’s treatment of cable franchise fees had not been dictated by statute, a decision to take such fees into account in regulating cable rates would not have required the Commission to allow providers of a different service (ICS) to pass through a different cost (site commission payments) to end users as part of its regulation of a totally different industry. At most, the cable franchise fee precedent – absent the statutory mandate cited above – would have established that the Commission has the *discretion* to allow providers to pass site commission payments through to consumers, not that it had an *obligation* to do so.

⁶⁷ *See Order Denying 2015 Stay Petitions*, 31 FCC Rcd at 270, para. 19 (citing Tex. Gov’t Code Ann. § 495.027(a)(2) (West 2009) (prohibiting the corrections board from awarding a contract to an ICS vendor unless the provider pays a commission based on gross revenues received from the use of the services provided)). Although ICS providers are contractually obligated to pay site commissions in certain other states, those states do not have statutory provisions requiring the payment of site commissions. *Id.*

⁶⁸ The record indicates that a provider called Evercom “invented the kickback model of giving money to corrections officials in exchange for monopoly contracts.” *See* Letter from Paul Wright, Executive Director, Human Rights Defense Center (HRDC), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 10 (filed Jul. 29, 2015) (explaining that until Evercom launched the practice of paying site commissions, ICS was “high quality and affordable.”).

⁶⁹ *See, e.g.*, HRDC Jan. 12, 2015 Comments at 6 (HRDC Comments) (describing site commissions as “legal bribes to induce correctional agencies to provide ICS providers with lucrative monopoly contracts.”).

⁷⁰ Another distinction between site commission payments and taxes is that site commissions vary based on the negotiations between providers and facilities, while taxes and regulatory fees are established at particular levels that apply uniformly to anyone in a given class. For example, all carriers are subject to the same contribution rate for Universal Service and no carrier can negotiate a lower (or higher) contribution level.

⁷¹ 84 C.J.S. *Taxation* § 2 (2010). Rather, “[t]axation is a legislative function.” *Nat’l Cable Television Ass’n v. U.S.*, 415 U.S. 336, 340 (1974); *accord* 84 C.J.S. *Taxation* §§ 13, 14; 71 Am. Jur. 2d *State and Location Taxation* §§ 95, 97 (May 2016 Update). Although a “legislature may, within constitutional limitations, delegate the power of taxation for local purposes to political subdivisions of the state,” 84 C.J.S. *Taxation* § 14, “[s]uch delegation is kept within defined lines, with supervisory control always vested in elective bodies.” 71 Am. Jur. 2d *State and Local Taxation* § 97.

⁷² *See, e.g.*, HRDC Jan. 12, 2015 Comments at 6; Prison Policy Initiative *2012 NPRM* Comments, Attach. at 2 (describing site commissions as “kickbacks”); Wright Petitioners Jan. 12, 2015 Comments at 7 (filed Jan. 12, 2015) (discussing the “ICS kickback regime”); Letter from Bernadette Rabuy, Prison Policy Initiative Policy and Communications Associate, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed June 12, 2015) (attaching Bucyrus Telegraph Forum discussing “prison phone commissions kickbacks.”).

⁷³ *See, e.g.*, Letter from Andrew D. Lipman, Attorney, Morgan Lewis & Bockius, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 5 (filed July 6, 2015) (explaining that “site commission [are] not related in any way to cost, nor [are] they restrained by any market forces. ICS providers [have] an incentive to offer increased site commissions . . . and consumer [have] no influence” on the site commission payments, even though the costs are being passed through to consumers in the form of higher rates).

4. Site Commissions Are Contractual Payments that Providers Enter into Willingly

18. Securus contends that the Commission acted unreasonably by failing to take providers' existing "contractual site commission" obligations into consideration when setting the revised rate caps in the *Reconsideration Order*.⁷⁴ Securus's position can be distilled into two basic arguments: first, that the revised rate caps should have covered Securus's fixed site commission payments, known as "Minimum Annual Guarantees"; and second, that it was unreasonable for the Commission to "ignore the market reality" that Securus has been unable to reduce or eliminate its Minimum Annual Guarantee payments because correctional facilities refuse to renegotiate site commissions.⁷⁵ Securus is unlikely to prevail on the merits of either of these arguments.

19. With respect to Securus's first argument, we have already addressed claims that site commissions should be included as costs under the rate caps,⁷⁶ and note that the revised rate caps allow providers to collect significant additional revenue, which Securus could choose to put towards covering the costs of its existing Minimum Annual Guarantee payments.⁷⁷ Moreover, Securus likely has additional revenue from permissible ancillary fees that Securus did not include in its analysis,⁷⁸ which may also offset some of the costs of covering the costs of fixed site commission payments.

20. With respect to Securus's second argument, there is evidence in the record that Securus itself ignores the "reality" of the ICS market. As Securus explains, in negotiating Minimum Annual Guarantees, it must contractually guarantee that a facility will receive a certain amount of money annually, regardless of the amount of revenue generated at that facility.⁷⁹ In other words, Securus has been entering into contracts with facilities for fixed payments even though it has known, or should have known, since at least 2012, that ICS rates, and thus ICS-derived revenues, could change at any time.⁸⁰ Securus claims that it has not been able to reduce or eliminate those terms,⁸¹ but this is simply a contractual dispute between the parties. Securus also suggests that it may be unable to meet contractually binding Minimum Annual Guarantees.⁸² Yet, evidence in the record suggests that Securus continues to offer substantial Minimum Annual Guarantees.⁸³ For example, just 14 days before Securus filed its Stay Petition, it submitted a response before the Georgia Department of Administrative Services defending the award of a contract in which Securus committed to make guaranteed payments of \$19.6 million over four

⁷⁴ See Securus Stay Petition at 10.

⁷⁵ See *id.* at 7-10.

⁷⁶ See *2015 ICS Order*, 30 FCC Rcd at 12821-1830; *Order Denying 2015 Stay Petitions*, 31 FCC Rcd at 268-273, paras. 16-26.

⁷⁷ See *supra* para. 15.

⁷⁸ See NCIC Opposition at 3; see also Wright Opposition to Telmate Petition at 5 (arguing that providers will be fairly compensated under the Commission's rate caps and permissible ancillary fees).

⁷⁹ See Securus Stay Petition at 8-9.

⁸⁰ See *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012); *2015 ICS Order*, 30 FCC Rcd at 12837, para. 143 (explaining that "providers have been on notice for years that the Commission might adopt rate caps, or even eliminate site commissions. Thus, any claims that our actions today upset 'investment-back expectations of ICS providers' are likely to fail, particularly claims from providers that recently entered into new contracts with high site commissions. . .").

⁸¹ Securus Stay Petition at 9. ICSolutions contends that Securus is disingenuous when it claims that it cannot renegotiate its contracts. See ICSolutions Opposition at 6 (explaining that "[n]ine days before the implementation date, Securus renegotiated all of their contracts to exclude site commissions as a result of the *2013 Order*.").

⁸² Securus Stay Petition at 9-10.

⁸³ See ICSolutions Opposition at 7.

years.⁸⁴ Given that Securus's obligations to pay Minimum Annual Guarantees appear to be a "problem" of its own making, it is unlikely to prevail on claims that such guaranteed payments support a stay of the Commission's revised rate caps.

5. The Court's Previous Stay Orders Are Not Determinative of the Petitioners' Likelihood of Success

21. Petitioners argue that the D.C. Circuit's previous actions signal that it is likely to stay the *2016 ICS Reconsideration*.⁸⁵ The State Petitioners even go as far as to claim that the court has expressed "grave reservations" about aspects of the Commission's *2015 ICS Order*, and argue that if the Commission does not stay the *Reconsideration Order*, it will "cast disrespect on both the federal courts and on the States as sovereigns."⁸⁶ Petitioners are correct that the D.C. Circuit stayed three provisions of the Commission's 2015 ICS rules in two separate orders.⁸⁷ Contrary to Petitioners' arguments, however, the Court provided no comment or explanation "to suggest the rationale behind the stay of the rates in the *2015 Order*."⁸⁸ Moreover, the Court declined to stay any other portion of the Commission's ICS reforms.⁸⁹ Thus, as the Wright Petitioners aptly explain, it is "impossible to accurately determine why the Court of Appeals granted a stay."⁹⁰ Petitioners' prior success in obtaining a stay of a different, but related, order does not mean they are likely to succeed on the merits of the arguments presented in the newest stay petitions. The Petitioners previously complained that the rate caps were too low to cover their costs, and that the Commission acted unreasonably when it recognized the possibility that facilities incur legitimate costs in providing access to ICS but then declined to separately account for such costs when calculating the rate caps.⁹¹ Those may have been the arguments that moved the Court of Appeals to grant a stay, but they lack force against the *Reconsideration Order*.⁹²

B. Petitioners Will Not Suffer Irreparable Injury Absent a Stay

22. The Petitioners have failed to prove that they will suffer irreparable injury absent a grant of their stay petitions. Many of the Petitioners' arguments were already addressed in the *Order Denying*

⁸⁴ Wright Opposition to Securus Petition at 6 (describing Securus' bid and noting that if Securus was "truly concerned about the impact of MAGs on its bottom line, it could have simply walked away from its offer during the Georgia proceedings").

⁸⁵ See State Petitioners Stay Petition at 4-5; GTL Stay Petition at 21 (arguing that the rates adopted in the *Reconsideration Order* will be invalidated, as "the D.C. Circuit's stay orders suggest is likely."); Securus Stay Petition at 4 (arguing that Petitioners' previous challenges were "well received by the D.C. Circuit . . . and the Order on Reconsideration has very low chances of survival); Telmate Stay Petition at 9.

⁸⁶ State Petitioners Stay Petition at 4-5.

⁸⁷ See *supra* para. 3.

⁸⁸ ICSolutions Opposition at 3; see also Wright Opposition to States' Petition at 3.

⁸⁹ See, e.g., Wright Opposition to Telmate Petition at 3 (arguing that the fact that the court allowed the caps on ancillary fees to go into effect for both inter- and intra-state calling suggests that the court did not believe the appellants were likely to succeed on the merits of their claims that section 276 does not give the Commission sufficient authority to regulate rates for intrastate ICS.); ICSolutions Opposition at 3 (arguing that "Securus grasps at straws when it suggests that the Court's stay of the rates in the *2015 [ICS] Order*" indicates that Securus is likely to prevail in appealing the *Reconsideration Order*.)

⁹⁰ Wright Opposition to GTL Petition at 2 (noting that the standard applied by the Court requires a balancing test of four factors and parties cannot know why the Court acted as it did "without being provided further information from the Court of Appeals.").

⁹¹ See, e.g., GTL 2015 Stay Petition at 9-13; Telmate 2015 Stay Petition at 9-10.

⁹² See *Order on Reconsideration* at para. 13 (increasing the rate caps substantially and expressly accounting for reasonable facility costs),

2015 Stay Petitions and, therefore, are not addressed here.⁹³ We reject Petitioners' additional claims of irreparable harm for the reasons described below.

23. *Petitioners Failed to Carry Their Burden of Proving Irreparable Harm.* The Petitioners all claim that they will suffer irreparable harm if the *Reconsideration Order* is not stayed.⁹⁴ None of them have carried their burden of proving they will suffer irreparable injury, however.

24. First, unspecific and unsupported claims of potential lost revenue do not constitute irreparable harm.⁹⁵ Here, Securus and Telmate each offer conclusory affidavits from executives of their respective companies stating that they will experience unrecoverable revenue losses if the *Reconsideration Order* takes effect.⁹⁶ Their affidavits, however, provide no analysis or supporting evidence of their costs to support their arguments that they will not be fairly compensated.⁹⁷ GTL and the State Petitioners' arguments are even less convincing.⁹⁸ Neither GTL nor the State Petitioners provide affidavits, or any details about the extent of the harm that they expect to face. Instead, they offer only generalized statements that amount to nothing more than speculation.⁹⁹ Without providing access to the Petitioners' underlying calculations or an explanation of their analysis, Petitioners fail to demonstrate that their alleged injury is "certain" or "great."

25. Second, even if the Petitioners had submitted specific and supported claims proving they will face revenue losses as a result of the *Reconsideration Order*, the harms they allege do not constitute irreparable harm. The Petitioners essentially argue that because the *Reconsideration Order* did not adopt the relief they would have preferred, they will suffer irreparable harm.¹⁰⁰ Moreover, as the Wright Petitioners point out, the Petitioners attempt to stay an order curbing excessive ICS rates by pointing to the decrease in their excessive ICS profits as their justification for the stay.¹⁰¹ These arguments are insufficient to demonstrate irreparable harm. The Commission is tasked with the responsibility of ensuring that ICS rates are fair, just, and reasonable.¹⁰² The actions necessary to accomplish this, as ICSolutions notes, will rarely "satisfy all interested participants."¹⁰³ However, a potential loss of revenue

⁹³ See *Order Denying 2015 Stay Petitions*, 31 FCC Rcd at 290-295, paras. 60-69.

⁹⁴ See Securus Stay Petition at 11; Telmate Stay Petition at 6; GTL Stay Petition at 21; State Petitioners Stay Petition at 7.

⁹⁵ See, e.g., *Wisc. Gas*, 758 F.2d at 674 (to demonstrate irreparable harm "the injury must be both certain and great").

⁹⁶ See Securus Stay Petition at 11; Telmate Stay Petition at 6.

⁹⁷ See Wright Opposition to Telmate Petition at 4. For example, Telmate argues that it will lose revenue absent a stay, but does not argue that the loss in revenue will cause Telmate to operate at a loss. See Telmate Stay Petition at 7. The magnitude of Telmate's harm is thus neither "certain" nor "great" enough to justify a stay. See *supra* n.[95] (citing *Wisc. Gas*, 758 F.2d at 674). We also note that Securus did not seek to stay the 2015 rate caps, which were lower than the ones adopted in the *Reconsideration Order*. See generally Securus Technologies, Inc. Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136), WC Docket No. 12-375 (filed Dec. 22, 2015), <http://apps.fcc.gov/ecfs/comment/view?id=60001361748>.

⁹⁸ See GTL Stay Petition at 21; State Petitioners Stay Petition at 7.

⁹⁹ See Wright Opposition to GTL Petition at 7 ("GTL's Petition also failed to include any analysis to support its claim that it will suffer irreparable injury as the result of the new ICS rate caps. Unlike Securus and Telmate, GTL apparently could not be bothered to even submit a self-serving affidavit from one of its executives to make the argument that GTL has lost \$X million in renegotiating its monopoly contracts.").

¹⁰⁰ See ICSolutions Oppositions at 8.

¹⁰¹ See Wright Opposition to Securus Petition at 5.

¹⁰² See 47 U.S.C. §§ 201, 276.

¹⁰³ See ICSolutions Opposition at 8.

alone does not entitle a party to a stay of a regulation, particularly when the regulation in question is aimed at curbing the party's excessive rates.¹⁰⁴

26. *Providers Entered Into Contracts Willingly.* Securus, Telmate, and GTL also argue that the revised rate caps adopted in the *Reconsideration Order* will require them to renegotiate their contracts with facilities, and claim that various costs associated with this process will cause irreparable harm.¹⁰⁵ We reject these claims for the reasons explained below.

27. Securus, Telmate, and GTL argue that renegotiating contracts will cause them to incur unreimbursable compliance costs, loss of goodwill, and “deal fatigue.”¹⁰⁶ Similar to Petitioners' claims of lost revenues, discussed above, Securus, Telmate, and GTL's arguments that renegotiating contracts will lead to compliance and negotiation costs are neither specific enough nor sufficiently supported to justify a claim of irreparable harm.¹⁰⁷ These claims are speculative, at best, and are the type of “blanket, unsubstantiated allegations of harm” that may not be used to grant a stay.¹⁰⁸ We also note that providers willingly entered into their contracts with facilities, with the knowledge that the Commission was undertaking comprehensive ICS reform and that regulations could change, in ways that might affect those contracts.¹⁰⁹

C. Granting the Requested Stays Would Result in Harm to Third Parties

28. The Petitioners argue that third parties will not be harmed if the Commission grants their stay petitions because those parties will be protected by the interim rate caps currently in effect. We reject these claims, however, and find that staying the *Reconsideration Order* would harm third parties, including inmates and their families, who rely on ICS to communicate with each other.¹¹⁰ Although the interim rate caps adopted in the *2013 ICS Order* ameliorated some of the harm caused by unfair, unjust, and unreasonable ICS calling rates, those interim caps apply only to interstate traffic. This severely limits

¹⁰⁴ See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (explaining that it is “well settled that economic loss does not, in and of itself, constitute irreparable harm”; to demonstrate irreparable harm “the injury must be both certain and great”); *Holiday Tours*, 559 F.2d at 843 n.2 (holding that “‘mere’ economic injuries” are not sufficient for a stay). See also Wright Opposition to Telmate Petition at 7; ICSolutions Opposition at 8. Moreover, it is unclear whether any of the Petitioners' “analyses” took into account the increased demand that is likely to result from lower rates. See, e.g., Telmate Mar. 25, 2013 Comments at 12 (“Telmate's experience proves the . . . economic truism that lower prices stimulate demand . . . [w]hen there are lower rates . . . volume goes up and everyone wins.”); Wright Opposition to Telmate Petition at 5 (discussing “undisputed evidence that call volume increases when rates are lowered.”). Nor do any of the Petitioners even mention their continuing revenue streams from various ancillary services and fees.

¹⁰⁵ See Securus Stay Petition at 11-12; Telmate Stay Petition at 6; GTL Stay Petition at 22.

¹⁰⁶ For example, Telmate states that without a stay, it will incur compliance costs, including “performing tasks such as negotiating amendments to all of its contracts, traveling to meet with customers to explain the changes, and altering its billing and internal systems.” Telmate Stay Petition at 7. Securus and GTL further allege that renegotiating contracts will cause the loss of customer goodwill arising from the ‘deal fatigue’ of having to renegotiate contracts twice in less than a year. Securus Stay Petition at 12; GTL Stay Petition at 22.

¹⁰⁷ See *supra* n. 104; *Holiday Tours*, 559 F.2d at 843 n.2 (referring to a “severe” injury as “destruction of a business”).

¹⁰⁸ *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 77 (D.D.C. 2013) (subsequent history omitted).

¹⁰⁹ See *supra* para. 20. In addition, providers were not required to renegotiate their contracts after the 2015 rate caps were stayed. Any contracts that complied with the 2015 rate caps would also comply with the revised regulations adopted in the *Reconsideration Order*. If providers were truly concerned about the “harms” of renegotiating such contracts, they could have waited for the final disposition of all of the ICS-related appeals before approaching their customers again.

¹¹⁰ See *Order Denying 2015 Stay Petitions*, 31 FCC Rcd 261, 295, at para. 72 (noting that a stay of the Commission's rate caps would delay relief to millions of ICS customers).

the scope of the relief, because over 80 percent of ICS calls are *intrastate*.¹¹¹ Moreover, the interim rate caps are still higher than the rate caps for most tiers, even after the Commission's decision to increase those rate caps in the *Reconsideration Order*.¹¹² Thus, many consumers are paying rates above what the Commission has found to be fair, just, and reasonable even for those calls that are currently subject to the interim rate caps.¹¹³

D. The Public Interest Does Not Support a Grant

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

30. *The Adopted Rate Caps Serve the Public Interest.* Petitioners' contentions that a stay will benefit the public interest contradict evidence in the record of the urgent need to reform the ICS market.¹¹⁴ Staying the reforms adopted in the *Reconsideration Order* would delay relief to inmates, their families, and loved ones, who depend on ICS to maintain contact and who would continue to be harmed by excessive ICS rates. As noted, the interim rates currently in effect do not apply to intrastate calls. Thus, without the reforms adopted in the *Reconsideration Order*, intrastate rates in most states will remain at egregiously high levels in most of the country.¹¹⁵ Accordingly, we agree with the Wright Petitioners that there will be "overwhelmingly positive public interest benefits arising from" implementation of the *Reconsideration Order* and "[a]ny delay ... would be, in fact, counter to the public interest."¹¹⁶

31. *The Public Interest Extends Beyond the Conservation of Judicial Resources.* Securus and Telmate argue that the public interest is served by the conservation of judicial resources.¹¹⁷ While conserving judicial resources is an important public interest consideration, so too is ensuring that consumers have access to fair, just, and reasonable rates under sections 201 and 276 of Communications Act. Moreover, the latter involves statutory mandates that the Commission is charged with enforcing.¹¹⁸ If the *Reconsideration Order* is stayed, intrastate rates, in particular, will be unfairly high.¹¹⁹ As the Wright Petitioners point out, "[a]ny delay in the effectiveness of the Recon Order would delay immediate relief to millions of ICS customers currently being charged excessive ICS intrastate rates, who have seen

¹¹¹ *Id.* at para. 71 (citing *2015 ICS Order*, 30 FCC Rcd at 12768, para. 7).

¹¹² See *Reconsideration Order* at n. 2 (explaining that the weighted average for all calls under the revised rate caps were "well below" the interim rate caps currently in effect).

¹¹³ GTL further contends that third parties will not be harmed if the Commission grants GTL's Petition because the interim rate caps are similar to the rate caps the Wright Petitioners requested in their original filing over a decade ago. GTL Stay Petition at 23. We addressed those arguments in the *Order Denying 2015 Stay Petitions* and incorporate that response by reference. See *Order Denying 2015 Stay Petitions*, 31 FCC Rcd 261, 295, at para. 72 (noting that "[t]elecommunications costs have fallen . . . and ICS rates that might have been fair, just, and reasonable in 2002 [when the Wright Petitioners filed their original request] may be excessive now.").

¹¹⁴ See *id.* at 297, para. 78 (citing *2015 ICS Order*, 30 FCC Rcd at 12768, para. 7).

¹¹⁵ See *2015 ICS Order*, 30 FCC Rcd at 12768, para. 7. In addition, as ICSolutions points out, "[t]he failure of the market to effectively control rates is hindering competition. Whenever one charge is controlled, the industry finds another charge to manipulate, forcing all providers to choose between fair, just, and reasonable rates or charging exorbitant rates." ICSolutions Opposition at 10.

¹¹⁶ Wright Opposition to Securus Petition at 8.

¹¹⁷ See Securus Stay Petition at 13; Telmate Stay Petition at 8 (contending the FCC should "preserve the D.C. Circuit's (and the parties') resources" because in the absence of an administrative stay, "the parties will proceed to the D.C. Circuit").

¹¹⁸ See 47 U.S.C. §§ 201, 276.

¹¹⁹ See *supra* para. 28; see also *Order Denying 2015 Stay Petitions*, 31 FCC Rcd at 295, para. 71 (citing *2015 ICS Order*, 30 FCC Rcd at 12775, para. 21).

their ICS expenses increase due to the actions of Telmate and other ICS providers.”¹²⁰ Thus, while we agree that judicial resources are a public interest concern, the record before us demonstrates that the public interest would be served best by capping ICS rates at fair, just, and reasonable levels without delay.¹²¹

IV. SECURUS’S MOTION TO STRIKE

32. Securus has filed a motion to strike those parts of NCIC’s Opposition that address Securus’s Stay Petition.¹²² In support of its motion, Securus points out that NCIC’s Opposition was filed “out of time.”¹²³ While Securus is correct that NCIC filed its Opposition after the deadline for oppositions had passed, we note that this proceeding has been designated “permit but disclose,” meaning that parties are permitted to submit *ex parte* presentations into the record.¹²⁴ We find that treating NCIC’s late-filed Opposition as a permissible *ex parte* filing would “best conduce to the proper dispatch of business and to the ends of justice.”¹²⁵ In making this finding, we recognize that NCIC’s Opposition is not limited to Securus’s Stay Petition. Rather, NCIC’s filing is explicitly directed at all four stay petitions.¹²⁶

33. We agree with Securus that it would have been better for NCIC to acknowledge that its filing was “out of time” and provide an explanation for its untimely filing.¹²⁷ We also recognize, however, that NCIC could have entered its arguments into the record without any dispute if it had simply styled its submission as an *ex parte* filing rather than an Opposition. In this particular instance, we find that “the ends of justice” would not be served by letting form trump substance. In reaching this decision, we consider the fact that Securus had sufficient time to file a substantive response to NCIC’s filing, had it chosen to do so.¹²⁸ We also consider the benefit of having as fulsome a record as possible regarding the issues raised in the stay petitions, particularly given the relatively small number of parties that weighed in on either side of the issue. Finally, we note that Securus is not prejudiced by our decision not to strike NCIC’s Opposition, because even if we were to grant the Motion to Strike, we still would deny all of the stay petitions, including the one filed by Securus.¹²⁹ We therefore deny Securus’s Motion to Strike.

V. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 201, 225, 276, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 201, 225, 276, and 303(r) and the authority delegated pursuant to section 0.91 and 0.291 of the

¹²⁰ Wright Opposition to Telmate Petition at 8.

¹²¹ See ICSolutions Opposition at 3 (explaining that Securus’s argument is “baseless” and pointing out that “it is axiomatic that it would save resources for the Court and all parties to consider the merits of the [*Reconsideration Order*] in the [context of] the current Appeal [of the 2015 ICS Order].”)

¹²² See Motion to Strike at 1.

¹²³ *Id.* (explaining that NCIC’s response to the Securus Petition was due September 6, 2016, but the NCIC Opposition “was not filed until September 14.”). Securus also notes that NCIC never requested the confidential version of the Securus Stay Petition. *Id.*

¹²⁴ See *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170, 13233, para. 161 (2014); 47 CFR §§ 1.1200 *et seq.*

¹²⁵ 47 U.S.C. 154(j).

¹²⁶ NCIC Opposition at 1.

¹²⁷ Motion to Strike at 1.

¹²⁸ Securus had sufficient time to draft and file a Motion to Strike.

¹²⁹ Put another way, our decision to deny the petitions does not depend on any arguments or facts that were presented solely in the NCIC Opposition.

Commission's rules, 47 CFR §§ 0.91 and 0.291, this Order Denying Stay Petitions in WC Docket No. 12-375 IS ADOPTED.

35. IT IS *FURTHER* ORDERED, that the Securus Technologies, Inc. Petition for Partial Stay of Order on Reconsideration Pending Appeal, the Petition of Telmate, LLC for Stay Pending Judicial Review, the Petition of Global Tel*Link for Stay Pending Judicial Review, and the Petition for Stay Pending Judicial Review of Order on Reconsideration by the States of Oklahoma, Arizona, Arkansas, Indiana, Louisiana, Kansas, Missouri, Nevada, Wisconsin, The Oklahoma Sheriffs' Association, The Indiana Sheriffs' Association, Oklahoma County Sheriff John Whetsel, Marion County Sheriff's Office, Lake County Sheriffs' Department, and The National Association of Regulatory Utility Commissioners ARE DENIED.

36. It is *FURTHER* ORDERED, that Securus's Motion to Strike, In Part, Opposition to Petitions for Stay is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Matthew S. DelNero
Chief
Wireline Competition Bureau