ORAL ARGUMENT HELD FEB. 6, 2017; DECIDED JUNE 13, 2017;
AMENDED AUG. 4, 2017

No. 15-1461 and Consolidated Cases

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

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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)

RESPONSE OF STATE AND LOCAL GOVERNMENT PETITIONERS TO INTERVENORS' PETITION FOR REHEARING EN BANC

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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); Leadership Conference on Civil and Human Rights; County of Santa Clara; State of Minnesota; State of Illinois; State of New York; Commonwealth of Massachusetts; State of Washington; State of New Mexico; the District of Columbia.

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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GLOSSARY

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)

INTRODUCTION

Petitions for rehearing en banc "are to be granted sparingly."[1] Rehearing en banc "is not favored and ordinarily will not be ordered unless (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."[2] Intervenors in this case claim that the panel majority's opinion is one of the rare decisions that should be reconsidered en banc, for both the reasons listed above. But on both, Intervenors miss the mark.

Intervenors claim that the question of whether *Chevron* deference is owed in this case is one of "exceptional importance." But the panel majority has now clarified that it did not and need not decide that question because no amount of deference could sustain the challenged Order. Intervenors also contend that the panel opinion is inconsistent with prior decisions interpreting the statute at issue. But no such conflict exists. Nor could it: the Commission has never before attempted to wield its authority under Section 276 of the 1996 Act to impose payphone rate caps, or to regulate intrastate calls solely to achieve its notion of just and reasonable rates, or to attain those rates either by lowering the compensation received by jails and prisons or by deliberately undercompensating payphone providers. The Order is unprecedented; the decision vacating it does not conflict with precedent. Rehearing is not warranted in this case.

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[1] *Aetna Cas. & Sur. Co. v. Walter Ogus, Inc.*, 396 F.2d 667, 670 (D.C. Cir. 1967).

[2] F. R. App. P. 35(a).

ARGUMENT

I. Determining whether the challenged Order is owed *Chevron* deference after the agency abandoned defense of the Order is not necessary for resolution of this case and is thus not worthy of en banc review.

Intervenors' first issue presented for en banc resolution is whether *Chevron*[3] deference is owed to the challenged Order's interpretation of 47 U.S.C. § 276 ("Section 276") even after the agency that adopted that interpretation has abandoned it. However, because resolution of that issue would not affect the judgment in this case, it is unworthy of en banc review by this Court. This is true for at least two reasons.

First, the panel majority has now made clear, by its Clarification and Amendment to the Majority Opinion, that the question of deference is unnecessary to resolve because the Order is "manifestly contrary to statute" and "exceeds [the Commission's] statutory authority."[4] The panel majority endorsed the concurrence's conclusion that "the agency's interpretation would fail at *Chevron*'s second step" because "it is an unreasonable (impermissible) interpretation of Section 276."[5] The panel majority holds that it "need not and do[es] not decide whether [it was] required to follow *Chevron* Step Two even though the agency declined to defend its position."[6] Thus, Intervenors' first

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

[4] Clarification and Amendment of the Majority Opinion at 1 (Aug. 4, 2017).

[5] *Id.*

[6] *Id.* at 2.

ground for rehearing en banc would not alter the majority's decision or the judgment in this case, and cannot constitute a persuasive basis for en banc determination. Any decision on this issue alone would be an advisory opinion only.

Second, even if the Commission did not abandon its interpretation of Section 276, deference to the Commission's attempt to displace State regulatory authority when regulating intrastate communications is not appropriate. As the State and Local Government Petitioners argued more extensively in their briefs[7] and as the panel majority recognized,[8] both this Court and the Supreme Court have held that, pursuant to the command of Section 152(b) of the Act,[9] Commission attempts to regulate intrastate telecommunications must be justified by statutory authority that is "unambiguous or straightforward."[10]

Although it is true that Section 276 explicitly grants the Commission authority to ensure payphone service providers are fairly compensated for intrastate calls and contains an express preemption provision,[11] the precise scope of that statutory authority

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[7] State Pets.' Br. 36-40; State Pets.' Reply 5-10.

[8] Op. 8-9, 21.

[9] 47 U.S.C. § 152(b).

[10] *Illinois Pub. Telecomm. Ass'n v. F.C.C.*, 117 F.3d 555, 561 (D.C. Cir. 1997) (quoting *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 377 (1986)).

[11] *See* 47 U.S.C. § 276(b)(1)(A) & (c)

over intrastate communications is the key interpretative question at issue in this suit. Any ambiguity as to the scope of intrastate authority granted is resolved by the presumption of Section 152(b) against expansive interference with State authority[12] rather than by *Chevron* deference. In other words, Section 152(b)'s presumption against intrastate authority operates as rule of statutory construction to determine the extent of intrastate authority.[13] Thus, under this rule, even if some amount of intrastate authority granted, that authority still must be narrowly construed.[14] As this Court has said, it is both a "substantive and interpretative limitation" on the agency's jurisdiction.[15]

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[12] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 381 n.8 (1999) ("Insofar as Congress has remained silent," as to a specific question concerning the scope of the Commission's intrastate authority, "§ 152(b) continues to function."); *New England Pub. Commc'ns Council, Inc. v. F.C.C.*, 334 F.3d 69, 73, 78 (D.C. Cir. 2003) (agreeing with the Commission's position that it cannot regulate under Section 276 where "Congress had not expressed with the requisite clarity its intention that the Commission exercise jurisdiction" over particular intrastate matters).

[13] *New England Pub. Commc'ns Council, Inc. v. F.C.C.*, 334 F.3d 69, 75 (D.C. Cir. 2003) (Section 152(b) is "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction."); *see also La. Pub. Serv. Comm'n*, 476 U.S. at 376 n.5 (Section 152(b) "not only imposes jurisdictional limits on the power of a federal agency, but also, by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction.").

[14] *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (D.C. Cir. 1998) (the presumption against preemption should not "apply only to the question of whether Congress intended any preemption at all" but also to the "question concerning the scope of its intended invalidation of state law," and thus is used to "support a narrow interpretation of an express [preemption] command").

[15] *Illinois Pub. Telecomm. Ass'n*, 117 F.3d at 561.

For this reason, regardless how the Court would answer Intervenors' first question presented, the Court would never reach *Chevron*'s second step because the precise question at issue—whether Section 276 grants that statutory authority to cap intrastate ICS rates that are already compensatory—is answered by application of the tools of statutory construction,[16] including the tool required by Section 152(b) of the Act that resolves statutory ambiguity against granting the Commission intrastate regulatory authority.[17] Not surprisingly, in prior cases where this Court has been tasked with interpreting the scope of the Commission's intrastate authority under Section 276, this Court has never applied *Chevron* deference, but has always applied the presumption created by Section 152(b) of the Act.[18] Thus, not only would Intervenors' first proffered reason for en banc rehearing leave the result in the case unchanged, it would also not change the standard of review used to reach that result. En banc resolution of this issue is inappropriate for this case.

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[16] *See Chevron*, 467 U.S. at 843 n.9; *see also Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013); *Cal. Indep. Sys. Operator Corp. v. F.E.R.C.*, 372 F.3d 395, 400 (D.C. Cir. 2004).

[17] *C.f. Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (holding that "*Chevron* deference is not applicable in" case involving Indian claims because "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' (citation omitted)).

[18] *See, e.g.*, *New England Pub. Commc'ns Council, Inc.*, 334 F.3d at 73-78; *Illinois Pub. Telecomm. Ass'n*, 117 F.3d at 561.

II. The panel majority correctly interpreted Section 276, in conformity with this Court's cases interpreting that same provision.

In its opinion, the panel majority carefully traced the statutory history and context of Section 276, with ample citation to this Court's and the Supreme Court's precedent on this provision, before identifying the fundamental flaws in the Order's interpretation of the Commission's statutory authority.[19] The majority rejected the Order's interpretation of this Court's precedent used to justify the Order, rebutting the same arguments that Intervenors now rehash to claim that the majority opinion must be reheard en banc to resolve a purported intra-circuit conflict.[20]

An examination of the cases upon which Intervenors rely demonstrates that the panel majority's opinion is not in conflict with this Court's other precedent, but rather a natural outgrowth of a twenty-year line of cases. In *Illinois Public Telecommunications Association* ("*Illinois*"), this Court addressed the Commission's first attempt to implement Section 276.[21] The Court began by explaining the history of the enactment of Section 276, agreeing with the Commission's position at the time that the provision addressed the competitive imbalance between independent payphone providers and the payphone

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[19] Op. 8-10, 21-23.

[20] Op. 24-27.

[21] *Illinois Pub. Telecomm. Ass'n v. F.C.C.*, 117 F.3d 555, 561 (D.C. Cir. 1997).

operations of telecommunications carriers.[22] This imbalance was in part created by the fact that the independent providers were not adequately compensated for certain calls such as "local coin calls, access code calls, subscriber 800 and other toll-free calls."[23] In order to correct this imbalance (pursuant to Section 276's mandate), the Commission deregulated local coin rates to allow for market-based compensation of coin calls and mandated that, for toll-free (coinless) calls, carriers must compensate payphone providers with the average deregulated coin rate.[24]

The *Illinois* Court first addressed a challenge to the deregulation of local coin rates, applying the standard under Section 152(b) of the Act that the Commission's authority to do so must be "unambiguous and straightforward."[25] The Court upheld the Commission's authority to deregulate local coin rates because (1) providers were being undercompensated in those States where coin rates were being artificially depressed by State regulation[26] and (2) "the only compensation that a [payphone provider] receives for a local call … is in the form of coins deposited into the phone by the caller."[27]

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[22] *Id.* at 558-59.

[23] *Id.*

[24] *Id.* at 560-61.

[25] *Id.* at 561.

[26] *Id.* at 558-59.

[27] *Id.* at 562-63.

Having approved of the Commission's authority to address the undercompensation of providers, the *Illinois* Court next addressed whether the Commission exercised that authority in an arbitrary and capricious manner. Some challengers argued that the Commission's choice of ensuring fair compensation to the providers for coin calls—market deregulation—was arbitrary and capricious for failure to account for the possibility of "locational monopolies," which might allow a provider "to charge an inflated rate for local calls."[28] But the Court upheld the Commission's decision *not* to address those monopolies, noting that the Commission reserved the right to pare back its deregulation (which preempted State regulation) if locational monopolies became a problem.[29] Others argued that the compensation rate for coinless calls paid by carriers to providers was arbitrary because the Commission had erroneously assumed that the cost of providing a coin call was the same as providing a coinless call, artificially inflating the compensation the Commission was mandating that carriers pay to providers.[30] The Court agreed with this argument, holding that the Commission's "*ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking."[31]

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[28] *Id.* at 562.
[29] *Id.* at 562-63.
[30] *Id.* at 563.
[31] *Id.* at 563-64. The second case relied upon by Intervenors vacated the Commission's attempt on remand to again set the compensation level for coinless calls as arbitrary and capricious. *See MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 608-09 (D.C. Cir. 1998).

Thus, *Illinois* and its progeny stand for the propositions that (1) the text, history, and structure of the Telecommunications Act of 1996 demonstrate that Section 276 grants the Commission the authority to correct the systematic undercompensation of payphone service providers; (2) that authority extends to regulation of intrastate telecommunications only to the extent that it is clear and unambiguous; and (3) when the Commission acts to address undercompensation, it must not do so in an arbitrary and capricious manner. All of this is consistent with the panel majority's conclusion that Section 276 does *not* grant plenary authority to regulate intrastate payphone rates, such as by imposing rate caps, when existing contracts already ensure payphone providers are not being undercompensated. Rather, the panel majority's opinion is consistent with a long line of cases delineating the scope of Section 276's mandate[32] by recognizing that Section 276 does *not* address the issue of allegedly "excessive" intrastate consumer payphone rates. Indeed, the Commission admitted that it has never before

[32] *Illinois Pub. Telecomm. Ass'n v. F.C.C.*, 752 F.3d 1018, 1020-21, 1026 (D.C. Cir. 2014), *cert. deniend*, 135 S. Ct. 1583 (2015); *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 118 (D.C. Cir. 2008); *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238, 1241 (D.C. Cir. 2005), *vacated on other grounds*, 550 U.S. 901 (2007); *New England Pub. Commc'ns Council, Inc.*, 334 F.3d at 71, 75-76; *Glob. Crossing Telecomm., Inc. v. F.C.C.*, 259 F.3d 740, 740 (D.C. Cir. 2001); *Am. Pub. Commc'ns Council v. F.C.C.*, 215 F.3d 51, 53 (2000); *Illinois Pub. Telecomm. Ass'n*, 117 F.3d at 558-59.

attempted to wield Section 276 to impose rate caps[33] and has previously disclaimed such authority.[34]

Moreover, all agree that the primary focus of the Order—and Intervenors' complaints about the ICS market—is reducing the effect on consumer rates of "site commissions," which are compensation paid by consumers to state correctional facilities and passed through the ICS providers.[35] No case of this Court—and certainly nothing in Section 276—suggests that the Commission has the authority to address compensation paid to correctional facilities as part of its authority "to ensure that all payphone service providers are fairly compensated for each and every completed

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

[34] *See In the Matter of Telecommunications Relay Servs. & the Americans with Disablities Act of 1990*, Fifth Report and Order, 17 F.C.C. Rcd. 21233, 21244 ¶ 24 (2002) (stating that the Commission "does not regulate payphone rates"); *In the Matter of Implementation of the Pay Tel. Reclassification & Comp. Provisions of the Telecommunications Act of* 1996, Order on Reconsideration, 11 F.C.C. Rcd. 21233, ¶¶52, 72 (1996)(rejecting request to regulate inmate calling rates and other rates, stating that when providers negotiate contracts on compensation, the Commission's "statutory obligation to provide fair compensation is satisfied" and any further action "is beyond the scope of [] Section 276").

[35] *See, e.g.*, Intervenors Pet. for Rehearing En Banc at 2, 16-17 (explaining the Order's attempt to address site commissions and stating that "these commissions are 'location rents' being captured *by premises owners* and unreasonably running up costs for the benefit of the location owners" (emphasis added)); Resp. Br. at 12 (site commissions are "a significant driver of [ICS] rates" and the Order was the Commission's attempt as "how best to address that problem"); J.A. 1350 ("We have addressed the harmful effects of outsized site commissions by establishing comprehensive rate caps … that may limit providers' ability to pass site commissions through to ICS consumers.").

intrastate and interstate call."[36] The mandate of Section 276 is with respect to providers and ensuring they are compensated; Section 276 does not concern itself with jails, or consumers, or excessive rates, or any other aspect of the payphone market. Intervenors may disagree with this conclusion, but it is undoubtedly not the source of an intra-circuit conflict.

III. The panel majority's holding that the Commission arbitrarily failed to include site commissions as a cost of providing service does not conflict with any decision of this Court.

Intervenors take issue with the panel majority's holding that the Commission acted arbitrarily and capriciously when it failed to account for site commissions as a cost incurred by the ICS providers. But the most they can cite to drum up an intra-circuit conflict is this Court's decision in *American Public Communications Council* ("*APCC*") because, in Intervenors' words, the Court upheld "without discussion" an order that contained a definition of payphone cost that excluded location rents.[37] This is hardly the stuff of en banc review.

In any event, the Commission's order on the coinless call compensation rate upheld by the Court in *APCC* is a far cry from the Order on review in this case.

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[36] 47 U.S.C. § 276.

[37] Intervenors' Pet. for Rehearing En Banc at 14-15 (citing *Am. Pub. Commc'ns Council v. F.C.C.*, 215 F.3d 51 (2000)).

First, the order at issue in *APCC* concerned the default compensation rate carriers must pay to payphone providers for completing coinless calls,[38] leaving greater compensation rates free for negotiation.[39] This is quite different from the intrastate rate caps at issue in the Order invalidated in this case, which absolutely forbid greater compensation to payphone providers or, more importantly, to correctional facilities.

Second, to ensure that each and every payphone was being adequately compensated, the Commission order in *APCC* set the default compensation rate as that necessary to sustain a payphone with the number of calls made by the "marginal payphone" rather than the "average payphone" because using the average payphone call volume "would cause many payphones with below-average call volume to become unprofitable."[40] Using the "average payphone" approach would fail to comply with Section 276's mandate to compensate "each and every" call, even if using the "marginal payphone" model would lead to some payphones being much more profitable than

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[38] *Am. Pub. Commc'ns Council*, 215 F.3d at 52-54.

[39] *See In the Matter of Implementation of the Pay Tel. Reclassification & Comp. Provisions of the Telecommunications Act of 1996*, 14 F.C.C. Rcd. 2545, 2551-52 ¶ 13 (1999) ("Third Payphone Order") (emphasizing that the default rate "applies only in the absence of some other price that may be negotiated between the payphone owner and the carrier").

[40] *Am. Pub. Commc'ns Council*, 215 F.3d at 54, 57.

others.[41] Thus, the Commission was not concerned with certain payphones receiving *too much* compensation; only that all payphones were at least adequately compensated. This is diametrically opposite to the Intervenors' defense of the Order's averaging methodology, undermines the idea that Section 276 forbids "overcompensation" of providers, and does not support the Order's deliberate undercompensation of providers by excluding site commissions.[42]

Third, the Commission order at issue in *APCC* excluded location rents from its calculation of the bare minimum compensation rate for the "marginal payphone" in part because it assumed that "the payphone provides increased value to the premises" and that "[m]any premises owners find payphones to be sufficiently valuable to warrant paying for the installation of a payphone where a payphone would not otherwise exist."[43] The agency record on the Order in this case, however, shows the exact opposite: allowing payphones in jails and prisons poses enormous risks to those inside and outside the facility, imposing both monetary costs in the form of increased security measures that help mitigate those harms and societal costs when those security

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[41] *See* Third Payphone Order, *supra* n.39, 14 F.C.C. Rcd. at 2566 ¶ 45 (Section 276's per-call compensation requirements "necessarily results in over-recovery of common costs for payphones in high traffic locations").

[42] Intervenors' Pet. for Rehearing En Banc at 12-13.

[43] *See* Third Payphone Order, *supra* n.39, 14 F.C.C. Rcd. at 2616 ¶ 156.

measures do not succeed.[44] Indeed, as the panel majority points out, the Commission's later *Order on Reconsideration* at least partially accounts for site commissions in recognition of facility costs, "effectively acknowledging that a categorical exclusion of site commissions from the ratemaking calculus is implausible."[45]

Thus, the panel majority's conclusion that the Order unreasonably excluded site commissions in accounting for the ICS providers' costs does not conflict with the Commission's prior action under Section 276, much less conflict with this Court's precedent upholding that action in an opinion that did not specifically approve the methodology Intervenors rely upon. And the opposite contentions that Intervenors advance—that rent should never be considered a legitimate cost of doing business or that the F.C.C. should sit in judgment of whether States have appropriately priced the societal costs of allowing phones in prisons in setting that rent for intrastate calls—are untenable on their face.[46]

CONCLUSION

For the foregoing reasons, Intervenors' Petition for Rehearing En Banc should be denied.

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[44] *See generally* J.A. 988-1152, 1237-42, 1489-91.

[45] Op. 30.

[46] *See Arsberry v. Illinois*, 244 F.3d 558, 564-65 (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.").

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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 3415 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Mithun Mansinghani
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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
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CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2017, a true and correct copy of the foregoing Response of State and Local Government Petitioners to Intervenors' Petition for Rehearing En Banc was served via the Court's CM/ECF system on counsel of record for all parties.

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