ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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

NOS. 13-1280, 13-1281, 13-1291, 13-1300, 14-1006

SECURUS TECHNOLOGIES, INC., ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties and Amici Curiae.

All parties and intervenors appearing in this Court are listed in the petitioners' briefs. We understand that the following organizations and individuals intend to participate as amici curiae in support of the FCC: Asian Americans Advancing Justice-AAJC; Lawyers' Committee for Civil Rights Under Law; and Professors Richard H. Frankel, Steven H. Goldblatt, and Alistair E. Newbern, on behalf of the Law School Appellate Litigation Clinics at Drexel, Georgetown, and Vanderbilt Universities.

2. Rulings under review.

The ruling at issue is *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (JA __) (2013).

3. Related cases.

The order on review has not previously been the subject of a petition for review in this Court or any other court. Counsel is not aware of any related cases pending before this Court or any other court.

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GLOSSARY

APA	Administrative Procedure Act, Pub L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.)
Br.	Joint brief for the provider-petitioners
Communications Act or Act	Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.)
Corrections Br.	Joint brief for the corrections-petitioners and supporting intervenors
FCC	Federal Communications Commission
FERC	Federal Energy Regulatory Commission

QUESTION PRESENTED

For years, inmates and their families have asked the FCC to address high rates for payphone services in correctional facilities. Market forces fail to constrain those rates: Inmate calling providers do not compete for users of their services, but rather for a facility's monopoly franchise—often based on how much they offer to pay the facility in "site commissions," which state and local governments appropriate for uses that in most if not all cases have absolutely no connection to providing inmate calling services. To recover the expense of site commissions, providers exploit their monopoly power and charge consumers rates that grossly exceed the actual costs of providing service. The resulting rates deter communication between inmates and their families, with severe and highly detrimental social consequences. In the order on review, the FCC took interim steps to exercise its statutory authority to ensure that interstate inmate calling rates are just, reasonable, and fair.

The consolidated petitions for review present the following question: Whether the FCC's order and the rules promulgated therein reflect a lawful exercise of the agency's statutory authority to ensure that rates for interstate inmate calling services are just, reasonable, and fair while the agency collects further data and public comment to refine its reforms.

JURISDICTION

The order on review, *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (JA __) (2013) (*Order*), is a final FCC order over which this Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). A summary of the *Order* was published in the Federal Register on November 13, 2013. *See* 78 Fed. Reg. 67,956. As required by 28 U.S.C. § 2344 and 47 C.F.R. § 1.4(b)(1) & (d), the petitioners filed their respective petitions for review within 60 days of that publication.

STATUTES AND REGULATIONS

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

COUNTERSTATEMENT

A. FCC's Statutory Authority over Inmate Calling Rates

Under Section 201(b) of the Communications Act, the FCC is empowered to "prescribe such rules and regulations as may be necessary" to ensure that "[a]ll charges [and] practices . . . for and in connection with [interstate] communication service" by wire or radio are "just and reasonable." 47 U.S.C. § 201(b). In addition, under Section 276 of the Communications Act, the FCC is charged with implementing Congress's directive "that all payphone service providers [be] fairly compensated for each and every completed intrastate and interstate call using their

payphone[s]." *Id.* § 276(b)(1)(A). The FCC's authority to regulate payphone services expressly extends to "inmate telephone service in correctional institutions, and any ancillary services." *Id.* § 276(d). Congress specified that FCC rules implementing Section 276 "shall preempt" any "inconsistent" state requirements. *Id.* § 276(c).

B. Failure in the Market for Inmate Calling Services

Market forces fail to constrain rates for inmate calling services. *See Order* ¶ 41 (JA __). This is because inmate calling providers do not compete for the consumers who pay for calls—primarily inmates and their families. *See id.* ¶ 3 (JA __). Instead, each provider has a monopoly franchise in the correctional facilities it serves. *See id.*; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3252 ¶ 10 & n.32 (2002) (*2002 Order*).

To be sure, providers may compete for the franchise at any given facility, but such competition does not usually result in lower end-user rates. *See Order* ¶ 41 (JA __); *2002 Order*, 17 FCC Rcd at 3253 ¶ 12. Instead, many facilities grant franchises based in part on how much money a provider offers to pay them for the franchise. *See Order* ¶ 41 (JA __). Providers therefore compete by increasing those payments—called "site

commissions"—which leads to correspondingly *higher* end-user charges. *See id.*; *2002 Order*, 17 FCC Rcd at 3253 ¶ 12. In practice, providers and correctional facilities share the monopoly profits extracted through end-user rates from inmates and their families, *see Order* ¶ 33 (JA __), who have no choice but to pay if they wish to keep in touch by telephone, *see 2002 Order*, 17 FCC Rcd at 3253 ¶ 12.

In some jurisdictions, correctional authorities use portions of their site-commission payments to fund inmate welfare programs or other corrections-related activities. *See Order* ¶ 34 & nn.131–132 (JA __). In many jurisdictions, commission payments also or instead finance general expenses of state and local governments, from employee salaries to road construction. *See id.* ¶ 34 & n.132 (JA __).

High rates for inmate calling services deter communication between inmates and their families, with severe and highly detrimental social consequences. *See Order* ¶ 42 (JA __). Just one 15-minute call can cost more than a month of ordinary residential telephone service. *Id.* Such rates discourage communication between inmates and their families, who are often among "the most economically disadvantaged in our society." *Id.* Barriers to communication caused by high inmate calling rates contribute to greater inmate recidivism. *See id.* In addition, when jailed parents lack regular

contact with their children, those children (2.7 million of them nationwide) have higher rates of truancy, depression, and poor school performance. *See id.* ¶ 2 (JA __). High rates for inmate calls also hinder the ability of inmates to communicate with their attorneys and are associated with higher rates of contraband cell phones in correctional institutions. *See id.* ¶ 44 (JA __). For all of these reasons, the costs to society from high inmate calling rates are considerable.

C. Petitions for Relief and Notice of Proposed Rulemaking

Over a decade ago, a grandmother from Washington, D.C., named Martha Wright led a group of inmates and inmates' family members in petitioning for relief from the FCC. *See* Petition for Rulemaking by Martha Wright, *et al.* (JA __), CC Docket No. 96-128 (Nov. 3, 2003) (First Wright Petition). The Wright petitioners proposed that the FCC ban exclusive payphone contracts in private prisons and create a "safe harbor" interstate rate cap, *id.* at 19 (JA __), with the opportunity for inmate calling providers to charge higher rates if they "could show that [their] costs justified" doing so, *id.* at 20 (JA __). In 2007, the Wright petitioners filed a second petition in which they asked, in the alternative, that the FCC cap interstate rates at all facilities. *See Order* ¶ 9 (JA __); *see also* Petitioners' Alternative

Rulemaking Proposal 6 (JA __), CC Docket No. 96-128 (Mar. 1, 2007) (Alternative Wright Petition).

To address the two Wright petitions—as well as the "significant comment" they generated—the FCC initiated a rulemaking in 2012. *Rates for Interstate Inmate Calling Services*, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16629 ¶ 1 (JA __) (2012) (*2012 Notice*); *see id.* ¶ 35 (JA __).

The *2012 Notice* sought comment on a broad array of topics. The FCC asked whether the caps proposed by the Wright petitioners would "ensure just and reasonable rates . . . consistent with sections 201 and 276 of the [Communications] Act," and "[w]hat factors . . . the [agency should] consider in determining an appropriate per-minute cap." *2012 Notice* ¶ 20 (JA __). The FCC further sought "specific, detailed cost information and other relevant data" pertinent to rate caps. *Id.*; *see id.* ¶¶ 7, 25, 44 (JA __, __, __). "If the [agency] decides to implement rate caps," the FCC inquired, "how should" the agency do so, and what would be the "best ways to determine just and reasonable caps"? *Id.* ¶ 23 (JA __); *see also id.* ¶ 20 (JA __) (asking "[w]hat factors" the agency should consider in setting rates). The FCC also sought comment on how the agency should treat per-call charges, *see id.* ¶¶ 18–19 (JA __) (inquiring about costs in this context), and other charges,

such as monthly account fees, that inmate calling providers impose on consumers in connection with inmate calling services but that are not tied to any particular call, *see id.* ¶ 33 (JA __).

D. *Order* on Review

In the *Order*, the FCC took a number of "critical, and long overdue" actions to address excessive rates for interstate inmate calling services on a temporary basis, while the agency gathers additional data and public comment on which to base more permanent reform. *Order* ¶ 1 (JA __); *see id.* ¶¶ 7–8 (JA __–__).

First, exercising its authority under the Communications Act to ensure that interstate inmate calling rates are just, reasonable, and fair, *see* 47 U.S.C. §§ 201(b), 276(b)(1)(A), the FCC determined that such rates must be based on the costs of providing service, *see Order* ¶¶ 12, 45–46 (JA __, __–__). The agency accordingly required that "[a]ll rates charged" for interstate inmate calling services, as well as charges ancillary to such services, "be based only on costs that are reasonably and directly related to the provision of [inmate calling services]." 47 C.F.R. § 64.6010 (*Order* App. A (JA __)).

The *Order* includes detailed guidance on cost categories likely to satisfy that standard, and others that likely do not. For example, in addition to "a reasonable share of common costs," costs recoverable in interstate

inmate calling rates "likely include," the agency explained, "the cost of capital (reasonable return on investment); expenses for originating, switching, transporting, and terminating [inmate] calls; and costs associated with security features relating to the provision of [inmate calling services]." *Order* ¶ 53 (JA __); *see also id.* ¶ 53 n.196 (JA __) (indicating that recoverable security costs would include advanced features such as "biometric caller verification," "sophisticated tracking tools," "link analysis software," and "audio word search"). Conversely, the *Order* specifies that "site commission payments, costs of nonregulated service, costs relating to general security features of the correctional facility unrelated to [inmate calling services], and costs to integrate inmate calling with other services, such as commissary ordering," are as a general rule not compensable in end-user rates. *Id.* ¶ 53 (JA __) (footnote omitted); *see id*. ¶ 54 (JA __).

Second, the FCC adopted a three-part interim rate structure to limit interstate inmate calling rates: (1) "safe-harbor" rate caps, which permit providers, in the first instance, to establish rates up to the capped levels without regard to costs, *see Order* ¶¶ 60–72 (JA __–__); (2) "hard" caps, which serve as a presumptive upper limit on permissible rates, but under which rates must be set based on costs, *see id.* ¶¶ 5, 73–81 (JA __, __–__); and (3) a waiver process for providers that, by virtue of unusually high costs

or for other reasons, can "demonstrate good cause" to exceed the hard caps, *id.* ¶ 82 (JA __); *see id.* ¶¶ 83–84 (JA __–__).

The agency set its safe-harbor caps at $0.12 per minute for debit and prepaid calls (*i.e.*, calls paid for through an inmate's institutional account) and $0.14 per minute for collect calls (which involve greater "bad debt" and collection costs). *See Order* ¶ 48 (JA __).[1] An inmate calling provider may in the first instance set rates up to the safe-harbor caps without regard to cost, making the caps "an administratively convenient pricing option" for providers. *Order* ¶ 69 (JA __). When a provider sets rates across all facilities it serves at or below safe-harbor levels, the *Order* provides that the provider's rates will "be treated as lawful" and presumed just, reasonable, and fair unless proven otherwise. *Id.* ¶ 60 & n.226 (JA __); *see* 47 C.F.R. § 64.6020 (*Order* App. A (JA __)). Moreover, should the rates of a provider electing to use the safe harbors at some future point be invalidated—the *Order* does permit challenges to safe-harbor rates under the FCC's complaint process, *see Order* ¶ 120 & n.427 (JA __)—the provider would only be required to change its rates prospectively and would not be liable for refunds, *see id.* ¶ 120 (JA __).

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[1] For both the safe-harbor and hard caps, the *Order* allows providers the flexibility to "calculat[e] their compliance on the basis of a 15-minute call (including any applicable per-connection charges)." *Order* ¶ 48 n.190 (JA __).

The FCC "expect[ed] the vast majority of providers" to charge rates "at or below safe-harbor rate levels." *Order* ¶ 119 (JA __). The safe harbors were not designed, however, as "binding rates." *Id*. ¶ 69 (JA __). Recognizing that some providers' costs could exceed the safe-harbor limits, the FCC allowed providers to charge higher rates based on their costs, up to a "hard cap" of $0.21 per minute for debit and prepaid calls and $0.25 per minute for collect calls. *Id*. ¶¶ 5, 48, 119 (JA __, __, __). The FCC based the interim hard-cap rates on "the highest costs in the record." *Id.* ¶ 74 (JA __).

Under the *Order*, rates between the safe-harbor and hard-cap levels must be based on an inmate calling provider's costs of service and will not have the safe-harbor protections. *See Order* ¶¶ 88–89 (JA __–__). In a challenge to rates above the safe harbors, the FCC will not presume them lawful; instead, the provider will "bear the burdens of production and persuasion" that its rates are "just, reasonable, and fair" (*i.e.*, that they are cost based). *Id.* ¶ 121 (JA __). Moreover, if the FCC were to find the rates unjust, unreasonable, or unfair, the provider could "be ordered to pay refunds." *Id*. ¶ 123 (JA __). The agency emphasized, however, that inmate calling providers will have significant flexibility in justifying their rates. A provider that serves multiple facilities with different cost characteristics may

base its cost justification on "groupings" of facilities, as long as a group "reflect[s] reasonably related cost characteristics." *Order* ¶ 123 (JA __).

As an additional accommodation for any inmate calling provider that has especially high costs or faces other special circumstances, the *Order* permits a "provider that believes that it has cost-based rates . . . that exceed [the] interim rate caps" to file a petition for a waiver. *Order* ¶ 82 (JA __); *see* 47 C.F.R. § 1.3; *Order* ¶ 83 (JA __). In part because of providers' ability to "centraliz[e] . . . security and other functionalities," the FCC determined to evaluate waiver requests "at the holding company level," and not with respect to the costs of any specific facility or group of facilities. *Id.*

Finally, in a *Further Notice* adopted with the *Order*, the FCC sought comment on "alternative ways of accomplishing interstate . . . rate reforms," *Further Notice* ¶ 153 (JA __), including ways to establish "permanent safe harbors and rate caps," *id*. ¶ 154 (JA __). That proceeding remains pending.

E. Subsequent Developments

Following release of the *Order*, several inmate calling providers and correctional institutions petitioned the agency for a stay pending judicial review. After the FCC's Wireline Competition Bureau denied the two earliest-filed petitions, *see Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 15927, 15927 ¶ 1 (JA __) (Wireline Competition Bur. 2013) (*Stay*

Denial Order), the petitioners sought a stay from this Court, which the Court granted in part and denied in part, *see Securus Techs., Inc. v. FCC*, No. 13-1280 and Consolidated Cases 1–2 (JA __–__) (D.C. Cir. Jan. 13, 2014) (*Partial Stay Order*). The Court stayed three of the rules adopted in the FCC's *Order*—47 C.F.R. § 64.6010 (Cost-Based Rates for Inmate Calling Services), 47 C.F.R. § 64.6020 (Interim Safe Harbor), and 47 C.F.R. § 64.6060 (Annual Reporting and Certification Requirement)—but otherwise left the *Order* and rules intact, including the interim hard caps (47 C.F.R. § 64.6030). *See Partial Stay Order*, No. 13-1280 at 1 (JA __).

SUMMARY OF ARGUMENT

Driven by site commissions that providers pay correctional facilities, excessive rates for inmate calling services impose unfair burdens on inmates and their families, with profound and detrimental social consequences. To address this pressing problem and carry out the agency's statutory responsibility to ensure that rates for interstate inmate calling services are just, reasonable, and fair, the FCC adopted a number of reforms while the agency considers further steps on a more developed record. Those reforms—which implement a cost-based framework of lower safe harbors and higher hard caps (subject to waiver for good cause)—are a sound exercise of the

FCC's broad discretion to adopt ratemaking rules on an interim basis. The Court should uphold them.

1. The FCC lawfully required that interstate inmate calling rates be based on the reasonable costs of providing inmate calling services. *See* 47 C.F.R. § 64.6010 (*Order* App. A (JA __)).

a. There was ample notice to support the FCC's adoption of a cost-based rule. The *2012 Notice* was sufficient to alert interested parties that the FCC was considering various methods of limiting interstate inmate calling rates, with a particular focus on costs that might justify such limits. The FCC has long looked to costs when determining whether rates are just, reasonable, and fair under the Communications Act. In view of that precedent—and when the record already reflected significant debate over the reasonableness of inmate calling costs—it should have come as no surprise that the FCC might include as part of its reforms a rule that rates be based on the reasonable costs of providing inmate calling services. Indeed, the record shows that commenters did anticipate that result.

b. Contrary to the provider-petitioners' contention, the cost-based rule does not impose rate-of-return regulation. More fundamentally, how to label the rule is beside the point. The cost-based rule was a firmly grounded exercise of the FCC's authority to ensure, just, reasonable, and fair rates for

interstate inmate calling services, and it was a "logical outgrowth" of the issues laid out in the *2012 Notice*. The APA requires nothing more.

c. The provider-petitioners mistakenly contend that the *Order* gives insufficient guidance on what kinds of costs typically are reasonably related to the provision of inmate calling services. For example, the *Order* identifies costs associated with advanced security features as a category likely to be reasonably related to the provision of inmate calling services, and thus recoverable through interstate rates under the cost-based rule. Conversely, the *Order* explains that site commissions, as a category, are not reasonably related to the provision of inmate calling services, and are likely not recoverable in end-user rates. The *Order*'s use of the term "likely" is unremarkable. It simply reflects the obvious proposition that specific cases may pose special considerations.

d. The FCC's determination that site commissions, as a category, are not recoverable through interstate inmate calling rates was reasonable. The provider-petitioners contend that commission payments are a "real" cost of providing service, rather than an apportionment of profit between providers and correctional facilities. To whatever extent site commissions may be a cost to inmate calling providers, they remain an unreasonable cost to pass through to consumers. As a category, they bear no necessary relationship to

the cost of providing a communication service. In establishing just, reasonable, and fair rates, the FCC has the undoubted authority to exclude unjust, unreasonable, and unfair costs.

2. The FCC's interim hard caps are reasonable and reasonably explained. The FCC fully accounted for high-cost providers and facilities when calculating the caps, and it was reasonable to apply the caps on a uniform basis while the agency continues to consider the possibility of adopting tiered pricing for the future. Likewise, there was nothing improper in the FCC's use of averaged and industry composite data to derive the caps, nor was any other aspect of the agency's methodological approach flawed. Finally, the *Order* flexibly accommodates providers with especially high costs, including by affording them the option to seek a waiver.

3. The interim safe-harbor caps are likewise reasonable and reasonably explained. As when setting the interim hard caps, the FCC reasonably accounted for high-cost providers and facilities and permissibly employed averaged data. The provider-petitioners' remaining criticisms of the agency's methodological choices are unfounded. As the expert agency, the FCC plainly had the discretion to determine what aspects of the data before it seemed most persuasive. And quibbles about the precise safe-harbor caps the FCC adopted are particularly misplaced when providers with higher

costs are free to charge rates up to the hard caps (with the possibility of a waiver beyond that).

4. The Court should likewise reject the provider-petitioners' challenge to the FCC's requirement that ancillary charges be cost based. The FCC's authority under the Communications Act extends not only to inmate calling, but to the provision of "ancillary services." 47 U.S.C. § 276(d); *see also id.* § 201(b) (granting the FCC authority to regulate "charges . . . in connection with . . . communication service[s]"). As should have been obvious to any interested party, regulating ancillary charges is a necessary aspect of ensuring just, reasonable, and fair interstate inmate calling rates. Otherwise, any limit on rates could easily be evaded by an increase in ancillary fees. In any event, the FCC's *2012 Notice* included specific requests for comment on ancillary charges, and the record reflects that interested parties understood the agency might regulate such charges.

5. The Court should also reject the petitioners' claim that the *Order* unlawfully infringes the power of state and local authorities to manage their correctional facilities and budgetary affairs. The FCC has statutory authority to ensure that rates for interstate inmate calling services are just, reasonable, and fair. *See* 47 U.S.C. §§ 201(b), 276(b)(1)(A), (d). Furthermore, Congress has provided that FCC rules ensuring fair rates "shall preempt" any

"inconsistent" state requirements. *Id.* § 276(c). That state and local governments and correctional facilities have opted to generate revenue and fund unrelated programs through site commissions, which unreasonably drive up inmate calling rates, in no way undermines the FCC's statutory powers. In any event, the *Order* does not bar inmate calling providers from having "arrangements" with correctional facilities "that include site commissions," *Order* ¶ 56 (JA __)—only from passing the cost of commissions through to consumers in interstate rates. Nor does the *Order* limit how correctional facilities may spend commissions they receive. And the *Order* expressly provides for recovery of security costs related to inmate calling services.

6. Finally, the *Order* does not abrogate contracts between inmate calling providers and correctional facilities; it merely regulates the charges that providers may impose on consumers. In many cases, providers may be able to satisfy their existing contracts within the confines of the FCC's rules, or to revisit or amend those contracts under change-of-law provisions or otherwise. Regulation often affects third-party arrangements, and such arrangements have no power to constrain the FCC's authority to act under statute. Indeed, when necessary, the agency has the power to override contracts that contravene the public interest.

STANDARD OF REVIEW

The petitioners bear a heavy burden to establish that the FCC's *Order* is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the *Order* is entitled to a presumption of validity. *E.g.*, *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). The Court must reject the petitioners' challenges to the *Order* unless the agency failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Because "ratemaking is far from an exact science and involves policy determinations in which the [FCC] is acknowledged to have expertise, courts are particularly deferential when reviewing ratemaking orders." *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999) (quotation marks omitted); *see Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996). The same is true "in matters implicating predictive judgments and interim regulations." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009).

Insofar as the petitioners challenge the FCC's interpretation of the agency's organic statute—including the agency's view of the scope of its jurisdiction—the Court applies the framework of *Chevron, U.S.A., Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *E.g.*, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013).

ARGUMENT

Section 201(b) of the Communications Act authorizes the FCC to adopt "rules and regulations . . . necessary" to ensure that "[a]ll charges [and] practices . . . for and in connection with" interstate telecommunications services are "just and reasonable." 47 U.S.C. § 201(b). Section 276 of the Act additionally empowers the FCC to regulate both "the provision of inmate telephone service in correctional institutions, and any ancillary services." *Id.* § 276(d). The FCC is responsible under Section 276(b)(1)(A) for ensuring that all payphone service providers—including inmate calling providers—are "fairly," not excessively, "compensated for . . . call[s] using their payphone[s]." *Id.* § 276(b)(1)(A).

The *Order* and the rules it enacts are a firmly grounded exercise of this statutory authority. Drawing upon policy judgments and "complex industry analyses" of a kind this Court has repeatedly recognized lie within an agency's expertise, *e.g.*, *Association of Oil Pipe Lines*, 83 F.3d at 1431, the FCC reasonably concluded that the market's failure to constrain rates for inmate calling services created a pressing need for reform and warranted immediate (if "long overdue") action, *Order* ¶ 8 (JA __). At the same time,

the agency appropriately recognized that its "work . . . is not done," *id.*, and set about collecting additional data and public comment to craft more permanent reforms, *see id.* ¶¶ 124–126 (JA __–__); *Further Notice* ¶¶ 128–179 (JA __–__).

More specifically, after comprehensive review of a voluminous record, the FCC determined in the *Order* that inmate calling rates "in far too many cases greatly exceed the reasonable costs of providing service." *Order* ¶ 3 (JA __). One "significant factor driving . . . excessive rates," the agency determined, are "site commission[s]" that inmate calling providers pay correctional facilities "to win the exclusive right to provide inmate phone service." *Id.* Site commissions can account for nearly 90 percent of consumer rates, *see id.* ¶ 34 (JA __), and they fund a host of non-call-related expenses: "everything from inmate welfare to salaries and benefits, states' general revenue funds, and personnel training," *id.* ¶ 3 (JA __); *see id.* ¶ 34 (JA __).

Seeking to reduce a significant burden on the ability of inmates to communicate—which the record showed has fostered considerable social harm—the FCC in the *Order* took steps to address the inmate calling industry's "most egregious interstate long distance[] rates and practices." *Order* ¶ 3 (JA __). At the same time, recognizing that inmate calling systems

"include important . . . features . . . that advance . . . safety and security," the agency took care to "ensure[] that security features that are part of modern [inmate calling services] continue to be provided and improved." *Id.* ¶ 2 (JA __).

The FCC adopted its rate reforms on an "interim" basis. *E.g.*, *Order* ¶ 5 (JA __); *see id.* ¶ 81 n.308 (JA __). To ensure a robust record on which to craft final rules, the FCC adopted a one-time, mandatory data collection to procure cost information of a more detailed and objective nature than inmate calling providers had offered in response to the *2012 Notice*. *See id.* ¶¶ 68, 75 n.278, 124–126 (JA __, __, __–__). The agency also issued a *Further Notice* soliciting comment on additional actions the agency might take to reform inmate calling services, *see Further Notice* ¶¶ 128–179 (JA __–__), including modifications to the interim rate structure, *see id.* ¶¶ 153–162 (JA __–__), regulation of intrastate rates in addition to interstate rates, *see id.* ¶ 154 (JA __), and "further rate reductions," *id.* ¶ 152 (JA __).

For the time being, the FCC adopted a multifaceted approach to reforming interstate inmate calling rates. *First*, the agency required that those rates and any ancillary charges "be based only on costs that are reasonably and directly related to the provision of [inmate calling services]." 47 C.F.R. § 64.6010 (*Order* App. A (JA __)). The *Order* provides detailed guidance on

the application of that rule, including "twenty specific examples of cost categories that the [FCC] would likely find compensable," such as security costs, and eight cost categories, including site commissions, "that it would not." *Stay Denial Order* ¶ 19 (JA __) (citing *Order* ¶ 53 nn.196, 198 (JA __–__)).[2]

Second, the FCC adopted a three-part framework of interim interstate rate limitations, giving inmate calling providers three choices: A provider may set rates at or below safe-harbor levels and receive a presumption that those rates are lawful, as well as immunity from liability for refunds if the rates are later proven unjustified in a complaint proceeding. *See Order* ¶ 60 (JA __). Alternatively, a provider may set its rates at or below the FCC's higher interim hard caps, in which case it foregoes the presumption of lawfulness and the protection from refunds if its costs are later challenged and found not to justify its rates. *See id.* ¶¶ 73–81 (JA __–__). Finally, a provider that believes its costs justify rates above the interim hard caps may seek a waiver to charge higher rates. *See id.* ¶¶ 82–83 (JA __–__).

[2] Although site commissions, as general matter, are not a cost category that is recoverable in interstate rates under the *Order*, the FCC noted "that some portion of [commission] payments . . . may, in certain circumstances, reimburse correctional facilities for their costs of providing [inmate calling services]"—which would be compensable. *Order* ¶ 54 n.203 (JA __).

Particularly given the agency's broad discretion to formulate interim rules while considering more permanent solutions to a regulatory problem upon a more developed record, *e.g.*, *Rural Cellular*, 588 F.3d at 1105; *accord In re FCC 11-161*, __ F.3d __, __, 2014 WL 2142106, at *122 (10th Cir. 2014), the Court should uphold the *Order* and the FCC's lawful and reasonable three-part rate structure. The Court should likewise uphold the *Order*'s requirement that ancillary charges be cost-based, reject the petitioners' claim that the *Order* unlawfully infringes state and local authority, and uphold the FCC's decision not to exempt existing inmate calling contracts from the *Order*'s reach.

I. THE COST-BASED RULE IS LAWFUL.

The provider-petitioners argue that the FCC gave insufficient notice of its intent to adopt the cost-based rule (47 C.F.R. § 64.6010), *see* Br. 16–22, which they assert amounts to rate-of-return regulation, *see id.* at 18, 22–25. Neither proposition is correct. The Court should likewise reject the provider-petitioners' theories (echoed by the corrections-petitioners) that the *Order* gives insufficient guidance concerning costs recoverable under the cost-based rule, *see* Br. 25–26; Corrections Br. 31, and that the FCC ignored "real costs" of providing inmate calling services, Br. 26; *see* Corrections Br. 26, 28.

A. The Rule Is a Logical Outgrowth of the *2012 Notice*.

The APA requires agencies to publish a notice of proposed rulemaking containing "either the terms or substance of the proposed rule *or* a description of the subjects and issues involved" in a rulemaking proceeding. 5 U.S.C. § 553(b)(3) (emphasis added). Accordingly, "an agency may issue rules that do not exactly coincide with the proposed rule so long as the final rule is [a] 'logical outgrowth' of the proposed rule." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991). A rule is not a logical outgrowth of a prior notice only if the variation between the two is "so major that the original notice did not adequately frame the subjects for discussion." *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (quotation marks omitted). Accordingly, the logical outgrowth standard is satisfied so long as it was "reasonably foreseeable" the agency would take the action it did. *Long Is. Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007); *see Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

Here, the *2012 Notice* proposed a "per-minute rate cap approach" to "ensure just and reasonable rates . . . consistent with sections 201 and 276 of the [Communications] Act." *2012 Notice* ¶ 20 (JA __). The FCC made clear that it was not committed to any single way of accomplishing that goal, asking, for example: "If the [FCC] decides to implement rate caps in the

[inmate calling] market[,] how should we? What additional data, if any, does the [agency] require to set rates? . . . We seek comment on the best ways to determine just and reasonable caps for [inmate calling] rates." *Id.* ¶ 23 (JA __).

The FCC also specifically asked "whether the criteria used to develop the . . . caps [proposed in the Alternative Wright Petition] are appropriate." *2012 Notice* ¶ 17 (JA __). In addition to the rate caps proposed in the Alternative Wright Petition, moreover, the FCC had before it the Wright petitioners' 2003 proposal that the agency create a "safe harbor" interstate rate cap, First Wright Petition 19 (JA __), with the opportunity for inmate calling providers to charge higher rates if they "could show that [their] costs justified" doing so, *id.* at 20 (JA __); *see 2012 Notice* ¶ 1 (JA __).

As well as seeking comment on the Wright petitioners' proposed rate caps and possible variants, the FCC solicited comment in the *2012 Notice* on other proposals in the record. *See Order* ¶ 59 & n.222 (JA __–__). For example, before the FCC issued the *2012 Notice*, one commenter had proposed that the agency "rely on facility-specific [inmate calling] cost evaluations" when instituting rate reforms. *Id.* ¶ 59 n.222 (JA __) (citing GEO Group Comments 10–11 (JA __ –__), CC Docket No. 96-128 (May 2, 2007)). The FCC sought comment on that proposal in the *2012 Notice*,

inquiring: "Would a rate cap approach require the [agency] to conduct rate cases, as some commenters suggest?" *2012 Notice* ¶ 23 (JA __); *see Order* ¶ 59 n.222 (JA __).

The agency likewise sought comment on a rate methodology proposed in 2008 by a group of inmate calling providers that included two of the provider-petitioners—Securus Technologies, Inc. (Securus) and CenturyLink Public Communications, Inc. (CenturyLink, then called Embarq). *See* Inmate Calling Services Interstate Call Cost Study 21 (JA __), CC Dkt. 96-128 (Aug. 15, 2008) (2008 Provider Proposal); *2012 Notice* ¶ 25 (JA __); *see also Order* ¶ 59 & n.222 (JA __) (citing the FCC's request for comment on "costs studies intended to provide a basis for [new] rates"). The providers themselves characterized that proposal as providing "cost information" to enable the FCC "to develop cost-based rate levels and rate structures." *Id.* ¶ 79 (JA __) (quoting 2008 Provider Proposal 2 (JA __) (emphasis omitted)); *accord id.* ¶ 78 n.288 (JA __); *see also 2012 Notice* ¶ 25 (JA __) (asking whether the 2008 Provider Proposal was supported by "sufficient cost, demand, and revenue detail to allow the [agency] to determine whether the proposed rates [were] just and reasonable").

More generally, the FCC made clear in the *2012 Notice* that it would consider implementing a cost-based rate regime. *See Order* ¶ 59 n.222

(JA __). The agency asked, for example "whether [existing inmate calling] rates accurately reflect the costs of providing [inmate calling services] and whether site commission payments are a reasonable cost of providing [inmate calling services] that therefore should be recovered in the [inmate calling] rates [that] inmates are charged." *2012 Notice* ¶ 7 (JA __). Elsewhere, the FCC inquired whether the "data supporting the First Wright Petition, the Alternative Wright Petition and the [2008 Provider Proposal]" were sufficient to support the rates those submissions proposed. *Id.* ¶ 44 (JA __); *see Stay Denial Order* ¶ 9 n.43 (JA __).

The *2012 Notice*, moreover, was not issued on a blank slate. The background precedent relevant to the proceeding was clear: Although "[t]he FCC is not required to establish purely cost-based rates," it must "specially justify any rate differential that does not reflect cost." *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996); *accord Access Charge Reform*, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606, 16619–20 ¶ 44 (1997) ("[T]he just and reasonable rates required by Sections 201 and 202 of the Communications Act must ordinarily be cost-based, absent a clear explanation of the [FCC's] reasons for a departure from cost-based ratemaking." (citation omitted)); *see also Farmers Union Cent. Exch., Inc. v.*

FERC, 734 F.2d 1486, 1502 (D.C. Cir. 1984) ("[E]ach deviation from cost-based pricing [must be] found not to be unreasonable and to be consistent with the Commission's [statutory] responsibility." (quoting *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 308 (1974) (second and third alterations in original)). As a result, parties interested in inmate calling reform (particularly sophisticated entities like the provider-petitioners) would have had every reason to understand, even apart from the multitude of indications in the *2012 Notice* itself, that the FCC might codify a cost-based rate requirement for interstate inmate calling. *See Order* ¶ 59 n.222 (JA __); *see also Alina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014) (noting that "proposed rules . . . obscure to the average reader" may yet adequately "alert members of the regulated class").[3]

Moreover, interested parties did in fact anticipate the agency might implement a cost-based system. *See Order* ¶ 59 n.222 (JA __). CenturyLink, for example, encouraged the FCC to adopt a system that would enable inmate

[3] The provider-petitioners contend that "[t]his Court and the [FCC] itself have often held that market-based rates are just and reasonable irrespective of costs." Br. 21. But the decisions upon which they rely involve markets that were found to be competitive. *E.g.*, *Orloff v. FCC*, 352 F.3d 415, 421 (D.C. Cir. 2003). They have no bearing when, as here, there is a clear market failure. *See, e.g.*, *Farmers Union*, 734 F.2d at 1510 (holding that the FERC could not lawfully rely on market prices to reflect "just and reasonable" rates "[w]ithout empirical proof" that "existing competition would ensure" that result).

calling providers "to recover the[ir] costs . . . as well as a sufficient return." CenturyLink Comments 5 (JA __), WC Docket No. 12-375 (Mar. 25, 2013); *see also id.* at 6 (JA __) ("Rate structures that generally align with the manner in which costs are incurred are just and reasonable . . . ."). Similarly, Securus stated that "rates set by the [FCC] must include a reasonable profit after accounting for the costs that the carrier incurs in providing service." Securus Comments 7 (JA __), WC Docket No. 12-375 (Mar. 25, 2013).

Advocating for a form of "benchmark" rate cap, the National Association of State Utility Consumer Advocates urged the FCC to "declare that rates for interstate [inmate] calls are unjust and unreasonable to the extent the rates exceed the reasonable costs of providing [inmate calling services], including a reasonable return." National Association of State Utility Consumer Advocates Comments 4 (JA __), WC Docket No. 12-375 (Mar. 25, 2013). The organization recommended that its proposed rate cap "be without prejudice," "in a particular case," "to any party's ability to argue that a higher or lower rate is in fact just and reasonable." *Id.* at 6 (JA __). In other words, the organization advocated that the FCC adopt a rate-cap approach but permit both providers and consumers to argue, in individual cases, that the rate cap was too low or too high based on the provider's costs—much as the agency eventually did. *See Order* ¶ 59 nn.222, 224 (JA __–__).

Conversely, other parties that anticipated the FCC might adopt cost-based rates sought to discourage the agency from doing so. For example, inmate calling provider Telmate, LLC (Telmate), an intervenor here, tried to dissuade the agency from "undertak[ing] the massive job of conducting formal rate cases for each [inmate calling] provider at each correctional facility location." Telmate Reply Comments 9 n.19 (JA __), WC Docket No. 12-375 (Apr. 22, 2013). Likewise, the Wright petitioners, opposing the particular cost-based methodology advocated in the 2008 Provider Proposal, submitted an expert declaration that characterized "[c]ost-based rate regulation" as "a second-best attempt to approximate the outcome of a competitive market." Wright Petitioners' Comments, Exh. C 28 (JA __), WC Docket No. 12-375 (Mar. 25, 2013).

These submissions further illustrate that the FCC gave interested parties adequate notice of the possibility of a cost-based rule. *See, e.g.*, *N.E. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (rejecting a notice challenge when the record revealed that multiple parties had in fact anticipated the possibility of the agency's action).

B. The Rule Does Not Impose Rate-of-Return Regulation.

The provider-petitioners repeatedly assert that the cost-based rule constitutes unjustified "rate-of-return" regulation. Br. 18, 22–25. That is

incorrect. A rate-of-return regime involves "a prescribed rate of return, ex ante review [of rates by the FCC], tariff filings, [and] compliance with cost accounting rules." *Order* ¶ 53 n.195 (JA __). Rate-of-return carriers are subject to complex regulations set forth in four lengthy and intricate parts of the FCC's rules. *See Stay Denial Order* ¶ 10 (JA __). They must use the "Uniform System of Accounts in Part 32" of the rules, allocate "costs between regulated and non-regulated categories pursuant to Part 64," separate "costs between interstate and intrastate jurisdictions under the Part 36 rules," and apportion "interstate costs to the appropriate services using the Part 69 rules." *Id.*

In sharp contrast, under the interim regime established in the *Order*, inmate calling providers may set their rates at or below the safe-harbor rate caps—or even the hard caps—without prior FCC review, without reference to the rules governing rate-of-return carriers, and without a need to cost-justify their rates until and unless they are subject to a complaint or agency enforcement proceeding (in which context they have always been subject to an obligation to justify costs, irrespective of the *Order*). *See Order* ¶ 53 n.195 (JA __); Br. 21.

The provider-petitioners' claim that the FCC was required to provide good reasons for choosing to impose "rate-of-return regulation," *see* Br. 22–

25, is thus a straw man. The FCC did no such thing, and the agency need not justify a choice it has not made.

In any event, how to label the rule is beside the point. For the reasons we have explained, *see supra* pp. 19–23, the interim rate structure implemented in the *Order*, including the cost-based rule, is a firmly grounded exercise of the FCC's authority to ensure that rates for interstate inmate calling services are just, reasonable, and fair. And the cost-based rule is a "logical outgrowth" of the issues laid out in the *2012 Notice*. *See supra* pp. 24–30. The APA requires nothing more. *See* 5 U.S.C. § 553(b)(3) (requiring agencies to provide notice of the "substance of [a] proposed rule or a description of the subjects and issues involved" in the rulemaking proceeding).

C. The *Order* Gives Reasonable and Appropriately Detailed Guidance on Recoverable Costs.

The provider-petitioners contend that the FCC failed to give adequate guidance on what costs are and are not recoverable under the cost-based rule. *See* Br. 25–26. On the contrary, the *Order* gives ample guidance on recoverable costs.

To begin with, the *Order* provides that rates set at or below the safe-harbor levels contained in 47 C.F.R. § 64.6020 "are presumptively in compliance with § 64.6010." 47 C.F.R. § 64.6020(a) (*Order* App. A

(JA __)); *see Order* ¶¶ 69, 119–20 (JA __, __–__). There is nothing amorphous about that standard. Although providers could theoretically be forced to change those rates through a complaint proceeding under 47 U.S.C. § 208, succeeding on such a challenge would be "difficult," as the FCC's Wireline Competition Bureau has explained, *Stay Denial Order* ¶ 13 (JA __); *see id.* ¶ 45 (JA __), and any resulting rate change would be prospective only, *see Order* ¶¶ 59 n.224, 120 (JA __, __).

Nor is there anything unclear about the rule for providers that elect not to use the safe harbors. The *Order* provides "twenty specific examples of cost categories that the [FCC] would likely find compensable and eight examples of costs that it would not." *Stay Denial Order* ¶ 19 (JA __) (citing *Order* ¶ 53 nn.196, 198 (JA __–__)). The *Order* specifies, for example, that recoverable cost categories include "the cost of capital (reasonable return on investment); expenses for originating, switching, transporting, and terminating [inmate] calls; and costs associated with security features relating to the provision of [inmate calling]"—including advanced security features. *See Order* ¶ 53 & n.196 (JA __).[4] Unrecoverable categories include "costs of

[4] Thus, contrary to assertions of the corrections-petitioners, *see* Corrections Br. 42–44, the *Order* plainly permits the recovery of security costs related to inmate calling services, *see Order* ¶¶ 53, 58 (JA __, __), including advanced security features, *see id.* ¶ 53 n.196 (JA __). Moreover, in calculating the

nonregulated service, costs relating to general security features of the correctional facility unrelated to [inmate calling], and costs to integrate inmate calling with other services, such as commissary ordering, internal and external messaging, and personnel costs to manage inmate commissary accounts." *Order* ¶ 53 (JA __). "[S]ite commission payments" generally may not be recovered, *id.*, except to the extent they may "reimburse correctional facilities for their costs of providing [inmate calling services]," *id.* ¶ 54 n.203 (JA __).

Should specific questions arise concerning the application of this guidance, agency staff routinely "works with providers to help guide them through the implementation" of new rules. *Stay Denial Order* ¶ 20 (JA __). Particularly for a temporary rate regime, the possibility that there might arise some future need for additional guidance does not make the cost-based rule impermissibly imprecise. *See, e.g.*, *Shays v. FEC*, 528 F.3d 914, 930 (D.C. Cir. 2008) (recognizing that an "agency is entitled to broad deference in

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interim safe-harbor and hard caps, the FCC relied on data that it expressly found to incorporate the cost of advanced security features. *See id.* ¶ 58 (JA __). The FCC further found that the costs of providing secure inmate calling services are decreasing and will continue to do so, due in part to increased automation and centralization of security features. *See id.* ¶¶ 29, 71 (JA __, __). Accordingly—in a reasonable exercise of expert, predictive judgment—the FCC concluded that its "reforms will not impact security or innovation in the [inmate calling] market." *Id.* ¶ 71 (JA __); *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 300–01 (D.C. Cir. 2003). That judgment warrants considerable deference. *E.g.*, *Rural Cellular*, 588 F.3d at 1105.

picking the suitable level" of specificity when it implements a rule, and that "there is no basis for suggesting that the agency has a statutory duty to promulgate regulations that . . . address every conceivable question" (quotation marks omitted)).

Nor does the fact that the *Order* uses the term "likely" when identifying compensable cost categories undermine the FCC's guidance. *See* Br. 26 (citing *Order* ¶ 53 & n.196 (JA __)); Corrections Br. 31 (same). That language merely reflects the fact that the *Order* sets forth an interim framework for rates; the *Order* need not and does not resolve particular cases, or determine the compensability of specific costs in precise circumstances. In other words, the language reflects the fact that the guidance is just that, and not a case-specific adjudication.

The fact that the cost-based rule forms part of an interim rate structure similarly explains the FCC's decision (about which the provider-petitioners also complain) not to prescribe a firm threshold for what constitutes a reasonable return on investment, *see* Br. 26 (citing *Order* ¶ 54 n.203 (JA__)), or dictate the manner in which inmate calling providers must "apportion their costs between interstate and intrastate calls," *id.* at 26 n.30 (quotation marks omitted) (citing *Order* ¶ 53 n.195 (JA __)). Inmate calling providers are well positioned to know their costs of capital and of providing ancillary services,

and they "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." *Stay Denial Order* ¶ 21 (JA __). The FCC's decision "to allow providers to utilize their existing accounting systems and conventions" for an interim period, *id.* ¶ 19 (JA __), while the agency collects further data and public comment to refine its rules, in no way diminishes the reasonableness of the cost-based rule.

D. The FCC Reasonably Concluded That Site Commissions Are Not a Compensable Category of Costs.

The provider-petitioners next challenge the FCC's determination that site commissions are not, "as a category[,] . . . a compensable component of interstate [inmate calling] rates," *Order* ¶ 56 (JA __), arguing that such commissions are "real costs" of providing inmate calling services that the agency has ignored, Br. 26, 29.[5]

As this Court has stated, "a common test for the lawfulness of rates is their connection to the reasonably-incurred costs of providing the regulated service." *NARUC v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007). Agencies

[5] Both the provider-petitioners and the corrections-petitioners also challenge the *Order* and its treatment of site commissions on a theory that the agency has unlawfully infringed state and local authority. *See* Br. 27–28; Corrections Br. 22–39. We explain separately why the Court should reject that challenge. *See infra* Part V.

routinely and appropriately "disallow recovery of costs imprudently incurred." *Id.*; *see also NAACP v. FPC*, 425 U.S. 662, 666–69 (1976) (holding that the Federal Power Commission's statutory authority to "establish 'just and reasonable' rates" gave the agency "ample authority" to prevent a regulatee from charging consumers for "unnecessary or illegitimate costs" that the regulatee might incur through "racially discriminatory employment practices").

Here, the FCC first determined, in accordance with its longstanding view, that site commissions are "an apportionment of profit" between inmate calling providers and correctional facilities. *Order* ¶ 54 (JA __); *see id.* ¶ 54 & nn.199–200 (JA __) (citing *2002 Order*, 17 FCC Rcd at 3254–55, 3262–63 ¶¶ 15, 38). As the agency explained, although they "may not be 'profits' to [inmate calling] providers in the sense that [the providers] can keep these excess revenues and use them for whatever purpose they like, they are excess revenues above costs nonetheless." *Id.* ¶ 55 (JA __).

Even if viewed as costs, the FCC found that site commissions "are not costs that are reasonably and directly related to the provision of [inmate calling services]," because the payments are used "for a wide range of purposes, most or all of which have no reasonable and direct relation to the provision of [inmate calling]." *Order* ¶ 54 (JA __); *accord id.* ¶ 55 (JA __).

Facilities very often use the site commissions they collect to fund ordinary corrections-related activities and expenses such as "employee salaries and benefits, equipment, building renewal funds, . . . and personnel training." *Order* ¶ 34 & n.132 (JA __); *see* Corrections Br. 11 n.3. There are also a number of jurisdictions in which large portions, or even all, of the site commissions that correctional facilities collect are treated as general governmental revenue. *See Order* ¶ 3 n.13 (JA __) (noting that "commissions paid to the [Massachusetts] Department of Correction are transferred to the General Fund of the Commonwealth"); *see also* Wright Petitioners' Reply Comments, WC Docket No. 12-375, Exh. H (JA __, __–__, __–__) (Apr. 22, 2013) (identifying Fla. Stat. § 945.215(b) (2012), Tex. Gov't Code Ann. § 495.027 (2012), and Wis. Stat. § 3[01].105 (2013) as allocating all or a substantial portion of site-commission payments to the general fisc). The petitioners stress—as the *Order* acknowledges, *e.g.*, *Order* ¶ 34 (JA __)—that some correctional facilities use portions of the commissions they collect to fund inmate welfare programs, *see* Br. 27; Corrections Br. 25–26. But even inmate welfare programs have no necessary connection to the provision of inmate calling services. *See Order* ¶¶ 54–55 (JA __–__).[6]

[6] The corrections-petitioners assert that some facilities use portions of the site

The Communications Act grants the FCC express authority to ensure that charges for telecommunications services are "just and reasonable," 47 U.S.C. § 201(b), and that payphone services providers, including inmate calling providers, are "fairly" compensated for calls, *id.* § 276(b)(1)(A); *see Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 566 (D.C. Cir.) (holding that the fair-compensation requirement of Section 276(b)(1)(A) unequivocally applies to inmate payphones), *supplemented by* 123 F.3d 693 (D.C. Cir. 1997). It was entirely reasonable for the agency to determine that site commissions, which typically bear no reasonable relation to the provision of inmate calling services—but which can account for nearly 90 percent of end-user rates, *see Order* ¶ 34 (JA __)—are as a category not compensable costs under the cost-based rule, *e.g.*, *id.* ¶ 56 (JA __). As the agency reasonably determined, the Communications Act is not "a mechanism for

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commissions they collect "to defray the costs of providing calling services," including security costs. Corrections Br. 26; *see id.* at 28. The record before the FCC neither established nor "foreclose[d]" that "possibility." *Order* ¶ 54 n.203 (JA __); *see id.* ¶ 57 n.213 (JA __). Accordingly, although the agency did not deem site commissions, as a category, a compensable cost of providing inmate calling services, *see id.* ¶¶ 53–58 (JA __–__), the agency did allow some leeway: To the extent commission payments reimburse a correctional facility for costs reasonably related to the provision of inmate calling services, a provider may recover those portions of its payments in end-user rates. *See id.* ¶ 54 n.203 (JA __).

funding social welfare programs unrelated to the provision of [inmate calling services], no matter how successful or worthy." *Id.* ¶ 57 (JA __).[7]

II. THE INTERIM HARD CAPS ARE REASONABLE AND REASONABLY EXPLAINED.

The petitioners claim that by electing to apply the interim hard caps to inmate calling services at all types of correctional facilities, and thereby (the petitioners contend) ignoring evidence of variation in costs among facilities, the FCC violated the APA. *See* Br. 30–37; Corrections Br. 39–41. The petitioners also challenge the hard caps as "[t]ainted by [m]ethodological [f]laws." Br. 37; *see id.* at 37–40; Corrections Br. 44. Their claims do not withstand examination.

A. The FCC Reasonably Concluded That Most Inmate Calling Providers Can Recover Their Costs within Uniformly Applicable Hard Caps.

In calculating the interim hard caps, the FCC took care to account for high-cost providers and facilities. *See Order* ¶¶ 76–80 (JA __–__). The agency derived the caps using the record submissions that reflected the highest costs: data from inmate calling provider Pay Tel Communications, Inc. (Pay Tel) for debit calls, and from the 2008 Provider Proposal for collect calls. *See Order* ¶¶ 76–78 (JA __–__). As the *Order* states, "Pay Tel serves

[7] The provider-petitioners challenge the FCC's annual reporting requirement (47 C.F.R. § 64.6060) on the sole basis that it "hinge[s]" on the cost-based rule. Br. 29. Because the cost-based rule is lawful, that challenge fails.

jails exclusively, which are generally smaller and which providers claim are more costly to serve than prisons." *Id.* ¶ 77 (JA __). Likewise, the FCC found that "smaller, potentially higher-cost facilities [were] over-represented in the data . . . sample" used in the 2008 Provider Proposal. *Id.* ¶ 80 (JA __). For numerous other reasons as well, the agency believed the data on which it relied were likely to overstate providers' actual service costs. *See id.* ¶¶ 77, 80 (JA __–__). Given the record before it, the FCC reasonably predicted it would be "rare" that an inmate calling provider could not recover its costs within the hard caps. *Id.* ¶ 74 (JA __); *see also id.* ¶ 119 (JA __) (predicting that the "vast majority of providers" would be able to recover their costs within even the lower safe harbors).

The provider-petitioners contend that the decision of agency staff to grant Pay Tel a waiver discredits the FCC's judgment. *See* Br. 34–35. In seeking a waiver, however, Pay Tel did not dispute that its average costs of providing interstate inmate calling services fall within the interim hard caps. *See Rates for Interstate Inmate Calling Services; Pay Tel Communications, Inc.'s Petition for Waiver of Interim Interstate ICS Rates*, Order, 29 FCC Rcd 1302, 1305, 1308–09 ¶¶ 6, 11 (JA __, __) (Wireline Competition Bur. 2014) (*Pay Tel Waiver Order*). Rather, Pay Tel obtained its waiver on a showing that *state laws* prevented the company from recovering its costs on *intrastate*

inmate calling services—which, under the interim hard caps, meant Pay Tel would operate at a loss at the holding company level. *See id.* at 1308–11 ¶¶ 11, 15, 18 (JA __–__); *accord* Br. 36.

The provider-petitioners also contend that, under the FCC's interim hard caps, some providers "may cease providing [services] altogether at the highest cost facilities they serve." Br. 36. The FCC considered that objection but found it unpersuasive. *See Order* ¶ 70 (JA __). Instead, the agency concluded that regulation of interstate inmate calling services would not "negatively impact . . . providers generally," or "curtail[] . . . access" to inmate calling services. *Id*. As the FCC explained, that finding "is supported by the fact that many state departments of correction make [inmate calling services] available . . . at rates lower than those . . . implement[ed in the *Order*] and nonetheless operate in a safe, secure, and profitable manner." *Id*.; *see id.* ¶ 70 & n.263 (JA __) (citing evidence showing rates lower than the safe-harbor caps in New Mexico, New York, Missouri and other states); *see also id.* ¶¶ 63 & n.235, 65 & n.238 (citing evidence of rates approximating $0.04–$0.05 per minute). The agency's predictive judgment that inmate calling providers will continue to offer service under the hard caps was a reasonable exercise of the agency's expertise in this area, which is entitled to deference. *E.g.*, *Rural Cellular*, 588 F.3d at 1105.

Nor did the FCC ignore "unrebutted evidence" that costs vary among facilities, as the provider-petitioners argue. Br. 30. In the *2012 Notice*, the FCC specifically requested information concerning "differences between correctional facilities[,] including size, location, security levels, facility age and staffing levels [that might] not allow a one size fits all solution." *2012 Notice* ¶ 22 (JA __); *see id.* ¶¶ 23, 25, 28 (JA __, __, __–__). Inmate calling providers, however, offered "conflicting assertions as to what [the relevant] distinctions [might] be." *Order* ¶ 81 (JA __); *see Further Notice* ¶ 159 (JA __). Notably, the provider-petitioners do not contend the available record was sufficient to sustain any particular tiered pricing scheme. *See* Br. 30–34. They suggest only that the FCC should have "defer[red] action" altogether until amassing better data. *See* Br. 32 n.36.

As the *Order* explains, the agency is "not required to defer action until it can assemble perfect data, where, as here, it faces clear evidence of widespread unreasonable [inmate calling] charges." *Order* ¶ 81 n.308 (JA __). Unreasonably high rates were an urgent problem that had for too long gone unaddressed. Under the circumstances, the agency reasonably elected to act, on an interim basis, relying on the "only available data." *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1243 (D.C. Cir. 2007). "[H]owever imperfect," the available record was sufficient to support the

FCC's adoption of uniform hard caps while the agency collects further data to craft more permanent reforms. *Id.*; *see Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000) (recognizing that the FCC "necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information" (quotation marks omitted)).[8]

B. In Setting the Hard Caps, the FCC Reasonably Considered Averaged, Per-Minute Costs.

The provider-petitioners also claim that the FCC's decision to adopt uniform hard caps was arbitrary and capricious because "average per-minute [inmate calling] costs" for some providers "at some facilities" may exceed hard-cap levels. Br. 31; *see id.* at 33, 35. The provider-petitioners stop conspicuously short of claiming they cannot operate profitably under the caps. *See* Br. 35–36. Instead, they appear to contend that the FCC's approach is arbitrary unless the caps permit providers to recover their costs at each and every correctional facility they serve.

Contrary to that contention—and as this Court has recognized—"the Supreme Court has affirmed ratemaking methodologies employing composite industry data or other averaging methods on more than one occasion."

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[8] Providers are required to submit detailed cost data to the FCC for this purpose by August 18, 2014. *See Rates for Interstate Inmate Calling Services*, Order, 29 FCC Rcd __, __ ¶ 5, 2014 WL 3427430, at *2 (Wireline Competition Bur. 2014).

Southwestern Bell, 168 F.3d at 1352; *see FPC v. Texaco, Inc.*, 417 U.S. 380, 387 (1974); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968). Likewise, this Court has upheld the FCC's calculation of rates to be paid by long-distance companies to private payphone owners on the basis of average call volume. *See APCC*, 215 F.3d at 54.

As the *Order* explains, "[i]t would not be possible, much less practical" to require the agency to tailor rate caps in the "exquisitely granular" manner the provider-petitioners desire. *Order* ¶ 62 n.230 (JA __). "Some averaging of costs must occur, and there is no logical reason that it must occur at the facility level." *Id.* ¶ 123 (JA __). And "[i]t is a given that when a regulatory pricing structure is established" on an industry-wide basis, "providers subject to those rates will serve higher and lower cost customers." *Stay Denial Order* ¶ 31 (JA __).

Indeed, as the FCC found, inmate calling providers—like many telecommunications providers—routinely use uniform rates to serve customers "with differing cost . . . characteristics." *Order* ¶ 76 n.280 (JA __–__). A cost study that Securus submitted, for example, "shows that the per minute rates Securus charges for its . . . group of [smallest] facilities are significantly below the per-minute costs Securus identified for those facilities." *Stay Denial Order* ¶ 32 (JA __); *see also Order* ¶ 81 n.301

(JA __) (paraphrasing a statement by Telmate's chief executive officer that "even if a provider may under-recover at some facilities, it may over-recover at others"); Br. 37 (confirming that providers at least "occasionally provide service at facilities at rates below costs").

The form of the cost data that inmate calling providers submitted to the record is consistent with the FCC's finding. Cost data that Pay Tel submitted, for example, averaged costs across all of the facilities the company serves. *See Order* ¶¶ 75–76 (JA __–__). Similarly, the 2008 Provider Proposal "submitted a single set of costs" for the seven participating providers, "regardless of the differing sizes of the correctional institutions they served." *Id.* ¶ 81 (JA __).

On this record, the provider-petitioners are mistaken to invoke *Petal Gas Storage, LLC v. FERC*, 496 F.3d 695 (D.C. Cir. 2007). *See* Br. 38 n.41. That case involved a challenge to a FERC decision to include natural gas *distribution* companies in a proxy group to determine the cost of capital for natural gas *pipeline* companies, when the agency had previously excluded gas distribution companies from gas pipeline proxy groups. *See Petal Gas*, 496 F.3d at 699. Here, by contrast, there is no basis in the record that would compel the FCC to analyze data from subgroups of correctional facilities

separately. It was entirely reasonable for the FCC to rely on averaged and industry composite data that inmate calling providers themselves supplied.

C. The Hard Caps Are Otherwise Methodologically Sound.

The petitioners fail to show that the interim hard caps are methodologically flawed in any other respect, either. *See* Br. 37–40; Corrections Br. 44.

First, the FCC cannot be faulted for relying on the 2008 Provider Proposal's calculation of collect-call costs using data from 25, as opposed to 28, of the correctional facilities that the participating providers included in that study. *See* Br. 38–39. The 2008 Provider Proposal itself presented data based on this sample of 25 facilities. *See* 2008 Provider Proposal 4 (JA __). Although the study also contained data from an expanded sample of 28 facilities, the additional facilities were exceedingly small—as the Wright petitioners emphasized before the agency—with "a total of only 20 . . . lines" among them, "or less than seven lines each," and for that reason "certainly should not be considered in a Cost Study used to calculate average costs." Wright Petitioners' Ex Parte Notice, Exh. A 8 (JA __), CC Docket No. 96-128 (Dec. 23, 2008) (Dawson Report). By contrast, the other 25 facilities in the proposal had, "on average, . . . 22 lines" each. *Id*. Given the evidence that the additional facilities included as an alternative in the 2008 Provider

Proposal were "outliers," it was well within the FCC's discretion to exclude them from consideration. *See Flying J, Inc. v. FERC*, 363 F.3d 495, 498 (D.C. Cir. 2004); *see also Z-Tel Commc'ns v. FCC*, 333 F.3d 262, 272 (D.C. Cir. 2003) (holding that "the weight of the evidence . . . [is] a matter peculiarly within the province of the [FCC]").

Nor is it true that the FCC "ignored . . . record evidence" that the 2008 Provider Proposal "is based on understated costs in other respects." Br. 39. The author of the 2008 Provider Proposal did assert that even though the study used "data for several small jail locations," "low volume, high cost location[s]" were "likely to be statistically underrepresented." 2008 Provider Proposal 15 (JA __); *see* Br. 40. But the FCC reasonably disagreed, finding that—even with respect to the 25-facility data—"smaller, potentially higher-cost facilities [were] over-represented in the data submission's sample, as compared with the national distribution of sizes of correctional facilities." *Order* ¶ 80 (JA __); *see also* Dawson Report 8 (JA __) (explaining that the low number of inmate phone lines "shows that, on average, these are small facilities"). Regarding an assertion that Securus made in a 2011 ex parte letter that its costs had increased "by more than 16%" since the 2008 Provider Proposal, Br. 40 (citing Securus Comments, Exh. 5 (JA __)), that claim was wholly unsubstantiated, and Securus made no attempt to relate it to interstate

collect calls (the category of calls for which the FCC used the 2008 Provider Proposal), *see* Securus Comments, Exh. 5 (JA __–__). There was no basis for the *Order* to address it. *See Covad*, 450 F.3d at 550 (holding that "[t]he FCC need not address every comment" when it "respond[s] in a reasoned manner to those that raise significant problems").[9]

Finally, the corrections-petitioners are mistaken to claim that the interim hard cap for collect calls "is unreasonably low when compared to non-inmate, interstate collect calling offered to the public." Corrections Br. 44. That argument improperly relies on two rate schedules, *see id.* at 44 & nn.6–7, that the Mississippi and South Dakota Departments of Corrections have previously conceded were not in the record before the FCC at the time of the *Order*, *see* Reply in Support of Mot. of Miss. Dep't of Corrections and S.D. Dep't of Corrections for Stay Pending Judicial Review 8 (Dec. 23, 2013). And even had the record established higher rates for "non-inmate interstate collect calling," Corrections Br. 44, the corrections-petitioners do not attempt to show that the costs per call for collect calls outside the inmate calling context is comparable to the costs of such calls in correctional

[9] We note as well that even crediting the assertion that Securus's costs have increased since 2008 (which the FCC had no basis to do), Securus's average per-minute costs at the facilities for which it has provided data are only $0.044—well below safe-harbor levels, let alone the hard caps. *See Order* ¶ 75 & n.277 (JA __).

institutions, where—unlike in the non-inmate market—demand for services of necessity remains robust.

D. The *Order* Provides Flexibility, Including a Waiver Process, for Providers with Good Cause to Charge Higher Rates.

The interim hard caps are particularly reasonable in view of the considerable degree of flexibility the *Order* permits inmate calling providers in setting rates at the facilities they serve. For one, while the FCC rejected the notion that a provider could justify its costs "on the basis of a single facility it serves," the *Order* specifically allows a provider to base its cost justification on "groupings" of facilities that "reflect reasonably related cost characteristics." *Order* ¶ 123 (JA __). And the agency's waiver process offers a further safety valve should an inmate calling provider that has especially high costs (or faces other unusual circumstances) be unable to operate profitably, at the holding company level, within the hard caps. *See id.* ¶¶ 73 n.270, 82 & n.309, 83 (JA __, __, __).

This Court has long recognized that a "safety valve procedure for consideration of an application for exemption based on special circumstances" supports the FCC's "discretion to proceed in difficult areas through general rules." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *see also Rural Cellular*, 588 F.3d at 1100, 1104 (rejecting a challenge

to an interim cap on universal-service subsidies to competitive carriers in part because carriers could obtain an exemption by submitting cost data to justify it).

To be sure, as the *Order* explains, the FCC "expect[s]" that waivers will be received only to "account for extraordinary circumstances," because the interim hard caps are set at "conservative levels." *Order* ¶ 83 (JA __); *see also id*. ¶ 74 (JA __) (predicting that only "the rare provider" would have costs justifying above-cap rates). But that expectation hardly means that the waiver process is not a viable avenue of relief. *See* 47 C.F.R. § 1.3 (permitting waiver of FCC rules "for good cause shown"); *Keller Commc'ns, Inc. v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997) (citing *WAIT Radio*). Indeed, as the provider-petitioners acknowledge, *see* Br. 35, the FCC has already granted a waiver to inmate calling provider Pay Tel, *see Pay Tel Waiver Order*, 29 FCC Rcd at 1302 ¶ 1 (JA __). The flexible nature of the agency's rate structure—including the waiver process—provides a further reason to sustain the hard caps.[10]

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[10] The provider-petitioners' reliance on *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977) (per curiam), which evaluated FCC rules regulating pay programming on cable television "without reference to" waiver provisions, is misplaced. *See* Br. 33. The provider-petitioners construe *HBO* to mean the Court must ignore the existence of a waiver mechanism if the agency will not grant waivers liberally. *See id.* This Court

III. THE INTERIM SAFE-HARBOR CAPS ARE REASONABLE AND REASONABLY EXPLAINED.

As with the interim hard caps, the petitioners challenge the interim safe-harbor caps on the basis that they apply uniformly to all types of correctional facilities, *see* Br. 40; Corrections Br. 39–42, and derive from data that reflect averaging, *see* Br. 42. Those arguments fail for the reasons already set forth. *See supra* pp. 40–47.[11] The provider-petitioners' several additional methodological challenges to the safe harbors, *see* Br. 40–43, are also unavailing.

The FCC based its interim safe-harbor rates on 2012 inmate calling data submitted by the Human Rights Defense Center—a nonprofit inmate advocacy organization—that covered "virtually all of the state departments of corrections in the country." *Order* ¶ 61 (JA __). For purposes of the interim

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has never construed *HBO* so broadly and should not do so now. In *HBO*, this Court dismissed the significance of specific waiver provisions not just because the FCC was on record that it would not "freely grant waivers," but more importantly because the agency's waiver procedures, in the context of rules subject to intermediate First Amendment scrutiny, did not comport with applicable constitutional requirements. 567 F.2d at 50.

[11] As when calculating the hard caps, the FCC accounted for high-cost providers and facilities in calculating the safe-harbor caps, adopting a "conservative" approach "to account for the fact that there may be cost variances among correctional facilities." *Order* ¶ 62 (JA __); *see id.* ¶¶ 63 n.235, 64 n.237 (JA __–__) (including data from two state departments of corrections that evidence indicated were high-cost outliers).

safe-harbor caps, the agency found "most relevant" a subset of that data limited to "seven states that have excluded site commission payments from their rates." *Id.* ¶ 62 (JA __). It found that the more limited subset "provide[d] a reasonable basis for establishing a conservative proxy for cost-based rates." *Id.*

"[C]alculating the average per-minute interstate [inmate calling] debit and prepaid call rates of the seven identified state departments of corrections," the agency determined that the average rate for a 15-minute debit call was $0.1186 per minute, and the average rate for a 15-minute prepaid call was $0.1268 per minute. *Id.* ¶ 63 (JA __). "Given the similarities of debit and prepaid charges," the FCC "group[ed] the two into a single category," and obtained an overall per-minute average of $0.1227, which it rounded to $0.12 per minute. *Id.* Using the same data and the same methodology, the agency derived an average rate for interstate inmate collect calls to be $0.1411 per minute, which it rounded to $0.14 per minute. *See id.* ¶ 64 (JA __).

"Other data in the record further validate that the interim interstate safe harbor rates are just, reasonable, and fair." *Order* ¶ 65 (JA __). The $0.12 per minute safe-harbor rate for debit and prepaid calls is "higher than rates currently charged [at] several state departments of corrections without site

commissions," and "is at or above the rate that would result if site commissions were deducted from the rates in ten states that allow them." *Id.*; *see id.* ¶ 65 nn.238–239 (JA __). Likewise, "there are nine states" that allow site commissions where rates, excluding those commissions, are within the $0.14 per minute safe-harbor rate for collect calls. *Id.* ¶ 65 (JA __). The *Order* also notes that the interim safe-harbor rates "closely approximate" the rates for prepaid and collect calling for detainees at U.S. Immigration and Customs Enforcement facilities. *Id.*

As a threshold matter, the provider-petitioners' several challenges to the methodology the FCC employed in deriving the interim safe harbors all suffer a common failing: They ignore the underlying nature of the caps. The safe harbors protect providers that charge below their limits, but they do not bind any provider with costs that exceed them. *See Order* ¶ 69 (JA __).

More specifically, the provider-petitioners mistakenly complain that in two of the seven states the FCC used to construct the safe-harbor caps—Michigan and Rhode Island—inmate calling rates exceed safe-harbor levels. *See* Br. 42. As we have explained, *see supra* pp. 44–47, averaging cost data is an unexceptional ratemaking practice. And as the FCC reasonably determined, because the record evidence "does not suggest a dramatic difference in costs among states (and, indeed, such states may be served by

the same [inmate calling] provider using common, centralized facilities)," the higher calling rates in those states "are likely to include" costs bearing no relationship to inmate calling services. *See Order* ¶ 63 n.235 (JA __); *see id.* (also noting that a statistical analysis of the variance of the two states' rates suggests they are anomalous); *accord id.* ¶ 64 n.237 (JA __). Even so, "in the interest of being conservative," the agency included those rates when calculating the safe-harbor caps. *Id.* ¶ 64 n.235 (JA __).

The FCC reasonably declined to base its safe-harbor rates on cost and revenue data submitted by Securus and CenturyLink. *See* Br. 41. As the *Order* explains, the agency did so because "Securus did not provide the disaggregated data used to derive the report's total cost results, and the data it submitted did not distinguish between collect, debit, or prepaid calls." *Order* ¶ 68 (JA __). Similarly, the agency did not rely on CenturyLink's submission because CenturyLink did not provide the "underlying data" or "a description of its methodology," and also did not distinguish "between debit, prepaid, and collect calling costs." *Id.* Although the rate data from state departments of corrections upon which the agency did rely may likewise not have disaggregated costs, *see* Br. 41–42, those data—unlike the Securus and CenturyLink submissions—were not selectively compiled for advocacy in the

FCC's proceeding and reflected actual, negotiated agreements with inmate calling providers, *see Order* ¶ 62 (JA __).

Nor is it the case, as the provider-petitioners claim, that the FCC failed to explain adequately why it excluded California when analyzing data from states that have eliminated site commissions from their rates. *See* Br. 42–43. The *Order* makes clear that although California's inmate calling rates do not include site-commission payments in precisely the same fashion as many other states, California's rates reflect "the costs of significant in-kind contributions" analogous to site commissions "that, under [the state's] contract, the [inmate calling] provider is required to make." *Order* ¶ 62 n.228 (JA __).[12]

The provider-petitioners also object to the FCC's decision to "round down" from the average rate data to construct the precise interim safe-harbor caps the agency adopted. *See* Br. 43. But the agency's application of standard rules for mathematical simplification, especially in the context of a

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[12] California's publicly available contract, which is cited in the *Order*, *e.g.*, *Order* ¶ 76 n.280 (JA __), shows that required contributions include the provision of a system to ensure "continuous blocking of all unauthorized cellular wireless communications" and a "Contract Administration Fee of $800,000," State of California, California Technology Agency, IWTS/MASS Agreement No. OTP 11-126805, *available at* https://www.prisonphonejustice.org/CA/ca-contract-with-gtl-2012-2018-part-1/ (last visited July 20, 2014) (JA __).

safe harbor, was entirely reasonable. As the FCC explained, there was ample evidence in the record to establish that the safe-harbor rates, even as rounded, were "just, reasonable, and fair." *Order* ¶ 65 (JA __); *see Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 949 (D.C. Cir. 2005) (upholding the decision of the Librarian of Congress to round down a rate for sound-recording performance).

For all of these reasons, the interim safe-harbor caps are reasonable and reasonably explained.[13]

IV. THE FCC'S REGULATION OF ANCILLARY CHARGES WAS LAWFUL.

As a "necessary aspect" of the FCC's "cost-based reforms," *Order* ¶ 91 n.338 (JA __), the *Order* requires "[a]ncillary service charges," in addition to inmate calling rates, to be "cost-based" and "reasonably and directly related to [the] provision of [inmate calling services]," *id.* ¶ 91 (JA __– __).

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[13] In addition to challenging the methodological underpinnings of the interim safe-harbor caps, the provider-petitioners assert that the rule codifying those caps (47 C.F.R. § 64.6020) "hinge[s]" on the cost-based rule and cannot survive without it. Br. 29. As we have explained, there is no basis for the Court to vacate the cost-based rule. *See supra* pp. 23–40. Moreover—as the provider-petitioners appear to acknowledge, *see* Br. 21—even without the cost-based rule, inmate calling rates are subject to cost-based challenges under the FCC's existing complaint process, *e.g.*, *Stay Denial Order* ¶ 12 (JA __). Accordingly, independent of the cost-based rule, the safe-harbor caps offer meaningful protections (and corresponding incentives) for inmate calling providers. *E.g.*, *supra* p. 9. The safe-harbor rule thus is severable. *See Order* ¶ 127 (JA __).

Interested parties are permitted to challenge ancillary charges through the complaint process established by the *Order*, and inmate calling providers will have the burden of demonstrating that their ancillary charges are "just, reasonable, and fair." *Id.* ¶ 92 (JA __).

The provider-petitioners claim that the FCC lacked jurisdiction to regulate ancillary charges, *see* Br. 45, and that the agency failed to give adequate notice it might do so, *see id.* at 44. Neither contention is persuasive.

A. The FCC Has Statutory Authority to Regulate Ancillary Charges.

The FCC's authority to regulate charges that are ancillary to inmate calling services is firmly grounded in the Communications Act. The payphone services that are subject to regulation under Section 276 of the Act are expressly defined to include not only "the provision of inmate telephone service in correctional institutions," but also "any ancillary services." 47 U.S.C. § 276(d). Likewise, Section 201(b) of the Act requires that "all charges . . . in connection with . . . communication service[s] . . . be just and reasonable." *Id.* § 201(b). As the *Order* explains, "[t]he services associated with . . . ancillary charges are 'in connection with'" inmate calling services within the meaning of Section 201(b), and are "ancillary" under Section 276. *Order* ¶ 91 (JA __). The agency's view warrants *Chevron* deference. *See City of Arlington*, 133 S. Ct. at 1874–75.

The provider-petitioners contend that ancillary charges "are entirely outside and independent of inmate [calling]." Br. 45. That is plainly incorrect. Ancillary charges, the FCC explained, are "non-call related charges" that are imposed on users "to make [inmate] calls." *Order* ¶ 90 (JA __); *see id.* (identifying, as examples, charges "to set up or add money to a debit or prepaid account, . . . or to deliver calls to a wireless number" (footnote omitted)). The provider petitioners contend that ancillary charges fall outside the FCC's authority because they are "assessed on . . . financial transactions." Br. 45. Regardless of that characterization, because ancillary charges are closely intertwined with the provision of inmate calling services, they fall squarely within the agency's statutory grant.

B. The FCC Gave Adequate Notice It Might Regulate Ancillary Charges.

Although the *2012 Notice* did not use the term "ancillary charges," it did include requests for comment that were specifically directed to non-call charges imposed on consumers to use inmate calling services. The *2012 Notice* asked questions, for example, regarding "how to handle monthly fees; how to load an inmate's account; and minimum required account balance." *2012 Notice* ¶ 33 (JA __). And in doing so, the agency specifically referred to comments in the record that addressed ancillary charges. *See id.* ¶ 33 & n.106 (JA __). The *2012 Notice* also sought comment on "any proposals in

the record" that it had not expressly described. *Id.* ¶ 35 (JA __). The record at the time contained a number of proposals asking the agency "to address excessive fees for ancillary services." *Order* ¶ 91 n.338 (JA __).[14]

In any event, as the FCC reasonably found, "regulating ancillary charges" is "a necessary aspect of" any effective approach to ensuring just, reasonable, and fair inmate calling rates. *Order* ¶ 91 n.338 (JA __). "[O]therwise providers could simply increase their ancillary charges to offset lower rates" under the agency's rules. *Id*. Even apart from the specific references in the *2012 Notice* to such charges, it was thus "reasonably foreseeable" to interested parties that inmate calling rate reform would carry with it protections relating to excessive ancillary charges. *Long Island Care*, 551 U.S. at 175. The record in fact reflects that "commenters properly understood that ancillary charges were part of the cost-based reform being considered." *Order* ¶ 91 n.338 (JA __) (citing Wright Petitioners' Comments

[14] For example, the American Bar Association had urged the FCC to "prohibit[]" ancillary charges that "dramatically increase the cost of communicating with" inmates but that "do not appear as part of the cost of the call reflected on a telephone bill." Letter from Director, American Bar Association, to Secretary, FCC, at 2 n.4 (JA __–__), CC Docket No. 96-128 (Jan. 15, 2009). The record similarly included a request that the agency "close the door to mechanisms that would allow prison phone service providers to inflate service fees that unfairly and unjustifiably increase the price of prisoner phone calls." Ex Parte Presentation of Michael S. Hamden 14–15 (JA __–__), CC Docket No. 96-128 (Oct. 29, 2008); *see also Order* ¶ 91 n.338 (citing these and other proposals).

3, 24–27 (JA __, __–__), WC Docket No. 12-375 (Mar. 25, 2013); Telmate Reply Comments 3 (JA __); and Pay Tel Reply Comments 2–3 & n.6 (JA __–__), WC Docket No. 12-375 (Apr. 22, 2013)).

V. THE *ORDER* DOES NOT UNLAWFULLY INFRINGE STATE OR LOCAL AUTHORITY.

Apart from their specific criticisms of the *Order*, both sets of petitioners mount a broad-brush challenge to the FCC's authority to reform inmate calling rates on the ground that the *Order* "intrud[es] on the prerogatives of state and local authorities to manage their prisons and related budgetary affairs." Corrections Br. 21; *see id.* at 22–39; Br. 27–28. Indeed, the corrections-petitioners claim that by restricting the ability of inmate calling providers to pay site commissions, the *Order* "tramples on" the ability of state and local authorities to make prison-management and budgetary decisions. Corrections Br. 27; *see id.* at 27–30; *accord* Br. 27–28.

In putting forth these claims, the petitioners conspicuously ignore the authority that Congress has expressly vested in the FCC to regulate interstate telecommunications generally and inmate calling services in particular. The Communications Act grants the FCC jurisdiction over "all interstate . . . communication by wire or radio," 47 U.S.C. § 152(a), and declares "unlawful" all "unjust or unreasonable" rates for interstate service, *id.* § 201(b). The Act also authorizes the FCC to regulate "the provision of

inmate telephone service in correctional institutions," *id.* § 276(d), directs the agency to adopt regulations to ensure that providers are "fairly compensated," *id*. § 276(b)(1)(A), and provides that the FCC's regulations "shall preempt" "State requirements [that] are inconsistent," *id.* § 276(c). The FCC reasonably determined that to permit "costs unrelated to the provision of [inmate calling services], no matter how . . . worthy," would be inconsistent with the agency's statutory charge to ensure that interstate inmate calling charges are just, reasonable, and fair. *Order* ¶ 57 (JA __).

It is well settled that the FCC's authority is not diminished "simply because a regulatory action has . . . consequences" on parties beyond the agency's jurisdiction. *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999). Thus, a rate-regulating agency has "indisputable authority to disallow recovery of costs imprudently incurred by jurisdictional firms," even when such a "conventional exercise[] of [the agency's] jurisdiction" might "impinge as a practical matter on the behavior of non-jurisdictional [entities]." *NARUC*, 475 F.3d at 1280.

The corrections-petitioners contend that where consequences for state and local government are at issue, a "clear statement" of congressional intent is necessary. Corrections Br. 32–33. To the extent that requirement is

applicable here, Congress has made its intent to vest authority over inmate calling services unmistakable. *See* 47 U.S.C. § 276(c), (d).

In addition, the *Order* neither bars inmate calling providers from continuing to pay site commissions out of their profits, nor restricts how correctional facilities spend such payments. *E.g.*, *Order* ¶¶ 55 n.205, 56 (JA __, __). Instead the *Order* simply provides that site-commission payments, as a category, are not recoverable as a cost of interstate inmate calling rates. *See id.* ¶ 56 (JA __). And as the corrections-petitioners acknowledge, *see* Corrections Br. 29, the FCC's reforms to date have no effect at all on the ability of correctional institutions to collect site commissions on intrastate calls—which constitute the vast majority of inmate calling services, *see Further Notice* ¶ 131 & n.444 (JA __).

The corrections-petitioners are likewise incorrect to contend that the interim rate caps "fail to account for" security costs and as a result are "unreasonably low." Corrections Br. 30; *see id.* at 30–31. As we have explained, *see supra* note 4, the *Order* and the rates were expressly designed to allow for recovery of "costs associated with security features relating to the provision of [inmate calling services]." *E.g.*, *Order* ¶ 53 (JA __); *see id.* ¶ 58 (JA __). The corrections-petitioners' assertion to the contrary is baseless and belied by the record.

VI. THE FCC REASONABLY CHOSE NOT TO EXEMPT EXISTING CONTRACTS.

The *Order* contains no exemption from the rules it enacts for existing contracts between inmate calling providers and correctional facilities. The corrections-petitioners contend that the *Order* therefore unlawfully "abrogates" those contracts in violation of *Regents of University System v. Carroll*, 338 U.S. 586 (1950). Corrections Br. 45; *see id.* at 45–46. The provider-petitioners argue that the FCC's failure to exempt existing contracts was arbitrary and capricious. *See* Br. 46–48. Neither theory is correct.

A. The *Order* Does Not Abrogate Existing Contracts, Although It Lawfully Could Have Done So.

To begin with, as the *Order* explains, the reforms adopted in the *Order* do not abrogate inmate calling providers' contracts with correctional facilities; the FCC has merely regulated "the relationship between . . . providers and end users." *Order* ¶ 100 (JA __). It may be that many providers can continue to satisfy the terms of their contracts with facilities and at the same time comply with the FCC's rate reforms. *See supra* p. 63. Nothing in the *Order* "directly overrides such contracts." *Order* ¶ 100 (JA __).

By the same token, however, agreements between inmate calling providers and correctional facilities "cannot trump the [FCC's] authority to

enforce the requirements of the Communications Act to protect those users within the [FCC's] jurisdiction." *Order* ¶ 101 (JA __). Thus, some agreements may have to be "revisited or amended," *id.*, under "change of law provisions" or otherwise, *id.* ¶ 102 (JA __). If that is the case, it will only be "because [such] agreements cannot supersede the [FCC's] authority to ensure that" inmate calling rates are "fair, just, and reasonable." *Id.* ¶ 101 (JA __). As this Court recognized in upholding the FCC's rules requiring wireless telephone companies to offer "roaming agreements" governing the provision of mobile data to other providers, "the third party impact" of FCC rules that "dictate[] certain interactions between [regulated entities] and third parties . . . differs in kind from the . . . issue at stake in *Carroll*." *Cellco P'ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

Indeed, even under *Carroll*, the FCC is free to require a party within its jurisdiction to repudiate contracts with third parties that the agency deems against the public interest. *See* 338 U.S. at 601–02. *Carroll* merely establishes the uncontroversial point that in doing so, the FCC cannot immunize the party it regulates from state-law remedies. *See id.* at 588, 602; *Cellco*, 700 F.3d at 543 ("[*Carroll*] holds only that the [FCC] lacks authority to invalidate licensees' contracts with third parties *and* to abrogate state-law contract remedies." (emphasis added)).

Similarly, under the "*Mobile-Sierra* doctrine," an agency may modify an established contract rate when doing so is "required by the 'public interest'" and "the changes are just, reasonable, and nondiscriminatory." *E. Ky. Power Co-op, Inc. v. FERC*, 489 F.3d 1299, 1309 (D.C. Cir. 2007). In view of the long history of excessive charges for inmate calling services—resulting in rates far out of compliance with the requirement of just, reasonable, and fair rates under the Communications Act, with profoundly detrimental social consequences—the FCC reasonably found that existing rates violated the public interest. *See Order* ¶ 101 n.365 (JA __); *Stay Denial Order* ¶ 25 (JA __). The agency thus had "authority under the *Mobile-Sierra* doctrine to proscribe contractual arrangements that contravene the relevant public interests." *Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302, 306 (D.C. Cir. 2012) (quotation marks omitted).

B. The FCC's Decision Was Reasonable and Reasonably Explained.

Contrary to the provider-petitioners' claim, *see* Br. 46–48, the FCC's decision to apply its interim reforms to existing contracts was not arbitrary or capricious. A number of commenters supported that choice. For example, the National Association of State Utility Consumer Advocates warned that grandfathering existing contracts "would only exacerbate the harm . . . to inmates and their friends and relatives." *Order* ¶ 99 n.361 (JA __). The

Human Rights Defense Center opined that it would be unjust and unreasonable to allow continued overcharges under existing contracts. *Id.* ¶ 99 n.361 (JA __). And even an inmate calling provider, Telmate, urged that any new rules should apply to existing contracts. *See id.* Moreover, to accommodate the operation of change-of-law provisions, as well as the voluntary renegotiation or termination of existing contracts, the FCC provided that its reforms would not take effect until 90 days after publication in the Federal Register (which itself was not accomplished for a month after the *Order*'s public release). *See id.* ¶ 102 (JA __).[15]

The petitioners assert that renegotiation may not always be an option—for example in Texas, which is the only state the petitioners have identified as statutorily requiring that correctional facilities collect site commissions. *See* Br. 48; Corrections Br. 30.[16] If inmate calling providers that serve correctional facilities in Texas cannot recover their costs within the interim rate caps, they may request a waiver or seek legislative change at the state

[15] This Court's order staying the cost-based and safe-harbor rules has given parties even more time to adjust to the FCC's rate reforms.

[16] The provider-petitioners also cite Mississippi Code Annotated § 47-5-158. Br. 27. That statute appears to authorize but not mandate the collection of site commissions.

level. *E.g.*, *Order* ¶¶ 73 n.270, 82 & n.309, 83 (JA __, __– __); *see Pay Tel Waiver Order* ¶ 1 (JA __).

CONCLUSION

The petition for review should be denied.

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July 21, 2014

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

SECURUS TECHNOLOGIES, INC., ET AL., PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NOS. 13-1280, 13-1281, 13-1291, 13-1300, 14-1006

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for the Federal Communications Commission in the captioned case contains 15,571 words.

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ADDENDUM

47 U.S.C. § 201
47 U.S.C. § 276

47 C.F.R. § 64.6000
47 C.F.R. § 64.6010
47 C.F.R. § 64.6020
47 C.F.R. § 64.6030
47 C.F.R. § 64.6040
47 C.F.R. § 64.6050
47 C.F.R. § 64.6060

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

§ 201. Service and charges

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

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from

furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

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

§ 276. Provision of payphone service

(a) Nondiscrimination safeguards

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

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

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

(b) Regulations

(1) Contents of regulations

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

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency

calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

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

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

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

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

(2) Public interest telephones

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

(3) Existing contracts

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

(c) State preemption

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

(d) “Payphone service” defined

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

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

§ 64.6000 Definitions.

As used in this subpart:

Ancillary charges mean any charges to Consumers not included in the charges assessed for individual calls and that Consumers may be assessed for the use of Inmate Calling Services. Ancillary Charges include, but are not limited to, fees to create, maintain, or close an account with a Provider; fees in connection with account balances, including fees to add money to an account; and fees for obtaining refunds of outstanding funds in an account;

Collect calling means a calling arrangement whereby the called party agrees to pay for charges associated with an Inmate Calling Services call originating from an Inmate Telephone;

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

Debit calling means a calling arrangement that allows a Consumer to pay for Inmate Calling Services from an existing or established account;

Inmate means a person detained at a correctional institution, regardless of the duration of the detention;

Inmate calling services means the offering of interstate calling capabilities from an Inmate Telephone;

Inmate telephone means a telephone instrument or other device capable of initiating telephone calls set aside by authorities of a correctional institution for use by Inmates;

Prepaid calling means a calling arrangement that allows Consumers to pay in advance for a specified amount of Inmate Calling Services;

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

Provider of Inmate Calling Services, or Provider, means any communications service provider that provides Inmate Calling Services, regardless of the technology used.

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
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SUBPART FF. INMATE CALLING SERVICES

§ 64.6010 Cost-based rates for inmate calling services.

All rates charged for Inmate Calling Services and all Ancillary Charges must be based only on costs that are reasonably and directly related to the provision of ICS.

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
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SUBPART FF. INMATE CALLING SERVICES

§ 64.6020 Interim safe harbor.

(a) A Provider's rates are presumptively in compliance with § 64.6010 (subject to rebuttal) if:

(1) None of the Provider's rates for Collect Calling exceed $0.14 per minute at any correctional institution, and

(2) None of the Provider's rates for Debit Calling, Prepaid Calling, or Prepaid Collect Calling exceed $0.12 per minute at any correctional institution.

(b) A Provider's rates shall be considered consistent with paragraph (a) of this section if the total charge for a 15–minute call, including any per-call or per-connection charges, does not exceed the appropriate rate in paragraph (a)(1) or (2) of this section for a 15–minute call.

(c) A Provider's rates that are consistent with paragraph (a) of this section will be treated as lawful unless and until the Commission or the Wireline Competition Bureau, acting under delegated authority, issues a decision finding otherwise.

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

§ 64.6030 Inmate calling services interim rate cap.

No provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. A Provider's rates shall be considered consistent with this section if the total charge for a 15–minute call, including any per-call or per-connection charges, does not exceed $3.75 for a 15–minute call using Collect Calling, or $3.15 for a 15–minute call using Debit Calling, Prepaid Calling, or Prepaid Collect Calling.

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SUBPART FF. INMATE CALLING SERVICES

§ 64.6040 Rates for Telecommunications Relay Service (TRS) calling.

No Provider shall levy or collect any charge in addition to or in excess of the rates for Inmate Calling Services or charges for Ancillary Charges for any form of TRS call.

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

§ 64.6050 Billing-related call blocking.

No Provider shall prohibit or prevent completion of a Collect Calling call or decline to establish or otherwise degrade Collect Calling solely for the reason that it lacks a billing relationship with the called party's communications service provider unless the Provider offers Debit Calling, Prepaid Calling, or Prepaid Collect Calling.

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

§ 64.6060 Annual reporting and certification requirement.

(a) All Providers must submit a report to the Commission, by April 1st of each year, regarding their interstate and intrastate Inmate Calling Services for the prior calendar year. The report shall contain:

(1) The following information broken out by correctional institution; by jurisdictional nature to the extent that there are differences among interstate, intrastate, and local calls; and by the nature of the billing arrangement to the extent there are differences among Collect Calling, Debit Calling, Prepaid Calling, Prepaid Collect Calling, or any other type of billing arrangement:

(i) Rates for Inmate Calling Services, reporting separately per-minute rates and per-call or per-connection charges;

(ii) Ancillary charges;

(iii) Minutes of use;

(iv) The average duration of calls;

(v) The percentage of calls disconnected by the Provider for reasons other than expiration of time;

(vi) The number of calls disconnected by the Provider for reasons other than expiration of time;

(2) A certification that the Provider was in compliance during the entire prior calendar year with the rates for Telecommunications Relay Service as required by § 64.6040;

(3) A certification that the Provider was in compliance during the entire prior calendar year with the requirement that all rates and charges be cost-based as required by § 64.6010, including Ancillary Charges.

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

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

SECURUS TECHNOLOGIES, INC. *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	**No. 13-1280 and**
	)	**consolidated cases**
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

CERTIFICATE OF SERVICE

I, Sarah E. Citrin, hereby certify that on July 21, 2014, I electronically filed the foregoing Brief for Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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