

**DISSENTING STATEMENT OF COMMISSIONER AJIT PAI
AS DELIVERED AT THE AUGUST 9, 2013 OPEN AGENDA MEETING**

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

Not long after I started working at the U.S. Senate Judiciary Committee in 2005, my boss, former Senator Sam Brownback, championed the Second Chance Act.¹ The bill recognized in its findings that family support was the most important factor in helping released prisoners reenter society and in reducing recidivism.² As the Senator shepherded the bill through the Committee, I got an up-close understanding of the social and economic challenges faced by those who are incarcerated and their families. How gratifying it was for so many, then, to see President Bush sign the Second Chance Act just three years later.³

This experience informs my approach to our work today. I believe that the government should usually stay its hand in economic matters and allow the price of goods and services to respond to consumer choice and competition. But sometimes the market fails, and government intervention carefully tailored to address that market failure is appropriate.

The provision of inmate calling services (ICS) is one such market. Inmates cannot choose their carrier, and carriers do not compete with each other for an inmate's calls. Instead, a prison administrator signs an exclusive contract with a single carrier. The decision to enter into such a contract often is driven by commissions and in-kind services offered to the prison by a prospective carrier.⁴ As such, the incentives of prison administrators and inmates may not align. This means that we cannot necessarily count on market competition to keep prices for inmate calling services just and reasonable.

For this reason, I welcomed the opportunity to address the petition filed by Martha Wright almost a decade ago, when she came to the FCC seeking redress for the high rates she paid to speak with her then-incarcerated grandson. Having reviewed the record thoroughly, I am convinced that we must take action to meet our duties under the law, not to mention our obligations of conscience. Indeed, the FCC should have acted years ago. I said last December and I say again today: Ms. Wright expected and deserved better.

It is therefore with a heavy heart that I will be dissenting from today's item. In an effort to seek common ground, I offered a simple proposal to cap interstate rates, with one rate for jails and a lower rate for prisons. My proposal would have cut interstate rates for prisoners in 36 states (and slashed exorbitant rates by more than 50 percent in 26 states) while balancing the need for security. It would have been easy for the FCC to administer and easier for the courts to sustain. I am disappointed that we were unable to achieve consensus and move forward unanimously this morning.

The first draft of today's order was circulated 14 days ago, and a substantially revised version was circulated late Wednesday night. As a result, my comments about the item today will be relatively brief. But I will provide a more detailed written statement that will accompany the order's release.

¹ Second Chance Act of 2005, S. 1934, 109th Cong., 1st Sess. (2005), *available at* <http://go.usa.gov/jf4C>.

² *Id.* § 2(14).

³ Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008), *available at* <http://go.usa.gov/jf4R>; *see also* "President Bush Signs H.R. 1593, the Second Chance Act of 2007," *available at* <http://go.usa.gov/jf4W>.

⁴ *See, e.g., Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Remand & Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3253, para. 12 (2002); Telmate 2013 Comments at 6 ("[C]ompetition for these commissions decreases incentives for cost-reduction and technological innovation.").

To put it simply, I am concerned that today's order will prove very difficult to administer and will have unintended consequences. I'll start with administration.

Instead of instituting simple rate caps, as I had proposed, today's order essentially imposes full-scale rate-of-return regulation on inmate calling service providers. What will be the Commission's role going forward, and how daunting will the task be?

Let's first look at an ICS provider with per-minute debit rates below the safe harbor benchmark of 12 cents a minute. First, we should remember that the safe harbor applies only if *all* of an ICS provider's rates are below 12 cents. If the rates for a single facility are above that benchmark, the ICS provider will not qualify for the safe harbor at *any* facility. Second, the term "safe harbor" is a misnomer because it provides no refuge from complaints. The order explicitly states that "[p]arties can file a complaint challenging the reasonableness of ICS rates" even if they are within the safe harbor.⁵ If those rates are challenged, the Commission will have to decide whether they are cost-based. To be sure, the provider will benefit from a rebuttable presumption that its rates are just and reasonable, but rebuttable means that the safe harbor isn't really safe.

Now let's turn to an ICS provider with rates between the "safe harbor" of 12 cents and the cap of 21 cents. These rates must be "cost-based." In this context, this means that rates must be based on "historical costs that are reasonably and directly related to the provision of ICS"—excluding some but not necessarily all site commissions—plus some return on investment.⁶ If challenged, the provider bears the burden of proving that its rates are cost-based. The Commission must then evaluate on a facility-by-facility basis which costs are legitimate and which are not. If the Commission disagrees after the fact with the ICS provider's accounting, the provider must lower its rates, and may be subject to refunds and forfeitures.

Finally, let's consider an ICS provider with rates above the cap of 21 cents. Under today's order, this provider cannot charge those rates for a particular facility—even if they are cost-based—unless and until the Commission grants a waiver for "extraordinary circumstances." In deciding whether to grant such a waiver, the Commission may examine not just the costs of serving that one facility, but its costs of serving each and every facility, including "costs directly related to the provision of interstate ICS and ancillary services; demand levels and trends; a reasonable allocation of common costs shared with the provider's non-inmate calling services; and general and administrative cost data."⁷

I have no doubt that the order's approach was crafted with the best of intentions. But I cannot support it. I do not believe that it is within the Commission's competence to micromanage the prices of inmate calling services. Nor do we have the resources to review the effectively-tariffed rates of ICS providers, to sort out legitimate costs from illegitimate costs, and to separate intrastate costs from interstate costs, possibly in every one of the thousands of correctional institutions in America. I am not sure how we will handle all of the disputes that are likely to arise with the limited and already-hardworking staff we have.

Turning from administrative difficulties to unintended consequences, I believe that the Commission's decision to impose a one-size-fits-all "safe harbor" and cap on all correctional institutions is a serious mistake. Based on the record, the rates set forth in the item are likely too low for most jails (the majority of jails in our nation hold fewer than 100 inmates), secure mental health facilities, and juvenile detention centers. The end result could be that some facilities receive limited phone service or no service at all. This could disconnect some inmates from their families entirely. For other facilities, the arbitrarily low rate will likely mean fewer security measures. As the National Sheriffs' Association puts

⁵ *Order* at para. 115.

⁶ *Id.* at para. 47 & note 180.

⁷ *Id.* at paras. 77–78.

it, this would pose “a substantial security risk to inmates and jail staff and to public safety in the community at large.”⁸ Indeed, the record contains overwhelming opposition to today’s order from our nation’s sheriffs.⁹ These are front-line perspectives from those who put their lives on the line every day to keep us safe.

Had we charted a different course—say, by applying reasonable caps on interstate rates—we could have substantially reduced interstate calling rates in a way that would have easily survived judicial scrutiny. As it stands, however, I believe that today’s order may not withstand a court challenge. No party could have foreseen the reach of today’s order when we opened this proceeding last December. The notice of proposed rulemaking teed up a per-minute rate cap and other discrete proposals, but the order codifies *de facto* rate-of-return regulation. Moreover, the record evidence simply does not support the Commission’s approach. Indeed, the order recognizes that we do not have the data to establish long-term rates and accordingly commences a mandatory data collection—which underscores that the cart is before the horse. All of this portends protracted litigation, which jeopardizes the very benefits this order is supposed to provide to inmates and their families. As Ms. Wright and the other petitioners know all too well, justice delayed is justice denied.

In conclusion, I very much hope that my concerns about today’s order prove to be unfounded. I hope that these rules will be easy to administer. I hope no inmates will lose access to calling services. And I hope that security inside and outside of prisons does not suffer. But because I can only make these statements out of hope rather than belief, I must respectfully and regretfully dissent.

⁸ Letter from Sheriff (ret.) Aaron D. Kennard, Executive Director, National Sheriffs’ Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (July 31, 2013).

⁹ Comments of John Buncich, Lake County Sheriff, Lake County, Indiana; Comments of Todd L. Thomas, Chief Deputy of Corrections, Thurston County Sheriff’s Office, Olympia, Washington; Comments of Robert D. Spoden, Rock County Sheriff, Janesville, Wisconsin; Comments of Jason Myers, Marion County Sheriff, Salem, Oregon on behalf of the Oregon State Sheriffs’ Association; Comments of Vaughn Killeen, Executive Director, Idaho Sheriffs’ Association; Comments of Rob “Lynn” McCallum, Captain, Detention Division, Elmore County Sheriff’s Office, Mountain Home, Idaho; Comments of Captain Michael Espinoza, Deschutes County Sheriff’s Office, Bend, Oregon; Comments of Kurt Braatz, Commander, Detention Services, Coconino County Sheriff’s Office, Flagstaff, Arizona; Comments of Craig Roberts, Sheriff, Clackamas County Sheriff’s Office, Portland, Oregon; Comments of Robert D. “Bobby” Timmons, Executive Director, Alabama Sheriffs Association; Comments of Keith Royal, Sheriff, Nevada County, and President, California State Sheriffs’ Association.