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

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

PETITION OF GLOBAL TEL*LINK FOR STAY PENDING JUDICIAL REVIEW

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INTRODUCTION AND SUMMARY

Pursuant to 47 C.F.R. §§ 1.41, 1.43, and 1.44(e), petitioner Global Tel*Link ("GTL")[1] respectfully requests that the Commission grant a stay as to part of the *Order*[2] – specifically, the Commission's requirement that rates for "Inmate Calling Services" ("ICS") be "based only on costs that are reasonably and directly related to the provision of ICS"[3] – pending GTL's petition for judicial review of this and other aspects of the *Order*.

In requiring that interstate ICS rates be cost-based, the *Order* imposes "*de facto* rate-of-return regulation,"[4] without any warning or any explanation for the Commission's decision to embrace a regulatory regime it has disfavored for decades. That result is fundamentally inconsistent with the Commission's legal obligations to provide public notice and an opportunity for comment and to explain its departures from prior practice and precedent. Moreover, the *Order* does not give adequate guidance about how ICS providers are to comply with it – what rate of return is permissible, for example, and which costs count. Magnifying the problem, the *Order* extends rate-of-return regulation to what the Commission calls "ancillary charges" – that is, ICS charges other than those assessed for individual calls[5] – without any prior notice or

[1] As used in this petition, "Global Tel*Link" or "GTL" refers to Global Tel*Link Corporation and its affiliates, including Public Communications Services, Inc. and Value-Added Communications, Inc.

[2] Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 13-113 (rel. Sept. 26, 2013) ("*Order*").

[3] 47 C.F.R. § 64.6010. The Commission has also promulgated a rule providing a "safe harbor" from the cost-based rule. *See id.* § 64.6020. Because the latter is derivative of the former, GTL requests a stay of the effect of both regulations.

[4] Dissenting Statement of Commissioner Ajit Pai at 112 ("Pai Dissent").

[5] *See Order* App. A at 89 (defining ancillary charges); *id.* ¶ 90 (citing, as examples of ancillary charges, charges on end users to "set up or add money to a debit or prepaid account, to refund any outstanding money in a prepaid or debit account, or to deliver calls to a wireless number") (footnote omitted).

guidance about what costs an ancillary charge can include, and without providing any clear basis to regulate these charges.

Absent a stay to preserve the status quo, the Commission's poorly conceived rate-of-return regulation will impose on GTL millions of dollars in unrecoverable losses and create substantial disruption and uncertainty in the industry. By contrast, a stay would not impose material harms on other parties: the petitioners for this rulemaking did not request rate-of-return regulation, and in any event proposed that the Commission delay implementation of any new rules for at least a full year. Indeed, the public would benefit from a stay. Rate-of-return regulation would jeopardize ICS at high-cost facilities that are no longer economical to serve, and it would slash site commission revenues on which cash-strapped state and local governments depend to fund inmate welfare services. A stay would defer these significant harms pending review.

Because of the severe and irreparable harm that will be caused by the new cost-based regulation if it is permitted to take effect, and to allow sufficient time for the reviewing court to address a stay motion in the event that the Commission does not grant relief, GTL respectfully requests action on this petition by November 21, 2013. If the Commission fails to resolve this petition by that date, GTL will seek relief in the court of appeals pursuant to Rule 18 of the Federal Rules of Appellate Procedure.

BACKGROUND

This proceeding was initiated in response to two petitions for rulemaking concerning interstate rates for ICS. The first of those petitions asked the Commission to prohibit exclusive ICS contracts and collect-call-only restrictions at privately administered prisons, and to require private prisons to permit interconnection with multiple long-distance carriers.[6] The second petition proposed as an alternative that the Commission establish rate caps "for all interstate, interexchange inmate calling services" and require ICS providers to offer debit calling services at all prison facilities they serve.[7] That petition asked the Commission to adopt benchmark rates no higher than $0.20 per minute for debit calls and $0.25 per minute for collect calls, with no additional set-up or per-call fees.[8]

Less than a year ago, the Commission initiated this rulemaking to seek comment on these and several other specific means of reducing ICS rates for interstate, long-distance calling at correctional facilities.[9] The *NPRM* sought comment on various "discrete proposals":[10] eliminating per-call charges, capping per-minute rates, using marginal location methodology to establish rate caps, adopting tiered pricing (with different per-minute rates for different volumes of usage), establishing different caps for collect calls and debit calls, capping interstate rates at intrastate long-distance rates, requiring ICS providers to offer debit or prepaid calling options, mandating a certain amount of free calling per inmate per month, and restricting billing-related

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

[7] Petitioners' Alternative Rulemaking Proposal at 4, 23, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (FCC filed Mar. 1, 2007) ("Alternative Wright Pet.").

[8] *Id.* at 5.

[9] *See generally* Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629 (2012) ("*NPRM*").

[10] Pai Dissent at 112, 114.

call blocking.[11] Interested parties filed comments addressing each of the discrete issues about which the Commission had sought comment.[12]

On September 26, 2013, the Commission released the *Order*. In the *Order*, the Commission noted the specific relief sought in the two petitions for rulemaking: a "prohibit[ion on] exclusive ICS contracts and collect-call-only restrictions," a "debit-calling option" requirement, a "prohibiti[on on] per-call charges," and the adoption of "rate caps for interstate, interexchange ICS."[13] The Commission further noted that it had sought comment on these and other specific "issues affecting the ICS market," including "possible rate caps for interstate ICS," "collect, debit, and prepaid ICS calling options," "site commissions," and "issues regarding disabilities access."[14]

The Commission accepted some of these proposals in whole or in part. For example, the Commission "adopt[ed] an interim rate cap of $0.21 per minute for debit and prepaid interstate calls, and $0.25 per minute for collect interstate calls."[15] It "strongly encourage[d] correctional facilities to consider including debit calling and prepaid calling as options for inmates."[16] And it prohibited ICS providers from engaging in billing-related call blocking of interstate ICS calls unless the providers have made available an alternative means to pay for a call, such as prepaid

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[11] *NPRM* ¶¶ 18-26, 28, 30-34, 36, 39-40.

[12] *See, e.g.*, Comments of Global Tel*Link Corp., WC Docket No. 12-375 (FCC filed Mar. 25, 2013) (addressing issues including rate caps; marginal location methodology; impact of rate reduction on call volumes; collect calling, debit calling, and prepaid calling; collect-call-only rules; no-cost calling; and billing-related call blocking).

[13] *Order* ¶ 9.

[14] *Id.* ¶ 10.

[15] *Id.* ¶ 48.

[16] *Id.* ¶ 110.

collect, that would avoid the need to block for lack of a billing relationship or to avoid the risk that bills would be uncollectible.[17]

But the Commission did not stop there. In addition to adopting discrete proposals contemplated by the *NPRM*, the Commission promulgated, by a two-to-one vote, a sweeping rule requiring that all interstate ICS rates and all ancillary charges be "cost-based."[18] The majority warned that any ICS rate – even if below the rate caps established in the *Order* – could be invalidated if not based on costs reasonably allocable to the provision of ICS.[19] Although the *Order* established interim "safe harbor" levels, below which rates would be presumed to be permissible, it made clear that even those rates could be invalidated.[20] It also made clear that no rates above the safe harbor would enjoy a presumption of reasonableness – and invalidation of those rates could force ICS providers to pay refunds and steep forfeitures (of hundreds of thousands or millions of dollars per "continuing violation").[21] And the *Order* created no safe harbor (nor any caps) at all for ancillary charges.

Notice of the Commission's new "cost-based" rule, and the safe harbor rule that derives from it, is expected to be published in the Federal Register shortly, and the new rules are scheduled to take effect 90 days after publication.

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[17] *Id.* ¶ 113.

[18] *Id.* ¶ 12.

[19] *Id.* ¶ 120.

[20] *Id.* ¶¶ 60, 120.

[21] *Id.* ¶¶ 89, 118.

DISCUSSION

The FCC should stay the cost-based rule adopted in the *Order*, 47 C.F.R. § 64.6010, and the safe harbor rule, *id.* § 64.6020, that follows from it. A stay is warranted where a petitioner demonstrates a likelihood of success on the merits and a showing of "irreparable injury," or, alternatively, a "serious" question regarding the merits coupled with a more substantial showing regarding the balance of equities.[22] This motion meets either standard: GTL is likely to succeed on the merits and without a stay is likely to suffer substantial irreparable injury, and the equities strongly favor a stay.

I. GTL IS LIKELY TO SUCCEED ON THE MERITS

GTL is likely to succeed on its petition for review because the Commission adopted rate-of-return regulation without adequate notice and comment, the rule represents a sharp and unexplained departure from Commission precedent, and the rule is insufficiently developed to enable ICS providers to comply with it.[23]

[22] *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) ("One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.") (internal quotation marks omitted); Order, *Regulation of Prepaid Calling Card Services*, 22 FCC Rcd 5652, ¶ 7 (Wireline Comp. Bur. 2007) (applying the test "established in *Virginia Petroleum Jobbers Association v. FPC*, as modified in *Washington Metropolitan Area Transit Commission*").

[23] Although GTL does not seek to stay the effect of the rate caps adopted by the *Order*, the record evidence demonstrates that the caps are arbitrary and capricious – a one-size-fits-all approach where more tailored regulatory measures are needed. The caps are far too low, for example, to permit recovery of costs at some correctional facilities. And they depend on the incorrect assumption that the costs of maintaining security features requested by facilities has held steady over time, when in fact the cost of some of those features has risen. Moreover, the caps will also diminish inexorably a revenue stream on which state and local budgets depend: ICS contracts typically entitle facilities to a *percentage* of ICS revenues, which the rate caps will reduce. For these and other reasons, GTL plans to challenge the rate caps in its forthcoming petition for review.

A. The Commission Did Not Give Notice of the Possible Adoption of Rate-of-Return Regulation

Before promulgating a new rule, the Commission must provide notice and an opportunity for public comment.[24] A reviewing court is likely to find that the Commission failed to give any notice that it would impose rate-of-return regulation on the provision of interstate ICS and ancillary services. The public thus had no chance to comment on the problems unique to this form of regulation, and the Commission had no chance to consider them.

1. Until the *Order* was released, "[n]o party could have foreseen" that the Commission was contemplating a cost-based, rate-of-return regime.[25] The two petitions for rulemaking that prompted last year's *NPRM* did not request it. Indeed, the first petition did not propose any regulation of ICS *rates*.[26] The second petition did ask the Commission to regulate interstate, interexchange ICS rates – but by establishing rate caps, not regulation limiting carriers to recovery of costs.[27] The petitioners clearly distinguished their proposal from rate of return. They described their proposed benchmark rates as "*proxies*" for "actual incremental cost plus a market-based rate of return"[28] – i.e., *substitutes* for rates established pursuant to a rate-of-return form of regulation. And in comments they filed with the Commission, the petitioners described

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[24] 5 U.S.C. § 553(b), (c); *see, e.g.*, *National Black Media Coal. v. FCC*, 791 F.2d 1016, 1022-23 (2d Cir. 1986); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (Commission must provide notice of alternatives it is considering).

[25] Pai Dissent at 112.

[26] *See generally* Wright Pet. at 8-9 (describing relief requested).

[27] Alternative Wright Pet. at 5.

[28] *Id.* at 19-20 (emphasis added; internal quotation marks omitted).

the benchmark rates they had proposed as akin to "*price caps* [that would] provide a powerful incentive for service providers to become more efficient."[29]

The *NPRM*, which opened a new docket for comments on these and other "discrete proposals,"[30] was equally silent on the possibility of rate-of-return regulation. The Commission sought comment on a number of specific avenues to reduce rates, including several rate cap proposals.[31] None of these proposals even hinted at a regulatory regime in which *any* rate – even a rate under the established rate caps – could be invalidated if the Commission deemed it not to be based on interstate ICS costs. Nor did the Commission's proposals indicate that it was considering regulation of ancillary charges – a term that did not even appear in the *NPRM*.[32]

After soliciting comment on these proposals, the Commission majority opted to impose a completely different, and far more disruptive, regulatory regime. The core of the new regime is a broad requirement, never mentioned by the Commission before now, that ICS revenues – both per-minute rates for interstate ICS calls and ancillary charges for all ICS – be "cost-based."[33]

2. The difference between this cost-based, rate-of-return regime and the *NPRM*'s proposed rules is fundamental. Rate caps like those described in the *NPRM* set "limits on prices carriers can charge for their services."[34] They therefore provide regulatory certainty and are easy

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[29] Comments of Martha Wright et al. at 32, WC Docket No. 12-375 (FCC filed Mar. 25, 2013) ("Wright Comments") (emphasis added).

[30] Pai Dissent at 112.

[31] *See NPRM* ¶¶ 18-40 (seeking comment on, among other things, across-the-board per-minute caps, caps tied to usage volumes, different caps for collect and debit calls, and caps tied to intrastate long-distance rates).

[32] *See* Pai Dissent at 115.

[33] *Order* ¶¶ 5, 7.

[34] Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, ¶ 22 (1990) ("*Second Report and Order on Rates for Dominant Carriers*").

to administer: a provider's rates are either in compliance (below the caps) or they are not. The *NPRM* expressly noted such benefits when it described the petitioners' argument that "several benefits would accrue from setting per-minute rate caps, such as *administrative ease* and the absence of jurisdictional challenges."[35]

The *Order*, by contrast, embarks on rate-of-return regulation – with the attendant complications and administrative challenges of that regulatory approach. The basic principle of rate of return is to limit the profits providers make by permitting them to "charge rates no higher than necessary to obtain 'sufficient revenue to cover their costs and achieve a fair return on equity.' "[36] The reasonableness of a given rate depends on determinations of what costs are properly allocable to the regulated service, whether those costs are "properly calculated and efficiently incurred," what rate of return is "allowable" for a carrier, and whether the rate covers allowable costs and an allowable return on capital (that is, rate of return).[37] These are precisely the determinations the *Order*'s new cost-based regime requires ICS providers and the Commission to make. ICS providers must base rates on historical costs that are "reasonably and directly related to the provision of ICS," and some reasonable rate of return (although the Commission has not yet told providers what that will be).[38] The Commission's rate caps thus serve only a peripheral role – setting the outer bounds of what rates the Commission *may* choose to allow but providing no assurance that rates beneath the caps will be deemed lawful.

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[35] *NPRM* ¶ 22 (citing Alternative Wright Pet. at 7-8) (emphasis added).

[36] *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 177-78 (D.C. Cir. 1993) (quoting Further Notice of Proposed Rulemaking, *Policy and Rules Concerning Rates for Dominant Carriers*, 3 FCC Rcd 3195, ¶ 24 (1988)).

[37] Report and Order and Second Further Notice of Proposed Rulemaking, *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, ¶ 18 (1989) ("*Report and Order on Rates for Dominant Carriers*").

[38] *Order* ¶ 52.

The majority denies that its new "cost-based" rule is the equivalent of rate-of-return regulation. The majority first notes that "[c]ost considerations may and frequently do play a role in rate cap regulatory regimes" that are not rate-of-return regulation.[39] That is true enough – a system of simple rate caps based on cost data, for example, is not a rate-of-return regime – but beside the point. The "cost-based" rule amounts to rate-of-return regulation not because it takes costs into account, but because it limits each interstate ICS rate and ancillary fee to historical costs plus some (Commission-approved) rate of return.

The majority also argues that its rule is "fundamentally different than rate-of-return regulation" because it does not require "ex ante review, tariff filings, detailed cost support in compliance with various accounting rules, and a prescribed rate of return, among other things."[40] This argument is wrong, first, because it treats these items as definitional elements of rate of return rather than what they are – regulatory methods the Commission "has used . . . in numerous circumstances, sometimes as part of rate-of-return regulation and sometimes not."[41] It is wrong, second, because the *Order* does include most of these requirements; it just calls them by different names.[42]

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[39] *Id.* ¶ 53 n.195.

[40] *Id.*

[41] Pai Dissent at 128 n.131.

[42] *See id.* at 128-29 (noting the *Order*'s requirements that ICS providers annually file detailed rate information and allocate costs, and its prohibition on above-cap rates without *ex ante* agency review).

Whatever the Commission calls its rules, "'it is the substance of what the [Commission] has purported to do and has done which is decisive.'"[43] What the Commission has done here is rate-of-return regulation, plain and simple.

3. The majority's suggestions that the *NPRM* provided adequate notice of its new rate-of-return regime for interstate inmate calls are misplaced. *First*, the *NPRM*'s solicitation of comment "on other possible ways of regulating ICS rates, as well as any other proposals from parties,"[44] could not suffice. "Catch-all" notice provisions do not give parties adequate notice of specific rules adopted thereafter.[45]

Second, that the *NPRM* sought comment on the costs of providing ICS hardly put parties on notice of the universe of cost-based ratemaking possibilities.[46] It suggested, at most, that the Commission might implement one of its proposals using cost data supplied by ICS providers or other parties. It certainly did not signal that ICS providers might be subjected to rate-of-return

[43] *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (quoting *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942)).

[44] *Order* ¶ 59 (characterizing the *NPRM*).

[45] *E.g.*, *Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (rejecting approach that would permit an agency "to justify *any* final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy 'notice,'" and noting that "[s]uch an exercise in looking over a crowd and picking out your friends does not advise interested parties how to direct their comments and does not comprise adequate notice") (citation and internal quotation marks omitted); *National Black Media Coal.*, 791 F.2d at 1023 (statement that the final rule would be promulgated as proposed in the NPRM but in accordance with any future "variants, modifications, or alternatives" did not provide parties with adequate notice of a policy shift); *Small Refiner*, 705 F.2d at 549 (general notice that the agency might make changes in the definition of small refinery was "too general to be adequate" and did not "describe the range of alternatives being considered with reasonable specificity").

[46] *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009) (agency rule for resolving rail rate disputes, which permitted parties to draw from four most recent years of railroad movement data, was not a "logical outgrowth" of NPRM, which proposed a rule permitting parties to draw from most recent year of data); *Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991) (per curiam) (rule is "not a logical outgrowth of the proposed regulations" if it "is not implicit in . . . the system presented in the proposed regulations").

regulation, and it gave providers no "opportunity to anticipate and criticize" *that* very different approach.[47] Although parties commented on every one of the proposals announced in the *NPRM*, none weighed in on the advantages or disadvantages of rate-of-return regulation. The absence of comments on that topic strongly suggests that "no commenter manifested an understanding that the FCC was considering" the "cost-based" rule it eventually adopted.[48]

For similar reasons, the majority is incorrect that providers should have anticipated rate-of-return regulation because § 201(b)'s "just and reasonable" standard "has traditionally been construed to require rates to be cost-based."[49] "Cost-based" ratemaking, as courts have used the term, can encompass *any* ratemaking that reflects costs.[50] For example, had the Commission adopted rate caps of $0.21 per minute for debit calls and $0.25 per minute for collect calls (but gone no further), that rule would constitute cost-based ratemaking because the caps purport to reflect the cost data the Commission received. Notice of cost-based rate caps did not provide notice of the *Order*'s very different sort of "cost-based" rule.

Finally, the 2007 Geo Group comments and the 2013 NASUCA comments did not satisfy the notice requirement, first of all, because a party's comments cannot substitute for proper

[47] *See Shell Oil*, 950 F.2d at 751 ("[W]eak signals from the agency gave petitioners no such opportunity to anticipate and criticize the rules or to offer alternatives."); *see also Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) ("Something is not a logical outgrowth of nothing.").

[48] *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 256 (3d Cir. 2010); *cf. Northeast Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (concluding rule was logical outgrowth of proposed rule, where "[n]umerous commenters – including two that are among the Industry Petitioners here – filed comments" on the issue).

[49] *Order* ¶ 59 n.222.

[50] *See Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996).

notice by the Commission itself.[51] The Commission "cannot bootstrap notice from a comment"; it "must *itself* provide notice of a regulatory proposal."[52] In any event, those comments did not anticipate the regulation that the Commission adopted in the *Order*. The Geo Group argued against *any* interstate ICS rate-setting.[53] And NASUCA's position on granular cost-based ratemaking was at best unclear: NASUCA did ask the Commission to "require ICS providers to justify their rates and their costs,"[54] but on the next page it waffled, proposing benchmark rates "to ensure that rates for interstate ICS calls become just and reasonable *without the need for complex regulatory reviews*"[55] – which granular cost-based regulation would plainly require.

4. The Commission's procedural error is not harmless. "[U]tter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure."[56]

GTL satisfies that standard here. By proceeding without notice of any proposal to impose cost-based, rate-of-return regulation, the Commission gave GTL and other ICS providers no opportunity, during the notice-and-comment period, to ventilate the significant flaws of a

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[51] *E.g.*, *CSX Transp.*, 584 F.3d at 1082; *Shell Oil*, 950 F.2d at 751; *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

[52] *Small Refiner*, 705 F.2d at 549.

[53] *See* Comments of The Geo Group, Inc. at 7-15, CC Docket No. 96-128 (FCC filed May 2, 2007).

[54] Initial Comments of NASUCA at 4-5, WC Docket No. 12-375 (FCC filed Mar. 25, 2013) ("In order to ensure that rates for interstate ICS calls become just and reasonable without the need for complex regulatory reviews, the Commission should include a provision that any interstate rate charged for a call from a correctional facility is unjust and unreasonable if it exceeds a benchmark determined by the Commission.").

[55] *Id.* at 5 (emphasis added).

[56] *Sugar Cane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002); *see also Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) ("showing of actual prejudice is not required under the prejudicial error rule").

rate-of-return approach. Rate-of-return regulation creates perverse incentives for telecommunications providers and has a poor track record in generating rates comparable to those achievable through competition. Rate-of-return regulation will also be significantly more expensive and complicated for the Commission and the ICS industry to implement than many of the *NPRM*'s proposals would have been.[57] For these exact reasons, the Commission has long disfavored rate of return. *See infra* Part I.B.

The Commission's procedural error prevented GTL and other interested parties from fully developing a record on the competitive distortions that would follow from applying rate-of-return regulation to interstate ICS and ancillary services. Had the Commission issued a proper notice, such issues could have been addressed in a comprehensive fashion, and the Commission would have had the opportunity to use this information in evaluating regulatory alternatives.

B. The Commission Failed To Justify the Adoption of a Regulatory Approach It Has Long Disfavored

The Commission must provide "good reasons" for its new regulations and articulate "a reasoned explanation . . . for disregarding facts and circumstances," including reliance interests, "that underlay or were engendered by the prior policy."[58] It failed to do so here. The Commission adopted rate-of-return regulation without explaining any reason for its departure from more than two decades of Commission precedent.

For more than 20 years, the Commission has retreated from rate-of-return regulation, recognizing that it "has certain inherent flaws," presents carriers with "perverse" incentives, and

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[57] *Second Report and Order on Rates for Dominant Carriers* ¶ 23 (using rate of return to ensure just and reasonable rates for consumers "is not a simple matter"); *see id.* ¶ 28 ("[W]hile we have made improvements in our ability to administer rate of return rules, the basic, underlying regulatory structure lying at the heart of our rules remains unchanged."); *id.* ¶ 24 (rate of return requires Commission's "extensive attention" to costs).

[58] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

is "difficult[to] administer[] . . . under any circumstances."[59] In the late 1980s, the Commission first "began to take serious note of some of the inefficiencies inherent in rate-of-return regulation."[60] The Commission noted that the regulatory strategy creates "incentives for carriers to be inefficient."[61] Because rate of return ties profits directly to the amount of costs in the rate base, it encourages carriers to "attribute unnecessary costs to their operations in an effort to generate more revenue."[62] As the Commission recognized, the approach also supplies "insufficient incentives to encourage innovation,"[63] because carriers are free to pass on any costs (unless identified as imprudent) to ratepayers. The Commission further noted that rate of return "tend[s] to foster cross-subsidization and inability to move toward an optimally efficient set of prices"; carriers have an incentive to misallocate costs from unregulated services to services subject to rate-of-return rules (where the costs can be passed on to consumers).[64] Finally, the Commission explained that rate of return produces "high administrative costs,"[65] as the agency is forced to "spend a great deal of [its] regulatory resources policing" cost padding and misallocation.[66]

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[59] *Report and Order on Rates for Dominant Carriers* ¶¶ 29, 30, 33.

[60] *National Rural Telecom Ass'n*, 988 F.2d at 178; *see also* Robert B. Friedrich, *Regulatory and Antitrust Implications of Emerging Competition in Local Access Telecommunications*, 80 Cornell L. Rev. 646, 689 (1995) ("In recent years, the FCC has moved away from rate-of-return pricing for interstate local access, as evidence continues to mount that such pricing is no longer appropriate.").

[61] *Report and Order on Rates for Dominant Carriers* ¶ 100.

[62] *Second Report and Order on Rates for Dominant Carriers* ¶ 29; *accord id.* ¶ 9.

[63] *Report and Order on Rates for Dominant Carriers* ¶ 100.

[64] *Id.*

[65] *Id.*

[66] *Second Report and Order on Rates for Dominant Carriers* ¶ 34.

The Commission saw "substantial" advantages in adopting price caps to encourage carriers to "engage in efficiency-enhancing techniques to generate profits."[67] It concluded that its "lengthy, substantial, and ongoing efforts to improve [its] rate of return methods . . . cannot create the positive incentives that are embodied in incentive-based regulation."[68] Although the Commission did not go so far as to say that "rate of return is necessarily a bankrupt regulatory practice," it made clear that "it is not the best" and that "incentive regulation is superior."[69]

In 1989, the Commission "concluded that price cap regulation would on balance be an improvement over rate-of-return in terms of meeting its statutory goals" and applied price cap regulation to AT&T.[70] In the next few years, the Commission extended price caps to local exchange carriers, although it made the shift optional for many of those carriers.[71] More recently, the Commission has frequently explained the reasons for its shift away from rate of return.[72] Indeed, the petitioners who requested this rulemaking proceeding recognized the Commission's longstanding "concern that traditional rate-of-return regulation did not result in sufficient incentives to improve efficiency," and therefore advocated for benchmark rates akin to

[67] *Report and Order on Rates for Dominant Carriers* ¶ 101.

[68] *Second Report and Order on Rates for Dominant Carriers* ¶ 25.

[69] *Id.* ¶ 29.

[70] *National Rural Telecom Ass'n*, 988 F.2d at 178 (citing *Report and Order on Rates for Dominant Carriers* ¶ 1).

[71] *Id.* at 178-79.

[72] *See, e.g.*, Sixth Order on Reconsideration and Memorandum Opinion and Order, *Connect America Fund*, 28 FCC Rcd 2572, ¶ 2 (2013); Memorandum Opinion and Order, *Petition of USTelecom for Forbearance*, 28 FCC Rcd 7627, ¶ 153 (2013); Report and Order, *International Settlement Rates*, 12 FCC Rcd 19806, ¶ 24 (1997); Order and Notice of Proposed Rulemaking, *Petition of Comsat Corp.*, 13 FCC Rcd 14083, ¶ 4 (1998).

"price caps" that would "provide a powerful incentive for service providers to become more efficient."[73]

The Commission imposed rate of return here without even acknowledging that its regulatory approach is a long-disfavored one – much less providing any justification for imposing on ICS providers this severely flawed form of regulation. On the basis of that failure by itself, a court is likely to reverse the *Order*'s "cost-based" rule.

C. The Commission Failed To Provide Guidance on the Implementation of Rate-of-Return Regulation

Finally, the Commission failed to provide sufficient guidance to enable ICS providers to implement the cost-based, rate-of-return regime it has adopted.[74] The *Order* requires all interstate ICS rates and all ancillary charges to be reduced to cost-based levels and threatens violators with severe penalties, including forfeitures of up to $1.5 million per continuing violation, refund obligations, and, in "egregious" cases, revocation of § 214 carrier authorization.[75] Yet the *Order* unaccountably withholds from ICS providers the critical information they need in order to ensure that they comply with the rule.

First, although the *Order* demands that ICS providers build into interstate rates only their historical costs "reasonably and directly related to the provision of ICS," it does not specify which costs count (other than to say that site commissions do not). The Commission *suggests* several cost categories that will "likely" count (such as equipment costs; costs for originating, switching, transporting, and terminating calls; certain security costs; and billing and collection

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[73] Wright Comments at 32.

[74] Deference cannot be afforded to regulatory "mush" that lacks "sufficient content and definitiveness" to qualify as "a meaningful exercise in agency lawmaking." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997).

[75] *Order* ¶ 118.

costs), and several others that "likely" will not (such as costs to integrate ICS with other correctional facility systems and services, and certain other security costs).[76] But the Commission makes no promises.

Second, the *Order* requires ICS providers to "apportion" their costs between interstate and intrastate calls, but "leave[s] it up to the individual providers to determine" how.[77] The Commission treats this as a flexible regulatory strategy that gives providers the ability to "determine the best and most efficient way to [apportion costs] for their companies." That is cold comfort to providers, however, for the Commission retains the right to impose penalties if it disagrees with a provider's jurisdictional separations.

Third, implicit in the new "cost-based" rule is a requirement that ICS providers build into their interstate ICS rates a reasonable rate of return. But the Commission refuses to "opine" on what rate of return it will permit.[78] Providers are left to guess at what the Commission considers a fair or permissible return. If they get it wrong, and the Commission deems their rate of return too high, they could owe refunds and forfeitures.

Compounding these uncertainties, the *Order*'s "cost-based" rule applies not only to interstate inmate calling rates, but also to ancillary charges.[79] The Commission does not begin to explain how providers should determine whether their ancillary charges are cost-based. But, because the *Order* establishes no "safe harbor" or caps for ancillary charges, ICS providers must bear all the risk as they try to predict whether their ancillary charges will meet the Commission's

[76] *Id.* ¶ 53 & n.196.

[77] *Id.* ¶ 53 n.195.

[78] *Id.* ¶ 54 n.203.

[79] *Id.* ¶ 91 ("[E]ven if a provider's interstate ICS rates are otherwise in compliance with the requirements of this Order, the provider may still be found in violation of the Act and our rules if its ancillary service charges are not cost-based.").

approval – based on metrics the Commission has not yet laid out, let alone tried to justify, and without obvious precedent about which costs providers may count as allocable and which they may not.

The Commission's failure to explain critical pieces of its new "cost-based" rule – when ICS providers are expected to adhere to the rule effective three months from now, and may be subjected to harsh penalties if they do not – epitomizes arbitrary and capricious decisionmaking and will likely require vacatur of the rule.

II. THE BALANCE OF EQUITIES FAVORS A STAY

The balance of equities likewise supports staying the "cost-based" rule pending review.

A. GTL will experience considerable irreparable harm if the rule goes into effect on schedule, little more than 90 days from now. Because the Commission provides no assurance that any rate will be approved if challenged, the only sure way to avoid the risk of significant penalties is to reduce all of GTL's interstate ICS rates all the way down to the *Order*'s safe harbor levels. If GTL were to do that, it would lose revenues of between $9 and $11 million in the next year alone even if GTL ceased paying all site commissions, and between $16 and $18 million if GTL continued to pay commissions under existing terms.[80] GTL is aware of no path – and the *Order* identifies none – by which it could recover these lost revenues from end users later, if it ultimately prevails on its petition for review. Such unrecoverable losses constitute irreparable harms.[81]

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[80] Yow Decl. ¶ 6 (estimating lost revenue if GTL does and does not continue to pay site commissions to customers).

[81] *See American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 594, 596 (7th Cir. 1986) (risk that complete recovery will not be possible creates irreparable injury); *Hughes Network Sys., Inc. v. InterDigital Communications Corp.*, 17 F.3d 691, 696 (4th Cir. 1994) (same); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1479 (9th Cir.

The Commission's refusal to say how existing ICS contracts will be affected by the "cost-based" rule only intensifies these harms. GTL is currently a party to hundreds of contracts requiring it to pay site commissions on individually tailored terms and conditions.[82] Under the Commission's rate-of-return regime, GTL will be prohibited from recouping these costs through ICS revenues. Yet the *Order* neither abrogates GTL's existing contracts nor grandfathers them in.[83] The Commission suggests that GTL and its customers can simply "voluntar[ily] renegotiat[e]" their contracts.[84] But renegotiating hundreds of contracts with hundreds of customers in less than three months would be an impossible task.[85] Even the petitioners for rulemaking advocated for a *one-year* "fresh look" period to give ICS providers time to adjust to the petitioners' proposed rules.[86] GTL thus has two options: absorb the cost itself (an unrecoverable expense) or refuse to pay future commissions on the basis of change-of-law, *force majeure*, or other provisions that some ICS contracts may contain. The former course would cost GTL between $5 and $9 million in the next year.[87] The latter course may lead to significant contract disputes with customers. That litigation would require significant and unnecessary diversion of public and private resources, and it would also dampen customer goodwill. Loss of

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1994) (same); *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (in the absence of "adequate compensatory or other corrective relief," "economic loss" amounts to irreparable harm) (internal quotation marks omitted).

[82] Yow Decl. ¶¶ 4-5.

[83] *See Order* ¶ 100.

[84] *Id.* ¶ 102.

[85] Yow Decl. ¶ 10 (estimating that renegotiation will require more than 10 person hours per contract, and more than 5,000 person hours total).

[86] Alternative Wright Pet. at 28.

[87] *See* Yow Decl. ¶ 6.

customers – stemming not from competition on the merits but rather from the inequitable effects of the *Order* – establishes irreparable injury.[88]

In addition, GTL does not believe full compliance with the Commission's "cost-based" rule will be practically attainable within 90 days. The *Order* instructs ICS providers to construct "cost-based" interstate ICS rates and ancillary charges, but it does not give definitive answers about key inputs to those rates or charges – what costs the Commission will consider properly allocable to the provision of ICS, or what rate of return the Commission will allow ICS rates to include. Nor will it suffice for GTL to cut its interstate ICS rates to the level of the rate caps; below-cap rates enjoy no presumption of reasonableness unless they are also below the (much lower) safe harbor levels adopted in the *Order*, so such rates are still at risk of invalidation and still leave GTL open to fines and refund obligations. And without a safe harbor (or cap) for ancillary services, no ancillary charge is safe. All of GTL's ancillary charges will remain at risk of invalidation – and GTL could incur penalties and be forced to pay refunds – if the Commission decides at some later date that they are not "cost-based."

Even if GTL could comply with the rule within the prescribed period – and it cannot – compliance will require substantial (unnecessary) expenditures that GTL will never be able to recover. GTL must, among other things, "record and document its costs of providing service"; distinguish between eligible and ineligible costs; figure out how to unbundle eligible costs from ineligible costs where, for example, the cost relates to both ICS and another service; determine how to treat each capital investment (including what depreciation method or amortization schedule to use); apportion joint and common costs among the facilities it serves; separate the

[88] *See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994).

costs of interstate ICS from the costs of intrastate ICS; and translate interstate, eligible costs into per-minute rates that include some rate of return.[89] These unrecoverable expenses themselves constitute irreparable injury.[90]

B. Other interested parties, by contrast, will not suffer material irreparable injury in the event of a stay. *First*, a stay of rate-of-return regulation would not injure the petitioners because they did not *ask* for that complex and disfavored regulatory approach, acknowledged its weaknesses, and proposed rate caps as a superior regulatory solution. Implementation of the rate caps adopted in the *Order* – which are nearly identical to those the petitioners requested – would not be affected by the stay GTL seeks.

Second, the petitioners cannot plausibly claim that they would be irreparably injured by a limited stay pending resolution of the legal challenges to the *Order* – likely a year or less from now – because the petitioners themselves asked for a one-year delay in implementation of the rate caps they proposed. The petitioners advocated for a one-year "fresh look" period to give ICS providers sufficient time to adjust their business plans and renegotiate or terminate their ICS contracts as needed.[91]

Indeed, a stay may *benefit* inmates housed in particularly high-cost facilities. At those facilities, if ICS providers reduce their rates to safe harbor levels – as, absent a stay, they will be forced to do, *see supra* Part II.A – they will be unable to operate above cost. If providers "make the rational business decision to withdraw from facilities where they would have to operate at a

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[89] Pai Dissent at 124-25.

[90] *See National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 824 (1st Cir. 1979) (irreparable harm found because plaintiff would incur substantial unrecoverable expenses to comply with regulations that may be invalid).

[91] Alternative Wright Pet. at 28.

loss, inmates in those facilities ultimately will suffer" – as will their families.[92] If providers continue to serve these facilities, inmates at lower-cost facilities will suffer, because they will have to pay to subsidize facilities where the rates permitted are inadequate to recover costs.

C. Finally, the public interest favors a stay. *First*, reducing interstate ICS rates to safe harbor levels will have a direct, adverse impact on the ability of correctional facilities to provide goods and services to inmates, because those services are frequently funded by site commissions and site commissions are usually a function of ICS revenues. Take Maryland as an example; its Department of Corrections (the "Maryland DOC") has an ICS contract with GTL that covers two dozen facilities in the state. Maryland law directs each state correctional facility to establish an Inmate Welfare Fund using ICS commissions (and other funds) to pay for goods and services that benefit the general inmate population.[93] Commissions are used to fund inmate medical supplies and services; athletic and recreational services, supplies, and equipment; educational services, material, supplies, and equipment; entertainment expenditures, including movie rentals, newspapers, and books; repair and replacement of property; indigent inmate welfare packages; and other goods and services.[94] To pay for these services at the two dozen facilities where GTL provides ICS, the Maryland DOC charges GTL an 87% commission on ICS revenue from collect calls and a 65% commission on ICS revenue from debit and prepaid calls.[95] If GTL were to cut its interstate ICS rates to \$0.12 per minute for debit calls and \$0.14 per minute for debit calls (but keep paying commissions), site commission revenues to these 24

[92] Pai Dissent at 119-20.

[93] Md. Code Ann., Corr. Servs. § 10-502.

[94] Md. Code Regs. 12.11.09.04.

[95] Yow Decl. ¶ 8.

facilities would likely decline by more than $300,000 in the next year.[96] Without commission payments, the facilities would lose revenues of more than $500,000 within a year.[97]

Similar cuts would be felt in correctional facilities across the country. According to GTL's projections, if interstate rates were reduced to the safe harbor levels, the facilities it serves would see their revenues from site commissions decline by $14 to $16 million in the next year, *even if* GTL kept paying site commissions under its existing contracts.[98] If GTL were to stop paying site commissions, site commission revenues to these facilities would drop by $20 to $22 million in the next year.[99] And these numbers take into account only facilities where GTL provides ICS; hundreds more would feel the impact of the new rate-of-return regulation in the coming months as other ICS providers scramble to comply with it.

Absent a stay, correctional facilities would have many fewer dollars to spend on goods and services that *they* deem essential to the safety and well-being of inmates, correctional personnel, and the general public. Even the *Order* acknowledges the social value of such services.[100] For this reason alone, a stay is in the public interest.

Second, a stay will forestall the expense and confusion – in the ICS industry and among correctional facilities – that would result from efforts to implement a "cost-based" rate rule

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[96] *Id.* ¶ 9.

[97] *Id.*

[98] *Id.* ¶ 7.

[99] *Id.* Even if GTL were to reduce its interstate rates only to the rate cap levels, GTL facilities would see between a $9 and $11 million decline in site commission revenues (if GTL continued to pay commissions at the same levels), or a $20 to $22 million decline (if GTL did not). *Id.*

[100] *Order* ¶ 57 ("The record reflects that site commission payments may be used for worthwhile causes that benefit inmates by fostering such objectives as education and reintegration into society.").

prematurely, and without adequate guidance from the Commission. The measures the Commission directs ICS providers and correctional facilities to take – e.g., the amendment of contracts to set interstate ICS rates at cost-based levels and eliminate site commissions – will require substantial time and effort not only from ICS providers, but also from the correctional facilities they serve.[101] Moreover, any amendments that providers and facilities negotiate will be time-consuming to unwind when the *Order* is overturned. Contracts that are renegotiated this winter will have to be renegotiated again next year. Facilities will not be able to recoup these substantial resource costs.

Third, as described above, *supra* Part II.B, a stay will increase the likelihood that ICS remains available to inmates (and their families) in high-cost facilities where the costs of providing service exceed the safe harbor levels established in the *Order*. The *Order* expressly acknowledges the societal benefits of family contact with inmates during incarceration – "lower recidivism rates," "fewer crimes," less need for more correctional facilities, and lower "overall costs to society."[102] The continued provision of ICS at high-cost facilities is critical to achieving these objectives.

Fourth, without a stay the Commission itself will face tremendous administrative burdens it lacks the resources to handle. As the dissent explains, the *Order*'s particular brand of rate-of-return regulation – "all-out rate-of-return regulation" without any "clarity over how the Commission will implement [it]" – will result in hundreds or thousands of waiver petitions for the Commission to adjudicate and hundreds of thousands of pieces of information for the

[101] Yow Decl. ¶ 10 (estimating person hours required).

[102] *Order* ¶ 2.

Commission to review and analyze.[103] The Commission's resources are already stretched thin,[104] and these additional burdens – which will have been unnecessary if the legal challenge to the *Order* succeeds – will steal time from the Commission's other communications policy priorities.

The public should not be forced to bear these burdens, particularly when a limited stay could be granted which, in the interim, gives inmates precisely the relief they sought in a petition for rulemaking filed just last year.

CONCLUSION

The Commission should issue a stay pending review of the *Order*.

Respectfully submitted,

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October 30, 2013

[103] Pai Dissent at 124, 126-27, 129.

[104] *Id.* at 128.

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of October, 2013, the foregoing Petition of Global Tel*Link for Stay Pending Review was served via electronic mail on the following persons:

Marlene H. Dortch
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/s/ Michael K. Kellogg
Michael K. Kellogg

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

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

DECLARATION OF CHARLES STEPHEN YOW

1. My name is Charles Stephen Yow. I am over the age of 21. I have never been convicted of a felony or a crime of moral turpitude. I am competent to make this declaration and, unless otherwise indicated, all the facts set forth in this declaration are based on my personal knowledge.

2. I am the Chief Financial Officer and Treasurer of Global Tel*Link Corporation ("GTL"). I also serve as Chief Financial Officer and Treasurer of Public Communications Services, Inc. ("PCS") and as Chief Financial Officer and Treasurer of Value-Added Communications, Inc. ("VAC"). Before joining GTL in 2002, I was the Director of Finance for a wireless communications provider, Powertel, Inc. I received a B.S. in business administration from Birmingham-Southern College and an M.B.A. from Emory University.

3. GTL and its wholly owned subsidiaries, which include PCS and VAC, are leading developers and suppliers of telecommunications systems and services to correctional facilities across the country. The systems and services that GTL, PCS, and VAC supply allow inmates to make phone calls from the correctional facility and permit correctional staff to review the calls, along with providing many other features. These services are commonly known as inmate calling services, or "ICS."

4. GTL and its wholly owned subsidiaries presently provide ICS to in excess of 1,650 correctional facilities throughout the nation, including in excess of 1,600 facilities operated by state or local governments.

5. GTL is a party to in excess of 700 ICS contracts, including in excess of 650 contracts with state, county, or city governments. These contracts typically have multi-year terms.

6. Of these contracts, more than 500 set rates for interstate ICS calls above the safe harbor levels of $0.12 per minute for debit calls and $0.14 per minute for collect calls adopted in the *Order*. According to GTL's internal projections, reducing interstate ICS rates in these contracts to the safe harbor levels would cost GTL between $16 million and $18 million in the next year, if GTL were to continue to pay site commissions according to commission terms of its contracts.[1] Reducing interstate ICS rates in these contracts to safe harbor levels would cost GTL between $9 and $11 million in the next year if it were to cease paying site commissions altogether.

7. Reducing interstate ICS rates to safe harbor levels would also reduce revenues to the correctional facilities GTL serves. During the next year, GTL projects that such rate reductions would result in between $14 million and $16 million in lost commission revenues to GTL facilities if GTL continued to pay site commissions, and more than $20 million if GTL stopped paying commissions to facilities. Indeed, even reducing interstate ICS rates to the rate caps would dramatically reduce these facilities' commission revenues in the next year – a revenue drop of $9 to $11 million if GTL kept paying commissions, or of $20 to $22 million if it did not.

[1] The projections in this declaration do not account for demand elasticity, which may or may not occur but must be determined on a facility-by-facility basis.

8. For example, GTL has entered into a contract with the Maryland Department of Corrections to provide ICS to two dozen Maryland correctional facilities. That contract requires GTL to pay an 87% commission on ICS revenue from collect calls, and a 65% commission on ICS revenue from debit and prepaid calls.

9. If GTL were to reduce its interstate ICS rates to $0.12 per minute for debit calls and $0.14 per minute for debit calls, GTL projects that site commission revenues to the Maryland DOC's 24 facilities would likely decline by more than $25,000 per month and more than $300,000 in the next year (if it continued to pay commissions), and by more than $40,000 per month and more than $500,000 in the next year (if it did not).

10. I estimate that it will require at least 10 person hours to renegotiate the terms of each of the more than 500 existing GTL contracts that set interstate rates above safe harbor levels, or more than 5,000 person hours overall. Even then, there is no guarantee that GTL's renegotiation attempts will be successful for all contracts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Mobile, Alabama, on the 29 day of October, 2013.

Charles Stephen Yow