BRIEF FOR RESPONDENTS

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

NOS. 15-1461, 15-1498, 16-1012, 16-1029, 16-1038, 16-1046, 16-1057

GLOBAL TEL*LINK, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties and intervenors appearing in this Court are listed in the petitioners' briefs. We understand that the following entities intend to participate as amici curiae in support of the respondents: the State of Minnesota and the County of Santa Clara, California.

2. Rulings under review.

The ruling under review is *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (JA __) (2015).

3. Related cases.

The order under review has not previously been the subject of a petition for review in this Court or any other court. Various petitioners challenge the Commission's predecessor reforms in *Securus Technologies, Inc. v. FCC*, Nos. 13-1280 et al. (D.C. Cir. filed Nov. 14, 2013). That case is currently in abeyance pending the resolution of these cases. *See Securus Techs., Inc. v. FCC*, Nos. 13-1280 et al. (D.C. Cir. May 19, 2016).

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* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

Commission	Federal Communications Commission
JA	Joint Appendix
OMB	Office of Management and Budget
Sheriffs' Association	National Sheriffs' Association

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

The Communications Act of 1934 (Communications Act or Act) directs the Federal Communications Commission (Commission) to ensure that providers of inmate calling services are "fairly"—not excessively—compensated for their services. 47 U.S.C. § 276(b)(1)(A); *see id.* § 201(b). For years, inmate calling providers have exploited their monopoly positions at individual correctional facilities by charging rates for inmate calls (and fees for services ancillary to such calls) that grossly exceed the cost of providing service. The resulting rates deter communication between inmates and their

families, with severe and highly detrimental social consequences. In 2013, the Commission took interim steps to bring rates for interstate inmate calling services more closely in line with costs. In the order under review, adopted in 2015, the Commission issued more comprehensive, longer-term reforms, including rate caps for both interstate and intrastate inmate calling services. *See Rates for Interstate Inmate Calling Services*, 30 FCC Rcd 12763 (JA __) (2015) (*Order*).

In August 2016, the Commission substantially increased the rate caps to better account for inmate calling costs reasonably incurred by correctional facilities. *See Rates for Interstate Inmate Calling Services*, FCC 16-102, 2016 WL 4212506 (2016) (*Reconsideration Order*). As of the filing of this brief, that order has not been published in the Federal Register and is therefore not ripe for judicial review. *See* 47 C.F.R. § 1.4(b).

The consolidated petitions for review present the following question: Whether the reforms promulgated in the *Order* reflect a lawful exercise of the Commission's statutory authority to ensure that interstate and intrastate rates for inmate calling services are just, reasonable, and fair.

JURISDICTION

The *Order* is a final order of the Commission over which this Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). A

summary of the *Order* was published in the Federal Register on December 18, 2015. *See* 80 Fed. Reg. 79,136. As required by 28 U.S.C. § 2344, the petitioners filed their respective petitions for review within 60 days of that publication.

STATUTES AND REGULATIONS

An addendum to this brief sets forth the relevant statutes and rules.

COUNTERSTATEMENT

A. The Commission's Statutory Authority over Inmate Calling and Ancillary Services

Under Section 276 of the Communications Act, the Commission is empowered to "promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). "[P]ayphone service" expressly includes "the provision of inmate telephone service in correctional institutions, and any ancillary services." *Id.* § 276(d).

In regulating payphone services, the Commission is required 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[s]." 47 U.S.C. § 276(b)(1)(A). In addition, under Section 201(b) of the Act, the Commission must ensure that "charges" and "practices" "for and in connection with" interstate telecommunications services—including

inmate calling services—are not "unjust or unreasonable." *Id.* § 201(b). Should the Commission adopt rules governing inmate calling services that "are inconsistent" with "any State requirements," "the Commission's regulations . . . shall preempt such State requirements." *Id.* § 276(c).

B. Market Failure in the Inmate Calling Marketplace

Inmate calling services are "a prime example of market failure." *Order* ¶2 (JA __). Inmates and their families cannot choose for themselves the inmate calling provider on whose services they rely to communicate. Instead, correctional facilities each have a single provider of inmate calling services. And very often, correctional authorities award that monopoly franchise based principally on what portion of inmate calling revenues a provider will share with the facility—*i.e.*, on the payment of "site commissions." Accordingly, inmate calling providers compete to offer the highest site commission payments, which they recover through correspondingly higher end-user rates. *See id.* ¶¶117–118, 122 (JA __–__, __). If inmates and their families wish to speak by telephone, they have no choice but to pay the resulting rates.

Excessive 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.

See Order ¶3 (JA __). 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. *See id.* ¶3 & n.18 (JA __). Barriers to communication from high inmate calling rates interfere with inmates' ability to consult their attorneys, *see id.* ¶1 (JA __), impede family contact that can "make[] prisons and jails safer spaces," *id.* ¶5 (JA __), and foster recidivism, *see id.* ¶¶3–4 (JA __–__).

C. History of the Commission's Inmate Calling Reform Proceeding

More than 12 years ago, a woman named Martha Wright, whose grandson was then incarcerated, led a group of inmates and family members in petitioning the Commission for relief from exorbitant inmate calling rates. In 2012, the Commission initiated a rulemaking to address the Wright petitioners' proposals and the "significant comment" they had generated. *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629 ¶1 (JA __) (2012) (*2012 NPRM*). Among other things, the Commission sought comment on the costs that providers incur to furnish inmate calling services, and on differences among correctional facilities that might affect those costs. *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107, 14112, 14152–53 ¶¶9, 81 (JA __, __) (2013) (*2013 Order*); *2012 NPRM* ¶22 (JA __). In response, inmate calling providers furnished only limited cost data. *E.g.*,

Rates for Interstate Inmate Calling Services, 29 FCC Rcd 13170 ¶6 (JA __) (2014) (*2014 NPRM*). As to the relevant cost distinctions among facilities, commenters disagreed. *2013 Order* ¶81 (JA __).

The record nonetheless showed a pressing need for agency action to curb excessive inmate calling charges. In the *2013 Order*, the Commission therefore 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 Commission ordered that rates for interstate inmate calls, as well as fees for ancillary services, be based on costs reasonably and directly related to the provision of inmate calling. *2013 Order* ¶12 (JA __). Such costs, the Commission determined, did not include site commissions. *Id.* ¶55 (JA __). Second, the Commission 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 minute for collect calls (which historically have been more expensive to provide). *Id.* ¶60 (JA __). Third, the Commission 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 (JA __). 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 (JA __–__).

Several parties petitioned for review of the *2013 Order*; some also sought stays, or partial stays, pending judicial review. Global Tel sought a stay of the Commission's cost-based rule and interim safe-harbor rate caps (plus a related reporting requirement), arguing that the agency had failed to provide adequate administrative notice of those reforms. *See* Mot. of Global Tel*Link for Partial Stay Pending Judicial Review in *Securus Techs., Inc. v. FCC*, Nos. 13-1280 et al. (D.C. Cir.) 8–13, 20 (Nov. 25, 2013). This Court granted Global Tel's requested relief but otherwise allowed the *2013 Order*, including the interim hard caps, to take effect. *See Securus Techs., Inc. v. FCC*, Nos. 13-1280 et al. (D.C. Cir. Jan. 13, 2014).

Meanwhile, the Commission sought further data and public comment to craft more comprehensive reforms.[1] Through a one-time mandatory data collection, the Commission required inmate calling providers to furnish additional data on their costs of providing inmate calling and ancillary

[1] On the FCC's unopposed motion, this Court placed the challenges to the *2013 Order* in abeyance while the Commission considered further reforms. *Securus Techs., Inc. v. FCC*, Nos. 13-1280 et al. (D.C. Cir. Dec. 16, 2014) (per curiam). Those cases remain in abeyance pending resolution of this litigation. *See Securus Techs., Inc. v. FCC*, Nos. 13-1280 et al. (D.C. Cir. May 19, 2016).

services—both interstate and intrastate. *2013 Order* ¶125 (JA __). The Commission also solicited comment on whether to prohibit site commissions outright, *2014 NPRM* ¶27 (JA __), 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 (JA __).

D. *Order* on Review

In the *Order* on review, the Commission "adopt[ed] comprehensive reform . . . [to] ensure that [inmate calling] rates," as well as "charges" for ancillary services, "comply with the Communications Act"—whether for interstate or intrastate calls. *Order* ¶9 (JA __).

1. *Rate caps*

The crux of the *Order*'s reforms consists of a four-tiered framework of inmate calling rate caps that differentiate among "prisons," which "primarily" house inmates confined "for sentences of longer than one year," and small, medium, and large "jails," which generally house people for shorter terms. *Order* ¶39 (JA __). The Commission imposed tiered rate caps based in part on evidence that there are economies of scale in serving larger correctional facilities. *See id.* ¶34 (JA __). In addition, the Commission adopted separate rate tiers for prisons and jails based on evidence that the higher pace of

inmate turnover ("churn") in jails makes it more expensive to provide inmate calling services in jails than in prisons. *Id.* ¶33 (JA __).

For "debit and prepaid" calls—calls paid for through accounts that inmates, or those who wish to speak with them, establish in advance, *see* 47 C.F.R. § 64.6000(g), (p)—the Commission adopted a rate cap of $0.11 per minute for prisons, and $0.22, $0.16, and $0.14 per minute, respectively, for small, medium, and large jails. *See Order* ¶9 tbl. 1 (JA __). The Commission constructed its rate caps by averaging the costs to serve each category of facility. *Id.* ¶52 (JA __). More specifically, the Commission relied on the 2012 and 2013 cost data of the 14 inmate calling providers that responded to the *2013 Order*'s mandatory data collection. *See id.* ¶51 (JA __). "Without limiting or restricting" reportable "costs or cost categories," the Commission had directed those providers to identify "all" of the costs they incur in providing inmate calling services. *Id.*

In calculating the rate caps, the Commission took the data submitted (excluding site commissions, which providers reported separately) "at face value," despite "significant evidence" that providers had "overstated" their costs. *Order* ¶53 (JA __); *see id.* ¶¶71–75 (JA __–__). The Commission also did not seek to adjust its per-minute cost calculations to reflect the higher call volume that it anticipated would follow from the imposition of rate caps. *E.g.*,

id. ¶¶52 n.170, 69–70 (JA __, __–__). Instead, the Commission took "the entirety of all costs reported by the providers for any [tier of facilities]" and divided that total by "aggregate minutes of use in [the relevant tier]." *Id.* ¶52 (JA __).

For collect calls—calls that are not funded by any pre-established account, but for which the called party agrees to pay in the future, *see* 47 C.F.R. § 64.6000(d)—the Commission adopted a "distinct rate structure" on a transitional basis. *Order* ¶84 (JA __). Recognizing that collect calling has historically been "more costly to provide" than debit or prepaid calling, *see id.* ¶86 (JA __), the Commission set the collect call rate caps at $0.49 per minute for jails and $0.14 per minute for prisons for a period of approximately one year, *see id.* ¶88 (JA __). Anticipating, however, that collect calling—which already represents a small and declining percentage of inmate calls, *see id.* ¶86 (JA __)—will reach "a nominal level in two years," *id.* ¶89 (JA __), the Commission provided that by July 1, 2018, the initial rate caps for collect calls will phase down to reach the same levels as for debit and prepaid calls, *see id.* ¶88 (JA __).

2. *Site commissions*

Originally devised by an inmate calling provider in the 1980s, *see Order* ¶118 n.375 (JA __), site commissions—in ever-increasing amounts—

have become pervasive, *see id.* ¶¶118 & n.375, 122 (JA __–__). Among the recent bids referenced in the *Order* were provider offers to share between 82 and over 85 percent of inmate calling revenue with the Georgia Department of Corrections; CenturyLink's winning offer to pay a 93.9 percent commission in Arizona; and bids by Securus, Global Tel, and CenturyLink to pay 88.1, 95, and 96 percent commissions, respectively, in Escambia County, Florida. *See id.* ¶122 & n.392 (JA __); 8/16/2014 Ex Parte Notice of the Wright Petitioners 1–3 (JA __–__). Correctional facilities use such payments, the record showed, to fund "a wide variety of programs" unrelated to inmate calling, *Order* ¶123 n.400 (JA __), including substance abuse and educational/vocational programs for inmates, as well as "general governmental or correctional activities," *id.* ¶127 & n.424 (JA __), from health care to "funding roads," *2013 Order* ¶34 (JA __); *see id.* ¶33 n.125 (JA __).

Although the Commission had solicited comment on whether site commissions might serve in part to reimburse costs that facilities themselves incur related to the provision of inmate calling services, it concluded in the *Order* that the record supplied no clear evidence to support such a finding. *See* ¶¶127, 138 (JA __, __). Rather, the record showed that site commissions are an incentive mechanism that induces correctional facilities to award

monopoly contracts without regard to the affordability or quality of a provider's services for end users. *See id.* ¶¶117, 122–123 (JA __, __–__). Such evidence persuaded the Commission to reaffirm that site commissions are not costs "reasonably related to the provision of [inmate calling services]." *Id.* ¶123 (JA __).

Recognizing that "site commissions have been a significant driver of [inmate calling] rates," *Order* ¶118 (JA __), the Commission carefully evaluated commenters' proposals for how best to address that problem, *e.g.*, *id.* ¶¶120–128 (JA __–__). Some parties advocated prohibiting site commissions. *Id.* ¶127 (JA __). Numerous others (including several inmate calling providers) encouraged the Commission to stop short of banning site commissions outright, and to curb site commissions' upward pressure on rates by adopting reasonable rate caps. *Id.* The Commission ultimately elected the latter approach, declining to prohibit site commissions but excluding such payments from the cost data used to derive the rate caps. *See id.* ¶¶118, 124 (JA __, __).

3. *Ancillary service charges and related fees*

The Commission also carefully considered proposals for how to address the problem of ancillary service charges and other add-on fees, which, unchecked by market forces, have escalated in size and grown in

diversity. *Order* ¶161 (JA __). To prevent inmate calling providers from exploiting ancillary service charges to circumvent the new rate caps, the Commission specified a list of permitted fee categories—including applicable taxes and regulatory fees, automated payment fees, fees for using a live agent, fees for a paper bill, and third-party financial transaction fees—and limited how much providers may charge for each category based on reasonable service costs. *Id.* ¶¶161, 163 tbl. 4 (JA __, __).

4. *Waiver and preemption*

The Commission anticipated that all "economically efficient . . . providers [would be able] to recover their costs . . . reasonably and directly attributable to [inmate calling services]" within the rate caps. *Order* ¶116 (JA __). Nevertheless, to accommodate the possibility of unusual circumstances, the Commission emphasized that companies that believe they are unable to recover their legitimate costs within the framework of the *Order* may file waiver requests, *see id.* ¶¶212, 217, 219 (JA __, __, __), which the Commission's Wireline Competition Bureau must endeavor to act on within 90 days, *see id.* ¶219 (JA __). Similarly, the Commission stated, 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 (JA __).

E. Stay Litigation

Following release of the *Order*, several inmate calling providers filed administrative petitions for a partial stay pending judicial review. After the Commission's Wireline Competition Bureau denied the three earliest-filed petitions, *see Rates for Interstate Inmate Calling Services*, 31 FCC Rcd 261 (JA __) (Wireline Comp. Bur. 2016) (*Stay Denial*), several of the petitioners sought a partial stay from this Court. In response, the Court stayed the Commission's four-tiered rate caps (47 C.F.R. § 64.6010), as well as the cap on fees for "single-call services" (47 C.F.R. § 64.6020(b)(2))—services that enable inmates to place collect calls to parties whose carriers do not bill for such calls, *see Order* ¶182 (JA__)—which incorporated the tiered rate caps. *See Global Tel*Link v. FCC*, Nos. 15-1461 et al. 1–2 (D.C. Cir. Mar. 7, 2016) (per curiam). "[I]n all other respects," the Court left the Commission's reforms in place and denied the motions for a stay. *Id.* at 2. A second motions panel—with Judge Millett dissenting—later expanded the stay to reach the interim rate caps (47 C.F.R. § 64.6030) that would otherwise have applied for the first time to "intrastate calling services." *Global Tel*Link v. FCC*, Nos. 15-1461 et al. 1 (D.C. Cir. Mar. 23, 2016) (per curiam).

F. *Reconsideration Order*

While the petitioners here sought judicial review of the *Order*, an individual named Michael S. Hamden petitioned the Commission for partial reconsideration. *See Reconsideration Order*, 2016 WL 4212506, at *5 ¶11. Among other things, Hamden proposed that the Commission "mandate a modest, per-minute facility cost recovery fee that would be added to the rate caps." *Id.* (citation and internal quotation marks omitted). Hamden based that request in part on the assertion that "facilities do incur *some* administrative and security costs that would not exist but for [inmate calling services]." *Id.* at *7 ¶18 (quoting the Hamden petition).

In response to the Hamden petition, various parties submitted comments "agreeing that the [*Order*'s] rate caps [did] not adequately account for [inmate calling] costs that facilities may incur." *Reconsideration Order*, 2016 WL 4212506, at *8 ¶19. Those comments echoed certain of the petitioners' claims in this litigation, *see id.* at *8 ¶20, and were also "consistent with earlier [administrative] filings" concerning facility-incurred costs, *id.* at *8 ¶21. On reconsideration, the Commission took a fresh look at the record and eventually focused on two proposals regarding how to account for facility-incurred costs in the rate caps: one from the National Sheriffs' Association (Sheriffs' Association) and another that was jointly submitted by

Darrell Baker, an employee of the Alabama Public Service Commission, and Don Wood, an outside economic consultant to inmate calling provider Pay Tel. *See id.* at *3, 8–11 ¶¶4, 22–30.

In August 2016, "with the benefit of an expanded record," *Reconsideration Order*, 2016 WL 4212506, at *9 ¶23, the Commission increased the *Order*'s rate caps "to expressly account for reasonable facility costs related to [inmate calling services]," *id.* at *2 ¶3. "[A]t least some [correctional] facilities," the Commission found, "likely incur [such] costs." *Id.* at *6 ¶12. Although "the record on what [those] costs" actually are remains "imperfect," *id.* at *10 ¶27, the Commission concluded that "a hybrid of the Baker/Wood and [Sheriffs' Association] [p]roposals" provides a reasonable approximation of those costs, *id.* at *10 ¶26. As the Commission explained, the proposals were "fairly consistent with each other": Baker and Wood proposed "a cost recovery mechanism of $0.07 per minute for [small] jails . . . , $0.05 for [medium and large] jails . . . , and $0.03 for prisons." *Id.* For those same categories, the Sheriffs' Association proposed that the Commission adopt a cost-based additional increment in the range of $0.09 to $0.11, $0.05 to $0.08, and $0.01 to $0.02, respectively. *See id.* The Commission "compared the Baker/Wood and [Sheriffs' Association] proposals and, . . . to produce a conservative rate," increased the *Order*'s rate

caps by "the higher . . . of the two proposals." *Id.*[2] The resulting rate caps for debit and prepaid calls are $0.31 per minute for small jails (over 40 percent higher than the previous cap for this tier), $0.21 per minute for medium jails (an increase of over 30 percent), $0.19 per minute for large jails (reflecting a similar increase), and $0.13 per minute for prisons (an increase of over 18 percent). *Id.* at *2 ¶3; *compare id. with Order* ¶9 tbl. 1 (JA __). For collect calls, as in the *Order*, the Commission adopted slightly higher transitional rate caps, to reach the same levels as for debit and prepaid calls by July 1, 2018. *See id.*[3]

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[2] "In the instance where even the low end of [the Sheriffs' Association's] proposed rate range was greater than the rate proposed by Baker and Wood, [the Commission] selected the lower end of the [Sheriffs' Association] rate range to better account for the suggestions of both proposals." *Reconsideration Order*, 2016 WL 4212506, at *10 ¶27.

[3] The below table summarizes those caps ("MOU" means "minutes of use"; "ADP" means "average daily population"). *See Reconsideration Order*, 2016 WL 4212506, at *2 ¶3.

Facility Type/Size	**Collect Rate Cap per MOU as of Effective Date**	**Collect Rate Cap per MOU as of 7/1/2017**	**Collect Rate Cap per MOU as of 7/1/2018**
0–349 Jail ADP	$0.58	$0.45	$0.31
350–999 Jail ADP	$0.54	$0.38	$0.21
1000+ Jail ADP	$0.54	$0.37	$0.19
Prisons	$0.16	$0.15	$0.13

The Commission explained that its "decision to increase [the] rate caps to better account for facilities' costs [did] not require" a "cap or limit [on] site commission payments." *Reconsideration Order*, 2016 WL 4212506, at *13 ¶38 n.151; *see id.* at *6 ¶13 nn.52, 54; *id.* at *13 ¶¶35–38. Under the *Reconsideration Order*, as with the *Order* under review, providers and correctional facilities are free to negotiate revenue-sharing arrangements between them, so long as charges to end users remain within the rate caps. *See id.* at *6 ¶13 n.52.

Several of the petitioners here—Securus, Telmate, Global Tel, and the corrections-petitioners—have asked the Commission for an administrative stay of the *Reconsideration Order*, in anticipation that those parties will seek judicial review of the *Reconsideration Order* once it is published in the Federal Register.

SUMMARY OF ARGUMENT

The inmate calling rate caps adopted in the *Order* under review have been significantly revised by the Commission on reconsideration. There is no reason for this Court to address challenges related to those caps, which will now never take effect. The petitioners' challenges to the *Order* under review should thus either be dismissed as moot or, in the alternative, consolidated with any petitions for review of the *Reconsideration Order*.

If the Court nonetheless decides to consider the challenges to the *Order* under review, in whole or in part, at this time—for example, to reach issues independent of the petitioners' challenges to the rate caps revised in the recent *Reconsideration Order*—the *Order* should be upheld.

1. In their challenges to the *Order* under review, the petitioners contest the Commission's authority to regulate the rates for intrastate inmate calling services, and to limit and cap fees for ancillary services. Rather than address the Commission's authority in the abstract, the Court should consider the petitioners' jurisdictional arguments if and when it reviews the Commission's exercise of that authority—in other words, when addressing any eventual challenges to the rate caps adopted in the *Reconsideration Order*, which supersede the caps adopted in the *Order* under review and are incorporated by reference in the Commission's rule governing fees for ancillary services (in the cap on fees for single-call services). If the Court nonetheless decides to address the petitioners' jurisdictional arguments now, it should reject them.

a. To "promote the widespread deployment of payphone services to the benefit of the general public," Section 276 of the Act directs the Commission to ensure that "payphone 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); *see id.*

§ 276(d). By those terms, the statute expressly extends the Commission's authority to "intrastate" as well as "interstate" calls, and obligates the Commission to ensure that inmate calling providers receive "fair[]" compensation.

The petitioners contend that Section 276 only authorizes the Commission to ensure that providers are not undercompensated, and grants the agency no power to address rates that are "unreasonably high." Br. 41. The phrase "fairly compensated," however, naturally encompasses not just payments that are too low but those that are too high. The Commission's view that "fairness" under Section 276 empowers the agency to consider not just the interest of providers, in not being undercompensated, but also the interest of consumers, in not having to pay excessive rates, thus deserves this Court's deference. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

b. The Court should likewise uphold the Commission's authority to limit and cap fees for ancillary services. Under Section 276, the "payphone service[s]" subject to the Commission's jurisdiction expressly include not just inmate calling services but "any ancillary services." 47 U.S.C. § 276(d). In addition, Section 201(b) directs the Commission to ensure the reasonableness of "[a]ll charges [and] practices . . . in connection with" interstate

"communications service[s]." 47 U.S.C. § 201(b). Those provisions comfortably support the Commission's authority to regulate "services that provide necessary support for the completion of" inmate calls. *Order* ¶196 (JA __). As Congress implicitly recognized, there would be little point to granting authority to regulate inmate calling rates if the rules could be evaded through a constellation of high fees for services ancillary to such calls.

2. Regardless whether the petitioners' other arguments are appropriately entertained at this time, the *Reconsideration Order* has plainly rendered moot the petitioners' challenges to the specific rate caps adopted in the *Order* under review. There is no longer any point to reviewing the legality of rate caps that have been materially revised (by between 18 and over 40 percent for debit and prepaid calls, *see supra* p. 17) and will no longer take effect. Accordingly, we do not address those arguments here. We discuss briefly why, if and when the time comes to review the Commission's revised rate caps, the petitioners' claims concerning the Commission's ratemaking methodology should not prevail.

a. The petitioners contend that the Commission was required, both in the *Order* under review and the *Reconsideration Order*, to take account of all site commission payments as a cost of providing inmate calling services, on a theory that site commissions are demanded by state and local correctional

facilities as a condition of providing service. But the record showed that site commissions are largely a means of allocating profit between providers and facilities, and that they are often used to fund programs and state activities that have nothing to do with the provision of inmate calling services. The Commission's refusal to establish rate caps that would permit providers to recover all site commission payments, however excessive, was proper. In establishing just, reasonable, and fair rates, the Commission has the undoubted authority to exclude unjust, unreasonable, and unfair costs.

b. The Commission also acted appropriately in setting the rate caps for each tier using the weighted average of providers' reported costs. As even the petitioners recognize, although Section 276 speaks of fair compensation "for each and every completed . . . call," 47 U.S.C. § 276(b)(1)(A), it does not require "an individual rate for every . . . call," Br. 29 (internal quotation marks omitted). Fair compensation for a call can be provided by reference to the average costs for such calls; indeed, the use of industry-wide averages in ratemaking is routine. Here, the Commission broadly accounted for the differing cost characteristics of prisons and jails of varying sizes by adopting its four-tiered rate structure, which it maintained in the *Reconsideration Order*.

3. Although the *Reconsideration Order* did not amend the Commission's rule governing fees for ancillary services, a provision of that rule—the Commission's cap on fees for single-call services—incorporates by reference the revised per-minute rate caps. The Court should thus dismiss as moot (or at a minimum wait to decide) the complaining providers' challenge to the Commission's cap on fees for single-call services. In any event, all aspects of the Commission's rule on ancillary service charges are reasonable. Not only are the specific caps that the rule sets forth reasonable but, as the Commission recognized, without limits on the allowable categories of ancillary service charges, providers could evade those caps (and the Commission's per-minute rate caps) merely by renaming the services in question.

4. The three additional claims raised by individual providers are baseless. Securus's challenge to reporting requirements relating to video visitation and site commission payments that have not yet received approval from the Office of Management and Budget (OMB) is not ripe. In any event, it was well within the Commission's authority to gather information regarding such activities to determine whether to refine or revise its inmate calling rules. Nor was the Commission compelled to preempt state rate caps that are lower than the Commission's, as Pay Tel contends, when the record

does not show that such state caps will prevent providers from recovering the costs of providing inmate calling services. Finally, Pay Tel has shown no prejudice from the timing of the Commission's decision granting Pay Tel's outside counsel access to confidential information.

STANDARD OF REVIEW

The petitioners bear a heavy burden to establish that the Commission's *Order* is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the *Order* is entitled to a presumption of validity. *E.g.*, *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 997 (D.C. Cir. 2008). The Court must reject the petitioners' challenges to the *Order* unless the agency failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Indeed, because "ratemaking is far from an exact science and involves policy determinations in which the [Commission] 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) (internal quotation marks omitted).

For challenges to Commission interpretations of the Communications Act—including interpretations concerning the scope of the agency's jurisdiction—this Court must apply the framework of *Chevron, U.S.A., Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *E.g.*, *City of Arlington*, 133 S. Ct. at 1868.

ARGUMENT

At the outset, we view the petitioners' challenge to the Commission's statutory authority to impose limits on intrastate inmate calling rates and fees for ancillary services as most appropriately considered in the context of any petition for review of the rate caps adopted in the *Reconsideration Order*. The Commission's revised rate caps—which are materially higher than those adopted in the *Order* under review—are not at issue in these cases. In any event, as we explain below, Section 276 of the Act, 47 U.S.C. § 276, gives the Commission authority to ensure that inmate calling providers are "fairly" compensated for both intrastate and interstate calls, and also empowers the Commission to regulate fees for services "ancillary" to those calls (which, for interstate calls, are also subject to the Commission's authority under Section 201(b) to regulate "charges [and] practices . . . in connection with such communication service," 47 U.S.C. § 201(b)).

As for the petitioners' arguments concerning the specific level of the superseded rate caps, they are clearly moot; the Commission in the *Reconsideration Order* has significantly revised the rate caps adopted in the *Order* under review, which will no longer take effect. Likewise, arguments

concerning the structure of those rate caps are moot or, at a minimum, premature. Nonetheless, we briefly explain why it was reasonable for the Commission not to include the payment of all site commissions, however excessive, in establishing the limits on inmate calling rates, and why the Commission permissibly based its four-tiered rate cap structure on providers' average costs.

The Court should likewise not reach the challenge that certain petitioners raise to the Commission's cap on fees for single-call services. The Court cannot review that claim without taking account of the Commission's revised rate caps, which the cap on fees for single-call services incorporates by reference. In any event, the petitioners' claim is unpersuasive.

Finally, the Court is free, if it so desires, to entertain arguments concerning other aspects of the Commission's rule governing fees for ancillary services, and to consider the claims of individual petitioners regarding reporting requirements, intrastate rate caps lower than the Commission's, and access to confidential data in the proceeding. Those challenges fail on the merits.

I. THE COMMISSION HAS JURISDICTION TO CAP RATES FOR INTRASTATE INMATE CALLING SERVICES.

The petitioners do not challenge the Commission's authority under Section 201(b) of the Act, 47 U.S.C. § 201(b), to ensure that rates for interstate inmate calling services are "just and reasonable." Br. 40.[4] Except for Pay Tel, however, *see* Br. 40 n.28, the petitioners dispute the Commission's jurisdiction to cap rates for *intrastate* inmate calling services under Section 276. *See* Br. 40–47; Corrections Br. 24–47. The text of Section 276 firmly supports the Commission's authority to regulate intrastate inmate calling services to ensure, on the one hand, that inmate calling providers are not undercompensated, and, on the other, that providers do not unfairly exploit their monopoly positions to collect excessive compensation. *See Order* ¶¶108–109, 114–115 (JA __–__, __). And the Commission's reasonable interpretation of its statutory powers is entitled to deference. *See City of Arlington*, 133 S. Ct. at 1874–75.

[4] Their one caveat relates to inmate calling services provided via "voice-over-Internet-protocol [or] other non-telecommunications services," which they contend "are not subject to § 201." Br. 44.

A. The Commission Has Express Authority to Limit Rates for Intrastate Inmate Calling Services.

Section 276(b)(1)(A) of the Act directs the Commission to "ensure that all payphone service providers are fairly compensated for each and every completed *intrastate* and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A) (emphasis added). By definition, "payphone service providers" include providers of inmate calling services. *See id.* § 276(d).

As the above discussion reflects, Section 276 by its terms extends the Commission's authority to "intrastate" as well as "interstate" calls. That unambiguous grant overcomes the presumption set forth in Section 2(b) of the Act that the agency generally lacks authority over "charges . . . for or in connection with intrastate communications service by wire or radio." 47 U.S.C. § 152(b); *see Order* ¶¶108–109 (JA __–__). Indeed, this Court so held in *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) (*IPTA*). *See id.* at 562 (recognizing that Section 276 "unambiguously grants the Commission authority to regulate the rates for local coin calls").

The Commission reasonably construed its jurisdiction under Section 276 to encompass the authority to impose rate caps. *E.g.*, *Order* ¶9 (JA __). The statute obligates the agency to ensure that payphone service providers—including inmate calling providers—are "fairly compensated." 47 U.S.C. § 276(b)(1)(A). Just as compensation is not "fair" if it provides too little

remuneration, compensation is likewise not "fair" if, by virtue of a market failure, it provides excessive remuneration. As the statute makes clear, an important reason for empowering the Commission to ensure that providers are "fairly compensated" is to "promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1); *see Order* ¶¶112, 116 (JA __, __–__). Excessive compensation amassed through monopoly rates, the Commission recognized, can deter the use of inmate calling services, to the detriment of inmates and their families. *See, e.g.*, *id.* ¶¶6–7 (JA __) (explaining that reducing rates increases call volume). The Commission thus reasonably concluded that its authority to ensure "fair compensation" includes the power to prevent providers from imposing rates that take "unfair advantage of inmates . . . [and] their families." *Id.* ¶114 (JA __); *see id.* ¶¶115–116 (JA __–__). And as the *Order* further provides, interpreting Section 276 to authorize the Commission to address the failure of market forces in the market for inmate calling services, *see id.* ¶2 (JA __), "encourag[e] efficiency" among inmate calling providers, *id.* ¶116 (JA __), and promote demand for inmate calling services, *see id.*, likewise serves the statutory aim of "promot[ing] competition," *id.* (quoting 47 U.S.C. § 276(b)(1)).

B. The Commission's Authority to Ensure "Fair" Compensation for Intrastate Inmate Calling Services Is Not Confined to Protecting Providers.

The petitioners concede that the Commission has some ability to regulate intrastate inmate calling services. *See* Br. 42 (recognizing that the Commission's "authority [under Section 276] extends to both intrastate and interstate calls"); Corrections Br. 40 (acknowledging that "Section 276(b)(1)(A) infringes on State authority to regulate intrastate rates," albeit "in only a narrow field"). They contend, however, that the statute's directive to ensure "fair" compensation "requires the [Commission] to see to it that payphone service providers receive *at least adequate* compensation for all payphone calls (including intrastate calls)." Br. 40–41. In the petitioners' view, the statute "does not suggest that the [Commission] is empowered to regulate market rates that are already compensatory." Br. 41; *see id.* at 40–43; Corrections Br. 27 ("Section 276(b)(1)(A) is only concerned with undercompensation . . . ."). In other words, the petitioners view Section 276 as a "one-way ratchet," granting the Commission authority to correct market failures that disadvantage payphone service providers, but not those that harm consumers. *See* Br. 40–47; Corrections Br. 24–47. The petitioners' interpretation of the statute is unsound.

1. In setting forth their reading of the statute, the petitioners rely heavily on their view of the "context in which [Section 276] was adopted." Br. 42; *see* Corrections Br. 27–36. In the petitioners' view, when enacting Section 276, Congress was concerned in part with ensuring that payphone providers were compensated for their costs in providing services to complete "dial-around," or toll-free, calls. *See* Br. 42–43; Corrections Br. 31–32. Be that as it may, the authority that Congress conferred upon the Commission by the broad terms of the statute—to ensure that providers are "fairly compensated"—is not limited to that problem of undercompensation. The term "fair" is capacious and, when used to modify "compensation," invokes a broad range of considerations not limited to undercompensation. At a minimum, authorizing the Commission to ensure that providers are "fairly compensated" would be an odd and imprecise way of restricting the Commission to ensuring that providers are not undercompensated. Had undercompensation been Congress's only concern, the statute's drafters could have directed the Commission to ensure against undercompensation in so many words—or to use the provider-petitioners' proffered terms "at least adequate" or "market-based" compensation. Br. 40–41, 47.

Instead, Congress vested the Commission with the broad authority to ensure "fair" compensation. Legislative history is powerless to override the

Commission's straightforward reading of the statute's unqualified terms. *See, e.g.*, *Montanile v. Bd. of Trustees*, 136 S. Ct. 651, 661 (2016) ("[Vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text . . . ." (first alteration in original; internal 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"); *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) ("[O]ur role is not to correct the text so that it better serves the statute's purposes . . . ." (internal quotation marks omitted)).[5] And the Commission's "permissible construction" of the Communications Act is entitled to deference. *E.g.*, *Chevron*, 467 U.S. at 843.

2. The petitioners also argue that when the Communications Act "authorizes regulators to reduce rates that are unreasonably high, it does so" using the phrase "just and reasonable," rather than "fair." *See* Br. 42; Corrections Br. 28–30. But legislators often have a menu of terms available to them to achieve the same purpose, and they are not limited to a single

[5] Cases on which the corrections-petitioners rely (at Corrections Br. 33 & nn.99–100) in arguing that a statute's legislative history is determinative merely underscore the primacy of the statutory text. *See, e.g., Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) ("The question . . . is not what Congress 'would have wanted' but what Congress enacted . . . .").

formulation, however frequently employed, to realize a legislative goal. In this case, the term "fairly compensated" can permissibly be read to embody concepts of "just" or "reasonable" compensation; the terms are largely synonymous in import. *See, e.g.*, Black's Law Dictionary 1456 (10th ed. 2014) (defining "reasonable," as in "reasonable pay," to mean "[f]air, proper, or moderate under the circumstances"); *see also* Peter Huber, Michael Kellogg & John Thorne, Federal Telecommunications Law § 3.11.4 (2d ed. 1999) (explaining, in an entry on "just and reasonable rates," that there has "been much talk in this context of 'fairness' and of the need to prevent unseemly profit or price gouging").

3. Similarly, the petitioners offer no sound basis why the terms "ensure" and "compensation" (as contrasted, for example, with "regulate" and "rates") cannot reach payments that end users make as well as those that "payphone providers receive." Br. 42 (emphasis omitted); *see* Corrections Br. 26–27. In particular, the corrections-petitioners are mistaken that the term "compensation" reveals a statutory "focus[] on ensuring remuneration for payphone providers, as opposed to . . . [just] rates for consumers." Corrections Br. 26. Compensation paid *to* payphone providers is necessarily paid *by* some other party—here, inmates and their families. Indeed, this Court expressly recognized in *IPTA* that "compensation" can "encompass rates paid

by callers." 117 F.3d at 562.[6] Thus, while the agency has not previously instituted rate caps pursuant to Section 276, *see* Br. 43–44; Corrections Br. 33–36, the Commission has long recognized that "fair compensation" depends not just on the interests of payphone providers, but also on those of the paying parties, *see Order* ¶¶107 n.335, 114 n.360 (JA __, __). For example, when discussing fair compensation in 2002, the Commission stated: "Section 276 requires us to ensure that per-call compensation is fair, which implies fairness to both sides." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 21274, 21302 ¶82 (2002).[7]

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[6] To be sure, *IPTA* involved review of a Commission order that deregulated, rather than capped, local coin calling rates. In a well-functioning market, however, market-based rates are a reliable "surrogate" for cost-based pricing. *IPTA*, 117 F.3d at 560. For that reason, this Court held that "it was not unreasonable for the Commission to conclude that market forces generally will keep prices at a reasonable level." *Id.* at 562. Nonetheless, Section 276 does not require the Commission to implement a market-based compensation plan. *See id.* at 562–63. For example, as both this Court and the Commission recognized, a market-based approach may not adequately protect consumers when a payphone service provider has "obtain[ed] an exclusive contract for the provision of all payphones at an isolated location . . . and is thereby able to charge an inflated rate for local calls made from that location." *Id.*

[7] *See also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, 3258–59 ¶¶25–26 (2002) (*2002 Payphone Order*) (declining to impose a $0.90 federal surcharge on inmate calls in part based on the concern that "a national surcharge on local inmate calls would result in excessive recovery in many states and confinement facilities," and because the

The Commission's 1996 payphone orders, *see* Br. 44–45; Corrections Br. 35 & n.105, are fully consistent with the *Order* here. In 1996, the Commission held that a market-based default local coin rate, coupled with the ability for payphone service providers and long-distance carriers to negotiate different rates, was sufficient to ensure fair compensation. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233, 21268–69 ¶¶71–72 (1996) (*Payphone Reconsideration Order*). But central to that conclusion was the Commission's recognition that the long-distance carriers had sufficient bargaining power to ensure that the market-based default rate would not "overcompensate" payphone service providers. *Id.* at 21268–69 ¶71. Similarly, as already noted, *see supra* note 6, when electing in 1996 to rely on a market-based surrogate for local coin rates, the Commission simultaneously recognized that if locational monopolies were to generate excessive end-user rates, the Commission might depart from its market-based approach, *see Payphone Reconsideration Order*, 11 FCC Rcd at 20572–73 ¶¶60–61.

Commission was not convinced that such a surcharge would function as "a cost-based surrogate that [could] define cost-based 'fair' compensation for local calls" (internal quotation marks omitted)).

Contrary to the corrections-petitioners' claim (at Corrections Br. 26–27), the exception in Section 276(b)(1)(A) for "emergency calls and telecommunications relay service calls," 47 U.S.C. § 276(b)(1)(A), in no way undermines the Commission's reading of "fair compensation." The carve-out for those calls simply recognizes that emergency calls and telecommunications relay services calls (which are provided to the deaf and hard of hearing, *see* 47 U.S.C. § 225) present special cases. The exception allows the Commission to determine how (and whether) to regulate such calls separately from the "compensation plan" for payphone services generally. *Id.*; *see Order* ¶236 & nn.840, 841 (JA __) (explaining the Commission's determination that payphone service providers may not charge for such calls).

4. Finally, claims predicated on the Commission's supposed "infringe[ment] on State authority," Corrections Br. 37, are unavailing. The corrections-petitioners assert that "any rule . . . purport[ing] to affect the . . . balance" of federal and state powers "requires a clear statement before presuming Congress intended such a result." *Id.* at 38–39 (internal quotation marks omitted). Even assuming that requirement applies here, Congress has made its intent to vest authority over intrastate inmate calling services unmistakable. *See* 47 U.S.C. § 276(c), (d); *supra* p. 28.

Furthermore, contrary to the corrections-petitioners' contention (at Corrections Br. 37), the Commission has not "question[ed] the legitimacy of state and local criminal justice practices" or sought to "alter how States manage and fund programs in their jails and prisons." To begin with, the Commission's rate caps by their terms govern only inmate calling "[p]rovider[s]," not correctional facilities. *See* 47 C.F.R. § 64.6010. In addition, the Commission rejected proposals to bar inmate calling providers from continuing to pay site commissions. *See Order* ¶128 (JA __); *see also Reconsideration Order*, 2016 WL 4212506, at *13 ¶¶34–38 (declining to reconsider the *Order*'s approach to site commissions). Given the conservative cost assumptions underlying the Commission's rate caps, moreover, the rate caps will in many instances readily allow correctional authorities to continue collecting substantial commissions, which correctional authorities remain free to spend as they choose. *See Order* ¶¶128, 139 (JA __, __); *Reconsideration Order*, 2016 WL 4212506, at *6 ¶13 nn.52, 54. And finally, to whatever extent the *Order* may collaterally affect correctional authorities, it is well settled that the Commission's jurisdiction is not diminished "simply because a regulatory action" may have "consequences" for unregulated parties. *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999); *accord*

Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (*NARUC*).[8]

II. THE COMMISSION HAS JURISDICTION TO CAP FEES FOR ANCILLARY SERVICES.

The Commission's authority to limit fees for ancillary services is likewise firmly grounded in the text of Section 276 and, for interstate calls, Section 201 of the Act. 47 U.S.C. §§ 201, 276; *see Order* ¶¶193–196 (JA __–__). Neither CenturyLink nor Pay Tel challenges that view. Br. 47 n.32. The remaining provider-petitioners cannot overcome the unequivocal statutory text. *See* Br. 47–51.

Section 276 expressly defines "payphone service[s]" subject to the Commission's jurisdiction as including not just inmate calling but also "any ancillary services." 47 U.S.C. § 276(d). That language is easily broad enough to sustain the Commission's authority to regulate "services that provide necessary support for the completion of" inmate calls. *Order* ¶196 (JA __). In

[8] The corrections-petitioners' contention that Section 276 limits the Commission to regulating the provision of payphone (including inmate payphone) "equipment," not the rates for payphone calls, *see* Corrections Br. 45–46, cannot be squared with the language of the statute, *see* 47 U.S.C. § 276(b)(1)(A) (directing the Commission to ensure fair compensation for "call[s]"); *id.* § 276(d) (extending the Commission's jurisdiction to "the provision of inmate telephone service"), or this Court's decision in *IPTA*, which affirmed the Commission's authority to regulate rates for local telephone calls, *see* 117 F.3d at 561–62.

addition, Section 201(b) directs the agency to ensure the reasonableness of "[a]ll charges [and] practices . . . in connection with" interstate "communications service[s]." 47 U.S.C. § 201(b). The Commission has reasonably interpreted that provision to authorize the agency to regulate ancillary service charges for interstate inmate calls. *See Order* ¶193 & n.690 (JA __–__); *2013 Order* ¶91 (JA __–__). Again, the Commission's permissible reading of the Communications Act is entitled to *Chevron* deference. *See City of Arlington*, 133 S. Ct. at 1874–75.

The provider-petitioners first reprise their argument that Section 276(b)(1)(A) "was passed to ensure [at least] *sufficient* compensation for payphone providers"—not to guard against price gouging. Br. 48. That argument fails for the reasons already explained with respect to the Commission's intrastate rate caps. *See supra* Part I.B.

The provider-petitioners also contend (at Br. 48–49) that the Commission lacks authority to cap fees for ancillary services because Section 276(b)(1)(A) requires fair compensation only for completed "call[s]." 47 U.S.C. § 276(b)(1)(A).[9] But the Commission reasonably determined that it is

[9] This theory is difficult to reconcile with the provider-petitioners' separate contention that Section 276(b)(1)(A) obligates the Commission to ensure that payphone service providers receive at least "sufficient compensation" for ancillary services. Br. 48 (emphasis omitted).

not possible to ensure that compensation for completed calls is fair as required under Section 276—or that rates for interstate inmate calls are "just and reasonable," as required under Section 201(b), 47 U.S.C. § 201(b)—without addressing fees for services that are ancillary to such calls. *See Order* ¶¶193–196 (JA __–__). As the Commission concluded, to leave ancillary service fees unregulated would allow providers to "circumvent" the Commission's rate reforms. *Id.* ¶194 (JA __); *see id.* ¶154 (JA __) (discussing evidence that providers have exploited "ancillary service charges as a loophole" to the Commission's interim interstate rate caps).[10]

The provider-petitioners claim that the ancillary service charges addressed in the *Order* are "outside the scope of § 276(b)(1)(A)," as well as Section 201(b), because they "are for *financial transactions*—not calling services." Br. 48. That characterization is wholly uninformative. The issue is whether the fees (however they may be described) are "ancillary" to inmate calls. 47 U.S.C. § 276(d). Here, the Commission reasonably concluded—and the provider-petitioners do not appear to deny—that the very "purpose" of the

[10] *See also* Reply Comments of CenturyLink 24 (JA __) (Jan. 27, 2015) ("Ancillary fees can inflate costs for consumers and will allow circumvention of any rate caps."); Pay Tel Comments 4 (Jan. 12, 2015) (JA __) ("The record contains extensive evidence . . . that meaningful reform of [inmate calling services] requires reform of fees in addition to rates.").

regulated services is "to fund communication with inmates." *Order* ¶196 (JA __). Because ancillary services are "necessary" and "integral" to the completion of inmate calls, *id.* ¶¶194–196 (JA __–__), they fall squarely within the agency's statutory authority. The required connection between the fee and the inmate calling service, moreover, belies the provider-petitioners' claim (at Br. 50) that there is no "limiting principle" to the Commission's analysis.

III. THE *RECONSIDERATION ORDER* HAS RENDERED THE PETITIONERS' VARIOUS CHALLENGES TO THE COMMISSION'S RATE CAPS EITHER MOOT OR PREMATURE.

The petitioners also challenge the sufficiency of the Commission's rate caps and the reasonableness of how the Commission derived them. *See* Br. 19–39; Corrections Br. 47–60. As we have explained, the Commission on reconsideration has significantly increased those rate caps—by between 18 and over 40 percent. *See supra* p. 17. There is no basis for the Court to consider the provider-petitioners' arguments concerning the level of the now-superseded rate caps. This Court should likewise not undertake to review the ratemaking methodology underlying those rate caps, even though aspects of that methodology are common to both the *Order* and the *Reconsideration Order*, because the *Reconsideration Order* is not yet ripe for review.

Nonetheless, out of an abundance of caution, we briefly address questions of methodology that may pertain to both orders.

A. In Calculating the Rate Caps, the Commission Appropriately Accounted for All Legitimate Costs of Providing Inmate Calling Services.

1. The central claim of the corrections-petitioners—that the Commission unreasonably "refus[ed] to include the costs of [inmate calling services] to jails and prisons" when calculating the rate caps, Br. 47—is now moot. In the *Order* under review, the Commission determined that, given the many conservative cost assumptions underlying the rate caps, it was unnecessary to account separately for the costs of providing inmate calling services that correctional facilities, rather than inmate calling providers, might incur. *See* ¶139 (JA __). The Commission has now reconsidered that position. *See Reconsideration Order*, 2016 WL 4212506, at *6 ¶14. Relying in part on cost estimates from a national trade association representing correctional authorities, *id.* at *11 ¶28, the Commission in the *Reconsideration Order* meaningfully increased the rate caps to account separately for potential costs to facilities, *see* 2016 WL 4212506, at *8 ¶22. As a result, there can be no plausible basis for the corrections-petitioners to assert that, when calculating the rate caps, the Commission unreasonably excluded the costs to facilities of providing access to inmate calling services.

2. Both sets of petitioners also challenge the Commission's decision to exclude from its rate cap calculations the site commission payments that providers reported in the mandatory data collection, which included all payments to facilities, regardless whether those payments bore any relation to costs that facilities incurred in providing access to inmate calling services. *See* Br. 19–26; Corrections Br. 47–48, 59. According to the provider-petitioners (at Br. 19–20), all such payments are "actual costs" of providing inmate calling services. The Court should not reach that argument, which forms part of the petitioners' challenge to rates that have now been revised on reconsideration, but we preview below why the Commission disagreed.

a. The provider-petitioners' main premise is that "the payment of site commissions" is "frequently" a precondition to providing service, and that site commissions are therefore "reasonably" tied "to the provision of [inmate calling services]." Br. 20 (internal quotation marks omitted). That is not so.

To begin with, although correctional authorities may choose to award their monopoly contracts to the provider that offers the largest site commission payments, that cannot by itself transform those payments into a compensable service cost. For one thing, other than having been sought (or accepted) by correctional facilities, such payments bear no necessary relation to the actual costs of providing inmate calling services. As important, if the

Commission had to take site commission payments in their entirety as a given, that would undermine the Commission's ability to ensure that providers of intrastate inmate calling services are fairly, not excessively, compensated, *see* 47 U.S.C. § 276, and that interstate inmate calling charges are "just and reasonable," 47 U.S.C. § 201(b). The Commission would be compelled to account for whatever payments a correctional authority might seek, or an inmate calling provider might offer, no matter how far afield from actual service costs. *See Order* ¶142 (JA __). As a result, under the petitioners' logic, the Commission might be required to ensure that rates for inmate calling services are high enough to cover the construction of a new intrastate highway or county hospital. *See, e.g.*, *Order* ¶33 n.125 (JA __) (discussing Virginia's use of site commissions to fund, "among other things, roads, transportation, education, and health care"). That result cannot be reconciled with the standard ratemaking practice of disallowing costs not reasonably incurred. *See, e.g.*, *NARUC*, 475 F.3d at 1280 (recognizing that agencies routinely and appropriately "disallow recovery of costs imprudently incurred").

The provider-petitioners also have no reasonable basis to fear that correctional authorities will demand or obtain from inmate calling providers site commissions higher than the providers can recover within the

Commission's rate caps (particularly after the significant increases to those caps in the *Reconsideration Order*). As the Commission has explained, "[c]orrectional authorities have every incentive to accept whatever commissions providers can pay within the rate caps given the benefits [that inmate calling] confers on both facilities and inmates." *Reconsideration Order*, 2016 WL 4212506, at *6 ¶13 n.54; *see Order* ¶¶5, 128, 131–132, 140, 213 (JA __, __, __–__, __, __). And even should correctional authorities seek to collect higher commissions, they may be prevented from doing so by the change-of-law and *force majeure* provisions that are commonplace in inmate calling contracts. *See id.* ¶213 (JA __). Alternatively, the Commission has made clear that any inmate calling provider faced with a state requirement to pay site commissions that are not recoverable within the rate caps may move for preemption of that requirement or seek a waiver of the rate caps. *See id.* ¶¶131 n.458, 216 (JA __, __).

b. The provider-petitioners claim (at Br. 22–23) that the Commission was unreasonable to characterize site commissions as "an apportionment of profit" between inmate calling providers and correctional authorities. *E.g.*, *Order* ¶124 (JA __). But as the Commission has explained, regardless whether site commissions are "'profits' to [inmate calling] providers in the sense that [the providers] can keep these excess revenues and use them for

whatever purpose they like," site commissions are nevertheless "excess revenues above [the reasonable] cost" of providing inmate calling services. *2013 Order* ¶55 (JA __) (cited in *Order* ¶123 n.396 (JA __)).

c. Insofar as the provider-petitioners seek to portray site commissions as ordinary commercial costs by likening them to "taxes," "licensing fees," or "rent," Br. 21, such comparisons do not hold. "Taxation is a legislative function." *E.g., Nat'l Cable Television Ass'n v. U.S.*, 415 U.S. 336, 340 (1974). By contrast, site commissions are creatures of contract, *e.g., Order* ¶¶117 n.370, 119 n.379 (JA __, __), and the record does not show that any state legislature has sought to vest in correctional authorities the power to levy taxes.[11] Nor are site commissions akin to licensing fees, which serve "to reimburse the licensing agency for the cost of processing the license," *Seafarers Int'l Union v. U.S. Coast Guard*, 81 F.3d 179, 181 (D.C. Cir. 1996)), and which may not be used "to recoup . . . general costs to the Government of operating a particular regulatory scheme," *id.* at 183—let alone to recoup entirely unrelated governmental costs. Finally, unlike ordinary commercial landlords and tenants, correctional authorities face no

[11] Indeed, throughout this proceeding, parties have identified only a single state—Texas—in which site commissions are required by statute. *See Stay Denial* ¶19 (JA __); *accord* Br. 20 n.16. That outlier case cannot reasonably control how the Commission should classify site commissions in general.

substitute for access to their locations, and inmate calling providers have a captive subscriber base. Accordingly, for reasons already explained, *see supra* pp. 43–44, the provider-petitioners cannot transform site commissions into legitimate service costs by comparing them to rent.[12]

B. The Commission Lawfully Considered Industry-Wide Averages in Setting the Rate Caps.

As with the petitioners' arguments concerning facilities' costs and site commissions, it would be inappropriate for the Court to reach the provider-petitioners' challenge to the Commission's averaging methodology separate and apart from review of the Commission's revised rate caps. *See* Br. 27–29. The petitioners' arguments against averaging are unpersuasive in any event.

The provider-petitioners contend that, because the Commission accounted for providers' legitimate costs of providing inmate calling services using a weighted averaging approach, *see Order* ¶52 (JA __), the resulting

[12] The provider-petitioners also suggest (at Br. 21–22) that the Commission was obligated to explain in the *Order* why site commissions are not analogous to cable franchise fees. But because no party raised that analogy to the Commission, the agency did not have an occasion to respond to it. In any event, cable franchise fees are subject to their own, distinct statutory and regulatory framework. *See* 47 U.S.C. § 541 *et seq.*; 47 C.F.R. § 76.41. Unlike correctional facilities, franchising authorities exercise power that is legislatively conferred upon them by federal, state, or local law. *See* 47 U.S.C. § 522(10). And they are prohibited by federal law from "grant[ing] an exclusive franchise." *Id.* § 541(a)(1).

rate caps do not satisfy the "per call" and "each and every . . . call" language of Section 276, *see* Br. 27, 29 (quoting 47 U.S.C. § 276(b)(1)(A)). Nothing in the statute, however, suggests that a provider cannot be "fairly compensated" for each of its calls by reference to the average costs of providing those calls. *See Stay Denial* ¶24 & n.82 (JA __); *see also Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 58 (D.C. Cir. 2000) (upholding the Commission's use of average call volume to set rates pursuant to Section 276(b)(1)(A)); *2002 Payphone Order*, 17 FCC Rcd at 3257 ¶23 (concluding that Section 276 "does not require *every* call to make an identical contribution to shared and common cost").

Indeed, after initially arguing for a strictly literal reading of Section 276, *see* Br. 27–28, the provider-petitioners eventually concede that the statute does not require "an individual rate for every [inmate] call," Br. 29 (quoting *Stay Denial* ¶24 (JA __)). They recognize that "the statute permits generally applicable rates," Br. 29, but argue, in effect, that the Commission drew the wrong lines when crafting its four rate tiers, *see id.*

The Commission "has wide discretion" in its administrative line-drawing. *E.g.*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006) (internal quotation marks omitted). This Court has repeatedly expressed "unwilling[ness] to review line-drawing performed by the

Commission unless a petitioner can demonstrate that [the] lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem." *Id.* (alteration in original; internal quotation marks omitted). Here, the Commission carefully analyzed the many rate reform proposals in the record, including numerous proposals on how to craft rate tiers or whether instead to adopt unitary rate caps not dependent on facility type or size (as the provider-petitioners, with the exception of Pay Tel, would have favored). *See Order* ¶¶24–37 (JA __). Having done so, the Commission reasonably elected to set its rate tiers based on considerations of facility size and inmate turnover. *See id.* ¶¶33–34, 37 (JA __–__); *accord Reconsideration Order*, 2016 WL 4212506, at *2, 10 ¶¶3, 27. The Court owes deference to that decision, regardless whether, as the provider-petitioners contend, a different tiering structure would have been better. *Southwestern Bell*, 168 F.3d at 1352; *accord FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016).

IV. THE COMMISSION'S REFORMS GOVERNING FEES FOR ANCILLARY SERVICES ARE REASONABLE.

Securus, Global Tel, and Telmate also challenge aspects of the Commission's rule governing fees for ancillary services, which includes caps on fees for debit- and credit-card processing fees, a cap on fees for single-call services, and limits on the types of ancillary services for which inmate calling providers may assess fees. *See* Br. 51–54; Securus Br. 3–6.

We note that when increasing the per-minute rate caps in the *Reconsideration Order*, the Commission did not amend the rule on ancillary service charges. But because the cap on fees for single-call services depends in part on the governing "per-minute rate" for the associated call, 47 C.F.R. § 64.6020(b)(2), reviewing that portion of the rule on ancillary service charges will require the Court to take account of the Commission's revised rate caps. The Court should thus dismiss as moot (or at a minimum wait to decide) the complaining providers' challenge to the Commission's cap on fees for single-call services. In any event, as explained further below, all of the limitations that the Commission has imposed on fees for ancillary services are reasonable.

A. The Cap on Fees for Single-Call Services Is Reasonable.

Securus, Global Tel, and Telmate challenge the Commission's cap on fees for single-call services (which they call "premium billing options"). *See* Br. 52–53; Securus Br. 5–6. Assuming the Court does not dismiss their claim as moot or defer its resolution, the Court should reject it as unavailing.

Single-call services allow inmate calling providers to bill certain collect calls—for example, to wireless phones—using third-party billing entities. *See Order* ¶182 (JA __). While recognizing that such services can "facilitate communications between inmates and their loved ones," *id.* ¶161

(JA __), the Commission also highlighted the abundant record evidence that single-call services have been a source of "substantial" abuse and consumer confusion, *id.* ¶182 (JA __); *see id.* ¶¶186, 189 (JA __, __). For example, the record showed that single-call service charges are often over 300 percent higher than the Commission's interim interstate rate caps. *Id.* ¶185 (JA __); *see also id.* ¶182 n.651 (JA __) (citing evidence of "rates upwards of $1.00 per minute" for single-call services). One consumer reported agreeing to pay "$2.39 for the first minute plus zero cents per minute up to the max call time of 15 minutes" to receive a call from "a panicked loved one who was in jail," only to eventually receive a bill for more than four times that amount. *Id.* ¶182 n.652 (JA __). The Commission acted to prevent such charges 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 (JA __).

Securus, Global Tel, and Telmate contend that "providers incur both external and internal costs for single-call service[s] and must make large, up-front investments to add these services to their call options." Br. 53. But when the Commission asked inmate calling providers to set forth what, if any, "additional costs [they incur] in providing single call services," *2014 NPRM* ¶99 (JA __), they failed to do so. Securus was the only provider to

make any effort to identify such costs, and it merely estimated its initial investment "to develop the [necessary] software and billing arrangements." Securus Br. 6. In any event, neither Securus nor any other provider has demonstrated that it cannot recover such costs within the Commission's per-minute rate caps, *see* 47 C.F.R. § 64.6020(b)(2), even before the Commission increased those caps on reconsideration, *see Reconsideration Order*, 2016 WL 4212506, at *2 ¶3.

B. The Record Supports the Commission's Caps on Credit- and Debit-Card Processing Fees.

The complaining providers also argue that the Commission's caps on fees for the processing of debit- and credit-card payments—$3.00 per transaction for automated processing and $5.95 per transaction for processing by a live agent, *see Order* ¶163 tbl. 4 (JA __)—lack adequate support in the record. *See* Br. 51–52; Securus Br. 3–5. Contrary to that claim, numerous commenters—including CenturyLink and Pay Tel (who do not join the complaining providers' challenge to the Commission's rule governing ancillary service charges)—told the Commission that those caps would allow providers to recover their reasonable costs of processing such payments. *See Order* ¶¶167–168 (JA __–__); *see also id.* ¶164 (JA __) (observing that the highest cost reported for live-agent transactions in response to the mandatory data collection was $5.26). Consistent with that record, neither Global Tel nor

Telmate has asserted or shown, whether here or before the Commission, that they cannot recover their costs within those caps. *See* Br. 51–52.[13]

Only Securus contends that its costs exceed what the Commission's caps on fees for debit- and credit-card payments allow, *see* Securus Br. 3–5, and Securus does not persuasively substantiate that claim. Notably, Securus fails to differentiate between the costs of automated and live-agent processing, *see id.* at 3–4, claiming for both types of services high costs including "internal labor," *id.* at 3, that should not apply to automated transactions. In addition, Securus offers no explanation for why its asserted costs for "internal processing," bad debt, and payments to third-party vendors reasonably exceed those of other providers. *See id.* at 3–4. It was thus neither "[a]rbitrary" nor otherwise "unlawful," Br. 51, for the Commission to treat Securus's asserted costs as those of an "outlier," *Order* ¶167 (JA __); *see also Domestic Secs., Inc. v. SEC*, 333 F.3d 239, 249 (D.C. Cir. 2003) (explaining that this Court gives deference to agencies in "[t]he making of policy decisions and the resolution of conflicting evidence," and that "the possibility

[13] That failure is telling because the Commission had specifically directed providers to submit their costs of furnishing such ancillary services, as well as to discuss how the proposed caps of $3.00 and $5.95 for processing debit- and credit-card transactions "compare to providers' costs." *2014 NPRM* ¶94 (JA __); *see 2013 Order* ¶125 (JA __).

of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" (internal quotation marks omitted)).

C. The Commission's Rule Leaves Room for Innovation.

Finally, Securus, Global Tel, and Telmate fail to show that the Commission's decision to limit the number of allowable ancillary service charges will "prevent development of new and better services." Br. 54. The Commission broadly defined the permissible categories of ancillary service charges without regard to the technology used, thereby leaving substantial flexibility for innovation. Providers wishing to adopt new categories of charges, moreover, may seek the Commission's approval to do so by means of a waiver or petition for rulemaking.

The Commission was concerned that "ancillary service charges [could function] as a loophole" that providers would exploit "to increase revenues and" circumvent the Commission's rate caps. *Order* ¶154 (JA __). Without limiting the allowable categories of ancillary service charges, the Commission feared, "providers [could] evade any limitation on a particular ancillary service charge simply by changing its name." *Id.* ¶153 (JA __); *accord Stay Denial* ¶51 (JA __). The Commission reasonably limited the

number of approved categories of ancillary fees to retain control over the nature of such charges.

V. THE CLAIMS SPECIFIC TO INDIVIDUAL PROVIDERS ARE MERITLESS.

The remaining three claims unique to individual providers are unfounded. *See* Br. 54–62.

A. Securus's Challenge to the Commission's Reporting Requirements Is Not Yet Ripe.

Securus challenges provisions of the Commission's annual reporting and certification requirement that direct inmate calling providers to furnish information regarding their site commission payments and their rates and charges for video visitation services. *See* Br. 54–57 (challenging 47 C.F.R. § 64.6060(a)(3) & (4)). Under the Paperwork Reduction Act, 44 U.S.C. §§ 3501–3520, agencies must submit plans for "information collections" such as these to OMB, "which can approve, disapprove, or 'instruct the agency to make substantive or material change,'" *CTIA-The Wireless Ass'n v. FCC*, 530 F.3d 984, 987 (D.C. Cir. 2008) (quoting 44 U.S.C. § 3507(e)(1)). "OMB must 'provide at least 30 days for public comment prior to making a decision.'" *Id.* (quoting 44 U.S.C. § 3507(b)).

The reporting requirements about which Securus complains have not yet been approved by OMB. As such, this claim "rests upon contingent future

events that may not occur as anticipated, or indeed may not occur at all." *CTIA*, 530 F.3d at 987 (internal quotation marks omitted). In addition, unless and until the reporting requirements take effect, Securus is "not required to engage in, or to refrain from, any conduct." *Id.* at 989 (internal quotation marks omitted). The challenge Securus brings to the Commission's reporting requirements is therefore "unripe" and should be held "in abeyance pending OMB's decision." *Id.* at 987.

Ripeness considerations aside, Securus's arguments are unpersuasive. Contrary to what Securus contends (at Br. 54–55), the Commission was not required to refrain from collecting information on video visitation services until first determining that such services are "inmate telephone service[s]" within the meaning of the Act. 47 U.S.C. § 276(d). "Video 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 (JA __). That marketplace development presents a matter of reasonable regulatory inquiry. If nothing else, there is the obvious question of whether video visitation charges—to the extent they are not already subject to the Commission's rules, *see Order* ¶304 (JA __)—should be regulated in the future, either as a form of inmate calling service, *see Order* ¶¶296 n.1029, 298 (JA __–__), or as a means of preventing inmate

calling providers from circumventing the Commission's exercise of its authority to ensure that rates for traditional inmate calling services are just, reasonable, and fair, *see id.* ¶¶ 296, 304 (JA __, __); *see* 47 U.S.C. §§ 201(b), 276.

At a minimum, as the Commission reasonably recognized, "because the [inmate calling] industry is modernizing and will continue to change," effective regulation of traditional inmate calling services demands that the agency track "trends or changes in calling patterns," including how the use of video visitation services affects those patterns. *Order* ¶266 (JA __). If the Commission had no authority to obtain information on the provision of video visitation services, it would be hindered in its ability to monitor developments in "an important segment of the marketplace" for traditional inmate calling, which the agency unquestionably may regulate. *Cellco P'ship v. FCC*, 357 F.3d 88, 102 (D.C. Cir. 2004).

Likewise, the Commission reasonably required inmate calling providers to report the "[m]onthly amount of each Site Commission paid." 47 C.F.R. § 64.6060(a)(3). Reading the Commission's reporting requirement

alongside the definition of "site commission" in 47 C.F.R. § 64.6000(t),[14] Securus claims to fear that the Commission will expect inmate calling providers to disclose any sales tax that a "city, county, or state where a [correctional] facility is located" might collect from providers for ordinary commercial purchases (e.g., "coffee and donuts" a provider buys for "its own employees"). Br. 56 (internal quotation marks omitted).

Securus's concern is baseless. As Securus concedes (at Br. 56), the Commission's definition of site commission cannot be divorced from the broader context of the *Order*. And the *Order* makes clear that site commissions are incentive payments designed to influence a correctional authority's selection of its monopoly service provider, not a form of ordinary tax. *See* ¶¶117 & n.372, 118 n.375, 119, 122 & n.392, 123 (JA __–__) (discussing the nature of site commissions); *supra* p. 46 (distinguishing site commissions from ordinary taxes); *see also Reconsideration Order*, 2016 WL

[14] The rule defines "site commission" as "any form of monetary payment, in-kind payment, gift, exchange of services or goods, fee, technology allowance, or product that a Provider of Inmate Calling Services or affiliate of [a] Provider of Inmate Calling Services may pay, give, donate, or otherwise provide to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide [inmate calling services], a governmental agency that oversees a correctional facility, the city, county, or state where a facility is located, or an agent of any such facility." 47 C.F.R. § 64.6000(t).

4212506, at *12 ¶31 n.129 ("As the [*Order*] makes clear, we distinguish between . . . taxes and fees and site commission payments.").

B. The Record Did Not Support Pay Tel's Call for Blanket Preemption of State-Imposed Intrastate Rate Caps.

According to Pay Tel, "[t]he *Order* violates § 276 because it fails to preempt inconsistent state rate regulations"—in particular "those that impose below cost rate caps." Br. 57. The Commission reasonably determined that the record before it did not warrant the blanket preemption that Pay Tel proposed. *See Order* ¶210 (JA __).[15]

1. Under Section 276(c), the Commission "shall preempt" state requirements that are "inconsistent" with the Commission's rules. 47 U.S.C. § 276(c). Here, the Commission developed "conservative" rate caps "as a

[15] Pay Tel similarly contends that the Commission was required to make an express determination that state regulations allowing inmate calling providers to charge a flat rate for local calls irrespective of their duration are preempted. *See* Br. 57. That claim is not properly before the Court, because Pay Tel did not raise it before the Commission. *See* 47 U.S.C. § 405(a). Although encouraging the Commission to ban flat-rate calling, *see* Pay Tel Reply Comments 53–54 (JA __–__) (Jan. 27, 2015), Pay Tel nowhere stated that adopting such a ban would in turn require the Commission to declare separately that state regulations allowing flat-rate calling are preempted, *see, e.g.*, Pay Tel Comments ii, 3–4, 7 & n.21, 49–55 (JA __, __–__, __–__) (nowhere referencing flat-rate calling when arguing for preemption). Insofar as Pay Tel now believes that states have in place rules requiring or permitting flat-rate calling, Pay Tel may petition for preemption of those rules. *Order* ¶211 (JA __).

backstop to ensure" that rates for inmate calling services are just, reasonable, and "do not take unfair advantage of inmates or their families." *Order* ¶210 (JA __). As the Commission found, the record contained "no credible . . . evidence demonstrating or indicating that any requirements that result in rates below [those] caps are so low as to clearly deny providers fair compensation." *Id.* To the contrary, "[e]vidence in the record" showed that the cost of providing inmate calling services may often fall well below the Commission's caps. *Id.*; *see id.* ¶¶19, 49, 63, 128, 131 (JA __, __, __, __, __). Accordingly, the Commission rejected Pay Tel's categorical claim that, "by definition," any "state-imposed intrastate rates that are below the adopted caps" are "inconsistent" with the Commission's rules. *Id.* ¶210 (JA __) (internal quotation marks omitted); *see id.* ¶211 & n.753 (JA __).

The Commission's refusal to declare blanket preemption of all state rate requirements lower than the rate caps adopted in the *Order* was sensible and, contrary to Pay Tel's assertion here (at Br. 59), did not "abdicate[]" the agency's role under Section 276(c). The Commission expressly affirmed its "authority to preempt state requirements that are inconsistent with [its] rules." *Order* ¶204 (JA __). The *Order* makes clear, moreover, that if inmate calling providers believe they are subject to "intrastate requirements that result in [their] being unable to receive fair compensation," they may seek preemption,

or a waiver, from the Commission on a case-by-case basis. ¶211 (JA __); *see id.* ¶212 (JA __).

Pay Tel's suggestion (at Br. 59) that the Commission seeks to "rely on a waiver process to evade its obligations under § 276" is unfounded. The *Order* provides that, if inmate calling providers petition for preemption of state requirements and establish that those requirements are inconsistent with the Commission's rules, the Commission will exercise its preemption authority under Section 276(c). *See Order* ¶211 (JA __). The availability of a waiver process as a possible alternative to seeking preemption does not undermine the Commission's commitment to apply Section 276(c). Nor was it unreasonable to recognize that providers may avoid the need for Commission intervention by seeking relief from state legislative, regulatory, or correctional authorities in the first instance. *See id.* ¶¶211 n.752, 212 n.755 (JA __).

2. Although Pay Tel makes general arguments about preempting "inconsistent state regulations" at large, Br. 57, its real grievance appears to be that the Commission should have preempted particular state requirements in Pay Tel's service area, which Pay Tel contends are "below-cost," Br. 58; *see id.* at 58–59. In support of that claim, Pay Tel relies heavily on a 2014 order of the Commission's Wireline Competition Bureau, in which the

Bureau found that Pay Tel was then subject to intrastate rate caps below the company's average costs of providing inmate calling services. *See Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 1302, 1310 ¶15 (JA __) (Wireline Comp. Bur. 2014) (*Pay Tel Waiver Order*) (cited at Br. 58–59). That determination, of course, preceded the rate reforms adopted in the *Order* (and later revised on reconsideration). The Commission thus appropriately required Pay Tel (and inmate calling providers generally) to make a specific showing of inconsistency with the Commission's newly adopted rules before exercising its preemption authority under Section 276(c). *See Order* ¶211 (JA __). The Commission's approach was particularly sensible given the possibility that states with below-cost intrastate rate caps would elect to increase them in view of the *Order*, thereby avoiding any need for providers to seek federal preemption. *See id.* ¶¶211, 212 n.755 (JA __).

3. Finally, Pay Tel's complaint (at Br. 59) that the Commission has not yet resolved the company's petition to extend the temporary relief afforded in the *Pay Tel Waiver Order* does not provide evidence that the Commission's waiver process is ineffective. Pay Tel filed its petition to extend that relief on October 31, 2014, less than two weeks before the temporary waiver granted in the *Pay Tel Waiver Order* was set to expire on November 11, 2014. *See Pay Tel Waiver Order* ¶22 (JA __). At the time, the Commission had just

released the *2014 NPRM* and was starting its work on the comprehensive reforms of the present *Order*. It was well within the Commission's discretion to prioritize those industry-wide efforts—and subsequent work to implement and defend the *Order*'s reforms—over the resolution of Pay Tel's individual concerns. *See, e.g.*, *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987) ("An agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing"); *see also Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) ("hesita[ting] to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others").

C. Pay Tel Has Shown No Prejudice from the Commission's Treatment of Confidential Information.

Pay Tel's final individual claim concerns requests by the company's outside counsel for "confidential cost information" submitted in the mandatory data collection. Br. 60. Pay Tel's outside counsel ultimately obtained access to the data in question, but because Securus, Global Tel, and Telmate objected to those requests, access was not provided until after the Commission issued the *Order*. *See Rates for Interstate Inmate Calling Services*, 31 FCC Rcd 2352, 2363 ¶29 (JA __) (2016) (*March 2016 Order*). In the meantime, however, Pay Tel's outside economic consultant had access to the requested data. *See id.* ¶15 (JA __).

Pay Tel contends that by "fail[ing] to adjudicate" the objections to access by its outside counsel "in a timely fashion," Br. 61, the Commission "violated Pay Tel's due-process rights and right to counsel," *id.* at 60. Pay Tel nowhere explains, however, how it was harmed by that asserted violation.

Pay Tel complains (at Br. 60–61) that it was "[p]rejudicial [e]rror" for the Commission to grant the company's outside counsel access to the confidential information in question only "*after* issuance of the *Order*" on review here. But Pay Tel's outside counsel has now had access to that information for many months, and it identifies no aspect of its advocacy that would have changed had its counsel been able to access the information in question sooner. *See* Br. 60–62. Pay Tel asserts vaguely (at Br. 62) that it "was forced to make decisions concerning its legal rights in a vacuum," but that broad statement cannot establish prejudice in the circumstances of this case. Pay Tel and its counsel remained at all times free to confer generally with Pay Tel's outside economic advisor, who did have access to the relevant information prior to the *Order*, and Pay Tel's counsel had direct access to the information during the period in which the Commission was considering the *Reconsideration Order*.

Finally, contrary to what Pay Tel implies (at Br. 62), the Commission itself made no finding of prejudice when it ultimately granted Pay Tel's

outside counsel access to the requested information. The Commission reaffirmed in the *March 2016 Order* that allowing outside counsel, as a category, to review confidential information subject to protective order serves the public interest. *See* ¶¶22–23 (JA __). But the Commission expressly declined to consider the actual, particular need of Pay Tel's outside counsel for the requested information. *See id.* ¶24 (JA __). The Commission held simply that counsel was eligible to review the information under the terms of the governing protective order. *See id.* ¶26 (JA __).

CONCLUSION

For all of the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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September 12, 2016

IN THE UNITED STATES 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.	NOS. 15-1461, 15-1498, 16-1012, 16-1029, 16-1038, 16-1046, 16-1057

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 14,196 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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September 12, 2016

STATUTORY ADDENDUM

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UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTHER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under

direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. § 201

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules

and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 276

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART III. SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

§ 276. Provision of payphone service

(a) Nondiscrimination safeguards

After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service--

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) Regulations

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that--

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on February 8, 1996, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) Public interest telephones

In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(3) Existing contracts

Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of February 8, 1996.

(c) State preemption

To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

(d) “Payphone service” defined

As used in this section, the term “payphone service” means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

47 U.S.C. § 522

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART I. GENERAL PROVISIONS

§ 522. Definitions

For purposes of this subchapter--

(1) the term "activated channels" means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use;

(2) the term "affiliate", when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;

(3) the term "basic cable service" means any service tier which includes the retransmission of local television broadcast signals;

(4) the term "cable channel" or "channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

(5) the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

(6) the term "cable service" means--

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

(7) the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system;

(8) the term "Federal agency" means any agency of the United States, including the Commission;

(9) the term "franchise" means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 546 of this title), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;

(10) the term "franchising authority" means any governmental entity empowered by Federal, State, or local law to grant a franchise;

(11) the term "grade B contour" means the field strength of a television broadcast station computed in accordance with regulations promulgated by the Commission;

(12) the term "interactive on-demand services" means a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider;

(13) the term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;

(14) the term "other programming service" means information that a cable operator makes available to all subscribers generally;

(15) the term "person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity;

(16) the term "public, educational, or governmental access facilities" means--

(A) channel capacity designated for public, educational, or governmental use; and

(B) facilities and equipment for the use of such channel capacity;

(17) the term "service tier" means a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator;

(18) the term "State" means any State, or political subdivision, or agency thereof;

(19) the term "usable activated channels" means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission; and

(20) the term "video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

47 U.S.C.A. § 541

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART III. FRANCHISING AND REGULATION

§ 541. General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title for failure to comply with this subsection.

* * * * * *

47 C.F.R. § 64.6000

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 64. MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
SUBPART FF. INMATE CALLING SERVICES

§ 64.6000 Definitions.

As used in this subpart:

(a) Ancillary Service Charge means any charge Consumers may be assess for the use of Inmate Calling services that are not included in the per-minute charges assessed for individual calls. Ancillary Service Charges that may be charged include the following. All other Ancillary Service Charges are prohibited.

(1) Automated Payment Fees means credit card payment, debit card payment, and bill processing fees, including fees for payments made by interactive voice response (IVR), web, or kiosk;

(2) Fees for Single–Call and Related Services means billing arrangements whereby an Inmate's collect calls are billed through a third party on a per-call basis, where the called party does not have an account with the Provider of Inmate Calling Services or does not want to establish an account;

(3) Live Agent Fee means a fee associated with the optional use of a live operator to complete Inmate Calling Services transactions;

(4) Paper Bill/Statement Fees means fees associated with providing customers of Inmate Calling Services an optional paper billing statement;

(5) Third–Party Financial Transaction Fees means the exact fees, with no markup, that Providers of Inmate Calling Services are charged by third parties to transfer money or process financial transactions to facilitate a Consumer's ability to make account payments via a third party.

(b) Authorized Fee means a government authorized, but discretionary, fee which a Provider must remit to a federal, state, or local government, and which a Provider is permitted, but not required, to pass through to Consumers. An Authorized Fee may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation.

(c) Average Daily Population (ADP) means the sum of all inmates in a facility for each day of the preceding calendar year, divided by the number of days in the year. ADP shall be calculated in accordance with § 64.6010(e) and (f);

(d) Collect Calling means an arrangement whereby the called party takes affirmative action clearly indicating that it will pay the charges associated with a call originating from an Inmate Telephone;

(e) Consumer means the party paying a Provider of Inmate Calling Services;

(f) Correctional Facility or Correctional Institution means a Jail or a Prison;

(g) Debit Calling means a presubscription or comparable service which allows an Inmate, or someone acting on an Inmate's behalf, to fund an account set up though a Provider that can be used to pay for Inmate Calling Services calls originated by the Inmate;

(h) Flat Rate Calling means a calling plan under which a Provider charges a single fee for an Inmate Calling Services call, regardless of the duration of the call;

(i) Inmate means a person detained at a Jail or Prison, regardless of the duration of the detention;

(j) Inmate Calling Service means a service that allows Inmates to make calls to individuals outside the Correctional Facility where the Inmate is being held, regardless of the technology used to deliver the service;

(k) Inmate Telephone means a telephone instrument, or other device capable of initiating calls, set aside by authorities of a Correctional Facility for use by Inmates;

(l) International Calls means calls that originate in the United States and terminate outside the United States;

(m) Jail means a facility of a local, state, or federal law enforcement agency that is used primarily to hold individuals who are;

(1) Awaiting adjudication of criminal charges;

(2) Post-conviction and committed to confinement for sentences of one year or less; or

(3) Post-conviction and awaiting transfer to another facility. The term also includes city, county or regional facilities that have contracted with a private company to manage day-to-day operations; privately-owned and operated facilities primarily engaged in housing city, county or regional inmates; and facilities used to detain individuals pursuant to a contract with U.S. Immigration and Customs Enforcement;

(n) Mandatory Tax or Mandatory Fee means a fee that a Provider is required to collect directly from Consumers, and remit to federal, state, or local governments;
(o) Per–Call, or Per–Connection Charge means a one-time fee charged to a Consumer at call initiation;

(p) Prepaid Calling means a presubscription or comparable service in which a Consumer, other than an Inmate, funds an account set up through a Provider of Inmate Calling Services. Funds from the account can then be used to pay for Inmate Calling Services, including calls that originate with an Inmate;

(q) Prepaid Collect Calling means a calling arrangement that allows an Inmate to initiate an Inmate Calling Services call without having a pre-established billing arrangement and also provides a means, within that call, for the called party to establish an arrangement to be billed directly by the Provider of Inmate Calling Services for future calls from the same Inmate;

(r) Prison means a facility operated by a territorial, state, or federal agency that is used primarily to confine individuals convicted of felonies and sentenced to terms in excess of one year. The term also includes public and private facilities that provide outsource housing to other agencies such as the State Departments of Correction and the Federal Bureau of Prisons; and facilities that would otherwise fall under the definition of a Jail but in which the majority of inmates are post-conviction or are committed to confinement for sentences of longer than one year;

(s) Provider of Inmate Calling Services, or Provider means any communications service provider that provides Inmate Calling Services, regardless of the technology used;

(t) Site Commission means any form of monetary payment, in-kind payment, gift, exchange of services or goods, fee, technology allowance, or product that a Provider of Inmate Calling Services or affiliate of an Provider of Inmate Calling Services may pay, give, donate, or otherwise provide to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide ICS, a governmental agency that oversees a correctional facility, the city, county, or state where a facility is located, or an agent of any such facility.

47 C.F.R. § 64.6010

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 64. MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
SUBPART FF. INMATE CALLING SERVICES

§ 64.6010 Inmate Calling Services rate caps.

(a) No Provider shall charge, in the Jails it serves, a per-minute rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of:

(1) $0.22 in Jails with an ADP of 0–349;

(2) $0.16 in Jails with an ADP of 350–999; or

(3) $0.14 in Jails with an ADP of 1,000 or greater.

(b) No Provider shall charge, in any Prison it serves, a per-minute rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of:

(1) $0.11;

(2) [Reserved]

(c) No Provider shall charge, in the Jails it serves, a per-minute rate for Collect Calling in excess of:

Size and type of facility	Debit/prepaid rate cap per MOU	Collect rate cap per MOU as of June 20, 2016	Collect rate cap per MOU as of July 1, 2017	Collect rate cap per MOU as of July 1, 2018
0-349 Jail ADP	$0.22	$0.49	$0.36	$0.22
350-999 Jail ADP	0.16	0.49	0.33	0.16
1,000+ Jail ADP	0.14	0.49	0.32	0.14

(d) No Provider shall charge, in the Prisons it serves, a per-minute rate for Collect Calling in excess of:

(1) $0.14 after March 17, 2016;

(2) $0.13 after July 1, 2017; and

(3) $0.11 after July 1, 2018, and going forward.

(e) For purposes of this section, the initial ADP shall be calculated, for all of the Correctional Facilities covered by an Inmate Calling Services contract, by summing the total number of inmates from January 1, 2015, through January 19, 2016, divided by the number of days in that time period;

(f) In subsequent years, for all of the correctional facilities covered by an Inmate Calling Services contract, the ADP will be the sum of the total number of inmates from January 1st through December 31st divided by the number of days in the year and will become effective on January 31st of the following year.

47 C.F.R. § 64.6020

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 64. MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
SUBPART FF. INMATE CALLING SERVICES

§ 64.6020 Ancillary Service Charge.

(a) No Provider shall charge an Ancillary Service Charge other than those permitted charges listed in § 64.6000.

(b) No Provider shall charge a rate for a permitted Ancillary Service Charge in excess of:

(1) For Automated Payment Fees—$3.00 per use;

(2) For Single–Call and Related Services—the exact transaction fee charged by the third-party provider, with no markup, plus the adopted, per-minute rate;

(3) For Live Agent Fee—$5.95 per use;

(4) For Paper Bill/Statement Fee—$2.00 per use;

(5) For Third–Party Financial Transaction Fees—the exact fees, with no markup that result from the transaction.

47 C.F.R. § 64.6030

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 64. MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
SUBPART FF. INMATE CALLING SERVICES

§ 64.6030 Inmate Calling Services interim rate cap.

No Provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. These interim rate caps shall sunset upon the effectiveness of the rates established in § 64.6010.

47 C.F.R. § 64.6060

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 64. MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
SUBPART FF. INMATE CALLING SERVICES

§ 64.6060 Annual reporting and certification requirement.

(a) Providers must submit a report to the Commission, by April 1st of each year, regarding interstate, intrastate, and international Inmate Calling Services for the prior calendar year. The report shall be categorized both by facility type and size and shall contain:

(1) Current interstate, intrastate, and international rates for Inmate Calling Services;

(2) Current Ancillary Service Charge amounts and the instances of use of each;

(3) The Monthly amount of each Site Commission paid;

(4) Minutes of use, per-minute rates and ancillary service charges for video visitation services;

(5) The number of TTY–based Inmate Calling Services calls provided per facility during the reporting period;

(6) The number of dropped calls the reporting Provider experienced with TTY–based calls; and

(7) The number of complaints that the reporting Provider received related to e.g., dropped calls, poor call quality and the number of incidences of each by TTY and TRS users.

(b) An officer or director of the reporting Provider must certify that the reported information and data are accurate and complete to the best of his or her knowledge, information, and belief.

Texas Code Ann. § 495.027

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
GOVERNMENT CODE
TITLE 4. EXECUTIVE BRANCH
SUBTITLE G. CORRECTIONS
CHAPTER 495. CONTRACTS FOR CORRECTIONAL FACILITIES AND SERVICES
SUBCHAPTER B. MISCELLANEOUS CONTRACTS FOR CORRECTIONAL FACILITIES AND SERVICES

§ 495.027. Inmate Pay Telephone Service

(a) The board shall request proposals from private vendors for a contract to provide pay telephone service to eligible inmates confined in facilities operated by the department. The board may not consider a proposal or award a contract to provide the service unless under the contract the vendor:

(1) provides for installation, operation, and maintenance of the service without any cost to the state;

(2) pays the department a commission of not less than 40 percent of the gross revenue received from the use of any service provided;

* * * * * *

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 September 12, 2016, I electronically filed the foregoing Brief for Respondents' 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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