



FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

OFFICE OF  
THE CHAIRMAN

March 28, 2017

The Honorable Cory Booker  
United States Senate  
359 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Senator Booker:

Thank you for your March 7, 2017, letter regarding prison payphones. And thank you for your efforts to help reduce the high rates that inmates and their families pay to stay in touch, including most recently by introducing Senate Concurrent Resolution 58 (Dec. 7, 2016), which would support the efforts of the Commission to bring about a compromise on inmate calling service rate caps and to ensure that those rates are just and reasonable.

For the past few years, the FCC has been working in good faith to realize a common and bipartisan goal: to substantially reduce the high rates that are being charged for inmate calling services. Those efforts began in 2012 when I joined all of my fellow commissioners in voting unanimously to launch a proceeding to consider new rules for interstate inmate calling services pursuant to the Commission's duty under Section 201 of the Communications Act to ensure that the rates for interstate telecommunications services are just and reasonable.<sup>1</sup>

Early on, I concluded that there was a market failure. Inmates cannot choose their calling service provider, and providers do not compete with each other for an inmate's calls. Instead, a prison administrator signs an exclusive contract with a single carrier. The decision to enter into such a contract often is driven by commissions and in-kind services offered to the prison by a prospective provider. As such, the incentives of prison administrators and inmates may not align. This means that "we cannot necessarily count on market competition to keep prices for inmate calling services just and reasonable."<sup>2</sup> For those reasons, I made clear my belief that the agency "must take action to meet our duties under the law, not to mention our obligations of conscience."<sup>3</sup>

Unfortunately, however, the FCC's well-intentioned efforts have not been fully consistent with the law. In particular, the FCC has attempted to cap rates for intrastate inmate calls in apparent violation of the clear limits Congress placed on the agency's intrastate authority, and it failed to account for all record evidence. Indeed, the U.S. Court of Appeals for the D.C. Circuit

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<sup>1</sup> *Rates for Interstate Inmate Calling Services*, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012).

<sup>2</sup> *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14217 (2013) (Dissenting Statement of Commissioner Ajit Pai).

<sup>3</sup> *Id.*

has taken the highly unusual step of issuing four different orders staying substantial parts of the FCC's rules.

There are now three separate sets of cases pending before the D.C. Circuit in which petitioners are challenging various parts of the FCC's inmate calling regulations. The first set challenges the Commission's 2013 Order. The court stayed large portions of that order in January 2014,<sup>4</sup> and then granted the Commission's December 10, 2014, motion to hold the case in abeyance while the Commission revisited its rules.<sup>5</sup> Your letter references the second set of cases, which challenge the Commission's 2015 Order. The court stayed significant portions of that Order on two occasions in 2016,<sup>6</sup> and it held oral argument on the case on February 6, 2017. The third set of cases challenges the Commission's 2016 Reconsideration Order. In November 2016, the court stayed that Order, too, and *sua sponte* held the case in abeyance pending resolution of the litigation challenging the 2015 Order.<sup>7</sup>

In light of the recent change in leadership and composition of the Commission, there are now several parts of the FCC's 2015 Order that a majority of the FCC's commissioners view as unlawful. Nonetheless, the FCC did not file a motion to hold the entire case in abeyance, which if granted would have resulted in the court postponing the oral argument scheduled on February 6. Nor did the FCC otherwise move to postpone or delay the oral argument.

Instead, the FCC notified the court on January 31, 2017, that it would allow those who had litigated this case for some time to have their day in court on February 6. A copy of that letter is attached. It contains additional information about the FCC's decision to proceed with the case.

Consistent with my long-standing view that the rates charged for inmate calling services are too high, agency counsel ably and vigorously defended the substantial portions of the Commission's regulations at oral argument that are both lawful and have the support of a majority of the FCC's current commissioners.<sup>8</sup> Among other points, agency counsel defended the FCC's authority to cap interstate rates for inmate calling services pursuant to the Commission's authority in Section 201 of the Communications Act and to regulate ancillary fees. Agency counsel also defended the FCC's authority to exclude from its cost calculations, when setting just and reasonable rate caps for interstate calls, portions of the commission and in-kind service payments that inmate calling providers make to correctional facilities. In addition, the FCC ceded half of its oral argument time to counsel for intervenors in support of the

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<sup>4</sup> *Securus Techs., Inc. v. FCC*, Nos. 13-1280 *et al.* (D.C. Cir. Jan. 13, 2014) (per curiam).

<sup>5</sup> *Securus Techs., Inc. v. FCC*, Nos. 13-1280 *et al.* (D.C. Cir. Dec. 16, 2014) (per curiam).

<sup>6</sup> *Global Tel\*Link v. FCC*, Nos. 15-1461 *et al.* 1–2 (D.C. Cir. Mar. 7, 2016) (per curiam); *Global Tel\*Link v. FCC*, Nos. 15-1461 *et al.* 1 (D.C. Cir. Mar. 23, 2016) (per curiam).

<sup>7</sup> *Securus Techs., Inc. v. FCC*, No. 16-1321 *et al.* (D.C. Cir. Nov. 2, 2016) (per curiam).

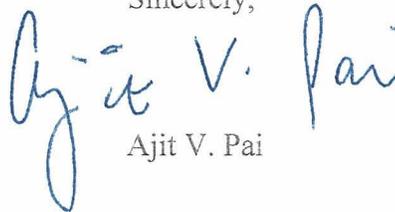
<sup>8</sup> A recording of the oral argument is available at [https://www.cadc.uscourts.gov/recordings/recordings2017.nsf/2318CE410CE9C008852580BF006AC865/\\$file/15-1461.mp3](https://www.cadc.uscourts.gov/recordings/recordings2017.nsf/2318CE410CE9C008852580BF006AC865/$file/15-1461.mp3).

respondents, who defended all aspects of the agency's Order at oral argument. If the court ultimately agrees with the positions the FCC defended at oral argument, the result could go a long way in helping to reduce the rates and fees associated with inmate calling services.

Your letter asks about the FCC's decision not to defend at oral argument the intrastate calling rate caps. As indicated above, agency counsel did defend the Commission's authority to cap interstate rate caps, as well as to cap the ancillary charges that can drive up the cost of prison payphone calls.<sup>9</sup> But given the circumstances in which the Commission found itself in this case—where oral argument was scheduled less than two weeks after I was designated to lead the Commission, the Commissioners who dissented from the order on review constituted a majority at the agency, and the court itself had stayed the effect of the intrastate calling rate caps—we determined that defending the portions of the Order supported by a majority of FCC commissioners was the most appropriate way to proceed.

Thank you again for your inquiry. The FCC would welcome the opportunity to provide technical assistance on any legislative solution, as you deem appropriate.

Sincerely,

A handwritten signature in blue ink that reads "Ajit V. Pai". The signature is written in a cursive style with a large, looped initial "A".

Ajit V. Pai

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<sup>9</sup> The Commission's specific caps on interstate rates were not before the court in this case because the Commission modified those rates in the 2016 Reconsideration Order.