Before the
Federal Communications Commission
Washington, D.C. 20554

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

ORDER DENYING STAY PETITIONS AND PETITION TO HOLD IN ABEYANCE

Adopted: November 21, 2013 **Released: November 21, 2013**

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. Two inmate calling service (ICS) providers, Securus Technologies, Inc. (Securus) and Global Tel*Link (GTL) (jointly ICS Providers) have filed Petitions for Stay[1] of the *Inmate Calling Report and Order and FNPRM*.[2] Securus also filed a Petition to Hold Further Rulemaking Proceeding in Abeyance.[3] We deny the three petitions for the reasons set forth below.

II. BACKGROUND

2. The Commission initiated its inquiry into inmate calling services in 2002 by seeking comment on, among other things, cost and revenue data related to the provision of ICS, site commission payment demands made by correctional facilities, states' use of rate ceilings on local calling, and alternatives to collect calling (including the use of debit calling).[4] In 2003, the Wright Petitioners filed a rulemaking petition with the Commission to address ICS practices.[5] The petition requested that the Commission prohibit exclusive ICS contracts and collect-call-only restrictions in correctional facilities.[6] In 2007, the same petitioners filed an alternative rulemaking petition, requesting that the Commission

[1] *See Rates for Interstate Inmate Calling Services*, Securus Technologies, Inc. Petition for Stay of Report and Order Pending Appeal (FCC 13-113), WC Docket No. 12-375 (filed Oct. 22, 2013) (Securus Petition); *see also Rates for Interstate Inmate Calling Services*, Petition of Global Tel*Link for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Oct. 30, 2013) (GTL Petition).

[2] *See Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 13-113 (rel. Sept. 26, 2013) (*Inmate Calling Report and Order and FNPRM* or *Order*). The *Order* was published in the Federal Register on Nov. 13, 2013. *See* 78 FR 67956 (Nov. 13, 2013) (final rules summary); *see also* 78 FR 68005 (Nov. 13, 2013) (proposed rules summary).

[3] *Rates for Interstate Inmate Calling Services*, Securus Technologies, Inc. Petition to Hold Further Rulemaking Proceeding in Abeyance, WC Docket No. 12-375 (filed Oct. 22, 2013) (Abeyance Petition).

[4] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, CC Docket No. 96-128, 17 FCC Rcd 3248 at 3276-79, paras. 73-79 (2002) (*Inmate Calling Services Order on Remand and NPRM*).

[5] *See generally* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 at 3 (filed Nov. 3, 2003) (First Wright Petition).

[6] *Id.*

reform high ICS rates by requiring a debit-calling option in correctional facilities, prohibiting per-call charges, and establishing rate caps for interstate, interexchange ICS.[7] The Commission sought and received comment on both petitions.[8] In 2008, certain ICS providers placed in the record a cost study that quantified their interstate ICS costs.[9] In December 2012, the Commission adopted a notice of proposed rulemaking seeking comment on the two Wright petitions.[10] Specifically, the Commission sought comment on the Alternative Wright Petition's proposed rate caps, and on possible variations on the rate caps, seeking comment throughout the *2012 ICS NPRM* on ways of regulating ICS rates based on the costs of providing ICS.[11] The *2012 ICS NPRM* also sought comment on issues affecting the ICS market, including the 2008 ICS Provider Data Submission; collect, debit, and prepaid ICS calling options; site commission payments; and the Commission's statutory authority to regulate ICS.[12] On June 26, 2013, the Wireline Competition Bureau (Bureau) released a Public Notice seeking additional comment on ancillary charges, that is, charges ancillary to those directly related to the recovery of the cost to provision telephone service, such as the costs of initiating or closing a debit or prepaid ICS account.[13] The Commission adopted the *Inmate Calling Report and Order and FNPRM* on August 9, 2013.[14] As described further below, the *Order* adopted several interim reforms regarding the rates for interstate ICS calls, which reportedly constitute no more than 15 percent of all ICS traffic handled by the ICS Providers.[15]

III. DISCUSSION

3. Section 201 of the Communications Act of 1934, as amended (Act) requires that all carriers' interstate rates be just and reasonable.[16] To be just and reasonable, rates must be related to the

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[7] *See* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007) (Alternative Wright Petition).

[8] *See Petition For Rulemaking Filed Regarding Issues Related to Inmate Calling Services Pleading Cycle Established*, CC Docket No. 96-128, Public Notice, DA 03-4027, 2003 WL 23095474 (Wireline Comp. Bur. 2003); *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, CC Docket No. 96-128, Public Notice, 22 FCC Rcd 4229 (Wireline Comp. Bur. 2007) (*2007 Public Notice*).

[9] *See generally* Don J. Wood, Inmate Calling Services Interstate Call Cost Study (WOOD & WOOD 2008), CC Docket No. 96-128 (filed Aug. 15, 2008); Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Aug. 22, 2008) (Joyce Aug. 22, 2008 *Ex Parte* Letter) (attaching supplemental cost and usage data); record submission by "several providers of inmate telephone service," CC Docket No. 96-128 (filed Oct. 15, 2008) (amending supplemental cost and usage data) (collectively 2008 ICS Provider Data Submission).

[10] *See generally Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012) (*2012 ICS NPRM*). The *2012 ICS NPRM* incorporated relevant comments, reply comments and *ex parte* filings from the prior ICS docket, CC Docket No. 96-128, into WC Docket No. 12-375. *See 2012 ICS NPRM*, 27 FCC Rcd at 16636, para. 15.

[11] *See 2012 ICS NPRM*, 27 FCC Rcd at 16637-38, paras. 18-21; 16639, paras. 25-26; 16642-43, para. 37; 16642, para. 35.

[12] *See generally 2012 ICS NPRM*.

[13] *See More Data Sought on Extra Fees Levied on Inmate Calling Services*, WC Docket No. 12-375, Public Notice, 28 FCC Rcd 9080, 9080-81 (Wireline Comp. Bur. rel. June 26, 2013).

[14] *See generally Inmate Calling Report and Order and FNPRM*. In the accompanying *FNPRM*, the Commission sought comment on the possible regulation of intrastate ICS rates, as well as certain other matters. Data and information gathered through the *FNPRM* will be used to establish final ICS rules.

[15] *See infra* para. 35.

[16] *See* 47 U.S.C. § 201(b).

cost of providing service.[17] Section 276 additionally requires that payphone rates be fair.[18] Yet for many years, interstate ICS rates have been unreasonably high, unfair, and far in excess of the cost of providing service.[19] Excessive rates have been driven largely by substantial commission payments ICS providers have agreed to make to prison authorities.[20] The Commission relies in the first instance on competition when it can do so to ensure just and reasonable rates. In the *Inmate Calling Report and Order and FNPRM* the Commission found that "competition for ICS contracts may actually tend to increase the rate levels in ICS contract bids where site commission size is a factor in evaluating bids."[21] As such, the Commission found that the market forces in the interstate ICS market actually fail to constrain ICS rates.[22] In fact, because the benefits of any "competition" in the ICS market ran to the facility rather than the inmate or their family (*i.e*., the party who actually paid for the service), rates in many cases were being driven higher.[23] In the absence of competition ensuring just and reasonable rates, the Commission has used benchmarks to establish the appropriate rates for services.[24] Here, however, the Commission did not have adequate information to establish an interstate ICS benchmark rate. The Commission thus utilized the data in the record – that is, cost data from ICS providers – to adopt interim rules that required interstate ICS rates be cost-based and established, as described below, an interim two-tiered framework to bring rates closer in line with costs with defined waiver processes.

4. In light of the Commission's finding of market failure, the *Order* required that interstate ICS rates be cost-based.[25] Based on this guiding principle,[26] the *Order* established "safe harbor" rate

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[17] Although in principle the Commission can specify a different approach to ensuring just and reasonable rates that departs from cost-based ratemaking, it never has done so in the context of ICS. *Inmate Calling Report and Order and FNPRM* at para. 45.

[18] *See* 47 U.S.C. § 276(b).

[19] *See Inmate Calling Report and Order and FNPRM* Section III.B.3.

[20] "[U]nder most contracts the commission is the single largest component affecting the rates for inmate calling service." *Inmate Calling Report and Order and FNPRM* at para. 41 (citing *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3252-53, para. 10).

[21] *See Inmate Calling Report and Order and FNPRM* at para. 41.

[22] *See id.*

[23] "While the process of awarding contracts to provide ICS may include competitive bidding, such competition in many instances benefits correctional facilities, not necessarily ICS consumers – inmates and their family and friends who pay the ICS rates, who are not parties to the agreements, and whose interest in just and reasonable rates is not necessarily represented in bidding or negotiation." *Id*. at para. 40 (internal citations omitted).

[24] 47 C.F.R. § 61.26(c) ("The benchmark rate for a CLEC's switched exchange access services will be the rate charged for similar services by the competing ILEC. If an ILEC to which a CLEC benchmarks its rates, pursuant to this section, lowers the rate to which a CLEC benchmarks, the CLEC must revise its rates to the lower level within 15 days of the effective date of the lowered ILEC rate.").

[25] *Inmate Calling Report and Order and FNPRM* at paras. 50-52; *see also id.* at App. A (§64.6010). Such a requirement is a commonplace aspect of the regulation of interstate communications services and enables the Commission to fulfill its core statutory responsibility that rates be just and reasonable. The requirement does not alter the fundamental nature of the rate cap regime instituted by the *Order*. It is primarily an enforcement mechanism which provides an objective and time-tested standard by which to assess the reasonableness of rates in response to a complaint or an investigation. The impact of this requirement on ICS providers is consequently narrow. Providers need not cost-justify their rates prior to setting them. They are not required to cost-justify to the Commission rates at or below the safe harbors, unless and until a challenger successfully bears the burden of proving those rates are unreasonable. *See infra* n.31. And they are not required to cost-justify in the first instance rates subject to an informal complaint unless Commission initiates an investigation. Providers must cost-justify their rates to the Commission only if those rates are above the safe harbors *and* are subject to a formal complaint or a Commission investigation.

(continued….)

levels. Rates set at or below the safe harbors will be presumed lawful,[27] "unless and until the Commission makes a finding to the contrary."[28] The safe harbor rate levels are based on substantial data in the record and were set conservatively – *i.e.*, at levels that are likely over-compensatory – to ensure cost recovery for services provided at the vast majority of correctional facilities.[29] The safe harbor rate levels do not mandate specific rates or even rate structures, but instead, allow providers flexibility in setting rates within the limits established by the safe harbor rate levels.[30] The safe harbor creates protections for providers because any party wishing to challenge a rate that complies with the safe harbor will bear the burden of production and persuasion to overcome the presumption of lawfulness, and unless a challenger overcomes that presumption, the ICS provider need not demonstrate its costs.[31] Further, rates charged within the safe harbor levels will not be subject to refunds should a complainant establish that the challenged rates are not just and reasonable.[32] Nor in the course of a Commission investigation will providers whose rates are within the safe harbors be subject to forfeiture or refund if their rates are found to be unjust and unreasonable. Such providers would be required to charge lower, cost-based, and compensatory rates on a prospective basis only.

5. Recognizing that ICS providers operate in some facilities where the costs of service are exceptionally high, the *Inmate Calling Report and Order and FNPRM* established interim hard rate caps, substantially higher than the safe harbor rates, which allow ICS providers flexibility in setting their rates to reflect their individual costs. The hard caps represent the outside range of what the Commission found, based on data in the record, a high cost ICS provider *may* be able to cost justify.[33] The hard caps give ICS providers even more flexibility in setting their interstate ICS rates, helping to ensure that the majority of ICS providers will be able to recover their costs without a significant administrative burden prior to

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It is not clear, moreover, how the Commission would enforce its ICS rate caps short of requiring such a cost showing. Such cost showings are standard practice in formal complaints filed at the Commission under sections 201 and 208 and pursuant to the Commission's complaint procedures. 47 U.S.C. §§ 201(b), 208; 47 C.F.R. § 1.720(ff). Providers' interstate ICS rates were subject to such complaint filings even prior to the adoption of ICS-specific rate regulation. Such complaint proceedings would unavoidably involve cost showings similar to those that ICS providers would make under the ICS rules. The *Order's* requirement that rates be cost-based can therefore hardly be said to represent a "novel" requirement on ICS providers. *See* Securus Petition at 5.

[26] As the *Order* noted, "the Commission typically focuses on the costs of providing the underlying service when ensuring that rates for service are just and reasonable under section 201(b)." *Inmate Calling Report and Order and FNPRM* at para. 50. *See, e.g.,* 47 C.F.R. § 61.49(d) (cost showing required for rates that exceed price cap indices); 47 C.F.R. § 52.33 (allowing price cap carriers to recover local number portability costs through a cost showing).

[27] *See generally Inmate Calling Report and Order and FNPRM* Section III.C.3.a.; *id.* at para. 49 (rates at or below safe harbor rates will be presumed to be "just, reasonable, fair and cost-based").

[28] *Inmate Calling Report and Order and FNPRM* at para. 60; *see also id.* App. A, §64.6020(c).

[29] *See Inmate Calling Report and Order and FNPRM* at para. 61.

[30] For example, the *Order* allows ICS providers to employ a rate structure that includes both per call and per minute charges as long as the resulting rates calculated for a 15 minute call remain under the safe harbor rates. *See Inmate Calling Report and Order and FNPRM* at para. 88.

[31] *Inmate Calling Report and Order and FNPRM* at para. 60; *id.* at para. 120. While the *Order* made the process clear from the outset, the type of burden-shifting is not substantially different than would occur in an enforcement proceeding absent these rules. Moreover, the rules give ICS providers that avail themselves of the safe harbor the additional protections that parties challenging such rates have to overcome a rebuttable presumption that such rates are just, reasonable and fair. *See id.*; *see also supra* para. 45.

[32] *Inmate Calling Report and Order and FNPRM* at para. 60; *id.* at para. 120.

[33] *See generally id*. at Section III.C.3.b. To address the theoretical possibility of outliers, the Commission also made clear that providers could seek waiver of the hard caps if they could show that their costs necessitated rates above that level. *Id.* at paras. 82-84.

setting their rates. In the event of a formal complaint or rate investigation, however, ICS providers that elect to set rates above the interim safe harbor rate levels and at or below the interim rate caps will bear the burden of production and persuasion and could be subject to refunds.[34]

6. Finally, the Commission recognized that there may be rare occasions where a particular ICS provider was serving only extremely high cost facilities and believed that its cost-based rates would be higher than even the hard caps. The *Order* provided the flexibility to deal with such situations by creating a waiver process whereby such an ICS provider could establish its costs and receive a waiver necessary to charge rates above the hard cap.[35]

7. To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.[36] For the reasons described below, the ICS Providers have failed to meet the test for extraordinary equitable relief.

A. Likelihood of Success on the Merits

8. *Adequacy of Notice*. Securus and GTL both claim that the Commission unlawfully failed to provide notice that it was contemplating a requirement that interstate ICS rates be cost-based.[37] Securus states that the *Order* "adopts a novel 'cost-based' ratemaking methodology that was neither raised in the NPRM nor discussed in the record . . . ."[38] GTL characterizes the requirement as "rate-of-return regulation" and claims that no notice was provided for such an approach.[39]

9. The Commission provided adequate notice[40] that it contemplated a cost-based rate cap structure.[41] As noted in the *Order*, the *2012 ICS NPRM* sought comment on various aspects of rate caps such as "how any caps should be set," "how they should operate," "the benefits to per-minute rate caps,"

[34] *See id*. at para. 89; *id.* at para. 121. This requirement makes clear what the burdens and potential remedies will be, a determination normally made in the course of an enforcement action. Importantly, the burden in such an enforcement proceeding is no higher than it would have been absent the Commission's actions at issue here.

[35] *See id*. at paras. 82-84.

[36] *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*VA Petroleum Jobbers*).

[37] Securus and GTL differ in their arguments for stay on which portions of the *Order* lacked adequate notice. Securus' claim is limited to the requirement that rates be cost-based. Securus Petition at 5. "There simply was no indication there that the Commission was considering the potential of requiring ICS providers to prove that their rates were cost-based . . . ." GTL's claim challenges the same requirement but also challenges the safe harbor rule that "derives from" or "follows from" it. GTL Petition at 5, 6. Apart from these passing references, however, GTL neither explains nor supports this assertion elsewhere in its petition. As explained below, the safe harbor rates are an integral part of the *Order's* two-tier rate cap system. We therefore find that GTL is not likely to succeed on its claim there was inadequate notice for the *Order's* safe harbor rates.

[38] Securus Petition at 5.

[39] GTL Petition at 7. GTL's assertion that the requirement that ICS rates be cost-based effectively transforms the *Order's* rate cap regulation into traditional rate of return regulation misses the fact that the Commission's price cap rules require that a carrier's initial price caps are set based on such carrier's costs and, once set, continue to require cost showings in certain circumstances. *See, e.g.*, 47 C.F.R. § 61.49(e) (requiring an explanation of cost allocations and assignments for proposed rates that exceed price cap indices.).

[40] The Commission provided a description of the subjects and issues involved as required by the Administrative Procedure Act. *See* 5 U.S.C. § 553(b).

[41] *See generally 2012 ICS NPRM*, 27 FCC Rcd at 16636-47, paras. 16-48.

and "perceived problems or challenges associated with" such caps.[42] Moreover, the *2012 ICS NPRM* discusses costs throughout. For example, the Commission asked commenters to provide "specific, detailed cost information and other relevant data" to support their proposals.[43] Not surprisingly, numerous commenters provided data on service costs and suggested rate caps. The public thus had notice and an opportunity to comment on cost-based rate caps. Although the *2012 ICS NPRM* did not expressly discuss the specific two-tiered cap system of the type ultimately adopted, that system is at the least a logical outgrowth of the *2012 ICS NPRM*. As the Commission stated, its rules are "the kind of variant on rate caps that was contemplated in the *NPRM*."[44] The Commission explained further that the *2012 ICS NPRM* "made clear that we were contemplating such a rule; at a minimum, it plainly left open the possibility that we would implement rate caps in a manner that addressed concerns about the variability in ICS costs."[45] The Commission thus "'adequately frame[d] the subjects for discussion.'"[46]

10. Contrary to GTL's characterization, the adopted regulatory framework does not constitute traditional rate of return regulation.[47] Traditional rate of return regulation involves rates established in a complex tariff filing process. At the Commission, the process is governed by Part 61 of the Commission's rules which require the use of the Commission's Uniform System of Accounts in Part 32, the allocation of costs between regulated and non-regulated categories pursuant to Part 64 of the Commission's rules, the separation of costs between interstate and intrastate jurisdictions under the Part 36 rules, and the apportionment of interstate costs to the appropriate services using the Part 69 rules.[48] Nothing of the sort is required by the *Order*. Rather, the *Order* adopted rate caps based on costs, and is actually closer to the price cap regime for LECs that replaced rate of return. Other than in an enforcement proceeding, a carrier need not demonstrate its costs or justify its rates. GTL therefore is wrong that the *Order* requires *ex ante* review of ICS rates. Neither does the requirement that ICS providers annually file rate information, so that the Commission may monitor compliance with our rules and determine the appropriate future regulatory course, meaningfully resemble typically voluminous cost-supported tariff filings.[49]

11. GTL asserts that such requirements are not "definitional elements of rate of return [but] regulatory methods."[50] The Commission has a long history as of rate of return regulation, which unavoidably entails the aforementioned complex of rules and procedures traditionally used to regulate the rates of incumbent local exchange carriers and interexchange carriers. These rules and procedures are integral to rate of return regulation and cannot be separated from it. GTL's reasoning, by contrast, would require that every Commission attempt to foster cost-based rates be analyzed under an ill-defined sliding scale to determine when it is or is not rate of return regulation. Indeed, GTL does not describe how to reliably distinguish between a "definitional element" and a "regulatory method." That the rate caps

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[42] *Inmate Calling Report and Order and FNPRM* at para. 59 n.222.

[43] *2012 ICS NPRM*, 27 FCC Rcd at 16637, para. 20; *see also id.* at 16645-6, para. 44 (asking whether proposed rate caps were supported by cost data); *id.* at 16633, para. 7 (questioning "whether ICS rates accurately reflect the costs of providing ICS"); *id.* at 16639, para. 25 (asking whether a rate proposal was supported by "sufficient cost, demand, and revenue detail to allow the Commission to determine whether the proposed rates are just and reasonable").

[44] *Id.*

[45] *Inmate Calling Report and Order and FNPRM* at n.222.

[46] *Id.* (citing *Omnipoint v. FCC*, 78 F.3d 620, 631-32 (D.C. Cir. 1996); *Nat'l Mining Ass'n v. Mine Safety and Health Admin.,* 512 F.3d 696, 699-700 (D.C. Cir. 2008)).

[47] *See Inmate Calling Report and Order and FNPRM* at n.195.

[48] These requirements occupy more than 150 pages of the Commission's rules.

[49] *See infra* paras. 12-13.

[50] GTL Petition at 10.

adopted by the *Order* include a cost-based requirement simply reflects that all ratemaking methods attempt to adopt rates that approach cost. In the context of the ICS market, which the *Order* determined is subject to market failures, we cannot rely on market mechanisms to achieve that goal.[51]

12. To be sure, should an ICS provider face a formal complaint proceeding or a Commission investigation, it may at that point be required to demonstrate that its rates are cost-based. That requirement does not turn the rate cap regime into rate-of-return regulation, however, because it is an aspect of the Commission's longstanding complaint process.[52] Given the basic requirement of section 201of the Act that *all* interstate rates be just and reasonable, *any* provider may, upon complaint, be required to show that its rates are based on its costs.[53] Moreover, as a practical matter, we expect that the cost-based requirement adopted in the *Order* will impose little burden on ICS providers to which they are not already subject through the Commission's existing complaint and investigation procedures.[54] GTL's position boils down to the erroneous claim that any form of cost-based rate regulation that does not fully insulate providers' rates from a cost-based challenge automatically amounts to rate of return regulation.

13. The enforcement mechanisms adopted in the *Order* streamline the enforcement process. The Act requires just, reasonable, and fair interstate ICS rates, and the Commission determined in the *Order* that this requirement would be fulfilled by requiring that rates be cost based, subject to a presumption that rates within the safe harbor would be presumed to be cost based unless and until the Commission made a contrary finding.[55] In reality, that presumption, along with the pleading requirements of the formal complaint process, would make it difficult for a challenger to mount a successful case against a safe harbor rate. The Commission also determined that in a formal complaint challenging ICS rates above the interim safe harbor, the burden of production and persuasion would fall on the ICS provider. In any complaint proceeding challenging whether interstate ICS rates are just, reasonable, and fair under sections 201 and 276 of the Act, however, evidence of the costs of providing interstate ICS would be relevant to resolving the complaint. Where, as here, the Commission has made a finding that competition does not work to ensure just and reasonable rates, such evidence becomes essential and can only come from the ICS provider, with or without the explicit burden shift adopted in the *Order*. The enforcement mechanisms adopted in the *Order* merely recognize the need for cost information and the fact that such information must be provided by the party in possession of the data. Adopting such enforcement processes does not convert a rate evaluation in a complaint proceeding into rate-of-return regulation. Any associated burdens will not rise to the level the ICS Providers fear.

14. The ICS Providers also assert that the *Order's* requirement that rates be cost-based eliminated the incentives to improve efficiency that are inherent in rate cap regulation.[56] The ICS Providers, however, fail to note that the *Order's* interim safe harbor rates provide precisely this kind of incentive. Rates set at or below the safe harbors benefit from a presumption of lawfulness.[57] Thus, a provider that sets its rates at the safe harbor level but whose costs are lower will keep all profits earned even if the Commission eventually were to issue an order finding those rates to be unjust and

[51] *See Inmate Calling Report and Order and FNPRM* Section III.B.4.

[52] Because the Commission did not adopt rate of return regulation, GTL cannot succeed on its claim that the Commission had an obligation to justify its adoption of rate-of-return regulation after having abandoned that regulatory methodology for interexchange carriers in the late 1980s. *See* GTL Petition at 14-19; *see also* Securus Petition at 6-10. The Commission had no obligation to explain a "return" to a system of regulation it did not adopt.

[53] We note that rates compliant with existing Commission rules adopted to ensure rates are just and reasonable may be subject to specific standards for evaluation. *See generally* 47 C.F.R. § 61.49. *See also supra* n.17.

[54] *See Inmate Calling Report and Order and FNPRM* at paras. 50-52.

[55] *See id*.

[56] *See* Securus Petition at 8; GTL Petition at 14-17.

[57] *Inmate Calling Report and Order and FNPRM* at para. 60.

unreasonable. In this sense, the safe harbor truly is safe: *i.e.,* profits earned prior to a Commission order finding a provider's rates to be unjust can be retained without risk of refund or forfeiture, provided the rate is below the safe harbor. By contrast, a provider whose rates fall outside the safe harbor runs the risk that any profit above a reasonable return will have to be remitted in the form of refunds plus possible forfeitures. In this way, the safe harbor rates and hard rate caps adopted in the *Order* combine cost-based regulation with a strong incentive to increase operating efficiencies.

15. GTL also claims the Commission provided inadequate notice for its requirement that charges for ancillary services be cost-based.[58] As the *Inmate Calling Report and Order and FNPRM* pointed out, however, the *2012 ICS NPRM* sought comment on "outstanding questions with prepaid calling such as: how to handle monthly fees; how to load an inmate's account; and minimum required account balance" – that is, ancillary charges.[59] The *Order* also notes that "many commenters properly understood that ancillary charges were part of the cost-based reform being considered."[60] These commenters submitted multiple examples of excessive fees and proposals for regulating them.[61] The *Order* also makes clear that regulating ancillary fees "was a necessary aspect of our cost-based reforms, as otherwise providers could simply increase their ancillary charges to offset lower rates subject to our caps."[62] The adopted system is at the least a logical outgrowth of the *2012 ICS NPRM*.[63] For the reasons described above, we find that the ICS Providers fail to demonstrate a likelihood of success on the merits of their inadequacy of notice claim.

16. *Vagueness*. Securus asserts that it is likely to succeed on the merits of its claim that the *Order* is "fatally vague in describing the rate regulation it imposes."[64] But there is nothing vague about the approach that the Commission adopted. A provider can set its rates either at or below the safe harbor level. Alternatively, if it believes its reasonable and direct costs of providing service exceed that level, the provider may set its rates up to the hard cap. And the Commission described in the *Order* the particular types of costs that would be considered: "the cost of capital (reasonable return on investment); expenses for originating, switching, transporting, and terminating ICS calls; and costs associated with security features relating to the provision of ICS."[65] The Commission has previously imposed rate cap regulation with a similar degree of specificity.[66]

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[58] "Nor did the Commission's proposals indicate that it was considering regulation of ancillary charges . . . ." GTL Petition at 8.

[59] *See Inmate Calling Report and Order and FNPRM* at para. 90. Although the *2012 ICS NPRM* did not expressly refer to such charges as "ancillary charges," it is clear that the term as used in the *Order* encompasses such charges.

[60] *Id.* at n.338.

[61] *Id.*

[62] *Id.*; *see also* Transcript of Reforming ICS Rates Workshop at 136, WC Docket 12-375 (filed July 16, 2013) (Transcript of Reforming ICS Rates Workshop) (Cheryl Leanza, President, A Learned Hand, LLC ("I think the FCC absolutely has to look at all the other corresponding fees because those will definitely go up if the rate – if only the rate is addressed.")).

[63] *See*, *e.g.*, *CSX Trans. v. Surface Trans. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). *See also, e.g*., Petitioners 2013 Comments at 3, 24-27; Pay Tel 2013 Reply at 2-3 & n.6; Telmate 2013 Reply at 3.

[64] Securus Petition at 6-10.

[65] *Inmate Calling Report and Order and FNPRM* at para. 53 & n.196.

[66] In a previous effort to impose a price cap regime less complex than the IXC or ILEC price cap regimes, the Commission imposed a price cap regime on providers of IP Relay service based generally on the price cap plan implemented for incumbent LECs but without specifying much of the detail required by that plan. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140, 20158-60, paras. 39-46 (2007).

17. It is of no consequence that the Commission did not adopt a specific return on investment such as the prescribed 11.25 percent rate of return used in traditional rate-of-return regulation of smaller local exchange carriers.[67] Securus claims that the *Order* leaves providers "without sufficient guidance" as to what a "reasonable profit" means,[68] but the Commission has a long history of determining reasonable costs of capital, including in the payphone context,[69] and the *Order* clearly identifies a "reasonable return on investment" as a compensable cost that is "reasonably and directly related to the provision of ICS."[70] The Commission also states that the rate caps it adopts will ensure "fair compensation (including a reasonable profit)."[71] The *Order* made clear that the absence of a prescribed rate of return (and other more technical elements of rate of return regulation) are examples of the flexibility inherent in the *Order's* rate cap approach.[72] The rate cap approach adopted here is by nature less burdensome and more flexible for providers to comply with and for the Commission to administer. Securus mistakes flexibility for vagueness. We therefore find Securus fails to demonstrate it is likely to succeed on the merits of its claim of vagueness.[73]

18. In a related vein, GTL contends that it faces severe penalties for failure to comply with the rate caps and the Commission failed to provide sufficient guidance to enable ICS providers to comply with the caps.[74] To the contrary, we find that the *Order* provided ample guidance to enable ICS providers to set cost-based rates in compliance with the interim rate caps established by the *Order* and created no undue risk of enforcement fines or penalties for entities that act in good faith.

19. As discussed above, the *Inmate Calling Report and Order and FNPRM* provided general guidance in assessing the costs that are recoverable through interstate ICS rates, that is, "only costs that are reasonably and directly related to the provision of ICS."[75] The *Order* then provided numerous specific examples of costs that would likely be compensable and non-compensable, giving providers granular guidance that includes no less than twenty specific examples of cost categories that the

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[67] *See* Securus Petition at 7.

[68] *Id.*

[69] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 at 2620-23, paras. 165-169 (1999).

[70] *Inmate Calling Report and Order and FNPRM* at para. 53.

[71] *Id.* at para. 61.

[72] *Id.* at n.195.

[73] In its arguments on vagueness, Securus includes assertions that its costs "must be reviewed on a contract-by-contract basis" and not on a holding company basis as the *Order* directs. Securus Petition at 10 & n.26. It claims that a review at the holding company level is arbitrary and capricious "because it ignores the reality of this market . . . that rates are derived on a contract-by-contract basis." *Id.* at n.26. The *Order*, however, finds that analyzing costs at the holding company level more accurately captures the operational realities of the ICS market. *Inmate Calling Report and Order and FNPRM* at para. 83. ICS providers typically make use of centralized calling platforms which realize very significant efficiencies and scale economies but which also may indicate that many of the costs of providing ICS are joint and common costs that would be difficult to allocate with accuracy on a facility-by-facility basis. *See id.* at para. 29. Moreover, the *Order* notes that the Commission previously determined that analyzing ICS costs on a holding company basis was appropriate. *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3257-58, para. 23 ("Unless an ICS provider can show that . . . the *overall* profitability of its payphone operations is deficient because the provider fails to recover its total costs from its aggregate revenues . . . then we would see no reason to conclude that the provider has not been 'fairly compensated.'") (emphasis in original); *see also infra* para. 28.

[74] *See* GTL Petition at 17-19.

[75] *Inmate Calling Report and Order and FNPRM* at para. 53.

Commission would likely find compensable and eight examples of costs that it would not.[76] To have included additional detail or to have mandated uniform compliance with those details would have risked creating a formalized system of cost accounts inappropriately detailed and rigid for the interim rate cap regime adopted by the *Order*. A central goal of the Commission was to provide a significant degree of flexibility to allow providers to utilize their existing accounting systems and conventions and not to impose a single set of mandated cost categories to which providers would have to expend time and resources conforming their internal accounting systems and data.

20. GTL is not likely to face "severe penalties" should it rates be found – after formal complaint or investigation proceedings – to be above its reasonable costs.[77] While the *Order* referred to the Commission's authority to assess fines, it did so with regard to "existing rules" that already applied to interstate ICS providers, such as disclosure requirements.[78] The *Order* did not indicate that carriers would face penalties for good faith efforts to set cost-based rates that are subsequently found to exceed permissible limits. Indeed, in almost all cases of new rule regimes, the Commission typically works with providers to help guide them through the implementation of the rules[79] and would be unlikely to assess penalties on ICS providers that make good faith efforts to comply with these rules during this process.[80] Moreover, if a provider's rates fall within the safe harbor, no matter what its costs are, those rates will be treated retrospectively as just and reasonable and cannot give rise to forfeiture or other penalty. Even if the Commission were to investigate those rates and find them to be above the provider's compensable costs, the sole result of the investigation would be the prospective prescription of a lower cost-based rate. There would be no penalty associated with those rates prior to the effective date of the new rate prescription. In this way, the safe harbor creates a true zone of safeness that is free from the risk of any penalty, much less the "severe penalties" cited by GTL.

21. GTL is also wrong that the Commission gave inadequate guidance on apportioning costs between interstate and intrastate calls.[81] ICS providers routinely distinguish between interstate and intrastate costs and traffic in the normal course of business, for example, to accurately price and monitor the different services they offer. This was evident in the record as the 2008 ICS Provider Data Submission and the Securus cost study were both based, in whole or in part, on jurisdictionally separated

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[76] *See Inmate Calling Report and Order and FNPRM* at para. 53, nn.196, 198.

[77] GTL Petition at 17.

[78] *Inmate Calling Report and Order and FNPRM* at para. 118. Moreover, GTL does not cite a single instance of an ICS provider being fined for violating the rules referenced in this section of the *Order*.

[79] *See, e.g.*, *Transport Rate Structure and Pricing*, Memorandum Opinion and Order, 8 FCC Rcd 5370, para. 1 (1993) ("clarify[ing] certain issues on which guidance is needed before the LECs file their initial transport rates"); *Amendment of Part 69 of the Commission's Rules to Ensure Application of Access Charges to All Interstate Toll Traffic*, Memorandum Opinion and Order and Request For Supplemental Comments, 102 FCC 2d 1243, 1257-58, para. 28 (1985) (providing "sufficient guidance to permit the exchange carriers or NECA to develop the necessary tariff provisions, if they do not already exist, and to permit the proper billing and collection of access charges"); *Material To Be Filed In Support Of 2013 Annual Access Tariff Filings*, Order, 28 FCC Rcd 5224, 5228, paras. 11-12 (Wir. Comp. Bur. 2013) (providing guidance on the transition from intrastate switched access rates and rate structures to interstate switched access rates and rate structures in light of questions that had been raised); Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, to Regina McNeil, Vice President and General Counsel, NECA, 27 FCC Rcd 5801 (2012) (describing Bureau staff discussions with NECA regarding the implementation of intercarrier compensation reform, and providing certain formal guidance in that regard).

[80] Due process would preclude the Commission from imposing a penalty insofar as the regulation at issue "'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012) (internal citations omitted).

[81] *See* GTL Petition at 18.

cost data.[82] Providers clearly were not hampered by a lack of guidance from the Commission in preparing these studies and the Commission did not question the allocations made in either case. The Commission in fact relied on one of these studies to set its interim rate caps.[83] The *Order* allowed providers to determine their own jurisdictional separations of costs to ensure providers have flexibility in implementing this requirement.[84] Moreover, the relatively burdensome nature of a formal separations process specified by the Commission makes it less well-suited to the interim rate cap regime instituted by the *Order*. GTL has not alleged that it does not or cannot separate its costs, the Commission is not requiring that ICS providers develop a new separations methodology for this purpose, and there is no indication that the Commission would find providers' current separations methodology to be unreasonable.

22. We therefore conclude that the ICS Providers are not likely to prevail on their claims that the *Order* unlawfully failed to provide sufficient guidance in describing and implementing the rate regulation it imposed.

23. *Contract Impairment*. Securus also claims that the Commission unlawfully interfered with its contracts with prison authorities.[85] It first invokes the *Sierra-Mobile* doctrine,[86] under which an agency may modify or abrogate a valid contract "only if it harms the public interest."[87] This doctrine does not apply for at least two reasons. First, as the Commission explained, the new rules "do not … explicitly abrogate any agreements between ICS providers and correctional facilities,"[88] nor do they modify any provisions within those contracts. Instead, the rules prohibit unjust, unreasonable, and unfair rates paid by ICS *end users*: *i.e.*, prisoners and their friends and family. End users are not parties to any existing ICS contracts, which are between ICS providers and correctional facilities.[89] Moreover, to the extent that contracts between ICS providers and correctional facilities have change of law provisions, a change in the law is by definition not an abrogation or modification of the contract. Because the Commission has not abrogated or modified any contract, *Sierra-Mobile* does not apply here.

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[82] *See* 2008 ICS Provider Data Submission; *see* Siwek Report.

[83] *Inmate Calling Report and Order and FNPRM* at paras. 78-80.

[84] *Id*. at para. 53, n.195.

[85] Securus Petition at 10-12.

[86] *Id*. at 11-12.

[87] *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 548 (2008) (*Morgan Stanley*). *See also Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) ("Under the *Sierra-Mobile* doctrine, the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful, . . . and to modify other provisions of private contracts when necessary to serve the public interest[.]") (citing *FPC v. Sierra Pacific Power Co.,* 350 U.S. 348, 353–55 (1956); *United Gas Co. v. Mobile Gas Corp.,* 350 U.S. 332, 344 (1956)); *id*. at 1501, n.2 (explaining that "[a]though the legal standard for changing contract rates (they must be 'unlawful') differs from the standard for changing other contract provisions (they must disserve 'the public interest'), in fact the two standards are not very different."); *Morgan Stanley*, 554 U.S. at 546 (holding that the public interest standard under *Sierra-Mobile* is not at odds with the just-and-reasonable rate standard, but rather defines "what it means for a rate to satisfy the just-and-reasonable standard in the contract context").

[88] *Inmate Calling Report and Order and FNPRM* at para. 101. As explained more fully below, not only does the *Order* not modify, abrogate, or require the renegotiation of any contract, nor does it prohibit contractual provisions obligating providers to pay site commissions to correctional facilities, but to the extent there are any indirect effects on particular contracts, change of law provisions and/or routine amendment processes should be sufficient to address those effects without impairing the contracts. *See infra* para. 40.

[89] *See Inmate Calling Report and Order and FNPRM* at para. 100 (observing that existing ICS agreements were not between sellers and purchasers of ICS, but rather between sellers (*i.e.*, ICS providers) and correctional facilities, with the purchasers of ICS not being parties to those agreements).

24. Second (and relatedly), "*Sierra* was grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate *and the party charged* [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them."[90] Here, however, the parties charged – prisoners and their friends and family – are not even parties to the agreements and thus have no bargaining power whatsoever. Consequently, the *Sierra-Mobile* doctrine does not apply here.

25. But, as the Commission concluded in the *Order*, even if *Sierra-Mobile* were relevant, the *Order* is consistent with that doctrine.[91] Indeed, insofar as "[t]he doctrine *directs* the Commission to reject a contract rate that 'seriously harms the consuming public,'"[92] the reforms adopted in the *Order* were both appropriate and necessary to fulfill that directive. In adopting those reforms, the Commission relied on ample record evidence that existing ICS rates were inflicting serious harms on the consuming public. For instance, the Commission found that the high ICS rates currently in place "discourage communication between inmates and their families and larger support networks, which negatively impact the millions of children with an incarcerated parent, contribute to the high rate of recidivism in our nation's correctional facilities, and increase the costs of our justice system," and that "[f]amilial contact is made all the more difficult because 'mothers are incarcerated an average of 160 miles from their last home, so in-person visits are difficult for family members on the outside to manage.'"[93] Given the extensive record of serious harm to the consuming public, the Commission found that the reforms adopted in the *Order* were necessary "to ensure that rates and charges for interstate ICS are just, reasonable, and fair under the Act and consistent with the public interest," and that

> [t]o the extent that a contract between a facility and an ICS provider contains a rate that not meet those legal standards, it would be in the public interest to mandate that the contracts be modified so that they reflect rates that comply with the relevant legal requirements. . . . even if we were understood to be directly modifying existing contracts.[94]

The *Order* also emphasized repeatedly that unjust, unreasonable, and unfair ICS rates were inflicting substantial and clear harm on the general public (and not merely on private interests),[95] and that to the extent interstate ICS rates exceeded providers' costs directly and reasonably related to the provision of ICS, those rates were unlawful under sections 201(b) and 276 of the Act.[96] Therefore, even if *Sierra-Mobile* were relevant (which it is not), the Commission satisfied its requirements by making appropriate

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[90] *Morgan Stanley*, 554 U.S. at 546 (quoting *Verizon v. FCC*, 535 U.S. 467, 479 (2002)) (emphasis added).

[91] *See Western Union*, 815 F.2d at 1501; *see also Inmate Calling Report and Order and FNPRM* at n.365 (noting that "[e]ven if our actions today were somehow construed as modifying particular contractual provisions or abrogating particular contracts, we still would be acting within our lawful authority").

[92] *NRG Power Marketing, LLC v. Maine Public Utils. Comm'n*, 558 U.S. 165, 175 (2010) (quoting *Morgan Stanley*, 554 U.S. at 545-546).

[93] *Inmate Calling Report and Order and FNPRM* at para. 42 (citations omitted). *See also id.* at paras. 1-3.

[94] *Inmate Calling Report and Order and FNPRM* at n.365. *See also id.* at paras. 42-46 (describing the societal impacts of high ICS rates, and the need to adopt reforms that will ensure that interstate ICS rates are just, reasonable, and fair).

[95] *See*, *e.g.*, *Inmate Calling Report and Order and FNPRM* at para. 1 (ICS reforms will "provide relief to the millions of Americans who have borne the financial burden of unjust and unreasonable interstate inmate phone rates"); *id.* at para. 2 ("This Order will promote the general welfare of our nation by making it easier for inmates to stay connected to their families and friends while taking full account of the security needs of correctional facilities."); *id.* at para. 8 ("The Communications Act (Act) requires that interstate rates be just and reasonable for *all* Americans . . . . The Act further requires that our payphone regulations 'benefit . . . the *general* public,' not just some segment of it. Our actions in this *Order*, while long overdue, fulfill these statutory mandates . . . .") (emphases in original).

[96] *See*, *e.g.*, *Inmate Calling Report and Order and FNPRM* at paras. 12, 45-53, 59, n.222.

findings in the *Order*.

26. *The Record Supports the Adopted Rates*. Securus is incorrect when it claims that the *Inmate Calling Report and Order and FNPRM* ignored record evidence of smaller, higher-cost facilities' costs in setting its rate caps, resulting in below cost rates.[97] In fact, the Commission expressly addressed such evidence and used it as the basis for the interim rate caps which establish the outside level of rates ICS providers *may* be able to cost justify. The interim rate cap for prepaid and debit ICS calls was set based on the detailed cost data submitted by Pay Tel, which serves exclusively jails, "which providers claim are more costly to serve than prisons."[98] The rate cap for collect ICS calls was based on the 2008 ICS Provider Data Submission which consisted of cost data from 25 correctional institutions (including some served by Securus), the majority of which were higher-cost jails.[99] With regard to the interim rate caps, the Commission stated that it adopted the "highest cost data available in the record, which we anticipate will ensure fair compensation for providers serving jails and prisons alike."[100] In fact, the cost data used to establish both interim rate caps were data for the very kind of higher cost jails that Securus asserts the Commission ignored.[101] Notably, the Commission relied on these high cost showings even though they contained types of costs that the Commission identified as costs that are not reasonably and directly related to the provision of ICS because the intended purpose of the interim rate cap is to mark the outer boundary of such costs to ensure reasonable compensation for all providers. The safe harbor rate cap levels, by contrast, were based on data from state prisons, which more closely approximated actual costs. That is why rates within the safe harbor are given a presumption of reasonableness.[102] Even the safe harbor rate levels were set conservatively to ensure that they accorded a reasonable recovery to the majority of ICS providers, including many serving higher-cost populations.[103]

27. While Securus faults the *Order* for ignoring record evidence that the cost of serving some of its facilities is higher than the interim rate caps,[104] Securus' own cost study underscores the fact that averaged pricing is commonplace among ICS providers, as it is among communications providers generally.[105] The Siwek Report shows that the rates Securus charges for the highest cost institutions fail to recover its self-identified costs of serving those institutions. It indicates that the average cost for "Low 10" group of institutions it serves is $1.71 per minute[106] but that on average Securus charges only $1.10 per minute for calls from these same institutions.[107] Securus does not contend that it is not profitable as a

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[97] *See* Securus Petition at 14-16.

[98] *Inmate Calling Report and Order and FNPRM* at paras. 76-77; *see also* Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed July 23, 2013).

[99] *Inmate Calling Report and Order and FNPRM* at paras. 78-80. *See also* 2008 ICS Provider Data Submission.

[100] *Inmate Calling Report and Order and FNPRM* at para. 81; *see also id.* at para. 62 ("We set our interim safe harbor at conservative levels to account for the fact that there may be cost variances among correctional facilities.").

[101] *See id*. at paras. 76, 78.

[102] *See id*. at paras. 61-65.

[103] *See id*. at para. 65 (citing several benchmarks confirming the conservative nature of the *Order's* safe harbor rates); *see also id*. at para. 63, n.235 (citing the inclusion of two states' rate data that are significantly higher than rate data from the other states in the sample, the effect of which was to increase the average rate for prepaid and debit calling from $0.054 per minute to $0.12 per minute).

[104] Specifically, the average per minute rates for Securus' Medium 10 and Low 10 groups are higher than the *Order's* rate caps. *See* Siwek Report at 3, Tbl. 2.

[105] *See, e.g*., HRDC 2013 Comments, Rev. Exh. B.

[106] Siwek Report at 3, Tbl. 2. These are costs for all local, intrastate and interstate calling. Costs for Securus' interstate calls would likely be higher than this average cost.

[107] *Id.* at 8, Tbl. 10.

whole or that because its current rates do not cover the cost of serving its Low 10 facilities, it will be obliged to cease serving these locations.

28. Securus further asserts it is likely to succeed in its claim that the "Commission's failure to address *Securus's* evidence . . . is a failure of 'reasoned decisionmaking.'"[108] This claim is factually inaccurate. As discussed above, the Commission used the 2008 ICS Provider Data Submission, which was based in part on Securus' own cost data, to set the *Order's* interim collect call rate cap.[109] The Commission also used the 2008 ICS Provider Data Submission and the average cost data reported by Securus' own cost study for all call types, net of commissions to benchmark the reasonableness of Pay Tel's debit calling cost data, and found the Pay Tel data yielded a higher interim rate cap for providers.[110] Securus contends that its cost study "demonstrated that smaller facilities are orders of magnitude more expensive to serve than larger facilities" and that the *Order* "dismisses these differences in cost structure."[111] Securus' cost study does show that the smaller institutions it serves may be more costly to serve.[112] Yet, as the *Order* noted, when a provider's costs are reviewed in the context of a complaint, it will be "on the basis either of the whole of its ICS business or by groupings that reflect reasonably related cost characteristics, and not on the basis of a single facility it serves."[113] An ICS provider will therefore be able to choose how its cost support is reviewed. On that basis, Securus' average per minute cost (without commissions) for all the institutions included in its study was significantly below even the lowest interim safe harbor rate level set by the *Order*.[114] Ultimately, Securus' own data suggest that, far from being harmed by the rates set by the *Order*, Securus likely will be overcompensated by such rates on a company-wide basis.[115] We find therefore that Securus is unlikely to succeed in its claim that the Commission failed to engage in "reasoned decisionmaking."

29. *The Order Does Not Violate the Takings Clause*. Securus also contends that the Commission failed to consider record evidence that site commissions are imposed by contract or state law, which failure "caused the Commission to set rate caps that are confiscatory in violation of the Takings Clause of the Fifth Amendment."[116] The Commission, however, considered and rejected ICS providers' record assertions that it "must defer to states on any decision about site commission payments."[117] Rather, the Commission stated "[w]e do not conclude that ICS providers and correctional facilities cannot have arrangements that include site commissions. We conclude only that, under the Act, such commission payments are not costs that can be recovered through interstate ICS rates."[118] The

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[108] Securus Petition at 15 (emphasis added).

[109] *See Inmate Calling Report and Order and FNPRM* at para. 78. The Commission found that the resulting cap exceeded the average costs for collect calls reflected in Securus' more recent cost data submission. *Id*.

[110] *See Inmate Calling Report and Order and FNPRM* at para. 77.

[111] Securus Petition at 15.

[112] The Commission accepted Securus' cost study for purposes of its analysis in the *Inmate Calling Report and Order and FNPRM*. This did not prejudge how the Commission would review Securus' cost study in a cost proceeding.

[113] *Inmate Calling Report and Order and FNPRM* at para. 123. *See also id.* at para. 83 (waiver petitions to be judged on a holding company basis). Providers whose costs for the whole of their ICS business exceed the *Order's* rate caps may seek a waiver. *See Inmate Calling Report and Order and FNPRM* at paras. 82-84.

[114] *Inmate Calling Report and Order and FNPRM* at para. 26.

[115] We also remind the ICS Providers that the reforms adopted in the *Inmate Calling Report and Order and FNPRM* are limited to interstate ICS only.

[116] Securus Petition at 15-16.

[117] *Inmate Calling Report and Order and FNPRM* at para. 56, n.211.

[118] *Id*. at para. 56.

Order also noted that the Commission previously held that site commission payments are an apportionment of profit, not a cost of providing ICS.[119] Additionally, the financial impact of our reforms on ICS providers is limited due to the fact that they affect only interstate ICS rates, which comprise only about 15 percent of all ICS traffic.[120] Finally, the *Order* also addressed and rejected the claim that the rate regulations it adopted effectuated unconstitutional takings.[121] Securus' petition provides no additional substantiation for this claim. We therefore find that Securus is not likely to succeed on this claim.

30. *The Order Does Not Mandate Cross-Subsidization*. Securus finally asserts it is likely to succeed on its claim that the Commission failed to take into consideration the differences in cost to serve smaller facilities, effectively mandating cross-subsidization between different correctional institutions.[122] Securus states that the "Commission ignored the record evidence"[123] and cites a "lack of reasoned analysis."[124] As previously discussed, however, the Commission took into account differences in the cost of serving smaller facilities.[125] Securus may disagree with the Commission's analysis but it cannot contend the Commission did not undertake it.

31. Securus asserts that the adoption of a single set of rates for all correctional facilities "requires nationwide cross-subsidization of ICS services."[126] Securus claims that the *Order* "never even acknowledges that [cross subsidization] is the necessary outcome of its new rules."[127] To the contrary, the *Order* squarely addressed this issue.[128] It is a given that when a regulatory pricing structure is established, providers subject to those rates will serve higher and lower cost customers or locations and will effectively be required to average its costs among those customers.[129] The *Order* cited both wireline and CMRS providers as examples.[130] Both types of providers use regional and nationwide prices to serve end users with a wide range of cost and traffic characteristics.[131] Likewise, no regulatory rate structure is precise enough to account for the differences between all providers let alone all the locations served by

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[119] *Id*. at para. 54 n.199.

[120] *See infra* nn. 145-50. Rules that affect such a small portion of traffic cannot, as a matter of law, constitute a taking. *See, e.g., Full Value Advisors, LLC v. SEC*, 633 F.3d 1101 at 1109 (D.C. Cir. 2011) (government action must "amount to a deprivation of all or most economic use" of property in order to constitute an unconstitutional regulatory taking).

[121] *Inmate Calling Report and Order and FNPRM* at paras. 103-07.

[122] Securus Petition at 16-18.

[123] *Id*. at 17.

[124] Securus Petition at 18.

[125] *See supra* paras. 26-28.

[126] *Id*. at 17.

[127] *Id*.

[128] *See Inmate Calling Report and Order and FNPRM* at n.280.

[129] *See Southwestern Bell Telephone Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999) ("The use of industry-wide averages in setting rates is not novel. Indeed, the Supreme Court has affirmed ratemaking methodologies employing composite industry data or other averaging methods on more than one occasion. *See, e.g., FPC v. Texaco Inc.*, 417 U.S. 380, 387, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974) (noting that agency ratemaking does not "require that the cost of each company be ascertained and its rates fixed with respect to its own costs"); *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 769, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968).").

[130] *Inmate Calling Report and Order and FNPRM* at n.280.

[131] *Id.* ("[B]oth wireline and CMRS providers routinely offer regional or nationwide service at a single rate, in spite of the fact that offering service in this manner necessarily involves averaging of higher and lower per-customer costs.").

each provider.[132] Additionally, the extent to which the averaging of costs among different facilities may actually be taking place is dependent on how joint and common costs are allocated among facilities.[133] This commonplace practice of averaging among locations of differing cost characteristics is distinguishable from what is traditionally described as cross subsidization and which the statute and the Commission's rules prohibit.[134]

32. The *Order* also noted that ICS providers commonly engage in this same kind of averaging of costs under single rates.[135] Securus participated in the 2008 ICS Provider Data Submission which produced average cost figures for both prepaid and collect ICS calling notwithstanding the fact that participating ICS providers would not recover their costs if the study's average cost figures were adopted as rates in the majority of locations included in the study.[136] Also, as previously discussed, Securus' cost study shows that the per minute rates Securus charges for its "Low 10" group of facilities are significantly below the per-minute costs Securus identified for those facilities.[137] As also previously discussed, the *Order* provided a mechanism for ICS providers to charge higher rates for higher cost facilities if it elects to establish (and justify in an enforcement proceeding if necessary) cost based rates for all of its facilities.[138] The *Order* provided that an ICS provider cost study supporting its rates in an investigation or formal complaint may be made "on the basis either of the whole of its ICS business or by groupings that reflect reasonably related cost characteristics, and not on the basis of a single facility it serves."[139]

33. Securus asserts that the cost averaging implicitly required by the rate caps "contravene[ ] the mandate of section 276, which expressly requires fair compensation for 'each and every' call."[140] In the context of ICS, however, the Commission has previously interpreted this statutory requirement to apply on a whole company basis, not on the basis of an individual call or service location.[141] Given the foregoing, we find Securus is not likely to succeed in its claim that the Commission's adoption of a single set of interim rate caps ignored evidence of higher costs among smaller correctional institutions, thereby mandating cross subsidization between correctional facilities.

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[132] *Inmate Calling Report and Order and FNPRM* at n.230 ("it would not be possible, much less practical, to set this kind of exquisitely granular rate").

[133] Given the highly centralized nature of ICS networks, a substantial portion of ICS costs are joint and common. *See Inmate Calling Report and Order and FNPRM* at n.301. Providers will have flexibility to allocate joint and common costs in a way that will help them charge rates at or below the caps and in compliance with the cost-based requirement.

[134] *See, e.g.,* 47 U.S.C. § 254(k).

[135] *Inmate Calling Report and Order and FNPRM* at n.280 ("ICS providers typically use uniform rates when they serve multiple correctional facilities with differing cost and demand characteristics under a single contract. *See, e.g.,* State of California, California Technology Agency, IWTS/MASS Agreement Number OTP 11-126805 (listing approximately 80 correctional facilities served through a common rate structure) (available at http://prisonphonejustice.org/Prison-Phone-Kickbacks.aspx?state=California) (last visited Sept. 17, 2013).").

[136] *See* 2008 ICS Provider Data Submission. The August 22, 2008 and October 15, 2008 subsequent *ex parte* filings by the study's participants contain additional data that enable the calculation that 17 out of 25 locations included in the study had costs higher than the study's average cost for both debit and collect calling. *See* Joyce Aug. 22, 2008 *Ex Parte* Letter.

[137] *See supra* para. 27.

[138] *See supra* para. 6.

[139] *Inmate Calling Report and Order and FNPRM* at para. 123.

[140] Securus Petition at 17.

[141] *See Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3257-58, para. 23.

B. ICS Providers will not Suffer Irreparable Injury

34. The ICS Providers have failed to prove that they will suffer irreparable injury absent a grant of their stay petitions. We reject their claims for the reasons described below.

35. *The Adopted Reform Applies to a Small Portion of the Petitioners' ICS Business*. Securus argues that it will suffer significant lost revenues under the new ICS rate regime.[142] The new rules may reduce Securus' revenue compared to pre-reform levels. But, to the extent that is true, it is because its current revenues are the product of unlawfully high rates.[143] Securus has no right to charge unjust and unreasonable rates that violate sections 201 and 276 of the Communications Act, and a requirement that it bring its rates to levels consistent with statutory requirements creates no cognizable irreparable injury.[144] Additionally, the Commission has created procedures such as third party complaints to determine, if necessary, whether Securus' interstate ICS rates are just and reasonable (should Securus believe that its lawful rates are between the safe harbor and the cap). And, as discussed above, if Securus sets rates that it believes in good faith are lawful and the Commission ultimately disagrees, Securus is unlikely to owe any more than a refund, which is not a penalty of any kind. There is thus no cognizable injury here, much less the kind of severe and imminent injury necessary to support the extraordinary relief of a stay. Moreover, the interim rate regime applies only to interstate calls, which constitute about 15 percent of Securus' traffic[145] (and about 10 percent of GTL's).[146] Thus, any loss of revenue will be minor in the context of Securus's entire business. That does not constitute irreparable injury of the sort that justifies a stay.[147]

36. As a factual matter, moreover, there is insufficient evidence that Securus will lose money on its operations, even if it chooses the safe harbor rates. Its 2012 cost data filing shows that costs for 99 percent of the ICS minutes included in the filing come from high volume/low-cost facilities and are significantly below the safe harbor levels.[148] Although Securus also serves smaller, higher-cost jails,[149]

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[142] *See generally* Securus Petition at Section II.

[143] *See e.g.*, HRDC 2013 Comments, Rev. Exh. B.

[144] A provider's recoverable costs include a reasonable return (or profit) and therefore any lost revenues would consist of revenues above a reasonable profit on the costs reasonably and directly associated with the provision of ICS. *See Inmate Calling Report and Order and FNPRM* at para. 61. The ICS Providers have not made the case that the loss of such revenues can justify a finding of irreparable harm. *See*, *e.g.*, *Wisc. Gas*, 758 F.2d at 674 (to demonstrate irreparable harm "the injury must be both certain and great" and "it is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm"); *Davis v. Pension Benefit Guaranty Corp*., 571 F.3d 1288, 1295 (D.C. Cir. 2009) ("in the absence of special circumstances, . . . recoverable economic losses are not considered irreparable") (ellipsis in original; citation and internal quotation marks omitted).

[145] Securus provided data for a representative sample of 38 of the correctional facilities it serves. Table 2 in this data filing provides all ICS minutes from those 38 facilities. Table 9 of the data filing provides the total interstate minutes for those 38 correctional facilities. Dividing total interstate minutes by all ICS minutes reveals that only approximately 15 percent of Securus' annual ICS minutes are interstate. *See* Siwek Report at 3, 8, Tbls. 2 and 9.

[146] *See* Letter from Michael K. Kellogg, Counsel for Global Tel*Link to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Nov. 7, 2013) (estimating that interstate ICS accounts for 10 percent of ICS provider GTL's ICS traffic) (GTL Nov. 7, 2013 *Ex Parte* Letter); *see also Inmate Calling Report and Order and FNPRM* at n.444.

[147] *See, e.g.*, *Wisc. Gas*, 758 F.2d at 674 (to demonstrate irreparable harm "the injury must be both certain and great"); *Holiday Tours*, 559 F.2d at 843 n.2 (referring to a "severe" injury as "destruction of a business" and holding that "'mere' economic injuries" are not sufficient for a stay). Nor have petitioners demonstrated that they lack a way to recover lost revenue if the *Order* were to be reversed by a court, as they allege, *see* Securus Petition at 28; GTL Petition at 19, for example through subsequently negotiated agreements with correctional facilities.

[148] When site commission payments are removed (as ordered by the *Inmate Calling Report and Order and FNPRM*) from Securus' sample per-minute rates provided in its 2012 cost data filing, its average per-minute rate level is $0.044. *See* Siwek Report at 3, Tbl. 2.

those facilities account for a smaller proportion of its overall business.[150] It also appears that small, high-cost jails have an especially low volume of interstate calls because the offenders held there are primarily local to the jail. Data in the record show that jails have weekly population turnover rates averaging more than 60 percent.[151] We thus expect that the vast majority of calls made from jails are intrastate and therefore not impacted by reforms adopted in the *Inmate Calling Report and Order and FNPRM*.[152]

37. GTL also claims it will suffer significantly reduced revenues from the Commission's action,[153] but it fails to substantiate that claim, and in any event it fails for all the same reasons discussed above as to Securus.[154] While GTL has asserted it stands to lose millions of dollars, the assertion is irrelevant to the extent that those revenues reflect unlawful rates. Moreover, GTL has declined to provide requested data throughout this proceeding.[155] GTL may not now complain that the Commission used the data that were available to it.[156] We also note that the rate reform adopted in the *Order* is interim in

(Continued from previous page)
[149] *See* Siwek Report at 3.

[150] Securus' data show that for all of 2012, its highest cost, lowest volume facilities had between 885 and 1,668 ICS minutes. Securus says this minute volume represents between 113 and 284 calls from the facilities they detailed *for an entire year*. *See* Siwek Report at 2-3.

[151] Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed July 3, 2013) ("The national turnover average for jails is 62.2% per week – meaning that over one-half of the inmate population changes in the course of a single week."). *See also* Transcript of Reforming ICS Rates Workshop at 262 (Timothy Woods, National Sheriffs' Association, noting the turnover differences between jail populations and prison populations).

[152] *See, e.g.*, Pay Tel 2007 Comments at 6 (Pay Tel, an ICS provider that serves primarily jail facilities, stated that in 2007 81 percent of its calls in jail facilities were local calls). *See also* Pay Tel 2013 Comments at 7 (in 2012 Pay Tel asserts that 84 percent of its revenue calls were intrastate).

[153] *See* GTL Petition at 19.

[154] *See supra* para. 36.

[155] GTL 2013 Comments at 26 ("Because GTL has more than 1,900 correctional facilities customers, each with unique procurement requirements and individualized contractual terms, it would be extraordinarily difficult and time-consuming to extract the summary information the Commission has requested for each of those correctional facility customers.").

[156] *See, e.g.*, *American Public Communications Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000) (citing *Industrial Union Dep't, AFL-CIO v. Hodgson,* 499 F.2d 467, 474-75 n. 18 (D.C.Cir.1974)) ("[W]e cannot require an agency to enter precise predictive judgments on all questions as to which neither its staff nor interested commenters have been able to supply certainty. 'Where existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information.'"); *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1233 (D.C. Cir. 1999) ("Throughout the rulemaking process, moreover, petitioners withheld the very cost data that would have enabled the Commission to establish precise, cost-based rates. In its published notice proposing the TCP methodology [at issue in the case], the Commission repeatedly invited commenters to suggest alternative methods for calculating settlement rates. . . . At one point, agreeing with petitioners' view that 'the appropriate cost standard for establishing benchmark settlement rates is the incremental cost of terminating international traffic,' . . . the Commission explicitly stated: 'We encourage foreign and U.S. carriers to submit data on their costs.' . . . Yet in its final rule, the Commission reported that 'no commenter has provided cost data in the record about the costs of providing international termination services.' . . . Since petitioners refused to let the Commission see their cost data, and since the Commission thoroughly explained why 'the TCP methodology provides a reasonable basis for establishing settlement rate benchmarks in the absence of carrier-specific cost data,' . . . we have no firm basis for accepting petitioners' claim that the benchmark rates are not fully compensatory.") (citations omitted). *Cf.* Wright Petitioners Opposition to GTL Petition at 4 ("[I]t is inconceivable that the ICS providers are incapable of immediately preparing reports that 'record and document its costs of providing service.'").

nature[157] and that GTL is free to charge up to the hard cap (subject to refunds if the Commission ultimately disagrees that such a rate reflects costs) and even take advantage of the waiver process to establish that it should be allowed to charge rates above the interim rate caps, should its costs justify that outcome.[158] Again, therefore, there is no evidence of severe, imminent, and irreparable injury.

38. *The Adopted Rate Reform Allows for Full Cost Recovery*. We also reject Securus' argument that it "will be forced to provide below-cost service"[159] under the requirements adopted in the *Inmate Calling Report and Order and FNPRM*. According to Securus' own cost data, the interim safe harbor rate levels and rate caps adopted in the *Order* should allow for full recovery of Securus' costs, including a reasonable return. As the Commission discussed, the 2012 cost data Securus filed in this proceeding show that Securus' per-minute ICS costs, exclusive of the costs of disallowed site commissions but inclusive of costs and minutes of use (MOU) from their highest cost facilities, were $0.04/minute, which is well below the interim safe harbor rate levels and rate caps adopted by the Commission.[160] Specifically, Securus' cost study establishes that its costs of providing ICS are less than 40 percent of the interim safe harbor rate levels and less than 30 percent of the interim rate caps. There is thus little likelihood that Securus, which can charge up to the hard cap without prior Commission permission (and subject, assuming good faith, only to refunds) will be forced to offer below-cost service, and, in any event, as discussed above, can even seek a waiver to go above the hard cap.

39. Securus complains that the rates adopted in the *Inmate Calling Report and Order and FNPRM* preclude it "from recovering the costs of mandatory site commission payments."[161] Here, too, however, this prohibition applies only to the 15 percent of Securus traffic that is jurisdictionally interstate. In addition, the *Order* builds upon prior Commission precedent when it states "that site commission payments are not part of the cost of providing ICS and therefore not compensable in interstate ICS rates."[162] And in the *Order*, the Commission made clear that actual costs reasonably and directly related to the provision of ICS, such as security costs, incurred by the correctional facilities and reimbursed by ICS providers could be recoverable.[163] As fully explained by the Commission, "our regulations are designed to allow providers to recover their costs of providing ICS, including a reasonable return on investment."[164]

40. *Minimal Effect on Contracts*. We reject the ICS Providers' unsubstantiated arguments[165] that the changes adopted in the *Inmate Calling Report and Order and FNPRM* will require the comprehensive renegotiation of almost every ICS contract they have with correctional facilities.[166] In the *Order* the Commission neither required the renegotiation of contracts, directed parties to modify contract

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[157] *See Inmate Calling Report and Order and FNPRM* at paras. 47-49.

[158] *See id*. at paras. 82-84.

[159] Securus Petition at 21.

[160] *See Inmate Calling Report and Order and FNPRM* at para. 26. *See also supra* n.148.

[161] *See* Securus Petition at 18-19.

[162] *Inmate Calling Report and Order and FNPRM* at para. 54 (citing the *Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd at 3254-55, para. 15).

[163] For example, the Commission will include the "costs associated with security features in the compensable costs recoverable in ICS rates." *Inmate Calling Report and Order and FNPRM* at para. 58.

[164] *Inmate Calling Report and Order and FNPRM* at para. 103.

[165] *See*, *e.g.*, Wright Petitioners Opposition to GTL Petition at 4.

[166] *See* Securus Petition at 19-21; GTL Petition at 20-21. According to the record, the average contract term is three to five years and ICS providers therefore renegotiate contracts in the regular course of business. *See Inmate Calling Report and Order and FNPRM* at para. 98.

terms, nor prohibited site commission payments by ICS providers under existing contract terms.[167] The *Inmate Calling Report and Order and FNPRM* made clear that site commission payments do not constitute a cost of providing ICS and thus cannot be used to justify unreasonable rates charged to inmates and their friends and families.[168] In addition, the rates at issue are charged to end users that are not parties to the ICS contracts.[169] While Securus notes that such rates are "generally included as express terms of service contracts,"[170] it does not demonstrate that those contracts compel it to charge only those rates and nothing lower. The record further indicates that many ICS contracts include change of law provisions[171] and the ICS Providers do not claim otherwise in their petitions.[172] In fact, the record contains examples of Securus' ICS contracts that contemplate Commission action lowering ICS rates and describe, within the contract, how that rate change will be accomplished.[173] The record also indicates that ICS contracts are amended on a regular basis[174] and it is reasonable to believe that changing, or even renegotiating, the applicable rates does not rise to the level of injury necessary to justify a stay.[175] As such, we reject the ICS Providers' claims that they will suffer irreparable harm as the result of renegotiating numerous ICS contracts.

41. *The Commission Adopted a Reasonable Reporting Requirement*. Securus has not shown it will suffer irreparable harm from the reporting requirements adopted in the *Inmate Calling Report and Order and FNPRM*.[176] First, we note that the reporting and certification requirement, as well as the one-time mandatory data collection, adopted in the *Order* are not effective until the Commission receives approval from the Office of Management and Budget (OMB).[177] There is thus no imminent irreparable

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[167] *Inmate Calling Report and Order and FNPRM* at paras. 100-102.

[168] *See id*. at paras. 54-58, 133.

[169] *Id*.

[170] Securus Petition at 19-20.

[171] The record shows that state contracts for ICS as well as county contracts for ICS include language "wherein the respective parties also agreed to conform their agreements in the future to take into account possible changes in the regulatory landscape." Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Aug. 2, 2013) (Wright Petitioners Aug. 2, 2012 *Ex Parte* Letter).

[172] ICS Providers may not now complain about the potential for renegotiating some of their ICS contracts after they previously made business decisions to exclude change of law provisions in their negotiated contracts. Specifically, if some of ICS contracts do not include change of law provisions, it is reasonable to conclude that this omission was a business decision made by sophisticated companies.

[173] *See, e.g.,* Wright Petitioners Aug. 2, 2012 *Ex Parte* Letter at Exh. B at 2 ("These rates shall remain firm during the term of the contract, and any renewals, unless: The Louisiana Public Service Commission (LPSC) or the Federal Communications Commission (FCC) issues regulations that mandate lower rates (individually or collectively, "Regulations"). If this occurs, and such Regulations are applicable to this Contract, the Contractor shall be required to decrease the affected rates in accordance with the time period required by such Regulations.").

[174] "[T]he State of Florida and Securus have amended their agreement on four occasions since its execution in 2007. . . . Among the modifications in the amendments are the rates to be charged inmates for telephone service." Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 3 (filed June 28, 2012).

[175] In fact, ICS contracts often include a one-page rate sheet that is easily modified. *See*, *e.g.*, Letter from Lee G. Petro, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at Exh. B., Attach. 1 at 34; Exh. C at 2; Exh. D, Attach. 1 at 24 (filed July 18, 2013).

[176] *See* Securus Petition at 23. If Securus' claim is true, we find that hiring employees, by itself, is not an irreparable harm that meets the test to satisfy the second prong of the *VA Petroleum Jobbers* test. *VA Petroleum Jobbers*, 259 F.2d at 925 ("The key word in this consideration is *irreparable*. Mere injuries, however, substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.").

[177] *See Inmate Calling Report and Order and FNPRM* at para. 188; App. A (§ 64.6060).

harm under any scenario as there is no danger such requirements will be implemented absent a comprehensive review by the OMB of the reasonableness of the burden such requirements will impose. For this reason alone, this claim is neither imminent nor certain and thus fails.

42. Additionally, Securus overstates the burden of these reporting requirements.[178] Securus' 2012 cost data filing shows that it already maintains much of the requested information. Specifically, the Siwek Report makes reference to Securus maintaining "data that includes costs incurred, revenue brought in, and call traffic volumes such as number of minutes and number of distinct calls."[179] Securus also complains about having to provide the Commission with its ICS rates and costs.[180] We reject the validity of these concerns because we find it reasonable that a large business, with "the largest team in the industry" that has provided ICS for 25 years[181] would maintain a comprehensive list of its ICS rates and costs in the normal course of business. Finally, the Commission was careful to ask only for the data it needs to establish a baseline and to provide itself with information necessary to determine trends and therefore inform future interstate and intrastate ICS rate regulation.[182] Securus will have an opportunity through the PRA process to make its claim regarding the burden of the Commission's data collection and record –keeping requirement.[183] We thus reject Securus' claims that they will suffer irreparable harm as the result of having to comply with the *Order's* reporting requirements.

43. *Petitioners Misunderstand the Applicable Enforcement Mechanisms and Safety Valves*. The ICS Providers' concerns about the enforcement mechanisms detailed in the *Inmate Calling Report and Order and FNPRM* are misplaced.[184] Specifically, interstate ICS has always been subject to the section 201 requirement that rates be just, reasonable, and non-discriminatory, and ICS providers have always been subject to the Commission's informal and formal complaint processes. The *Inmate Calling Report and Order and FNPRM* merely enunciated these pre-existing standards[185] and established how burdens would be placed in a formal complaint proceeding, including reducing some burdens on ICS providers in certain circumstances.[186]

44. With regard to the informal complaint process explained in the *Order*, no additional burden is placed on ICS providers by the *Order*. Further, the Commission's existing informal complaint process does not impose significant procedural burdens[187] on complainants or respondents and does not automatically trigger the formal complaint process.[188]

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[178] We agree with the Wright Petitioners' opinion that "it is inconceivable that the ICS providers are incapable of immediately preparing reports reflecting 'rates, costs, minutes of use as well as average call duration,' and claims that companies might have to hire up to 10 new employees are unsupported as well." *Rates for Interstate Inmate Calling Services*, Opposition to Petition for Stay of Report and Order Pending Appeal, WC Docket No. 12-375 at 3-4 (filed Oct. 29, 2013) (Wright Petitioners Opposition to Securus Petition).

[179] Siwek Report at 2.

[180] *See* Securus Petition at 22.

[181] *See* Securus Technologies, Inc. Company Fast Facts, *available at* https://securustech.net/web/securus/company-profile (last visited Nov. 20, 2013).

[182] *See Inmate Calling Report and Order and FNRPM* at paras. 124-26.

[183] *See* Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

[184] *See Inmate Calling Report and Order and FNPRM* at Section III.H.

[185] *See supra* para. 20.

[186] *See supra* para. 4.

[187] *See* 47 C.F.R. §§ 1.716-.719.

[188] "If the complainant is not satisfied by the carrier's response and the Commissions' disposition, it may file a formal complaint in accordance with § 1.721 of this part." 47 C.F.R. § 1.717.

45. With regard to the formal complaint process explained in the *Order*, the Commission addressed how the burdens of production and persuasion would be placed in certain circumstances and limited the burden and potential financial exposure of ICS providers where they elect to take advantage of the safe harbor rate levels.[189] Specifically, the burdens of production and persuasion fall on the ICS provider only when its rates are above the safe harbor levels.[190] This is because the ICS providers are best-suited to supply the information and analysis needed to conduct a complaint proceeding. In addition, the *Order* establishes that the complaining party will have the burdens of production and persuasion when challenging ICS rates that are below the safe harbor levels.[191] As a practical matter, that burden allocation will likely insulate ICS providers with rates at or below the safe harbor levels from formal complaints. This is a protection that did not exist prior to the *Inmate Calling Report and Order and FNPRM*. Absent this explicit burden shift, the formal complaint process would be more burdensome for an ICS provider.

46. With regard to forfeitures, the risk of incurring enforcement penalties is mitigated because the *Order* set interim safe harbor rates at conservatively high levels and thus reduced the risk that providers would run afoul of the *Order's* guidance on compensable costs. This is likely to be particularly true for the two petitioning ICS Providers. Securus submitted cost data into the record (data submitted to the Commission using the company's own internal accounting processes with no guidance from the Commission) that yielded average per-minute costs, net of commission revenues, significantly below the adopted safe harbors.[192] GTL did not submit any of its own cost data in the record,[193] despite having the opportunity to do so, but did claim in its comments that it is "one of the largest providers" of ICS and thus has "economies of scale and efficiency"[194] that make its costs lower than other providers.[195] As a result, the risk that GTL (or Securus) will incur enforcement penalties if they act in good faith seems remote – and thus not the kind of imminent or certain injury that could justify a stay.[196]

C. The Requested Stays Will Result in Harm to Others

47. The ICS Providers have failed to prove that third parties will not suffer if the

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[189] *Inmate Calling Report and Order and FNPRM* at para. 121. *See also* 47 C.F.R. § 1.720 ("Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings.").

[190] *See Inmate Calling Report and Order and FNPRM* at para. 121.

[191] *See id*. at paras. 120-21.

[192] *See* Securus 2013 Comments, Expert Report of Stephen E. Siwek (Siwek Report) at 3, 5, Tbls. 2, 5 (enabling the calculation of an average minute-weighted cost net of commissions of all facilities included in the study of $0.044 per minute).

[193] GTL stated "it would be extraordinarily difficult and time-consuming to extract the summary information the Commission has requested . . . ." GTL 2013 Comments at 26. The Wright Petitioners stated "ICS providers such as GTL flatly refused to actively participate in the FCC's rulemaking" and "flatly refused to supply cost data." Rates for Interstate Inmate Calling Services, Opposition to Petition for Stay of Report and Order Pending Appeal, WC Docket No. 12-375 at 3 (filed Nov. 6, 2013) (Wright Petitioners Opposition to GTL Petition).

[194] *Inmate Calling Report and Order and FNPRM* at para. 80 & n.296.

[195] GTL serves the New York Department of Corrections and Community Supervision-run correctional facilities at a rate of $0.048/minute. *See* Letter from Anthony J. Annucci, Acting Commissioner, NY DOCCS to Gregory V. Haledjian, Attorney-Advisor, FCC, WC Docket No. 12-375 at 2 (filed July 8, 2013).

[196] *See, e.g.*, *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir.1985) (per curiam) (*Wisc. Gas*) (To demonstrate irreparable harm "the injury must be both certain and great; it must be actual and not theoretical. . . . [T]he party seeking injunctive relief must show that '[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'") (citations omitted).

Commission grants their stay petitions. We reject their claims for the reasons described below.

48. As the Commission stated in the *Inmate Calling Report and Order and FNPRM*, current interstate ICS rates are, in most cases, greatly above costs,[197] and as such, "place an unreasonable burden on some of the most economically disadvantaged people in our nation."[198] The Commission noted that excessively high ICS rates "discourage communication between inmates and their families and larger support networks."[199] This lack of contact in turn negatively impacts recidivism rates, increases costs to our criminal justice system, harms the children of prisoners by depriving them of parental love and guidance, and discourages adequate access to counsel for inmates.[200] If these petitions are granted and a stay is issued, these "third parties," that is, perhaps millions of ICS customers and their family members, will continue to suffer the negative effects of existing unjust, unreasonable, and unfair interstate ICS rates. In addition, members of the public would continue to be harmed by the greater recidivism, and attendant crime, that would likely persist during a stay. The reforms implemented in the *Inmate Calling Report and Order and FNPRM* have been delayed long enough. They should not be delayed any further, and we reject petitioners' assertion that third parties will not continue to be harmed by a stay.[201]

49. Additionally, Securus and GTL are incorrect that the Wright Petitioners will not be harmed by a stay because they "did not envision or advocate the ongoing, cost-based rate review that the Commission has established here."[202] The objective of the Wright Petitioners, and of the Commission in adopting its *Inmate Calling Report and Order and FNPRM*, was to reduce excessive ICS rates and the harms that resulted from such rates. As explained above and further below, the record shows that many, perhaps millions, of third parties will be harmed by a stay through the continued imposition of highly excessive rates, as the Wright Petitioners themselves observe in opposing a stay.[203] In any event, as the Commission noted from the outset, "[p]etitioners made clear that their proposed rate caps were designed to ensure that ICS rates better reflected the costs of providing ICS service."[204] The Commission sought comment on Wright Petitioners' proposed cost-based caps, and on possible variations to the caps, in the *2012 ICS NPRM*, and sought comment throughout on ways to regulate ICS rates based on costs.[205] In the *2012 ICS NPRM*, the Commission also "sought comment on the competitive nature of the ICS market and whether such competition constrains ICS rates."[206] Prior to that time, the Commission requested comment on "fair compensation under section 276 with reference to the costs of providing the relevant service, including in the context of ICS."[207] The ICS Providers' contention that the Wright Petitioners did not envision cost-based rates is incorrect and does not support the adoption of a stay.

50. We also disagree with the ICS Providers' argument that third parties will be harmed due to correctional facilities' "deprivation" of site commissions, which would lead to compromised "security

[197] *Inmate Calling Report and Order and FNPRM* at paras. 38-41.

[198] *Id*. at para. 2.

[199] *Id*. at paras. 42-44.

[200] *Id*.

[201] *See* Wright Petitioners Opposition to Securus Petition at 4.

[202] Securus Petition at 24; GTL Petition at 22 (the Wright Petitioners "did not *ask* for that complex and disfavored regulatory approach," nor did they ask for "rate caps as superior regulatory solution").

[203] Wright Petitioners Opposition to Securus Petition at 4-5.

[204] *Inmate Calling Report and Order and FNPRM* at n.222, *citing* Alternative Wright Petition at 4, 16-18.

[205] *Inmate Calling Report and Order and FNPRM* at n.222, *citing 2012 ICS NPRM* at 16637, para. 20; *id.* at 16638, para. 22; *id.* at 16638, para. 23.

[206] *Inmate Calling Report and Order and FNPRM* at para. 39.

[207] *See Inmate Calling Services Order on Remand and NPRM*, 17 FCC Rcd 3248 at 3276-79, paras. 73-79.

features and functionalities necessary to maintain public safety inside and outside the correctional facility."[208] In the *Inmate Calling Report and Order and FNPRM*, the Commission recognized the "critical security needs to correctional facilities."[209] The Commission took into account "security needs as part of the ICS rates" as well as its "statutory commitment to fair compensation."[210] The *Order* allows ICS providers to recover costs associated with security features in the overall category of compensable ICS costs.[211] It also recognized that ICS systems include "important security features, such as call recording and monitoring, that advance the safety and security of the general public, inmates, their loved ones, and correctional facility employees."[212] What the Commission disallowed is the recovery of site commission payments "because they are payments made to correctional facilities or departments of corrections for a wide range of purposes, most or all of which have no reasonable and direct relation to the provision of ICS."[213] In contrast, the Commission specifically allowed for the inclusion of costs related to the provision of ICS that are incurred by correctional facilities and reimbursed by ICS providers. Such allowable costs include security costs.[214] Securus therefore has failed to show that a stay is necessary to ensure that costs related to security will be recovered or that a stay otherwise is needed to maintain those security measures.[215]

51. We also disagree with GTL's assertion that inmates at lower-cost facilities will suffer because they will subsidize higher-cost facilities and may ultimately suffer loss of services due to such cross-subsidization.[216] As discussed above,[217] the *Order* did not mandate what is traditionally called "cross-subsidization."[218] What the *Order* did, however, was adopt a single set of interim safe harbor rate levels and interim rate caps based on averaged data that will ensure fair compensation for all providers.[219] It also held that an ICS provider may cost justify its rates on "the basis of either the whole of its ICS business or by groupings that reflect reasonably related cost characteristics, and not on the basis of a single facility it serves[,]" thereby providing a mechanism for ICS providers to elect to charge higher rates for high cost facilities where it can cost justify such rates and it makes business sense to do so company-wide.[220] As stated in the *Order*, no regulatory rate structure is granular enough to account for all differences between providers, let alone all locations served.[221] These assertions of loss of service, with no substantive support, provide an inadequate basis for stay.

D. The Public Interest Does Not Support a Grant

52. The ICS Providers have failed to prove that the public interest supports grant of their stay petitions. We reject their arguments for the reasons described below.

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[208] Securus Petition at 26; *see also* GTL Petition at 24.

[209] *Inmate Calling Report and Order and FNPRM* at para. 58.

[210] *Id*. at para. 58.

[211] *Id*. at para. 58 & n.196.

[212] *Id*. at para. 2.

[213] *Id*. at para 54.

[214] *Id*. at para 58 & n.196.

[215] *See* Securus Petition at 25.

[216] *See* GTL Petition at 22-23.

[217] *See supra* paras. 30-33.

[218] *See, e.g.*, 47 U.S.C. § 254(k).

[219] *See Inmate Calling Report and Order and FNPRM* at paras. 60, 62-64.

[220] *Id*. at para. 123.

[221] *Id*.

53. We disagree with GTL and Securus' assertions that the public interest favors a stay, pursuant to the fourth prong of the *Virginia Petroleum Jobbers* test.[222] Specifically, the ICS Providers assert that the reforms adopted in the *Order* will harm the public interest by eliminating cost recovery in the form of site commission payments,[223] and by negatively affecting inmate and public safety,[224] victims' rights and inmate welfare,[225] and inmates' access to ICS.[226]

54. First, as discussed above, the *Inmate Calling Report and Order and FNPRM* allows ICS providers to recover their just, reasonable, and fair costs, including reasonable security costs.[227] And, as stated in the *Order*, the Commission's statutory obligations relate only to the rates charged to end users—the inmates and the parties whom they call.[228] While objectives such as education and societal reentry are worthy goals, Congress has determined that the public interest demands rates that are just, reasonable, and fair, and the Commission is bound by that statutory mandate.[229] The Act does not provide a mechanism for funding social welfare programs or other costs unrelated to the provision of ICS, "no matter how successful or worthy."[230]

55. Additionally, as discussed above, the Commission did not address "how correctional facilities spend their funds or from where they derive."[231] The ICS Providers offer no proof in support of their arguments that correctional facilities will have to change their budgets or program decisions as a result of interstate ICS rate reform.[232] In addition, affordable access to telecommunications service itself provides ample benefits that will justify continuation in the absence of site commissions. The ICS Providers' vague speculations about purported effects of the reforms adopted in the *Inmate Calling Report and Order and FNPRM* are insufficient reason to grant a stay.

56. We also dispute Securus and GTL's assertion that the new rules adopted in the *Order* will harm the public interest by discouraging competition and innovation.[233] The Commission stated that it believes that "innovation will continue to drive down costs through automation and centralization of the security features" that correctional facilities require, which will lead to increased efficiencies.[234] The Commission found, as did several commenters to the *2012 ICS NPRM*, including Securus, that robust

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[222] *See* GTL Petition at 23-24; Securus Petition at 28.

[223] *See* GTL Petition at 23; Securus Petition at 25-26.

[224] *See* Securus Petition at 25-26; *see also* GTL Petition at 23-24.

[225] *See* Securus Petition at 25-26; *see also* GTL Petition at 23.

[226] *See* Securus Petition at 25-27; *see also* GTL Petition at 23-26.

[227] *See supra* para. 39; *Inmate Calling Report and Order and FNPRM* at para. 58 and n.196.

[228] *Inmate Calling Report and Order and FNPRM* at para. 56.

[229] *Id*. at para. 57.

[230] *Id*.

[231] *Id*. at para. 56.

[232] As discussed above, the Commission did not preclude ICS providers from paying site commissions to correctional facilities, but only held that such commission payments are not costs that can be recovered through interstate ICS rates. *See supra* para. 31. In this regard, we note that interstate ICS accounts for only a small portion of total ICS (including just 15 percent of Securus's traffic and about 10 percent of GTL's). *See supra* para. 37. Finally, the ICS Providers' assertions of harm to inmates in this regard absent a stay clearly cannot extend to the use of site commissions for things unrelated to correctional facilities. *See Inmate Calling Report and Order and FNPRM* at para. 34 & n.132 (discussing the use of site commissions for things unrelated to correctional facilities including, for example, states' general revenue funds).

[233] Securus Petition at 9, 27; GTL Petition at 23-24.

[234] *Inmate Calling Report and Order and FNPRM* at para. 71.

competition exists among ICS providers during the bidding process.[235] The ICS Providers have offered insufficient evidence for us to find otherwise.

57. Finally, we disagree with the ICS Providers' general assertions that the public interest will be harmed by "enforcing a rate regulation that is later vacated," as it will lead to a waste of time and energy that is "ultimately borne by subscribers of the service."[236] As discussed above, the cost-based requirement and interim implementing framework adopted in the *Order* is based on significant data in the record and provides a means for ICS providers to seek a waiver if their costs support rates outside the boundaries established by such framework. Additionally, delay of implementation of the reforms adopted in the *Order* will perpetuate the significant harms that third parties are currently subject to in the form of unjust, unreasonable and unfair ICS rates and the various secondary harms that those excessive rates cause, such as a higher rate of recidivism and emotional harm to prisoners' children.[237] Finally, the cases cited by Securus are unavailing.[238] They merely demonstrate that the Commission may hold applications, waiver requests and the like in abeyance when the balance of interests favors such an outcome. We do not find that to be the case here. We affirm that the reforms adopted in the *Inmate Calling Report and Order and FNPRM* were reasonable, and that the ICS Providers have not otherwise demonstrated a likelihood of success on the merits of their petitions.[239] These reforms have been delayed long enough and should not be delayed any further due to the providers' speculative claims.[240]

IV. PETITION TO HOLD FNPRM IN ABEYANCE

58. Securus also filed a Petition to Hold Further Rulemaking Proceeding in Abeyance.[241] Specifically, Securus argues that "taking and considering comments on the FNPRM, the great majority of which is expressly premised on the findings and conclusions in the Report and Order, would not be an appropriate use of Commission resources. . . ."[242] While we appreciate Securus' concerns over Commission resources, we reject Securus' arguments. Contrary to Securus' claims, the Commission's ICS rules are not "unsettled."[243] In addition, the questions in the *FNPRM* do not undermine the reforms adopted in the *Order*, but rather seek further comment on the interim reforms adopted in the *Order*[244] and the possible applicability of the reforms adopted in the *Order* to intrastate ICS rates.[245]

59. In addition, the comments received as a result of the information sought by the *FNPRM*

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[235] *Inmate Calling Report and Order and FNPRM* at para. 40 & n.156 (citing comments by, *inter alia*, Securus, which states that "The competition for service contracts is, to put it mildly, robust."). As the Commission found in the *Order*, however, competition during the bidding process does not sufficiently exert downward pressure on rates for ICS consumers. *Id*. at para. 41.

[236] Securus Petition at 28; *see also* GTL Petition at 24-25 ("A stay will forestall the expense and confusion – in the ICS industry and among correctional facilities – that would result from efforts to implement" the reforms.).

[237] *See supra* para. 48; *see also* Wright Petitioners Opposition to GTL Petition at 5 & n.21 (noting that the record to the *Order* reflects that "just a 1% decrease in the recidivism rate would result in savings of more than 250 million dollars for state, county and local jurisdictions").

[238] *See* Securus Petition at 28.

[239] *See supra* Section III.A.

[240] *See supra* para. 48.

[241] *See generally* Abeyance Petition.

[242] Abeyance Petition at 1.

[243] *Id*. at 2.

[244] *See Inmate Calling Report and Order and FNPRM* at para. 152.

[245] *See id*. at para. 129.

will be extremely valuable to the Commission regardless of the outcome of any pending litigation.[246] For example, such comments will help inform the adoption of permanent interstate ICS rates, whether they are higher or lower than the interim rates adopted, and will help determine the appropriateness of intrastate ICS rate regulation. Finally, just as staying the reforms adopted in the *Inmate Calling Report and Order and FNPRM* will harm third parties and is counter to the public interest,[247] preventing or delaying the receipt of additional information will not help inform further ICS rate reform. As such, we reject Securus' arguments that we should hold in abeyance the *FNPRM* in this proceeding.

V. OTHER

60. We note that the Commission recently received a third petition for stay of the *Inmate Calling Report and Order and FNPRM*.[248] Given that the Correctional Institutions' Petition was received significantly after the Securus and GTL petitions we will address the Correctional Institutions petition in a separate order.

VI. ORDERING CLAUSES

61. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 201, 225, 276, and 303(r) and of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 201, 225, 276, and 303(r) and the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, this Order Denying Stay Petitions and Petition to Hold in Abeyance in WC Docket No. 12-375 IS ADOPTED.

62. IT IS FURTHER ORDERED, that the Securus Technologies, Inc. Petition for Stay of Report and Order Pending Appeal (FCC 13-113), the Securus Technologies, Inc. Petition to Hold Further Rulemaking Proceeding in Abeyance, and the Petition of Global Tel*Link for Stay Pending Judicial Review ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Chief
Wireline Competition Bureau

[246] *See Securus Technologies, Inc. v. FCC*, No. 13-1280 (D.C. Cir. filed Nov. 15, 2013).

[247] *See supra* Sections III.C and III.D.

[248] *Rates for Interstate Inmate Calling Services*, Correctional Institutions Petition for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Nov. 12, 2013) (Correctional Institutions' Petition).