ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1461 and Consolidated Cases

In the United States Court of Appeals for the District of Columbia Circuit

GLOBAL TEL*LINK, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, AND THE UNITED STATES OF AMERICA,

Respondents.

CENTURYLINK PUBLIC COMMUNICATIONS, ET AL.,

Intervenors.

On Petition for Review of Final Agency Action
of the Federal Communications Commission
80 Fed. Reg. 79,136 (Dec. 18, 2015)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the State and Local Government Petitioners certify as follows:

A. Parties and Amici

The parties participating in the proceeding below are listed in Appendix B to the challenged Order. These cases involve the following parties:

1. Petitioners

No. 15-1461: Global Tel*Link

No. 15-1498: Securus Technologies, Inc.

No. 16-1012: Centurylink Public Communications, Inc.

No. 16-1029: Telmate, LLC

No. 16-1038: National Association of Regulatory Utility Commissioners

No. 16-1046: Pay Tel Communications, Inc.

No. 16-1057: State of Oklahoma, *ex rel.* Joseph M. Allbaugh, Interim Director of the Oklahoma Department of Corrections; John Whetsel, Sheriff of Oklahoma County, Oklahoma; The Oklahoma Sheriffs' Association, on behalf of its members.

2. Respondents

Federal Communications Commission and the United States of America.

3. Intervenors and Amici Curiae

No. 15-1461: *Intervenor for Petitioners*: Centurylink Public Communications, Inc.; Indiana Sheriff's Association; Lake County Sheriff's Department; Marion County Sheriff's Office.

Intervenor for Respondents: Campaign for Prison Phone Justice; Citizens United for Rehabilitation or Errants; DC Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs; Dedra Emmons; Ulandis Forte; Human Rights Defense Center; Laurie Lamancusa; Jackie Lucas; Darrell Nelson; Earl J. Peoples; Ethel Peoples; Prison Policy Initiative; United Church of Christ, Office of Communication, Inc.; Charles Wade; Network Communications International Corp.

Amicus Curiae for Respondents: Network Communications International Corp. (terminated 03/07/2016).

No. 16-1057: *Intervenor for Petitioners*: State of Arizona; State of Arkansas; State of Indiana; State of Kansas; State of Louisiana; State of Missouri; State of Nevada; State of Wisconsin.

B. Rulings Under Review

These consolidated appeals challenge an Order of the Federal Communications Commission, *In the Matter of Rates for Interstate Inmate Calling Services*, "Second Report and Order and Third Further Notice of Proposed Rulemaking," 30 FCC Rcd. 12763, FCC 15-136, WC Dkt. No. 12-375 (released November 5, 2015), published December 18, 2015, at 80 Fed. Reg. 79,136.

C. Related Cases

The cases consolidated before this Court in this action are Case Nos. 15-1461, 15-1498, 16-1012, 16-1029, 16-1038, 16-1046, and 16-1057. In addition, other related actions involve some of the same parties and issues: *Securus Technologies, Inc v. FCC*, No. 13-1280 and consolidated cases (D.C. Cir.) and *Securus Technologies, Inc v. FCC*, No. 16-1321 and consolidated cases (D.C. Cir.).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit rule 26.1, the following parties submit these disclosure statements. National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC is a "trade association" as that term is defined in Circuit Rule 26.1(b). NARUC has no parent company. No publicly held company has any ownership interest in NARUC. NARUC represents those government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, among other things, the telecommunications within their respective borders.

The Indiana Sheriffs' Association (ISA) submits that it was established in 1930 and incorporated as a nonprofit organization in the State of Indiana in 1977. The ISA is a "trade association" as that term is defined in Circuit Rule 26.1(b). The ISA acts as the representative for the ninety-two Indiana county sheriff's offices to promote and improve the delivery of county sheriffs' services, foster professionalism through the criminal justice system, and to encourage the appreciation and practice of law enforcement in the State in Indiana. The ISA has no parent company. No publicly held company has any ownership interest in the ISA.

The Oklahoma Sheriffs' Association (OSA) is a nonprofit 501(c)(3) registered with the Oklahoma Secretary of State since 1991. The OSA is a "trade association" as

that term is defined in Circuit Rule 26.1(b). The OSA's mission is to represent the elected Sheriffs in all 77 counties of Oklahoma. The OSA has no parent company. No publicly held company has any ownership interest in the OSA.

All other Petitioners are State or local government entities and are not required to file a disclosure statement.

Respectfully submitted,

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Act	The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*
1996 Act	The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
ICS	Inmate Calling Services
Order	The order challenged in this suit, *In the Matter of Rates for Interstate Inmate Calling Services*, "Second Report and Order and Third Further Notice of Proposed Rulemaking," 30 FCC Rcd. 12763, FCC 15-136, WC Dkt. No. 12-375 (released November 5, 2015)

SUMMARY OF THE ARGUMENT

At its core, the challenged Order is the Commission's attempt to stem the practice of site commissions, which the Commission believes leads to unjustly high intrastate phone call rates for State inmates. The Commission does not contend that payphone providers are all profiting excessively from high rates (they are not). Instead, the Order expresses the Commission's disagreement with State and local correctional authorities' decision to fund certain inmate welfare programs through site commissions. While the Commission may think that criminal justice policy is better served by lowering the inmates' intrastate calling rates rather than providing them those welfare programs, that policy determination is not the Commission's to make because it is both outside their statutory authority and far afield of their expertise.

Section 276(b)(1)(A) of the Telecommunications Act of 1996 grants the Commission nothing more than the power to ensure "all payphone service *providers* are fairly compensated" for calls from their payphones. It does not give the Commission the authority to ensure *correctional facilities* are fairly compensated for use of their facilities by payphone service providers. And that is what a site commission is: compensation paid *by* a payphone provider *to* a correctional facility. Nowhere did Congress give the Commission the authority to regulate such compensation in order to promote the Commission's vision of good State criminal justice policy. The history and purposes of the provision further undercut the Commission's claim of regulatory authority—something the Commission does not meaningfully contest.

Instead, the Commission asks the Court to ignore the context in which Section 276(b)(1)(A) was enacted and narrowly focus on the partial word "fair." The Commission claims that this myopic attention to a single word taken out of context renders its interpretation "feasibl[e]," even if incorrect. The problem with this argument is that it not only ignores the text and history of Section 276, but also ignores the well-established case law and statutory mandates that require the Commission to demonstrate its authority unambiguously when regulating intrastate telecommunications. In the end, the Commission is unable to establish that it has the authority to regulate overcompensation of providers, much less State and local correctional institutions.

The Commission's arguments to the contrary are unavailing. The Commission argues that, if Petitioners' interpretation of Section 276(b)(1)(A) were correct, Congress could have been more clear that it was only intending to prevent undercompensation of providers. Even if one accepts the premise that Congress must always legislate perfectly, this argument cuts against the Commission because Congress *has* been exceptionally clear when it intends to give the Commission plenary authority over rate setting, as it did when it gave the Commission the authority to ensure that all interstate "charges" are "just and reasonable" under Section 201 of the Act. Congress's deliberate choice not to use such language in Section 276(b)(1)(A) forecloses the Commission's reading. The Commission's response that these different phrases must be read as having

the same, rather than different meanings, is *ipse dixit* contradicted by the case law on statutory interpretation.

Neither can the Commission square with its interpretation the exception for emergency calls in Section 276(b)(1)(A), providing no explanation for why Congress would mandate the Commission prevent price gouging in all payphone calls *except* for the ones of greatest public importance. Finally, the cases and prior Commission actions relied on by the Commission at best stand for the uncontroversial proposition that, when acting to correct *under*compensation under Section 276(b)(1)(A), the Commission cannot regulate in an arbitrary and capricious manner by mandating overcompensation. Nothing in this Court's case law or the Commission's previous actions has contemplated that the Commission has authority to impose rate caps for intrastate calls when providers are not being undercompensated.

In the end, the Commission's only explanation for its authority involves the legal alchemy of combining Section 276(b)(1)(A)'s mandate to ensure payphone providers are fairly compensated for interstate and intrastate calls with Section 201 (which concerns only interstate calls) to create the plenary authority to set intrastate payphone rates to levels it deems "just, reasonable, and fair"—a power provided by neither of those provisions. Because the Order is premised on this unlawful reading of the Commission's statutory authority, the Order must be vacated.

ARGUMENT

The Commission does not address the State and Local Government Petitioners' arguments that the Order is arbitrary and capricious, believing those issues to have been mooted by the Commission's later promulgation of its *Order on Reconsideration*.[1] Petitioners maintain that both the Order challenged in these cases and the *Order on Reconsideration* are arbitrary and capricious. Moreover, if the *Order on Reconsideration* is invalidated (for example, because it is procedurally defective or because it is arbitrary and capricious), the Order challenged in these cases must also be invalidated because (1) the Commission has conceded in its *Order on Reconsideration* that the challenged Order failed to account for correctional facility costs (repeatedly citing the State and Local Government Petitioners' brief pointing out the Commission's errors)[2] and (2) the Commission has not attempted to defend that failure in its brief in this case.

Nonetheless, both Orders are unlawful because they exceed the Commission's statutory authority by attempting to cap intrastate payphone rates in order to reduce the compensation State and local agencies receive for permitting the use of ICS.

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[1] Resp. Br. 42.

[2] *See* Order on Reconsideration, *Rates for Interstate Inmate Calling Services*, FCC 16-102, 81 Fed. Reg. 62818, ¶ 13, ¶ 17 & n.69, ¶ 18 & n.73, ¶¶ 22-23 & n.89, ¶ 27 n.109(2016), J.A. —, —, —, —, —.

I. The challenged Order exceeds the Commission's statutory authority.

A. The Commission has the burden to demonstrate that its Order is authorized by a clear and unambiguous grant of statutory authority.

The Commission maintains that it is entitled to deference under *Chevron*[3] in interpreting the extent of its authority under Section 276(b)(1)(A).[4] But it does not address Petitioners' arguments that the presumption against preemption, Section 152(b) of the Communications Act, and Section 601(c) of the Telecommunications Act of 1996 all require that ambiguous statutory provisions are strictly construed against expanding the breadth of the Commission's authority to regulate intrastate rates.[5] *Chevron* is therefore inapplicable.[6] The Commission contends that these laws have no effect because Section 276 contains an express preemption provision and provides some authority to regulate intrastate calls, but the Commission fails to acknowledge, much less rebut, Petitioners' argument that the statutory and Constitutional presumptions also operate to restrict the *scope* of intrastate authority, not just the substantive fact of intrastate authority.[7]

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[3] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[4] Resp. Br. 27-28.

[5] State Pets.' Br. 37-41.

[6] *Id.*

[7] *See* State Pets.' Br. 39-40 & nn. 122-24; *see also Illinois Pub. Telecomm. Ass'n v. F.C.C.*, 117 F.3d 555, 561 (D.C. Cir. 1997) (Section 152(b) is both a "substantive and interpretative limitation[].").

Thus, the Commission is wrong to imply that Section 152(b) should be ignored simply because Section 276(b)(1)(A) provides *some* authority to the Commission to regulate compensation to payphone providers for intrastate calls, since the presumption reflected in Section 152(b) also requires that the limited grant of authority must not be construed to give the Commission *plenary* or *unrestricted* power to regulate intrastate payphone rates. Accordingly, in order to sustain its Order, the Commission must demonstrate that Section 276(b)(1)(A) is unambiguous as to the precise question at issue[8]: whether it has the authority to impose intrastate rate caps to prevent alleged overcompensation of State and local correctional facilities for intrastate ICS calls when ICS providers themselves are already being adequately compensated.[9] For the reasons stated below and in Petitioners' opening brief, Section 276(b)(1)(A) does not plainly authorize such action.

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[8] *See Illinois Pub. Telecomm. Ass'n*, 117 F.3d at 561 ("§ 276 should not be read to confer upon the FCC jurisdiction . . . unless § 276 is 'so unambiguous or straightforward so as to override the command of § 152(b).'" (quoting *Louisiana Public Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 377 (1986))).

[9] Contrary to the Commission's argument, Resp. Br. 28, this is a different question than the one answered by this Court in *Illinois Public Telecommunications Association*. In that case, the Court was addressing whether the Commission had the authority to prevent undercompensation of providers for local calls—an action squarely within the heartland of Section 276 and its purposes. *See Illinois Pub. Telecomm. Ass'n*, 117 F.3d at 561-62. The Court did not endorse plenary authority to regulate intrastate rates for every and all purposes, including imposing rate caps to limit compensation to correctional facilities.

The Commission also does not contest that, in Section 276(b)(1)(A), it has "discover[ed] in a long-extant statute an unheralded power to regulate" a significant portion of the telecommunications market.[10] The Commission does not dispute that Section 276(b)(1)(A) was meant to address the problem of independent payphone providers being unable to compete with Bell and other carrier payphone operations because they were being undercompensated for certain types of calls.[11] "The concept [of Section 276(b)(1)(A)] is simple: Telecommunications carriers must compensate [payphone providers] for calls made from payphones."[12] Although site commissions and their effect on inmate calling rates existed a decade before Section 276 was enacted,[13] the Commission points to no evidence that high rates were the concern addressed by Congress in Section 276(b)(1)(A). Thus, when executing Congress's mandate to craft a "compensation plan," after several iterations, "the Commission finally crafted such a plan" that corrected the undercompensation about which Congress was concerned, uttering nary a word about rate caps or unjust charges to

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[10] *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014).

[11] *See* State Pets.' Br. 5-11, 31-36.

[12] *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 118 (D.C. Cir. 2008); *see also* State Pets.' Br. 31-32 n.97.

[13] *See* Order, ¶ 118 n.375, ¶ 129 n.442, J.A.__, J.A.__.

inmates.[14] Indeed, Section 276 required the Commission to establish its compensation plan "within 9 months after February 8, 1996,"[15] so either the Commission has been derelict in its statutory mandate for 20 years or—more likely—the capping of ICS rates to ensure "just, reasonable, and fair" charges to inmates is simply not within the purview of Section 276(b)(1)(A). And the Commission does not contest that it has previously disclaimed the authority to regulate payphone rates and the authority to disrupt the compensation contracts negotiated by payphone providers of ICS.[16]

So it went for the next 20 years,[17] until for the first time in the challenged Order the Commission claimed that Section 276(b)(1)(A) provides it with "comprehensive" authority over all intrastate payphone calls,[18] equivalent to the "extensive control[]"[19] of the market provided by Section 201 for interstate calls. The Commission presents no evidence that Congress—or anyone else—ever contemplated that subparagraph

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[14] *See APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238, 241 (D.C. Cir. 2005), *vacated on other grounds*, 550 U.S. 901 (2007); *see also* State Pets.' Br. 8-11.

[15] *See* 47 U.S.C.§ 276(b)(1); *see also MCI Telecommunications Corp. v. F.C.C.*, 143 F.3d 606, 609 (D.C. Cir. 1998).

[16] *See* Pets.' Br. 30 & n.93, 35 & n.105.

[17] *See* State Pets.' Br. 9-11 & nn. 28, 32.

[18] *See, e.g.*, Order, ¶ 9, J.A.__.

[19] *United States v. Radio Corp. of Am.*, 358 U.S. 334, 349 & n.17 (1959)

(b)(1)(A) of Section 276 provides the Commission with such sweeping authority.[20] As Petitioners argued in their opening brief,[21] this is yet another reason to treat the Commission's grasp for authority with "skepticism,"[22] not deference.

It is not surprising that the Commission places total reliance on deference to support its claims that its interpretation is "permissibl[e]," and that the words of the statute may be "capacious" enough to encompass its actions.[23] The Commission simply cannot demonstrate that its construction is the best interpretation of Section 276(b)(1)(A), much less the correct one. Not only is this insufficient to meet the strictures of Section 152(b), it also illustrates why deference to the Commission should be denied in order to avoid serious constitutional questions.[24] The Commission no longer seeks to faithfully execute the law according to its best attempts to interpret Congress's mandates, but instead pursues its own purposes and policies, expecting Courts to abdicate their role in determining the correct interpretation of the law in favor

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[20] Indeed, the Supreme Court has explicitly contrasted Section 201's "traditional form of regulation," which provides comprehensive control over monopoly-dominated markets, with the 1996 Act (of which Section 276 is a part), which provides a competition-oriented form of regulation in markets with multiple participants. *See Glob. Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45, 49-50 (2007).

[21] State Pets.' Br. 30-31 & n.95.

[22] *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

[23] Resp. Br. 31, 33.

[24] *See* State Pets.' Br. 46-47.

of passively ratifying the Commission's grasp for any *post hoc* statutory justification that may be "reasonable." Such acts indicate serious dysfunction in our Constitution's system of separation of powers.[25]

In any event, not only is the Commission's interpretation of Section 276 incorrect, it is also unreasonable, as further explained below. Because the Order is premised on this unlawful interpretation of the 1996 Act, the Order must be vacated.

B. The Commission's attempts to divorce Section 276 from its context and history are unavailing.

The Commission does not contest Petitioners' explanation and characterization of the manifest purpose of Congress's enactment of Section 276(b)(1)(A), namely, to prevent undercompensation of payphone providers in order to enable them to compete with Bell companies and other carrier payphone services.[26] The Commission also admits that it has never before attempted to wield Section 276 to impose rate caps.[27] The Commission maintains, however, that provision's statutory and historical context should be ignored in favor of focusing on one part of one word in the statute—"fair"—

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[25] *See* State Pets.' Br. 46-47; *see also Gutierrez-Brizuela v. Lynch*, No. 14-9585, 2016 WL 4436309, at *5-12 (10th Cir. Aug. 23, 2016) (Gorsuch, J., concurring) (explaining the numerous constitutional problems that arise out of agencies demanding judicial deference to their legal interpretations).

[26] *See* Resp. Br. 31.

[27] *See* Resp. Br. 34.

and assuming that the Commission's jurisdiction extends to the broadest possible meaning of that isolated term.[28] But as the Supreme Court has recently and repeatedly reaffirmed, the use of such linguistic blinders does not constitute proper statutory construction.[29] Nor do any of the other arguments that the Commission attempts to muster undermine the fact that Section 276(b)(1)(A) grants the Commission only the authority to remedy undercompensation of providers, and not the authority to regulate intrastate rates when providers are already receiving adequate compensation (or, for that matter "excessive compensation").

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[28] *See* Resp. Br. 28-32.

[29] *See, e.g.*, *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (although one reading of a term "may be plausible in the abstract," that reading is incorrect if "it is ultimately inconsistent with both the text and context of the statute as a whole," since "[s]tatutory language 'cannot be construed in a vacuum'" and "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (citation omitted)); *Luna Torres v. Lynch*, 136 S. Ct. 1619, 1626 (2016) ("staring at, or even looking up, the words" to be interpreted "cannot answer" the question of interpretation without "reference to the statutory context," since words "take[] on different meanings in different contexts"); *King v. Burwell*, 135 S. Ct. 2480, 2489-90 (2015) (despite what may appear "[a]t the outset," the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context") (citation omitted)); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2254 (2013) ("Words that can have more than one meaning are given content, however, by their surroundings." (citation omitted)); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013) ("Text may not be divorced from context.").

First, the Commission argues that Petitioners' interpretation is incorrect because, if Congress intended that interpretation, they could have used better or more clear words.[30] But that will almost always be the case for any issue of statutory construction and it is hardly a reason to reject an interpretation that is consistent with the textual and historical context.[31] Of course, if more precise terms were used *elsewhere* in the statute, that would be a good indication that Congress knew how to use clearer language and deliberately chose not to because it did not intend that meaning.[32] But that is true of the Commission's interpretation, not the Petitioners', in that the Commission argues that the language of ensuring "providers are fairly compensated" should be interpreted identically to the language from Section 201 that all interstate "charges . . . shall be just

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[30] Resp. Br. 31.

[31] *See, e.g.*, *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 41 (2008) (although "Congress could have used more precise language . . . and thus removed all ambiguity," it does not render "two readings of the language that Congress chose . . . equally plausible"); *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 422 (2005) ("We do not doubt that Congress could have drafted [the statute] with more precision than it did, but" such "inexact wording" does not foreclose an interpretation); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 810 (1989) ("While Congress could perhaps have used more precise language, the overall meaning of [the statute] is unmistakable" once context and history is taken into account).

[32] *See, e.g.*, *U.S. Telecom Ass'n v. F.C.C.*, 825 F.3d 674, 717-18 (D.C. Cir. 2016).

and reasonable,"[33] despite the fact that Congress deliberately chose not to use that language.

Second, the Commission responds to this point by contending that Sections 201(B) and 276(b)(1)(A) should be read to have identical meanings because the court should presume that Congress was simply picking different words from "a menu of terms available to them to achieve the same purpose."[34] But the Commission is not able to cite any case for this novel method of statutory interpretation. Nor is the Commission able to rebut the cases Petitioners cited that stand for the opposite, well-established rule: that "[w]hen Congress uses different language in different sections of a statute, it does so intentionally" to give those statutes different meaning.[35]

Notably, this represents a subtle shift in the Commission's position. In its brief, the Commission never attempts to defend its mishmash approach to statutory construction espoused in the Order, in which it claimed that its authority to regulate

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[33] 47 U.S.C. § 201(b).

[34] Resp. Br. 32-33.

[35] *See Florida Pub. Telecomm. Ass'n, Inc. v. F.C.C.*, 54 F.3d 857, 860 (D.C. Cir. 1995); *see also Greene v. Sprint Commc'ns Co.*, 340 F.3d 1047, 1051 (9th Cir. 2003) ("We decline to attribute a similar intent [to create a private right of action for violations of] the regulations prescribed by § 276 given that Congress knew how to create a private action for violating a regulation when it wanted to [in § 227], yet did not include an action for violating the regulations contemplated by § 276 in the text of § 276, § 206, or § 207."); State Pets.' Br. 29 & n.87, 43-44.

interstate rates as "just and reasonable," when "read in conjunction" with its authority to ensure payphone providers are "fairly compensated" for interstate and intrastate calls, somehow yields the plenary authority to regulate all intrastate payphone rates to ensure they are "just, reasonable, and fair."[36] This approach to agency rulemaking, whereby the agency's claimed statutory authority is greater than the sum of its parts, is unsupported by any cited authority and is unreasonable.

Third, the Commission has no adequate response to Petitioners' textual argument that the exception to the "fairly compensated" mandate for emergency calls and calls for the deaf and hard of hearing make sense only if the mandate was intended to prevent undercompensation rather than overcompensation.[37] The Commission states that this exception "simply recognizes that" those calls "present special cases" and "allows the Commission . . . to regulate such calls separately from the 'compensation plan.'"[38] But that response at best only describes the exception—it does nothing to harmonize the exception with the Commission's interpretation. The Commission has no explanation for why Congress would ***mandate*** that the Commission prevent excessive charges by payphone providers except for calls of high public importance. Nor does the

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[36] *See* State Pets.' Br. 43-44 (citing Order, ¶ 115, J.A.__).

[37] *See* State Br. 26-27.

[38] Resp. Br. 36.

Commission point to any statutory authority by which they could "separately" regulate intrastate emergency call rates. In any event, the Commission already has the authority to regulate different types of calls differently under the same compensation plan, as it has done before[39] and attempts to do in the challenged Order.[40] Thus, the Commission's interpretation of the exception in Section 276(b)(1)(A) renders it mere surplusage.[41]

Fourth, the Commission grasps at various statements in court opinions and its own orders to attempt to buttress its claimed authority to regulate rates even when providers are receiving sufficient compensation.[42] But all of those statements are in the context of Commission actions aimed at preventing undercompensation, while at the same time ensuring that those actions are not taken in an arbitrary and capricious manner by overcorrecting and causing excessive compensation. For example, in *Illinois Public Telecommunications Association*, this court considered the potential problem of

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[39] *See, e.g.*, *Am. Pub. Commc'ns Council v. F.C.C.*, 215 F.3d 51, 53-54 (D.C. Cir. 2000) (affirming the Commission's regulation of compensation for coinless calls separately from coin calls).

[40] *See* Order, ¶ 9, J.A.__ (separately regulating rates based on different types of calls and facilities).

[41] *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. . . . We are reluctant to treat statutory terms as surplusage in any setting." (citations and internal marks omitted)).

[42] Resp. Br. 33-35.

"locational monopolies" causing overcompensation to providers, but only in the context of the argument that the Commission's decision to deregulate local coin calls—which under State regulation had generally *under*compensated providers—was arbitrary and capricious.[43] The Court rejected the argument and noted that if such locational monopolies became a problem, the Commission had suggested potential solutions, which did *not* include imposing federal rate caps.[44] Instead, the Commission suggested allowing *States* to remedy to problem by scaling back deregulation and permitting them "to require competitive bidding for locational contracts" or permitting them "to mandate that additional PSPs be allowed to provide payphones at the location."[45] These statements are perfectly consistent with the view that Section 276(b)(1)(A) gives authority to the Commission to remedy undercompensation of providers, but leaves to the States' the judgment and authority concerning when and how to remedy other issues related to intrastate payphone rates, including overcompensation. In contrast, this Court (and heretofore, the Commission) has never contemplated that Section 276(b)(1)(A) permits intervention in the State-regulated intrastate payphone call market when providers were already being adequately compensated.

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[43] *Illinois Pub. Telecomm. Ass'n*, 117 F.3d at 562-63.

[44] *Id.*

[45] *Id.*

C. The Order is also unlawful because it attempts to address alleged overcompensation to State and local correctional facilities, rather than any systematic overcompensation of providers.

Even assuming the Commission has correctly interpreted the word "fair," the Order is still not authorized by Section 276 because it ignores another word inseparably connected to it: "providers."[46] Section 276(b)(1)(A) allows the Commission to "ensure that all payphone service ***providers*** are fairly compensated."[47] This focus on providers is no mere textual artifact: it is in perfect harmony with the history of Section 276 described in Petitioners' opening brief.[48] Thus, even if the provision authorizes the Commission to prevent provider overcompensation as well as undercompensation, all actions under Section 276(b)(1)(A) must be ultimately aimed at ensuring the fairness of compensation paid to providers, not other parts of the payphone market such as end users or correctional facilities.[49] Again, Section 201 provides a useful contrast. There, Congress stated that all interstate "charges . . . shall be just and reasonable,"[50] allowing

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[46] *See* State Pets.' Br. 44-45, 59-60.

[47] 47 U.S.C. § 276 (emphasis added).

[48] *See* State Pets.' Br. 5-11.

[49] The Commission has conceded as much. *See Order on Reconsideration*, *supra* n.2, at ¶ 24 nn.93 & 95, J.A.__ (stating that "[t]he Commission only has jurisdiction over providers, not facilities, pursuant to sections 201 and 276" and that "the Commission lacks jurisdiction over correctional facilities").

[50] 47 U.S.C. § 201(b).

the Commission the authority to regulate rates for all portions of the interstate telephone market, regardless of who was paying or being paid those "charges."[51] But Congress deliberately avoided such capacious language in Section 276(b)(1)(A).

Contrary to the language of Section 276(b)(1)(A), the challenged Order is not aimed at correcting systematic undercompensation or overcompensation paid *to* providers, but rather is targeted at restructuring the market[52] in order to address what the Commission believes to be unfair compensation paid *by* consumers *to* correctional facilities and passed through the providers. The proposed rulemaking for the Order goes on at length about how "[e]xcessive rates are primarily caused by the widespread use of site commission payments," which are "the main cause of the dysfunction of the ICS marketplace,"[53] resulting in the Commission deciding to "restrict site commissions . . . indirectly" by adopting rate caps in the Order.[54] The Commission's brief similarly makes clear that the Order was intended to correct the "market failure" that results in

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[51] *See Glob. Crossing Telecomm., Inc.*, 550 U.S. at 62-63 (2007).

[52] *See, e.g.*, Order, ¶ 9, J.A.__ (stating that the Order attempts to reform "all aspects of ICS," not just provider compensation).

[53] Second Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170 ¶¶ 3, 6, 19, 20, 21, 24, 27 (2014), J.A.__, __, __, __, __, __ ("Second FNPRM").

[54] Order, ¶¶ 127-130, J.A.__; *see also* Order, ¶ 9, J.A.__ (stating that the Order "[a]ddress[es] payments to correctional institutions by excluding site commission costs from our rate caps").

high site commissions, which create "correspondingly higher end-user rates," and that the Order was intended to "curb" this "significant driver of [inmate calling] rates" by "adopting reasonable rate caps."[55]

The Commission, however, never purports to impose the rate caps based on any evidence that providers are systematically exacting excessive profits from the existing system of state regulation. It is ultimately compensation demanded by state prisons and county jails that the Commission is attempting to ensure is "fair." Thus, despite the Commission's claims that it is only regulating providers, not States,[56] such action is not authorized by Section 276(b)(1)(A) because the regulation is not aimed at ensuring provider compensation is "fair."

For example, the updated affidavit from the Oklahoma Department of Corrections (ODOC) attached to this Reply states that under the current contract with Value-Added Communications, prisoners are charged $0.20/minute for ICS, with $0.15 allocated to ODOC and $0.05 allocated to the payphone provider.[57] Under the Commission's own estimates, the provider is not being overcompensated because its compensation is well-under the $0.11/minute maximum the Commission has deemed

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[55] Resp. Br. 4, 11-12.

[56] Resp. Br. 37.

[57] Affidavit of Tina Hicks, ¶ 10.

"just, reasonable, and fair" to cover the cost of providing ICS service (exclusive of facility costs).[58] Section 276(b)(1)(A) provides no authority to the Commission to further regulate compensation to providers that is already "fair." Yet the Commission imposes an $0.11 cap (or a $0.13 cap under the *Order on Reconsideration*), which is aimed at reducing the *State*'s commission of $0.15/minute, regardless of whether providers are overcompensated or undercompensated. Simply put, the challenged Order has little to do with providers being "fairly compensated," however "fair" is defined.

Similarly, by imposing intrastate rate caps, the Commission is also for the first time regulating intrastate toll rates on consumers—such as rates charged by carriers and passed through providers for long-distance intrastate calls—even though such action is traditionally regulated by the States and not anywhere authorized by Section 276.[59] Section 276 draws distinctions between different parts of the payphone market, which includes those who provide the physical payphone equipment (payphone providers), those on whose telecommunications lines calls are transmitted (carriers), and those who rent the physical location on which to place a payphone (in this case, correctional facilities).[60] The mandate of Section 276(b)(1)(A) is focused on ensuring compensation

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[58] *See* Order, ¶¶ 21-22, J.A.__.

[59] *See* State Pets.' Br. 45-46.

[60] *See, e.g.*, 47 U.S.C. § 276(b)(3) (noting that nothing in the law affects "existing contracts between location providers and payphone service providers or . . . carriers").

for the physical equipment providers,[61] but the Commission's Order regulates *rates*, which cap the charges carriers can levy on consumers for intrastate calls—and which is outside of the Commission's authority.[62]

In the end, the Order is the Commission's attempt to do indirectly what it cannot do directly: reform how State and local governments fund their criminal justice programs by depriving them of ICS revenue under the guise of regulating payphone provider compensation. Nothing else explains the Commission's statements throughout expressing its judgment about good penological policy and the appropriate use of State ICS revenue.[63] But such judgments are far afield from the Commission's

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[61] *See* 47 U.S.C. § 276(b)(1)(A) (requiring a provider compensation plan for calls "using their payphone").

[62] Contrary to the Commission's claim, Resp. Br. 38 n.8, this Court has never stated that Section 276 allows the Commission to cap intrastate toll charges. Rather, this Court's earlier decisions *deregulated* local calls to allow for greater compensation of equipment providers. *See Illinois Pub. Telecommunications Ass'n*, 117 F.3d at 562.

[63] *See, e.g.*, Order, ¶¶ 1-2, 4, 125-126, 140, J.A.__, __, __, __ ("If telephone contact is made more affordable, we will help ensure that former inmates are not sent home as strangers, which reduces both their chances or returning to prison or jail and the attendant burden on society of housing, feeding, and caring for additional inmates."); Order at 193-97, J.A.__ (Statements of Commissioners Wheeler, Clyburn, and Rosenworcel); Second FNPRM, *supra* n.53, ¶ 2, J.A.__; *See also* Resp. Br. 4-5 (discussing the "damaging social consequences" of high ICS rates, including impeding "family contact that can 'make[] prisons and jails safer spaces' and foster[ing] recidivism"); Resp. Br. 11, 44 (criticizing the high site commissions charged by some States and the programs States fund with those revenues).

authority or expertise, and instead vested exclusively in the States.[64] The Commission's attempt to use Section 276 as a backdoor to regulate correctional facility ICS compensation by deliberately undercompensating ICS providers is unlawful.[65]

CONCLUSION

For the foregoing reasons, this Court should vacate the challenged Order.

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[64] *See, e.g.*, *Ewing v. California*, 538 U.S. 11, 24 (2003) (The Courts' "tradition of deferring to state legislatures in making and implementing such important [criminal justice] policy decisions is longstanding."); *Beard v. Banks*, 548 U.S. 521, 535 (2006); *Arsberry v. Illinois*, 244 F.3d 558, 564 (7th Cir. 2001) ("By what combination of taxes and user charges the state covers the expense of prisons is hardly an issue for the federal courts to resolve."); State Pets.' Br. 37 & n.111.

[65] *See, e.g.*, *N. California Power Agency v. Fed. Power Comm'n*, 514 F.2d 184, 189 (D.C. Cir. 1975) (affirming agency's rejection of request to exercise its jurisdiction in a manner that would require the agency to do "indirectly what it cannot do directly"); *Cent. W. Util. Co v. Fed. Power Comm'n*, 247 F.2d 306, 309-12 (3d Cir. 1957) (affirming agency's rejection of request to regulate in a manner that, although it does not "in so many words" require a party to perform an act that the agency has no authority to mandate, it "in effect compels [the party] to do so"); *see also Transmission Agency of N. California v. F.E.R.C.*, 495 F.3d 663, 674-76 (D.C. Cir. 2007) (where agency's authority is based on the identity of the party rather than the nature of the transaction, agency cannot impose requirements on entity outside its jurisdiction even if the entity is engaging in a transaction with a party within the agency's jurisdiction).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Garamond, 14-point. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's briefing order because it contains 5,338 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Mithun Mansinghani
Mithun Mansinghani

CIRCUIT RULE 32(A)(2) ATTESTATION

Pursuant to D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this joint brief is submitted concur in the brief's content.

/s/ Mithun Mansinghani
Mithun Mansinghani

CERTIFICATE OF SERVICE

I hereby certify that, on October 31, 2016, a true and correct copy of the foregoing Reply Brief of State and Local Government Petitioners was served via the Court's CM/ECF system on counsel of record for all parties.

/s/ Mithun Mansinghani
Mithun Mansinghani

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

GLOBAL TEL*LINK, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	**Case No. 15-1461 (and consolidated cases)**
	)	
FEDERAL COMMUNICATIONS COMMISSION, and	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	

AFFIDAVIT OF TINA HICKS

State of Oklahoma)
) ss
County of Oklahoma)

I, Tina Hicks, of lawful age, being first duly sworn upon my oath, hereby state the following:

1. The following statements are true and correct to the best of my personal knowledge.

2. I am the Chief of Administrative Services for the Oklahoma Department of Corrections. My job responsibilities include overseeing the Department's contracts with outside vendors.

3. My job responsibilities include oversight of any contract between the Oklahoma Department of Corrections and a provider of inmate calling services that would be affected by the Federal Communications Commission's Order published on December 18, 2015, as well as the Reconsideration Order published September 13, 2016.

4. The Oklahoma Department of Corrections currently has a contract with Value-Added Communications, Inc., to provide inmate calling services at prisons operated by the Department.

5. Value-Added Communications, Inc., was awarded the contract to provide inmate calling services after participating in a competitive bidding process governed by Oklahoma's public purchasing laws.

6. In 2011, Global Tel*Link Corporation purchased Value-Added Communications, Inc., which continues to operate as an independent subsidiary and to provide inmate calling services in Oklahoma prisons.

7. The contract between the Oklahoma Department of Corrections and Value-Added Communications, Inc., whose terms were set in 2011 to begin in effect on January 1, 2012 (the "2012 contract"), and were in effect at the time the Federal Communications Commission (FCC) released its Second Report and Order and Third Further Notice of Proposed Rulemaking on Rates for Interstate Inmate Calling Services (Nov. 15, 2015) (the "Order"), sets the rates that inmates pay for telephone service and for other services. After the FCC released its Order and that Order was partially stayed by the U.S. Court of Appeals for the District of Columbia Circuit, the Department of Corrections and Value-Added Communications agreed to an amendment of the contract on March 22, 2016 (the "2016 amendment").

8. The rates set out in the 2012 contract include a $3.00 flat charge for a 15-minute phone call. The contract also allows a $4.75 transaction fee for using a credit card, debit card, or electronic check to deposit money. The contract prohibits all other ancillary charges, although taxes or fees mandated by a government entity can be added to the cost of a call. The contract also specifies that the Oklahoma Department of Corrections would receive $2.30 of revenue for each $3.00 phone call charge.

9. The average call length since the contract went into effect has been about 13.49 minutes. Under the 2012 contract, that means that inmates paid an average of about $0.22 per minute

for calls, the Oklahoma Department of Corrections received about $0.17 per minute, and Value-Added Communications, Inc., retained about $.05 per minute.

10. Under the 2016 amendment, the calling rates for both intrastate and interstate calls is $0.20/minute (exclusive of taxes). The amendment also specifies a $3.00 transaction fee for using a credit card, debit card, or electronic check to deposit money, as well as other fees for other services. The contract allocates $0.15 per minute for intrastate phone calls to the Department of Corrections.

11. If the Order on Reconsideration went into effect, the rate applicable in Oklahoma prisons would be $0.13 per minute. If Value-Added Communications, Inc., retained the same amount per minute that it currently does, approximately $.05 per minute, the Oklahoma Department of Corrections could only receive—at most—about $.08 per minute for intrastate calls under rates that comply with the Order on Reconsideration. Should the caps in the Order on Reconsideration go into effect, the Oklahoma Department of Corrections expects to see its revenue drop from around $2,500,000 per year to approximately $1,300,000, assuming call volume remains approximately the same as it did in 2015—a loss of $1,200,000.[1]

12. It is unlikely that increased call volume due to lower rates will make up for the lost funding to the Department of Corrections. First, it does not appear that the FCC's interstate rate caps, which went into effect in March 2014, corresponds with any significant long-term impact on call volume, despite any short-term spikes. Many factors impact call volume at DOC facilities, including the size of the inmate population and the facility policies on phone use, which were modified in March 2016. Thus, the best measure of the impact of the FCC's Orders on call volume is call minutes per inmate in years prior to substantial inmate call policy changes (years 2012-2015).

[1] These estimates were created using the estimated revenue per minute noted above multiplied by the total intrastate minutes last year (2015), which was 16,707,248.

13. DOC's original contract operated during the entirety of 2012 and 2013 without the effects of Federal Communications Commission interstate rate setting. During 2012, Oklahoma facilities produced, on average, 1,494,074 ICS minutes per month. That number translates into each inmate spending about 83 minutes on the phone during any given month. Those numbers decreased slightly in 2013, with facilities accounting for an average of 1,466,743 ICS minutes per month, and per-inmate averages falling to around 82 minutes per month. The Oklahoma Department of Corrections received an average of $3,037,883.525 per year in revenue during each of those years.

14. In March 2014, the Federal Communications Commission's interim rates for interstate calls went into effect. Monthly ICS minutes rose that year to 1,696,993 minutes per month, with a corresponding increase in average monthly minutes per inmate to about 91 minutes. The majority of the increase can be attributed to a spike that occurred in the three months immediately following the FCC's Order (April, May, and June of 2014), with inmates spending around 98, 97, and 93 minutes per month on the phone, respectively. But despite the increase in ICS activity, the Department's 2014 revenues fell from the prior years' average to $3,030,112.76.

15. The increased ICS activity in 2014 was only temporary. In 2015, with the interstate rate caps in effect for the whole year, average ICS minutes dropped to 1,629,320 minutes per month, and the per-inmate average fell to 83 minutes per month. This is approximately the same per-inmate monthly minute average from years 2012 and 2013, before the FCC's interstate rate caps went into effect. Thus, it does not appear that the FCC's interstate rate caps were associated with any long-term increase in call volume. The Oklahoma Department of Corrections received $2,850,983.15 in revenue in 2015, in addition to a $250,000 signing bonus received after renewing the contract for that year.

16. Second, it is unlikely that the interstate rate caps had impact on call volume because it appears that most of the fluctuation in call volume during 2014 and 2015 was due to changes in intrastate call activity (which was not subject to the FCC's original rate caps), not interstate call activity.

It is difficult to determine whether interstate calls increased after imposition of the interstate rate caps, because the Department of Corrections only began to keep separate accounts of interstate and intrastate ICS activity in response to the FCC Order setting interstate rate caps in March 2014. But from March 2014 through the end of 2014, interstate ICS minutes stayed roughly the same, ranging from a low of 222,384 minutes in July to a high of 268,725 minutes in December (a maximum deviation of 46,341 minutes). Intrastate minutes fluctuated more, with a range from as low as 1,388,745 minutes in March to as high as 1,565,409 minutes in May (a maximum deviation of 176,664 minutes).

17. Similarly, the average interstate minutes per month in 2014 during and after March was 242,636, while in 2015 (when total minutes regressed to the mean) that same figure was 237,049 (a difference of only 5,587 minutes); meanwhile, intrastate minutes for those time period fluctuated more meaningfully from 1,469,876 minutes per month in 2014 during and after March to 1,392,271 minutes per month in 2015 (a difference of 77,605 minutes). Minutes per inmate reflected a similar pattern, with intrastate minutes shifting from 78 in 2014 during and after March to 71 minutes per month in 2015, and interstate minutes changing from 13 to 12 minutes per month for the same periods. The graph attached to this Affidavit plots the monthly minutes per inmate figures and shows that the fluctuation in minutes is primarily due to intrastate, not interstate, calls. In total, intrastate ICS minutes made up for an average of 85.8% of DOC's total ICS activity in 2014; interstate minutes made up for only 14.2%.The allocation in 2015 was almost identical (85.5% and 14.5%). Thus, it is likely that any differences in call volume in 2014 were the result of increases in intrastate call minutes rather than a result of the FCC's interstate rate caps.

18. Third, even if some increase in volume can be expected as a result of the FCC's rate caps, such an increase will have a smaller impact on the loss of funds due to the rate caps because increased call volume also increases the Department of Corrections' costs in allowing ICS services.

The Oklahoma Department of Corrections is critical in the delivery of the inmate calling service to the inmates incarcerated in its correctional facilities. The Department has seventeen correctional facilities with security levels ranging from minimum to maximum security. As a result, there are varying levels of staff involvement and time that must be invested by the Department in order for the inmate calling service to be provided to the inmates. Without this investment by the Department, inmates would not be able to utilize the inmate calling service.

19. The Oklahoma Department of Corrections expends resources in time and money in efforts designed to interdict contraband entering into its correctional facilities and investigating other forms of criminal activity conducted by inmates through the use of inmate calling services. One tool currently available to the Department is the ability to monitor telephone calls made by inmates using the inmate calling service. The fact that the phone calls are monitored also helps as a deterrent to inmates using the inmate calling service to conduct criminal activity. Because the safety and security of its correctional facilities are vital to the Department's mission of protecting the public, the Department's employees, and the inmates, the monitoring of inmate phone calls by Department staff is absolutely a necessity so long as inmates are allowed to use an inmate calling service.

20. The Oklahoma Department of Corrections must use the revenue it receives from inmate calling services for the benefit of inmates as part of the Department's canteen system according to Title 57, Section 537 of the Oklahoma Statutes.

21. Benefits provided to inmates from the canteen system in Oklahoma include, among other things, substance abuse treatment, mental health treatment programs, counseling programs, health services, legal resources including Westlaw access and copying machines, job training, inmate clothing, and recreational equipment including sporting equipment, board games, exercise equipment, and more.

22. The Oklahoma Department of Corrections would not be able to fund all of the benefits currently provided through the canteen system if revenue from inmate calling services dropped from approximately $2,500,000 per year to somewhere less than $1,300,000 per year. Indeed, this loss of $1,200,000. To put this in perspective, this $1,200,000 shortfall represents the Department's entire operational budget for substance abuse treatment during Fiscal Year 2016.[2]

23. If the Order goes into effect, then, the Oklahoma Department of Corrections would be forced to change its policy goals by reducing programming provided with canteen system revenues or by diverting funds that currently achieve other policy goals in order to pay for programs currently funded by canteen system revenues.

FURTHER AFFIANT SAITH NOT.

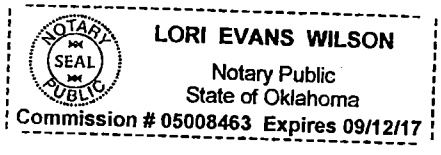
Tina Hicks

Tina Hicks

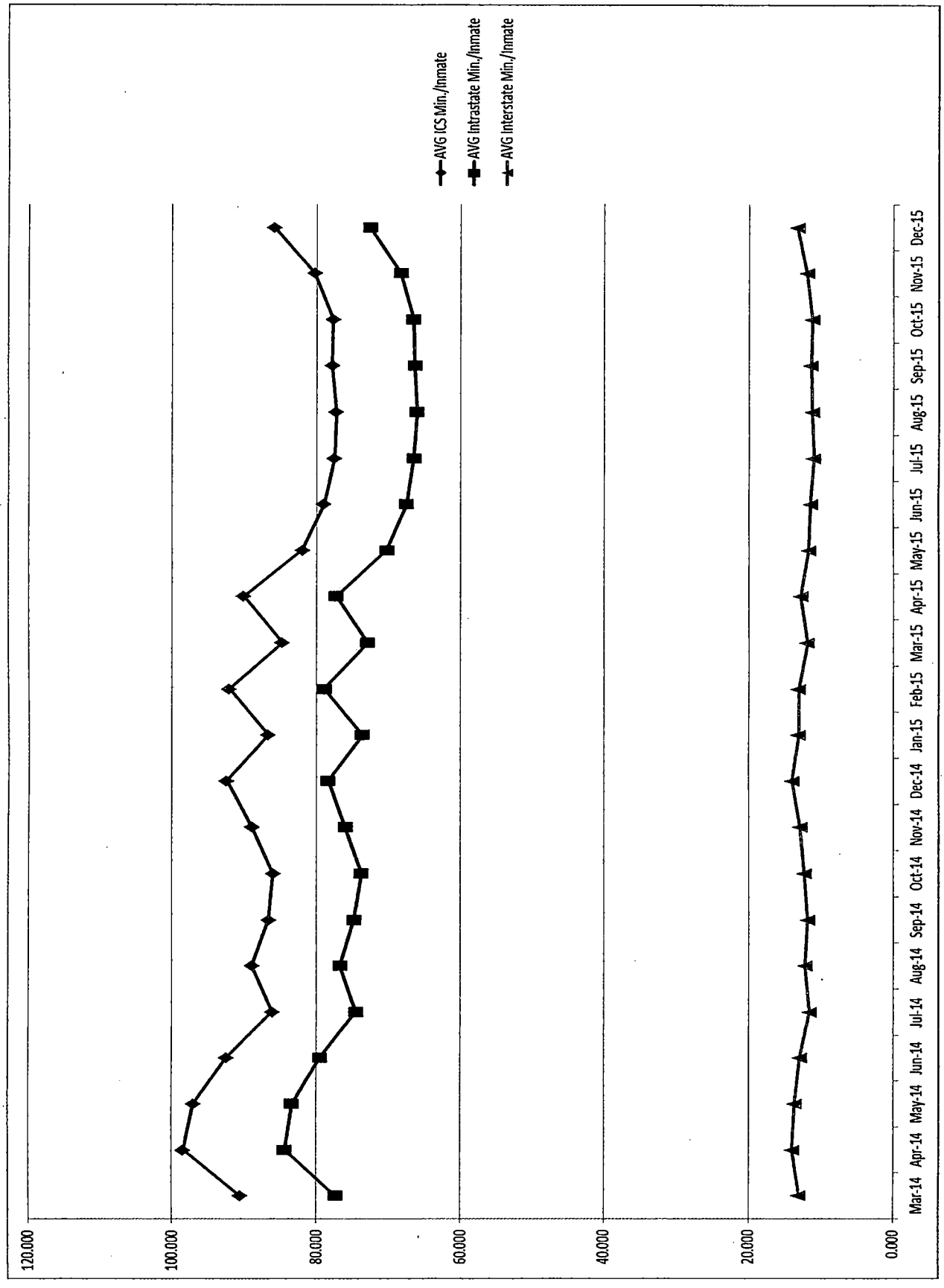
SUBSCRIBED AND SWORN before me, the undersigned Notary Public, on this 4th day of October, 2016.

Notary Public

My Commission Expires on 9/12/17



[2] FY-2017 Executive Budget – Historical Document, Oklahoma Office Of Management And Enterprise Services at 224, https://www.ok.gov/OSF/documents/bud17hd_tagged.pdf (figures for Residential Substance Abuse Treatment ("RSAT") and "Substance Abuse BJCC," a facility that is dedicated to substance abuse and cognitive behavior programs).


AVG ICS Min./Inmate
AVG Intrastate Min./Inmate
AVG Interstate Min./Inmate
120.000
100.000
80.000
60.000
40.000
20.000
0.000
Mar-14
Apr-14
May-14
Jun-14
Jul-14
Aug-14
Sep-14
Oct-14
Nov-14
Dec-14
Jan-15
Feb-15
Mar-15
Apr-15
May-15
Jun-15
Jul-15
Aug-15
Sep-15
Oct-15
Nov-15
Dec-15