IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECURUS TECHNOLOGIES, INC. *et al*.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 13-1280 and
	)	consolidated cases
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO MOTION FOR STAY OF MISSISSIPPI AND SOUTH DAKOTA DEPARTMENTS OF CORRECTIONS

The Federal Communications Commission (FCC) opposes the motion of the Mississippi Department of Corrections and South Dakota Department of Corrections (Corrections Departments) for a stay pending judicial review of interim rules that cap interstate rates for calling services to prisoners. *See Rates for Inmate Calling Services*, FCC No. 13-113 (rel. Sept. 26, 2013) (*ICS Order*).[1]

The Corrections Departments contend that the FCC's interim rules unlawfully intrude into state and local authority over prison administration and do not account for the costs of inmate calling services (ICS), including the costs of security measures. Those contentions are unavailing. As we explain below, far

[1] Motions for a stay of the same rules have been filed by inmate calling service providers Securus Technologies, Inc. (Securus), Global Tel*Link (GTL), and CenturyLink Public Communications, Inc. The FCC filed its opposition to those motions on December 16, 2013.

from intruding into state or local powers, the interim rules are a firmly grounded exercise of the FCC's statutory authority to ensure that rates for interstate payphone calls are just, reasonable, and fair. *See* 47 U.S.C. §§ 201(b), 276(b). In adopting them, the agency took care to account for the reasonable costs associated with the provision of ICS. Among other things, the FCC set generous interim rate caps using data that included security costs. The agency also made clear that security costs – including for advanced security features – remain recoverable through end-user rates.

Like the stay sought by their provider counterparts, the injunctive relief the Corrections Departments seek would preserve a discredited system that has constrained prisoners and their families to pay excessive inmate calling charges for far too long. Because the Corrections Departments fail to meet the stringent test for equitable relief, the Court should deny their motion.

BACKGROUND

Section 201(b) of the Communications Act requires that all charges "for and in connection with" interstate telecommunications service "be just and reasonable." 47 U.S.C. § 201(b). Section 276(b) of the Act requires the FCC to promulgate rules to ensure that all payphone service providers, including providers of ICS, be "fairly" – not excessively – "compensated for each and every … interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A). In adopting the interim reforms of the *ICS Order*, the FCC took "critical, and long overdue, steps" to address unjust, unreasonable, and unfair ICS rates. *ICS Order* ¶1.

As our opposition to the provider stay motions explains, *see* 12/16 Opp. 8-11, the FCC's interim rules establish a three-part framework for interstate ICS. First, any provider may initially set its rates at a "safe harbor" level that will be presumed to reflect costs. Second, if a provider has costs above the safe harbor, it can choose to set a cost-based rate above the safe harbor level, up to a "hard cap" based on the highest costs reflected in the administrative record – including security costs. Third, a provider with especially high costs may seek a waiver of the hard cap based on those costs. *ICS Order* ¶¶60-84.

The interim rules permit rates up to the hard cap based only on "costs that are reasonably and directly related to the provision of ICS, including a reasonable share of common costs." *ICS Order* ¶53. Such costs include "the cost of capital (reasonable return on investment); expenses for originating, switching, transporting, and terminating ICS calls; and costs associated with security features relating to the provision of ICS." *Ibid*. Recoverable security costs include the cost of advanced features such as "biometric caller verification," "sophisticated tracking tools," "link analysis software," "audio word search," "storage of inmate call recordings," and call "blocking mechanisms." *Id.* n.196. And to ensure that modern ICS security features will "continue to be provided and improved" under the FCC's interim rate structure, *id.* ¶2, the agency's interim caps are "based on cost studies that include the cost of advanced security features such as continuous voice biometric identification." *Id*. ¶58; *see also id*. ¶76 (setting the interim hard cap for debit and prepaid calls based on data that "include[ed] continuous voice biometric identification fees").

ARGUMENT

To obtain a stay, the Corrections Departments must show that (1) they will likely prevail on the merits, (2) they will suffer irreparable harm unless the Court grants a stay, (3) a stay will not harm other interested parties, and (4) a stay will serve the public interest. *WMATC v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Cir. Rule 18(a)(1). A stay is an "intrusion into the ordinary processes of administration and judicial review" and thus "is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks omitted). To merit such an "extraordinary remedy," the Corrections Departments must make "a clear showing" that they are "entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). They have failed to do so.

1. The Corrections Departments Have Not Demonstrated A Likelihood Of Success On The Merits.

The Corrections Departments make two primary arguments in support of their motion for a stay: first, that the *ICS Order* goes beyond the FCC's authority by intruding on the "prerogatives" of state and local authorities, Mot. 5-11; and second, that the order is arbitrary and capricious because it does not account for significant costs, including security costs, of providing ICS. Mot. 11-15. Neither argument is persuasive.[2]

[2] In a fleeting, one-sentence reference, Mot. 4-5, the Corrections Departments adopt the arguments that the provider petitioners raised in their earlier-filed motions. Our opposition to the providers' stay motions explains why those arguments fail. *See* 12/16 Opp. 12-23.

a. The Order Is A Firmly Grounded Exercise Of The FCC's Statutory Duty To Ensure Just, Reasonable, and Fair Rates for Interstate Calls.

The *ICS Order* is not an impermissible intrusion into state or local authority; it is an exercise of express authority under federal law. The order does not restrict how state or local authorities can administer their correctional institutions. It simply implements Congress's decision, embodied in federal law, that ICS rates should be just, reasonable, and fair. *See* 12/16 Opp. 22.

The Communications Act vests in the FCC the power to adopt rules to ensure that "[a]ll charges … for and in connection with [interstate] communication service … be just and reasonable," 47 U.S.C. § 201(b), and that the owners of payphones receive fair – not excessive – compensation for calls made from their phones, *id.* § 276(b)(1)(A). That grant of authority is broad. *See, e.g.*, *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1232 (D.C. Cir. 1999) (citing "the expansive powers delegated to the Commission under section[] 201(b)"); *Global Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001) (recognizing that Congress has given the FCC "the authority to make the choice between ... alternative[]" ways of implementing Section 276(b)(1)(A), and that the Court will not second-guess the agency's reasonable exercise of that authority); *see also Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) (discussing the FCC's "broad authority" under Section 276), *aff'd*, 550 U.S. 45 (2007). A federal agency does not impermissibly intrude into state authority when it properly exercises its powers under federal law. And while state and local authorities are free under state law to administer their own

correctional facilities, *see* Mot. 5, they are not entitled to profit from excessive charges for interstate communications services that violate federal law, *see, e.g.*, 47 U.S.C. § 276(c) ("To the extent that any State requirements are inconsistent with the Commission's regulations [implementing Section 276 of the Act], the Commission's regulations on such matters shall preempt such State requirements.").

Contrary to the Corrections Departments' contentions, nothing in the *ICS Order* "improperly displaces the judgment of state and local authorities" as to "the worthiness of correctional facilities' programs and services and who should pay for them." Mot. 7. While the order imposes new requirements on providers of ICS, it does not regulate correctional institutions. In particular, the order "say[s] nothing … about how correctional facilities spend their funds or from where they derive." *ICS Order* ¶56. Correctional facilities may continue to "have arrangements [with ICS providers] that include site commissions," *ibid.*; the order merely bars *providers* generally from passing through commission payments to end-users through "interstate ICS rates," *ibid.* Using commission payments or any other source of revenue, correctional facilities remain free to sponsor any program they wish.

The FCC reasonably determined that commissions to correctional facilities are not recoverable because they bear no direct relationship to costs, *id.* ¶7; *see id.* ¶57, but are instead an allocation of profit from ICS providers to the facilities, *id.* ¶54. That judgment falls well within the FCC's power to regulate interstate ICS rates, and the agency "does not exceed its authority simply because a regulatory

action" may affect parties beyond the agency's jurisdiction. *Cable & Wireless*, 166 F.3d at 1230.

b. The Order Takes Legitimate ICS Costs, Including Security Costs, Into Account.

The interim, interstate ICS rates that the FCC adopted also account for evidence in the record of the costs of providing ICS – including security costs.

Contrary to the Corrections Departments' contentions, the FCC did not "fail[] to consider the significant [cost] differences across correctional facilities." Mot. 11; *see ICS Order* ¶¶69, 81. As explained at page 3 above, the rules permit a provider whose costs exceed the safe harbor rates to charge cost-justified rates up to the hard rate cap, and even to seek a waiver of the hard cap in the event it can show its costs exceed that limit. The rules thus provide mechanisms to account for a provider's particular cost structure in setting its rates. The Corrections Departments complain that the FCC used "averaging to establish the safe harbor rates." Mot. 12. But as we explained in our opposition to the provider petitioners' stay motions, *see* 12/16 Opp. 21-22, there is nothing novel or improper in the agency's use of industry-wide and averaged data to craft an interim rate structure. *See Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352-53 (D.C. Cir. 1999).

The Corrections Departments also argue that the FCC "failed to consider adequately the significant costs of necessary security measures," Mot. 13, and that the *ICS Order* undermines the decision of state and local officials to use "advanced security measures," Mot. 10. On the contrary, however, the FCC took great care to account for security concerns in its rate determinations, and the order makes

abundantly clear that "compensable costs" include, among other things, "costs associated with security features relating to the provision of ICS," *ICS Order* ¶53, including the costs of advanced security features, *id*. n.196 (acknowledging the propriety of provider investment in "sophisticated security features" relating to ICS); *id.* ¶58 (basing the interim rate caps on studies "that include the cost of advanced security features such as continuous voice biometric identification").

Indeed, while the *ICS Order* generally prohibits the recovery of site commission payments through interstate end-user rates above the safe harbor, *ICS Order* ¶¶53-58 (because in "most or all" cases such payments "have no reasonable and direct relation to the provision of ICS," *id.* ¶55), the order allows some leeway to reflect a "possibility," which the record did not "foreclose," "that some portion of payments from ICS providers to some correctional facilities" might on occasion repay the "facilities for their costs of providing ICS," *ICS Order* n.203. The agency therefore stated that "any ICS provider … seeking to justify costs between the safe harbor and the interim rate cap" in the context of a formal complaint or enforcement proceeding, or seeking a waiver, "may provide specific details about payments to correctional facilities that it contends are compensable for costs meeting [the FCC's] cost standards." *Ibid.*

The Corrections Departments also argue that lower rates will deter deployment of advanced ICS security features and deter further technological innovation. Mot. 13-14. The FCC found, on the basis of record evidence, that the costs of providing secure ICS were decreasing, due in part to advances in technology. *ICS Order* ¶29. The agency accordingly found that its rate reforms

would "not impact security or innovation in the ICS market." *Id.* ¶71. Instead, it explained, "innovation will continue to drive down costs through automation and centralization of the security features correctional facilities require." *Ibid.*

Finally, the Corrections Departments contend that "the *Order* conflicts with" evidence "that the Commission's rate cap is arbitrarily low when compared to non-inmate, interstate collect calling offered to the public." Mot. 14. That claim overstates the nature of the record, which as far as we can tell contained neither of the rate schedules that the Corrections Departments cite in their motion. Mot. nn.16-17. The FCC reasonably, and conservatively, based its interim collect call rate cap on "the highest costs of any data submitted in the record" for ICS calls, *ICS Order* ¶78, which came from a cost study by "seven different ICS providers that serve various types and sizes of correctional facilities," *id.* ¶6; *see id.* ¶25. And even had the record established higher rates for "ordinary" collect calls, the FCC might reasonably still have opted to use the ICS providers' data; a heavier volume of collect calls in correctional settings may allow ICS providers to offer collect calling services at a lower cost per call than is possible for providers of ordinary residential telephone or payphone service.

2. The Corrections Departments Have Not Demonstrated Irreparable Injury.

The Corrections Departments claim that the FCC's supposed failure to account for the costs of ICS security will deter deployment of security features and thereby "risk serious harm to the public and to prison officials." Mot. 16. But as we have explained, *see* pp. 8-9, *supra*, the FCC reasonably found that its rate

reforms would not deter deployment of current or advanced security features, because the cost of such features has been accounted for, and is recoverable in, ICS rates. Indeed, as the FCC observed, the successful history of ICS rate reform in states "such as New Mexico and New York" shows "that rates can be reduced to reasonable, affordable levels without jeopardizing … security." *ICS Order* ¶4; *see id*. ¶70 ("[M]any state departments of correction make ICS available to inmates at rates lower than those we implement here and nonetheless operate in a safe, secure, and profitable manner.").

The Corrections Departments also contend that the FCC "creat[ed] uncertainty" as to what costs are recoverable in end-user rates, Mot. 16, which they fear "will make ICS providers reluctant to continue providing needed security measures," Mot. 17. It is impossible to see how that can be; the agency made clear that the "costs associated with security features relating to the provision of ICS" – as opposed to "general security features of the correctional facilit[ies] unrelated to ICS" – are costs "compensable" through interstate ICS rates. *ICS Order* ¶53; *see* 12/16 Opp. 17-18.

3. A Stay Would Harm Third Parties And Disserve The Public Interest.

The interim rate reforms that the FCC has adopted are intended to make it easier for prisoners to stay connected to their families and friends, to lessen the negative impact on the millions of children with an incarcerated parent, to reduce recidivism (and thus lower the cost of repeated incarceration), and to improve communications between inmates and their legal representatives. *See ICS Order*

¶¶2, 42-44. The order thus advances inmate welfare, as well as the public interest. A stay of the order would undermine both.

The Corrections Defendants contend that the FCC's interim rate reforms "may … deprive[]" prisoners at high-cost facilities of access to ICS. Mot. 20. But as we have explained, there is no basis in the record for presuming that the reformed rates, which are based on highly conservative assumptions, will be insufficient to support service in high-cost facilities.[3] *See* 12/16 Opp. 29. The FCC therefore was reasonable in "not find[ing] persuasive the assertion that regulation of interstate ICS" would "curtail[] ICS access." *ICS Order* ¶70.

The Corrections Departments additionally argue that the FCC's interim reforms will harm third parties and the public interest by threatening to eliminate programs and services to prisoners, Mot. 18-19, as well as "services provided outside of prisons," Mot. 19, that are currently funded by commissions from ICS providers. But there is no reason why users of ICS – particularly family and friends of the incarcerated, who have committed no crime, but who typically pay for ICS calls – should bear the costs of unrelated services through overcharges

[3] The Corrections Departments assert that "the per-minute cost for a call at all facilities served by Securus exceeds the safe harbor rates set by the *Order*, and the per-minute cost for a call from the median facility is more than double the rate cap established by the *Order*." Mot. 17-18 (emphasis omitted). In fact, the record showed that costs for the majority of Securus's calls were about 4 cents per minute – well under the safe harbor. *See ICS Order* ¶26 & n.91; *Rates for Inmate Calling Services*, No. DA13-2236, n.148 (Nov. 21, 2013) (Ex. B to GTL's Motion). To support the assertion that Securus's costs are higher, the Corrections Departments incorrectly rely on data that includes noncompensable site commission payments, Mot. n.13 (citing Expert Report of Stephen E. Siwek ¶3.1 (Ex. B to 12/16 Opp.)).

imposing a serious hardship on their ability to communicate. *See* 12/16 Opp. 28-29. And nothing in the *ICS Order* prevents a state or locality from replacing any diminution in ICS commissions through taxpayer revenues or other funding mechanisms.

Prisoners and their families have for far too long "borne the … burden of unjust and unreasonable interstate inmate phone rates." *ICS Order* ¶1. The *ICS Order* offers relief from "the most egregious" of the existing abuses. *Id.* ¶3. The "parties and the public … are … entitled to [its] prompt execution." *Nken*, 556 U.S. at 427.

CONCLUSION

For the foregoing reasons, the Court should deny the Corrections Departments' motion for a stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sarah E. Citrin, hereby certify that on December 20, 2013, I electronically filed the foregoing Opposition Of Federal Communications Commission To Motion For Stay Of Mississippi And South Dakota Departments Of Corrections with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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