



Federal Communications Commission
Washington, D.C. 20554

Brendan Carr
Acting General Counsel

February 21, 2017

The Honorable Bobby L. Rush
U.S. House of Representatives
2188 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Rush:

Thank you for your February 6, 2017, letter regarding prison payphones. And thank you for your efforts over the past decade to help reduce the high rates that inmates and their families pay to stay in touch, including by introducing the Family Telephone Connection Protection Act. As you know, that legislation would codify new, specific authority that the FCC could rely on to regulate inmate calling rates.

For the past few years, the FCC has been working in good faith to realize a common and bipartisan goal: to substantially reduce the high rates that are being charged for inmate calling services. Those efforts began in 2012 when the FCC, including then-Commissioner Pai, voted unanimously to launch a proceeding to consider new rules for interstate inmate calling services pursuant to the Commission's duty under Section 201 of the Communications Act to ensure that the rates for interstate telecommunications services are just and reasonable.¹

Early on, then-Commissioner Pai concluded that there was a market failure. Inmates cannot choose their calling service provider, and providers do not compete with each other for an inmate's calls. Instead, a prison administrator signs an exclusive contract with a single carrier. The decision to enter into such a contract often is driven by commissions and in-kind services offered to the prison by a prospective provider. As such, the incentives of prison administrators and inmates may not align. This means that "we cannot necessarily count on market competition to keep prices for inmate calling services just and reasonable."² For those reasons, then-Commissioner Pai made clear his belief that the agency "must take action to meet our duties under the law, not to mention our obligations of conscience."³

¹ *Rates for Interstate Inmate Calling Services*, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012).

² *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14217 (2013) (Dissenting Statement of Commissioner Ajit Pai).

³ *Id.*

Unfortunately, however, the FCC's well-intentioned efforts have not been fully consistent with the law. In particular, the FCC has attempted to cap rates for intrastate inmate calls in apparent violation of the clear limits Congress placed on the agency's intrastate authority, and it failed to account for all record evidence. Indeed, the U.S. Court of Appeals for the D.C. Circuit has taken the highly unusual step of issuing four different orders staying substantial parts of the FCC's rules.

There are now three separate sets of cases pending before the D.C. Circuit in which petitioners are challenging various parts of the FCC's inmate calling regulations. The first set challenges the Commission's 2013 Order. The court stayed large portions of that order in January 2014,⁴ and then granted the Commission's December 10, 2014, motion to hold the case in abeyance while the Commission revisited its rules.⁵ Your letter references the second set of cases, which challenge the Commission's 2015 Order. The court stayed significant portions of that Order on two occasions in 2016,⁶ and it held oral argument on the case on February 6, 2017. The third set of cases challenges the Commission's 2016 Reconsideration Order. In November 2016, the court stayed that Order, too, and *sua sponte* held the case in abeyance pending resolution of the litigation challenging the 2015 Order.⁷

In light of the recent change in leadership and composition of the Commission, there are now several parts of the FCC's 2015 Order that a majority of the FCC's Commissioners view as unlawful. Nonetheless, the FCC did not file a motion to hold the entire case in abeyance, which if granted would have resulted in the court postponing the oral argument scheduled on February 6. Nor did the FCC otherwise move to postpone or delay the oral argument.

Instead, the FCC notified the court on January 31, 2017, that it would allow those who had litigated this case for some time to have their day in court on February 6. A copy of that letter is attached. It contains additional information about the FCC's decision to proceed with the case.

Consistent with now-Chairman Pai's view that the rates charged for inmate calling services are too high, agency counsel ably and vigorously defended the substantial portions of the Commission's regulations at oral argument that are both lawful and have the support of a majority of the FCC's current Commissioners.⁸ Among other points, agency counsel defended the FCC's authority to cap interstate rates for inmate calling services pursuant to the Commission's authority in Section 201 of the Communications Act and to regulate ancillary fees. Agency counsel also defended the FCC's authority to exclude from its cost calculations, when setting just and reasonable rate caps for interstate

⁴ *Securus Techs., Inc. v. FCC*, Nos. 13-1280 *et al.* (D.C. Cir. Jan. 13, 2014) (per curiam).

⁵ *Securus Techs., Inc. v. FCC*, Nos. 13-1280 *et al.* (D.C. Cir. Dec. 16, 2014) (per curiam).

⁶ *Global Tel*Link v. FCC*, Nos. 15-1461 *et al.* 1–2 (D.C. Cir. Mar. 7, 2016) (per curiam); *Global Tel*Link v. FCC*, Nos. 15-1461 *et al.* 1 (D.C. Cir. Mar. 23, 2016) (per curiam).

⁷ *Securus Techs., Inc. v. FCC*, No. 16-1321 *et al.* (D.C. Cir. Nov. 2, 2016) (per curiam).

⁸ A recording of the oral argument is available at [https://www.cadc.uscourts.gov/recordings/recordings2017.nsf/2318CE410CE9C008852580BF006AC865/\\$file/15-1461.mp3](https://www.cadc.uscourts.gov/recordings/recordings2017.nsf/2318CE410CE9C008852580BF006AC865/$file/15-1461.mp3).

calls, portions of the commission and in-kind service payments that inmate calling providers make to correctional facilities. In addition, the FCC ceded half of its oral argument time to counsel for intervenors in support of the respondents, who defended all aspects of the agency's Order at oral argument. If the court ultimately agrees with the positions the FCC defended at oral argument, the result could go a long way in helping to reduce the rates and fees associated with inmate calling services.

Your letter asks about other instances in which the FCC has declined to defend one of its orders in whole or in part. While the Office of General Counsel does not maintain a record of all such instances, there are a number of cases where the FCC has decided not to defend an order in court.⁹ And the FCC is not alone in this respect. There are numerous cases in which the federal government has chosen not to defend an order in court.¹⁰ Under the circumstances in which the Commission found itself in this case—where oral argument was scheduled less than two weeks after Chairman Pai was designated as such, and the Commissioners who dissented from the order on review constituted a majority at the agency—we determined that defending the portions of the Order supported by a majority of FCC commissioners was the most appropriate way to proceed.

Thank you again for your inquiry. The FCC would welcome the opportunity to provide technical assistance on the Family Telephone Connection Protection Act or any legislative solution, as you deem appropriate.

Sincerely,

A handwritten signature in blue ink, appearing to read 'B Carr', with a stylized flourish at the end.

Brendan Carr
Acting General Counsel

⁹ See, e.g., *Pacific Bell v. FCC*, No. 94-1148, 1994 WL 475062 (D.C. Cir. 1994) (per curiam); *Arkansas AFL-CIO, Inc. v. FCC*, 11 F.3d 1430 (8th Cir. 1993); *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989); *Pinnacle Broad. Corp. v. FCC*, No. 85-1364 (D.C. Cir.) (dismissed Dec. 23, 1985).

¹⁰ See, e.g., *League of Women Voters v. Newby*, 838 F.3d 1 (D.C. Cir. 2016) (Department of Justice); *In re Young*, 82 F.3d 1407 (8th Cir. 1996) (Department of Justice).



Federal Communications Commission
Washington, D.C. 20554

January 31, 2017

Mark J. Langer, Clerk
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, NW Room 5523
Washington, DC 20001

Re: *Global Tel*Link, et al.*, No. 15-1461 & consolidated cases

Dear Mr. Langer

As the Court is aware, argument is set in these cases on February 6. I will be presenting the Commission's argument in this matter.

The Order under review was adopted by a 3-2 vote on October 22, 2015. Since then, there have been significant changes in the composition of the Commission. In particular, two commissioners who voted for the Order recently have left the Commission (Commissioner Rosenworcel on January 3, 2017, and Chairman Wheeler on January 20, 2017). On January 23, 2017, Commissioner Pai was designated FCC Chairman.

As a result of these changes in membership, the two Commissioners who dissented from the Order under review—on the grounds that, in specific respects, it exceeds the agency's lawful authority—now comprise a majority of the Commission. See Dissenting statement of Commissioner Pai; see also Dissenting statement of Commissioner O'Rielly.

In particular, a majority of the current Commission does not believe that the agency has the authority to cap intrastate rates under section 276 of the Act. I am therefore informing the parties and the Court that we are abandoning, and I am not authorized to defend at argument, the contention—contained in Section I of our brief—that the Commission has the authority to cap intrastate rates for inmate calling services.

If the Court reaches the issue, we are also abandoning, and I am also not authorized to defend, the argument (contained in a portion of section III.B of the

brief) that the Commission lawfully considered industry-wide averages in setting the rate caps contained in the Order.

I will continue to defend at oral argument the significant remaining portions of the Order pursuant to the brief respondents filed in these cases.

Given that the government's position at argument has changed, the Commission has ceded ten minutes of its allotted argument time to Mr. Schwartzman, counsel for the "Wright Petitioner" intervenors, who will be prepared to defend all aspects of the Order.

Respectfully submitted,

/s/ David M. Gossett

David M. Gossett
Deputy General Counsel

cc: counsel of record per ECF

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

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GLOBAL TEL*LINK, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	No. 15-1461 and
)	consolidated cases
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
Respondents.)	
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CERTIFICATE OF SERVICE

I, David M. Gossett, hereby certify that on January 31, 2017, I electronically filed the foregoing Letter with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ David M. Gossett

David M. Gossett
Deputy General Counsel
Federal Communications Commission