UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECURUS TECHNOLOGIES, INC., et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 16-1321 and consolidated cases

OPPOSITION OF THE RESPONDENTS TO MOTIONS FOR STAY

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October 13, 2016

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GLOSSARY

FCC	Federal Communications Commission
GTL	Global Tel*Link
NSA	National Sheriffs' Association

Respondents the Federal Communications Commission (FCC) and the United States of America oppose the motions for a stay pending judicial review of the FCC's modified rate caps governing calling services for inmates at prisons and jails.

The FCC first adopted inmate calling rate reforms—on an interim basis, and governing only interstate calls—in 2013. *See Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) (*2013 Order*), *petitions for review pending in Securus Techs., Inc. v. FCC*, Nos. 13-1280 et al. (D.C. Cir.). In 2015, with the benefit of a more fully developed record, the FCC adopted a new, more comprehensive framework of long-term reforms to govern both interstate and intrastate inmate calls. *See Rates for Interstate Inmate Calling Services*, 30 FCC Rcd 12763 (2015) (*2015 Order*), *petitions for review pending in Global Tel*Link v. FCC*, Nos. 15-1461 et al. (D.C. Cir.) (*GTL*). In the reconsideration order now under review, the FCC significantly increased the rate caps adopted in the *2015 Order* to take better account of inmate calling costs that may be incurred by correctional facilities. *See Rates for Interstate Inmate Calling Services*, FCC 16-102, 2016 WL 4212506 (Aug. 9, 2016) (*Order*).

In 2014, the Court stayed three rules adopted in the *2013 Order* as to which inmate calling provider Global Tel*Link (GTL) had argued there was inadequate administrative notice. The Court did not otherwise stay the *2013 Order*, allowing

the FCC's interim backstop rate caps for interstate calls to take effect. *See* Order, *Securus* at 1 (D.C. Cir. Jan. 13, 2014) (per curiam) (*January 2014 Order*). In March 2016, the Court stayed the *2015 Order*'s rate caps, which parties had argued were too low, for both intrastate and interstate calls. *See* Order, *GTL* at 1 (D.C. Cir. Mar. 7, 2016) (per curiam) (*March 7 Order*). Later, when parties argued that the FCC had not intended the *2015 Order* to expand the scope of the 2013 interim backstop rate caps—which were readopted in the *2015 Order* to remain effective until the new rate caps could come into force—the Court also stayed the application of those caps to intrastate calls. *See* Order, *GTL* at 1 (D.C. Cir. Mar. 23, 2016) (per curiam) (*March 23 Order*). But the Court otherwise allowed the *2015 Order* to take effect, including a ban on flat-rate calling as applied to intrastate calls and limits on charges for services "ancillary" to intrastate calls.

The petitioners contend that the Court's partial stays of the FCC's earlier orders warrant an automatic stay of the *Order* here. But this *Order* is materially different from those prior orders: By expressly accounting for inmate calling-related costs incurred by correctional facilities, it significantly increases the applicable interstate and intrastate rate caps in a manner that benefits both inmate calling providers and correctional facilities. The Court's partial stays of lower rate caps adopted in prior FCC orders does not alter the petitioners' burden to justify the extraordinary remedy of a stay with respect to the present *Order*.

The petitioners fail to meet their burden to justify a stay. The Communications Act obliges the FCC to ensure that inmate calling providers are "fairly compensated" for inmate calling services. 47 U.S.C. § 276(b)(1)(A); *see id.* § 201(b). In the *Order* under review, the agency found that the inmate calling rate caps, as now modified, fairly account for the costs incurred by inmate calling providers and correctional facilities in furnishing inmate calling services. To whatever extent providers or facilities may lose revenue under the *Order*, the FCC reasonably determined that ensuring fair compensation for inmate calls does not obligate the agency to rubber stamp rates at levels above and beyond the legitimate costs of providing service, including reasonable payments to correctional facilities and a reasonable rate of return for providers. And the possibility of lost revenue to providers and facilities is far outweighed by the harm to the public interest that would result from a stay of the *Order*—in particular to inmates and their families, who have for far too long been constrained to pay exorbitant inmate calling rates.

Contrary to GTL's contention (at Mot. 4), the FCC has not engaged in "gamesmanship" by modifying its rate caps on reconsideration. Indeed, an "agency . . . must consider . . . the wisdom of its policy on a continuing basis." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (first alteration in original; quotation marks omitted). Here, reflecting on the record developed in response to a petition for reconsideration, the FCC found it appropriate

to increase the rate caps to better account for inmate calling costs that may be incurred by correctional facilities, while ensuring that inmate calling providers are fairly compensated. That was not gamesmanship but responsible decisionmaking.

The FCC's rate caps, as modified in the *Order*, should not be stayed.

BACKGROUND

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

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

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

Inmate calling is "a prime example of market failure." *2015 Order* ¶2. Providers do not compete for end users—the inmates and their families who pay for

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[1] Likewise, the FCC must ensure that "charges . . . for and in connection with" interstate inmate calling services are not "unjust or unreasonable." *Id.* § 201(b).

calls. Rather, providers compete for exclusive contracts to serve a given facility. Many correctional facilities grant that monopoly franchise based primarily on providers' offers to make payments known as "site commissions," which facilities use "mainly to fund a wide and disparate range of activities . . . unrelated to the costs of providing [inmate calling]." *Id.* ¶127. Providers accordingly compete to offer the highest such payments, which leads to correspondingly higher charges for end users. *Id.* ¶¶117–118. Market forces fail to keep those charges in check.

High rates for inmate calling deter communication between inmates and their families, with substantial and damaging social consequences. Inmates' families may be forced to choose between putting food on the table or paying hundreds of dollars each month to keep in touch with their incarcerated loved ones. *2015 Order* ¶3. Barriers to communication from high inmate calling rates foster recidivism, with significant costs to taxpayers. *Id.* ¶¶3–4. And when incarcerated parents lack regular contact with their children, those children—2.7 million of them nationwide—have higher rates of depression and poor school performance. *Id.* ¶3 & n.18. In short, excessive inmate calling rates cause considerable societal harm.

C. *2013 Order*.

More than 12 years ago, an individual named Martha Wright, whose grandson was then incarcerated, led a group of inmates and family members (who became known the "Wright Petitioners") in asking the FCC for relief from exorbitant

inmate calling rates. The FCC initiated a rulemaking in 2012 to address the Wright Petitioners' proposals and the "significant comment" they had generated. *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, 16629 ¶1 (2012).

In response, inmate calling providers gave the agency only limited data concerning their costs. Even so, the record showed a pressing need for agency action to curb excessive inmate calling charges. In the *2013 Order*, the FCC adopted an interim framework of reforms designed to bring interstate inmate calling rates more closely in line with provider costs until the agency could craft a longer-term solution on a more fully developed record. First, the FCC ordered that rates for interstate inmate calls, and fees for ancillary services, be based on costs reasonably and directly related to the provision of inmate calling. *2013 Order* ¶12. The FCC made clear that site commissions, as a category, do not constitute such costs. *Id.* ¶55. Second, the FCC established interim "safe-harbor" rate caps beneath which rates would be presumptively cost-based: $0.12 per minute for "debit and prepaid" calls (calls paid for through pre-established accounts), and $0.14 per minute for collect calls (calls not funded through any such account). *Id.* ¶60. Third, using the highest cost data in the record to generate a conservative, upper-bound proxy for cost-based rates, the FCC established uniform interim backstop (or "hard") caps of $0.21 per minute for debit and prepaid calls, and $0.25 per minute for collect calls. *See id.* ¶¶73–81.

Several parties petitioned for review of the *2013 Order*, and some sought stays, or partial stays, pending judicial review. GTL sought a stay of the FCC's cost-based rule and interim safe-harbor rate caps (plus a related reporting requirement), arguing that the FCC had failed to provide adequate notice that it intended to adopt those reforms. GTL 2013 Mot. 8–13, 20 (*Securus* Dkt. #1467732). This Court granted GTL's requested relief but otherwise let the *2013 Order* take effect. *See January 2014 Order*. Rates for interstate inmate calls thus became subject to the interim backstop rate caps in 2014.

D. *2015 Order*.

Meanwhile, the FCC collected further data and public comment on which to base more comprehensive inmate calling reforms.[2] With the benefit of that more fully developed record, the FCC in the *2015 Order* adopted new, comprehensive reforms for inmate calling and ancillary services, whether interstate or intrastate.

1. Central to the reforms adopted in 2015 was a four-tiered framework of rate caps for debit and prepaid inmate calls—both interstate and intrastate—which differentiated among "prisons" ($0.11 per minute) and small, medium, and large "jails" ($0.22, $0.16, and $0.14 per minute, respectively). *2015 Order* ¶9 (table 1).[3]

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[2] On the FCC's unopposed motion, this Court placed the challenges to the *2013 Order* in abeyance while the agency considered further reforms. Order, *Securus* at 1 (D.C. Cir. Dec. 16, 2014) (per curiam).

[3] For collect calls, a diminishing segment of the inmate calling market, *see id.* ¶89, the FCC adopted a "distinct rate structure" on a transitional basis, *id.* ¶84.

The FCC's adoption of tiered rate caps reflected its finding in the *2015 Order* that there are economies of scale in serving larger correctional facilities. *Id.* ¶34. In addition, the 2015 rate caps reflected evidence that jails, in which inmates are housed for shorter terms, may have a higher rate of turnover ("churn") than prisons—with correspondingly higher costs. *Id.* ¶33; *see id.* ¶39.

To derive the applicable rate cap for each category of facilities, the FCC used data from 14 inmate calling providers, "dividing . . . the entirety of all costs reported by the providers for any category" (with the exception of site commission payments) "by aggregate minutes of use in that category." *2015 Order* ¶52. In doing so, the FCC took "the [providers'] data at face value," despite "significant evidence" that providers had "overstated" their costs. *Id.* ¶53; *see id.* ¶¶71–75. In addition, despite finding that the imposition of rate caps would result in higher call volumes that would lower providers' per-minute costs due to economies of scale, the FCC did not seek to adjust its per-minute cost calculations to reflect that anticipated consequence of the rate caps. *E.g.*, *id.* ¶¶34 & n.108, 52 n.170, 70.

As well as adopting tiered rate caps, the FCC prohibited inmate calling providers from charging a flat rate for inmate calls (whether interstate or intrastate). *See 2015 Order* ¶105. The FCC also recodified, in amended form, the interim backstop rate caps first adopted in the *2013 Order*. *See* 47 C.F.R. § 64.6030. In doing so, the FCC provided that the interim caps would "sunset upon the effective-

ness of the [tiered] rates [adopted in the *2015 Order*].” *Id.*

2. The FCC adhered to its settled view that site commissions, as a category, are not costs “reasonably related to the provision of [inmate calling services].” *2015 Order* ¶123. Accordingly, although the FCC declined to prohibit payments from inmate calling providers to correctional facilities, it excluded providers’ reported site commission payments from the data used to derive the rate caps. *Id.* ¶118. Given the benefits to both facilities and inmates from inmate calling services—as well as the prevalence of change-of-law and *force majeure* clauses in inmate calling contracts, and the backstop availability of waiver or preemption relief from the FCC—the agency did not believe that correctional authorities would continue to collect more in site commissions than inmate calling providers could profitably pay within the new rate caps. *See id.* ¶¶140, 212–213, 219.

The FCC did recognize in the *2015 Order* that some correctional facilities may incur legitimate costs in providing access to inmate calling services. *See 2015 Order* ¶139 & n.497. On the available record, the FCC found that such “costs would likely amount to no more than one or two cents per billable minute.” *Id.* ¶139. The FCC thus concluded that its tiered rate caps—which, as explained above, reflected various conservative cost assumptions, *see supra* p. 8—were “sufficiently generous to cover any [legitimate] costs” to facilities without accounting for such costs separately. *2015 Order* ¶139.

3. In the *2015 Order*, the FCC also addressed the problem of ancillary service charges. To prevent inmate calling providers from exploiting those charges as a loophole to the new rate caps, the FCC specified a list of permitted fee categories and limited how much providers may charge for each category based on reasonable service costs. *2015 Order* ¶¶161, 163 (table 4). Those limits applied equally to interstate and intrastate calls. *See id.* ¶¶193–196.

E. Litigation Concerning the *2015 Order*.

Several parties petitioned for review of the *2015 Order* and some sought partial stays pending judicial review. Securus Technologies, Inc. (Securus) and Telmate, LLC (Telmate) sought a stay of the FCC's limits on ancillary service charges, arguing that the agency lacked jurisdiction to regulate such charges, and that certain of the limits adopted were too low. *See* Securus 2016 Mot. 4–10 (*GTL* Dkt. #1595628); Telmate 2016 Mot. 17–18 (*GTL* Dkt. #1596259). Telmate, GTL, and one other inmate calling provider—but not Securus—also sought a stay of the four-tiered rate caps. *See* Telmate 2016 Mot. 9–17; GTL 2016 Mot. 9–18 (*GTL* Dkt. #1595450); CenturyLink 2016 Mot. 8–16 (*GTL* Dkt. #1597573). Those providers asserted, among other things, that the rate caps were too low to ensure that all inmate calling providers could recover their costs in full at all facilities in all jurisdictions. *E.g.*, GTL 2016 Mot. 15–16. In addition, Telmate argued that it was unreasonable not to account separately in the rate caps for inmate calling-related

costs that the FCC acknowledged correctional facilities may legitimately incur. *See* Telmate 2016 Mot. 12.

In response, the Court stayed the FCC's four-tiered rate caps (47 C.F.R. § 64.6010), as well as a lone portion of the FCC's rule governing ancillary service charges that incorporated the tiered rate caps (47 C.F.R. § 64.6020(b)(2)). *See March 7 Order*. The Court otherwise allowed the rules adopted in the *2015 Order* to take effect. *See id.*

Because no party had sought to stay (and thus the Court's *March 7 Order* did not address) the "Inmate Calling Services Interim Rate Cap" rule, which recodified the interim backstop rate caps first adopted in the *2013 Order*, *see supra* pp. 8–9, and because "Inmate Calling Service[s]," under the *2015 Order*, include both interstate and intrastate calls, *see* 47 C.F.R. § 64.6000(j), the FCC announced that one effect of the *March 7 Order* would be to extend the interim backstop rate caps to intrastate calls until the tiered rate caps could take effect. *See Wireline Competition Bureau Addresses Applicable Rates for Inmate Calling Services*, 31 FCC Rcd 2026, 2027–28 (Wireline Comp. Bur. 2016). Arguing that the FCC's view was not supported by the *2015 Order* itself, Securus and Telmate moved the Court to "modify" or "reconsider" the scope of the *March 7 Order*. *E.g.*, Securus Modification Mot. 1, 5 (*GTL* Dkt. #1604434); Telmate Reconsideration Mot. 2, 4 (*GTL* Dkt.

#1604585).[4] With Judge Millett dissenting, the Court granted those requests. *See March 23 Order*.

F. *Order* under Review.

While the stay litigation concerning the *2015 Order* was proceeding, the FCC received public comment on a petition by an individual named Michael S. Hamden for partial administrative reconsideration of the 2015 rate caps. Among other things, Hamden asserted that correctional "facilities do incur *some* administrative and security costs that would not exist but for [inmate calling services]," and that the rate caps adopted in the *2015 Order*, which excluded all site commission payments reported by inmate calling providers, did not adequately account for such costs. *Order* ¶18 (quoting the Hamden Petition). Various commenters agreed with that view, which also echoed claims in the unfolding litigation over the *2015 Order*. *See id.* ¶¶19–20. The FCC accordingly took a fresh look at the record, focusing on two proposals regarding how to account for facility-incurred costs in the rate caps. *See id.* ¶¶4, 22–30. Based on those proposals—one of which was from the National Sheriffs' Association (NSA)—the FCC increased its rate caps for debit and prepaid calls by between 18 and over 40 percent: from $0.11 to $0.13 per minute for prisons, from $0.14 to $0.19 per minute for large jails, from $0.16 to $0.21 per minute for medium jails, and from $0.22 to $0.31 per minute for small

[4] GTL sought equivalent relief but styled its motion as one to "enforce" the earlier stay. GTL Enforcement Mot. 2 (*GTL* Dkt. #1604580).

jails. *Compare Order* ¶3 (table) *with 2015 Order* ¶9 (table 1).[5] The FCC determined that those increased rate caps would be sufficient to ensure fair compensation to inmate calling providers, as well as to correctional facilities, by fully compensating providers for their costs of service, including reasonable payments to correctional facilities, while confining rates to levels that are just, reasonable, and fair for end users. *See Order* ¶¶4 & 27 n.108.

As explained in the *Order*, so long as charges to end users remain within the rate caps, the FCC did not cap site commission payments or restrict the ability of providers and correctional authorities to negotiate revenue-sharing arrangements. *Order* ¶38 n.151; *see id.* ¶13 nn. 52, 54; *id.* ¶¶35–38. That approach reflected the FCC's determination that rate caps permitting reasonable, but not unlimited, payments to correctional facilities would "address[] the harmful effects of outsized site commissions" through "market forces, rather than regulatory intervention." *Id.* ¶13 n.54 (quotation marks omitted). In reaching that conclusion, the FCC found that "[c]orrectional authorities have every incentive to accept whatever commissions providers can pay within the rate caps given the benefits [inmate calling services] confer[] on both facilities and inmates." *Id.*

The petitioners thereupon requested an administrative stay of the *Order*, which the FCC's Wireline Competition Bureau denied on September 30, 2016. *See*

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[5] The FCC adopted corresponding increases to the 2015 rate caps for collect calls. *See Order* ¶¶12, 22.

Rates for Interstate Inmate Calling Services, DA 16-1169, 2016 WL 5720877 (Wireline Comp. Bur. Sept. 30, 2016) (*Stay Denial*).

ARGUMENT

I. The Earlier Stay Orders Do Not Dictate a Stay Here.

It is well settled that a movant bears the burden to justify the "extraordinary remedy" of a stay. *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008). Although certain of these petitioners contend that "respect for this Court's previous stays" governing earlier FCC orders lessens the showing required to justify a stay of the *Order* now under review, State Mot. 6, there is no reason why that should be so.

The rate caps adopted in the *Order* are considerably different from those the FCC adopted in the *2015 Order*. The debit and prepaid rate cap for prisons is now $0.13 per minute rather than $0.11 a minute. For larger jails (with an average daily population of 1000 inmates or more), it is $0.19 per minute rather than $0.14 per minute; for medium-sized jails (from 350 to 999 inmates), it is $0.21 per minute rather than $0.16 per minute; and for smaller jails (with 350 inmates or fewer), it is $0.31 per minute rather than $0.22 per minute. "[T]he new rate cap for the smallest jails is over 40 percent higher than the previous cap, the rate caps for medium and larger jails increased by approximately 30 percent[,] and even the rate caps for prisons increased by over 18 percent." *Stay Denial* ¶15 n.58.

The provider petitioners nonetheless argue that the current rate caps are

"[e]ssentially the [s]ame" as those previously stayed. Securus Mot. 7; *see* GTL Mot. 11; Telmate Mot. 10–14. That argument assumes that the increases adopted in the *Order* will go "*solely* to compensate facilities," not providers. Telmate Mot. 11; *see* GTL Mot. 11; Securus Mot. 7. But as the FCC has made abundantly clear, the rate increases permitted under the *Order* allow inmate calling providers to collect additional revenue from end users, without dictating how much (if any) of that additional revenue must be paid to facilities. *See Order* ¶¶13 n.52, 38 n.151. The *Order* "will [thus] ensure that all providers can earn sufficient revenues to cover their [inmate calling]-related costs while also compensating facilities for reasonable costs incurred directly as a result of providing [inmate calling services]." *Id.* ¶4; *see id*. ¶¶23, 37 n.147.

Several of the petitioners argue that in staying the intrastate application of the FCC's interim rate caps, this Court's *March 23 Order* signaled that the agency lacks jurisdiction to cap intrastate rates. *See* State Mot. 13; GTL Mot. 6, 17; Telmate Mot. 9. That claim is difficult (if not impossible) to reconcile with the *March 7 Order*, which allowed all but one of the FCC's limits on ancillary service charges, as well as the agency's ban on flat-rate calling, to take effect for both interstate and intrastate calls. In any event, the *March 23 Order* is silent as to the specific grounds for the Court's decision. Among other possibilities, the Court may simply have concluded that the *2015 Order* had not made sufficiently clear that the

interim backstop rate caps would extend to intrastate calls if the tiered rate caps were stayed.[6]

GTL contends that the Court's prior stay orders have "made clear that the FCC's basic approach to [inmate calling services] rate regulation should be reviewed before taking effect." Mot. 20. That contention is not borne out by the prior proceedings in this case, nor is it consistent with the standard of review in a stay proceeding. At every turn, this Court has narrowly tailored the scope of its stay orders, always allowing at least some of the FCC's reforms to take effect pending judicial review. In 2014, the Court stayed only those rules as to which GTL had argued there lacked adequate administrative notice, declining to stay the interim backstop rate caps. And when providers argued that the tiered rate caps adopted in the *2015 Order* were too low—among other reasons, because they did not separately account for facility-incurred costs—the Court stayed those rate caps but allowed other rules governing both interstate and intrastate calls to take effect (including, for example, all but one of the FCC's limits on ancillary service charges). None of the Court's prior orders either directly or indirectly constrains the agency's power to amend its rate reforms pending judicial review.

In short, the petitioners cannot avoid their burden to establish the traditional

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[6] Contrary to passing suggestions of certain petitioners, *see* GTL Mot. 17; Telmate Mot. 6, the *March 23 Order* cannot plausibly have stayed the interim rate caps as to intrastate calls on the basis that those caps were too low. No party made that argument to the Court, and the caps remain in effect for interstate calls.

factors governing the grant of a stay pending judicial review by invoking this Court's partial stays of prior FCC orders. The *Order* under review is distinct from those prior orders and must be judged on its own merits.

II. The Petitioners Have Not Satisfied the Stringent Requirements for a Stay Pending Judicial Review.

Under well-settled standards, the petitioners must make "a clear showing" that (1) they are likely to prevail on the merits, (2) they will suffer irreparable harm unless a stay is granted, (3) other interested parties will not be harmed if a stay is granted, and (4) a stay will serve the public interest. *Winter*, 555 U.S. at 22; *see WMATC v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Cir. Rule 18(a)(1). They have not made that showing.

A. *The Petitioners Are Not Likely to Succeed on the Merits.*

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

1. *Inmate calling providers can recover their costs within the rate caps.*

The provider petitioners dispute the FCC's determination that the new rate caps are high enough for "all providers [to] earn sufficient revenues to cover their [inmate calling]-related costs while also compensating facilities for reasonable

costs incurred directly as a result of providing [inmate calling services]." *Order* ¶4.

None of the provider petitioners denies the accuracy of that conclusion as it applies to them individually. Only Securus makes any representation at all concerning its service costs, claiming they "average $0.1776 per minute." Mot. 7. But that figure, which does not disclose costs by type of facility or call, is unilluminating. If anything, it suggests Securus's costs are readily recoverable under the new rate caps, which for all jails comfortably exceed $0.1776. *See supra* pp. 12–13.

The crux of the provider petitioners' claim that the rate caps are too low is their contention that the increases adopted in the *Order* will go "*solely* to compensate facilities." Telmate Mot. 11. The provider petitioners accordingly contend that the Court should disregard those increases and instead assess the sufficiency of the FCC's new rate caps (at least as to inmate calling providers) as if they remained at the levels specified in the *2015 Order*. *See* GTL Mot. 12–13; Telmate Mot. 11–12; Securus Mot. 7–9. But as already explained, *see supra* p. 15, the additional revenue available under the *Order* may flow to facilities, providers, or both.

Telmate challenges the FCC's conclusion that the new rate caps will allow all inmate calling providers to recover their costs on the additional basis that the agency "did not compare providers' costs *inclusive of facilities' costs* with the rate caps." Mot. 12. But the FCC increased its rate caps "out of an abundance of caution," *Order* ¶14, because it found that "at least some facilities . . . may in some in-

stances" incur legitimate costs related to inmate calling services that exceed the "one or two cents a minute" recognized in the *2015 Order*, *id.* ¶17; *accord id.* ¶13. Any suggestion that all facilities routinely incur such costs (let alone at levels commensurate with the increases adopted in the *Order*) is not supported by the record. Indeed, both GTL and Securus have represented that most or all of the functions identified in the record as generating costs for facilities are ordinarily performed by inmate calling providers. *See 2015 Order* ¶134 & nn.470–472.[7]

Even assuming for argument's sake that none of the revenue increases allowed under the *Order* are retained by inmate calling providers, the provider petitioners fail to show that the rate caps are unreasonably low. Importantly, their arguments ignore the increases in call volume—and corresponding increases in revenue and decreases in per-minute costs—that lower rates are bound to produce. *See 2015 Order* ¶¶6, 34 & n.108, 52 n.170, 56 & n.177, 57 & n.181, 65, 67 & n.203, 70. The provider petitioners themselves have previously acknowledged that the implementation of the FCC's 2013 interstate rate caps generated a 15.5 percent increase in interstate call volume. *See* Joint Br. for the Carriers 39 (*GTL* Dkt.

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[7] Securus contends that the rate cap increases adopted in the *Order* do not reasonably capture facility-incurred costs. Mot. 8. But Securus relies on raw data that the NSA itself treated only as "inputs that, once compared to and tested by information elsewhere in the record, could be refined to generate more reliable estimated ranges of facilities' reasonable costs." *Order* ¶28 n.115 (quotation marks omitted). It was entirely reasonable for the FCC to rely "(in part)" on the NSA's more refined cost ranges—"particularly" when a separate proposal from different commenters "arrive[d] at similar conclusions." *Id.*

#1617174). And that 15.5 percent figure may be conservative. The County of Santa Clara, for example, reported a more than eight-fold increase in its monthly interstate call minutes after implementing the 2013 rate caps. *See* Br. for the County of Santa Clara et al. 3 (figure 1) (*GTL* Dkt. #1638294).[8] As the FCC explained, "because of the general economies of scale in the supply of [inmate calling services]," any additional costs associated with increased call volumes "will be swamped by the [associated] revenue increase[s]." *2015 Order* ¶34 n.108; *accord id.* ¶57 n.181. There is thus no reasonable basis to conclude that the FCC's rate caps will prevent inmate calling providers from recovering their legitimate costs of providing service, including a reasonable profit.

Finally, contrary to what GTL and Telmate contend (at GTL Mot. 13; Telmate Mot. 10), the statutory requirement of fair compensation "for each and every . . . call," 47 U.S.C. § 276(b)(1)(A), does not foreclose the FCC's use of averaging in setting intrastate rate caps. Nothing in Section 276 suggests that a provider cannot be "fairly compensated" for each of its calls by reference to the average costs of providing such calls. And "[t]he use of industry-wide averages in setting rates is not novel." *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir.

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[8] Even petitioner the State of Oklahoma concedes that its prisons saw a significant increase in average monthly minutes of inmate calls after the FCC's interim interstate rate caps took effect (although it seeks to identify other possible causes for that increase). *See* State Mot. Ex. C ¶¶13–17. The Wright Petitioners' consolidated opposition to these stay motions (lodged on October 13, 2016) sets forth additional evidence of the demand-stimulation effect of lower inmate calling rates.

1999). Indeed, this Court has previously upheld the FCC's use of average call volume to set rates pursuant to Section 276(b)(1)(A). *See Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 54, 57–58 (D.C. Cir. 2000).

2. *Not all site commissions are legitimate service costs.*

The provider petitioners also challenge the FCC's adherence to its decision, when deriving the rate caps in the *2015 Order*, not to take as a given all site commission payments reported by inmate calling providers. *See* GTL Mot. 9–12; Telmate Mot. 13–14; Securus Mot. 9–13. According to the provider petitioners, "whatever compensation [a] correctional facility obtains" from an inmate calling provider is a cost the FCC must build into its rate caps. Securus Mot. 12; *see* Telmate Mot. 13–14; GTL Mot. 10–11. 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 cost. Beyond having been sought (or accepted) by correctional facilities, site commissions bear no necessary relation to the actual costs of providing inmate calling services.

Requiring the FCC to take all site commission payments as a given would undermine the agency's ability to ensure that providers of intrastate inmate calling services are "fairly," not excessively, "compensated," 47 U.S.C. § 276(b)(1)(A), and that interstate inmate calling charges are "just and reasonable," *id.* § 201(b).

The agency would be compelled to account for whatever payments a correctional authority might seek, or an inmate calling provider might offer, no matter how far removed from actual service costs. *See 2015 Order* ¶142. For example, the FCC might be required to ensure that inmate calling rates are sufficient to fund the construction of a new highway or hospital. *See 2013 Order* ¶33 n.125. That result cannot be reconciled with the standard ratemaking practice of disallowing costs not reasonably incurred. *See NARUC v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007).

The provider petitioners contend that the FCC has "ignore[d]" a "market reality" that correctional authorities will demand site commissions in excess of what providers can profitably pay within the new rate caps. Securus Mot. 12; *see* GTL Mot. 10; Telmate Mot. 13. But the FCC reasonably concluded that, given the inherent "benefits" of inmate calling services for "both facilities and inmates," "[c]orrectional authorities have every incentive to accept whatever commissions providers can pay within the rate caps." *Order* ¶13 n.54. Thus, as the chief of administrative services for the Oklahoma Department of Corrections (Oklahoma) has explained, Oklahoma amended its inmate calling contract in the wake of the *2015 Order* to reduce inmate calling charges while still providing for site commissions. *See* State Mot. Ex. C ¶¶7, 10; *see also* Securus Mot. 10 (acknowledging that Securus has "been able to reduce or eliminate" some agreements to pay site commissions). There is no reason to believe providers will be forced to pay site commis-

sions that would preclude the provision of inmate calling services. Particularly given the prevalence of change-of-law and *force majeure* clauses in inmate calling contracts, and the backstop availability of waiver or preemption relief from the FCC, *see supra* p. 9, the claim that exorbitant site commissions are a necessary cost of providing inmate calling services is fanciful.[9]

3. *The FCC has jurisdiction to cap intrastate rates.*

GTL, Telmate, and the state petitioners (various states, sheriffs, and the National Association of Regulatory Utility Commissioners) also reprise arguments that the agency lacks jurisdiction to cap intrastate rates for inmate calls. *See* State Mot. 7–13; GTL Mot. 14–16; Telmate Mot. 7–10. That claim flies in the face of Section 276 of the Communications Act, which directs the FCC "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." 47 U.S.C. § 276(b)(1)(A) (emphasis added). As this Court has previously recognized, *see Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 561–62 (D.C. Cir. 1997) (*IPTA*), that clear grant of jurisdiction readily overcomes the ordinary presumption, under Section 2(b) of the Act, 47 U.S.C. § 152(b), that the agency lacks authority over intrastate communication services.

In the *Order* under review (at ¶3), the FCC adhered to its conclusion in the

[9] GTL's effort (at Mot. 11) to equate contractually agreed-upon site commissions with taxes and regulatory fees is likewise unavailing. *See Stay Denial* ¶17.

2015 Order that the agency's jurisdiction to ensure fair compensation for intrastate inmate calls encompasses the authority to cap rates at levels linked to service costs, *see 2015 Order* ¶¶106–116, since otherwise providers could collect excessive (unfair) compensation, *see id.* ¶¶108, 114. That decision reflects a reasonable interpretation, entitled to deference, of what it means for providers to be "fairly compensated." *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874–75 (2013).

The petitioners contend that the FCC's authority to ensure fair compensation is "most naturally read," GTL Mot. 15, as authorizing the FCC to set "a floor" for rates but not a "ceiling," Telmate Mot. 9; *see* State Mot. 9. To begin with, the question before the Court is whether the FCC's reading of the statute—not the petitioners'—is reasonable and thus deserves deference. In any event, far from "natural," the petitioners' statutory construction depends on an unjustifiably narrow interpretation of the term "fair," which the FCC reasonably construed to encompass the fairness of compensation not just from the standpoint of inmate calling providers, but also from that of consumers. *See 2015 Order* ¶¶107 n.335, 114 & n.360.[10]

To support their reading of the statute, the petitioners lean heavily on their view of its "history and purpose." GTL Mot. 16; *see* State Mot. 8–9; Telmate Mot. 8. But the petitioners point to nothing in the legislative history that indicates

[10] *See also Oxford English Dictionary* 671 (2d ed. 1989) (defining "fair," as in "fair wages," to mean "[t]hat [which] may be *legitimately* aimed at" (emphasis added)); Respondents' Initial Br. 33 (*GTL* Dkt. #1635294) (explaining that the terms "fair" and "just and reasonable" are largely synonymous).

Congress wished to confine the FCC's role, under Section 276, to acting when providers are "undercompensated." State Mot. 9. Had Congress wished to do so, it could easily have employed that term, rather than the capacious term "fair."

The FCC's interpretation of "fair compensation" is wholly consistent with agency and judicial precedent. Contrary to what GTL and the state petitioners claim (at State Mot. 11–12; GTL Mot. 15–16), the FCC has never concluded that it should deploy Section 276 only to increase payphone rates. Indeed, the FCC has recognized since at least 2002 that Section 276 requires the agency to consider not just the interests of payphone providers, but also those of the paying parties. *See 2015 Order* ¶¶107 n.335, 114 n.360; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 21274, 21302 ¶82 (2002). Consistent with that view, this Court has discussed with approval the possibility of agency action to curb market-based rates where 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 . . . calls made from that location." *IPTA*, 117 F.3d at 562.

4. *The* Order *is not procedurally defective.*

Finally, Telmate claims that, because the FCC did not grant the precise relief requested in the Hamden Petition, the *Order* is "procedurally defective." Mot. 14; *see id.* at 14–15. But the FCC was not reduced to a "binary choice" of either grant-

ing "the precise relief" Hamden sought or denying reconsideration altogether. *Stay Denial* ¶11. Instead, it was free to address the issue raised in the reconsideration petition in a manner that built on, but did not precisely mirror, the relief requested.

The Hamden Petition reflected concern that the rate caps adopted in the *2015 Order* were not high enough "to allow providers to pay facilities for [facilities'] reasonable [inmate calling]-related costs and still earn a profit." *Order* ¶11. Hamden (and the petitioners here) would have preferred the FCC to address that concern by "mandat[ing] a 'modest, per-minute facility cost recovery fee that would be added to the rate caps'" (or else by banning site commissions outright). *Id.* (quoting the Hamden Petition). The FCC reasonably chose an alternative solution—higher rate caps allowing for additional revenue that providers may keep or pay to facilities. That approach was, "at a minimum, a logical outgrowth of the Hamden Petition." *Id.* ¶13 n.54.

B. ***The Petitioners Have Not Shown Irreparable Injury.***

The Court need go no further than determining that the petitioners have failed to show a likelihood of success on the merits. *See Ark. Dairy Co-op Ass'n v. USDA*, 573 F.3d 815, 832 (D.C. Cir. 2009). But the petitioners also fail to satisfy this Court's "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Under that standard, "the injury 'must be both certain and great; it must be actual and not theoretical.'"

Id. (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). Moreover, "the fact that economic losses may be unrecoverable does not absolve the movant from its considerable burden of proving that those losses are certain, great and actual." *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52 (D.D.C. 2011) (quotation marks omitted). A court should look to the claimed loss only "during the pendency of [the] case," then ask whether that loss is sufficiently grave "to threaten the movant's business." *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 47–48 (D.D.C. 2014).

The petitioners have not met these strict standards. In asserting irreparable harm, all four rely principally on assertions that they will suffer unrecoverable economic losses.[11] *See* State Mot. 18; GTL Mot. 18; Telmate Mot. 16–17; Securus Mot. 14–15. But such losses do not constitute irreparable harm *per se*, and no petitioner has asserted or shown losses significant enough to justify a stay—particularly considering the additional revenue made available under the *Order* (as compared to under the *2015 Order*) to both providers and facilities.

The state petitioners' only showing of irreparable harm is a prediction that

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[11] GTL and Securus also contend that renegotiating their existing contracts to comply with the new rate caps would risk their goodwill with customers. GTL Mot. 18–19; Securus Mot. 15–16. It is difficult to see how that could be so; all inmate calling providers would be subject to the same rate caps, and facilities would presumably blame any need for renegotiation on the FCC. In any event, "providers willingly entered into their contracts . . . with the knowledge that the [agency] was undertaking comprehensive [inmate calling] reform and that regulations could change . . . in ways that might affect those contracts." *Stay Denial* ¶27.

Oklahoma may see its intrastate site commissions reduced from $0.15 per minute to $0.08 per minute. State Mot. Ex. C ¶¶10–11. That loss of revenue, the state petitioners contend, would "undermine critical correctional and rehabilitative programs." Mot. 19. But to whatever extent bringing inmate calling rates within the bounds of what the FCC has determined is "fair" within the meaning of Section 276 of the Communications Act, 47 U.S.C. § 276, may prevent Oklahoma from continuing to collect outsized site commission payments, site commissions are not Oklahoma's only available source of funding for inmate welfare programs. Oklahoma does not assert that the diminution in revenue it projects will threaten the availability of inmate calling services at its facilities. *See* State Mot. Ex. C. ¶¶22–23. That projected diminution in revenue—which in any event may be offset by increased call volume, *see supra* pp. 19–20 and note 8—is far from grave or certain enough to show irreparable harm.

As for the provider petitioners, their unspecific and unsupported claims of potential lost revenue likewise do not show irreparable harm. GTL does not quantify its feared losses at all. *See* Mot. 18. Securus and Telmate each offer conclusory affidavits from company executives regarding projected revenue losses that are devoid of analysis or supporting evidence. *See* Telmate Mot. Attach. A; Securus Mot. Attach. Boyd. Such "bare allegations" of harm, *Wisconsin Gas*, 758 F.2d at 674, which do not appear to account for revenue increases from lower rates, cannot

support a stay.

Even if the revenue losses that Securus and Telmate claim were better supported, the harms they allege do not come close to threatening their respective businesses or ability to provide inmate calling services. *See ConverDyn*, 68 F. Supp. 3d at 46 ("[M]onetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." (alteration in original; quoting *Wisconsin Gas*, 758 F.2d at 674)). Securus projects a loss in annual revenue (at Mot. Attach. Boyd ¶6) that, as a percentage of the company's total 2015 calling revenue, does not rise to the level of irreparable harm. *See id.* at 48–49 (citing with approval cases holding that lost revenue amounting to 10 or even 20 percent of a plaintiff's business is not irreparable harm).[12] And the only harm that Telmate anticipates is a delay in or reduction of research and compliance efforts. *See* Mot. Attach. A ¶¶6, 11.

C. *A Stay Would Harm Third Parties and the Public Interest.*

Finally, a stay pending appeal would harm third-party consumers of inmate calling services, as well as the public generally. As the FCC has now repeatedly recognized, millions of inmates and their families, including some of the most economically disadvantaged members of our society, have paid exorbitant calling rates

[12] Securus makes no attempt to show why the "loss in net income" (as distinct from lost revenue) that it projects (at Mot. Attach. Boyd ¶7) is attributable to the *Order*, nor does Securus assert that its projected loss in net income will threaten the survival of its business.

for far too long. Once in effect, the *Order* will at last bring those rates in line with the costs of providing service. Lower rates will make it easier for inmates to stay connected to their families, reduce recidivism (with attendant savings to taxpayers), and lessen the negative impact on the millions of children with an incarcerated parent. *See 2015 Order* ¶3.

Moreover, the *Order* in no way threatens "the availability" or "quality" of inmate calling services. GTL Mot. 20. Upon a thorough examination of a comprehensive record, the FCC determined that its rate caps will "ensure that all providers can earn sufficient revenues to cover their [inmate calling]-related costs while also compensating facilities for reasonable [inmate calling-related] costs incurred directly." *Order* ¶4. A number of states and inmate calling providers have made clear that they agree. *E.g.*, Admin. Stay Opp. of Inmate Calling Solutions, LLC 4 (attached hereto as Attachment A); Br. for Minn. et al. 4–14 (*GTL* Dkt. #1636355). And as already noted, *see supra* p. 28, even Oklahoma makes no contrary showing.

In short, the rate caps adopted in the *Order* serve the public interest, as well as the interests of millions of inmates and their families in maintaining affordable communication with each other. The *Order* should not be stayed.

CONCLUSION

The Court should deny the motions for stay pending judicial review.

Respectfully submitted,

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October 13, 2016

Attachment A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

INMATE CALLING SOLUTIONS, LLC
OPPOSITION TO SECURUS TECHNOLOGIES, INC.'S PETITION FOR STAY

Inmate Calling Solutions, LLC ("ICSolutions") hereby submits the Petition for Partial Stay of Order on Reconsideration, filed by Securus Technologies, Inc. ("Petition").[1] The Petition requests that the FCC stay the effectiveness of parts of the *Order on Reconsideration* ("*Order*") adopted by the Federal Communication Commission ("FCC" or "Commission") on August 4, 2016, and released on August 9, 2016, in this Docket,[2] which modifies parts of the FCC's *Second Report and Order*, FCC 15-136, released on November 5, 2015 ("*2015 Order*") [3] Specifically, the Petition requests that the FCC delay implementing the rules addressing rates in the *Order*.[4]

As provided below, Securus incorrectly claims that (i) it will likely prevail in a future judicial review; (ii) it will suffer irreparable harm; (iii) other interested parties will not be substantially harmed if the stay is granted; and (iv) the public interest favors granting a stay.[5]

[1] The Petition was filed on August 25, 2016. Pursuant to Section 1.45(d) of the FCC's rules, this Opposition is filed within 7 days of submission. *See* 47 C.F.R. s 1.45(d) (2015).
[2] *Rates for Interstate Inmate Calling Services*, Order on Reconsideration, FCC 16-102, rel. Aug. 9, 2016 ("*Order*").
[3] *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (2015) ("*2015 Order*"), stayed in part by *Global Tel*Link, et al. v. FCC*, Order, Case No. 15-1461 (D.C. Cir., Mar. 7, 2016) (staying 47 C.F.R. §§ 64.6010, setting caps on calling rates and 64.6020(b0(2), setting caps on fees for single-call services).
[4] Petition, pg. 1.
[5] Petition, pgs. 2-3.

Securus's arguments fail to satisfy the *Virginia Petroleum Jobbers* test[6] and, therefore, the Petition must be dismissed.

For the first prong of the *Virginia Petroleum Jobbers* test, the Petition is incorrect that an appeal is likely to be successful.[7] Securus basis its contention on three arguments: (A) A stay will avoid needless expenditure of the FCC's, Securus's, and the Court of Appeals' resources; (B) The Order sets rates that are below Securus's cost to provide inmate telephone services ("ITS"); and (C) The FCC has acted "unreasonably" by avoiding the regulation of ITS providers' payment of site commissions. These arguments fail to support Securus's conclusion that a reversal on appeal is likely to be successful.

Securus's first argument that its appeal will be successful because a stay will avoid costs is unsupported. It cannot be reasonably denied that it would be more economically efficient for all parties and the Court of Appeals to consider the *Order* in the current Appeal of the *2015 Order* ("Appeal")[8] because it changes the *2015 Order*. Inarguably, there is no point in arguing about the aspects of the *2015 Order* that have been changed in the *Order*. While the Court denied the FCC's petition for an abeyance of the Appeal,[9] it does not mean that the Court will not address the *Order* in the Appeal. As Appellants CenturyLink and Global Tel*Link pointed out in their opposition to an abeyance, the brief can consider the merits of the *Order* in the Appeal by allowing supplemental briefs.[10] The Court has provided no indication that it intends to decide the Appeal without considering the changes made by the *Order*. To the contrary, the Court Order on the FCC's Petition for Abeyance orders the parties to "file motions to govern

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[6] 259 F.2d 921 (D.C. Circ., 1958).
[7] Petition, pgs. 3-10.
[8] *Global Tel*Link, et al. v. FCC*, Case No. 15-1461 (D.C. Cir.) (appeal pending) ("Appeal").
[9] *Global Tel*Link, et al. v. FCC,* Case No. 15-1461, Order (D.C. Cir., Aug. 19, 2016).
[10] *Global Tel*Link, et al. v. FCC,* Case No. 15-1461, Joint Response of Global Tel*Link and CenturyLink to Respondents' Motion to Hold Cases in Abeyance, pgs. 2-3 (D.C. Cir., Aug. 1, 2016).

further proceedings within seven days of the deadline to Petition for Review,"[11] suggesting that the Court will at least consider including supplemental briefs in this Appeal. If an appeal of the *Order* occurs, it is axiomatic that it would save resources for the Court and all parties to consider the merits of the *Order* in the current Appeal as opposed to waiting until the Appeal is finalized. Thus, Securus's argument that the Court, the FCC, and any other parties to the Appeal could avoid "needless expenditure" by staying this *Order* until after the Appeal is baseless.

Moreover, Securus grasps at straws when it suggests that the Court's stay of the rates in the *2015 Order* "signal strongly that Securus and petitioners have shown 'substantial case on the merits' for overturning regulations that are premised on ignoring a major component of ICS costs, namely site commissions."[12] There simply is nothing from the Court's stay order to suggest the rationale behind the stay of the rates in the *2015 Order*. Indeed, Securus's purported reasons contradict the Court's decision to not stay the interstate rate caps in the FCC's first *Report and Order and Further Notice of Proposed Rulemaking* ("*2013 Order*"), even though that order also did not prohibit the payment of site commissions.[13]

Securus's arguments that the rates are still below its costs to provide service, even if true, are insufficient reasons to stay the *Order*. First, Securus misrepresents the *Order* when it reports that the "FCC states and intends that the extra funds generated by the 'revised rate caps' will go to correctional facilities."[14] The FCC made no such statements. The FCC never stated that all facilities will necessarily incur these costs and, therefore, are entitled to the extra rate caps. Even

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[11] *Global Tel*Link, et al. v. FCC,* Case No. 15-1461, Order, pg. 2 (D.C. Cir., Aug. 19, 2016).
[12] Petition, pg. 5.
[13] *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd 14107, ¶ 56 (2013) ("*2013 Order*") ("We do not conclude that ICS providers and correctional facilities cannot have arrangements that include site commissions."); *see also .Order*, pg. 8, footnote 52 ("As explained below at not 151, because we do not regulate site commissions in this order (***and have not done so previously***), any revenues derived under these rate caps may be passed through to facilities.") (emphasis added).
[14] Petition, pg. 6.

Securus's references to the *Order* shows that the FCC is merely acknowledging that facilities ***may*** incur costs,[15] and the rates were increased to "ensure that all providers can earn sufficient revenues to cover their ICS-related costs while also compensating facilities for reasonable costs incurred directly as a result of providing ICS."[16] The FCC has increased rates to allow the flexibility of providers to compensate facilities for any costs the facilities may incur for providing ITS, and at the discretion of ITS providers. Despite Securus's mischaracterization of the *Order*, the increase in rates is not a pass-through fee.

Securus has already gone on the record in this Docket to say that its clients incur no costs to provide ITS, that Securus bears most of the costs related to providing ITS.[17] It is reasonable to presume for the purposes of determining whether to issue a stay that Securus's clients incur costs similar to what was proposed by Securus's counsel, Andrew Lipman, of $0.01 per minute for facilities with average daily population (ADP) of 1,000 or greater, $0.02 per minute for facilities with ADP of 300-299, and $0.03 per minute for facilities with ADP below 300.[18] The Lipman proposal was endorsed by Securus, GTL, Telmate, and Pay Tel in a joint filing in this Docket.[19] Thus, based on Securus's own representations, the costs of providing ITS for Securus clients is low, enabling Securus to keep most, if not all, of the increase in rates.[20]

Second, Securus's claim that the new rates are below their costs compares apples to oranges, as well as contradicting their concessions in this Docket and their current practices.

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[15] Petition, pg. 6 (citing *Order*, ¶ 30).
[16] Petition, pg. 6 (citing *Order*, ¶ 6).
[17] Attachment 1, Exhibit 1 (page 4).
[18] Attachment 2, page 6.
[19] Attachment 3, pgs. 1-2.
[20] *Illinois Public Telecomm. Ass'n v. FCC*, 117 F.3d 555, 570 (D.C. Cir., 1997) ("Under a price cap system, 'the regulator sets a maximum price, and the firm selects rates at or below the cap.' Cost reductions under the price cap scheme 'do not trigger reductions in the cap,' but rather increase the company's profits.").

Securus claims that its average per-minute cost to provide ITS is $0.1776.[21] Securus's alleged costs are misleading because they lump all their facilities together, while the rate caps in the *Order* are differentiated by facility size. Securus's alleged costs are further contradicted by its support for the FCC's rates from the *2015 Order*, which are lower than those in the *Order*, so long as the FCC prohibited or capped commissions.[22] Moreover, Securus's current practice has included offers to facilities when rates are capped at the FCC's rates are inconsistent with their allegations that they will lose costs if the *Order* is implemented. In March 2016, at Georgia DOC, Securus agreed to pay 59.6% commission on calling rates of $0.11 per minute for all domestic prepaid and debit calling and $0.13 per minute for all domestic collect calling, including a minimum monthly guarantee (MMG) payment of $325,000.00, and an additional financial incentive of **$4,000,000.00** payment to be made upon contract signing.[23] Clearly, Securus can make a reasonable profit under the FCC's previous rates when it can afford to charge the *2015 Order*'s rates and still offer a $4,000,000 upfront payment, plus 59.6% in commissions that are guaranteed to be a minimum of $325,000.00 per month.

Third, Securus's argument that the FCC must regulate site commissions to rate caps that result in reasonable and fair profits is false. As a threshold matter, the FCC does not have the authority to regulate how a provider spends its profits. Indeed, a regulator's attempt to prohibit expenditures would raise several constitutional questions, including but not limited to the freedom of speech in the First Amendment. Nor could the FCC reasonably enforce any such regulations, particularly considering that the FCC cannot regulate political contributions or

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[21] Petition, pg. 6.
[22] Attachment 3, pg. 2 ("If, however, the FCC issues an order that (a) adopts the rate caps and fees stated in the Fact Sheet, and (b) establishes a maximum site commission in the form of a per-minute, capped additive rate, consistent with the Lipman proposal, the companies will not seek judicial review of these matters.")
[23] See Attachment 4, pgs 5-6.

charitable contributions – whether they are from the providers themselves or individual employees, which are protected by the First Amendment. The *2015 Order* states: "Accordingly, if a provider is able to demonstrate that a particular state law or requirement is inconsistent with the rules we adopt in this Order, we will, consistent with section 276, preempt the inconstant requirement."[24] Thus, the *2015 Order* clearly preempts contracts requiring the provision of ITS without permitting providers a fair and reasonable profit, as required in Section 276 of the Telecommunications Act.

Therefore, Securus is disingenuous when it claims to the FCC that it cannot renegotiate contracts. Nine days before the implementation date, Securus renegotiated all of their contracts to exclude site commissions as a result of the *2013 Order*,[25] even though their purported average costs of $0.1776[26] are below the maximum rate caps of $0.21 per minute for debit and prepaid calls and $0.25 per minute for collect calls,[27] and despite the fact that the *2013 Order* did not prohibit the payment of site commissions either.[28] In addition to agreeing to charge the rates from the *2015 Order*, Securus agreed to charge less than the fee cap from the *2015 Order* for live agent fees, by agreeing to charge $4.75,[29] instead of the permissible $5.95 per transaction.[30] Nevertheless, even if they could not renegotiate their contracts, they have failed to exhaust their administrative remedies of seeking the FCC to consider an express preemption, as stated in Paragraph 211 of the *2015 Order*.

[24] *2015 Order*, ¶ 211.
[25] Attachment 5, filed as Wright Petitioners Consolidated Comments, WC Docket No. 12-375 at Exhibit B (filed mar. 11, 2014).
[26] Petition, pg. 6.
[27] 47 C.F.R. § 64.6030 (implemented in the *2013 Order*).
[28] *2013 Order*, ¶56 ("We do not conclude that ICS providers and correctional facilities cannot have arrangements that include site commissions."); *see also .Order*, pg. 8, footnote 52 ("As explained below at not 151, because we do not regulate site commissions in this order (***and have not done so previously***), any revenues derived under these rate caps may be passed through to facilities.") (emphasis added).
[29] Attachment 4, pg. 6.
[30] 47 C.F.R. § 64.6020(b)(3).

In addition, Securus's argument that it pays commissions at all of its facilities, and that should be a reason to stay the rates, ignores the fact that Securus has been making offers that continue to include the payment of substantial commissions and agreeing to contracts that are knowingly inconsistent with the *2015 Order*. Securus's conscious and purposeful decision to make exorbitant commission offers and to continue to charge rates much higher than the rates the FCC has signaled it has found to be fair, just, and reasonable cannot be a reason to stay the *Order*. In many cases, Securus funds their current commission offers by charging much higher first minute rates for in-state rates that are the equivalent of a per-call charge,[31] arguably in violation of the effective rules of the *2015 Order.* And, while Securus is making these claims that they pay commissions on all of their contracts, they do not provide any specific information. There are many contracts by ITS providers that have caveats of not paying commissions on interstate calling revenue or the higher first minute of intrastate revenue.[32] Securus's argument that they are bound to pay the commissions while still offering exorbitant commission offers is a self-perpetuating problem that should not be hold up the FCC's ability to pass regulations. The financial offer Securus made to the Georgia DOC in March 2016 is a perfect example. The FCC could never arrive at a fair, just, and reasonable rate cap if the providers can always claim that their current contracts are inconsistent with the rates when the providers are purposely entering into such agreements.

[31] See Attachment 6 (showing first minute rates of $5.90 at a jail in Michigan, $5.56 at a jail in Texas, $4.99 at a jail in Virginia, and $4.00 at a jail in Missouri). These are a sample of jails in a sample of States, and many more facilities in many more states can have similar higher first-minute rates. Since these rates were obtained on July 28, 2016, Securus has removed the rate calculator from its public website to prevent further research.

[32] *See* Wright Petitioners Consolidated Comments, WC Docket No. 12-375 at Ex. B (filed Mar. 11, 2014) ("Due to the FCC's Order, Securus no longer will pay site commissions on interstate calls.") ; *see also Rates for Interstate Inmate Calling Services*, Ongoing Payment of Interstate Site commissions in Contravention of *Inmate Rate Order* (FCC 13-113), WC Docket No. 12-375 , pg. 2 (posted May 5, 2015) (showing Securus continued with its policy to not pay site commissions on interstate calls).

As for the second prong of the *Virginia Petroleum Jobbers* test, Securus fails to meet the burden necessary to warrant a stay. Securus's arguments are essentially that, because the *Order* is not in its favor, it will suffer irreparable harm. It is rare that regulations satisfy all interested participants. Thus, an affected party needs to show more than just that its operations will change in a somewhat detrimental manner in order to support a stay. Moreover, in this case specifically, because Securus is charging rates as high as $19.41 for a 15-minute call for some of their intrastate calls, Securus may very well lose revenue if this *Order* is not stayed. Indeed, the *Order* is intended to stop practices of such high calling rates and those providers who have rode the wave of high rates will likely suffer. But, it does not necessarily follow that their profits will be unreasonable or otherwise unfair in the eyes of the law. Regulated providers are entitled to fair and reasonable profits, not a continuance of their existing revenue.

Securus's assertion that it spent $3 million to renegotiate 1,500 contracts for the rates in the *2015 Order* is questionable, at best.[33] Given the fact that Securus is only installed at a fraction of the limited number of State DOCs, most of the 1,500 contracts must have been jails. It is hard to believe that Securus was renegotiating the rates of their existing jail contracts to the tune of $2,000 a contract prior to the Court of Appeals' stay of the rates in the *2015 Order* on March 7, 2016, particularly when considering Securus was one of the proponents arguing for the stay and the implementation dates for jail rates was not until June 20, 2016. Such imprudent spending cannot be controlled by or otherwise attributable to the FCC.

Similarly, it is unclear why Securus would have such an antiquated and inefficient billing system that would require 7,200 man hours of re-programming, at an amount of $720,000.00, in order to change rates.[34] In addition to being nonsensical how Securus would have used 7,200

[33] Petition, pg. 11.
[34] Petition, pg. 12.

man hours of reprogramming while it was arguing for a stay of the rates, every facility has a different rate structure. Surely, Securus doesn't have to reprogram its billing system every time it gets a contract with a new rate structure. If their billing system can handle multiple rate structures to accommodate their 1,500 contracts, it is hard to understand why Securus's technology department does not have a way to change the rates to the streamlined rates in the FCC's *2015 Rate Order*. But, even if they did incur those costs for the rates, it is even harder to believe that they would be unable to utilize at least some of the development for this *Order*. Accommodating a new rate structure should not be reinventing the wheel. If it is, again, the FCC cannot be held accountable for the inefficiencies of a minority of the companies. It is management's decision what technology to use, not the FCC's decision.

For the third prong of the *Virginia Petroleum Jobbers* test, Securus ignores the harm that will occur by continuing with the uncertainty of intrastate rates. Securus presents its stay as "simply the continuation of the status quo," but it is anything but status quo in the industry. After the *2013 Order*, many providers increased fees dramatically to maintain their revenue. Now that fees have been capped, some providers are using significantly higher intrastate rates to increase revenue. Many States do not regulate intrastate rates at all or in a meaningful manner to rein in exorbitant rates. The result is industry confusion that has translated to an uncertainty hindering competition. Providers will be unable to compete unless and until they adopt the predatory practices of charging substantially higher for intrastate rates and even charging a higher non-commissionable first minute, to serve as the equivalent of per-call fees without having to charge an actual per-call fee. Providers that want to operate in the spirit of the law, by charging fair, just, and reasonable rates, if for no other reason than to avoid future litigation for unjust and unreasonable rates or other unjust enrichment claims, will be unable to compete and

will be squeezed out of the market. Moreover, in this day and age of mobile cell phones, and the disconnection of a phone number's area code from the actual location of the phone, it does not make sense why in-state consumers would pay more than six times what their interstate counterparts pay.[35] For those consumers who have non-local, in-state numbers and actually live outside of the facility's jurisdiction, and cannot vote for the officials who make the decisions on commissions in contracts, are the most susceptible to high rates. The regulation of interstate rates and fees, while leaving intrastate rates unregulated, is causing a great deal of harm.

As for the fourth prong of the *Virginia Petroleum Jobbers* test, the public interest is not served by a stay. The failure of the market to effectively control rates is hindering competition. Whenever one charge is controlled, the industry finds another charge to manipulate, forcing all providers to choose between charging fair, just, and reasonable rates or charging exorbitant rates. The market needs certainty in what rates and charges are lawful, while leaving the providers to the decisions of how to utilize the revenue. That's what this *Order* is attempting to accomplish.

Thus, the Petition has (i) failed to establish that an appeal of the *Order* would be successful on the merits; (ii) failed to provide any solid evidence that Securus will suffer irreparable harm; (iii) failed to show the lack of harm to third parties (in fact, great harm be caused from a delay in the effectiveness of the lower ICS rates); and (iv) failed to show any public interest benefit from granting a stay. Therefore, Petitioners oppose the Petition for Partial Stay, and respectfully request that the FCC deny the request as legally unsustainable.

Respectfully submitted this 31st day of August, 2016.

By: /s/Charlena S. Aumiller__________
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[35] At Benzie County, Sheriff's Department in Michigan, a 15-minute call for a prepaid or debit call costs $3.15 for an interstate call, while an in-state call costs $19.41. See Attachment 6.

CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2016, the forgoing Opposition was served via electronic mail on the following persons:

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECURUS TECHNOLOGIES, INC., *ET AL.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, AND UNITED STATES OF AMERICA,
Respondents.

No. 16-1321 (and consolidated cases)

CERTIFICATE OF SERVICE

I, Sarah E. Citrin, hereby certify that on October 13, 2016, I electronically filed the foregoing Opposition of the Respondents to Motions for Stay with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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.

/s/ Sarah E. Citrin