COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GLOBAL TEL*LINK, et al., *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	)	No. 15-1461 and consolidated cases

OPPOSITION OF RESPONDENT THE FEDERAL COMMUNICATIONS COMMISSION TO MOTIONS FOR PARTIAL STAY

Jonathan B. Sallet
General Counsel

David M. Gossett
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

Sarah E. Citrin
Counsel

Federal Communications Commission
Washington, DC 20554
(202) 418-1740

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GLOSSARY

FCC	Federal Communications Commission
GTL	Global Tel*Link
OMB	Office of Management and Budget

Respondent the Federal Communications Commission (FCC or Commission) opposes the motions of Global Tel*Link (GTL), Securus Technologies, Inc. (Securus), Telmate, LLC (Telmate), and CenturyLink Public Communications, Inc. (CenturyLink) for a stay pending judicial review of rules adopted by the FCC to reform historically "exorbitant" rates for inmate calling services. *Rates for Interstate Inmate Calling Services*, 30 FCC Rcd 12763 ¶1 (Nov. 5, 2015) (*Order*), *admin. stay denied*, DA 16-83 (WCB Dec. 18, 2015) (*Stay Denial*).

The Communications Act directs the FCC to ensure that inmate calling providers are "fairly"—not excessively—compensated for their services. 47 U.S.C. § 276(b)(1)(A). For years, however, providers of inmate calling services have exploited their monopoly positions at individual correctional facilities by charging rates for inmate calls (and fees for services ancillary to such calls) that greatly exceed the cost of providing service. Inmates and their families have urged the FCC to curb those egregious overcharges since 2003. In 2013, based on the data available at that time, the FCC adopted interim reforms to bring interstate rates for inmate calling closer in line with providers' costs. *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) (*2013 Order*). To inform more comprehensive and permanent reforms, the FCC then collected additional data and public comment. Upon carefully considering the resulting record, the FCC adopted further measures to curb excessive inmate calling rates.

In the *Order* on review, the FCC prescribed four tiers of rate caps, taking into account data in the record showing differing cost characteristics of servicing different-sized jails and prisons. The agency also limited the types and capped the rates of permissible "ancillary" charges, which, if left unaddressed, might have served as a loophole to the per-minute rate caps.

In crafting those reforms, the FCC considered various alternative proposals for combatting the market-distorting effects of "site commissions," which are payments (monetary or otherwise) from providers to correctional facilities for monopoly access to those facilities. Ultimately, the FCC elected to address the effect of site commissions on inmate calling charges by relying on its rate caps, without seeking to dictate whether or how providers of inmate calling services share their profits with correctional facilities.

GTL and CenturyLink seek a stay of the FCC's rate caps (47 C.F.R. § 64.6010). Securus seeks a stay, or partial stay, of specified restrictions on ancillary charges (47 C.F.R. §§ 64.6020, 64.6080, 64.6090, 64.6100), of the *Order*'s definition of site commissions (47 C.F.R. § 64.6000(t)), and of reporting requirements concerning site commissions and video visitation services (47 C.F.R. § 64.6060). Telmate challenges all of the rules adopted in the *Order* except the definitions (47 C.F.R. § 64.6000) and consumer disclosure requirements (47 C.F.R. § 64.6110). For the reasons set forth below, no petitioner has met this Court's

stringent test for stay pending appeal, and the Commission's long-overdue reforms should be permitted to go into effect.

BACKGROUND

A. *FCC Authority over Inmate Calling and Ancillary Services.*

Section 276 of the Communications Act directs the FCC to "promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). Payphone services expressly include "the provision of inmate telephone service in correctional institutions, and any ancillary services." *Id.* § 276(d). Section 276 further directs the FCC to "establish a per call compensation plan to ensure that all payphone service providers," including inmate calling providers, are "fairly compensated for each and every completed intrastate and interstate call using their payphone." *Id.* § 276(b)(1)(A).[1] If states have in place "requirements . . . inconsistent with the Commission's regulations, the Commission's regulations . . . shall preempt such . . . requirements." 47 U.S.C. § 276(c).

B. *Market Failure in the Inmate Calling Marketplace.*

Inmate calling is "a prime example of market failure." *Order* ¶2. Because each inmate calling provider has a monopoly within a given facility, providers do not compete for end users—the inmates and their families who pay for calls. No

[1] Likewise, under Section 201(b) of the Act, the FCC must ensure that "charges . . . for and in connection with" interstate inmate calling services are not "unjust or unreasonable." 47 U.S.C. § 201(b).

market force keeps rates in check. On the contrary, because many correctional facilities grant the monopoly franchise based partly on providers' offers to pay site commissions, providers compete to offer the highest payments to facilities, which leads to correspondingly *higher* charges for end users. *Id.* ¶¶117–118. Providers and correctional facilities split the monopoly profits extracted from inmates and their families, who have no choice but to pay if they wish to speak by telephone.

High rates for inmate calling deter communication between inmates and their families, with substantial and damaging social consequences. Inmates' families may be forced to choose between putting food on the table or paying hundreds of dollars each month to keep in touch. *Order* ¶3. Barriers to communication from high inmate calling rates foster recidivism, with significant costs to taxpayers. *Id.* ¶¶3–4. In addition, when incarcerated parents lack regular contact with their children, those children—2.7 million of them nationwide—have higher rates of truancy, depression, and poor school performance. *Id.* ¶3 & n.18. High rates for inmate calls also hinder the ability of inmates to communicate with their attorneys, *id.* ¶1, and impede family contact that can "make[] prisons and jails safer spaces for inmates and officers alike," *id.* ¶5. In short, excessive inmate calling rates cause considerable societal harm.

C. *History of the FCC's Inmate Calling Reform Proceeding.*

More than 12 years ago, a grandmother named Martha Wright led a group of

inmates and family members in petitioning the FCC for relief from exorbitant inmate calling rates. The FCC initiated a rulemaking in 2012 to address the Wright petitioners' proposals and the "significant comment" they had generated. *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629 ¶1 (2012) (*2012 NPRM*). Among other things, the FCC sought comment on inmate calling providers' costs, and on differences among correctional facilities that might affect those costs. *2013 Order* ¶¶9, 81; *2012 NPRM* ¶22. At the time, inmate calling providers furnished only limited cost data, and commenters disagreed as to the relevant cost distinctions among facilities. *2013 Order* ¶81; *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170 ¶6 (2014) (*2014 NPRM*).

Although imperfect, the record showed a pressing need for agency action. Accordingly, in the *2013 Order*, the FCC adopted an interim framework of reforms designed to bring interstate inmate calling rates more closely in line with provider costs until the agency could craft a longer-term solution on a more fully developed record. First, the FCC ordered that rates for interstate inmate calls, and fees for ancillary services, be based on costs reasonably and directly related to the provision of inmate calling. *2013 Order* ¶12. Such costs, the FCC made clear, do not include site commissions. *Id.* ¶55. Second, the FCC established interim "safe-harbor" rate caps—uniform for all types of facilities—beneath which rates would be presumptively cost-based: $0.12 per minute for debit and prepaid calls, and $0.14 per mi-

nute for collect calls (which historically have been more costly to provide). *Id.* ¶60. Third, the FCC established uniform interim "hard" caps of $0.21 per minute for debit and prepaid calls, and $0.25 per minute for collect calls. *Id.* ¶73. The agency derived the hard caps from the highest cost data in the record, generating a conservative, upper-bound proxy for cost-based rates. *Id.* ¶¶74–81.

Several parties petitioned for review of the *2013 Order*, and some sought stays, or partial stays, pending judicial review. GTL sought a stay of the FCC's cost-based rule and interim safe-harbor rate caps (plus a related reporting requirement), arguing that the FCC had failed to provide adequate administrative notice of those reforms. GTL 2013 Mot. 8–13, 20, *Securus Techs., Inc. v. FCC* (D.C. Cir. Nos. 13-1280 et al.), Dkt. #1467732. This Court granted GTL's requested relief but otherwise allowed the *2013 Order* to take effect. Order, *Securus*, Dkt. #1474764. Rates for interstate inmate calls are thus now subject to the interim hard caps.

Meanwhile, the FCC sought further data and public comment to craft more comprehensive, permanent reforms.[2] Through a one-time mandatory data collection, the agency obtained additional cost data on the provision of inmate calling services (both interstate and intrastate) and ancillary services. *2013 Order* ¶125. Regarding site commissions, the FCC asked whether to prohibit them outright,

[2] On the FCC's unopposed motion, this Court placed the challenges to the *2013 Order* in abeyance while the agency considered further reforms. Order, *Securus*, Dkt. #1527663.

2014 NPRM ¶27, or whether "instead" to "[set] interstate and intrastate [inmate calling] rates at levels that do not include the recovery of site commission payments," *id.* ¶46. In addition, the FCC sought comment on the effect of emerging video "visitation" or conferencing services on traditional inmate calling, *2013 Order* ¶¶164–165, the agency's authority to regulate such services, *2014 NPRM* ¶151, and possible reporting requirements, *id.* ¶¶152–154.

D. *Order.*

In the *Order*, the FCC adopted a comprehensive set of reforms for both intrastate and interstate inmate calling services, as well as ancillary services.

1. *Rate caps.*

The FCC adopted a four-tiered framework of rate caps for debit and prepaid inmate calls, differentiating among prisons ($0.11 per minute) and small, medium, and large jails ($0.22, $0.16, and $0.14 per minute, respectively). *Order* ¶9.[3] The FCC's decision to impose tiered rates reflected its data-based finding that there are economies of scale in serving larger correctional facilities. *Order* ¶34. The record also showed that "jails," in which inmates are housed for shorter terms, may have a higher rate of turnover ("churn") than "prisons," with correspondingly higher

[3] For collect calls, the agency adopted a two-tiered framework of rate caps ($0.49 per minute for jails, and $0.14 per minute for prisons) through June 2017, which will then transition, over a two-year period, to the same rate caps as for debit and prepaid calls. *See Order* ¶9. As the petitioners do not make any specific criticisms of the collect call rate caps, we do not separately address them here.

costs. *Id.* ¶33; *see id.* ¶39 (defining jails and prisons). The FCC constructed its rate caps by averaging the costs to serve each category of facility. *Id.* ¶52. Using 2012 and 2013 cost data from 14 inmate calling providers, the FCC "divid[ed] . . . the entirety of all costs reported by the providers for any category" (with the exception of site commission payments) "by aggregate minutes of use in that category." *Id.*

The FCC took the providers' reported data "at face value," even though there was "significant evidence . . . suggesting that the reported costs [were] overstated." *Order* ¶53; *see id.* ¶¶71–75. For example, the *Order* explains, several providers "over-estimated their capital costs, potentially double-counting their cost of debt," *id.* ¶72, and at least one provider reported obviously ineligible costs such as "entertainment and meals," *id.* ¶73. In addition, the FCC did not adjust its per-minute cost calculations for the higher call volume that would likely follow from the *Order*'s reforms. *E.g.*, *id.* ¶¶52 n.170, 69–70. Consistent with the evidence that providers' reported costs were inflated, the record showed that inmate calling services could be provided in states that had recently engaged in calling rate reform, *id.* ¶¶19, 49, including states in which providers continue to pay significant site commissions, *id.* ¶¶49, 128. Particularly because of these conservative cost assumptions, the FCC concluded that the rate caps would "allow economically efficient—possibly all—providers to recover their costs that are reasonably and directly attributable to [inmate calling services]." *Id.* ¶116.

2. *Site commissions.*

The FCC declined to prohibit site commission payments by providers of inmate calling services to correctional facilities, but it excluded such payments from the cost data used to derive the rate caps. *Order* ¶118. The resulting rate caps, the FCC concluded, would ensure just, reasonable, and fair rates for end users while at the same time allowing inmate calling providers, in many instances, to continue paying substantial site commissions within the rate caps. *Id.* ¶128.

In excluding site commissions from its rate caps, the agency adhered to its settled view that site commission payments are not costs "reasonably related to the provision of [inmate calling services]." *Order* ¶123. Although the FCC had solicited comment on whether site commissions might in part reimburse facilities for costs they incur in connection with the provision of inmate calling services, the record supplied no clear evidence to that effect. *Id.* ¶¶127, 138. Instead, the Commission reaffirmed, site commissions are "an apportionment of profit," *id.* ¶124, that continue to fund "a wide variety of programs" unrelated to inmate calling, *id.* ¶123 n.400; *see id.* ¶127.

The record did show that "site commissions have been a significant driver of [inmate calling] rates." *Order* ¶118. Commenters advanced various proposals for how best to address that problem, which the FCC considered and discussed at length. *E.g.*, *id.* ¶¶120–128. Some commenters advocated prohibiting site commis-

sions. *Id.* ¶127. Numerous others—including inmate calling providers, a state public utilities commission, and the Wright petitioners—encouraged the FCC to stop short of banning site commissions outright and instead rein in the upward pressure on rates from commissions by putting in place reasonable rate caps. *Id.* The FCC ultimately elected the latter approach. *Id.* ¶124.

3. *Ancillary service charges and related fees.*

The FCC also carefully considered proposals for how to address the problem of ancillary service charges and other add-on fees, which the record showed have been escalating in size and multiplying in number, unchecked by market forces. *Order* ¶161. To prevent inmate calling providers from exploiting ancillary service charges as a loophole to the new rate caps, the FCC specified a list of permitted fee categories and limited how much providers may charge for each category based on reasonable service costs. *Id.* ¶¶161, 163.

Among other things, the *Order* permits providers to charge $3.00 for automated processing of credit-card payments and $5.95 for processing transactions through a live agent. *Order* ¶163. In addition, the *Order* allows providers to pass through third-party financial transaction fees when end users of inmate calling services make payments using services such as Western Union. *Id.* ¶171. The Commission prohibited providers, however, from charging an additional fee, or "mark-up," for which they had "offered no cost-based justification." *Id.* Similarly, for

"single-call services" that enable inmates to place collect calls to non-landline phones, providers are allowed to collect ordinary per-minute rates and pass through (again without mark-up) associated financial transaction fees. *Id.* ¶187. The FCC likewise permitted providers to pass through, but not mark up, taxes and regulatory fees. *Id.* ¶¶191–192.

4. *Waiver and preemption.*

The FCC anticipated that its reforms would protect the legitimate financial interests of inmate calling providers. It nevertheless included a mechanism for accommodating any outlier cases. A provider that cannot recover its legitimate service costs within the framework of the *Order*'s reforms may apply for a waiver of the rate rules for good cause, which the agency's staff must endeavor to act on within 90 days. *See Order* ¶¶212, 217, 219. Likewise, if "there are state requirements, including possible contractual requirements, that make [the] rate caps onerous for a particular provider, the affected provider may file for preemption of the state requirement or seek a temporary waiver of the rate caps for the duration of any existing contract." *Id.* ¶212.

5. *Enforcement and monitoring.*

To ensure that the *Order*'s reforms are enforceable, the FCC adopted certain annual reporting requirements. *See Order* ¶¶263–268. Among other things, an inmate calling provider will be required to disclose the monthly amount of any site

commission payments it makes, *id.* ¶267, whether in monetary form or otherwise, *see* 47 C.F.R. § 64.6000(t) (defining "site commission"). An inmate calling provider must also report the "minutes of use[,] per-minute rates[,] and ancillary service charges" for any video visitation services it provides. *Order* ¶267. Those reporting requirements are subject to approval by the Office of Management and Budget (OMB), *id.* ¶268, and have not yet gone into effect. The first annual report will be due no earlier than April 1, 2017. *Id.*

The *Order* provides that the rate caps for prisons do not take effect until March 17, 2016, 90 days from the *Order*'s publication in the Federal Register; the caps for jails (which are more numerous) will not take effect until June 20, 2016, six months after Federal Register publication. *Order* ¶259; *see* Public Notice, DA 15-1484 (WCB Dec. 22, 2015). Going forward, as the *Order* explains, the Commission will "continu[e] to review the [inmate calling service] market, including both costs and rates, to ensure that regulation remains necessary and that the [*Order*'s] reforms . . . strike the right balance." *Order* ¶197.

ARGUMENT

To obtain a stay pending appeal, the petitioners must show that (1) they will likely prevail on the merits, (2) they will suffer irreparable harm unless a stay is granted, (3) other interested parties will not be harmed if a stay is granted, 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 petitioners must make "a clear showing" that they are "entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). They have not done so here.

I. The Petitioners Are Not Likely to Succeed on the Merits.

At the outset, the petitioners have failed to demonstrate a likelihood of success on the merits. The Commission's reforms are a reasonable exercise, well supported by an extensive record, of the agency's authority to ensure that providers of inmate calling services are paid "fairly"—but not excessively—for their "intrastate and interstate" calls, 47 U.S.C. § 276(b)(1)(A), including "ancillary services" associated with such calls, *id*. § 276(d).

A. *The FCC Has Jurisdiction to Cap Intrastate Rates.*

Although conceding that the FCC has jurisdiction to ensure that *interstate* rates are "just and reasonable," *see* 47 U.S.C. § 201(b), GTL and CenturyLink contend that the agency lacks jurisdiction to cap *intrastate* rates for inmate calls. GTL Mot. 16–18; CenturyLink Mot. 15. Telmate makes the same argument. Telmate Mot. 9–10, 16. The petitioners' contention flies in the face of the text of Section 276 of the Communications Act, which directs the FCC "to ensure that all pay-

phone service providers," including inmate calling providers, "are fairly compensated for each and every completed *intrastate and* interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A) (emphasis added); *see id.* § 276(d); *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 561–62 (D.C. Cir. 1997).

The FCC concluded that its jurisdiction to ensure fair compensation for intrastate inmate calls encompasses the authority to cap rates for such calls at levels reasonably linked to providers' service costs, because otherwise providers could collect excessive (unfair) compensation. *See Order* ¶¶108, 114; *Stay Denial* ¶37. That decision reflects a reasonable interpretation of what it means for providers to be "fairly compensated"—an interpretation entitled to deference. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874–75 (2013).

The petitioners contend that the FCC's authority to ensure fair compensation is a "one-way ratchet." GTL Mot. 18 n.17 (quotation marks omitted); *see* Telmate Mot. 9–10; CenturyLink Mot. 15. In their view, the agency is confined to ensuring that "providers receive *adequate* compensation for each call," and may not act to "prevent supposedly excessive compensation." GTL Mot. 17. That position depends on an unjustifiably narrow interpretation of the term "fair," which the FCC reasonably construed to encompass a notion of equity not just to providers of inmate calling services, but to consumers of such services as well. *See Order* ¶¶107 n.335, 114 n.360; *Stay Denial* ¶37 & n.149; *see also Oxford English Dictionary*

671 (2d ed. 1989) (defining "fair," as in "fair wages," to mean "[t]hat [which] may be *legitimately* aimed at" (emphasis added)).[4]

To support their reading of the statute, the petitioners lean heavily on their view of its "history and purpose." GTL Mot. 17; *see* Telmate Mot. 7–8; CenturyLink Mot. 15. But legislative history cannot trump the FCC's straightforward reading of the statute's terms, which are unqualified. *See, e.g.*, *Montanile v. Bd. of Trustees*, 136 S. Ct. 651, 661 (2016) ("[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text . . . ." (first alteration in original; quotation marks omitted)); *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012) (observing that a statute's text overcomes even "formidable argument[s] concerning [its] purposes"). Had Congress wished to confine the FCC's role under Section 276 to ensuring "at least adequate" or "market-based" compensation for payphone providers, *see* GTL Mot. 17–18, the statute's drafters could easily have employed those terms.

The *Order*'s interpretation of "fair compensation" is wholly consistent with FCC precedent. The agency has long recognized that determining what compensation to payphone providers is fair depends in part on the interests of the parties obligated to pay them. *See Order* ¶¶107 n.335, 114 n.360. And the FCC has never

[4] Nor does the statute's reference to "compensation" limit the FCC to protecting the interest of "payee[s]." GTL Mot. 18 n.18. Compensation paid *to* payphone providers is necessarily paid *by* some other party—here, by inmates and their families.

previously "concluded that it should deploy § 276" *only* to increase payphone rates. GTL Mot. 18. Nothing in a 1996 notice of proposed rulemaking that GTL invokes from a prior payphone proceeding in any way "foreclose[s] the possibility that section 276 can be used to reduce compensation that is unfairly high." *Stay Denial* ¶36 n.145. Indeed, the notice "specifically addresses at least one instance in which the [FCC] was concerned about practices that might unfairly *increase* the compensation a payphone provider received." *Id.*

B. *The FCC Has Jurisdiction to Cap Ancillary Fees.*

Securus and Telmate challenge the FCC's jurisdiction to limit ancillary service and related add-on fees. Securus Mot. 4–6; Telmate Mot. 17–18. These claims likewise falter in the face of the statute's text.

Section 276(d) expressly defines the "payphone service[s]" subject to the FCC's jurisdiction to include not only "the provision of inmate telephone service in correctional institutions" but also "any ancillary services." 47 U.S.C. § 276(d). In view of that explicit language, the FCC reasonably concluded that Section 276 authorizes the agency to regulate "services that provide necessary support for the completion of" inmate calls. *Order* ¶196 (emphasis omitted).

Securus contends that "ancillary services" in Section 276 must be limited to "communications services." Mot. 4 (emphasis omitted); *see id.* at 4–5. To the contrary, Title II of the Communications Act is replete with provisions conferring FCC

jurisdiction over matters that are not themselves communications services. *See, e.g.*, 47 U.S.C. § 201(b) (governing common carrier "charges" and "practices . . . in connection with [interstate] communications service[s]"); *id.* § 224 (pole attachments); *id.* § 251 (unbundled network elements). And there is nothing in the language of Section 276 or the ordinary meaning of the term ancillary to compel the conclusion that an ancillary service must itself be a communications service. The term ancillary identifies a service that provides "necessary support" to a primary activity, *see Order* ¶195 (quoting *Oxford Dictionaries*, www.oxforddictionaries.com/us (last visited Oct. 21, 2015)). It does not require that the two services must be of the same type.[5]

Finally, Telmate cannot defeat the FCC's jurisdiction to limit and cap ancillary charges by arguing that Section 276(b)(1)(A) authorizes the agency to ensure fair compensation only for "calls," and not for "payphone services" more generally. Mot. 17. The FCC reasonably determined that it cannot ensure fair compensation for calls without regulating fees for services that are ancillary to those calls,

[5] Securus's reliance (at Mot. 6) on *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), is wholly misplaced. That case concerned the scope of the FCC's ancillary *jurisdiction* under Title I; it did not involve the meaning of the quite different term "ancillary services." Moreover, the *American Library* Court found "no statutory foundation" for the agency's challenged rules; it therefore held they were "ancillary to nothing." 406 F.3d at 692. Here, by contrast, the FCC has asserted direct, not ancillary, jurisdiction based on its express authority to regulate inmate calling and services ancillary thereto. 47 U.S.C. § 276(d); *Stay Denial* ¶42 n.171.

since otherwise inmate calling providers could "circumvent [the *Order*'s] rate caps." *Order* ¶194; *see id.* ¶154.

C. *The Rate Caps Are Reasonable.*

GTL, Telmate, and CenturyLink contend that even if the FCC has jurisdiction to regulate charges for inmate calling services, the *Order*'s rate caps are unreasonable. GTL Mot. 9–16; Telmate Mot. 10–16; CenturyLink Mot. 8–14.

In advancing that contention, the petitioners face a high bar. "[B]ecause agency ratemaking is far from an exact science and involves policy determinations in which the agency is acknowledged to have expertise, courts are particularly deferential when reviewing ratemaking orders." *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999) (quotation marks omitted). The FCC need only make a "reasonable selection from the available alternatives." *Id.* (quotation marks omitted). It is not a court's role to consider whether "a different decision would have been more reasonable or desirable." *Id.* (quotation marks omitted); *accord FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016). Under that standard, none of the petitioners' challenges to the FCC's rate caps is likely to succeed.

1. *The FCC reasonably excluded the cost of site commissions.*

The petitioners argue that site commissions are costs that inmate calling providers "actually incur to provide service." *E.g.*, GTL Mot. 9. But the record amply supports the FCC's conclusion in the *Order*—consistent with the agency's histori-

cal view—that site commissions are not costs "reasonably related to the provision of [inmate calling services]." *Order* ¶123; *see 2013 Order* ¶54. On that basis, the FCC's decision that site commissions "should not be considered in determining fair compensation for [inmate] calls," *id.*, is in keeping with the standard ratemaking practice of disallowing costs not reasonably incurred, *e.g.*, *NARUC v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007). The mere fact that a correctional facility seeks a payment from an inmate calling provider does not answer whether that payment is a legitimate cost of providing inmate calling—otherwise, the Commission would be required to take account of payments for wholly unrelated expenses (say, private jets for correctional officials) in regulating inmate calling rates.

Telmate contends that "at least a portion of commission payments pay for costs that facilities incur when they permit prison phone service." Mot. 12. As the FCC explained, however, the record contains little credible evidence that correctional facilities incur such costs at all, let alone that they use site commission payments to cover them. *See Order* ¶¶127, 133–139. Insofar as the record even arguably supports that facilities incur "legitimate costs in connection with [inmate calling]," the FCC found that such costs would be "no more than one or two cents per billable minute." *Id.* ¶139. The rate caps are "sufficiently generous to cover such [hypothetical] costs." *Id*. Indeed, the record suggests that inmate calling providers will be able to continue paying site commissions as high as 40 percent within the

FCC's rate caps. *Stay Denial* ¶19 n.58 (citing *Order* ¶128 & n.439); *see Order* ¶49.

Likewise, the record contradicts GTL's assertion that site commissions are merely "rent" that providers pay to compensate facilities for housing their equipment. Mot. 10. The record is clear that site commissions fund a variety of government activities as diverse as road construction, salaries, and inmate substance abuse programs. *E.g.*, *Order* ¶¶123, 127; *2014 NPRM* ¶23. Moreover, landlords in a competitive real estate market cannot charge (and tenants will not pay) more in rent than the market will bear. But correctional facilities, which face no substitute for access to their locations, and inmate calling providers, which have a captive subscriber base, confront no similar constraints.

Finally, there is no basis for the petitioners' claims that correctional authorities are likely to seek to hold providers to "money-losing contracts," GTL Mot. 12, or to terminate their relationships with providers that decline to pay site commissions higher than they can recover within the FCC's rate caps, *see* CenturyLink Mot. 13. For one thing, given the prevalence of change-of-law and *force majeure* provisions in inmate calling contracts, facilities may be unable to do so. *See Order* ¶213. Such provisions aside, correctional authorities have every incentive to accept whatever commissions providers *can* pay within the rate caps—which may be considerable—given the benefits to both facilities and inmates resulting from inmate calling services. *See id.* ¶¶5, 128, 132; *Stay Denial* ¶¶15 n.38, 19 n.58.

2. *The FCC reasonably elected not to ban site commissions.*

GTL and Telmate also have not shown that it was arbitrary, capricious, or otherwise unlawful that the FCC declined to ban site commissions outright. *See* GTL Mot. 12–15; Telmate Mot. 10–13.

The FCC acknowledged in the *Order* that site commissions can be "a significant driver of [high inmate calling] rates." *Order* ¶118. Commenters advocated various solutions to that problem. Some proposed that the FCC prohibit site commissions outright. *See id.* ¶127 & n.422. Many others—among them CenturyLink—asserted that it was unnecessary to ban site commissions when the agency could curb their effect on rates using rate caps. *See, e.g.*, *id.* ¶127 & nn.429–430.

The FCC carefully reviewed and considered commenters' competing proposals. *See Order* ¶¶127–132. It then made a policy judgment that "establishing comprehensive rate caps and caps on ancillary service charges" would be sufficient to stem "the harmful effects of outsized site commissions" without an outright ban. *Id.* ¶128. That judgment reflected the FCC's reasonable prediction that correctional facilities will not continue to insist on receiving excessive site commission payments—whether under existing contracts or on a prospective basis. *See supra* Part I.C.1. Moreover, as the Commission explained, excluding site commission payments from the costs considered in establishing the rate caps avoids undue regulatory interference with how profits from inmate calling services are apportioned be-

tween providers and correctional authorities. *Order* ¶128. It also ensures that facilities can receive appropriate compensation for any costs they may (hypothetically) themselves incur from the provision of inmate calling services. *Id.* ¶129. And it eliminates the need to decide the contested question whether the Commission has the power to ban site commission payments altogether. *Id.* ¶130. Finally, because the record shows that the agency's rate caps permit efficient providers to earn a reasonable profit on their services, the agency's decision to exclude site commissions from its analysis does not render the rate caps unconstitutionally "confiscatory." GTL Mot. 12; *see Order* ¶¶141–143.

In short, the FCC "weighed competing views, selected [an approach] with adequate support in the record, and intelligibly explained the reasons for [its] choice." *Electric Power*, 136 S. Ct. at 784. The petitioners may disagree with the FCC's judgments, but that is not a basis on which to second-guess them. *See id.*

3. *The FCC's averaging methodology was reasonable.*

GTL, Telmate, and CenturyLink also challenge the averaging methodology by which the FCC derived its rate caps. *See* GTL Mot. 15–16; Telmate Mot. 14–16; CenturyLink Mot. 8–14. But as this Court has explained, "[t]he use of industry-wide averages in setting rates is not novel." *Southwestern Bell*, 168 F.3d at 1352. "[A]gency ratemaking does not 'require that the cost of each company be ascertained and its rates fixed with respect to its own costs.'" *Id.* (quoting *FPC v. Tex-*

aco Inc., 417 U.S. 380, 387 (1974)).

Here, the *Order* painstakingly analyzes the record's "[n]umerous . . . rate reform proposals" and accompanying data. *Order* ¶76; *see id.* ¶¶48–97. The FCC found that there are economies of scale in serving larger facilities and differences affecting costs between prisons and jails. *See id.* ¶¶33–34. In light of those findings, the agency adopted four separate tiers of rate caps for debit and prepaid calls. *See id.* ¶9. Within each of those tiers, the FCC established its caps by dividing "the entirety of all costs reported by the providers for any category . . . by aggregate minutes of use in that category." *Id.* ¶53. It explained at length why that approach was justified. *See id.* ¶¶48–83. On the basis of its analysis, the Commission concluded that its rate caps "will allow efficient firms to recover their economic costs, including a reasonable return." *Id.* ¶60.

CenturyLink contends that Section 276 forecloses the FCC's weighted averaging approach because the agency must "establish a *per call* compensation plan to ensure that all [inmate calling] providers are fairly compensated *for each and every completed intrastate and interstate call using their payphone*." CenturyLink Mot. 8 (quoting 47 U.S.C. § 276(b)(1)(A)). Thus, in CenturyLink's view, "if an [inmate calling] provider serves ten prisons and facilitates 100 calls at each of those prisons, the provider is entitled to fair compensation for 'each and every' one of those 1,000 calls, judged on a per call basis." *Id.* at 9. To the extent that CenturyLink

maintains the FCC must establish an individual rate for every inmate call, such a reading of the statute is plainly unreasonable as well as administratively infeasible; even GTL disavows such an approach. GTL Mot. 11 n.15; *see Order* ¶116; *Stay Denial* ¶24. Nothing in the statute suggests that a provider cannot be "fairly compensated" for each of its calls by reference to the average costs of providing such calls. *See Stay Denial* ¶24 & n.82. Indeed, this Court has previously upheld the FCC's use of average call volume to set rates pursuant to Section 276(b)(1)(A). *See Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 58 (D.C. Cir. 2000); *see also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248 ¶23 (2002) (*2002 ICS Order*) (concluding that Section 276 "does not require *every* call to make an identical contribution to shared and common cost").

Apart from their challenge to averaging, GTL and Telmate contend that the FCC's rate caps are unreasonably low. Telmate asserts, without support, that the caps are "below the costs of almost half the industry." Mot. 14 (emphasis omitted). GTL claims, more narrowly, that the "rate caps would force 40% of all debit/prepaid minutes of use across all responding [inmate calling] providers and all facility types to be provided at below-cost rates." Mot. 16 (emphasis omitted); *accord* CenturyLink Mot. 3. That statement, by itself, is wholly unilluminating, because it does not require the conclusion that any particular provider will operate at

a loss in providing inmate calling services. If 40 percent of calls (in minutes of use) cost more to provide than the rate caps allow (which we do not concede), the corollary is that as many as 60 percent of all calls can be provided at costs *below* (and perhaps well below) the rate caps.

Moreover, the petitioners cannot overcome the Commission's reasons, firmly supported by the record, for concluding that the rate caps will cover efficient providers' costs, plus a reasonable rate of return. *Order* ¶60. For example, the Commission reasonably predicted that lowered rates will lead to "increases in call volumes" (which were as much as 70 percent for interstate calls after the interim rate caps took effect, *id.* ¶14) with corresponding gains in revenue. *Id.* ¶57 & n.181. In addition, the FCC took the cost data from which it derived the rate caps at face value, even though there was substantial evidence that those reported costs were "likely overstate[d]," with "many incorrectly calculated additions such as inappropriately recoverable financing costs," *id.* ¶74, overstated costs of capital, *id.* ¶72, and costs for "dues, subscriptions, entertainment and meals," *id.* ¶73. That evidence was consistent with a record of rates in many jurisdictions that are well below the rate-cap levels, *see id.* ¶¶19, 49, even including significant site commissions, *id.* ¶¶49, 128.

The petitioners contend that the FCC ignored different service demands among jurisdictions and correctional facilities that (the petitioners say) affect pro-

viders' respective costs. GTL Mot. 15; Telmate 15; CenturyLink 12–13. The FCC considered commenters' assertions of local cost variation but found that, beyond factors accounted for in the four-tiered rate framework, the administrative record did not show that such variation exists. *E.g.*, *Order* ¶¶56 & n.180, 59; *see id.* ¶49. Nothing the petitioners argue now undermines that finding. *See* GTL Mot. 15 (speculating that "[l]ower-cost providers . . . *may* simply serve lower-cost facilities" (emphasis added)); Telmate Mot. 15 (citing as support a 1999 order in which the FCC, on the basis of a different record and factors inapplicable in the inmate calling context, rejected a proposal to set rates at the cost level of a "maximally efficient" provider).

CenturyLink sets forth in this Court the specific contention that its costs of providing service in Texas are higher than in West Virginia because of additional requirements for service imposed by Texas authorities. Mot. 12. That specific assertion does not undermine the FCC's general finding. Moreover, CenturyLink, or any other provider that finds itself in a similar situation, is free under the *Order* to seek a waiver of the rate caps where they do not provide fair compensation, *Order* ¶219, or to request preemption of state requirements inconsistent with the agency's rate-cap framework, *id*. ¶212. It is well settled that such "safety valve procedure[s]" support the FCC's "discretion to proceed in difficult areas through general rules." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *see Rural Cel-*

lular Ass'n v. FCC, 588 F.3d 1095, 1100, 1104 (D.C. Cir. 2009).

D. *The Caps on Ancillary Service Charges and Other Mark-Ups Are Reasonable.*

Securus and Telmate raise a grab bag of other objections to the specific details of the FCC's rate reforms, all of which lack merit and none of which supports a stay pending appeal. In the main, they contend that the FCC's caps on ancillary service charges—and related limitations on providers' ability to impose add-on charges for passing through taxes and mandatory fees—prevent providers from recovering the costs of specific services. *See* Securus Mot. 6–9; Telmate Mot. 17–18. But the record amply supports those reforms.

1. *The rule governing charges for single-call services is reasonable.*

Securus challenges the Commission's rule governing "single-call services" (which it calls "premium billing services"). Mot 10–12. Such services allow inmate calling providers to bill certain collect calls—for example, to wireless phones—using third-party billing entities. *Order* ¶182. "[T]he record is replete with evidence that" such services have been a source of substantial abuse and consumer confusion. *Id.*; *see id.* ¶¶186, 189. A consumer who receives a panicked call from a newly incarcerated loved one, for example, may think she is receiving a "free call," only to learn later that completing the call will carry a substantial charge. *See id.* ¶182 n.652. Single-call service charges are often over 300 percent higher than the FCC's interim interstate rate caps. *Id.* ¶185. The FCC acted to prevent such charg-

es from becoming a means of circumventing the new rate caps by limiting provider charges to ordinary per-minute rates plus "the amount of the [associated] third-party financial transaction [fee] (with no markup)." *Id.* ¶187.

Securus complains that the FCC's rule precludes recovery of Securus's "substantial investments to develop the software and billing arrangements necessary to offer" its single-call services. Mot. 12. But Securus does not show why it cannot recover its asserted software development costs within the per-minute rate caps. And to the extent that Securus's real complaint is that it will lose *revenue* under the FCC's rule, *see* Boyd Aff. ¶¶6–8, that is an appropriate result of the FCC's decision to cap provider prices at lawful levels. *Stay Denial* ¶54 n.225.

2. *The caps on fees for processing credit card payments are reasonable.*

Securus also argues that its costs of processing credit or debit card payments exceed the FCC's caps of $3.00 for automated processing and $5.95 for processing by a live agent. Mot. 6–7. But in the *Order*, the FCC expressly considered and reasonably rejected Securus's claimed costs as justifying higher caps. *See Order* ¶167. Numerous commenters, including several inmate calling providers, agreed that the FCC's chosen caps will allow providers to recover their reasonable costs of processing these payments. *See id.* ¶¶167–168. Securus offers no explanation for why its asserted costs of "bad debt and credit card fraud," "internal processing costs," or payments to "a third-party vendor" would reasonably exceed those of other provid-

ers. Smith Aff. ¶5. Contrary to Securus's contention (at Mot. 7), it was not "arbitrary" or "discriminatory" for the FCC to decline to set its rate caps based on the unsupported cost claims of "an outlier." *Order* ¶167.

3. *The rule governing third-party financial transaction fees is reasonable.*

Securus's challenge (at Mot. 7–9) to the FCC's decision to bar inmate calling providers from marking up third-party money transfer service fees is likewise unavailing. The record showed that inmate calling providers have imposed exorbitant add-on charges "as high as $11.95, for end users to make account payments via third parties, such as Western Union," and that providers "shar[e] the resulting profit with those" third parties. *Order* ¶171. In prohibiting such mark-ups, the FCC found that providers had "offered no cost-based justification for imposing" them, nor "explained what (if any) functions they must necessarily perform to 'process' a transfer already transferred from the third-party provider." *Id.*

4. *The rule governing pass-through of taxes and fees is reasonable.*

Telmate likewise challenges the FCC's decision to prohibit inmate calling providers from imposing add-on charges for passing through taxes and regulatory fees. Mot. 18. But Telmate identifies nothing in the record that would establish what, if any, costs providers incur from such activity. *See id.* (asserting only that collecting and remitting taxes costs providers "time and money"). There is no reason to think that such costs, if they exist at all, are not *de minimis* and cannot be

recovered within the FCC's conservative rate caps. *See Stay Denial* ¶49 n.201.

E. *Securus's Remaining Claims Lack Merit.*

Securus raises three additional claims, all similarly unpersuasive.

1. Securus complains that the FCC's decision to limit the number of allowable ancillary service charges arbitrarily "deters the development and introduction of any new services in the future." Mot. 9. In fact, the agency broadly defined the permissible categories of charges, without regard to the technology used, thereby leaving substantial flexibility for innovation. *Stay Denial* ¶51. And providers are of course free to seek approval, by means of a rule waiver or petition for rulemaking, for new categories of charges. Any delay or procedural hurdles a provider could conceivably face in seeking to introduce a new service are more than justified by the need to rein in "ever-increasing fees that are unchecked by competitive forces and unrelated to costs." *Order* ¶161. If the Commission had not specified the broad categories of permissible ancillary charges, providers "could simply establish a new category . . . , however unreasonable or unnecessary, and thereby make an effective end-run around" the FCC's rate reforms, forcing the agency to play a never-ending "game of 'whack-a-mole' to police abuses." *Id.* ¶51.

2. Also unpersuasive is Securus's claim (at Mot. 12–14) that the FCC's definition of "site commission" is vague or overbroad. In the first place, the definition has significance only with regard to reporting requirements that are subject to

OMB approval and have not yet gone into effect—as Securus concedes. *See* Mot. 18. In any event, the *Order* reasonably identifies site commissions as payments not "reasonably and directly related to the provision of [inmate calling]." *Order* ¶121 (quoting *2013 Order* ¶53); *see id.* ¶123; *Stay Denial* ¶33. And the agency has made clear what types of costs are, or are not, directly related to the provision of inmate calling. *See 2013 Order* ¶53 & nn.196, 198.

3. Finally, Securus is wrong that the FCC failed to provide administrative notice to require inmate calling providers to include information regarding video visitation services as part of the *Order*'s annual reporting requirement. Mot. 14–15; *see Order* ¶267. The FCC sought comment regarding the effect of video visitation and other advanced services on traditional inmate calling, as well as on the FCC's authority to regulate rates for such services. *2013 Order* ¶¶163–165. At a minimum, the FCC's video visitation reporting requirement is a logical outgrowth of those requests. *Stay Denial* ¶59.

Nor did the FCC need to decide whether it had authority to regulate video visitation services before requiring inmate calling providers to report on their provision of those services. As the Commission found, "[v]ideo calling has become another way for inmates to make contact with the outside world in addition to in-person visits and [inmate calling services] via telephones hanging on the wall." *Order* ¶298. Barring the Commission from obtaining information on such services

would hinder the agency's ability to monitor developments in "an important segment of the marketplace" for traditional inmate calling, which it decidedly *does* regulate. *Id.* (quoting *Cellco P'ship v. FCC*, 357 F.3d 88, 102 (D.C. Cir. 2004)).

II. The Petitioners Have Not Shown Irreparable Injury.

The Court need go no further than determining the petitioners have failed to show a likelihood of success on the merits. *See Ark. Dairy Co-op Ass'n v. USDA*, 573 F.3d 815, 832 (D.C. Cir. 2009). But the petitioners also fail to satisfy this Court's "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Under that standard, "the injury 'must be both certain and great; it must be actual and not theoretical.'" *Id.* (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). Moreover, "the fact that economic losses may be unrecoverable does not absolve the movant from its considerable burden of proving that those losses are certain, great and actual." *Nat'l Min. Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52 (D.D.C. 2011). A court should look to the alleged magnitude of loss only "during the pendency of [the] case," then consider whether it is sufficiently grave "to threaten the movant's business." *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 47–48 (D.D.C. 2014).

The petitioners have not met these strict standards. In asserting irreparable harm from the rate caps, GTL, Telmate, and CenturyLink rely heavily on assertions that they will suffer unrecoverable economic losses. *See* GTL Mot. 19; Tel-

mate Mot. 19; CenturyLink Mot. 19.[6] But such losses do not constitute irreparable harm *per se*, and none of the petitioners asserts that its feared losses are of a magnitude that will threaten either its business or its ability to provide inmate calling services at most, if not all, of its facilities.[7]

Moreover, the petitioners' contentions are based on current inmate calling contracts. The FCC found, however, that inmate calling contracts are "amended on a regular basis" and "typically include" *force majeure* or change-of-law provisions. *Order* ¶213. In addition, the Commission noted that the inmate calling market readily adjusted to the *2013 Order*'s interim interstate rate caps. *See id.* ¶¶213–214. Securus, for example, implemented the interim rate caps on "nine days' notice to facilities." *Id.* ¶213. In view of that record, the FCC reasonably concluded that its new rate caps are "likely," when necessary, "to alter or trigger the renegotiation of

[6] Securus makes a similar claim in challenging the rules governing ancillary service charges (at Mot. 17–18) and likewise fails to show that its asserted losses are sufficiently grave to constitute irreparable harm. Securus's chief executive officer attests that he is "*concerned* that Securus will not be able to service its debt and *could* be in default of certain covenants with its banks." Smith Aff. ¶13 (emphasis added). Speculative "concerns" do not show irreparable harm.

[7] *Sottera, Inc. v. FDA*, 627 F.3d 891 (D.C. Cir. 2010), does not hold that "unrecoverable losses constitute irreparable harm" *per se*. *E.g.*, GTL Mot. 19. That case involved an order prohibiting altogether the importation of the movant's e-cigarettes, which had "obviously destroyed the firm's ability in the United States to cover its costs for purchase or production" of that product. *Id.* at 898.

. . . contracts." *Id.* ¶132.[8]

The FCC was not swayed by the possibility—stressed by CenturyLink here (at Mot. 14)—that some contracts lack provisions for automatic renegotiation. Providers have been on notice for years that the agency might impose new inmate calling rules; as sophisticated corporations, they can reasonably be expected to have negotiated change-of-law provisions. *Stay Denial* ¶64; *see Order* ¶¶215, 262. And even where change-of-law provisions are not present, parties are not foreclosed from renegotiating their arrangements in light of the Commission's rules, and there is no reason why they would not have every incentive to do so here.[9] Finally, in the unlikely case that a provider is unable to renegotiate existing contracts, the *Order* makes clear that the provider may seek a "limited waiver" or "preemption" from the Commission. *Order* ¶215.

III. A Stay Would Harm Third Parties and the Public Interest.

A stay pending appeal would also plainly harm third-party consumers of inmate calling services, as well as the public generally. As the FCC found, millions

[8] GTL contends that renegotiation would "risk the providers' goodwill," Mot. 19, but does not explain how renegotiations triggered by FCC action could do so.

[9] Telmate contends that it cannot "plausibly" renegotiate all of its contracts within "the 90 days allowed by the *Order*," and that "if" it cannot, it faces a "threat" of litigation. Mot. 19. That claim assumes, dubiously, that all of Telmate's "hundreds" of contracts are with prisons (the separate rate caps for jails are not effective for six months). In any event, the *Order* invites providers that experience difficulty renegotiating their contracts to seek relief from the FCC. *See Order* ¶212.

of inmates and their families, including some of the most economically disadvantaged members of our society, have paid exorbitant calling rates for far too long. The *Order*'s long-overdue reforms will bring those rates in line with the costs of providing service. Lower rates will make it easier for inmates to stay connected to their families, friends, and legal representatives; reduce recidivism (with attendant savings to taxpayers); foster a safer environment for both inmates and correctional officers; and lessen the negative impact on the millions of children with an incarcerated parent. *See Order* ¶3.

The Commission determined, on the basis of an exacting examination of a comprehensive record, that its reforms will "ensur[e]" that inmate calling service providers "receive fair compensation and a reasonable return," and that the reforms will neither "compromise security in correctional facilities" nor "fail to cover the cost of providing calling services." *Order* ¶6.

In short, the Commission's inmate calling service *Order* serves the public interest, as well as the interests of millions of inmates and their families in maintaining affordable communication with each other. It should not be stayed.

CONCLUSION

The Court should deny the motions for partial stay pending appeal.

Respectfully submitted,

Jonathan B. Sallet
General Counsel

David M. Gossett
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

/s/ Sarah E. Citrin

Sarah E. Citrin
Counsel

445 Twelfth Street SW
Washington, DC 20554

February 12, 2016

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

GLOBAL TEL*LINK, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 15-1461 and
	)	consolidated cases
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

CERTIFICATE OF SERVICE

I, Sarah E. Citrin, hereby certify that on February 12, 2016, I electronically filed the foregoing Opposition of Respondent the Federal Communications Commission to Motions for Partial Stay 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.

Stephanie A. Joyce ARENT, FOX LLP 1717 K Street, N.W. Washington, D.C. 20036 *Counsel for: Securus Technologies, Inc.*	Michael K. Kellogg Benjamin S. Softness Aaron M. Panner KELLOGG HUMBER HANSEN TODD EVANS & FIGEL, PLLC 1615 M Street, N.W., Suite 400 Washington, D.C. 20036 *Counsel for: Global Tel*Link*
Andrew D. Lipman MORGAN, LEWIS & BOCKIUS LLP 2020 K Street NW Washington, DC 20006 *Counsel for: Securus Technologies, Inc.*	James B. Ramsay Jennifer M. Murphy NARUC 1101 Vermont Avenue, NW Suite 200 Washington, DC 20005 *Counsel for: NARUC*

[Service List Continued From Previous Page]

Andrew J. Schwartzman GEORGETOWN UNIVERSITY LAW CENTER Room 312 600 New Jersey Avenue, NW Washington, DC 20001 *Counsel for: Ulandis Forte, et al.*	Eric G. Null LAW OFFICE OF ERIC G. NULL 1375 Kenyon Street, NW #515 Washington, DC 20010 *Counsel for: Ulandis Forte, et al.*
Brita D. Strandberg John R. Grimm Jared P. Marx HARRIS, WILTSHIRE & GRANNIS LLP 1919 M street, NW 8th Floor Washington, DC 20036 *Counsel for: Telmate, LLC*	Robert A. Long, Jr. Kevin F. King COVINGTON & BURLING One CityCenter 850 Tenth Street, N.W. Washington, D.C. 20001 *Counsel for: CenturyLink Public Communications, Inc.*
Marcus W. Trathen Julia Ambrose BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, LLP 150 Fayetteville Street 1600 Wells Fargo Capitol Center Raleigh, NC 27601 *Counsel for: Pay Tel Communications, Inc.*	

/s/ Sarah E. Citrin

Sarah E. Citrin
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1537