

**DISSENTING STATEMENT OF  
COMMISSIONER AJIT PAI**

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

When we launched this rulemaking in 2012, I welcomed the opportunity to “consider new rules for interstate inmate calling services,” so long as we took action “consistent with our legal authority.”<sup>1</sup> This item is the latest in a series of well-intentioned actions on that front by the Commission, and I commend the efforts of those working to reduce the rates for inmate calling services. But the last time the Commission adopted rules for inmate calling service, I thought the action legally flawed<sup>2</sup>—and the D.C. Circuit ultimately stayed most of those rules.<sup>3</sup> Unfortunately, I cannot support these regulations either because I believe that they are also unlawful. The *Order* fails to respect the bounds that the Communications Act places on our jurisdiction and fails to comply with the Administrative Procedure Act’s requirement that our rules not be arbitrary and capricious in light of the evidence contained in the record.

I.

In my view, the Commission does not have the legal authority to regulate the intrastate rates charged by payphone service providers (including inmate telephone service providers).

Let’s start with section 201 of Act, which commands that “charges [and] practices . . . shall be just and reasonable” and that any “charge [or] practice . . . that is unjust or unreasonable is declared to be unlawful.”<sup>4</sup> That directive forms the basis for the Commission’s plenary authority to review and regulate rates. But it comes with a caveat: It only applies to “interstate or foreign communication by wire or radio.”<sup>5</sup> And so, if the Commission wants to declare unlawful certain interstate charges (say particular per-minute rates for interstate inmate telephone services or ancillary fees associated with interstate inmate telephone services<sup>6</sup>), there’s little doubt that section 201 empowers the Commission to do so.

And there’s likewise little doubt that section 201 expressly does *not* authorize the Commission to regulate intrastate rates in the same manner. Indeed, as the Supreme Court has held, Congress decided to “fence[] off from FCC reach or regulation intrastate matters.”<sup>7</sup> In section 2, Congress made clear that the FCC cannot touch intrastate rates: “[N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges . . . for or in connection with intrastate communication service by wire or radio of any carrier.”<sup>8</sup> In section 221, Congress made clear that local rates were off limits as well: “[N]othing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges . . . for or in connection with . . . telephone exchange service [i.e. local service] . . . even though a portion of such exchange service constitutes interstate or

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<sup>1</sup> *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16662 (2012) (*Interstate Inmate Calling Notice*) (Statement of Commissioner Ajit Pai).

<sup>2</sup> *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14218 (2013) (Dissenting Statement of Commissioner Ajit Pai).

<sup>3</sup> *Securus Techs. v. FCC*, No. 13-1280, Order (D.C. Cir. Jan. 13, 2014).

<sup>4</sup> Communications Act § 201(b).

<sup>5</sup> Communications Act § 201(a).

<sup>6</sup> *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510, 1512 (D.C. Cir. 1990).

<sup>7</sup> *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986).

<sup>8</sup> Communications Act § 2(b).

foreign communications.”<sup>9</sup> And section 601 of the Telecommunications Act of 1996 instructed the FCC that “[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede . . . State . . . law unless expressly so provided in such Act or amendments.”<sup>10</sup>

In the face of these clear, specific prohibitions, ambiguous delegations of authority—such as section 4(i)’s authorization for the FCC to “make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions”<sup>11</sup>—cannot be the basis for intrastate ratemaking.

Nor can the Commission rely on section 276 of the Communications Act for intrastate ratemaking authority. Congress adopted that section for the narrow purpose of empowering independent payphone service providers to compete against the Bell operating companies.

Before the Telecommunications Act of 1996, the Bells monopolized local telephone service and leveraged that monopoly to dominate the market for payphone services. Congress adopted section 276 to end the “government regulation of prices, regulatory barriers to entry and exit, as well as . . . significant subsidies from other telecommunications services” that “significantly distorted” the payphone service market.<sup>12</sup> And Congress did so through a discrete and particularized set of commands to the FCC: The Commission had to establish a plan to ensure fair compensation for all payphone service providers,<sup>13</sup> to discontinue implicit and explicit subsidies for payphone service,<sup>14</sup> to prescribe nonstructural safeguards for Bells in the payphone market,<sup>15</sup> and to establish payphone service providers’ right to select their presubscribed carriers.<sup>16</sup> The FCC prescribed regulations to fulfill those duties before the end of 1996.<sup>17</sup>

Unsurprisingly, the Commission has *only* invoked section 276 in the context of eliminating the subsidies and discriminatory conduct that once warped the payphone service market. In the *New England Preemption Order*, the Commission preempted Connecticut’s bar on independent payphone service providers entering the market (implementing section 276(b)(1)(D)).<sup>18</sup> In the *Payphone Reconsideration Order*, the Commission reconsidered its methodology for ensuring that local exchange carriers no longer subsidized their own payphone services (implementing section 276(b)(1)(B)).<sup>19</sup> In the *Second Payphone Order*, the Commission addressed the default fair compensation that interexchange carriers would pay payphone providers for dial-around calls (implementing section 276(b)(1)(A)).<sup>20</sup> In the *Third Payphone*

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<sup>9</sup> Communications Act § 221(b).

<sup>10</sup> Telecommunications Act § 601(c)(1).

<sup>11</sup> Communications Act § 4(i).

<sup>12</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 et al.*, CC Docket Nos. 96-128 et al., Report and Order, 11 FCC Rcd 20541, 20548, para. 13 (1996) (*Initial Payphone Order*).

<sup>13</sup> Communications Act § 276(b)(1)(A).

<sup>14</sup> Communications Act § 276(b)(1)(B).

<sup>15</sup> Communications Act § 276(b)(1)(C).

<sup>16</sup> Communications Act § 276(b)(1)(D)–(E).

<sup>17</sup> *Initial Payphone Order*, 11 FCC Rcd 20541.

<sup>18</sup> *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCB Pol. 96-11, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19726, para. 27 (1996).

<sup>19</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd 21233, 21236, para. 3 (1996).

<sup>20</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Second Report and Order, 13 FCC Rcd 1778, 1778, para. 1 (1997). Dial-

*Order*, the Commission reexamined its default fair compensation scheme for dial-around calls (implementing section 276(b)(1)(A)).<sup>21</sup> And in the *Wisconsin Payphone Order*, the Commission reviewed the discriminatory rates that Bells charged independent payphone operators for connecting to the network (implementing sections 276(a)(1)–(2) and 276(b)(1)(C)).<sup>22</sup>

Furthermore, the Commission rejected the idea that section 276 gives us ratemaking authority over inmate telephone service rates in the *Payphone Reconsideration Order*.<sup>23</sup> There, inmate telephone service providers had argued that the Commission should order carriers to pay “special” compensation for inmate telephone service. In rejecting that argument, the Commission first found that “virtually all calls originated by inmate payphones are 0+ calls”—meaning those calls were handled by an inmate telephone service provider’s chosen carrier—and thus inmate telephone service providers “tend to receive their compensation pursuant to contract” with that carrier.<sup>24</sup> Next, the Commission stated that “whenever a [payphone service provider] is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied.”<sup>25</sup> Or as the Commission put it elsewhere: “[T]he level of 0+ commissions paid pursuant to contract on operator service calls is *beyond the scope of both Section 276 and this proceeding*.”<sup>26</sup>

To be fair, section 276 does contain a preemption clause and makes clear that its “fair compensation” mandate extends to intrastate calls.<sup>27</sup> But that mandate is a one-way ratchet: We preempt state regulations only when intrastate payphone service rates are *too low* to ensure fair compensation—and thus *too low* to “promote competition among payphone service providers and promote the widespread deployment of payphone services.”<sup>28</sup>

The *Initial Payphone Order*, for example, found that states had adopted “subsidized local coin rate[s]” “in the context of [local exchange carriers] providing local payphone service as part of their regulated service”<sup>29</sup> and held that such rates were *too low* to “ensure that all payphone service providers are fairly compensated.”<sup>30</sup> As a reviewing court later found, “[b]ecause the only compensation that a [payphone service provider] receives for a local call . . . is in the form of coins deposited by the caller,”

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around calls are calls where a payphone caller neither pays the payphone service provider directly nor uses the presubscribed interexchange carrier that has a prearranged billing relationship with the payphone service provider.

<sup>21</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999).

<sup>22</sup> *Wisconsin Public Service Commission Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2064, para. 42 (2002).

<sup>23</sup> *Payphone Reclassification Order*, 11 FCC Rcd 21233.

<sup>24</sup> *Id.* at 21269, para. 72.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 21260, para. 52 (emphasis added). As NARUC ably explains, section 276’s “new framework separated payphone equipment from the telecommunications services provided, including, as the FCC has previously specified the operator services provided to payphones which are independently regulated under the Telephone Operator Consumer Services Improvement Act.” NARUC Comments at 10. Notably, the federal statute on operator services expressly limits the Commission’s reach to *interstate* services. Communications Act § 226(a)(7).

<sup>27</sup> Communications Act § 276(b)(1)(A), (c).

<sup>28</sup> Communications Act § 276(b)(1).

<sup>29</sup> *Initial Payphone Order*, 11 FCC Rcd at 20571, para. 58.

<sup>30</sup> Communications Act § 276(b)(1)(A).

section 276's directive could only have effect for local coin calls if the FCC preempted state regulation for such calls.<sup>31</sup>

The *Payphone Reclassification Order*, in turn, acknowledged that "state-mandated intrastate toll rate ceilings" might be *too low* to ensure fair compensation.<sup>32</sup> As such, the Commission instructed inmate telephone service providers to "remind the states that Section 276's mandate that [inmate telephone service providers] be fairly compensated for all payphone calls is an obligation that is borne both by us and the states" and invited those companies to petition for preemption if rates were in fact *too low*.

Nonetheless, the *Order* claims that section 276 gives the Commission *carte blanche* to regulate the intrastate rates charged by inmate telephone service providers, asserting that section "requires the Commission to broadly craft regulations to 'promote the widespread development of payphone services for the benefit of the general public.'"<sup>33</sup> Not so.

*For one*, section 276 covers not just inmate telephone services but all payphones, and it manifestly does not purport to be another iteration of section 201 for payphones. It does not require payphone charges or practices to be just and reasonable.<sup>34</sup> Nor does it declare unjust and unreasonable charges or practices to be unlawful.<sup>35</sup> Nor does it empower the Commission to determine and prescribe what will be the just and reasonable charge for payphone services.<sup>36</sup> Nor does it anywhere suggest that we have general authority to regulate payphone services. Small wonder, then, that the Commission itself has held that it "does not regulate payphone rates."<sup>37</sup>

*For another*, the *Order* may be correct that section 276 uses the term intrastate "several" times,<sup>38</sup> but "[u]ntil this proceeding, the FCC has consistently interpreted this section in a much less preemptive fashion."<sup>39</sup> More specifically, the FCC has viewed its intrastate authority as strictly limited by the metes and bounds of section 276. So when the Commission determined that it could require the Bells' intrastate payphone line rates to be cost-based in the *Wisconsin Payphone Order*, it stressed that "we do not have a Congressional grant of jurisdiction over non-[Bell] [local exchange carrier] line rates" and that "we cannot say that . . . Congress has spoken with sufficient clarity to overcome the presumption of section 2(b)."<sup>40</sup> The D.C. Circuit upheld that reasoning, agreeing with the FCC that "when Congress referred to 'Bell operating companies' rather than 'local exchange carriers,' it acted deliberately" and thus "the Commission may not regulate [the] intrastate payphone line rates" of non-Bell local exchange carriers."<sup>41</sup>

To be sure, the *Order* points out that the court held "that section 276 unambiguously and straightforwardly authorizes the Commission to regulate the BOCs' intrastate payphone line rates."<sup>42</sup> But

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<sup>31</sup> *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997).

<sup>32</sup> *Payphone Reconsideration Order*, 11 FCC Rcd 21269, para. 72.

<sup>33</sup> *Order* at para. 109 (quoting in part section 276(b)'s preamble).

<sup>34</sup> *Cf.* Communications Act § 201(b).

<sup>35</sup> *Cf.* Communications Act § 201(b).

<sup>36</sup> *Cf.* Communications Act § 205(a).

<sup>37</sup> *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Fifth Report and Order, 17 FCC 21233, 21243, para. 24 (2002).

<sup>38</sup> *Order* at para. 109.

<sup>39</sup> NARUC Comments at 8.

<sup>40</sup> *Wisconsin Payphone Order*, 17 FCC Rcd at 2064, para. 42.

<sup>41</sup> *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69, 78 (D.C. Cir. 2003).

<sup>42</sup> *Id.* at 75.

the *Order* misses a critical point. Those rates are *not* the rates a payphone service provider can charge a customer but instead the rates that Bell operating companies could charge payphone service providers for local service. And as the FCC explained in the *Wisconsin Payphone Order* and the court reiterated, that authority stemmed from several Bell-specific provisions of the section, *not* section 276’s fair-compensation mandate.

I would have thought these points uncontroversial just three years ago, when the Commission launched this proceeding. There, we sought comment on “our authority to address *interstate* interexchange ICS rates,”<sup>43</sup> recognized that “intrastate local or long distance calls . . . are regulated by the states,”<sup>44</sup> and sought comment on “how the Commission can encourage states to reevaluate their policies regarding intrastate ICS rates.”<sup>45</sup> Indeed, the very caption of this docket—“Rates for Interstate Inmate Calling Services”—reflected what was then the unanimous view of the five Commissioners regarding our jurisdiction.

Our lack of jurisdiction does not, of course, mean that inmate calling service providers set intrastate rates without constraint. States have been quite active in lowering rates. Michigan law requires rates for inmate calls in prisons to be “the same as . . . for calls placed from outside of correctional facilities” except for charges “necessary to meet special equipment costs.”<sup>46</sup> Rhode Island law requires rates in prisons to be “comparable” to rates outside.<sup>47</sup> In Alabama, the Public Service Commission has set capped rates for jails and prisons and capped ancillary service charges.<sup>48</sup> And the Ohio Department of Rehabilitation and Correction renegotiated lower state prison rates just this year.<sup>49</sup>

Other States have lowered rates more indirectly. New York law prohibits the state department of corrections from accepting commissions “in excess of its reasonable operating cost” and requires the department to focus on the “lowest possible cost to the telephone user.”<sup>50</sup> New Mexico law requires prisons and jails to award contracts to vendors who offer “the lowest cost of service to inmates.”<sup>51</sup> Nebraska’s administrative code prohibits prisons from receiving site commissions “[i]n the interest of making inmate calling as affordable as possible.”<sup>52</sup> Rhode Island law prohibits site commissions at state prisons.<sup>53</sup> South Carolina law prohibits site commissions at state prisons and requires rate reductions in

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<sup>43</sup> *Interstate Inmate Calling Notice*, 27 FCC Rcd at 16647, para. 49 (emphasis added).

<sup>44</sup> *Id.* at 16647, para. 50.

<sup>45</sup> *Id.*

<sup>46</sup> Mich. Act. No. 245, Public Acts of 2008 § 219.

<sup>47</sup> R.I. Gen. Law § 42-56-38.1.

<sup>48</sup> Final Order of Alabama Public Service Commission Adopting Revised Inmate Phone Service Rules, Docket 15957 (July 7, 2014).

<sup>49</sup> Ohio Department of Rehabilitation and Correction – Offender Phone Services, [http://www.drc.ohio.gov/web/phone\\_services.htm](http://www.drc.ohio.gov/web/phone_services.htm).

<sup>50</sup> N.Y. Cor. Law § 623.

<sup>51</sup> N.M. Stat. § 33-14-1.

<sup>52</sup> Neb. Admin. Code § 205.03(XII).

<sup>53</sup> R.I. Gen. Law § 42-56-38.1.

proportion to this foregone state revenue.<sup>54</sup> So does California law.<sup>55</sup> And the Missouri, New Jersey, and West Virginia Departments of Corrections have evaluated bids without regard to site commissions.<sup>56</sup>

Whatever the method, it is clear that many States can and do regulate intrastate rates. Congress did not authorize us to reach beyond our jurisdictional bounds to displace them.

## II.

Lack of statutory authority is not the *Order*'s only legal infirmity. The *Order* fails to comply with the Administrative Procedure Act because the record evidence does not support the Commission's chosen rate caps.

The *Order* establishes rates of 11 cents a minute for prisons, 14 cents for very large jails with 1,000 or more inmates, 16 cents for large jails with 350–999 inmates, and 22 cents for medium jails with 100–349 inmates as well as small jails with fewer than 100 inmates. These rates apply to all domestic calls, although collect calls will have higher, interim rates for two years.<sup>57</sup> At these rates, inmate calling service revenues should total \$610,394,065 each year, with revenues \$80,910,259 higher in the first year of the plan and \$43,096,251 higher in the second due to the interim rates for collect calls.<sup>58</sup>

And what are the costs of service? Let's start from the top. In aggregate, inmate calling service costs \$671,676,423 each year, or about \$61,282,358 more than expected revenues once the rates become permanent.<sup>59</sup> And that's problem number one: You can't cap rates in aggregate so that revenues won't cover expenses unless you want the quantity produced (here, likely the number of facilities served) to be reduced. That doesn't appear to be the Commission's policy, nor is it Congress's,<sup>60</sup> but it's the ineluctable result of these caps.<sup>61</sup>

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<sup>54</sup> S.C. Code § 10-1-210.

<sup>55</sup> Calif. Sen. Bill 81 § 32 (2007 Reg. Sess.).

<sup>56</sup> Missouri Request for Best and Final Offer for Offender Telephone System No. B2Z11019, Exhibit A (2011) (“Prices shall not include commissions to be paid to the State of Missouri.”); New Jersey Department of the Treasury, Division of Purchase and Property, Request for Proposal 14-x-22648, Addendum No. 3 (“The State is not seeking to receive commissions or other form of rebate or payment through this contract.”); West Virginia Request for Proposal – Inmate Telephone System No. COR61453, Attachment A (2013) (“The commission rate quoted by Vendor will not be included in the bid evaluation process.”).

<sup>57</sup> *Order* at Table One.

<sup>58</sup> Like the *Order*, this analysis relies on the 2012 and 2013 historical data reported by inmate calling service providers unless otherwise noted. To calculate total annual revenues for a particular facility type, I multiplied the average annual minutes of use for each call type (prepaid/debit and collect) by the appropriate rate according to the *Order*'s Table One. So for small jails, I multiplied 85,567,713 prepaid/debit minutes of use by the 22 cent a minute rate (\$18,824,896.86), multiplied 15,279,505 collect minutes of use by the 49 cent a minute rate in year one (\$7,486,957.45), and then added the two together to get the total revenues inmate calling providers could expect to receive from serving small jails in year one (\$26,311,854.31). I reiterated this process for all facility types and summed the results by year to arrive at the totals.

<sup>59</sup> To calculate total annual costs, I summed total costs for serving all facility types in 2012 and 2013 and then divided by two.

<sup>60</sup> Communications Act § 276(b) (charging the FCC with adopting regulations to “promote the widespread deployment of payphone services”).

<sup>61</sup> Although the *Order* asserts that “average reported costs are exaggerated and in any case exceed efficient costs,” *Order* at note 170, the record is not so clear on that point. Inmate calling service “is really a managed IT service” with costs varying by the demands (such as security needs) and policies of the particular institution, Letter from Thomas M. Dethlefs, Associate General Counsel – Regulatory, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (Oct. 15, 2015), which explains the fact that a single firm has both the highest and

This creates a serious problem for our nation's jails. Very large jails are the most expensive to serve, with annual costs of \$267,549.88 per facility, followed by the large jails (\$200,266.21), the medium jails (\$91,140.03), and small jails (\$24,918.08).<sup>62</sup> But calling volume scales quickly, so that the revenues needed to cover costs in very large jails are only 16.2 cents a minute, but 18.9 cents in large jails, 25.7 cents in medium jails, and 34.4 cents in small jails.<sup>63</sup> In other words, the *Order's* rates fail to compensate inmate calling service providers for the average cost of serving *each and every tier of jails*.<sup>64</sup>

It's worst for the smallest facilities. The rate caps cover only 64% of the cost of serving small jails, which according to our own data account for more than one third of all jails in the country.<sup>65</sup> And while small jails may account for "less than 10 percent of the inmate population,"<sup>66</sup> that doesn't make inmates there any less deserving of access to inmate calling services. Nor is that a reason to use the same rate cap for small and medium jails given their widely divergent costs (rates need to be about 33% higher<sup>67</sup> at small jails to cover their costs).<sup>68</sup>

Does that mean every jail in the country will lose service? Of course not—some likely have below-cap costs and a few might benefit from cross-subsidies. But it does mean that some jails should expect to lose service once these caps come into full effect. It's no wonder that the National Sheriff's Association wrote the FCC that with these caps "there is the very real possibility that many Sheriffs will no longer have an [inmate calling service] provider that is willing to provide [such] service in their jail and that there will be no remedy for the Sheriff."<sup>69</sup>

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lowest costs per minute for serving prisons. *Compare id.* (Texas prisons cost the most); CenturyLink, Rates for West Virginia Division of Corrections, <http://www.centurylink.com/corrections/west-virginia/rates.html> (showing West Virginia prisons cost the least—several times less than Texas). So low per-minutes rates in certain states are not evidence that "reported costs may be inflated," *Order* at para. 49, but that in those particular states costs per minute are low. That two small providers have low costs doesn't make them "efficient," *Order* at paras. 63–64, but instead suggests they serve lower-cost facilities. It's not "implausibl[e]" that the data don't show average costs falling with the provider's size, *Order* at para. 61, or that "roughly similarly situated providers have substantially different costs," *Order* at para. 62; the data plausibly suggest such providers serve different institutions. I suppose one could take the stance of Coleman Bazelon—an economist the *Order* cites to support its conclusion, *see Order* at para. 55—that "it is impossible" to set rates based on the data the FCC has collected, Letter from Lee G. Petro, Counsel for Martha Wright et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Attach. at 16 (Sept. 17, 2014), but the *Order* nonetheless proceeds to set rates based on the data as it is, and so I structure my analysis accordingly.

<sup>62</sup> To calculate costs per facility, I summed total costs by facility type in 2012 and 2013, divided by two, and then divided by the total number of each type of facility in the data set.

<sup>63</sup> To calculate costs per minute by facility type, I summed total costs by facility type in 2012 and 2013, summed total revenue-producing minutes of use by facility type in 2012 and 2013, and divided the former by the latter.

<sup>64</sup> In contrast, the average prison costs \$147,167.25 to serve, which translates into a per-minute rate of 10.5 cents to recover those costs.

<sup>65</sup> 22 cents a minute divided by 34.4 cents a minute equals 63.95%.

<sup>66</sup> *Order* at para. 46.

<sup>67</sup> 34.4 cents a minute divided by 25.7 cents a minute equals 133.85%.

<sup>68</sup> The *Order* suggests that lumping small jails in with medium jails should mitigate GTL's concern for "potential confusion" if the FCC were to adopt (as it did) tiered caps. *Id.* But I cannot fathom how adding one more tier to the FCC's given structure, *Order* at Table One, could create confusion significant enough to warrant ignoring the real cost differences between small and medium jails.

<sup>69</sup> Letter from Mary J. Sisak, Counsel to the National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (Oct. 14, 2015).

Compounding the problem is that the *Order* fails to include sufficient head room in its chosen rate caps so that providers can compensate facilities for the cost of administering inmate calling services.<sup>70</sup> From enrolling inmates into a biometric voice system to real-time call monitoring,<sup>71</sup> the record makes clear that facilities incur actual costs that are directly and incrementally attributable to increased access to inmate calling services. The only dispute is the amount of those costs: whether it's 1.6 cents a minute (as one of the two largest providers suggests),<sup>72</sup> 5.28 cents (as one mid-sized provider explains),<sup>73</sup> or 5.9 cents for large and very large jails and 9.4 cents for small and medium jails (as a mid-sized provider explains).<sup>74</sup> (Notably, the FCC did not ask for these data as part of its mandatory collection, so these estimates are the best record evidence available.) Taking the most conservative estimate, jails' administrative and security expenses owing to inmate calling service total \$38,120,863 each year.<sup>75</sup> And yet, the *Order* excludes the cost to jails for administering and monitoring inmate calling services in calculating rates entirely.<sup>76</sup> And because the caps already put inmate calling service providers underwater at most jails, county sheriffs are likely to bear the brunt of these costs.<sup>77</sup>

The record makes clear the consequences: Less access to inmate calling services in jails around the country. Sheriff Danny Click of Laramie, Wyoming and Sheriff Jon Stivers of Washington County, Colorado explain that they currently let inmates make calls twelve or even sixteen hours a day. But if they can't recover their costs, they'll have to cut back inmate access.<sup>78</sup> The sheriffs of Louisiana and Maryland agree, noting that "discretionary access to phones by inmates and detainees may be significantly limited or eliminated altogether" absent cost recovery.<sup>79</sup> The sheriffs of Washington State

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<sup>70</sup> Letter from Martin Ryan, President of the California State Sheriffs' Association and Sheriff of Amador County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (Oct. 14, 2015) ("Sheriffs must be able to recover the costs that are associated with providing ICS and it is unclear that the Commission's proposed rates will permit that in practice.").

<sup>71</sup> National Sheriffs' Association Comments at 2–3 (listing inmate-calling-specific activities performed by corrections officers).

<sup>72</sup> Reply Comments of Global Tel\*Link Corp., Attachment 2 at 10.

<sup>73</sup> Letter from Thomas M. Dethlefs, Associate General Counsel, Regulatory for CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 & Attachment B (Sept. 19, 2014).

<sup>74</sup> Letter from Timothy G. Nelson, Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 4 (filed May 8, 2015).

<sup>75</sup> 1.6 cents a minute (the lowest record estimate of costs to jails) multiplied 2,382,553,962 average minutes of use at jails equals \$38,120,863.39.

<sup>76</sup> The *Order*'s primary reason for not including any facility costs appears to be that "ICS continues to be offered in states that have prohibited payments from ICS providers to facilities." *Order* at para. 138 (citing one commenter for the point). Notably, that commenter points to New York, but then explains that the legislature made up for the shortfall through "budget increases and the elimination of some inmate services." HRDC Comments at 3. Similarly, when Ohio renegotiated its contract to reduce its site commission and the accompanying rates, Governor John Kasich included offsetting funding in his budget proposal. Prison Policy Initiative Comments at Attachment. Such funding cannot be assured in other states, undermining the *Order*'s rationale.

<sup>77</sup> If the Commission chooses to treat inmate calling service providers and corrections officers as partners splitting a joint profit (as it does), then it must also treat them as partners for purposes of assessing the costs of service. And yet, the rate caps wholly exclude all payments to jails and prisons, even though some (perhaps significant) portion is attributable to the incremental cost of permitting access to inmate calling services at the facility.

<sup>78</sup> Letter from Danny Glick, Sheriff of Laramie, Wyoming, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (Oct. 8, 2015); Letter from Jon Stivers, Sheriff of Washington County, Colorado, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (Oct. 7, 2015).

<sup>79</sup> Letter from Craig E. Frosch, Counsel for Louisiana Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3 (Oct. 9, 2015); Letter from Karen J. Kruger, Executive Director and General Counsel,

worry that the “rate structure, if implemented, would jeopardize the viability of the ICS market and leave many jails without the ability to provide calling services to their inmates.”<sup>80</sup> Indiana has already heard from many sheriffs in the state that “they may be forced to discontinue or significantly limit discretionary inmate calling services if they cannot recover their costs.”<sup>81</sup> Sheriff K.C. Clark of Navajo County, Arizona, points out that “[i]f the cost of allowing ICS must compete with all other budget needs, it may not be funded.”<sup>82</sup> Or Sheriff Ezell Brown of Newton County, Georgia put it: We “will not be ripping the phones off the walls” but instead “forced to significantly limit access to inmate phones.”<sup>83</sup>

One more likely consequence of below-cost caps is less competition: If inmate calling service providers cannot recover their costs, new competitors are less likely to enter the market and existing providers are more likely to consolidate to stay in business. And that’s precisely the opposite result from Congress’s intent, which passed section 276 in part to “to promote competition among payphone service providers and promote the widespread deployment of payphone services.”<sup>84</sup>

These are not the only flaws with the *Order*’s rate caps. These caps are apparently intended to be set based on averages, but doing so by definition means a significant number of facilities will face caps set at or below their cost of service. As the Los Angeles Sheriff’s Department explains, differences in security requirements, inmates, age, infrastructure and maintenance needs of facilities must be accounted for in the Commission’s decision-making process.<sup>85</sup> To put it another way: The security requirements of a maximum-security facility are likely different than those of a juvenile detention center, so it should not be surprising that the per-minute rates needed to recover costs at even similarly styled facilities may vary significantly. As CenturyLink recently explained, capital investments and security features like voice biometrics and “strict manual processes for pre-registering and verifying each called party” almost double the cost of offering inmate calling services in Texas prisons.<sup>86</sup> And using averages is doubly difficult here since the Commission isn’t setting rates but setting caps—so all rates above the caps must come down to the average, but below-average rates remain where they are pursuant to existing contracts. That means the \$61 million annual shortfall I discussed earlier *understates* the gravity of the situation for inmate calling service providers and the facilities they serve.

The *Order*’s transition period is also problematic. As the *Order* recognizes, most contracts for inmate calling services require site commission payments, which are real costs to the provider above and beyond the cost of service. And yet the below-cost rate caps will deny providers the money to make those payments. How the Commission intends inmate calling service providers to renegotiate contracts (and

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Maryland Sheriffs’ Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (Oct. 7, 2015) (“[R]estricting . . . payments to levels that do not at least cover costs will have the effect of reducing the ability to continue to allow ICS in this manner.”).

<sup>80</sup> Letter from Casey Salisbury, President of Washington Association of Sheriffs and Police Chiefs and Sheriff of Mason County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (Oct. 14, 2015).

<sup>81</sup> Letter from Stephen P. Luce, Executive Director of the Indiana Sheriffs’ Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (Oct. 12, 2015).

<sup>82</sup> Letter from K.C. Clark, Sheriff of Navajo County, Arizona, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at (Oct. 7, 2015).

<sup>83</sup> Letter from Ezell Brown, Sheriff of Newton County, Georgia, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (May 7, 2015).

<sup>84</sup> Communications Act § 276.

<sup>85</sup> Comments of County of Los Angeles Sheriff’s Department, WC Docket No. 12-375, at 2 (filed Jan. 12, 2015) (County of Los Angeles Sheriff’s Department Second FNPRM Comments).

<sup>86</sup> Letter from Thomas M. Dethlefs, Associate General Counsel – Regulatory, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (Oct. 15, 2015).

these payments) with the 1,491 prisons in the country in 90 days, let alone the 3,724 jails in six months is beyond comprehension.<sup>87</sup> Nor is there any precedent for such an abbreviated transition. When we found that rates were too high in the intercarrier compensation context, we gave carriers six to nine years to transition.<sup>88</sup> And when we found that rates paid by taxpayers for video relay services was too high, we adopted a four-year transition that still leaves rates above cost.<sup>89</sup> Here, despite the substantial turmoil the *Order* appears to contemplate, it sticks with 90 days because the record doesn't show significant difficulties in implementing the higher, interstate-only rate cap two years ago (without explaining why that experience, which imposed a substantially higher cap on a substantially smaller fraction of calls, is relevant).

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There is another pressing issue involving prisoners and phones that deserves the Commission's attention: inmates' use of contraband cellphones. On October 15, I visited a maximum-security prison in Jackson, Georgia to learn more about this problem. To put it mildly, I was disturbed by what I heard. Georgia Department of Corrections Commissioner Homer Bryson, Warden Bruce Chatman, and other corrections officers told me that contraband cellphones are flooding into Georgia prisons. They are flown into institutions via drones. They are thrown over prison fences stuffed into everything from footballs to dead cats. They are smuggled into facilities within everything from underwear to legal papers. Contraband cellphones have even made their way into the most secure part of the prison: death row. This year alone, Georgia corrections officers have seized over 8,305 illicit cellphones, and the pace of confiscations is on the rise.

Those are only the contraband devices that are caught. Those that aren't caught are used by inmates to perpetrate a wide range of criminal activities. For instance, prisoners use contraband cellphones to extort the family and friends of the incarcerated, putting inmates' safety and lives at risk. For example, the wife of one Georgia prisoner received a text demanding \$1,000 from inmates in the same prison as her husband. And when she couldn't gather the money, she was texted an image of her husband with burns, broken fingers, and the word "RAT" carved into his forehead. In another case out of Georgia, a woman received images on her phone of her incarcerated boyfriend being strangled with a shank held to his head. She was told that unless she forked over \$300, the beatings would continue. She could only afford to send about half that amount. Sadly, the assaults didn't stop, and after a severe beating, he died.

The problems aren't limited to any one state. In Maryland, an inmate being held in the Baltimore City Detention Center on murder charges used a contraband cellphone to order the murder of a witness to his crime. Shortly thereafter, a 15-year-old gang member shot the witness three times, killing him in the process. An inmate in South Carolina orchestrated a "hit" on a prison guard through his contraband cellphone. The guard was shot six times but miraculously survived. And across the border in North Carolina, a high-ranking member of the Bloods street gang serving a life sentence used a contraband cellphone to mastermind the kidnapping of the father of the Assistant District Attorney who had prosecuted him. During the abduction, the kidnappers and the inmate exchanged at least 123 calls and text messages as they discussed how to kill and bury the victim without a trace. Fortunately, the FBI was able to rescue the victim and save his life.

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<sup>87</sup> *Order* at para. 132 (“[W]e conclude that our actions in this Order constitute changes in law and/or instances of force majeure that are likely to alter or trigger the renegotiation of many ICS contracts.”).

<sup>88</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17677, para. 35 (2011).

<sup>89</sup> *Structure and Practices of the Video Relay Service Program et al.*, CG Docket Nos. 10-51, 03-123, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618, 8705, Table 2 (2013).

During my prison visit, I also learned that inmates frequently conduct phone scams. In one popular scheme, inmates pretend to be calling from the local sheriff's office and tell the person on the other end of the line that there is a warrant for his or her arrest for failing to show up for jury duty. They then indicate that unless the person receiving the phone call pays a hefty fine, he or she will go to jail. Those who are fooled into paying up are then told to purchase prepaid debit cards, such as Green Dot MoneyPaks, and relay those cards' serial numbers to the caller. Inmates are then able to transfer money from those cards to their own accounts. In one Georgia case, a 78-year-old man purchased \$734 worth of cards at the behest of an inmate serving 30 years in jail for drug offenses. The money ended up on the prepaid Visa card of someone dating the inmate's brother. The inmate then called his brother, who moved some of the money onto more prepaid cards and spent the rest at barbecue restaurants and convenience stores. Unfortunately, stories like this are commonplace because prisoners across the country are using contraband cellphones to defraud vulnerable people on a daily basis.

When it comes to the use of contraband cellphones by prison inmates, the status quo is entirely unacceptable. One reason we imprison criminals is to incapacitate them; that is, to prevent them from committing additional crimes. But with contraband cellphones, prisons have become a base of operations for criminal enterprise. While behind bars, inmates are running drug operations. They are managing gang activities. They are ordering hits. They are running phone scams.

The time has come to end this crime wave.

The bad news is that it's just not possible for corrections officers to keep all cellphones out of prisons. Contraband has always made its way in, and it always will. But the good news is that the FCC has a positive role to play. In 2013, the Commission issued a Notice of Proposed Rulemaking that aimed to spur the development of technological solutions to combat the use of contraband wireless devices in correctional facilities. The factual record we've developed has long since been complete. And in the intervening two years, the problem has only become worse. The message I took from Georgia—one I suspect most people around the country would deliver—is that the Commission needs to take further action, and soon, to protect the public.

Solving this problem won't be easy. There are both technological and legal obstacles to overcome. But I'm convinced that we can make substantial progress if the FCC, wireless carriers, technology companies, and dedicated corrections officers like the ones I met in Georgia work together in good faith. In the weeks and months ahead, I intend to work closely with all stakeholders to see if we can find common ground. We owe it to all Americans—victims, witnesses, inmates, corrections officers, and the many others who have been harmed through the use of contraband cellphones—to get the job done.